

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

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(E) soliciting insurance quotes on behalf of a consumer from an insurance producer.

(b) For purposes of this section, "necessary to effect, administer, or enforce a transaction" refers to a disclosure of information that is

(1) required to enforce a licensee's rights or the rights of another person engaged in carrying out the financial transaction or providing the product or service;

(2) required to

(A) carry out a transaction or service business of which the transaction is a part and record, service, or maintain the consumer's account in the ordinary course of providing an insurance product or service;

(B) administer or service benefits or claims relating to a transaction or a product or service business of which the transaction is a part;

(C) provide a confirmation, statement, or other record of a transaction or information on the status or value of an insurance product or service to the consumer or the consumer's producer;

(D) accrue or recognize incentives or bonuses associated with the transaction that are provided by a licensee or other party;

(E) underwrite insurance at the consumer's request or for the following purposes in relation to a consumer's insurance:

(i) account administration;

(ii) reporting;

- (iii) investigating or preventing fraud or material misrepresentation;
- (iv) processing premium payments;
- (v) processing insurance claims;
- (vi) administering insurance benefits, including utilization review activities;
- (vii) participating in research projects;
- (ix) as required or specifically allowed by federal or state law; or

(3) made in connection with

(A) the authorization, settlement, billing, processing, clearing, transferring, reconciling, or collection of amounts charged, debited, or otherwise paid by using a debit, credit, or other payment card, check or account number, or other means of payment;

(B) the transfer of receivables, accounts, or interest in the receivables or accounts; or

(C) the audit of debit, credit, or other payment information. (Eff.

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.610. Other exceptions to notice and opt out requirements for disclosure of nonpublic personal financial information.** A licensee is not subject to the requirements for initial notice in 3 AAC 26.610(a)(2), the opt out requirements in 3 AAC 26.625 and 3 AAC

26.645, and the requirements in 3 AAC 26.660 if the licensee discloses nonpublic personal financial information

(1) with the consent or at the direction of the consumer, unless the consumer has revoked the consent or directive;

(2) to protect the confidentiality or security of the licensee's records pertaining to the consumer, service, product, or transaction;

(3) to protect against or to prevent fraud or unauthorized transactions;

(4) for required institutional risk control or for resolving consumer disputes or inquiries;

(5) to a person holding a legal or beneficial interest related to the consumer;

(6) to a person acting in a fiduciary or representative capacity on behalf of the consumer;

(7) to provide information to an insurance rate advisory organization, a guaranty fund or agency, an agency that rates the licensee, a person assessing the licensee's compliance with industry standards, or the licensee's attorney, accountant, or auditor;

(8) to the extent specifically allowed or required under other provisions of law or in accordance with 12 U.S.C. 3401 (Right to Financial Privacy Act of 1978)

(A) to law or regulatory enforcement agencies, including the following:

(i) Federal Reserve Board;

(ii) Office of the Comptroller of the Currency;

(iii) Federal Deposit Insurance Corporation;

- (iv) Office of Thrift Supervision;
- (v) National Credit Union Administration;
- (vi) Securities and Exchange Commission;
- (vii) Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping);
- (viii) state insurance authority;
- (ix) Federal Trade Commission;
- (B) to a self-regulatory organization; or
- (C) for an investigation of a matter related to public safety;
- (9) to a consumer-reporting agency in accordance with 15 U.S.C. 1681 (Federal Fair Credit Reporting Act);
- (10) from a consumer report reported by a consumer-reporting agency under 15 U.S.C. 1681 (Federal Fair Credit Reporting Act) to a nonaffiliated third party;
- (11) in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit, if the disclosure of nonpublic personal financial information concerns only consumers of the business or unit;
- (12) to comply with federal, state, or local laws or other applicable legal requirements;
- (13) to comply with a properly authorized civil, criminal, or regulatory investigation or a subpoena or summons issued by a federal, state or local authority;

(14) to respond to judicial process or a government regulatory authority that has jurisdiction over a licensee for examination, compliance, investigation, or other purpose authorized by law; or

(15) for a purpose related to the replacement of a group benefit plan, group health plan, group welfare plan, or workers' compensation plan. (Eff. \_\_\_/\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.675. Exceptions for surplus line brokers, surplus lines insurers, and employees, agents, or other representatives of a licensee.** (a) A person licensed, registered, or authorized under AS 21 is not subject to the notice and opt out requirements in 3 AAC 26.610 - 3 AAC 26.670, if the person is an employee, agent, or other representative of another licensee and

(1) the licensee for whom the person is acting as an employee, agent, or other representative complies with and provides the notices required in 3 AAC 26.610 - 3 AAC 26.670; and

(2) the person does not disclose nonpublic personal financial information to anyone other than the licensee for whom the person is acting as an employee, agent, or other representative or that licensee's affiliate, except as allowed under 3 AAC 26.660 - 3 AAC 26.670.

(b) A surplus lines broker or surplus lines insurer is not subject to the notice and opt out requirements under 3 AAC 26.610 - 3 AAC 26.670, if

(1) the surplus lines broker or surplus lines insurer does not disclose nonpublic personal information of a consumer to a nonaffiliated third party for any purpose, including joint servicing or marketing under 3 AAC 26.660, except as permitted under 3 AAC 26.665 or 3 AAC 26.670; and

(2) the surplus lines broker or surplus lines insurer delivers a notice to the consumer at the time a customer relationship is established that states in 16-point type the following: "PRIVACY NOTICE: Neither the U.S. broker that handled this insurance nor the insurer that has underwritten this insurance will disclose nonpublic personal information concerning the buyer to a non-affiliated broker or insurer except as permitted by law."

(c) For purposes of this section, "employee, agent, or other representative of another licensee" includes

(1) an insurance producer acting as a broker, an independent adjuster, or other licensee who is employed by another insurance producer, adjuster, or licensee;

(2) an independent adjuster adjusting a claim or benefit on behalf of an insurance company;

(3) an agent as defined in AS 21.90.900;

(4) an insurance producer acting as a broker as described under AS 21.27.560; or

(5) a subagent of a managing general agent. (Eff. \_\_\_\_/\_\_\_\_/\_\_\_\_\_, Register

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Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.680. Disclosure of nonpublic personal health information.** (a) Except as provided in (b) of this section a licensee may not disclose nonpublic personal health information about a consumer unless authorization that complies with 3 AAC 26.685 is obtained from the consumer whose nonpublic personal health information the licensee seeks to disclose.

