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Executive Summary

This paper examines benefits and drawbacks of the use of videotape technology in the investigation and prosecution of child abuse and neglect. Selective use of videotaped interviews and depositions has been promoted since the 1970s as a method for protecting child victims and witnesses by reducing the number of times a child must be interviewed and by sparing the child the trauma of testifying in open court. More recently, there has been movement to require the videotaping of all investigative interviews as a mechanism for ensuring accountability of public child welfare agencies. It is in this approach that Alaska's current proposed legislation, H.B. 348, "An Act to Require Taping of All Official Interviews with Children Who Are Alleged to Have Been Abused or Neglected," has its roots.

A. The National Perspective

Currently, no states have legislation that *requires* the videotaping of all investigative interviews with alleged child victims of abuse or neglect. At least three states—New Hampshire, Minnesota, and Ohio—have more limited statutes that require that videotaping occur under specific circumstances and/or for cases involving specific types of abuse.

Numerous states have legislation that *allows* for videotaped depositions or interviews to be admitted as evidence in court in criminal cases. There have been a number of challenges to such statutes under the 6th Amendment Confrontation Clause and the 14th Amendment Due Process Clause. Recent decisions indicate the Supreme Court prefers to allow the use of videotaped depositions or interviews on a case-by-case basis when the court deems that the protection of the child victim or witness outweighs the defendant's right to confrontation. The Supreme Court has also found that videotaping is not necessary to determine the reliability of a child's out-of-court's statements.

Experts disagree on the impact of videotaping on the legal, policy and practice aspects of child abuse investigation. In the legal arena, opponents argue that the use of videotaped statements in court shifts the focus of the trial away from the child's answers and onto the interview's technique; the proceedings may then revolve around the technicalities of the interview and taping process rather than on whether or not abuse actually occurred. Proponents, on the other hand, argue that the use of videotape can support the nonsuggestive nature of the interview by showing the questions asked and the child's responses.

The mandate to videotape all interviews also engenders debate in several areas relating to policy. Most professionals agree that child victims need to be treated differently than adult victims in some respects. However, some argue that it is unfair to require videotaping of child victims when videotaping of

B. Impact of Alaska's Proposed Legislation

An analysis of Alaska's proposed legislation indicates that its sweeping scope leaves it open to challenge in a number of areas. Areas not addressed by the legislation include: intent, definitions of key terms, limitations of scope, access to tapes, consent by child and/or family, admissibility of tapes in court, penalties for failure to comply, and exceptions.

Staff of Alaska's Division of Family and Youth Services (DFYS) can identify both positive and negative aspects of mandatory videotaping; however, they believe that the drawbacks far outweigh the potential benefits. Videotaping of interviews, they believe, may be helpful in that they can document proper interviewing when it occurs, thus relieving the public's concerns about poor technique. It can also serve as a therapeutic tool for families and as a training tool for staff: supervisors could review tapes with their staff as part of ongoing staff development activities.

On the other hand, staff expressed significant concern over the disruptive influence of introducing videotaping or audiotaping equipment during highly emotional moments when a child discloses abuse. They noted that children often disclose abuse at times when they feel safe, such as driving in a car, and that taping would be impossible at those moments. The obtrusiveness of introducing video equipment is particularly a concern, they believe, when they conduct interviews in Native villages, where they strive to be as respectful of the family and the culture as possible.

Staff also expressed concern that the inability to tape an interview or an equipment malfunction may prevent them from taking necessary protective action under the proposed mandate. This would result in children being left in unsafe situations where they might be re-victimized. They also expressed concern that the funds required to buy and maintain equipment, to provide training on its usage, and to catalog and store hundred of thousands of tapes would drain resources that could be better used to serve children and families.

A cost analysis, presented in this paper, estimates that the financial impact of Alaska's proposed legislation would be over \$3.5 million per year.

In response to the above, the paper presents the following conclusions:

- A mandate to videotape all investigative interviews with victims of child abuse will contribute neither to protecting Alaska's vulnerable children nor to ensuring fair and accurate fact-finding by Alaska's courts of law.
- A mandate to videotape all investigative interviews is likely to impair services to children and families by draining limited human and fiscal

I. Introduction

A. A Brief History

In the past several years the increasing accessibility of videot technology has exerted a dramatic impact upon many areas of our society. Whether this impact is positive or negative, however, is a subject of controversy in many professional fields.

In the field of child welfare, the impetus to use videot technology to support the investigation and prosecution of child abuse grew out of a growing professional awareness that children were sometimes traumatized by the system that was intended to protect them. Since the 1970s, it has been argued that use of carefully conducted, videotaped interviews can reduce system-induced stress on child victims by eliminating the need for them to tell their story over and over again to an array of strangers. The selective use of videotaped statements or depositions in court has also been explored as a technique for freeing children from the stressful experience of testifying in open court.

More recently, use of videot technology has been proposed as a method for ensuring accountability of child protection agencies. Spurred by concerns about children's suggestibility, proponents have argued that use of videot technology can assure an accurate record of what children are asked and how they respond. This approach to the use of videot technology supports mandatory videotaping of interviews as a component of a system of checks and balances designed to protect families from abuse of power by governmental agencies.

It is in the latter approach that Alaska's current proposed legislation, H.B. 348, has its roots. The legislation grew out of concerns raised in 1993 regarding the interviewing of a preschool child who was reported to be the victim of sexual abuse. As a result, the Office of the Ombudsman conducted an extensive investigation into the manner in which the Division of Family and Youth Services (DFYS) investigated the report. The Ombudsman released his findings in June, 1995, including a recommendation that DFYS conduct a feasibility study regarding the videotaping or audiotaping of interviews with alleged victims of child abuse and neglect. The Division agreed to do so.

B. Purpose of this Paper

In response to the Ombudsman's recommendation, this paper will explore the issue of mandatory videotaping of interviews with children who are alleged to be victims of abuse or neglect. It will attempt to provide a balanced discussion of both the benefits and drawbacks of the use of videotape technology in child abuse cases. Specifically, this paper will:

- review the professional literature relating to the use of videotaping from the perspective of law, policy and practice;

Finally, the State of Ohio is currently beginning implementation of a pilot project in one county that would mandate the videotaping of all interviews with alleged child victims of sexual abuse. The American Bar Association is providing extensive training for both county social services personnel and members of the judiciary. It is too early to determine the impact of the pilot project. [Baker, 1995]

In addition, at least four other states—Alaska, California, Colorado, and Washington—have considered similar legislation in the past several years. In each of these instances, the proposed legislation was unsuccessful.

While no states have legislation that requires videotaping in every case, many states do have legislation that allows videotapes to be entered into evidence in court. Because videotapes are generally considered to be hearsay evidence, they—like other out-of-court statements—are inadmissible in court unless statutory authority outlines conditions for their admissibility. Statutes addressing the use of videotapes in court generally fall into two categories:

- those allowing for the use of videotaped depositions or testimony, and
- those allowing for the use of videotaped interviews or statements.

As of December 31, 1994, 35 states had enacted legislation which specifies criteria for the admissibility of videotaped depositions or testimony in criminal child abuse cases. [National Center for Prosecution of Child Abuse, 1995a] However, significant variation exists among these state laws.

Thirteen states specifically allow for the videotaping of a child's deposition. (When depositions are videotaped, the child victim is under oath and attorneys conduct the questioning, generally in an out-of-court setting.) Other state statutes allow for the videotaping of testimony presented at a preliminary hearing for use at a later hearing; still others specify that testimony may be taped to present to the grand jury.

Nineteen states require that the state must make a showing as to the need for use of videotaped rather than live testimony. These statutes generally require a finding that the child is "medically or otherwise unavailable" to testify and/or that testifying will result in emotional harm to the child.

Finally, many state statutes specify the whereabouts of the defendant while the child victim is testifying: In 13 states, statutes specify that the defendant must be able to see and hear the child and communicate with his/her attorney while the child testifies, but that the child should not be able to see and hear the defendant; in four other states, statutes require a finding of harm to the child before he/she is allowed to testify without seeing or hearing the defendant. [Toth, Whalen and Dinsmore, 1989]

defendants: The 6th Amendment states that a person accused of a crime shall have the right "to be confronted with the witnesses against him;" the 14th Amendment guarantees that citizens shall not be deprived of life, liberty or property without due process of law.

Challenges under the 6th Amendment Confrontation Clause have focused not only on videotaping, but also on a range of other techniques that block face-to-face testimony. These include the use of closed circuit television and the use of one-way screens to shield victims from defendants. Case law is evolving quickly in this area, and a full discussion of all relevant cases is beyond the scope of this paper. However, the following cases illustrate some of the recent decisions that may have bearing on the use videotape technology in the prosecution of child abuse cases:

- *Coy v. Iowa*: In this 1988 case, the U.S. Supreme Court considered the case of an Iowa man accused of sexually assaulting two thirteen-year-old girls. During the trial, the girls testified from behind a one-way screen, which allowed the defendant to see and hear the girls but did not allow the victims to see him. Coy was convicted, but argued that his rights under the Confrontation Clause had been violated because he could not confront his accusers. The Supreme Court agreed that use of the screen was unconstitutional, and the conviction was overturned.

Writing for the majority, Justice Scalia stated, "We have never doubted...that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." This argument would appear to bring into question the use of either videotaped interviews or depositions at trial.

However, observers note that the court left some room for further consideration of the issue. In his opinion, Justice Scalia added that, "We leave for another day...the question whether any exceptions exist." [*Coy v. Iowa*, 56 USLW 4931, (US, June 29, 1988), cited in Appelbaum, 1989]

Similarly, in her concurring opinion, Justice O'Connor notes,

"...[N]othing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses...I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is, in my view...just such a policy..." [*Coy v. Iowa*, 56 USLW 4931 (US, June 29, 1988), cited in Toth, Whalen and Dinsmore, 1989]

- *Maryland v. Craig*: In this case, a Maryland day care operator was convicted of sexually abusing a six-year-old child based upon the testimony presented by four young children via closed-circuit television. The trial judge allowed the

admission of such statements at trial. The procedural requirements identified by the [Idaho Supreme] court... to the extent regarded as conditions precedent to the admission of child hearsay statements in child sexual abuse cases, may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes...We, therefore, decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the Clause." [Idaho v. Wright, 110 Supreme Court 3139 (1990)]

Thus, it would appear that the preference of the Supreme Court is to allow the use of videotaped interviews in court on a case-by-case basis when the need to protect a child victim outweighs the defendant's right to face-to-face confrontation. However, the Court has also ruled that while videotaping may be *allowable* under certain circumstances it is not a *necessary* prerequisite for determining a child's statement to be reliable. It is equally important to note that the Constitutional status of state statutes that allow for the use of videotapes in court is still a volatile issue, and it is likely Supreme Court will continue to address this issue in the future.

It should be noted that the above-mentioned case law has developed from and applies to *criminal* cases only. Many child abuse cases, however, are tried in civil court, which may be less formal than criminal court. It is generally held that the 6th Amendment Confrontation Clause *does not* apply to civil proceedings, but the 14th Amendment Due Process Clause *does* apply. However, some judges have interpreted "Due Process" to include the right to confrontation—so the status of the use of videotaped interviews in civil court is, at present, unclear. [Baker, 1995]

3. Impact of Videotaped Interviews on Court Proceedings

Notwithstanding the Constitutional questions surrounding the use of videotaped statements in court, a variety of concerns exist regarding the impact such statements have upon the nature of the court process. Three main arguments arise; these are summarized below:

(1) *The use of videotaped statements in court shifts the focus of the trial away from the child's answers and onto the interviewer's questions and the videotaping process.* Many prosecutors and clinicians believe that when videotaped statements are used, the focus of the trial changes dramatically. Rather than focus on fact-finding, attorneys argue the merits, or lack thereof, of the videotape. [Berliner, 1992; Bulkely, 1992; Hindman, 1992; Ratterman, 1992; Stern, 1992c; Toth, 1992]

For example, while leading questions are clearly not best practice, experts agree that in some cases "when young children fail to respond to generic, open-ended questions, more directive questioning may be necessary..." [APSAC, 1989] The use of a leading question, however, may enable the defense to disallow or discredit an

(2) *The use of videotape can unfairly influence a judge and jury.* Like all media, videotape can be used to distort reality, either by design or by accident. The Supreme Court of Colorado addressed this issue in *People v. Newbrough*. (803 P.2d 155, 1990) Here the Court reversed the conviction of a woman accused of sexually abusing a six year old child, based on a finding that the trial court had improperly admitted into evidence a videotaped interview with the child conducted by a therapist. In reversing *Newbrough*, the court indicated significant concerns about the impact of videotaped interviews:

"A videotaped interview of a child victim is undoubtedly more powerful, and thus potentially more prejudicial, than testimony of a witness about what the child said...Without the proper safeguards, a videotaped interview can also be used to present slanted or distorted testimony...Camera angles and lighting can affect the jurors' impressions of a witness' demeanor, and the use of videotape or closed-circuit television may enhance the credibility of a witness..." [*People v. Newbrough* (803 P.2d 155, 1990)]

Proponents, on the other hand, argue that videotaped interviews with child victims were never meant to be presented as the sole disclosure at trial. Rather, they must be presented along with information regarding other spontaneous declarations of the child to teachers, parents, friends, physicians and others. [Stephenson, 1992b] Further, they argue, a videotaped interview, conducted by a supportive individual in an informal atmosphere, may elicit a more complete account of the child's victimization than could be presented by a young child in a formal court hearing. [Bernstein and Claman, 1986]

(3) *Use of videotape can increase the number of guilty pleas and decrease the need for trials.* Some proponents argue that confronting a perpetrator with a compelling videotape will increase the likelihood of his/her entering a guilty plea, thus reducing the need to go to trial. Bernstein and Claman (1986) write:

"When a defendant has committed an offense and only the child is a witness, viewing the tape may encourage a confession or ease the defendant toward a plea bargain. The evidence on the tape is permanent and potentially devastating. The child can neither forget, nor can he or she be intimidated or influenced. A plea of guilty might then be the common sense approach for the defendant."

However, opponents note that there are no published studies which document an increase in the number of pleas. Stern (1992c) concludes, "There is as yet an insufficient number of cases where a guilty plea was obtained only through a videotaped statement to justify routine videotaping of all investigative interviews."

Opponents argue that it is unfair to require videotaping of all interviews with child victims when there is no similar requirement to videotape adult victims. Such requirements, they believe, are discriminatory in that they assume that child victims are inherently unreliable. Stern (1992c) writes, "It is inappropriate to create a separate class of citizens that law enforcement can talk with only if a video camera is on."

Similarly, Toth (1992) states:

"We treat child victims differently than adults. There's an implicit suggestion that children are so unreliable that interviewers will plant ideas in their head to get them to believe they were abused..."

Hindman (1992) concurs, "I think we should mandate videotaping of all children right after we mandate videotaping of all adults."

2. Privacy and Consent Issues

Mandatory videotaping of interviews with child victims also raises issues regarding the child's right to privacy and the issue of consent. Among these questions are:

(a) *Must the child be informed that he/she is to be videotaped?* Many practitioners agree that, ethically, children must be informed that they are being taped. [Burt, 1992; Ratterman, 1992; Seitz; 1992] Ratterman notes that legally the child's right to privacy is a "gray area," but cautions that legislation which does not address the issue of informing the child raises serious privacy rights concerns and would, most likely, be challenged.

(b) *What happens if the child refuses to be videotaped or a parent refuses permission to videotape his or her child? What if a camera malfunctions?* Ratterman and Burt also note that sound legislation requiring videotaping must address the sticky issue of consent: Can a child refuse to be videotaped or can a child be videotaped over a parent's objection? If so, under what circumstances? What is the status of information obtained in interviews that are not taped? Would there be a consequence for not videotaping interviews? If so, what?

Further, some experts argue that a requirement to videotape all interviews might result in dismissal of charges on technical grounds when there is an otherwise sound case. Addressing this issue, Stern (1992b) notes:

"Surely, a videotape camera will sometimes malfunction...Sometimes, voices will be too soft and not audible on tape. Sometimes, the camera will be completely out of focus or shoot blackness. Sometimes, a tape will be accidentally erased or lost. The risk of dismissal of charges if any of these occurs is too great a risk to warrant routine videotaping."

While both supporters and opponents of videotaping agree that the requirement to videotape all interviews will not solve the problem of lack of trust in the system, perceptions differ on its impact on the more specific problem of poor or misleading interviews.

On this issue, Stephenson (1992b) writes:

"If in your jurisdiction you have interviewers who are inarticulate, overbearing, intimidating, manipulative or insensitive, then I suggest you have the courage to do something about that. Get rid of them or stop using them. Please remember, though, that as prosecutors we cannot put blinders on and pretend that because they are not videotaped, the bad interviews are not happening. Videotaping can be your best tool in ensuring consistently skillful interviews."

On the other hand, Stern (1992c) contends:

"Perhaps the most significant disadvantage to videotaping is that it does not fix any of the problems of bad interviewing...Poor, unprofessional interviewing of children needs to be addressed and corrected. Videotaping does not serve that function. If all the money that is poured into the purchase of video cameras, tapes, storage facilities, security of the tapes, and so forth was used instead to hire and properly train professional interviewers of children, we would accomplish more in terms of enhancing the quality of interviews than videotaping ever could."

C. Practice Considerations

Finally, in evaluating the mandatory videotaping of interviews with victims of child abuse, one must evaluate several practice considerations. These issues can generally be broken down into arguments relating to:

- minimizing intrusiveness into the child's life,
- eliciting and preserving accurate information concerning the abuse, and
- operational and logistical issues.

1. Minimizing Intrusiveness into the Child's Life

Both proponents and opponents of videotaping agree that child victims should not be re-victimized by the system that is designed to protect them. Accordingly, supporters of videotaping argue that the use of videotape can save an abused child from the need to tell his or her story repeatedly to a variety of strangers. Practitioners agree that a well-done videotape can be viewed by attorneys, social workers, law enforcement, and expert witnesses, all of whom would otherwise want

"Overall, studies have not converged on a simple relation between age and suggestibility. It is clear, however, that children are not always more suggestible than adults. When and if a person (child or adult) is suggestible depends on cognitive, social, emotional and situational factors such as level of interest or salience of an event."

Sorensen and Snow's findings further weaken the argument for mandatory videotaping of a child's early statements about his/her abuse. Sorensen and Snow studied the cases of 116 children in which findings of sexual abuse were confirmed either by a confession, a conviction in criminal court, or medical evidence highly consistent with sexual abuse. They found that in 79% of the cases, children moved through a process of denial and tentative disclosure before they reached active disclosure—the point at which they could give a "detailed, coherent, first-person account of the abuse."

Furthermore, only 11% of the children in the Sorensen and Snow study were in active disclosure at the time of their initial interview. Thus, a mandate to videotape all interviews would, in the vast majority of cases, produce hours of tapes of children who either deny or are tentative, ambiguous or "fuzzy" regarding the details of their abuse. These tapes could then be used to discredit later tapes of the same children in active disclosure.

According to Sorensen and Snow,

"...[V]irtually all investigative protocols are designed to respond to only those children in active disclosure. Issues of child suggestibility, contamination and false allegations have increasingly restricted the amount of support that clinical, protective, and investigative systems have made available to assist children through the disclosure process...

"An illustration of this concern is the videotaping of child disclosures during the initial clinical or investigative interviews. Disclosure as a process suggests that denial and tentative features may be prominent on early interview tapes, which may then serve to impeach a child who is later capable of providing credible court testimony. An acquittal of the defendant may place the child again at risk but with fewer resources."