(b) A licensee may disclose a consumer's nonpublic personal health information without obtaining authorization from the consumer if the disclosure

- (1) is required by federal or state law or regulation or is otherwise allowed by law;
- (2) is in response to a governmental regulatory authority with jurisdiction over a licensee for examination, investigation, compliance, or other purposes authorized by law;
- (3) is compelled by a subpoena, search warrant, or other order issued by a court or administrative agency of competent jurisdiction;
- (4) is for detection, investigation, or reporting of fraud, misrepresentation, or other violation of law;
- (5) is for the performance of the following insurance functions by or on behalf of the licensee:
  - (A) claims administration;
  - (B) claims adjustment or management;
  - (C) underwriting;
  - (D) policy placement or issuance;
  - (E) loss control;
  - (F) rate development;

- (G) guaranty fund functions;
- (H) reinsurance, stop loss insurance, or excess loss insurance;
- (I) risk management;
- (J) case management;
- (K) disease management;
- (L) quality assurance or improvement;
- (M) performance evaluation;
- (N) verification of provider credentials;
- (O) utilization review;
- (P) peer review activities;
- (Q) actuarial, scientific, medical, or public policy research;
- (R) grievance procedures;
- (S) internal administration of compliance, managerial, and information systems;
- (T) policyholder service functions;
- (U) auditing;
- (V) reporting;
- (W) database security;
- (X) administration of consumer disputes and inquiries;
- (Y) external accreditation standards;

(Z) replacement of a group benefit plan or workers compensation policy or program;

(AA) activities in connection with the sale, merger, transfer, or exchange of all or part of a business or operating unit;

(6) is required, the disclosure is a lawful or appropriate method to enforce the licensee's rights or the rights of other licensees engaged in carrying out an insurance transaction or providing an insurance product or service that a consumer or customer requests or authorizes;

(7) is allowed without requiring authorization under 45 C.F.R. Parts 160 and 165 (Standards for Privacy of Individually Identifiable Health Information). (Eff.

\_\_\_\_/\_\_\_\_/\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.685. Authorization to disclose nonpublic personal health information. (a)**  
Authorization to disclose nonpublic personal health information under 3 AAC 26.680 must be in written or electronic form and must contain

(1) the identity of the consumer who is the subject of the nonpublic personal health information;

(2) a description of the types of nonpublic personal health information that may be disclosed;

(3) a description of the person to whom the licensee intends to disclose nonpublic personal health information, the purpose of the disclosure, and how the recipient of the information will use the information;

(4) the signature of the consumer who is the subject of the nonpublic personal health information or an individual who is legally empowered to grant authority for the consumer and the date signed;

(5) the length of time that the authorization is valid; and

(6) a statement to the effect that the consumer may revoke the authorization at any time along with a clear and easy-to-follow description of how the consumer may revoke the authorization.

(b) The duration of an authorization under (a) of this section may be no more than 24 months.

(c) A consumer may revoke an authorization at any time but the revocation may not take effect before the date the licensee receives the revocation.

(d) A licensee shall retain the authorization or a copy of the authorization in the licensee's records of the consumer.

(e) A licensee is not required to deliver an authorization form to a consumer or to include an authorization form in any other notice unless the licensee intends to disclose nonpublic personal health information under 3 AAC 26.680. (Eff. \_\_\_/\_\_\_/\_\_\_\_\_, Register \_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.690. Access to and maintenance of nonpublic personal information. (a)**

Within 30 working days from the date a licensee or insurance support organization receives a written request from a consumer for recorded nonpublic personal information about the consumer that adequately describes the information requested, if the licensee or insurance support organization can locate and retrieve the information, the licensee or insurance support organization shall

(1) provide to the consumer a description of the nature and substance of the requested information in writing or in electronic form, if the consumer agrees to electronic delivery of information;

(2) as directed by the consumer,

(A) send the requested information, including the source of the information, to the consumer by mail or electronically; or

(B) allow the consumer to see and copy the requested information in person;

(3) provide to the consumer

(A) if recorded, a listing of the identities of each person to whom the licensee or insurance support organization has disclosed nonpublic personal information within the two years before the date of the consumer's request; or

(B) if not recorded, a listing of the names of the persons to whom the information is normally disclosed; and

(4) provide to the consumer a summary of the procedure the consumer may use to request correction, amendment, or deletion of recorded nonpublic personal information.

(b) A licensee or insurance support organization may charge a fee sufficient to cover the costs of providing a copy of the nonpublic personal information to the consumer under (a) of this section.

(c) Within 30 working days from the date a licensee or insurance support organization receives a written request from a consumer to correct, amend, or delete any recorded nonpublic personal information about the consumer that is in the possession of the licensee or insurance support organization, the licensee or insurance support organization shall

(1) correct, amend, or delete the portion of the information as requested; or

(2) notify the consumer

(A) that the licensee or insurance support organization refuses to make the requested correction, amendment, or deletion;

(B) why the licensee or insurance support organization refuses to make the correction, amendment, or deletion; and

(C) of the consumer's right to file a statement as provided under (e) of this section.

(d) If a licensee or insurance support organization corrects, amends, or deletes recorded nonpublic personal information under (c) of this section, the licensee or insurance support organization shall provide written or electronic notification that includes the correction, amendment, or deletion to

(1) a person specifically designated by the consumer who may have received the recorded nonpublic personal information within the two years before the date the licensee or insurance support organization made the correction, amendment, or deletion;

(2) except for an insurance support organization that no longer maintains recorded nonpublic personal information about the consumer, an insurance support organization whose primary source of nonpublic personal information is the licensee if the insurance support organization systematically received recorded nonpublic personal information from the licensee within seven years before the date the licensee made the correction, amendment, or deletion; and

(3) an insurance support organization that provided to the licensee the nonpublic personal information that the licensee corrected, amended, or deleted.

(e) If a consumer disagrees with a licensee or insurance support organization's refusal to correct, amend, or delete recorded nonpublic personal information, the consumer may file with the licensee or insurance support organization

(1) a statement listing the information the consumer believes is the correct, relevant, or fair information; and

(2) a statement of the reasons why the consumer disagrees with the licensee's or insurance support organization's refusal to correct, amend, or delete recorded nonpublic personal information.

(f) If a consumer files a statement under (e) of this section, the licensee or insurance support organization shall

(1) file the statement with the disputed nonpublic personal information and ensure that anyone who reviews the disputed nonpublic personal information is aware of and has access to the statement;

(2) when disclosing disputed nonpublic personal information to a person, clearly identify the information in dispute and provide the consumer's statement to the person; and

(3) provide the consumer's statement to the persons and in the manner specified in (d) of this section.

(g) For purposes of this section, "insurance support organization" means a person who regularly engages in the practice of assembling or collecting information about an individual to provide the information to a licensee for purposes of transacting insurance including

(1) providing consumer reports or investigative consumer reports to a licensee;

(2) collecting information from a licensee or another insurance support organization to detect or prevent fraud, material misrepresentation, or material nondisclosure.

(Eff. \_\_\_/\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.695. Relationship to federal privacy laws.** (a) If a licensee complies with all requirements of 45 C.F.R Parts 160 and 165 (Standards for Privacy of Individually Identifiable Health Information) even though the licensee is not required to comply, the licensee is not required to comply with 3 AAC 26.680 and 3 AAC 26.685.

(b) 3 AAC 26.605 - 3 AAC 26.749 may not be construed to modify, limit, or supercede the operation of 15 U.S.C. 1681 - 1681u (Federal Fair Credit Reporting Act) and no inference may be drawn on the basis of the provisions of 3 AAC 26.605 - 3 AAC 26.749 regarding whether information is transaction or experience information under of 15 U.S.C. 1681 - 1681u, Section 603. (Eff. \_\_\_/\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.700. Nondiscrimination.** (a) A licensee may not unfairly discriminate against a consumer because the consumer opts out of disclosure of nonpublic personal financial information under 3 AAC 26.645.

(b) A licensee may not discriminate against a consumer because the consumer has not authorized the disclosure of nonpublic personal health information under 3 AAC 26.680. (Eff. \_\_\_/\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.705. Consumer information security program.** A licensee shall develop and implement a comprehensive written consumer information security program that

(1) includes administrative, technical, and physical safeguards for the protection of consumer information;

(2) is appropriate for the size and complexity of the licensee and the nature and scope of the licensee's activities; and

(3) is designed to

(A) ensure the security and confidentiality of consumer information;

(B) protect against any anticipated threats or hazards to the security or integrity of the consumer information; and

(C) protect against unauthorized access to or use of consumer information that could result in substantial harm or inconvenience to a consumer. (Eff.

\_\_\_\_/\_\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.710. Transition period for compliance.** A licensee must comply with 3 AAC 26.605 - 3 AAC 26.749 no later than 90 days after the effective date of this regulation.

(Eff. \_\_\_\_/\_\_\_\_/\_\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.715. "Consumer" defined.** (a) In 3 AAC 26.605 - 3 AAC 26.749, "consumer" means an individual who seeks to obtain, obtains, or has obtained or is a claimant or beneficiary of an insurance product or service that provides coverage primarily for personal, family, or household purposes, including employee job-related injury and disease, and about whom a licensee has nonpublic personal information.

(b) As defined under (a) of this section, "consumer" includes

(1) a legal representative of an individual defined under of this section;

(2) an individual who provides nonpublic personal information to the licensee in connection with obtaining or seeking to obtain financial, investment, or economic advisory services relating to an insurance product or service, regardless of whether the licensee establishes an ongoing advisory relationship;

(3) an applicant for insurance before the effective date of insurance coverage;

(4) an individual about whom a licensee discloses nonpublic personal financial information to a nonaffiliated third party or nonpublic personal health information other than as allowed under 3 AAC 26.660 - 3 AAC 26.670 and 3 AAC 26.680; and

(5) an individual who is

(A) a beneficiary of a life insurance policy underwritten by the licensee;

(B) a claimant under an insurance policy issued by the licensee;

(C) an insured under an insurance policy issued by the licensee;

(D) an annuitant under an annuity contract issued by the licensee; or

(E) a mortgagor of a mortgage covered under a mortgage insurance

policy.

(c) As defined under (a) of this section, "consumer" does not include

(1) an individual who is a consumer of another financial institution for which the licensee

(A) acts solely as an agent of the financial institution; or

(B) provides only processing or other services to the financial institution;

(2) an individual whose sole relationship with the licensee is that of a beneficiary of a trust for which the licensee is a trustee; or

(3) an individual whose sole relationship with the licensee is due to the individual designating the licensee as a trustee for a trust.

(d) If a licensee provides the notices required under 3 AAC 26.610, 3 AAC 26.615 and 3 AAC 26.630 to a plan sponsor, group or blanket insurance policyholder, group annuity contract holder, or workers compensation policyholder, and the licensee does not disclose nonpublic personal information about an individual described in this subsection to a nonaffiliated third party except as allowed under 3 AAC 26.660 - 3 AAC 26.670, an individual is not a consumer as defined under (a) of this section solely because the individual is

(1) a participant or beneficiary of an employee benefit plan that the licensee administers or sponsors or for which the licensee acts as a trustee, insurer, or fiduciary;

(2) covered under a group or blanket insurance policy or group annuity contract issued by the licensee; or

(3) a claimant under a workers compensation plan. (Eff. \_\_\_\_/\_\_\_\_/\_\_\_\_,

Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

**3 AAC 26.749. Definitions.** In 3 AAC 26.605 - 3 AAC 26.749, unless the context requires otherwise,

- (1) "affiliate" means a company that controls, is controlled by, or is under common control with another company;
- (2) "clear and conspicuous" means reasonably understandable and designed to call attention to the nature and significance of the information;
- (3) "collect" means to obtain information that is organized or can be retrieved by the name of a consumer or by a number, symbol, or other identifier assigned to the consumer;
- (4) "company" means a corporation, limited liability company, business trust, general or limited partnership, association, sole proprietorship, or other similar organization;
- 5) "consumer-reporting agency" has the meaning given in 15 U.S.C. 1681a(f) (Fair Credit Reporting Act);
- (6) "continuing relationship between a consumer and a licensee" means a relationship in which a consumer is a current policy holder of an insurance product issued by or through a licensee or in which the consumer obtains financial, investment, or economic advisory services relating to an insurance product or service from the licensee for a fee; "continuing relationship between a consumer and a licensee" does not include a relationship in which
  - (A) a consumer applies for insurance but does not purchase the insurance;
  - (B) a licensee sells a consumer airline travel insurance in an isolated transaction;
  - (C) an individual is no longer a current policyholder of an insurance product or no longer obtains insurance services with or through the licensee;

(D) a consumer is a beneficiary or claimant under a policy, submits a claim under that policy, and chooses a settlement option that involves an ongoing relationship with a licensee;

(E) a consumer is a beneficiary or claimant under a policy, submits a claim under that policy, and chooses a lump sum settlement option;

(F) a consumer's policy lapses, expires, or otherwise becomes inactive under a licensee's business practices and the licensee has not communicated with the customer about the relationship for a period of 12 consecutive months, other than to provide annual privacy notices, material required by law, communication at the directive of a state or federal authority, or promotional materials;

(G) an individual is an insured or an annuitant under an insurance policy or annuity but is not the policyholder or owner of the insurance policy or annuity.

(H) a consumer whose last known address in a licensee's records is invalid so that mail sent to the address by the licensee is returned by the postal authorities as undeliverable, and the licensee's subsequent attempts to obtain a current valid address for that consumer are unsuccessful;

(I) the latest of the following occurs when a licensee provides real estate settlement services:

(i) an individual completes the execution of all documents related to a real estate closing;

(ii) the licensee has received payment for the real estate settlement services;

(iii) the licensee completes all the licensee's responsibilities with respect to the real estate settlement including filing documents on the public record;

(7) "control" means

(A) the ownership, authority, or power to vote at least 25 percent of the outstanding shares of any class of voting security of a company;

(B) the authority in any manner over the election of a majority of the board of directors, trustees, general partners, or other individuals exercising similar functions of the company; or

(C) the authority or power to influence the management or policies of a company as determined by the director;

(8) "customer" means a consumer who has a customer relationship with a licensee;

(9) "customer information" means nonpublic personal health information or nonpublic personal financial information about a customer that is maintained by or on behalf of a licensee;

(10) "customer information systems" means the electronic or physical methods used to access, collect, store, use, transmit, protect, or dispose of customer information,

(11) "customer relationship" means a continuing relationship between a consumer and a licensee in which the licensee provides at least one insurance product or service to the consumer and occurs when the consumer

(A) becomes a policyholder of an insurer by delivery of an insurance policy to the consumer;

(B) obtains insurance through a licensee; or

(C) agrees to obtain financial, economic, or investment advisory services relating to insurance products or services for a fee from the licensee;

(12) "designed to call attention" means a notice that

(A) contains a heading written in plain language and is conspicuous;

(B) is written using a typeface and a type size that are easy to read;

(C) contains wide margins and line spacing;

(D) is written using boldface or italics for key words;

(E) if distributed with other information, is written using a type size, style, and graphics, such as shading or sidebars that are distinct from the type size, style, and graphics of the other information;

(F) if provided on a web page, is written using text or visual cues to encourage scrolling down the page when necessary to view the entire notice and is designed to ensure that other elements on the web page such as text, graphics, hyperlinks, or sound do not distract attention from the notice, and the licensee

(i) places the notice on a screen that consumers frequently access, such as a page on which transactions are conducted; or

(ii) places a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature, and relevance of the notice;