3. Operational and logistical issues

The one point that virtually all of the experts contacted for this study agree upon is that the mandate to videotape all investigative interviews would place an enormous and unworkable administrative and fiscal burden on the agency. Because the impact of videotaped interviews is potentially so great—they may be used as a tool to substantiate or invalidate a report of child abuse or, in court, to determine guilt or innocence in a criminal matter—tapes must consistently be of the highest quality. For this reason, sending a social worker to the field with a hand-

highly controlled environment, using specially trained interviewers. The cost to taxpayers was approximately \$300 per interview. According to the San Diego County District Attorney's Office, the cost of taping *all* investigative interviews would be "simply prohibitive." [Stephenson, 1992c]

While these figures are not, of course, directly applicable to Alaska, they begin to illustrate the implications of a requirement to videotape all investigative interviews. In reflecting on the financial and administrative burden of a mandate to videotape all investigative interviews, one state child welfare director concluded, "The disadvantages of such a proposal far outweigh the advantages. I'm afraid (the mandate) would take on an overwhelming life of its own." [Wilson, 1992]

Costs specific to Alaska's proposed legislation are discussed below. (See Cost Analysis)

III. Impact Analysis

From the review of the literature presented above, it is clear that no overriding professional consensus exists regarding the potential benefits and/or drawbacks of videotaping interviews in cases of child abuse and neglect. For this reason, it is important to examine specifically how the proposed statute may affect Alaska's children and families as well as how it will impact upon DFYS and other professionals who service children and families. Therefore, this section will:

- analyze the contents of the proposed legislation;
- examine its likely impact upon children and families;
- examine its likely impact upon DFYS and other professionals.

A. The Proposed Legislation: An Analysis

H.B. 348, "An Act Requiring Taping of All Official Interviews with Children Who Are Alleged to Have Been Abused or Neglected," states that:

"Upon receiving a report that a child has been abused or neglected, an officer, employee, or agent of the department, a local government health or social services agency, a law enforcement agency, or another state or local government agency or unit may not interview the child concerning the alleged abuse or neglect unless the initial interview and each subsequent interview is videotaped. If videotaping of the initial or a subsequent interview is impractical, the interview shall be audiotaped."

The bill is virtually the same as H.B. 350, defeated during the 1994 legislative session, except for the reference to audiotaping.

abuse or neglect; however, it does not specify when the mandate to videotape ends. For example, does it apply only to interviews during the investigative phase of the case or throughout the life of the case? What is the status of further disclosures of abuse that may occur after a child has been adjudicated and is receiving ongoing services from the Division?

- Access: The legislation does not specify who may see the tapes and under what circumstances, nor does it discuss whether court orders are necessary to release the tapes.
- Consent: The legislation does not specify whether children must give consent to be taped nor whether parents must give consent to have their children taped. It also does not address the Division's options if consent is withheld.
- Admissibility: The legislation does not address the circumstances under which videotaped interviews may be admissible in court.
- Failure to comply: The legislation does not address the effect of failure to comply with the requirement. For example, can the Division take protective action based upon an interview that was not taped? If so, what is the consequence? Does a disclosure made when a tape is not running or when a camera malfunctions "count"?
- Exceptions: The legislation does not address emergency situations or any other conditions in which the mandate does not apply.

It is informative to contrast H.B. 348 with the model Child Witness Code developed by McGeorge School of Law Professor John Myers. The model Code is a comprehensive statute intended to protect the interests of children in the legal system while also ensuring fairness to individuals alleged to have maltreated them. While the Code strongly supports the use of videotape in the investigation and prosecution of child abuse, it also contains numerous protections that are absent in Alaska's proposed legislation. For example, the model Code addresses:

- who may have access to video or audiotapes,
- the requirement of a protective court order to access the tapes;
- a penalty for unauthorized release,
- when and how tapes may be destroyed,
- multidisciplinary interviewing and training of interviewers,

order to provide concrete feedback on interviewing technique as part of their ongoing staff training responsibilities.

Finally, staff agreed that if videotaping is done cooperatively with law enforcement, it can decrease the number of interviews which the child must undergo. In order for this reduction to occur, staff noted, both law enforcement and child protective personnel must be cross-trained to ensure that the interviewer asks questions necessary for both the law enforcement and child protective aspects of the investigation.

(3) Negative Aspects

DFYS staff also indicated a number of areas in which they believe a mandate to videotape or audiotape all interviews would negatively impact the children and families they serve. First, they noted, the use of videotape or audiotape equipment increases the intrusiveness of DFYS intervention into families: As noted above, producing a high-quality videotape of a young child (who is not likely to sit still nor to speak clearly) requires more than a single worker with a hand-held camera. It requires, at a minimum, a camera mounted on a tripod, operated by another worker. Depending on conditions, it may also require use of additional lighting and special microphones to ensure clarity. And if the tape is to be used in court, it also requires a number of special (and sometimes awkward) conditions: an on-camera clock (if the camera doesn't have a date-and-time setting); identification of all voices on the tape prior to the beginning of questioning; and positioning of the camera to ensure that both the worker and child are always in view.

While such conditions can be attained in specialized facilities designed for interviewing (for example, facilities with two-way mirrors, built-in microphones, wall-mounted cameras, and specially-designed lighting), DFYS staff noted that they cannot be readily achieved in the field. Interviews are routinely conducted in dimly-lit family homes, in cramped school offices, and in local law enforcement or DFYS offices that were not built with videotaping in mind.

Substituting audiotaping is not a panacea either, staff noted: even under the best conditions background noise or low voice levels can interfere with the clarity of a taped interview; add to the equation a sobbing child or a pre-schooler who squirms, leaves the table or plays with the equipment and the result is far worse. Further, staff indicated, while audiotaping may appear to be less cumbersome than videotaping, it is often harder to interpret: without important cues from facial expression and body language, listeners may misinterpret taped statements. The outcome of either mandated videotaping or audiotaping, staff fear, will be that interviews will become more cumbersome to conduct and still yield a tape that is too poor in quality to accomplish its goal.

Of particular concern, staff reported, is the impact of the mandate to videotape on their relationships with the State's 254 Native villages. Staff noted that they try to be

separate children who were telling the truth from children who were lying only 58% of the time.) [Davies and Wescott, 1992]

In addition, staff noted that the proposed legislation would create significant logistical concerns for the agency, which might, in turn, drain resources that could better be used to protect children. As one staff member noted, "If it's a logistical problem anywhere else, it's a nightmare in Alaska." Among the concerns identified were:

- the likelihood of camera malfunction in extreme temperatures,
- the need for additional staff to film interviews (particularly a problem for Alaska's 18 one-person DFYS offices),
- the need for additional office space to catalog and securely store the tapes necessary to film tens of thousands of interviews per year,
- the difficulty of maintaining confidentiality of tapes, particularly in rural areas where "everyone knows everyone,"
- the cost of translating tapes that are in Native languages, and
- the cost of transcribing tapes for records and reports.

Fiscal impact of the proposed legislation is discussed in greater detail, below.

C. Impact on Other Professionals

The proposed legislation would impose the mandate to videotape or audiotape on all professionals who conduct investigations of child abuse and neglect. In addition to DFYS, this would include law enforcement, the military, and tribal social service organizations. Thus, each of these entities would have to purchase appropriate equipment and train their staff in its usage as well. Further, each entity would have to develop a system to catalog and store its own tapes as well as protocols for sharing tapes between and among agencies.

The status of other professionals is not as clear in the proposed legislation. Depending on how the law is interpreted, it is possible that physicians, teachers and contract providers who work for programs funded with government funds may also be affected. In this case, these systems, too, would be share in the requirements cited above.

Finally, it is likely that the Attorney General's Office would be profoundly affected by this legislation. First, a mandate to videotape all interviews would, undoubtedly, result in the more frequent use of tapes in court and the resultant shift in court focus, as described above. As prosecutors, they may find themselves at a

Cost Analysis

Item	Calculation Basis	Cost	Explanation
A. Equipment: Initial Outlay			
Videocameras	50 x \$750	\$37,500	50 cameras is a rounded estimate, based on the assumption of one camera for every two interviewers in the same office.
Carrying Cases	50 x \$300	\$15,000	Specialized "Polar Bear Cases" recommended for usage in cold climates.
Tripods	50 x \$75	\$7,500	Based on the assumption of one tripod per camera.
Tape recorders	34 x \$50	\$1,700	34 tape recorders is an estimate, based on the assumption of one per office. Price is for a portable "micro" recorder.
VCRs	34 x \$300	\$10,200	Based on the assumption of one per office.
Monitors	34 x \$350	\$11,900	18 inch, color monitors for reviewing tapes.
Total Initial Equipment Outlay		\$83,800	
B. Equipment: Ongoing costs			
Videotapes	10,487 x \$5	\$52,335	Based on 15,700 reports of harm received by DFYS in FY '95. Assuming that 2/3 of the cases are videotaped and 1/3 are audiotaped. Also assuming 1 tape per case. (While some reports may not require a full tape, many will require more. Each case would require a separate tape, since putting more than one case on a tape could result in breaches of confidentiality.)
Audiotapes	5,233 x \$2.50	\$13,083	See above.
Batteries	34 x 13 weeks x \$5	\$2,210	Assuming 34 tape recorders, which require new batteries every 4 weeks.

Staff travel	Travel to Juneau— \$5,459 Travel to Anchorage—\$9,637 Travel to Fairbanks— \$18,351	\$33,447	Includes air fare, per diem expenses, hotel and 10% Alaska Airlines discount for a total of 78 DFYS staff members.
Training for Other Professionals			
Trainer costs	2 trainers x 2 days training x 3 locations (Juneau, Anchorage, Fairbanks) x \$1,000/day	\$12,000	Training for judges, attorneys, and others who will be affected by this mandate. Does not assume training of all law enforcement, military or tribal social services personnel, who also must comply with the mandate.
Trainer travel	2 trainers x \$1500 x 3 trips	\$9,000	Includes air fare and per diem expenses.
Community Orientations	75 sites x \$300	\$22,500	Community meetings to introduce the new mandate to interested community members. Includes room, audiovisual, handouts
Total Initial Training Costs		\$103,947	
E. Training Costs: Ongoing			
DFYS	1 trainer x 2 days x 1 site x 2 times a year x \$1,000/day	\$4,000	Semi-annual training sessions for new staff members
Staff travel	\$33,447 x 15%	\$5,017	Assumes 15% new staff per year.
Other professionals	1 trainer x 1 day x 3 locations x \$1,000/day	\$3,000	Annual training for other professionals who did not participate in the initial training.
Trainer travel	3 x \$1500	\$4,500	Assuming DFYS and other professional training are coordinated to save air fare.
Total Ongoing Training Costs		\$16,517	
Cost Summary			
Initial (1-Time) Costs	A+ D	\$187,747	
Ongoing Costs (Annual)	B +C+E	\$3,645,155	
Total First Year		\$3,832,902	
Subsequent Years		\$3,645,155	

Further, I would make the following recommendations:

- *DFYS should take concrete steps to address the issues of trust that underlie the proposed mandate for videotaping.* The agency should build upon and strengthen existing efforts to be an active partner with other community agencies that serve families. For example, since early 1994 the agency has been collaborating with tribal organizations, other state and non-profit agencies, and representative of local communities (including parents and consumers of service) in planning and implementing federal Family Preservation and Family Support legislation. These forums began at the state level and have expanded to include more local and regional planning. Continued local forums are an excellent vehicle for the agency to receive ongoing community input on improving the child protection system and to address the issues of trust that underlie the proposed legislation.

Similarly, many communities have local multi-disciplinary child protection teams or provider groups that ensure collaboration among entities to meet clients' needs. Where they exist, DFYS should continue to take an active role in the activities of these teams; in areas where no teams exist, the agency should take a leadership role in developing them.

The agency should also examine and enhance its communication program to ensure that the public receives accurate information about the agency's mission and activities.

- *DFYS, with the consultation of outside professionals, should evaluate the effectiveness of its existing accountability mechanisms.* When dealing with sensitive and emotion-laden issues, such as child abuse, a climate of open, healthy professional debate is often the best method for ensuring that what is best and fairest will prevail. Because child protection is, ultimately, a community responsibility, all communities should have a system of checks and balances to assure that critical decisions affecting children and families are never made in a vacuum.

While mandatory videotaping has been proposed as a vehicle for encouraging accountability of the child protection system, there are several mechanisms already in place that should be examined and strengthened before introducing a new, cumbersome and untested mandate. The courts, for example, are an entity that has the power to provide strong oversight of the actions of DFYS. However, in many states, judges and attorneys lack the comprehensive training and support to effectively fulfill that role. To address the effectiveness of the court system, Alaska has recently undertaken a Court

- *DFYS should be adequately funded to provide regular, comprehensive training to all staff who work with children and families. Protecting children while respecting the rights of families is, undeniably, one of the most critical and difficult jobs an individual can undertake—and, certainly, the crux of the concerns that led to the proposed legislation. Doing the job well takes a special individual who is sensitive, astute, courageous—and highly trained. Yet when budgets are tight, training dollars are often the first to be cut.*

While an analysis of DFYS' existing staff development program is outside the scope of this paper, the importance of continued, comprehensive training cannot be understated. As in many fields, the state of the art in child protection is changing, and even experienced staff need assistance in incorporating new principles, in learning new techniques and in adopting the new collaborative role that the community expects them to fulfill. It is critical that the Division examine its initial and ongoing training program for staff, using national standards as a guide, and that it be funded to ensure an adequately trained, professional staff.

Implementations of these strategies, I believe, will enable the agency to achieve the intent of the proposed legislation—ensuring that DFYS respects the rights of families while protecting the safety of children—without creating an unnecessary burden for Alaska's citizens.

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State of Alaska
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**STATE OF ALASKA
OFFICE OF THE OMBUDSMAN**

INVESTIGATIVE REPORT

Department of Health & Social Services
Division of Family and Youth Services
Ombudsman Complaint A093-6593

June 21, 1995

Stuart C. Hall
Ombudsman



State of Alaska
ombudsman
A Legislative Service Agency

INVESTIGATIVE REPORT

(Finding of Record and Closure)

(Publicly-released report. Edited to remove confidential information per AS 24.55.160)

Ombudsman Complaint A093-6593

June 21, 1995

SUMMARY OF THE COMPLAINT

On February 22, 1993, the Bethel field office of the Division of Family and Youth Services (DFYS) received a telephone call (hereafter, "referral" or "report of harm") reporting possible mental and/or sexual abuse of a five year old child. The "reporter" named the child's father, "Mr. X", as the "alleged abuser." The reporter based the allegations upon the reporter's observations of the child and the child's family some months previously, viewed in light of a booklet the reporter had recently received regarding reporting child sexual abuse.

Two social workers interviewed the child at her preschool to investigate the report of harm on February 26, 1993. As a result of what the child allegedly said in that interview, the social workers stopped the interview, took the child into emergency custody, took her to DFYS offices, and sat in while the child was interviewed again, this time by an Alaska State Trooper. After approximately 20 minutes in the second interview, the trooper determined Mr. X's wrist had touched the child's bottom during play, "accidentally." After having been in emergency custody for approximately two hours, the child was returned to her parents' home. The DFYS case was closed as "invalid."

Mr. X said the whole experience was extremely upsetting, especially for the child's mother, Ms. X. He alleged his family now lives in fear that DFYS might return on any pretext and take the child. Mr. X complained to the Ombudsman's office on July 16, 1993, that interviewing the child and taking emergency custody of her was unreasonable under the circumstances. Assistant Ombudsman Emily Read responded by asking the agency to conduct an internal investigation into its actions. Regional Program Auditor Gary Neubauer conducted the review and concluded in a letter to Ms. Read that, "participating Division personnel acted within full scope of the law and in accordance with Division policy and procedure."

Mr. X was not satisfied with this answer and returned to the Ombudsman for further review. Mr. X alleged that if the social workers actually acted within DFYS policy and procedure in this case, then the policy and procedures should be changed.

Specifically, Mr. X alleged that:

- The report of harm the agency received concerning the child did not justify embarking on an investigation. He analogizes to police procedures, where "probable cause" is necessary to obtain a search warrant for police investigations. In contrast [REDACTED]

- [REDACTED]
- The evidence the social workers had in this case did not justify taking the child into emergency custody. Mr. X believes the DFYS [REDACTED] were going to take the child into emergency custody before they [REDACTED].
 - The Bethel DFYS office is a "loose canon" [REDACTED] of children too often, and the incident involving this [REDACTED] In support of this allegation, Mr. X said he has heard that the Bethel DFYS office took emergency custody of children numerous times in the two and a half years prior to this incident, yet only a few court ordered custody actions have taken place in the same time period.
 - DFYS could not have legitimately taken "emergency" custody of the child when it waited four days after receiving the report of harm before it interviewed the child.
 - Under AS 47.17.027, the child's preschool teacher should have been present during the caseworkers' interview with the child. DFYS erred procedurally b [REDACTED].
 - If DFYS is not required to audio or video record its initial interviews with children, the agency actions of taking emergency custody based on those interviews is unreasonably shielded from review.

Rephrased to fit within the Ombudsman's statutory framework this office investigated the following allegation:

The Division of Family and Youth Services abused its discretion by deciding to interview complainant's child based on an insubstantial report of harm and by thereafter taking complainant's child into emergency custody.

Regional Director, then Assistant Ombudsman, Bea Hagen investigated this complaint. She reviewed the DFYS case file, applicable statutes, regulations, and policies and procedures. In addition, she deposed or interviewed the following persons:

- Mr. X, complainant
- Trooper Terry Asberry, Alaska State Troopers, Bethel
- Elsie Francis, former DFYS caseworker, Bethel
- Mercedes Jewett, DFYS caseworker, Bethel
- Georgina Kacyon, DFYS Intake Supervisor, Bethel
- Gary Neubauer, DFYS Northern Regional Program Auditor, Fairbanks

- Richard Winters, Program Manager, Child Protective Services, Olympia, Washington
- "Susan", Intake Screener, Children's Services Division, Department of Human Resources, Portland, Oregon
- Vickie Koehler, Acting Intake Supervisor, DFYS, Fairbanks
- David Herringshaw, former Bethel DFYS Social Services Associate
- Ron Parker, former DFYS Northern Regional Administrator
- Eva Kopacz, Assistant Professor, University of Alaska, Fairbanks, social work faculty
- Steve Emerson, Social Worker IV, DFYS Staff Training Center, Fairbanks
- Julie Miller, pre-school teacher, Bethel
- Kathy Tibbles, DFYS Social Services Program Officer, Juneau
- Cathleen Connolly, pre-school board member, Bethel
- Barbara Cotting, Aide to Representative Jeannette James

EDITING OF THIS REPORT

Ombudsman investigators had access to statutorily confidential DFYS files and deposed or interviewed DFYS personnel about confidential information. AS 24.55.160 gives the Ombudsman "access at all times to records of every state agency, including confidential records" and provides that "the ombudsman may not disclose a confidential record obtained from an agency. Because legislators and numerous complainants have raised the public policy issue of whether DFYS interviews with children should be videotaped or audiotaped, the Ombudsman decided to release an edited public version of this report.

Confidential information to which the ombudsman investigator had access was included in a preliminary confidential report to the agency. Information from DFYS records and interviews that would identify the child involved or that is otherwise confidential and not directly relevant to the issues raised by the allegations has been removed from this version of the report. The child which was the subject of the report of harm is referred to as "the child." The complainant is identified as "Mr. X" and his spouse as "Ms. X". DFYS was provided with a draft copy of the final public report so that the agency could review it for confidentiality prior to release.

BACKGROUND

The X family consists of both parents, the child and a sibling. The child was five at the time of the incident at issue. Both parents had been employed professionals in Bethel for several years prior to the events at issue.

On Monday, February 22, 1993, at 2:40 p.m., social worker Elsie Francis received a telephone call at the Bethel DFYS office from a person who wished to remain anonymous (hereafter identified as "reporter"). The reporter gave his or her name to Ms.

Francis and stated a non-familial relationship to the child. The reporter apparently last had contact with the child approximately six months earlier.

A handwritten narrative on a standard DFYS form entitled, "Family Service Report of Contact" (ROC) and signed by Ms. Francis, described the allegations. The report said in pertinent part:

[Reporter] said that a St. Trooper gave [reporter] a booklet on reporting child SA [sexual abuse] as [portion deleted].