(13) "financial institution" mean a business that engages in a financial activity or an activity incidental to a financial activity under 12 U.S.C. 1843(k) (Bank Holding Company Act of 1956); "financial institution" does not include

(A) with respect to a financial activity, a person that is subject to the Commodity Futures Trading Commission under 7 U.S.C. 1 et seq. (Commodity Exchange Act);

(B) the federal Agricultural Mortgage Corporation or any person charged and operating under 12 U.S.C. 2001 et seq. (Farm Credit Act of 1971); or

(C) a business chartered by the Congress of the United States specifically to engage in securitization of assets, secondary market sales, sales of servicing rights or similar transactions related to a transaction of a consumer, when the business does not sell or transfer nonpublic personal information to a nonaffiliated third party;

(14) "financial product or service" means a product or service that a financial holding company could offer by engaging in a financial activity or an activity incidental to a financial activity under 12 U.S.C. 1843(k) (Bank Holding Company Act of 1956); "financial

product or service” includes evaluation or brokerage of information that a financial institution collects in connection with a request or an application from a consumer for a financial product or service;

(15) “health care” means

(A) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, services, procedures, tests, or counseling that

(i) relates to the physical, mental, or behavioral condition of an individual; or

(ii) affects the structure or function of the human body or any part of the human body, including the banking of blood, sperm, organ, or any other bodily tissue; or

(B) prescribing, dispensing, or furnishing to an individual drugs, biologicals, medical devices, or health care equipment or supplies;

(16) “health care provider” means a person licensed, accredited, or certified in any state to provide health care services; “health care provider” includes a health care facility regardless whether the facility is licensed, accredited, or certified to provide health care services;

(17) “health information” means oral or recorded information or data, excluding age and gender, created by or derived from a health care provider or consumer that relates to

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) payment for the provision of health care to an individual;

(18) "insurance product or service" means a product or service offered by a licensee, including evaluation, brokerage, or distribution of information that a licensee collects in connection with a request or an application from a consumer for an insurance product or service;

(19) "licensee" means a person licensed or required to be licensed, authorized or required to be authorized, or registered or required to be registered under AS 21, including a surplus lines insurer or surplus lines broker;

(20) "nonaffiliated third party" means

(A) a person that is not

(i) an affiliate of a licensee; or

(ii) employed jointly by a licensee and a company that is not an affiliate of a licensee;

(B) a company that is an affiliate of the company due to the direct or indirect ownership or control of the company by the licensee or its affiliate in conducting merchant banking or investment banking activities described 12 U.S.C. 1843(k)(4)(H) (Bank Holding Company Act) or insurance company investment activities described in 12 U.S.C. 1843(k)(4)(I) (Bank Holding Company Act);

(21) "nonpublic personal information" means nonpublic personal financial information and nonpublic personal health information;

(22) "nonpublic personal financial information" means personally identifiable financial information; a list, description, or other grouping of consumers and publicly available

information pertaining to the consumers that is derived using personally identifiable financial information that is not publicly available; and a list of individual names and street addresses that is derived using personally identifiable financial information that is not publicly available, such as account numbers; "nonpublic personal financial information" does not include

(A) health information;

(B) publicly available information, unless included in a list described in this paragraph;

(C) a list, description, or other grouping of consumers and publicly available information pertaining to the consumers that is derived without using personally identifiable financial information that is not publicly available; or

(D) a list of individual names and addresses that contains only publicly available information that is not derived using personally identifiable information that is not publicly available and that does not indicate that an individual on the list, description, or other grouping is a consumer of a financial institution;

(23) "nonpublic personal health information" means health information

(A) that identifies an individual who is the subject of the information; or

(B) in which a reasonable basis exists to believe that the information could be used to identify an individual;

(24) "opt out" means to direct a licensee not to disclose nonpublic personal financial information about a consumer to a nonaffiliated third party, except as allowed under 3 AAC 26 660 - 3 AAC 26 670;

(25) "personally identifiable financial information" means information a consumer provides to a licensee to obtain an insurance product or service from the licensee, information about a consumer resulting from a transaction between a licensee and a consumer involving an insurance product or service, or information a licensee obtains about a consumer in connection with providing an insurance product or service to the consumer; "personally identifiable financial information"

(A) includes

- (i) information a consumer provides to a licensee on an application to obtain an insurance product or service;
- (ii) account balance information and payment history of a consumer;
- (iii) the fact that an individual is or has been a customer of a licensee or has obtained an insurance product or service from the licensee;
- (iv) information about a licensee's consumer if the information is disclosed in a manner that indicates that the individual is or has been the licensee's consumer;
- (v) information that a consumer provides to a licensee or that the licensee or the licensee's agent obtains in connection with collecting a loan or servicing a loan;
- (vi) information a licensee collects from an information collecting device through an internet web server; or

(vii) information from a consumer report;

(B) does not include

(i) health information;

(ii) a list of names and addresses of customers of an entity that is not a financial institution; or

(iii) information that does not in any way identify a consumer;

(26) "publicly available information" means information that a licensee has a reasonable basis to believe is lawfully made available to the general public from

(A) federal, state, or local government records, including information from government real estate and security interest filings;

(B) widely distributed media, including information from a telephone book, a television or radio program, or a newspaper that is available to the general public on an unrestricted basis or from a web site that is available to the general public regardless of whether a fee or password is required to access the web site; or

(C) disclosures to the general public that are required to be made by federal, state, or local law;

(27) "reasonable basis" means a licensee takes action to determine

(A) that the information is of a type that is available to the general public;

and

(B) if an individual can direct information to not be made available to the general public and the individual has not directed that the information not be made available to the general public;

(28) "reasonably understandable" means a notice in which

(A) information is presented using clear and concise sentences, paragraphs, and sections;

(B) short explanatory sentences or bullet lists are used whenever possible;

(C) definite, concrete, everyday words and active voice are used when possible;

(D) multiple negatives are avoided;

(E) legal and highly technical business terminology is avoided when possible; and

(F) imprecise and ambiguous explanations are avoided;

(29) "service provider" means a person that maintains, processes, or otherwise is allowed access to customer information due to the service the person furnishes directly to a licensee. (Eff.

\_\_\_\_/\_\_\_\_/\_\_\_\_, Register \_\_\_\_\_)

Authority: AS 21.06.090 AS 21.36.162

# Alaska State Legislature

Out of Session:  
PO Box 531  
Golovin, Alaska 99762  
(907) 443-5599

In Session:  
State Capitol, Suite 510  
Juneau, Alaska 99801-1182  
(800) 597-3707  
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(907) 465-4821 Fax

## SENATOR DONALD C. OLSON

### DISTRICT T

Alakanuk  
Ambler  
Anaktuvuk Pass  
Atkasuk  
Barrow  
Brevig Mission  
Browerville  
Buckland  
Chevak  
Deering  
Diomede  
Eliot  
Golovin  
Gambell  
Golovin  
Hooper Bay  
Kaktovik  
Kiana  
Kivalina  
Kobuk  
Kotlik  
Kotzebue  
Koyuk  
Mountain Village  
Noatak  
Nome  
Noorvik  
Nuiqsut  
Nunam Iqua  
Pilot Station  
Pitka's Point  
Point Hope  
Point Lay  
Savoonga  
Scammon Bay  
Selawik  
Shaktoolik  
Shishmaref  
Shungnak  
St. Michael  
Stebbins  
Teller  
Unalakleet  
Wainwright  
Wales  
White Mountain

### IN THE SENATE JUDICIARY COMMITTEE

### RECOMMENDED CHANGES BETWEEN CS SB 217 ( ) "I" VERSION AND CS SB 217 (HES) "H" VERSION

1. Section 1 of the "H" version on legislative findings is deleted. A separate letter of intent is offered as a replacement.
2. Sec. 18.13.010 (b)(5) on page 3, lines 4 through 8 of the "H" version is deleted. Dr. Bert Boyer, a genetic research scientist at UAF, recommends that scientists and educators that collect, analyze, and use genetic material be held to the informed consent requirements and penalties of the bill.
3. The definition of "DNA analysis" on page 4, lines 4 through 7 of the "H" version is changed in the "I" version on page 3, lines 2 through 8 to accommodate some uncertainties posed by an insurance company.

IN THE SENATE JUDICIARY COMMITTEE

SB 217, Genetic Privacy

LETTER OF INTENT

The legislature finds that with the preeminent discovery of the deoxyribonucleic acid (DNA) molecular structure, medical and biochemical sciences are making rapid advances in decoding the genetic information contained that uniquely makes up the character and development of each individual being. Analysis of a DNA sample can disclose private information of a fundamental nature not only of the individual but also their blood relatives. More and more, advances in genetic information technology are revealing of one's medical future.

The legislature recognizes that knowledge of one's genetic information can be of great benefit to the individual's health and welfare. In addition, advances in genetic information technology have engendered many useful and practical applications for society in general, particularly in law enforcement, paternity identification, and natal medicine. The legislature also understands, however, that the improper collection, retention, or disclosure of genetic information can significantly harm an individual and lead to stigmatization and discrimination.

The purpose of SB 217 is to address this latter consideration. It is the intent of the legislature that an individual's genetic privacy be protected against unwanted, unwarranted, and unauthorized invasions.

23-LS1074I  
Luckhaupt  
2/23/04

**CS FOR SENATE BILL NO. 217( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

BY

Offered:  
Referred:

Sponsor(s): SENATOR OLSON

**A BILL**  
**FOR AN ACT ENTITLED**

1 "An Act relating to genetic privacy."

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

3 \* Section 1. AS 18 is amended by adding a new chapter to read:

4 **Chapter 13. Genetic Privacy.**

5 **Sec. 18.13.010. Genetic testing.** (a) Except as provided in (b) of this section,

6 (1) a person may not collect a DNA sample from a person, perform a  
7 DNA analysis on a sample, retain a DNA sample or the results of a DNA analysis, or  
8 disclose the results of a DNA analysis unless the person has first obtained the  
9 informed and written consent of the person, or the person's legal guardian or  
10 authorized representative, for the collection, analysis, retention, or disclosure;

11 (2) a DNA sample and the results of a DNA analysis performed on the  
12 sample are the exclusive property of the person sampled or analyzed.

13 (b) The prohibitions of (a) of this section do not apply to DNA samples  
14 collected and analysis conducted

15 (1) under AS 44.41.035 or comparable provisions of another

1 jurisdiction;

2 (2) for a law enforcement purpose, including the identification of  
3 perpetrators and the investigation of crimes and the identification of missing or  
4 unidentified persons or deceased individuals;

5 (3) for determining paternity;

6 (4) to screen newborns as required by state or federal law;

7 (5) for the purpose of emergency medical treatment.

8 (c) A general authorization for the release of medical records or medical  
9 information may not be construed as the informed and written consent required by this  
10 section. The Department of Health and Social Services may by regulation adopt a  
11 uniform informed and written consent form to assist persons in meeting the  
12 requirements of this section. A person using that uniform informed and written  
13 consent is exempt from civil or criminal liability for actions taken under the consent  
14 form. A person may revoke or amend their informed and written consent at any time.

15 **Sec. 18.13.020. Private right of action.** A person may bring a civil action  
16 against a person who collects a DNA sample from the person, performs a DNA  
17 analysis on a sample, retains a DNA sample or the results of a DNA analysis or  
18 discloses the results of a DNA analysis, in violation of this chapter. In addition to the  
19 actual damages suffered by the person, a person violating this chapter shall be liable to  
20 the person for damages in the amount of \$5,000 or, if the violation resulted in profit or  
21 monetary gain to the violator, \$100,000.

22 **Sec. 18.13.030. Criminal penalty.** (a) A person commits the crime of  
23 unlawful DNA collection, analysis, retention, or disclosure if the person knowingly  
24 collects a DNA sample from a person, performs a DNA analysis on a sample, retains a  
25 DNA sample or the results of a DNA analysis, or discloses the results of a DNA  
26 analysis in violation of this chapter.

27 (b) In this section, "knowingly" has the meaning given in AS 11.81.900.

28 (c) Unlawful DNA collection, analysis, retention, or disclosure is a class A  
29 misdemeanor.

30 **Sec. 18.13.100. Definitions.** In this chapter,

31 (1) "DNA" means deoxyribonucleic acid, including mitochondrial

1 DNA, complementary DNA and DNA derived from ribonucleic acid;

2 (2) "DNA analysis" means DNA or genetic typing and testing to  
3 determine the presence or absence of genetic characteristics in an individual, including  
4 tests of nucleic acids or chromosomes in order to diagnose or identify a genetic  
5 characteristic; "DNA analysis" does not include a routine physical measurement, a test  
6 for drugs, alcohol, cholesterol, or the human immunodeficiency virus, a chemical,  
7 blood, or urine analysis, or any other diagnostic test that is widely accepted and in use  
8 in clinical practice;

9 (3) "genetic characteristic" includes a gene, chromosome, or alteration  
10 of a gene or chromosome that may be tested to determine the existence or risk of a  
11 disease, disorder, trait, propensity, or syndrome, or to identify an individual or a blood  
12 relative; "genetic characteristic" does not include family history or a genetically  
13 transmitted characteristic whose existence or identity is determined other than through  
14 a genetic test.

15 \* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to  
16 read:

17 **APPLICABILITY.** AS 18.13, enacted by sec. 1 of this Act, applies to any collection,  
18 analysis, retention, or disclosure occurring after the effective date of this Act.

IN THE SENATE JUDICIARY COMMITTEE

SB 217, Genetic Privacy

LEGISLATIVE INTENT

The legislature finds that with the preeminent discovery of the deoxyribonucleic acid (DNA) molecular structure, medical and biochemical sciences are making rapid advances in decoding the genetic information contained that uniquely makes up the character and development of each individual being. Analysis of a DNA sample can disclose private information of a fundamental nature not only of the individual but also their blood relatives. More and more, advances in genetic information technology are revealing of one's medical future.

The legislature recognizes that knowledge of one's genetic information can be of great benefit to the individual's health and welfare. In addition, advances in genetic information technology have engendered many useful and practical applications for society in general, particularly in law enforcement, paternity identification, and natal medicine. The legislature also understands, however, that the improper collection, retention, or disclosure of genetic information can significantly harm an individual and lead to stigmatization and discrimination.

The purpose of SB 217 is the latter consideration. It is to protect an individual's genetic privacy against the unwanted, unwarranted, and unauthorized invasion.