Symptoms the child/family - Father gets really annoyed by children's develop. delays [sic]. He calls them stupid; his anger seems out of proportion to the situation. -

- Child is seductive. "Don't I look pretty" Reporter feels uncomfortable.
- Father always has his daughter w/him when he's not at work.
- They've had her thru 5 diff. providers in the last 5 yrs. [portion deleted].
- Child is interested in sexual things.
- Child hates boys to the pt. of strange.
- child is a manipulative liar
- mother is very passive - [Reporter] questions whether mother is afraid of father. -
- Other child: [portion deleted] victim of family dog bit[e]. . . .
- Child always wants to look sexy. She would wear strapless gowns: "Don't I look pretty." she only wanted to be w/adults; not w/other [children]. Child hates her [sibling].
- [Reporter] feels that parents took child from [care provider] when child was getting too comfortable.
- Child cannot remember simple things. She tells parents what to do - role reversal.
- [sibling]. - unusually passive. Displays nervous behavior - neurosis. [sibling] bites other children.

Father would call them stupid - "How are these little brats doing?" [Reporter] started telling him what good kids he had. He just would laugh it off. Mother would say, "How are you doing sugar puss, bear, Big . . . [sic] Bear." Everything was puss to her daughter. Mother from [another state].

-[Reporter] was apologetic - felt bad.

On the basis of this intake information, Ms. Francis called the Alaska State Troopers to set up an investigation plan. She spoke with Trooper Rosemary Decker.

Ms. Francis next consulted with Intake Supervisor Georgina Kacyon. Ms. Francis later wrote on her ROC form, "She [Trooper Decker] agreed that it might be better for the Troopers to handle situation [rather than the Bethel City Police]."

The notes continued, "[Trooper Decker] said to do a further invest. by interviewing the child & if it is determined that the child is at risk, to call the Troopers. Informed her that [the child] attends school at [deleted] & I would conduct interview on Wed. or Fri."

On Friday, February 26 at 11:00 a.m., Ms. Francis and another social worker, Mercedes Jewett, went to the child's preschool where the child was in class during the day. Prior to interviewing the child, the social workers interviewed the child's teacher, Julie Miller. In pertinent part, the file notes indicate that Ms. Miller said:

"She's right about where she needs to be & socially she's fine." Julie stated [the child's] father usually picks her up from school. Julie also stated, [the child] did not seem to have problems relating to male children and she plays w/male and female children.

Mr. and Ms. X were both notified that the child would be interviewed. Both parents came to the school. Mr. X questioned the social workers' qualifications to investigate the allegations, but nevertheless agreed that the social workers could interview the child.

Ms. Jewett and Ms. Francis interviewed the child alone in a "cloakroom" at the preschool. Each later signed notes to the DFYS file which summarize the interview with the child at her preschool. Ms. Jewett's typewritten notes about the interview stated in pertinent part:

During this interview [the child] stated her father "touches" her "private parts . . . sometimes on Saturday or Sunday." The child identified the areas of her vagina and her bottom on the drawn outline picture of a female child's body. When asked what her reaction to this occurrence was [the child] stated, "I said no."

Ms. Jewett's handwritten notes signed by both workers, and also transcribed at some later time from earlier notes, stated in pertinent part about the interview:

[The child] was informed by worker Elsie Francis that she would be asked to answer some questions and she could ask questions if she did not understand and stop the interview at anytime.

Child stated she was 5 & her birthday is [deleted]. Child stated she understood the difference between truth & lies. Child stated she understood the difference between good touch, bad touch & secret touch. Child stated "once" her friend [deleted] touched her "private parts" at school & she told her mother. Child also stated "Sometimes my Dad touches my private parts on Saturday or Sunday - accidentally- [sic].¹

¹ The word "accidentally" [sic] was crossed out in the notes and initialed by Ms. Francis. A separate typewritten note in the file signed by Ms. Jewett and Ms. Francis states, "Point of Clarification in regard to the notes of the interview with [the child] on 2/26/93 at 11:25 at the [preschool] with Elsie Francis and Mercedes Jewett. The word "accidently" [sic] was included on the report as the notes from the above interview were being transferred to an Abuse/Neglect Investigation Sheet while [the child] was talking to

The transferred interview notes go on:

Child stated, the last time this happened was "Saturday," while her mother was in the kitchen & her [sibling] was sleeping. "I was sitting on my dad's lap . . . he touched me the wrong way & I said no." Child identified the areas of her vagina & her bottom on the picture. Child further stated "my dad really did it." Child stated "I feel sad when he touches me" and "he touched me w/his hand."

On the basis of this alleged interchange Ms. Francis stopped the interview and called Ms. Kacyon who advised her that assumption of emergency custody was appropriate under the circumstances. Ms. Francis called the Alaska State Troopers as she had prearranged with Trooper Decker pending the contingency that the interview would produce evidence that sexual abuse had taken place.

Ms. Francis also notified Mr. and Ms. X at that point that the results of the interview made it necessary to assume emergency custody pending further investigation. The social workers then took the child to the DFYS office.

Trooper Terry Asberry came to the DFYS office to conduct another interview with the child. The second interview was tape recorded. In the course of the interview, the child indicated that it was in play that her father touched her private parts. As a result of the trooper interview, DFYS workers returned the child to her parents at home and dropped the emergency custody about two hours after it had begun.

Under section 2.214 of the DFYS child protective services policy manual, an "invalid" case is one, "where there are no facts to support the allegation that a child has suffered abuse or neglect." This type of finding is to be made at the "conclusion of the investigation." The final assessment in the child's case was that the allegation was invalid.

INVESTIGATION

Was the report of harm substantial enough in this case to justify the decision to interview the child at her preschool?

Alaska Statute 47.17.030 provides that DFYS must "investigate" each report of harm to some degree. The law says:

[T]he department shall, for each report received, investigate and take action, in accordance with law, that may be necessary to prevent further harm of the child or to ensure the proper care and protection of the child.

Gary Neubauer, DFYS Regional Program Auditor in Fairbanks, stated that all reports of harm alleging possible physical abuse, sexual abuse or neglect communicated to DFYS are "screened" to determine the need for Division intervention. He said that all screenings do not result in investigations or resulting interviews. If the intake supervisor decides that the report does not justify intervention, it is not assigned to a caseworker for investigation, but is kept for future reference to help evaluate other reports which might be made about the same child or family.

the state trooper. During the interview with the state trooper [the child] did state, "my dad touches my private parts. . . accidentally" [sic]. However during the earlier interview she did not use the word "accidently." [sic]

DFYS has general policies and procedures for suspected child sexual abuse cases which were developed in accord with an 1984 Child Sexual Abuse Agreement signed by the governor. This agreement states that the Departments of Health and Social Services, Law, Public Safety and Corrections must develop general policies and procedures concerning interaction between agencies.

According to Section E-1 of the policy, concerning Intra-Family Child Sexual Abuse, the order of investigation should proceed as follows: the worker should speak to the referring person to obtain as complete information as is available. *The worker should call any other collateral people that are appropriate to contact, "before first visit with child and family,"* and look[s] at any previous records. [Emphasis added.] Then, the worker immediately contacts the appropriate law enforcement agency to jointly develop a plan of investigation. The procedure states, "in the majority of cases, the child will be interviewed first.... This preferably will be accomplished through joint interviews." The procedure also provides that the "worker and/or law enforcement" will "make direct contact with [the] child," and "interview the child and secure a statement regarding inappropriate sexual activity -- also expected family reaction...."

Mr. Neubauer noted that the credibility of the reporter and history of false reports would be considered in the decision about whether to assign the case for investigation. The worker would consider behavioral indicators that sexual abuse had occurred as part of the overall analysis. CPS Manual Appendix N-2 contains a "summary chart" of behavioral indicators of sexual abuse. Listed are:

Unwilling to Participate in Certain Physical Activities

Withdrawal, Fantasy or Unusually Infantile Behavior

Bizarre, Sophisticated, or Unusual Sexual Behavior or Knowledge

Poor Peer Relationships

Reports of Sexual Assault by Caretaker

The DFYS Child Protective Services policy manual CPS 2.14, Priority Rating Scale, states that "Each case accepted for investigation will be assigned a priority rating of "Priority 1," "Priority 2" or "Priority 3" contingent on the severity of the reported risk of harm to the child.

DFYS assigned the report of harm concerning this child a "priority 3." Section 2.1.4 of the Child Protective Services Manual defines this as follows: "Priority Three will be assigned to those referrals which indicate that a delay in assessing the situation will not result in significant additional harm to the child."

Mr. Neubauer said a priority rating of 3 for the report about the child was appropriate because the information provided by the reporter did not indicate that the child was in immediate danger, or subject to imminent danger of physical harm, or had suffered serious physical injury as a result of abuse or neglect, or in need of medical attention. He emphasized that although the report made allegations that indicated *possible* sexual abuse, "at the time of receipt of the referral, the child in question had not yet disclosed sexual abuse." If she had, the report would have been rated as a priority 1.

Under procedures in the CPS manual, an interview with the child must be conducted for non emergency priority 1's within 24 hours of the report. A priority 2

interview must be within 72 hours and a priority 3 interview should take place within seven calendar days of the report of harm.

Kathy Tibbles, DFYS Social Services Program Officer, said that when a report of harm alleges "behavioral indicators" of sexual and emotional abuse, it should be ranked as a priority 2. However, she said, "The priority system is supposed to be fluid. After the interview, a case could become a high risk case. Technically, priority doesn't matter [except as a framework for response time]." She said that the priority system is a method of handling caseload. When the workload gets too high, the policy is usually to not investigate priority 3 reports until there are three reports about the same family or child. But, she cautioned that even this policy would be a fluid one.

Once a local supervisor determines that a referral, or report of harm, is appropriate for Division intervention and it is given a priority rating, the intake referral is assigned for investigation. Under CPS 2.2.3, minimum standards once an investigation is undertaken are:

- a. One face to face contact with the child.
- b. One face to face contact with the parent/caretaker.
- c. All siblings who live in the same household should be interviewed.
- d. Any collateral contacts as necessary to reach a decision on the report. A collateral contact is any person who is not directly a part of the situation but may have significant information which will aid in determining whether the report is substantiated, unconfirmed or invalid.
- e. Any exceptions to the minimum standards require review and approval by the supervisor.

In other words, once the report of harm about the child was assigned a priority and assigned an investigator, an interview was technically required unless the supervisor, Ms. Kacyon in this case, decided otherwise.

To obtain uninvolved professional viewpoints about whether the report about the child justified launching an investigation, the ombudsman investigator read the referral report in this case to various professionals, excluding names and other identifying material.

Vickie Koehler, Acting Intake Supervisor for the Fairbanks DFYS office said, "I would struggle over that one. There appear to be some things of concern, but there is nothing clear." She continued, "It wouldn't be a priority 1." Ms. Koehler said that the Fairbanks office might do some "collateral contact" if it had a reason to be suspicious of the report. For example, "Often we call the school to see if they have concerns too." She said that the existence of prior reports is important to the decision about whether to investigate. She said a major problem for her is the fact that the report was made so long after the reporter's last contact with the child at issue. However, she said that sexual abuse gets a lot more attention, even in Fairbanks, than other kinds of reports of harm.

At Mr. X's suggestion, the ombudsman investigator interviewed David Herringshaw. Mr. Herringshaw is Mr. X's personal friend, but also worked in the Bethel DFYS office for four and one half years. At the time of the child's interview, Mr. Herringshaw was a Social Services Associate, a position somewhat lower in the hierarchy than a Social Worker. Mr. Herringshaw stated he has a degree in Health Care

Administration and six to seven years background working with abused or wayward children. He said that to be a good social worker, one has to, "Think like a cop with the sensitivity of a pastor."

He said that in general, he believes that, "all reports [of harm] in Bethel [were] incompetently handled" by the Bethel office. He said, "It is not just the X case. That office is out of control." He continued, "You mention sexual abuse in that office [and] it is like a whirlwind - an extreme, gross reaction. If you want to destroy someone's life in Bethel, you turn them in for child sexual abuse."

Mr. Herringshaw opined that the child, "probably made some innocent comment," during the interview which was misinterpreted, and led to the taking of emergency custody. He added, "These people don't know how to ask non-leading questions."

Mr. Herringshaw said that after Ms. Francis received the report of harm concerning the child, but before the interview took place, the report came across his desk in the course of his job duties. He told the ombudsman investigator, "You gotta understand, these people were in my house all the time. I intimately knew the [X] family."

He said he went to Ms. Francis and told her, "I know these people - I know the situation. I know [the child]. She is not a victim. This is a bogus claim. You need to go do some research with the reporter." Mr. Herringshaw said he told Ms. Francis that contrary to what the reporter said, the child was, "just a little girl that loved to dress up and wear makeup." Her sibling was an "aggressive little [child], not a whimpering little thing. [Ms. X] was anything but browbeaten."

Mr. Herringshaw said, "Somehow, this got pushed to the point Elsie *had* to investigate." Mr. Herringshaw said that Ms. Francis normally attended to licensing issues at DFYS. She, "didn't hardly ever do intakes. She didn't want to do the interview." He said, "Elsie is a kind, warm person, but she is not street smart. She would have made a phenomenal social worker, but she quit because of this case."

He said collateral contacts should have been made with the child's current caretakers before interviewing the child. He said that if he had been the screener, he would have taken all the information the reporter offered during the referral call. Then, he would have asked questions. He would have "circumspectly" contacted [deleted] day care workers, and he would have found out the reporter's relationship with the family. He would, he said, "Find out more than what the [reporter] *thinks*, I would find out what [the reporter] has *seen*."

Finally, he said he didn't think the report of harm in the child's case had enough information in it to justify an interview. He said, "Elsie's supervisor [Ms. Kacyon] should have recognized a weak report and required some follow up before deciding to proceed with an interview."

Ms. Francis told the ombudsman investigator, "We did this case by the book. I consulted with my supervisor, Georgina [Kacyon], at every step."

Ms. Francis said that in the small Bethel office, every worker "got a turn as screener, mixed with their other caseload duties." Ms. Francis said, "This one was an unusual report" in that the reporter had had no contact with the child for six months. She said, "I think that's why I didn't go out right away."

Ms. Francis said she remembers speaking about the intake report with Mr. Herringshaw and that she knew Mr. Herringshaw was Mr. X's friend. However, she said she did not discuss her conversation with Mr. Herringshaw with Ms. Kacyon when they conferred about the intake. Ms. Francis said she did not know Mr. X, but she was aware of his [employment position] in Bethel. She also did not know the reporter.

The ombudsman investigator asked Ms. Francis if, in her opinion, the report of harm justified going on the interview. She said, "I don't think it was enough to do an interview. I remember feeling uncomfortable about it. I basically didn't want to do it [the interview]. Ms. Francis said two things that made her uncomfortable were that Mr. X was a former [professional worker] and his was a "white family." She said she, "knew from talking with Georgina [Kacyon] they could turn around and sue [us]."

She said, "In hindsight, I would have wanted to talk to the reporter some more, and I would have wanted to see the book that [the reporter] referred to."

Ms. Francis said she wonders now how many intake calls in Bethel were taken to the interview stage. She suspects that all calls were. Ms. Francis said, "In Bethel, interviews come of every allegation of sexual abuse. . . . [I] think the practice is excessive at times. . . . Any sex abuse allegation in that office is treated as an emergency."

She said that she now believes the screening process in Bethel isn't done properly. She said, "The problem is how the system is set up. The system is wrong in Bethel - we [went] out and interview[ed] on anything."

Ms. Francis opined that the screening process should be changed, "because now, it results in, people getting back at other people." She said, "Right now the law reads if you 'suspect' [abuse] you have to report it." But, she said the screening process should better screen out false reports. She added that Ms. Kacyon was a "relatively new intake supervisor at the time of the child's interview. She was still learning her job." Ms. Francis suggested that to improve the system, DFYS should have people who "do only one job." She said the screener should be separate from the investigator, and that the screener and a supervisor should make the decision to interview a child after they conduct more research into the complaint, if necessary.

In spite of these problems, Ms. Francis said that, "I think I was acting professionally at the time." However, she said that the case was "one of the reasons," she stopped working at Bethel DFYS. She said, "[It was] seeing how it affected the Xs. They were very upset." She continued, "The aftermath was horrible. I felt horrible."

The investigator asked Ms. Francis why she called the Alaska State Troopers rather than the Bethel police to set up an investigation plan. She said the call was a "true accident." She had only remembered at the time that she had worked before with the Alaska State Troopers on such investigations, so she called the Alaska State Troopers.

As intake supervisor, and a Social Worker IV, it was Georgina Kacyon's job to oversee the intake and to review the referrals (reports of harm) and assign them for investigation when appropriate. Ms. Kacyon had been in the child protection field for 10 years prior to this incident. She had been working in Bethel since October 1989.

Ms. Kacyon said that she knew Mr. X only as a professional acquaintance. She knew his position of employment. She said she knew Ms. X's professional status and had talked with her professionally in situations similar to the one involving Ms. X's child. She said that the allegation about the child was awkward because "I was sensitive to, you

know, they were both high profile community members and that this would be very delicate - in dealing with them." Ms. Kacyon said she did not know the reporter.

Ms. Kacyon went on to say:

I remember her [Ms. Francis] saying that the reporter was a [job status] and that she had . . . a presentation on child abuse and had been given a booklet by one of the troopers and she had just picked up on some behavior indicators that [the child] was exhibiting that caused her to suspect that . . . [the child] may be being sexually abused and she had reason to believe it was the father. . . . I remember that we did talk about that to determine whether there was enough to assign it for investigation, and we felt that it did [warrant an investigation].

Ms. Kacyon said that the elapse of time since the reporter observed the behavior did not make a difference in her evaluation about whether to assign the report for investigation. She said, "We often investigate reports that may have had years gone by since someone had observed it and they're just coming forward to report it. . . . We would investigate it even if it occurred several years ago."

In this child's case, Ms. Kacyon said the basis of her screening decision to investigate was, "[T]he reporter . . . suspected on . . . observations that there may be some sexual abuse of the child. Based on her behavior . . . and . . . other factors of how the father treated her and her [sibling]. There was more than just the sexual abuse. There was some mental injury there that needed to be addressed."

The ombudsman investigator also contacted child protection workers in Washington and Oregon, who had the following comments after being read, verbatim - excluding names or other identifying material - what Ms. Francis wrote on her ROC form from the intake interview.

Richard Winter., Program Manager, Child Protective Services, in Olympia, Washington said, "This report calls for collateral contact prior to an interview." He said, "It is one person's opinion and observations. They needed a more recent contact and a second opinion before calling in the troops. This was a vague concern [on the part of the reporter] and a vague suspicion doesn't cut it." He added, "In Washington, I would hope that [the agency] wouldn't do [an interview] on this report without collateral contact supporting it." As an example of the kind of collateral contact which should have been done, he cited contacting the present daycare provider or doing a background check on the alleged abuser.

The ombudsman investigator also spoke with "Susan," an intake screener with the Oregon DFYS equivalent agency, the Children's Services Division of the Department of Human Resources. Susan said that the report about the child was a "borderline case." Depending on which office or supervisor might be consulted, the decision to investigate in Oregon, "might go either way."

However, Susan said that in her opinion, the report would have called for some "follow up." She, "would have needed more information than [the report of harm] to decide to go on an interview. She said she would have asked more questions of the reporter, because, for example, "What one person thinks is seductive, in and of itself, might not be enough [to justify an interview]."

She said she would ask questions regarding the reporter's motive for making the report. She might contact the child's recent daycare provider and see if the provider had similar concerns; if the daycare provider had not noticed anything with the child, the report might not have been investigated. She said that if the report wasn't investigated, her agency would probably have written a letter to the family informing them that concerns about their child had been reported.

The ombudsman investigator also read the report of harm - excluding confidential information - to Eva Kopacz, an assistant professor on the faculty of the University of Alaska, Fairbanks, Behavioral Sciences and Human Services Department. Ms. Kopacz teaches "applied" classes -- how to be a social worker. She came to the University with 18 years prior experience as a licensed clinical social worker. She also has 18 years in clinical practice as a social worker, including experience as an intake screener in states other than Alaska, as well as experience providing inpatient and outpatient psychological services to child victims of sexual abuse. The investigator asked Ms. Kopacz to evaluate the report as if she were the screener.

She said, "I wouldn't feel like this [report] was enough for an interview. I probably wouldn't do an investigation. . . . Behaviors have so many possible factors - this behavior could be normal." She said that she would have filed the report and waited to see if there were other complaints. Or, she might have done some follow up questioning of the reporter before deciding to do an interview.

She said, "Essentially, based on what's written in the report, there is no distinction between observed behavior and the meaning ascribed to the behavior. The report is empty of observations and data. There are no facts. There is no factual information in it that tells you how to come to a reasonable conclusion. I would have a million questions."

For example, she said that some of the behaviors mentioned, such as the child's tendency to dress up, "could be meaningful," but her age, five, "is a dress up age." She said, "We shouldn't attribute adult attitudes and motives to children." She said she would have wanted to know more about the nature of the child's interaction with her father. Ms. Kopacz noted, "You can find 'warning signals' in almost anything." As an example, she said that if one went down a "checklist" for "warning signs" of codependency, "almost everyone would be codependent."

Ms. Kopacz said that after hearing the report of harm from Ms. Francis' notes, her recommendation to DFYS would be to advise intake workers that their notes should describe *behavior* rather than the worker's or the reporter's *conclusions* about the behavior. She said, "I have seen reports with a lot more than this that weren't investigated."

Ms. Kopacz said, "[The report about the child is] full of powerfully loaded conclusions. . . . It is devoid of solid observations, [so] there is no data on which to base conclusions." For example, Ms. Kopacz said that instead of the word, "manipulative", the worker might say, "When Suzy hit Johnny, the following happened. . . ." She said that in this particular report, she would want the reporter to say, "This is why I felt that the child's behavior was seductive."

Ms. Kopacz also said that Ms. Francis' report contained, "Lots of jargon but not much description. What bothers me, the jargon is not descriptive of behavior." She said, "Increasingly, the whole message in the field is: don't make conclusions -- describe the behavior." A worker should say, "It is my impression that. . . ." and, "the impression is

based upon. . . . " The worker should clearly differentiate the source of the report, such as, "Per report of the mother. . . . "

However, Ms. Kopacz added, "Often, the decision to investigate is based on subjective impressions rather than factual data. There is a place in [such a] decision for judgment calls."

The ombudsman investigator also read the report of harm text to Stephen Emerson, Social Worker IV, Staff Training Center, DFYS, Fairbanks. It is Mr. Emerson's job to train caseworkers on agency policy and procedure. He said, "There's a lot there. [Based upon that report] I would assign someone to talk to the child because of the possible emotional abuse that was alleged." He noted, for example, the allegation that Mr. X called his children "stupid." In addition, he said the report contained, "a billion red flags for sex abuse." He cited, for example, that common themes in sexual abuse are that the parent always has the child with him, and that care providers are changed frequently. He said that in his opinion, the report did not sound inordinately vague. He said, "Each allegation [in this report] alone, out of context, may not have resulted in an [interview]. It was the number and the overall flavor of the allegations which justifies concern."

He said that even if an investigation isn't geared toward sexual abuse but is the result of a neglect report, for instance, he has found it best to ask the child about sexual abuse in the initial interview. Mr. Emerson said that the younger the child at issue, the greater the chances that the report would be assigned for investigation. He added that in the case of this report, "I would want to know if there had been other reports about this family." He said, "If [a supervisor] is on the fence, assign. It is better to err on the side of safety for a child."

Did the interview justify the emergency custody decision?

The only available evidence about what transpired in the child's interview comes from the two social workers who were present and their transcribed notes in the DFYS file.

CPS Manual Policy and Procedure 2.2.5, Investigation Child/Victim, includes guidelines for social workers to follow when interviewing children. There are also comprehensive interviewing guidelines in Appendices 0-1, Interviewing General Guidelines in 0-2, and Interviewing the Young Sex Abuse Victim with the Aid of Dolls. Upon hire, each caseworker accomplishes a Pre-Service Orientation through division policies and procedures in the form of a self-study guide and test.

During their first months of hire, all child protective service workers receive what is called CORE training in four increments. Mr. Neubauer said the first three increments relate to child sexual abuse:

The first increment, CORE Training 101, lasts three days (18 hours) and consists of a variety of topics including Introduction to Sexual Abuse, The Spectrum and Dynamics of Sexual Abuse, and Indicators of Sexual Abuse. The second increment, CORE 102, lasts five days (30 hours) and consists of a variety of topics including Characteristics of the Casework Interview, Interviewing Strategies and Their Utility, Building Trainee Skills in Interviewing and The Dynamics of Resistance: Implications for the Casework Interview. The third increment, CORE Training 103, lasts three days (18 hours) and consists of topics including The Effects of Abuse and Neglect on Infants and Toddlers, The Effects of Abuse and Neglect on

Preschool Children, The Effects of Abuse and Neglect on School Age Children, The Effects of Abuse and Neglect on the Development of Adolescents.

Ms. Francis told the ombudsman investigator she had conducted sex abuse interviews with children prior to the child's. She said she had participated in DFYS CORE training before the interview, and she had been with DFYS about two and a half years prior to this incident.

Ms. Francis said she went to the interview, "with a neutral perspective -- [I] didn't know if sexual abuse had happened or not." She said that she was deliberately trying not to ask "yes and no" questions or "leading questions" during the interview. Ms. Jewett, the other social worker present in the room with the child, was silent during the interview, but took notes. Ms. Francis did not take any notes.

Ms. Francis said that during the interview, the child "showed" where she was "touched" by "pointing" at locations on her body. She also pointed to parts of an outline picture of a little girl. Ms. Francis said that as soon as the child indicated her father had touched her inappropriately, "I stopped the interview right there." Ms. Francis said she didn't want to ask the child any more questions because she didn't want the child to have to describe the incident twice.

Ms. Francis said that when Ms. Jewett was *rewriting* her notes of the preschool interview, she mistakenly inserted the word, "accidentally," because the child hadn't said that the touching was accidental until the second interview, the one with Trooper Asberry. Ms. Francis said she noticed the error when she read Ms. Jewett's transcription, so she crossed out the inaccurate word, initialed the change, and the two social workers made a separate memorandum explaining the change.

Ms. Francis said she doesn't remember what was done with Ms. Jewett's original notes, which she believes were also written on DFYS Report of Contact forms. Ms. Francis said it was not a "general practice" to rewrite notes for the file, but it was not uncommon. Ms. Francis said she did not keep the outline drawing she used during the interview in the file because the child had made no marks upon it.

Ms. Jewett said that although she has a bachelor's degree in social work and had been working in jobs connected with social services since 1986, the child's interview was her first experience with child protection because she had only been employed with DFYS for about four days previously. She had not yet had any of the CORE training, but had reviewed the CPS manual. She went with Ms. Francis to observe the interview as part of her on-the-job training. Ms. Francis asked her to take notes.

Ms. Jewett remembers that the interview took place in, "kind of like a . . . cloak room. Elsie explained things to her [the child]. Like, did she know the difference between good touch and bad touch and telling a lie and telling the truth, and that type of thing." Ms. Jewett said, "[The child] said her father had touched her private parts. . . . Actually, it seems like she may have said something like, 'My Dad really did it.' Or, 'He really did that,' or something. She was not upset through the interview at all. She was really calm. You know, just talking matter-of-factly, and didn't seem upset at all."

When asked if she remembers the exact words the child used in the interview, Ms. Jewett said, "The one I do remember is that she said her dad touched her 'private parts.' That's the word, that's the way I remember it because I remember I had thought about it after . . . and that's what she said. In just those words."

Ms. Jewett remembers taking notes on a ROC form during the interview. She remembers typing the notes over, "so that they would be readable." She said she is sure the original notes were thrown away.

Ms. Jewett also remembers writing "accidentally," in error, on other transcribed notes which Ms. Francis and she both signed. She said, "I remember that, I did that. I took notes when she [the child] was talking to Elsie [Francis], then I also took notes when the child was talking to the trooper. You know, when she was talking to the trooper she said, "accidentally." And then . . . I put that in on the wrong sheet, because as it turned out I didn't need to take notes when she talked to the trooper at all."

Ms. Jewett said she typed an addendum to the file explaining the error on the ROCS rather than simply rewriting the notes accurately because, "We had already given it [the P.O.C containing the error] to the troopers."

Ms. Jewett said that the trooper interview was "longer" than Ms. Francis'. She said, "You know you don't want to grill them [the child] unnecessarily, since it was known that after you talk with the child, then somebody else has to talk to them again." She noted that compared to the interviews she has done since the one at issue, "[the child] was really articulate. . . . Usually, the kids that I've dealt with, they're a lot less willing to talk about things. A lot of the kids -- I guess not all of them -- but now, that kind of stands out."

Concerning the interview with Trooper Asberry, Ms. Jewett said, "I remember him demonstrating, like picking somebody up . . . which is what was determined to have happened in this case is that her dad picked her up with his hands on bottom. Picked her up in the air. And I remember him demonstrating that to her, and she was saying, 'Yeah, you know, like that.'"

Is DFYS sufficiently accountable for what transpires in initial interviews with children who are the subject of child abuse investigations? Should DFYS tape record or video tape its initial interviews with children who are interviewed as the result of reports of harm?

Ms. Kacyon said that there is no office policy about whether to keep a social worker's original working notes in the file or to throw them away after they are rewritten on ROC forms. She said that it is routine to throw them away.

After Mr. X consulted an attorney about the incident concerning the child, Ms. Kacyon forwarded a copy of a letter from that attorney to the Attorney General's office in Anchorage by facsimile transmittal on March 10, 1993. She wrote on the transmittal cover sheet, "We are completing our documentation of our investigation and will be forwarding a copy to Julie & Gail for Torts Review." When the ombudsman investigator asked what documentation was being "completed" at that time, Ms. Kacyon said, "I think Elsie was completing her investigation. Writing up her investigation."

When the ombudsman investigator pointed out that the facsimile was dated almost three weeks after the incident, Ms. Kacyon said she remembers reminding Ms. Francis "several times" that she needed to get her investigation written up. She noted that Ms. Francis was also the licensing specialist in the office and had other responsibilities then, when the office was also short staffed. "That was the reason," she said.

CPS Policy and Procedure Manual Section 1.5 deals with "case recording." It states in pertinent part that the "purpose and intent" of proper record keeping is to provide

"a clear account of the need for service and the Divisions' response." Proper record keeping also "serve[s] to meet the Division's responsibility to be accountable for services delivered."

The manual provides, "The case record is the basic tool required to prepare and present a case for court. The worker should remember that every case of child abuse and/or neglect has the potential of going to court. Complete and proper records can also be an aid in defense in lawsuits against the agency and/or worker." The policy is for "Case recording [to be] maintained on the Report of Contact (ROC) sheets." Nothing in the manual addresses whether the case recording notes are to be original notes or notes transcribed from original notes. Nothing in the manual addresses keeping original notes.

CPS 1.5, Case Recording, provides in pertinent part:

- d. The record should be specific on who, what, when, where, why and how . . .

Examples:

- A. "John is a very frightened boy." Frightened how? About what? In which situation?
- B. "He was abusive to his child." Abusive how, when, to what extent?
- C. "Mrs. N says she can no longer cope." Says to whom? No longer cope with what?
- D. "Debbie and her mother have a communication problem." A Communication problem with whom? Communicating what?

* * *

- G. Subjective words such as "the house was filthy" should be avoided. Use descriptive observations, such as "dirty dishes were piled all over the counter and table, there were several piles of dirty clothing on the floor and there were old scraps of food on the floor throughout the kitchen and living room."

Assistant Professor Kopacz said, "One of the purposes of notes is to be able to substantiate the reasons for intervention." She said it is common for social service agencies to destroy original notes because otherwise, such notes can be subpoenaed in court. However, she said she believes it would be appropriate to say that original notes should be kept until a case is closed. Finally, she said, "In my opinion, it would be a good idea to keep original critical notes in a file, and in a protective setting, if we were not taping an interview, I would keep my original notes, for reasons of accountability, self-protection, and for doing a good job. I might want to look back at my original notes."

When asked why DFYS does not audio record its interviews with children as do the Alaska State Troopers, Mr. Neubauer said, "It has been discussed," within the agency. However, he said that one reason against such recording is "the interview process is intimidating enough."

Ms. Jewett remembers that the tape recorder was located on the desk during Trooper Asberry's interview and that its presence did not seem to distract the child. She said that she does not see how it would be any problem to record social workers' interviews similarly. She said, "I don't see how it would be a problem, and it would be a lot easier than taking notes."

Ms. Kacyon said that there has been "some discussion" about taping initial interviews with children but, "[T]here's been some reluctance to do that because of not having the training to do that within the division. I know that the police have the training to do that." She added that on one occasion, a new Bethel social worker taped an interview. "She wasn't aware that it wasn't done and she just taped an interview and then it was used in the [court] case." Ms. Kacyon said that she's been told that "training" is an issue. "You know, we have different attorneys representing us so every time we get a new attorney there's a different opinion too . . . I've been told that there can be some legal problems with [taping] and I've just been given different explanations."

Appendix 0-3 to the CPS manual concerns interviewing techniques for incest cases when interviewing the victim. Page 8 of that section provides that when the interviewer makes a transition in the interview from general questions to more direct questions, like "Is someone bothering you," or "Is that person in your family," the interview "(should be taped)." [Emphasis added.]

In 1994, the second session of the Eighteenth Alaska Legislature failed to consider House Bill 350 which would have required that all official interviews with children who are alleged to have been abused or neglected be videotaped. The bill's prime sponsor was Representative Jeannette James and was co-sponsored by Representative Gene Therriault, both of North Pole. The bill was introduced at the request of a group of her constituents. Senator Mike Miller of North Pole also introduced a companion bill, Senate Bill 323. According to Representative James' aide, Barbara Cotting, HB 350 "died" in the House Judiciary Committee, the first committee to which it was referred; SB 323 died in the Senate Health, Education & Social Services Committee.

Ms. Cotting told the ombudsman investigator, "I thought this bill would be easy to get through, but the agencies were all up in arms [about it]." She continued, "I'd never seen anything like it, it got incredible resistance, mainly on the grounds of expense and what it would do to children who were already afraid." She said it would be fair to say that it, "Got complete resistance from all state agencies that would have been affected." She said the resistance included comments that taping initial interviews would also be an invasion of the privacy of the children at issue.

DFYS set out the reasons it opposed HB 350 in its bill analysis for the Office of the Governor. The bill analysis said in pertinent part:

This bill would require the Department to videotape all interviews with children. Since the majority of initial interviews do not occur in the office, the Department would have to obtain cameras and hire additional staff in order to comply with the requirement that all interviews be videotaped. In FY93 . . . 9,323 investigations were completed. In many cases, more than one interview is conducted with a child before the investigation is complete. Thus this bill would require that all interviews that comprise these investigations would have to be videotaped.

Interviews with children occur in schools, hospitals, the homes of friends, or the children's homes. They may be conducted in the same setting as

other children or adults who may be upset by the proceedings. The logistics of arranging to take a videocamera along on these interviews, when sometimes they are arranged on short or no notice, would complicate investigations considerably. In addition, tact, sensitivity and considerable skill are required on the part of interviewers in alleged child abuse and neglect investigations. Therefore, it would be unrealistic for the interviewer to simultaneously conduct the interview and tape the proceedings. An aide would need to be available to operate the cameras, as they would need to be able to participate in the process with sensitivity and protection to the child's and the family's confidentiality.

Social Workers and police officers are intimidating to children when investigations are being conducted. Cameras will make the process even more intimidating, and are likely to cause many children to refuse to discuss abuse or neglect which legitimately needs to be investigated. One way to mitigate the threatening nature of the videotaping would be to remodel offices with one-way mirrors and hidden cameras in each office. However, the costs of renovation would also be significant. In addition, to remove a child to an office for an interview would require the Division to assume emergency custody, which is not advisable in many cases, and is another cost to the child welfare and legal systems.

* * *

Other solutions might better address the concerns raised by the sponsor of this bill. Training of police officers and of investigating social workers are important elements . . . Interviews that police agencies conduct with alleged perpetrators are, to our knowledge, routinely audiotaped. . . .

This bill could have some negative unintended consequences. One is that children could be at risk if interviews were delayed due to lack of, or malfunctioning, equipment. It is often essential that children be interviewed as quickly as possible to take appropriate action to protect them.

Another concern is that DFYS would have to maintain a chain of evidence on the taped interview if it were to be used by law enforcement agencies. DFYS does not have the staff, facilities, or expertise to adequately track or store tapes for that purpose. In addition, there is the possibility of equipment failure leading to "gaps in tapes" which could lead to genuine cases of abuse not being prosecuted because the problems in taping could be used by the defense as a reason to drop the case altogether.

Kathy Tibbles, DFYS Social Services Program Officer in Juneau, said that in spite of its opposition to HB 350, the division has no policy against tape recording or video recording initial interviews with children. She said, "It is a recommended practice in sexual abuse allegations, but there is no policy to do so."

She said that agency workers need room to apply discretion about whether to record an interview. An important reason the agency opposed HB 350 is because it would have required videotaping *all* interviews and the discretion of professionals would have been lost. She said that in many reports of harm which lead to interviews with children, the allegation does not involve sexual abuse. However, even reports of neglect are

capable of provoking interviews which might lead to disclosures by the child of sexual abuse.

Other states also have resisted taping interviews at the initial stages. Mr. Winters (with CPS in Washington) said that in Washington, "We have avoided video and audio taping initial interviews with children like the plague." He said there were two main reasons for the agency position. First, having possession of tapes "sets up a whole new requirement for record keeping." He indicated that this record keeping would be administratively burdensome for reasons of cost, space and security. Second, he said that the Washington attorney general's office decided that the existence of such tapes set the stage for defense challenges which "avoid the real issue," which is whether or not there was abuse. He indicated that potential questions by defense attorneys about interviewing technique, and phrasing, or eye contact, "open the agency up to additional elements of challenge."

However, he said that personally he has always been in favor of taping initial interviews. Not only for reasons of agency accountability, but for the protection of children. He said, "Not infrequently, a child recants a first disclosure."

Mr. Winters said that Washington caseworkers are not required to keep original notes of interviews in their files. A caseworker usually will transcribe a narrative of the interview into their computer and may not necessarily take notes during an interview.

"Susan," the Oregon intake screener consulted by the ombudsman investigator, said that Oregon social workers work so closely with law enforcement that a policeperson would have been present at the initial interview. However, these initial interviews are not tape recorded. Susan said that in Oregon, interviews with children are not videotaped until after a court decides there is "reasonable cause" to take a child into protective custody. She continued, "People have to trust we're doing our jobs regarding accountability for first interviews." She said that caseworkers have no motive to make up disclosures of sexual abuse, and that they are "neutral observers."

Susan uses yellow pads on which to record her original notes from interviews. She then transfers the notes as a narrative to agency forms, and shreds her original notes.

Ms. Kopacz said that the controversy surrounding whether to tape record or videotape initial interviews with children calls into play "a balance between wanting to protect the family and providing safety for children."

She said that in a child protection case, "the only way to review a case is to tape it." She said that more and more, professionals are saying that the first interview with a child is critical and should only be done by the very skilled with that particular age group. She said, "It is so easy to suggest and reinforce things with children." She noted that false reports alleging sexual abuse are becoming common in custody battles between separating parents.

Ms. Kopacz said that a video tape is a much better source for review than an audio tape. She said that research indicates that 80 to 95 percent of what people respond to is visual or non-verbal, and that whenever there is a conflict between verbal and non-verbal messages, people will pay more attention to the non-verbal messages. She said that videotaping of interviews would not require skilled personnel. "It is possible to get a wide angle lens which will cover the entire room." She concluded, "but audio taping is better than nothing."

Should the child's preschool teacher have been present during the child's interview with the social workers?

AS 47.17.027 provides in pertinent part:

(a) If the department . . . provides written certification to the child's school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected . . . school officials shall permit the child to be interviewed . . . before . . . receiving permission from, the child's parent . . . A school official *shall be present* during an interview at the school *unless* the child objects or the department or law enforcement agency determines that the presence of the school official will interfere with the investigation. [Emphasis added.]