# Alaska Civil Liberties Union

*An Affiliate of the American Civil Liberties Union*

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: [akclu@alaska.net](mailto:akclu@alaska.net)

To: Senator Donny Olson  
CC: Senate Judiciary Committee  
From: Jennifer Rudinger, Executive Director  
Date: February 24, 2004

Re: **Proposed amendments to strengthen SB 217 ("Genetic Privacy")**

Dear Senator Olson:

I have reviewed the work draft for a proposed Judiciary CS for SB 217 that Dave Gray faxed me today, and while we appreciate the removal of the medical/scientific research exemption that was in 18.13.010(b)(5) of the HESS version, we remain concerned about the following issues:

1. In order to truly protect people's genetic privacy, SB 217 must employ a comprehensive definition of "genetic characteristic" in 18.13.100(3). The AkCLU recommends that the appropriate definition of genetic information should be broader than DNA or genetic testing, covering:

"Any information about genes, gene products, or inherited characteristics that may derive from the individual or a family member. This includes, but is not limited to, information regarding carrier status, information regarding an increased likelihood of future disease or increased sensitivity to any substance, information derived from laboratory tests that identify mutations in specific genes or chromosomes, physical medical examinations, family histories, requests for genetic services or counseling, tests of gene products, and direct analysis of genes or chromosomes."

2. We respectfully submit that the definition of "DNA analysis" in 18.13.100(2) is too narrow as amended. We are wary of the removal of tests for specific proteins from the HES version of this definition, and we object to the exemptions in the second half of this definition because these exemptions are not necessary and may make the bill so vague as to be unworkable. For example, does this exemption mean that informed consent for genetic testing or retention of genetic information is not necessary if the genetic information was discovered in course of one of the listed exempt procedures? Given that these procedures are increasingly common, these exemptions will gut the bill.

3. Given the substantial costs involved in providing medical care and other benefits to those who contract genetic diseases, if employers or insurers are permitted to collect genetic information about employees, policyholders and applicants, some of them will use it, even if this is not legal. Even where discrimination does not occur, the employee or insured party has still suffered a loss of privacy. For this reason we continue to suggest the following language:

“ (a) No employer or insurer may directly or indirectly collect or have access to any genetic information concerning an employee, policy holder or applicant, or member of their family. An exception exists for an employer who can demonstrate that the information is job related and consistent with business necessity.

(b) No employer or insurer shall discriminate against any employee, policyholder or applicant, or any member of that individual's family because of any genetic information about that individual or a member of their family. An exception exists for an employer who can demonstrate that the information is job related and consistent with business necessity.”

4. There may be circumstances where a person's genetics put them at elevated risk in certain jobs, but do not affect their ability to do the job, or endanger other employees. In these circumstances, the final decision whether to accept such a job ought to be up to the individual. Often employers have been allowed to override an employee's judgment in such situations. To correct this, the job related/business necessity standard referenced above should be defined as follows:

“Job related and consistent with business necessity means the condition in question renders the individual unable to perform the essential functions of the position that such individual holds or desires. This includes situations in which the individual poses a direct threat to the health or safety of others in the workplace, but not situations in which only the individual is at risk.”

4. In addition, we would like the bill to define or outline minimum standards for “informed and written consent.” For example, can a company get informed consent from an individual to use their genetic information for “general research purposes” or should they have to spell out precisely how and for what purposes the information will be used? Would consent for general research purposes allow a company to transfer that consent to another company or research project? Individuals who allow or request their genetic information to be collected,

retained, or disclosed should be informed of:

- The specific purpose and use of the information;
- Who will have access to the information;
- Where a genetic test is involved, the meaning and reliability of the test.
- How long the consent lasts;
- How confidentiality will be maintained;
- Their rights to and the procedures for removal of their information from the research, where applicable;
- How they can be assured that their information will not be sold to or shared with other parties.

6. Further, the ACLU has concluded that there is a constitutional privacy right in genetic material that is so important that it cannot also be called a "property right." Genetic material is not akin to property that can be bought or sold. These ethical questions have posed themselves repeatedly in various contexts, such as whether people should be able to buy and sell human organs, fetuses, babies, etc., and the conventional wisdom thus far is that human material should generally not be devalued to the point of being a market commodity. It is true that people can sell their blood, eggs and sperm, but the ACLU cautions legislators not to travel any further down this slippery slope. If human genes are "property," then poor people could be pressured into selling their organs, their genetic material, and other parts of themselves that would be akin to selling their humanity. Moreover, a person's genetic code contains information that applies to more than one individual - it describes his/her parents, children and other family members. We therefore urge that 18.13.010(a)(2) of the proposed Judiciary CS for SB 217 delete the reference to individuals' property interest in their DNA.
7. With regard to liability, we strongly urge that the private right of action should not only allow a "person" who violates this chapter, but also against a government agency that violates this law. AS 01.10.060 (8) defines "person" as "a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." It is imperative that people also be protected from abuses of genetic privacy that are perpetrated by the government.
8. In addition, we maintain that damages for violations probably should not be capped. It's too hard to predict the types of consequences misuses of genetic information could have.
9. With regard to the exemption for law enforcement in 18.13.010(b)(2), this needs to be tightened up to ensure that the law enforcement purpose claimed as the rationale for collecting genetic information is actually limited to what is authorized under Alaska state law.

CS SB 217 comments  
Page 4 of 4

Thank you very much for the opportunity to submit written comments on this important legislation. Please feel free to contact me at (907) 258-0044 if I may be of further assistance.

Sincerely,

Jennifer Rudinger  
Executive Director

SB


219



## SENATOR FRED DYSON

### MEMORANDUM

To: Senator Ralph Seekins, Chair  
Senate Judiciary Committee

From: Senator Fred Dyson 

Date: April 7, 2004

RE: Request for Hearing—SB 219

---

Please consider hearing SB 219—*An Act relating to offenses against unborn children*—in the Senate Judiciary Committee. A Federal Unborn Victims of Violence Act was previously passed by the U.S. House of Representatives and signed by President Bush. In addition to this federal protection, there are areas where we, on the state level, can provide additional safeguards. If you have questions, I would be glad to discuss this bill with you, as would my staff. Thank you for your consideration.



## SENATOR FRED DYSON

### SPONSOR STATEMENT

#### SB 219—*"An Act relating to offenses against unborn children."*

Twenty-nine states have enacted laws that recognize unborn children as victims of violent crimes covered by *state* laws. Recently, the U.S. Congress passed the Unborn Victims of Violence Act, and President Bush subsequently signed the bill into law. This federal law recognizes that when a person attacks a pregnant woman, and injures or kills her unborn child, the attacker has harmed two victims. The bill establishes that if an unborn child is injured or killed during the commission of a federal crime of violence, then the assailant may be charged with a second offense on behalf of the second victim, the unborn child. The exact charge would depend on which federal law is involved, the degree of harm done to the child, and other factors. Recently, this issue has saturated the media in the highly publicized case involving Scott, Laci, and Conner Peterson.

Thus far, it has been consistently established that unborn victims laws do *not* conflict with the U.S. Supreme Court's pro-abortion decrees (*Roe v. Wade*, etc.). Many legal challenges have been brought against state unborn victims laws, based on *Roe* and other constitutional arguments, but state and federal courts have rejected all such challenges.

Pregnant women who have been harmed by violence, and their families, know that there are two victims -- the mother and the unborn child -- and both victims should be protected by law. SB 219 recognizes this value of life and establishes, in law, defense for the unborn victims of violent crime.

SB 219 establishes the following crimes against an unborn child: murder, manslaughter, criminally negligent homicide, and assault. Explicit exceptions from these crimes are made for legal abortion and for customary medical treatment. This bill also defines "unborn child" within the criminal statutes.