Mr. X alleged that the social workers never told his child's preschool teacher that she could, or should, be present during the interview. The DFYS case file contains a copy of a form document signed by Ms. Francis which was given to Ms. Miller when the caseworkers arrived at the preschool. The name of the preschool is handwritten in a blank on the form. In addition to other language apparently crafted to comply with the "certification" required by AS 47.17.027, it "certifies" that, "[an] interview is necessary to determine whether abuse or neglect has occurred." One sentence reads, "In the opinion of the Division, the presence of a district representative *will/will not* be detrimental to the interview." [Emphasis added.] That sentence was not modified by Ms. Francis to clarify whether or not the division made a decision about the propriety of a teacher's presence during the child's interview.

Ms. Miller told the ombudsman investigator that when the two social workers came in the preschool the day of the interview, Ms. Francis, "looked and acted uncomfortable." Ms. Miller said that she knew Ms. Francis, and later thought Ms. Francis was uncomfortable either because she, "wasn't sure of the complaint," or simply because she knew Ms. Miller. The social workers told Ms. Miller they, "needed to interview [the child]," but didn't tell Ms. Miller what the complaint was. Ms. Miller said she remembers that the social workers asked her "If the parents had 'put her [the child] down' or called her dumb." Ms. Miller told them that she had not observed behavior like that.

Ms. Miller said she asked the social workers, "if I needed to be with them when they talked to the child." She said one of the workers told her, "No, the interview needs to be private." Ms. Miller said that the social workers did not point out to her that there was a statute which said the teacher should be at the interview unless there was a determination the teacher's presence would interfere with investigation.

Ms. Miller said that the issue of whether a teacher should be present during DFYS interviews has been "grappled with" since the child's interview. Cathleen Connolly, a former preschool board president who is also an attorney with Alaska Legal Services in Bethel, told the ombudsman investigator that she understood that "They waved some paper at Ms. Miller that was an agreement with another school district, and not our preschool."

Ms. Francis' file notes state that she discussed with the child's teacher the fact that the school had no existing protocol about interviewing children. The notes reflect that because the school did not have a protocol, it requested that the caseworkers contact the child's parents before the interview. Both Ms. Francis' notes and Ms. Jewett's notes indicate that Mr. X gave them permission to interview the child when he arrived at the preschool prior to the interview.

A letter from Assistant Attorney General Julie E. Bryant dated March 24, 1993, to Mr. X's attorney said, "[T]he department presented the preschool with the proper certification to interview the child as indicated by AS 47.17.027. However, that statute does not mandate a school official to be present during the interview." It went on, "Before the interview with the child was conducted, both parents were informed and Mr. X gave his permission for the interview to take place. At that point, based on that permission, a school official's presence was not needed to conduct the investigation."

Is the Bethel DFYS office too aggressive in taking emergency custody or conducting sexual abuse investigations?

Mr. X alleged that a secretary to Bethel Judge Dale Curda told him that in the 2 1/2 year period prior to his complaint, the Bethel DFYS office took numerous emergency custodies, but only a few custodies were ordered by the court in the same time period. This indicated to Mr. X that DFYS must be taking too many emergency custody actions. He reasoned that if the emergency custody actions were really necessary, more would go further, to the court ordered stage, and the court would support DFYS's action.

Under CINA statutes at AS 47.10.142 and AS 47.10.010, DFYS may take emergency custody of children, "upon discovering" that a child has been sexually abused or is in imminent and substantial danger of being sexually abused by the child's parent. However, those emergency custodies may never be scrutinized in a court proceeding. Only if the agency decides custody longer than 12 hours is necessary to protect the child, must the agency file a petition with the court alleging that the child is a child in need of aid. The statute provides this must be done within 12 hours after custody is assumed. However, if the child is released from emergency custody within 12 hours the agency must merely file a "report" with the court within 12 hours of release of custody, explaining why the child was taken into emergency custody.

In this child's case, a "report" was filed with the court in the form of an affidavit of Elsie Francis, dated March 8, 1993. The affidavit said the report of harm was determined "invalid" when the child was questioned by the Alaska State Troopers. The affidavit was dated March 8, 1993, about 10 days after the emergency custody was terminated.

Mr. Neubauer had an explanation for why DFYS typically might assume emergency custody but drop it before formally petitioning the court for continued custody. He said that in his opinion, the DFYS policy of "family centered services" promotes a reluctance of social workers not to take long term custody of children when it can be avoided. Instead, social workers attempt to return children to their parents as soon as possible, or to place children with close family relations.

Mr. Neubauer said he suspects that most often, emergency custody actions are taken then dropped without a court hearing when social workers perceive children to be at risk, but parents then voluntarily allow their children to stay with a relative temporarily. This situation would not require a court petition. Mr. Neubauer said this scenario would likely be particularly true in village areas where there are often many relatives in the vicinity. The idea would be that the child would be out of the home only temporarily, for a night or a week or two and then would go home when the situation there had improved. Social workers would regard this as an "open intake" which would be informally monitored and which would not require court participation.

To explore Mr. X's allegation the Bethel DFYS takes too many emergency custodies, the ombudsman investigator looked at DFYS statistics. DFYS offices record their statistics on PROBER, a computerized data base. Those statistics indicate for FY93

that the Bethel district had intakes for 259 families alleging various harms, including sexual abuse, neglect, runaways and mental injury. Of those families, 50 had children taken into emergency custody (approximately 19 percent). Barrow had intakes for 76 families with eight families having children taken into emergency custody (approximately 10 percent). Nome had 111 families with intakes involving their children, and 28 of those families had emergency custody taken (approximately 25 percent). In Kotzebue, 102 families had intakes, 11 families had children taken into emergency custody (approximately 11 percent). Accordingly, the Bethel office has neither the highest nor the lowest percentages of emergency custody actions per intake among the four presumably similarly situated areas.

DFYS statistics indicate that statewide in FY93, there were 2,249 referrals for sexual abuse. These amounted to 15.4 percent of all types of reports of harm. Other types include neglect, physical abuse, mental injury and abandonment. Of the 2,249 referrals for sexual abuse, 1,586, or 70.5 percent were assigned for investigation statewide.

In FY93, Bethel investigated 67 of 157 sexual abuse referrals, or 42.5 percent. Barrow investigated 55 of 96 sexual abuse referrals, or 57.3 percent. Nome investigated 21 of 35 sexual abuse referrals, or 60 percent. Kotzebue investigated 21 of 21 sexual abuse referrals, or 100 percent. These statistics indicate that compared with the three other offices, Bethel DFYS investigated the lowest percentage of its sexual abuse referrals, and far fewer than the 70.5 percent investigated statewide.

Of the investigated sexual abuse referrals in Bethel, five percent were found invalid, 47.5 percent were substantiated, and 47.5 percent were found unconfirmed. In Barrow, 10 percent were found invalid, 75 percent were substantiated, and 15 percent were unconfirmed. In Nome, 5.3 percent were found invalid, 31.6 percent were substantiated and 63.2 percent were unconfirmed. In Kotzebue, 87 percent were found substantiated and 12.5 percent were unconfirmed. Statewide, six percent were found invalid, 35.8 percent were found unsubstantiated, and 57.9 percent were unconfirmed. These statistics indicate that Bethel social workers found second fewest substantiated allegations in the four areas.

ANALYSIS AND PROPOSED FINDINGS

Mr. X believes the social workers embarked on their investigation assuming that he was guilty of abusing his child. He believes this attitude was unfair and was directed personally against him. He stated that it is his understanding that even police need "probable cause" to obtain a search warrant. In contrast, he said, practically no evidence is apparently needed to launch an investigation for child abuse and so interfere in a family's private life.

None of the three social workers involved in this incident knew Mr. X more than casually. Both Ms. Francis and Ms. Kacyon said they were relieved when the interview with Trooper Asberry showed that if Mr. X had touched the child in an improper place, it had been accidental, and in play. Investigation indicated that none of the social workers displayed any animosity toward Mr. X concerning this event. There is no evidence that any social worker treated this report more harshly than others. Under AS 47.17.030, DFYS is required to investigate each report of harm as much as "necessary" to protect the child.

For the most part, the workers in this case followed procedure. After she took the telephone call from the reporter, Ms. Francis properly consulted her intake supervisor,

Ms. Kacyon, who decided the allegations warranted an investigation. She assigned the investigation to Ms. Francis. Because the allegations were based on behavioral indicators and not observed or disclosed sexual abuse, the report was given a priority 3. Although Ms. Tibbles would arguably have assigned the report a priority 2, Mr. Neubauer gave reasonable arguments for why a priority 3 was also appropriate. Accordingly, DFYS had 7 days in which to investigate the allegation. Ms. Francis interviewed the child four days after the report, which is within procedural timelines.

The primary issues from Mr. X's perspective are: 1) did the initial report of harm justify the interview, and 2) did the interview justify the emergency custody? DFYS employees are vested by law with the discretion to make these difficult decisions. In this case the Ombudsman must determine whether an abuse of that discretion has occurred. The Ombudsman's policy and procedures manual states that to make a finding of abuse of discretion the evidence must show that, in the exercise of its judgment, the agency:

- (A) did not proceed according to law;
- (B) based its decision on an erroneous choice of standards or principles;
- (C) based its decision on considerations not supported by evidence;
- (D) based its decision on considerations that are not relevant; or
- (E) made a decision that is clearly contrary to the reasonable inferences or deductions to be made from the evidence.

The Decision to Assign and Interview

While the report of harm was primarily conclusory in nature rather than factual, it did invoke possible "red flags" for child abuse as indicated by the DFYS manual summary chart of behavioral indicators of sexual abuse. The reporter's allegations in this case could arguably be interpreted as touching upon three of five indicators. The reporter indicated the child wore strapless gowns and allegedly said, "Don't I look pretty," in a seductive manner. This could be regarded as either "fantasy" or "sophisticated, unusual sexual behavior or knowledge." Granted, other interpretations are quite possible and may even be more likely, but the inference drawn by DFYS is plausible and supported by agency standards.

Similarly, the fact that the reporter said the child "hates boys to the point of strange" could be an indicator of "poor peer relationships," if accurate. In addition, as Mr. Emerson said, a trained social worker is taught that a parent's pattern of changing caretakers frequently can be a sign of ongoing sexual abuse. Whether the reported five caretakers over five years was accurate or if so, constitutes "frequent" changes, are separate questions.

As a result, the decision to assign the report of harm and conduct the interview was clearly in accordance with law. Nor were the standards or principles applied or the inferences drawn from the evidence clearly erroneous.

However, the most reasonable inferences are only as good as the evidence from which they are drawn. Likewise, correct standards applied to faulty facts will yield problematic results. At the extreme, if a reporter simply alleged that he or she "felt" that sexual abuse was occurring, or simply stated that "the red flags were all there," without offering supporting facts, a conclusion that an abuse investigation was warranted would

not be supported by the evidence. Put another way, the fact that behavioral indicators of sexual abuse have been alleged does not mean that the existence of the indicators was supported by relevant evidence, or that contrary evidence can be ignored. The same can be said for red flags of mental injury.

As a result, analysis must still determine whether DFYS' conclusion that indicators of abuse were present (the "considerations" referenced in Ombudsman standards) was supported by evidence.

Ms. Francis' intake notes memorializing the report of harm do not conform to the case recording policy at CPS 1.5 requiring who, what, when, where, why, and how specifics in the record. For the most part, Ms. Francis' notes describe the reporter's *conclusions* about the child's alleged behavior rather than the behavior itself. These conclusions were filtered through the reporter's imagination and Ms. Francis' mental translation.

The intake notes left unanswered fundamental questions about the basis for the reporter's conclusions. For example:

- what behavior indicated that the child was "seductive?"
- where did the strapless gown come from and what was the context in which it was worn?
- what "sexual things" was the child "interested" in?
- why did the reporter think it suggestive that Mr. X "[had] his daughter w/him when he's not at work?"
- how did the child indicate hatred of boys?
- in what context did Mr. X call his children "stupid?" who else was present?
- who were the alleged five different day care providers?

If Ms. Francis did elicit more specific facts from the reporter, she could not remember them when she spoke with the ombudsman investigator and her case notes were not helpful.

Uninvolved professionals from child protective services in Washington and Oregon, as well as an experienced teacher in the field, regarded Ms. Francis' written report of harm as borderline, vague, and lacking in specific factual observations which would back up the jargon used on the intake notes.

Further, it is disturbing that collateral contacts were not used in the decision making process in this case although collateral contacts *prior* to the initial interview are suggested by the 1984 Child Sexual Abuse Agreement and were named as important steps in light of this particular report of harm by Washington and Oregon caseworkers as well as by an assistant professor of social work.

Two "collateral contacts" in fact occurred and could have been considered in deciding whether to assign the report of harm or go ahead with the interview.

First, Mr. Herringshaw, a DFYS employee, knew the X family on a personal basis and told Ms. Francis that the report should be checked out further because it did not match what he knew about the family dynamics. He said that in his observation, the children were not timid and that Ms. X was not the "browbeaten" person hinted at by the reporter.

However, Ms. Kacyon, the agency decision-maker, was not aware of Mr. Herringshaw's information because Ms. Francis did not mention it to her. The fact that the report was assigned a priority 3 shows that Ms. Kacyon did not regard it as an emergency; Ms. Francis should have given Ms. Kacyon the opportunity to use Mr. Herringshaw's information to provoke further inquiry before she made a decision to investigate.

Even absent that information, given the borderline nature of the information and suggested agency procedure, Ms. Kacyon arguably should have instructed Ms. Francis to recontact the reporter as well as other collateral contacts prior to assigning the report for investigation.

The second collateral contact was with the child's preschool teacher at the time of the interview. However, she was not contacted until the investigators arrived to conduct the interview. Nevertheless, the teacher also contradicted the reporter's observations. She told caseworkers that the parent did not "put down" the children, the child was socially "fine," and that she did not seem to have problems relating to male children. Presumably she would have provided the same information had she been contacted by phone, prior to the decision to investigate. Both collateral contacts lessened the credibility of the intake report. Ms. Francis should have conveyed them to Ms. Kacyon and allowed her to reconsider the investigation decision even at that point.

Although CPS 2.2.3 states that an investigation "requires" one face to face contact with the child, it also states, "any exceptions to the minimum standards require review and approval by the supervisor." This seems to indicate that once a case is assigned for investigation, it is not necessarily an irreversible process. Ms. Kacyon could have reconsidered her decision to investigate and interview the child in light of Mr. Herringshaw's comments about the family and Ms. Miller's comments that the child was socially right on target.

It must be remembered that the first question here is whether the agency inappropriately launched an in-school interview to determine whether abuse had occurred, not whether the agency reached inappropriate conclusions after investigation. Clearly, an investigative agency cannot be required to demonstrate that allegations are true before an investigation is undertaken. Yet even investigative efforts resulting in exoneration can harm those under investigation. As a result, some minimal threshold of factual support for allegations should be required before steps which may cause harm or embarrassment are undertaken.

While the reporter's initial allegations did conclusorily invoke *possible indicators* of child abuse, they contained few specific *facts supporting the existence of those indicators*. Even those few facts were refuted by other observers, including an agency staffer and a current day care teacher. Ms. Kacyon, the decision-maker, was not given the opportunity to consider relevant information in making the decision to interview the child, and should herself have ordered further collateral contacts.

Although it is a close call, the considerations (behavioral indicators) cited by the agency to defend its decision to interview the child were not sufficiently supported by the

evidence. While the agency did not base its decision on irrelevancies, it failed to consider relevant and material information available to it. As a result, the Ombudsman proposed to find the allegation justified, that DFYS abused its discretion when it decided to interview Mr. X's child based upon the report of harm.

The Decision to Take Custody

Mr. X also alleged that the evidence the social workers found upon investigation did not justify taking emergency custody of the child and that his case is a prime example of how the Bethel office is a "loose cannon" in general, investigating too many sexual abuse allegations and taking emergency custody too frequently.

The ombudsman investigator compared DFYS statistical information about reports of child sexual abuse in four similar population areas. Compared to Nome, Kotzebue, and Barrow offices, Bethel DFYS is the most conservative as to the number of sexual abuse referrals investigated. Bethel DFYS is in the middle as to percentages of emergency custody actions taken per number of intakes. Assuming that the other three offices are not out of line, the weight of the evidence is that the Bethel office is not "out of control," in this respect.

While these statistical manipulations do not account for all variables, they do indicate that Bethel is performing comparably to other DFYS districts similarly situated. This indicates that while there is a perception even among some social work professionals that the Bethel DFYS office is not properly screening reports of sexual abuse, DFYS statistics refute the allegation.

However, investigation of Mr. X's allegation raised an additional question: as a broad policy matter, is DFYS being held sufficiently accountable for its actions in making emergency custody decisions? Mr. X's complaint illustrates the issues: does the DFYS file in the child's case contain enough information so that the caseworker's actions are fairly reviewable?

Mr. X believes that because the agency does not routinely tape record its initial interviews with children, the emergency custody decisions based on those interviews are unreasonably shielded from review.

Although the agency might argue that the state interest in protecting children overcomes an interest in accountability at the initial interview level, Mr. X raises a good point. A point which was supported by the difficulty the ombudsman investigator faced in attempting to effectively review the discretionary decision-making in this case.

The child's file did not contain original notes, so nothing but potentially self-serving testimony and after-the-fact transcribed notes from the persons whose discretion was being questioned were available as a review tool. Though Bethel DFYS's interest in protecting the child would certainly overcome her parents' right to noninterference by DFYS, the agency action should not be so shielded from scrutiny.

The Department of Health and Social Services's Bill Analysis for HB 350 gave many reasons DFYS did not support videotaping initial interviews. Among these were many addressing administrative convenience. For example, the agency does not want to worry about tracking chains of custody or storing tapes; it does not want to "train" its workers to use video cameras. The agency doesn't want the expense of video cameras. Other reasons included that children might be intimidated by the camera, and that defense lawyers would have more to question in court cases if tapes exist. On the other hand,

Ms. Tibbles told the ombudsman investigator that DFYS is not necessarily adverse to taping some initial interviews, but simply wants to retain discretion in the matter.

Social workers questioned by the ombudsman investigator, however, either said that audio taping would not be a problem and might be easier than note taking, or said that a videotape would be the best way to review a case. Mr. Winters even said that a taped initial interview might capture a disclosure which might otherwise be recanted, adding that children frequently recant at a second interview. Finally, even DFYS's own policy and procedure manual provides that interviews concerning incest cases "should be taped."

The Ombudsman finds that, as a policy matter, administrative convenience does not justify lack of agency accountability in this sensitive area. From the perspective of effective child protection, the arguments for videotaping, or at least audio taping initial interviews, are as powerful as those against it. Further, agency argument that "training" would be excessively burdensome in either an audio or video scenario is unconvincing in this technological age when even three year olds run recording devices and many families already own camcorders. Similarly, where video and tape recorders might have intimidated children of the 1960's, the same likely cannot be said for children of the 1990's. While video cameras are admittedly expensive, audiotape recorders are not.

In this case, if the child's preschool teacher had been present during the interview, at least some accountability would also have been present. There would have been a non-agency witness to what the child said during the interview.

It appears that there is some confusion in the Bethel office about the statutory requirement to include a school official in most DFYS interviews of children at schools. In this case, Ms. Francis should have required that a school official attend the interview unless there was some reason a school official's presence would have been detrimental. Instead, the social workers actively excluded the teacher.

Assistant Attorney General Julie Bryant argued that in a technically legal sense Ms. Miller's presence was not necessary because Mr. X gave prior permission for the interview. The Ombudsman finds that whether or not the assistant attorney general's interpretation of the statute is correct, the agency's procedures were improper because the teacher was told she could not attend *without any apparent basis for the exclusion*. If Ms. Miller had been present, an important check and balance upon the caseworker's interviewing technique would have been in place. While the investigator did not research the legislative intent for including the mandatory "shall be present" language in AS 47.17.027, the plain language is there and should have been obeyed.

The Ombudsman concludes that Ms. Francis' failure to include Ms. Miller as a witness to the interview was an error. Compounding the error was the fact that the caseworkers did not memorialize the interview with their original notes. That transcribed notes can be unreliable is clear by the facts of this case: e.g. Ms. Jewett's insertion and later redaction of the word "accidentally" in her transcription.

Unfortunately, due to this combination of circumstances, it was impossible in this complaint independently to review the critical issue of whether the workers abused their discretion by taking the child into emergency custody.

Therefore, the Ombudsman proposed to find this portion of Mr. X's allegation indeterminate.

Proposed Overall Finding

Under Ombudsman regulations, when one allegation or portion thereof is found indeterminate and another is found justified, the overall allegation is found partially justified. As a result, the Ombudsman proposed to find partially justified the allegation that:

The Division of Family and Youth Services abused its discretion by deciding to interview complainant's child based on an insubstantial report of harm and by thereafter taking complainant's child into emergency custody.

PROPOSED RECOMMENDATIONS

The Ombudsman proposed to find part of this allegation indeterminate because agency practices made the allegation incapable of adequate investigation. The Ombudsman proposed the following recommendations:

(1) Caseworkers should never dispose of their original file notes, but should retain them as part of the case file at issue.

(2) DFYS should adopt a policy that interviews with children, during which no other persons are present but agency employees and the interviewee(s), should be audio recorded. When possible, such interviews should be videotaped. The agency should consult with the Alaska State Troopers to learn how similar interviews are recorded as a regular practice of that agency.

(3) The division should consult with the Department of Law, in particular the assistant attorney general assigned to it, and then review with all division social workers their obligation under AS 47.17.027 to have a school official present during school interviews.

(4) DFYS policy makers and trainers should work together with Bethel caseworkers to tighten up existing procedures in the Bethel office so that record keeping is accomplished timely and is more fact oriented, affidavits to the court are filed on time, screening decisions are made critically, and persons whom the Bethel social workers contact are made aware of their rights and responsibilities concerning child protection.

AGENCY RESPONSE TO OMBUDSMAN'S PRELIMINARY REPORT

Under AS 24.55.180, "Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person." This is done to give the agency an opportunity to tell the Ombudsman's Office if the report contains errors of any kind and to provide any response it wishes to be included in the final report. The agency responded to this preliminary report by letter dated April 28, 1995.

The Commissioner stated, "After reviewing this investigative report, it is the general opinion of the Department of Health and Social Services that appropriate judgment and discretion were exercised by the DFYS Bethel field office." In other words, the agency did not accept the Ombudsman's finding that the Bethel DFYS office should have conducted further research or made collateral contacts before social workers interviewed the X's child.

However, the Commissioner also wrote, "In general, we conclude that a thorough, detailed and objective investigation was conducted." In other words, the agency did not dispute the facts found in the Ombudsman's investigation.

Regardless of what the Ombudsman and the agency could further argue to justify their opposing points of view regarding whether the social workers abused their discretion in this case, there is no individualized remedy the Ombudsman is prepared to suggest for Mr. X and his family. Each discretionary decision made by DFYS social workers in the future must be made on its own merits. Even if the agency were to agree with the Ombudsman's finding in this case, the interview with this child already has been conducted. The report of harm ultimately was determined invalid. Investigation *did not find* that the social workers *deliberately* abused their discretion.

Therefore, because the agency response offers nothing which changes the Ombudsman's opinion regarding the facts of this particular case, the proposed finding stands: the Ombudsman agrees with Mr. X that the decision to interview his child solely on the basis of the particular report of harm was an error.

Because of the paucity of available objective evidence, the Ombudsman was unable to evaluate the social workers' decision to take emergency custody. As a result, the Ombudsman was forced to find *indeterminate*, the allegation that the agency abused its discretion by taking emergency custody based upon the interview at the preschool.

As a public policy matter an indeterminate finding is unacceptable when it is based on an insufficiency of agency accountability. Accordingly, two of the Ombudsman's proposed recommendations addressed accountability issues for the future.

The first proposed recommendation was that caseworkers should never dispose of their original file notes, but should retain them as part of the case file at issue. The agency response requested that the Ombudsman modify the recommendation to read, "DFYS should train staff in effective investigative note-taking and record entries so that critical information is properly recorded in case files." The agency director wrote, "I believe doing a good job and knowing what information should go into notes makes the work more accountable."

The agency's proposed modification is unacceptable because, in the Ombudsman's opinion, it insufficiently addresses the accountability issue. While, of course, further and continued staff training is a laudable goal, this does not adequately resolve the point of the recommendation which is to assure that social workers' *original* impressions are retained in the file. Accordingly, the Ombudsman retains its proposed recommendation as the final recommendation on this issue.

The second proposed recommendation was that initial DFYS interviews with children be either audio or videotaped. The agency agreed that this important issue must be addressed. However, rather than make a policy change based on the Ombudsman's recommendation, the agency proposed the recommendation be modified to provide for further research on the issue as a "first step" toward reconsideration of its present policy allowing discretionary audio recording of child protection interviews. A generalized promise to "do more research" would not have been convincing. But, the agency has committed to concluding such a study by the time the legislature convenes in January 1996. Because, as the agency states, "no thorough study has been completed to analyze the issue and its effects on child protective services in this state," the Ombudsman will modify the recommendation as requested by the agency.

The Ombudsman's third proposed recommendation asked that all social workers be specifically retrained in their obligations under AS 47.17.027 to have a school official present during school interviews. The agency responded, "[W]e believe that the social workers [in this case] acted appropriately, due to the fact that the father came to the school prior to the interview and had given his permission for the interview to be conducted." Stated otherwise, the agency continued to characterize as a deliberate one, the social workers' decision not to have a teacher present at the child's interview.

The Ombudsman's investigation indicated, however, that if the social workers knew of the statutory requirement to have a school official present unless that presence would interfere with the investigation, they did not express that knowledge to either Julie Miller, the preschool teacher, or Mr. and Ms. X. Those witnesses said they did not know of the requirement and were not informed of it at the scene. In addition, there was no evidence the social workers had any basis for believing a teacher's presence might interfere with the interview. Investigation could not definitively determine whether the social workers knew of the requirement, decided not to mention it, or had forgotten it.

However, the Ombudsman's reading of AS 47.17.027 is that DFYS social workers should interpret the statute to mean exactly what it says: "a school official *shall be present* during an interview at the school unless the child objects or the Department or law enforcement agency determines that the presence of the school official will *interfere* with the investigation." [Emphasis added.] This was not done in the child's interview and the agency did not satisfactorily explain the omission. Therefore, the Ombudsman continues to believe the agency erred in this respect in this case.

The Ombudsman's proposed recommendation on this issue suggested that the requirements of AS 47.17.027 be reviewed with the agency's attorney and with all social workers. The agency responded, "Knowledge and protocol related to statutes and regulations should be clearly covered in our CORE training components." In this case, however, both social workers had completed the CORE training components.

The agency suggested modifying the proposed recommendation by including it within recommendation 4 which addresses further training of social workers. As set out below, DFYS has retrained its Bethel social workers in their responsibilities under AS 47.17.027. Therefore, the Ombudsman agreed to modify the recommendation as requested.

Finally, the Ombudsman's proposed recommendation number 4 was directed specifically at retraining the Bethel DFYS office concerning several other issues which arose during investigation of this complaint. The agency responded that in summer 1993 the Bethel office actually underwent further training as a regular part of agency procedures. The agency said, "At the request of then Director, Deborah Wing, a Training Plan was established for the Bethel Family Services office last summer following a July visit to Bethel by Steve Emerson, Staff Training Center. During this visit Individual Training Needs Assessments (ITNA) were completed for each staff member and a plan was established to meet those training needs, as identified. During the past six (6) months the Bethel field office has received 69 hours of training including CORE training..."

In conclusion, while not admitting any errors on the part of the DFYS Bethel staff concerning this situation, the agency has in fact retrained its Bethel staff in CORE issues (including AS 47.17.027) and the other issues addressed by the Ombudsman's proposed recommendation. Accordingly, the Ombudsman will modify its final recommendation 4 as requested by the agency.

FINAL FINDING

The Ombudsman finds that DFYS social workers in Bethel abused their discretion in this case when deciding to interview the X's child based upon a particularly weak report of harm without considering available collateral information. In addition, the Ombudsman was unable to reach a conclusion independently regarding the allegation that the workers abused their discretion when taking the child into emergency custody because the initial interview was not audio or video recorded and original notes of the interview were not retained by the agency. Therefore, the Ombudsman finds partially justified the overall allegation that:

The Division of Family and Youth Services abused its discretion by deciding to interview complainant's child based on an insubstantial report of harm and by thereafter taking complainant's child into emergency custody.

FINAL RECOMMENDATIONS

In the belief that sound public policy supports accountability of agency action, the Ombudsman makes the following recommendations:

(1) Caseworkers should never dispose of their original file notes, but should retain them as part of the case file at issue.

(2) DFYS should conduct a feasibility study regarding audiotaping/videotaping of initial interviews with alleged victims of child abuse and neglect. The study will include a cost analysis, review of appropriate literature, pros and cons related to CPS investigations, training needs, legal issues and specified situations that would benefit from taping. This study should be completed by the start of the January 1996 Alaska legislative session.

(3) DFYS policy makers and trainers should continue their efforts to improve social workers' skills, competence and casework knowledge through comprehensive, consistent and timely training opportunities for all DFYS staff.

The agency has accepted final recommendations 2 and 3. The agency has refused to accept final recommendation 1. As a result this complaint will be closed as partially justified and partially rectified.

LEGAL SERVICES

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MEMORANDUM

February 11, 1996

SUBJECT: Sectional Summary of SB188 (Work Order No. 9-LS1225\C)

TO: Senator Mike Miller
Attn: Sharon

FROM: Gerald P. Luckhaupt *GPL*
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 47.17.010 by providing legislative intent.

Section 2 of the bill amends AS 47.17.025(a) by providing that the Department of Health and Social Services may not proceed with an investigation of reported child abuse unless each interview with the child is videotaped.

Section 3 of the bill amends AS 47.17.027(a) to require that interviews be videotaped with children who are believed to have been abused or neglected that are conducted by law enforcement officials at the child's school.

Section 4 of the bill amends AS 47.17 by adding a new section that provides that law enforcement and government officials who receive reports of child abuse or neglect may not investigate those reports by interviewing the child unless the interview with the child is videotaped.

GPL:lmb
96-044.lmb

by Scott Trafford Calder

A POSITION-PAPER ON THE PROPOSAL TO MANDATE
THE VIDEO RECORDING OF INTERVIEWS WITH CHILDREN,
IN EVERY CASE OF AN ACCUSATION OF ABUSE HAVING BEEN MADE

Abuse, Neglect, and Sexual Abuse of a Minor is everyone's business. No person is unaffected by the poor treatment of any child in his or her community. Healthful conditions for every child is a cultural priority, the most basic form of compelling government interest, a political yardstick, by which all other public interests may be measured.

The enforcement and promulgation of culturally defined and consistent expectations for the protection, nurture and education of children, is the natural, logical and appropriate function of the parents of children. It is within a family group that the child becomes a citizen, and learns to then become a parent, or elder, within the culture. Society can not function, nor can it exist, without natural, functional, biological families.

For these and other reasons, parents have an affirmative duty to guard, and to guide, their children. Before government and life itself, each child is born from two parents, and has two parents. Just as important as the possibility of abuse, neglect, and sexual abuse of a minor, along with the need to address that, is the possibility of incorrectly creating a destructive intrusion into a child's natural, logical, appropriate support group, based upon a false reason. In the absence of a substantial reason to act, possible threats to the families of children are threats to children. Any investigation based upon a false report, necessarily strips the child of his or her support group, the family, a means to be protected. Approximately four, out of five, investigations of this type are themselves the primary source of danger to many children. Even a legitimate investigation may be more harmful, than helpful.

No reason exists to reject the superior empirical means for documenting the manner, content, and method, of an interview with a child, during the investigation of possible abuse, following a credible report of such harm: a videotaped record of both child and interviewer. One record, not five or eleven; Every linguistic feature and item, not an expert's opinion or feeling; The thing in and of itself, not a substitute, is evidence. Why not real truth?

Opinion

Letters to the I

Abuse allegations nightmare for parents

A person accused of robbery is assumed innocent until he is charged, tried, and found guilty. Then he's sentenced. My husband and I find ourselves in a worse position- guilty until proved innocent — because we're suspected of child abuse.

Our Fairbanks pediatrician, Richard Reems, said to take our sons, 8 months old, to Seattle for an operation on a birth defect in the sinus of one son. The doctor there found a cracked rib, a blood clot and tissue tear in the sinus. He also saw a bruise that even the social worker couldn't see. He said the injuries were "consistent with" child abuse. He didn't say there was child abuse. Dr. Reems was astonished at the allegation.

A social worker in our hometown of Delta says there's absolutely no charge against us. But we must have tests and commute 80 miles to classes and support groups. And a trooper is asking around town about us.

Taping at child abuse interviews

Legislation to require the taping of all official interviews with children allegedly abused or neglected, was discussed this week in the House State Affairs Committee.

HB 348, sponsored by Representative Jeannette James (R-Fairbanks), proposes to begin recording official interviews with abused children upon commencing the interview, to record the entire interview and all subsequent interviews.

"When dealing with emotion-laden situations, adults' perceptions and memories are not necessarily reliable, videotaping of interviews in alleged child abuse cases can establish credibility for the child as well as the interviewer," said Representative Jeannette James.

There have been a number of recent cases in Alaska and the U.S.

Social Services gave our babies to foster parents, even though the great grandmother, Mabel Olmstead, had immediately asked for custody, and she's an ideal person.

To add insult to injury, some people in Delta are copying DFYS by skipping the steps between suspicion and turning us off.

We are innocent. But even if we had abused our twins, shouldn't we be treated as innocent until we are charged, properly tried, and found guilty?

We thank our friends for being steady, and Concerned Parents for Reform in North Pole (488-0334) for their sense of America Justice as we look for an end to this nightmare.

Tammy and Carl Dedmond
Delta, AK
Jan. 18, 1996

No restrooms

Dear Legislator,

There are no Public Restrooms functioning at the Yakutat Airport. I was forced to piss in the parking lot. How long will this policy remain in effect? Are there some legal repercussions? Will you respond soon, please?

Sincerely,
George Ogle

where decisions have been made for disposition of children which leaves the parents vexed and believing they have been wronged," said Rep. James

James noted that children can be influenced to respond in certain ways based on the way the question is asked

"We need to balance this issue in a way that will meet the needs of the people of Alaska. We are working seriously with the involved agencies to find an answer that will work in urban as well as bush areas. Our goal must be to find a way to increase agency accountability while maintaining the integrity of Alaska's families and the safety of Alaska's children," said James

Abuse interviews may be taped

The Associated Press

ANCHORAGE—The state agency in charge of investigating child abuse will consider videotaping its initial interviews with alleged victims following an ombudsman review.

The Department of Family and Youth Services planned to complete its study in time for the next legislative session in January. A bill requiring recorded interviews has been filed for consideration next year.

Bea Hagen, an ombudsman investigator in Fairbanks, said Thursday that the issue arose when a Bethel man complained that his 5-year-old daughter was taken into emergency custody for two hours based on abuse charges that turned out to be false.

Hagen said the ombudsman accepted the case when it turned out that agency policies had been followed and there was no requirement for video or audio recordings of initial interviews with children.

Hagen said there also was no policy requiring case workers to keep original notes made during the children's interviews. Alaska is among states where notes may be reconstructed later and originals may be destroyed.

The department has agreed to study whether interviews should be recorded. It has rejected a recommendation that initial interview notes be retained, Hagen said.

The ombudsman said that failing to record the interviews and permitting original notes to be discarded made it impossible to retrace steps leading up to emergency custody.

"The father was very upset," said Hagen, who said confidentiality rules barred her from identifying the family. "He wanted to know why original notes weren't kept."

Hagen said the 1993 case raised policy issues about how to hold the department more accountable for one-on-one interviews with children.

The ombudsman's office said the department had acted legally in the Bethel case. Telephone messages left with a DFYS supervisor in Fairbanks were not immediately returned Thursday.

Hagen said the case began when DFYS officials received a hot-line report claiming the 5-year-old asked if she was "pretty" and acting in a "seductive" way.

The report also said the child appeared to hate boys and was always with her father when he was not at work.

Hagen said that taken alone, the behavior seemed "fairly benign." But she said she could see how a professional could interpret the girl's actions as symptoms of abuse.

"This vague, social service jargon was used to justify interviewing the child at her preschool," Hagen said. State law permits authorities to approach a child, without a parent's knowledge, if a report of harm appears worth investigating.

But Hagen said the department had erred by failing to check with others before going ahead with an interview. Among sources available was another social worker who knew the family well, Hagen said.

The ombudsman said the child was taken into protective custody and state troopers were called when she made disturbing statements during the initial interview.

Hagen said that after questioning that same day by a trooper, the social workers concluded that the child's bottom had been touched during innocent play. She was released to her parents and remains with them today, Hagen said.

The department has resisted recording initial interviews because it would be expensive, require staff training and may intimidate a child.

Danger lurks in suggestive interviews

In January, 1989, a parent charged Bob Kelly of sexually abusing her son at the Little Rascals Day Care Center in North Carolina. Panic swept the town as the police, parents, and therapists relentlessly questioned the preschoolers. After months of repeated questions, 90 children made charges not only against Bob Kelly but against dozens of people in the town. The charges included rape, sodomy, and fellatio.

Some children said that pins and magic markers were put into their vaginal and anal openings. Others claimed Bob burned a cat with a candle and murdered babies.

Some children said they were taken away on a boat and thrown into a sea of circling sharks.

The jury convicted Bob Kelly and all the other defendants. Bob Kelly was sentenced to serve 12 consecutive life terms. Last May, his conviction was overturned on appeal.

In their new book, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington, D.C.: American Psychological Association, 1995), psychologists Stephen Ceci of Cornell University and Maggie Bruck of McGill University examine what goes wrong in such cases.

Their conclusions are the



Judith
Kleinfeld

more convincing because they refuse to cash in on their expertise. They have declined hundreds of requests to serve as expert witnesses. In the five cases where they did testify, sometimes for the prosecution and sometimes for the defense, they refused any fees. Preschool children are able to provide accurate testimony about sexual abuse, Ceci and Bruck conclude, but they are also suggestible.

Aggressive interviewing about events that never happened can distort their memories to the point where the truth may be buried forever.

Researchers have devised clever experiments to examine how children react to false suggestions about being touched.

One fascinating set of studies examined children's memories of ordinary visits to the doctor. The researchers knew what had happened at the doctor's office—a routine examination. But what would children say if

adults asked them leading questions with a sexual whiff, such as "Did the nurse lick your knee?"

The 7-year-old children stuck to the truth 90 percent of the time. The 3-year-old children were far less reliable, especially when asked about the doctor's visit three months later. The researchers discovered a valuable clue to the truth of children's testimony. When the event never happened, many children at first laughed at the question. This happened in the Little Rascals case. As a mother testified:

Mother: I asked him has Mr. Bob ever touched your peebug...

Attorney: And what were his responses?

Mother: He thought it was funny. He was laughing at me...

If we want accurate testimony, say Ceci and Bruck, we should watch for such clues.

We also need to watch out for the powerful impact of interviewer bias where parents or investigators think they know what has happened and attempt to get the child to confirm it.

In a dramatic experiment, Ceci and his colleagues asked preschool children to play a game a lot like "Simon Says." The children touched their stomachs and other children's noses.

A month later trained social workers interviewed them about the game. Some of the social workers were told the truth. Others were misled. They were told, for example, that the children's knees had been licked.

What the social worker believed to be true had an astonishing impact on what the children ending up saying. When the social worker knew the truth, the preschool children gave accurate reports 95 percent of the time.

When the social worker had wrong information, more than a third of the children confirmed these false beliefs. At first the children appeared hesitant when they agreed that someone had done something like licking their knees. But their confidence increased as the interview went on. When these social workers passed on their notes to other social workers, who interviewed the children again two months later, the children stuck to their errors with even greater confidence.

Ceci and Bruck do not deny the reality of sexual abuse. But they provide convincing evidence that suggestive questioning during investigation can provide confident child witnesses testifying to things that never happened.

Judith Kleinfeld is a professor of psychology at the University of Alaska Fairbanks.