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 219  
 (S) Publish Date: 4/7/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act relating to offenses against unborn children." RDU CRIMINAL  
 Component CDCO  
 Sponsor Senator Dyson  
 Requester Senate State Affairs Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill amends AS 11.41 by creating new felonies involving murder, manslaughter, negligent homicide or assault of an unborn child.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughettee, Director Phone 465-3673  
 Division Administrative Services Date/Time 4/5/04 9:53 AM  
 Approved by: Kathryn Daughettee for Gregg D. Renkes, Attorney General Date 4/5/2004  
 Agency Department of Law

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: SB 219  
 (S) Publish Date: 4/7/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to offenses against unborn BRU Legal and Advocacy Services  
 Component Public Defender Agency  
 Sponsor Senator Dyson  
 Requester Senate State Affairs Component No. 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	*	*	*	*	*	*

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	*	*	*	*	*	*

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 This bill will likely have a fiscal impact on the operations of the Agency, but it is impossible to determine with any accuracy what that impact will be. Creating numerous felony offenses for death or harm done to an unborn child, mostly at the felony level, will increase the caseload and workload of the Agency. Making it a felony to knowingly cause serious physical injury to an unborn child that is subsequently born alive would certainly have a fiscal impact if it includes children born after inadequate prenatal care. It is impossible however to predict with any accuracy how many new cases this legislation would generate if enacted, therefore an indeterminate fiscal note is submitted.

Prepared by: Linda K. Wilson, Deputy Director Phone (907)-334-4416  
 Division Public Defender Agency Date/Time 4/5/04 12:00 AM  
 Approved by: Kevin Jardell, Assistant Commissioner Date 4/5/2004  
 Agency Administration

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: 3  
Bill Version: SB 219  
(S) Publish Date: 4/7/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
Title Offenses Against Unborn Children BRU Alaska Court System  
Component Trial Courts  
Sponsor Senator Dyson  
Requester \_\_\_\_\_ Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Senate Bill 219 creates new criminal offenses for certain acts that result in harm to unborn children. Although these new offenses will likely result in an increase in the number of cases brought before the court system, that increase is not anticipated to be significant enough to warrant a fiscal note.

Prepared by: Doug Wooliver Administrative Attorney Phone 463-4750  
Division Alaska Court System Date/Time 4/6/04 10:05 AM  
Approved by: Stephanie Cole Administrative Director by Doug Wooliver Date 4/6/2004  
Agency Alaska Court System

# The Washington Times

www.washingtontimes.com

## Bush signs fetus-protection bill

By Joseph Curl

THE WASHINGTON TIMES

Published April 2, 2004

President Bush yesterday signed legislation that criminalizes harming a fetus while assaulting a pregnant woman during a federal crime, the first national law granting an unborn child a status separate from the mother.

In a high-profile ceremony in the White House's East Room, attended by parents and relatives of murdered pregnant women, the president signed the Unborn Victims of Violence Act, a narrow law that mirrors statutes now in place in 29 states.

"As of today, the law of our nation will acknowledge the plain fact that crimes of violence against a pregnant woman often have two victims," Mr. Bush said.

"Under this law, those who direct violence toward a pregnant woman will answer for the full extent of the harm they have done, and for all the crimes they have committed," he said to applause.

Although the law applies only in assaults that are already federal, such as a drug-related shooting, the statute pleases social conservatives, who make up the president's political base and overwhelmingly oppose abortion. The law applies to fetuses at "any stage of development."

More than 80 percent of Americans think the murder of a pregnant woman takes two lives, according to three national public opinion polls. Fewer than 10 percent think such a crime has only one victim.

Democratic presidential candidate John Kerry voted against the bill last month in the Senate. Yesterday, his spokesman called the new law an infringement of a woman's right to choose.

"John Kerry strongly supports making it a federal crime to commit an act of violence against a pregnant woman," David Wade said. "He agrees with the vast majority of Americans who want tough punishment for anyone who would commit such heinous crimes and know we can do so without undermining a woman's right to choose."

The House passed the bill by a 245-163 vote; the Senate by a 61-38 margin.

The law states that "nothing in this section shall be construed to permit the prosecution ... of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained."

Despite that clause, Kate Michelman, president of NARAL Pro-Choice America, said Mr. Bush "is making good on his pledge to do everything in his power to restrict a woman's right to choose."

"Pro-choice Americans aren't going to forget this president's record, with its steady drumbeat of attacks on reproductive freedom," she said in a statement.

David Seldin, a spokesman for the group, said his organization supported a bill that did not establish the unborn child as a separate entity.

"What they insisted on that was so unnecessary to the goal of protecting women and punishing criminals was to grant separate legal status to embryos, fetuses and two-cell zygotes at the moment of conception," he said.

Opponents of abortion said the new law will protect unborn children and took issue with

Mr. Kerry's contention that it will infringe on a woman's right to abortion.

"If there ever was a bill to protect a woman's right to choose, it is this bill that seeks to deter violence against or at least provide justice to the pregnant woman who is choosing life for her unborn child only to see her choice deprived by a crime of violence against her and/or her child," said Samuel B. Casey, head of the Christian Legal Society.

Mr. Bush said the new statute, often referred to as the "Laci and Conner" law, after Laci Peterson, who was eight months pregnant with a boy she planned to name Conner when she was slain, simply corrects a legal "omission." Her husband, Scott, is accused of two counts of murder.

"The death of an innocent unborn child has too often been treated as a detail in one crime, but not a crime in itself," he said.

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To go to the main unborn victims (fetal homicide) page, please click [here](#).

## Constitutional Challenges to State Unborn Victims (Fetal Homicide) Laws

February 16, 2004

(All challenges were unsuccessful. All challenges were based at least in part on *Roe v. Wade* and/or denial of equal protection, unless otherwise noted.)

### California

In *People v. Davis* [872 P.2d 591 (Cal. 1994)], the California Supreme Court upheld the legislature's addition of the phrase "or a fetus" to the state murder law in 1970, but held that the term "fetus" applies "beyond the embryonic stage of seven to eight weeks." (California Penal Code 187(a) says, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.") In *People v. Dennis* [950 P.2d 1035 (Cal. 1994)], the California Supreme Court upheld inclusion of fetal homicide under Penal Code 190.2(3), which makes a defendant eligible for capital punishment if convicted of more than one murder.

### Georgia

A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously upheld the conviction of Richard James Smith, Sr., under Georgia's "feticide" statute. Smith argued that the law conflicted with *Roe v. Wade*, but the court rejected this assertion as "without merit." The court held: "The proposition that Smith relies upon in *Roe v. Wade* -- that an unborn child is not a "person" within the meaning of the Fourteenth Amendment -- is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus." *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987). Related state supreme court decision: *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984) (vagueness/due process challenge).

### Illinois

*U.S. ex rel. Ford v. Ahitow*, 888 F.Supp. 909 (C.D.Ill. 1995), and lower court decision, *People v. Ford*, 581 N.E.2d 1189 (Ill.App. 4 Dist. 1991).

*People v. Campos*, 592 N.E.2d 85 (Ill.App. 1 Dist. 1992). Subsequent history: *appeal denied*, 602 N.E.2d 460 (Ill. 1992), *habeas corpus denied*, 827 F.Supp. 1359 (N.D. Ill. 1993), *affirmed*, 37 F.3d 1501 (7th Cir. 1994), *certiorari denied*, 514 U.S. 1024 (1995).