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

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February 5, 1996

Senator Robin Taylor
Alaska State Legislature
State Capitol (MS 3100)
Juneau AK 99801-1182

Dear Senator Taylor,

On behalf of the Alaska Peace Officers Association, I would like to inform you of our position on Senate Bill 188. At a recent meeting of the APOA State Board, we unanimously decided to oppose this legislation. While video taping interviews has merit and should be encouraged, requiring it is not practical in all areas of the state - especially the bush. By requiring the video taping, if the equipment was not available, or if it malfunctioned, this would cause otherwise viable abuse cases to be lost or unnecessarily delayed.

Please contact me at 451-5316, if you have questions about the position the Alaska Peace Officers Association has on this issue.

Sincerely

Michael Corkill
State President

ORIGINALS IN MAIL

Post-It Fax Note	7671	Date	2/5	# of pages	1
To	SEN. R. TAYLOR	From	MIKE CORKILL		
Co./Dept.	AK SENATE	Co.	APOA		
Phone #		Phone #	277-0515		
Fax #	465-3922	Fax #	272-5355		



City and Borough of Sitka

POLICE DEPARTMENT

304 Lake Street, Room 102 • Sitka, Alaska 99835

John H. Newell
Chief of Police

Business 747-3245
Fax 747-1075

February 2, 1996

Senators Taylor and Miller
Nineteenth Legislature
Second Session

RE: SB 188

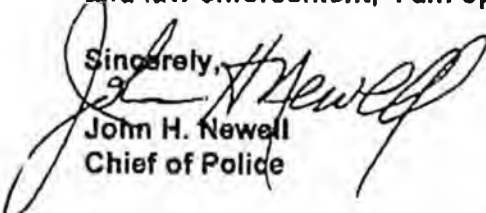
With all respect for Senators Taylor and Miller, who I believe are committed to good law enforcement and healthy family units, I cannot support SB 188 in its current form.

It is not clear to me who will be served by the changes being proposed in SB 188, but I have concern that it will not be the children who are subjected to abuse.

The investigation of child abuse, whether it is by neglect, physical abuse or sexual abuse, is difficult to investigate. It requires training, sensitivity to the individual child, development of trust to allow the child to talk about what has happened, and a lack of distractions. It is my experience that interviews with children regarding suspected abuse are now routinely videotaped. On the other hand, there may be times when the training and judgement of the investigators lead them to a decision not to tape a particular interview. There may be other times when it is just not practical.

As written, SB 188 would prohibit an investigation from proceeding if videotaping equipment was not available. The law would require videotaping even in situations where the trained investigator viewed the taping as an interference and detriment to the investigation.

I admit I don't understand the need or desirability of the changes proposed in SB 188. Without understanding the good that would be accomplished, and seeing what I believe to be detriments to the interest of our children and law enforcement, I am opposed to SB 188.

Sincerely,

John H. Newell
Chief of Police

c. Commissioner of Public Safety

Honorable Drue Pearce

- 2 -

January 25, 1996

(2) **DFYS Accountability regarding Initial Interviews with Children who are Subjects of Child Abuse Reports.** The Legislature has under consideration House Bill 348 that would require videotaping of interviews with children who are subjects of child abuse reports. In an investigation of alleged abuse of discretion by Division of Family & Youth Services staff in interviewing a child and thereafter taking that child into emergency custody, the Ombudsman initially recommended that when children are interviewed with no other persons present but DFYS employees and the interviewee(s), the interviews either should be audio recorded, or, when possible, video recorded. DFYS proposed a modified recommendation that further research into this subject be conducted; the Ombudsman believed that a promise to "do more research" would not be convincing. In a compromise recommendation, DFYS agreed to conduct a study analyzing the effect of audio/video recording on the state's child protective services program by the time the Legislature convened its 1996 session; accordingly, the Ombudsman modified its recommendation. The Ombudsman still believes the audio/videotaping of DFYS staff's initial child interviews has merit. However, the Legislature should obtain and carefully review the DFYS study of this issue -- "Mandatory Videotaping in the Investigation of Child Abuse and Neglect: An Impact Study for the State of Alaska," prepared by the National Child Welfare Resource Center for Organizational Improvement, Edmund S. Muskie Institute of Public Affairs, University of Southern Maine -- as it further considers HB 348. (Ombudsman Complaint A093-6593, Division of Family & Youth Services.)

We reaffirm several 1995 legislative recommendations that we believe still merit your favorable consideration:

(1) **Procurement Practices.** As in 1995, we again urge the Legislature to revisit this subject. Procurement practices, particularly small procurements, continue to be troubling problems the Ombudsman is asked to examine. On the basis of a formal investigation conducted by this office, the Ombudsman recommends that a training and certification program for state employees performing the procurement function be enacted. Also, that legislation should strengthen the position of Chief Procurement Officer. The Ombudsman believes that position should oversee, supervise, monitor, audit, and train staff in the procurement function, not merely provide procurement services or serve as Deputy Director, Division of General Services (DGS) in the Department of Administration. In short, we believe the Chief Procurement Officer position should involve a level of "separateness" from the DGS; that is not currently the case. (Ombudsman Complaint J093-1475, Department of Education.)

(2) **Public Records Act (AS 09.25.120).** The Legislature should review the subject matter of this statute and consider if legislation should be enacted clarifying whether the public will have access to reports of criminal investigations where no prosecution occurs. (Ombudsman Complaint J092-1562, Department of Public Safety; see also, Opinion of the Attorney General, Public Release of Police Records, File 663-93-0339; Opinion No. 1, Nov. 25, 1994.)

(3) **Abatement of Electrical Hazards.** Legislation should be enacted modifying AS 18.60.630 granting inspectors authority to issue orders to abate electrical hazards discovered during an inspection that pose an immediate danger to life or safety. (Ombudsman Complaint A091-2030, Division of Labor Standards & Safety, Department of Labor.)

(4) **Agency Policies and Procedures.** The Legislature should insist, either by enacting a statute or adopting a resolution, that state agencies "unwritten policies" be set out either in statute, regulation or in department policy and procedures manuals so that affected members of the public are informed of the policies and procedures that apply to them when dealing with a state agency. As a veteran state employee recently observed, "An 'unwritten policy' isn't worth the paper it isn't written on." We concur. Perhaps this topic usefully might be examined by the Legislature's Administrative Regulation Review Committee in a legislative oversight hearing. (Ombudsman Complaints: J093-2030, Department of Environmental Conservation; A092-0128, Anchorage Pioneers Home, Division of Senior Services, Department of Administration; A093-4506, Division of Oil & Gas, Department of Natural Resources; A094-0668, Alaska Public Utilities Commission.)

SB

191

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 191(STA)

Revision Date: _____
 Title: "An Act Regulating Campaigns, Campaign Financing And Lobbyists' Campaign Activities..."
 Sponsor: Senator Kelly
 Requestor: (S) Judiciary, Finance

Department Affected: Administration
 BRU: Public Offices Commission
 Component: Public Offices Commission
 COMPONENT SERIAL NO. 70

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	72	146.3	129.9	100.7	103.5	106.7
TRAVEL	0	0	2.5	0	2.5	0
CONTRACTUAL	9.0	10.1	3.2	0	1.2	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	17.7	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	98.7	156.4	129.6	100.7	107.2	106.7

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	98.7	156.4	129.6	100.7	107.2	106.7
1005 GF/Program Receipts	0	0	0	0	0	0
1037 GF/Mental Health	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	98.7	156.4	129.6	100.7	107.2	106.7

Estimate of any current year (FY 96) cost: \$ 0 _____

POSITIONS:

FULL-TIME	3	3	2	2	2	2
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

SEE ATTACHED.

Prepared by: Karen Boorman
 Division: Public Offices Commission

Phone: 276-4176
 Date: _____

Approved by Commissioner: Mark Bover
 Agency: Department of Administration

Date: 5/29/96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 191(STA)

ANALYSIS: (continued)

1. Assumption

This expenditure detail is based upon the assumption that SB 191 will take effect midway through FY 97. The first elections to which the new law would apply are the FY 97 Anchorage municipal election including mayoral in April and municipal elections in the fall.

2. Program Summary

This bill would require extensive education of all candidates and contributors of the new limits on contributions, expenditures and behavior. New manuals and forms would be necessary to provide immediate help. Regulations, civil penalty assessments, advisory opinions and adjudication of complaints would provide long term guidance. The computer tracking system would have to be significantly upgraded to accommodate the increased number of reports as well as the new civil penalty structure.

a. Positions

Positions would not be established until January 1, 1997.

1. An investigator III/associate coordinator would write advisory opinions, handle complex civil penalty assessments and inquiries from the public, train candidates and contributors and investigate complaints.
2. An administrative clerk III would be responsible for processing filed reports, statements and registrations as well as accurate and prompt input of data about contributors' and candidates' registering and reporting. This position would assign work to and supervise an existing administrative clerk II; answer inquiries from the public about APOC's expanded databases; and compose reports of contribution, expenditure and candidate activity.
3. A regulations specialist II would draft regulations interpreting this bill's new provisions for consideration by the commission and the Department of Law. This position would also draft new forms and manuals. This is a two year position and would end six months into FY 99.

b. Other expenditures

Travel costs in FY 99 and FY 01 cover training in Fairbanks, Barrow, Kenai and Ketchikan as well as an additional commission teleconference to approve new manuals and forms. Contractual costs in FY 97 cover printing and mailing new manuals and forms, additional office space for 1 1/2 years, and reprogramming the current computer tracking system in FY 98. Equipment costs in FY 97 cover computer equipment for the new positions as well as an improved backup and storage system. Funds in two election years, FY 99 and FY 01 for newspaper ads in six communities would tell the public of the new limitations.

c. Funding

Undesignated revenue to the general fund from civil penalties is likely to increase, but the amount of any increase is speculative. Any increased revenue would go to the general fund, not APOC.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 191(STA)

Revision Date: _____
 Title: 'An Act Regulating Campaigns, Campaign Financing And Lobbyists' Campaign Activities...
 Sponsor: Senator Kelly
 Requestor: (S) Judiciary, Finance

Department Affected: Administration
 BRU: Public Offices Commission
 Component: Public Offices Commission
 COMPONENT SERIAL NO. 70

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PERSONAL SERVICES	72.	146.3	123.9	100.7	103.5	106.7
TRAVEL	0	0	2.5	0	2.5	0
CONTRACTUAL	9.0	10.1	3.2	0	1.2	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	17.7	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	98.7	156.4	129.6	100.7	107.2	106.7

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	98.7	156.4	129.6	100.7	107.2	106.7
1005 GF/Program Receipts	0	0	0	0	0	0
1037 GF/Mental Health	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	98.7	156.4	129.6	100.7	107.2	106.7

Estimate of any current year (FY 96) cost: \$ 0

POSITIONS:

FULL-TIME	3	3	2	2	2	2
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

SEE ATTACHED.

Prepared by: Karen Boorman
 Division: Public Offices Commission

Phone: 276-4176
 Date: _____

Approved by Commissioner: Mark Boyer
 Agency: Department of Administration

Date: _____

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 191(STA)

ANALYSIS: (continued)

1. Assumption

This expenditure detail is based upon the assumption that SB 191 will take effect midway through FY 97. The first elections to which the new law would apply are the FY 97 Anchorage municipal election including mayoral in April and municipal elections in the fall.

2. Program Summary

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3. A regulations specialist II would draft regulations interpreting this bill's new provisions for consideration by the commission and the Department of Law. This position would also draft new forms and manuals. This is a two year position and would end six months into FY 99.

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c. Funding

Undesignated revenue to the general fund from civil penalties is likely to increase, but the amount of any increase is speculative. Any increased revenue would go to the general fund, not APOC.

FISCAL NOTE

No. 8

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Bill Version: CSSB/91(CSTA)

(S) Publish Date: 4/9/96

Revision Date: _____
Title: "An Act Regulating Campaigns, Campaign Financing And Lobbyists' Campaign Activities..."
Sponsor: Senator Kelly
Requestor: (S) Judiciary, Finance

Department Affected: Administration
BRU: Public Offices Commission
Component: Public Offices Commission

COMPONENT SERIAL NO. 70

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	72	145.3	123.9	100.7	103.5	106.7
TRAVEL	0	0	2.5	0	2.5	0
CONTRACTUAL	9.0	10.1	3.2	0	1.2	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	17.7	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	98.7	156.4	129.6	100.7	107.2	106.7

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE:

(Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	98.7	156.4	129.6	100.7	107.2	106.7
1005 GF/Program Receipts	0	0	0	0	0	0
1037 GF/Mental Health	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	98.7	156.4	129.6	100.7	107.2	106.7

Estimate of any current year (FY 96) cost: \$ 0

POSITIONS:

FULL-TIME	3	3	2	2	2	2
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

SEE ATTACHED

Prepared by: Karen Boorman
Division: Public Offices Commission

Phone: 276-4176
Date: _____

Approved by Commissioner: Mark Boyer
Agency: Department of Administration

Date: 3/29/96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 191(STA)

ANALYSIS: (continued)

1. Assumption

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3. A regulations specialist II would draft regulations interpreting this bill's new provisions for consideration by the commission and the Department of Law. This position would also draft new forms and manuals. This is a two year position and would end six months into FY 99.

b. Other expenditures

Travel costs in FY 99 and FY 01 cover training in Fairbanks, Barrow, Kenai and Ketchikan as well as an additional commission teleconference to approve new manuals and forms. Contractual costs in FY 97 cover printing and mailing new manuals and forms, additional office space for 1 1/2 years, and reprogramming the current computer tracking system in FY 98. Equipment costs in FY 97 cover computer equipment for the new positions as well as an improved backup and storage system. Funds in two election years, FY 99 and FY 01 for newspaper ads in six communities would tell the public of the new limitations.

c. Funding

Undesignated revenue to the general fund from civil penalties is likely to increase, but the amount of any increase is speculative. Any increased revenue would go to the general fund, not APOC.

FISCAL NOTE

No. 7

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Bill Version: CS SB 191 (STA)

(S) Publish Date: 3-25-96

Revision Date:	3/21/96	Dept. Affected:	Department of Law
Title:	*...election campaigns, election campaign financing, the oversight and regulation of election campaigns...	BRU:	Civil Division
Sponsor:	Senator Kelly	Component:	General Legal Services
Requester:	Senate State Affairs Committee	COMPONENT SERIAL NO.:	2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	34.5	23.0	23.0			
TRAVEL	2.6	2.6	2.6			
CONTRACTUAL	9.1	7.7	7.7			
SUPPLIES	1.0	0.6	0.6			
EQUIPMENT	0.3	0.2	0.2			
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	47.5	34.1	34.1	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	47.5	34.1	34.1			
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	47.5	34.1	34.1	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

CSSB 191 (STA) is an extensive revision of Alaska campaign finance law with new reporting requirements for political contributions and expenditures, revised civil penalties and criminal sanctions, and many other changes directly affecting the Alaska Public Offices Commission (APOC).

Section 19 of CSSB 191 (STA) repeals AS 15.13.120(d) and reenacts the statute to allow a person to file a superior court action relating to a violation of AS 15.13 under certain circumstances (under current law, a person may only file a complaint with APOC). The person must still file an administrative complaint with APOC. If APOC does not complete a report of a preliminary investigation within 60 days following the filing of the administrative complaint, the person may file a superior court action. The civil action could seek an injunction or civil penalties. Section 19 requires the person to serve the attorney general and APOC with a copy of the summons and complaint. The impact on the Department of Law is that APOC could intervene as a matter of right in the superior court action, which will mean that APOC would require more attorney resources. Because

Prepared by:	Richard I. Peques, Director	Phone: 465-3672
Division:	Administrative Services Division	Date: 3/21/96
Approved by Commissioner:	<i>Richard I. Peques</i> Bruce M. Botelho, Attorney General	Date: 3/21/96
Agency:	Department of Law	

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSSB 191 (STA)

ANALYSIS CONTINUATION:

the bill deletes the current version of AS 15.13.120(d), APOC would no longer refer violations of AS 15.13 to the attorney general for possible criminal prosecution under that statute.

Section 20 repeals AS 15.13.120(e) and reenacts it to allow a person to file a complaint with APOC relating to a violation of AS 15.13 (similar to the current version of AS 15.13.120(d)). The revision notes that APOC would not have exclusive jurisdiction over such violations. The impact on the Department of Law should not be significant because APOC processes administrative complaints under current law, except that the department's attorney representing APOC would also be required to monitor or intervene in a separate court action relating to the same violation as noted above for Section 19.

Section 24 of CSSB 191 (STA) expands and amends the criminal sanctions in AS 15.56 relating to campaign finance contributions, expenditures and reporting violations, which will not impact the Department of Law.

If it is enacted, CSSB 191 (STA) very likely will prompt litigation concerning the constitutionality or legal validity of restrictions on various contributions and expenditures (for example, SB 191 limits the amount of contributions which certain Alaska politicians are able to receive in the aggregate from non-Alaskans), which will require the department to defend such lawsuits.

Last, because of the bill's extensive revision of Alaska campaign finance law, all of APOC's regulations will have to be rewritten, which will require substantial assistance from the Department of Law. It is our estimate that about 30 percent of additional attorney time will be required in the first year after the bill is in effect (10 percent for regulations and 20 percent for increased representation). This will decrease to 20 percent in the following two years. Although this increase in workload is not sufficient to warrant a new position, the increase does warrant fiscal note costs. This is because the department's civil division budget has been severely reduced and the division faces increasing workloads in non-discretionary work in child protection and labor relations litigation. Consequently, assuming other additional workload is problematic at best. Therefore the addition of fiscal note funds to reduce position vacancy, currently near the maximum permitted, will allow the department to handle the CSSB 191 (STA) workload increase by proportionately increasing attorney staff time. The amounts shown on the fiscal note represent 30 percent of the annual cost of an Attorney IV, including associated support costs, in conformance with the department's cost allocation plan and attorney rate methodology. In addition, \$7,500 is also included for out-of-pocket litigation costs.

FISCAL NOTE

No. 6

STATE OF ALASKA
1996 LEGISLATIVE SESSION

... Bill Version: CS SA 191 (STA)
(S) Publish Date: 3-25-96

Revision Date: _____
Title: "An Act relating to election campaigns, election campaign financing, the oversight and...."
Sponsor: Senator Kelly
Requestor: Senate State Affairs

Department Affected: Legislative Affairs Agency
BRU: All
Component: All

COMPONENT SERIAL NO:

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE FUND SOURCE	0	0	0	0	0	0
---------------------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact.

Prepared By: Karla Schofield, Deputy Director
Division: Administrative Services

Phone: 465-3852
Date: 3/21/96

Approved By: Pamela A. Varni, Executive Director
Agency: Legislative Affairs Agency

Date: 3/21/96

Distribution (by preparer): Leg. Finance, Legislative Sponsor, Requestor, OMB, Gov. & Impacted Agency(ies).

FISCAL NOTE

No. 5
 Bill Version: CS SB 191 (STA)
 (S) Publish Date: 3-20-96

STATE OF ALASKA
 1996 LEGISLATIVE SESSION

Revision Date: 1/23/96 Dept. Affected: Office of the Governor
 Title: An Act relating to election campaigns, election BRU: Elective Operations
campaign financing.... Component: Elections
 Sponsor: Senators Kelly and Phillips
 Requester: Senate State Affairs COMPONENT SERIAL NO. 21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES	0.0					
TRAVEL	0.0					
CONTRACTUAL	0.0					
SUPPLIES	0.0					
EQUIPMENT	0.0					
LAND & STRUCTURES	0.0					
GRANTS, CLAIMS	0.0					
MISCELLANEOUS	0.0					
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

SB 191 does not have a fiscal impact on the Division of Elections.

Prepared by: Dana LaTour *D.LaTour* Phone: 465-5347
 Division: Division of Elections Date: 1/23/96
 Approved by: _____ Date: _____
 Commissioner: Lt. Governor Fran Ulmer *John Lundbeck*
 Agency: Office of the Lt. Governor *11*

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LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

April 8, 1996

SUBJECT: Effect of Initiative 95 CFPO and related pending legislation on election campaign fundraising applicable to the April 1997 Anchorage mayoral campaign. (Work Order No. 9-LS1846)

TO: Senator Tim Kelly
ATTN: Bill Miles
and
Representative Jeannette James

FROM: Jack Chenoweth
Legislative Counsel

Your April 3 memo notes the April, 1997, Anchorage mayoral election and inquires as to the implications for election campaign fundraising for that election under the pending election campaign financing reform initiative, Initiative 95 CFPO, and under each of the two principal measures--CSHB 368(JUD) or CSSB 19(STA)--that are now under consideration by the legislature.^{1/} Of particular interest to you is the probable effect of the Initiative and the two measures on election campaign funds "already raised and those currently being raised" for that municipal mayoral election.^{2/}

^{1/} Unless the voters in a municipality have voted to exempt the municipality, then for municipalities with a population of more than 1000 people, the procedures, standards, and other requirements of AS 15.13 are minimum requirements. Both the Initiative and each of the two bills would require that municipal election campaigns in those municipalities be conducted at least in accordance with the requirements of AS 15.13.

^{2/} In almost all cases, it appears that the Anchorage municipal election will be conducted under revisions to AS 15.13 and other provisions made by the Initiative or by one or the other of two legislative measures.

The effective date of an initiative is determined with reference to article XI, section 6, that is, it becomes effective 90 days after certification of the results of the election at which it was approved. Typically, the results of a general election are
(continued...)

Senator Tim Kelly
Representative Jeannette James
April 8, 1996
Page 2

As a general rule, whether with reference to the Initiative or to either of the principal measures now receiving legislative consideration, statutes are presumed to operate prospectively only, and will not be applied to matters arising before their enactment unless a contrary legislative intent appears, either expressly or by necessary implication. Hood v. State Workmen's Compensation Board, 574 P.2d 811, 813 - 814 (Alaska 1978), Pan Alaska Trucking, Inc. v. Crouch, 773 P.2d 947, 949 (Alaska 1989).^{2/} However, procedural changes in the law that do not affect substantive rights may be applied retroactively. Matanuska Maid, Inc. v. State, 620 P.2d 182, 186 - 187 (Alaska 1980).

Under either the Initiative or one or the other of the two pending measures, more stringent limitations, restrictions, and constraints to be imposed on election campaign financing are clearly substantive. They would come into effect on the effective date of the vehicle--the Initiative or the legislative bill--imposing the limitation or constraint. Until the appropriate effective date of a change in the law, candidates for municipal office are subject to current law. Consequently, candidates now are free to conduct election campaign financing efforts in ways that, on the appropriate effective date, would become illegal.

So, for example, under current law, the maximum contribution that an individual may make to a municipal candidate is \$1000; within limits not here relevant, corporations, partnerships, associations, and organizations are free to make contributions to the candidates; and candidates may obtain contributions from nonresidents of the state. However, after the effective date of the Initiative, for example, the ceiling on individual contributions to a municipal candidate drops to \$500; corporations, partnerships, associations, and organizations, among others, are barred from making election campaign contributions at all; and nonresidents' contributions may not be accepted. Nothing in the Initiative may be said

(...continued)

certified about December 1 following the election. So, Initiative 95 CFPO, if left on the November general election ballot and approved, would have approximately a March 1, 1997, effective date.

Each of the two principal legislative measures now receiving consideration, CSHB 368 (Judiciary) and CSSB 191 (State Affairs), specifically sets out a January 1, 1997, effective date. However, if, under the two bills, the effective date section is not approved by a two-thirds majority, then the measures' provisions would take effect 90 days after becoming law, or approximately late September or early October of this year, that is, before this year's general election.

^{2/} In addition, in a provision that reflects the general rule, AS 01.10.090 relates that statutes enacted are not retrospective unless expressly so declared in the Act.

Senator Tim Kelly
Representative Jeannette James
April 8, 1996
Page 3

to compel someone who is a candidate^{4/} for mayor to refrain from raising amounts in excess of \$500 (but not in excess of the current maximum of \$1000) from individual contributors until the date the law changes and reduces the maximum permissible contribution to a municipal campaign. Nothing compels that candidate from refusing to accept contributions from corporations, partnerships, associations, and organizations, or from nonresidents of the state until the date that the law changes and bars those contributions entirely.

More to the point of your inquiry, nothing compels a candidate, who, having raised these amounts and tapped these sources, to have to make refunds to contributors whose contributions, once legal, have, by operation of the Initiative or one or the other of the legislative measures, subsequently exceeded the reduced maximums or otherwise have become illegal. To so require, it seems to me, would be to be contrary to the reasonable expectations of the candidate and the candidate's contributors.

Your inquiry also implicates the status of election campaign finance contributions and other assets held by a candidate as of the day before the effective date of the Initiative or of an election campaign finance reform measure enacted into law. Neither the Initiative nor either of the two measures in their current form explicitly addresses the handling of amounts raised and held by a candidate before the taking effect of the changes made by the Initiative or measure.

Again, I do not read either the Initiative or the legislation as necessarily implying that the election campaign finance reforms are to be given retrospective effect. Applying the principles of the cases cited, it would be my judgment that, as to money raised by a candidate before a change in the law and being held by the candidate as of the effective date of the change in law, unless to do so would be to give retrospective effect to a substantive change in law that defeated the reasonable expectations of the parties, the changes in law apply to thereafter require that the campaign balance on hand be subsequently handled in accordance with the law as it is amended.

What that means, in my view, is this:

-- if, on the day before the effective date of the change in law, a candidate has money on hand that, on and after the effective date, the candidate could not otherwise properly accept and use as a campaign contribution, the candidate is not compelled to offer refunds; however, on and after that date of the change in law, to the extent that more restrictive, more stringent limitations attach to the expenditure or use of campaign funds on hand, those more

^{4/} I here use the term "candidate" to include not only formally declared candidates but also anyone who, by filing with the Alaska Public Offices Commission under the appropriate regulation, indicates an intention to raise money in order to campaign as a candidate for the mayoral office.

Senator Tim Kelly
Representative Jeannette James
April 8, 1996
Page 4

restrictive, more stringent provisions apply and the amounts on hand become subject to those provisions;

-- if, on or before the day before the effective date of the change in law, a candidate borrowed money pledging campaign contributions as a source of loan repayment, notwithstanding new prohibitions and limitations on use of campaign contributions imposed on and after that date of the change in law, it seems to me that the application of the case decisions may allow the candidate to use excess contributions to meet the debt obligation. See Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090, 1093 (Alaska 1985) (superseded statute under which, while it was in effect, parties to a liquor license transfer provided security for debt payment remained applicable to retransfer of liquor license to avoid giving substantive retrospective effect of the later enactment).

*

Two cautions:

First, to all who expect to campaign in the Anchorage mayoral campaign, keep complete records. Those records should be kept in a way that there is no ambiguity as to when contributions were received, obligations incurred, and expenditures paid or accrued. Since the Municipality's mayoral election campaign period will in all likelihood overlap the change in law, the completeness and accuracy of the records may be critical to a definitive determination as to whether a transaction required to be recorded and reported was consistent with applicable law.

Second, although I am the legislative attorney assigned responsibility for drafting HB 368 and SB 191, I cannot provide you with a definitive opinion on the question. To obtain conclusive guidance concerning the interplay between the Initiative, or either of the bills, and current law that you may fully rely on, candidates considering the Anchorage mayoral race would be well advised to check with the Executive Director of the Alaska Public Offices Commission, Karen Boorman (in consultation with the Department of Law) and, because the question involves election campaign financing in the context of a municipal election, from the Office of the Anchorage Municipal Attorney, Mary Hughes.

*

JBC:glc
96-212.glc

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

ALASKA PUBLIC OFFICES COMMISSION

TONY KNOWLES, GOVERNOR

2221 E. NORTHERN LIGHTS, ROOM 128
ANCHORAGE, ALASKA 99508-4149
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PHONE: (907) 465-4864
FAX: (907) 465-4832

April 3, 1996

The Honorable Robin Taylor
Chair, Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 30
Juneau, Alaska 99801-1182

Re: CSSB 191 (Working Draft "M"), Campaign Finance Reform

Dear Senator Taylor:

Thank you for the opportunity to comment on CSSB 191 (Working Draft "M"). Most of the Commission's concerns have been resolved in the working draft before you. There are two remaining issues; one regarding a reporting exemption for candidates, and the other involving the time period for the Commission to resolve complaints.

The Commission proposes the following amendments to CSSB 191 (Working Draft "M"):

Section 7. Page 4, line 17. AS 15.13.040(b). The Commission supports a reporting exemption threshold at \$1000.00 for state and municipal candidates. The proposed \$2500.00 exemption would eliminate most municipal campaign disclosure.

Section 20. Page 18, line 1. AS 15.13.120(e). The Commission recommends deleting, "or complete action on the complaint within 120 days of the filing" on lines 3-4. As currently worded this section requires a complaint to be rejected if either one of two requirements is not met. A complaint is rejected if the Commission fails to open an investigation of a complaint within 90 days of its filing or if the Commission does not complete action on the complaint within 120 days of its filing.

The 120 days to resolve a complaint is not realistic. There are a number of situations beyond the control of the Commission, such as legislative immunity during the 120 day legislative session, a complaint that must be resolved through an Administrative Procedures Act hearing with its prescribed timetable, the increased workload during elections, and the personal schedules of the parties involved in the complaint. In practical terms, this means that the more complex and involved complaints would most likely be rejected without resolution by the Commission because of the 120 day limit.

Sincerely,

Karen Boorman

Karen Boorman
Executive Director

cc: Commission Members

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR _____

TO: SCS CSHB 341(JUD), Work draft D (Apr. 16, 1996)

1 Page 12, line 28 to Page 13, line 10:

2 Delete all material and insert:

3 “* Sec. 4. AS 22.10.020(d) is amended to read:

4 (d) The superior court has jurisdiction in all matters appealed to it from a
 5 subordinate court, or administrative agency when appeal is provided by law. The
 6 hearings on appeal from a final order or judgment of a subordinate court or
 7 administrative agency, except in an appeal under AS 43.05.242, shall be on the
 8 record unless the superior court, in its discretion, grants a trial de novo, in whole or
 9 in part. The hearings on appeal from a final order or judgment under AS
 10 43.05.242 shall be on the record.”

11 Page 17, line 10:

12 Delete “FORMAL APPEAL”

13 Insert “ADMINISTRATIVE APPEAL”

14 Page 17, line 15 to Page 19, line 8:

15 Delete all material and insert:

16 “Sec. 43.05.242. JUDICIAL APPEAL CHALLENGING VALIDITY OF
 17 TAX. (a) Within 60 days after a decision resulting from the informal conference, a
 18 person aggrieved by the action of the department under AS 43.05.240 on a ground

1 specified in this section may appeal to the superior court. An appeal under this
2 section may be taken from an informal conference decision only upon the ground that
3 a tax statute or tax regulation is

- 4 (1) violative of the United States Constitution;
- 5 (2) violative of the Alaska Constitution; or
- 6 (3) preempted by federal statute, regulation or treaty.

7 (b) An appeal under this section may not be taken if

- 8 (1) there is a dispute of material fact;
- 9 (2) a factual record is necessary to decide the question of law raised;
- 10 (3) development of a factual record will render it unnecessary to reach
11 the question of law raised; or
- 12 (4) the taxpayer challenges the assessment of the tax on a ground other
13 than one listed in (a).

14 (c) No issue may be presented to the superior court unless it first has been
15 presented in writing to the department at or before the informal conference. The
16 department shall prepare a record of that portion of the informal conference relevant
17 to the issue on appeal. The court shall

- 18 (1) resolve a question of law in the exercise of the independent
19 judgment of the superior court judge;
- 20 (2) defer to the Department of Revenue on a question of law for which
21 discretion is legally vested in the Department of Revenue, unless not supported by a
22 reasonable basis.

1 (d) An appeal of the informal conference decision under this section is
2 exclusive, and the taxpayer electing to appeal under this section may not pursue an
3 appeal under AS 43.05.241 or pursue any other action under another statute.

4 (e) When an appeal is taken under this section, the taxpayer shall be given
5 access to the file of the department in the matter for preparation of the appeal.

6 (f) In an appeal under this section, the amount due shall be paid within 30 days ⁶⁰
7 after the date of the service of the informal conference decision. In place of payment
8 of the amount due, the taxpayer may file a bond with the court or otherwise obtain
9 relief from payment in accordance with the Alaska Rules of Appellate Procedure.

10 (g) Venue for an appeal filed under this section shall be set under rules
11 adopted by the supreme court.

12 (h) If it is determined that appeal was improperly filed under this section, or if
13 the court rules against the taxpayer, the appeal shall be transferred to the office of tax
14 appeals for further proceedings under AS 43.05.400 - 43.05.499 without prejudice to
15 any claims or defenses of the taxpayer that were barred from being raised in court by
16 (b)(4) of this section."

17 Page 19, lines 14-21:

18 Delete:

19 "A return made and subscribed by the department in accordance with this
20 section is presumed sufficient for all legal purposes. However, nothing
21 prevents a taxpayer from presenting evidence or other information on informal
22 conference [APPEAL] under AS 43.05.240 or in an appeal under AS

1 43.05.241 or 43.05.242 in order to rebut the presumed sufficiency of a return
2 made and subscribed by the department, nor does the presumption of
3 sufficiency alter the parties' respective burdens of proof once the taxpayer has
4 presented evidence or other material information to rebut that presumption."

5 Insert:

6 "An assessment or [A] return [MADE AND] subscribed by the department in
7 accordance with this section is presumed sufficient for all legal purposes.
8 However, nothing prevents a taxpayer from presenting evidence or other
9 information in [ON] an informal conference [APPEAL] under AS 43.05.240
10 or in an appeal under AS 43.05.241 in order to rebut the presumed
11 sufficiency of a return or assessment [MADE AND] subscribed by the
12 department, nor does the presumption of sufficiency alter the parties'
13 respective burdens of proof once the taxpayer has presented evidence or other
14 material information to rebut that presumption."

15 Page 19, line 28:

16 Insert:

17 "*Sec. 13. AS 43.05.275 is amended by adding new subsections:

18 (c) A taxpayer who has filed a return, paid the full amount due on the
19 return, and made a claim under this section may, without exhausting
20 administrative remedies, file an action in superior court to recover on the
21 claim if the sole ground for appeal is that a tax statute is:

22 (1) violative of the United States Constitution;

- 1 (2) violative of the Alaska Constitution;
- 2 (3) preempted by federal statute, regulation or treaty.
- 3 (d) An action under (c) may not be brought if
- 4 (1) there is a dispute of material fact;
- 5 (2) a factual record is necessary to decide the appeal;
- 6 (3) development of a factual record will render it unnecessary to
- 7 reach a question of constitutional law or federal preemption; or
- 8 (4) the taxpayer challenges the assessment of the tax on a
- 9 ground other than one listed in (c)."

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR _____

TO: CSHB 341(FIN), Work draft D (Apr. 16, 1996)

1 Page 19, lines 10 - 16:

2 Delete all material and insert:

3 "Sec. 17. TRANSITIONAL PROVISIONS. (a) The remedies and procedures provided
 4 by this Act apply to all revenue tax appeals in which a request for formal hearing is filed
 5 with the Department of Revenue on or after the effective date of this Act. The remedies and
 6 procedures existing before the effective date of this Act apply to all revenue tax appeals in
 7 which a request for formal hearing was filed with the Department of Revenue before the
 8 effective date of this Act, unless all of the parties to an appeal agree in writing to the
 9 remedies and procedures established by this Act."

10 Page 22, lines 6-10:

11 Delete all material and renumber remaining section accordingly.

LAW OFFICES
GROSS & BURKE
A PROFESSIONAL CORPORATION
424 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801

AVRUM M. GROSS
SUSAN A. BURKE

19071 586-2777

February 12, 1996

Senator Tim Kelly
Chairman, Legislative Council
Alaska State Legislature
Room 101, State Capitol
Juneau, AK 99801-1182

Re: Campaign Financing Initiative

Dear Senator Kelly:

You have asked us to review the pending Campaign Financing Initiative and advise you as to whether there are significant constitutional problems with any of its provisions. We have done that review and in our opinion there are a number of sections in the Initiative that raise serious constitutional issues. We will review the provisions we have identified, and for each provision we will give you our opinion as to the likelihood of its being held unconstitutional and a brief discussion of the basis for our opinion.

1. \$500 Limit on Individual Contributions to Candidates
(Proposed AS 15.13.070(a), Sec. 5 at page 2).

The Initiative proposes to reduce the maximum amount that individuals may contribute to candidates each year from the existing \$1,000 limit to \$500. We believe that a limit of \$500 would probably withstand a constitutional challenge on First Amendment grounds, although it is a fairly close question.

In Buckley v. Valeo, 424 U.S. 1 (1976), the United States Supreme Court upheld a limit of \$1,000 for contributions to candidates for federal office. The Court prefaced its analysis by recognizing that any limits on campaign contributions restrict a person's right of free political association. 1/ As a result, contribution limits can be justified only by demonstrating that the limits promote an "important" governmental interest and that the limits are "closely drawn to avoid unnecessary abridgment of association freedoms." 2/ In other words, the limits on what a person may spend to further his or her political ideas by contributing to a candidates who shares those ideas may be no lower than reasonably necessary to further legitimate and competent governmental interests.

Although various governmental interests were asserted in Buckley to justify the \$1,000 limit at issue in the case, the Court recognized only one as being sufficiently important to justify infringement of associational rights -- the government's interest in preventing corruption and the appearance of

1/ The Court stated:

Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals.

Buckley v. Valeo, 424 U.S. at 22.

2/ Buckley v. Valeo, 424 U.S. at 25.

corruption that may result from the "real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 3/ Throughout its analysis, the Court emphasized that it was only "large" contributions that tended to suggest corruption or the appearance of corruption -- the perception that "large contributions are given to secure political quid pro quo's from current and potential office holders." 4/ In deciding that the \$1,000 amount was "closely drawn" to achieve the goal of preventing corruption, the Court gave substantial deference to Congress in setting the precise amount. The Court, for instance, viewed the distinction between a limit of \$1,000 and a limit of \$2,000 as simply one of degree, but went on to caution that at some point differences of degree may become "differences in kind."

It was just such "differences in kind" that caused the United States Court of Appeals for the Eighth Circuit to invalidate extremely low campaign contribution limits to candidates adopted by initiative in Missouri. Carver v. Nixon,

3/ Buckley v. Valeo, 424 U.S. at 25. The Court in Buckley specifically rejected the argument that contribution limits of any amount could be justified on the basis of two other interests -- (1) that of equalizing the relative abilities of the rich and the poor to affect the outcome of elections and (2) reducing what the Court described even in 1976 as "the skyrocketing cost of political campaigns."

4/ Buckley v. Valeo, 424 U.S. at 26.

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64 U.S.L.W. 2407 (8th Cir., December 19, 1995). The contribution limits at issue in Carver were set at \$100 and \$200 (depending on the population of the election district) for legislative and local races, and \$300 for statewide candidates. While acknowledging the importance of the state's interest in preventing corruption and the appearance of corruption associated with large contributions, the Court found that the limits were not closely drawn (or in the Court's words "narrowly tailored") to promote that interest. The Court found that the State had not demonstrated any necessity for such low contribution limits, noting that the \$100 to \$300 limits amounted, after adjusting for inflation, to only a very small percentage of the \$1,000 limit approved in Buckley in 1976 as being sufficient to avoid the appearance of corruption. ^{5/} The Court also found it significant that the \$100 to \$300 limits would affect a large number of contributors, since statistics from recent Missouri elections showed that, depending on the particular race, between 19.5 and 35.6 percent of contributors had given more than the limits at issue.

We believe that courts would analyze the Initiative's proposed \$500 limitation on contributions to candidates in the

^{5/} The Court cited to a prior decision, Day v. Holohan, 34 F.3d 1356 (8th Cir. 1994), in which the Court invalidated a \$100 limit on contributions to political committees. The Court in Day observed that a \$100 contribution in 1976 would have a value of \$40.60 in 1994 dollars -- approximately 4 percent of the \$1,000 limit approved in Buckley.