### Louisiana

Re double jeopardy -- *State v. Smith*, 676 So.2d 1068 (La. 1996), *rehearing denied*, 679 So.2d 380 (La. 1996).

## Minnesota

*State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), *cert. denied*, 496 U.S. 931 (1990).

Re establishment clause -- *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991).

## Missouri

In the 1989 case of *Webster v. Reproductive Health Services* (492 U.S. 490), the U.S. Supreme Court refused to invalidate a Missouri statute (Mo. Rev. Stat. 1.205.1) that declares that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," to the extent permitted by the Constitution and U.S. Supreme Court rulings. A lower court had held that Missouri's law "impermissibl[y]" adopted "a theory of when life begins," but the Supreme Court nullified this ruling, and held that a state is free to enact laws that recognize unborn children, so long as the state does not include restrictions on abortion that *Roe* forbids.

In *State v. Knapp*, 843 S.W. 2nd (Mo. en banc) (1992), the Missouri Supreme Court held that the definition of "person" in this law is applicable to other statutes, including at least the state's involuntary manslaughter statute.

## Pennsylvania

*Commonwealth of Pennsylvania v. Corrine D. Wilcott*, No. 2426 A & B of 2002 (Court of Common Pleas of Erie County, Pennsylvania, Criminal Division). Rejected challenges that Pennsylvania Crimes Against Unborn Children Act is unconstitutionally vague, violates U.S. Supreme Court abortion cases, violates equal protection clause, and conflicts with state tort law on definition of "person." January 24, 2003.

## Utah

*State of Utah v. Roger Martin MacGuire*. MacGuire was charged under the state criminal homicide law with killing his former wife and her unborn child. He argued that the law, which covered "the death of another human being, including an unborn child," was unconstitutional because the term "unborn child" was not defined. The Utah Supreme Court upheld the law as constitutional, holding that "the commonsense meaning of the term 'unborn child' is a human being at any stage of development in utero. . . ." MacGuire was also charged under the state's aggravated murder statute, which applies a more severe penalty for a crime in which two or more "persons" are killed; the court ruled that this law was also properly applied to an unborn victim and was consistent with the U.S. Constitution. January 23, 2004.

## Wisconsin

Re due process -- *State v. Black*, 526 N.W.2d 132 (Wis. 1994) (upholding earlier statute).

One Hundred Eighth Congress  
of the  
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,  
the twentieth day of January, two thousand and four*

An Act

To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Unborn Victims of Violence Act of 2004" or "Laci and Conner's Law".

SEC. 2. PROTECTION OF UNBORN CHILDREN.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 90 the following:

"CHAPTER 90A—PROTECTION OF UNBORN CHILDREN

"Sec.  
"1841. Protection of unborn children.

"§ 1841. Protection of unborn children

"(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

"(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

"(B) An offense under this section does not require proof that—

"(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

"(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

"(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

"(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

"(b) The provisions referred to in subsection (a) are the following:

"(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f), (h)(1), and (i), 924(j),

930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1951, 1952 (a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

"(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).

"(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

"(c) Nothing in this section shall be construed to permit the prosecution—

"(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

"(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

"(3) of any woman with respect to her unborn child.

"(d) As used in this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 90 the following new item:

"90A. Protection of unborn children ..... 1841".

### SEC. 3. MILITARY JUSTICE SYSTEM.

(a) PROTECTION OF UNBORN CHILDREN.—Subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 919 (article 119) the following new section:

#### "§ 919a. Art. 119a. Death or injury of an unborn child

"(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section and shall, upon conviction, be punished by such punishment, other than death, as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother.

"(2) An offense under this section does not require proof that—

"(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

"(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

"(3) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

H. R. 1997—3

"(4) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

"(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

"(c) Nothing in this section shall be construed to permit the prosecution—

"(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

"(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

"(3) of any woman with respect to her unborn child.

"(d) In this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 919 the following new item:

"919a. 119a. Death or injury of an unborn child."

*Speaker of the House of Representatives.*

*Vice President of the United States and  
President of the Senate.*

**The Unborn Victims of Violence Act and *Roe v. Wade*—  
Read what these supporters of legal abortion  
say about “fetal homicide” laws**

February 2, 2004

**Professor Walter Dellinger, former advisor to President Clinton**

Walter Dellinger of Duke University School of Law was at one time perhaps the most prominent legal advocate in the pro-abortion-rights movement. He was closely associated with NARAL, and until 1992, he co-chaired a NARAL-sponsored commission to defend *Roe v. Wade*. After President Clinton was elected, Dellinger was appointed as a White House advisor to Clinton on “constitutional issues,” in which capacity he says he drafted five executive orders that were issued by President Clinton on his third day in office, nullifying various anti-abortion policies adopted by earlier presidents. Dellinger later served the Clinton Administration as Assistant Attorney General and as Acting Solicitor General of the United States. On July 13, 2003, the *Raleigh News-Observer* published the following passage in a story titled “A Question of Rights,” posted here: <http://newsobserver.com/news/v-print/story/2690147p-2494289c.html>

Walter Dellinger, a former solicitor general with the Clinton administration who teaches at Duke University, says that, although he is a strong advocate for a woman’s right to choose abortion, he sees no major problem with the fetal-homicide laws. “I don’t think they undermine *Roe v. Wade*,” he said. “The legislatures can decide that fetuses are deserving of protection without having to make any judgment that the entity being protected has freestanding constitutional rights. I just think that proposals like this ought to be considered on their own merit.”

**Professor Richard Parker, Harvard University**

In “Victim Politics,” by Marcia Yablon, *The New Republic*, May, 2001, ([http://www.beliefnet.com/story/79/story\\_7941\\_1.html](http://www.beliefnet.com/story/79/story_7941_1.html)), this passage appeared:

Organizations like Planned Parenthood and the National Abortion Federation . . . oppose the Unborn Victims of Violence Act because they say that by legally enshrining fetal personhood it undermines *Roe v. Wade*. But that simply isn’t true. Since the bill specifically exempts all forms of legal abortion, it leaves the constitutional rationale for the right to choose unaffected. According to Richard Parker, a professor of criminal law at Harvard University and a supporter of abortion rights, “There is nothing as a formal law that would undermine *Roe v. Wade*. . . . This is not at all a big deal.”

**The Alan Guttmacher Institute**

Heather Boonstra, senior public policy analyst at the Alan Guttmacher Institute (affiliated with Planned Parenthood), acknowledged that the federal Unborn Victims of Violence Act “would probably survive a court challenge.” (*National Journal*, April 21, 2001, page 1173)

(continued)

## UNBORN VICTIMS OF VIOLENCE AND ROE V. WADE, 2

### **Professor Michael Dorf, Columbia University School of Law**

*Professor Michael Dorf is a former Supreme Court clerk who, by some accounts, drafted some key parts of the 1992 5-4 ruling in Casey v. Planned Parenthood, which reaffirmed Roe v. Wade. This passage is excerpted from Dorf's essay for Findlaw.com, titled "How Abortion Politics Impedes Clear Thinking on Other Issues Involving Fetuses," under the subheading, "Why Feticide Prohibitions that Exempt Abortion Are Consistent with Roe." [http://writ.news.findlaw.com/scripts/printer\\_friendly.pl?page=/dorf/20030528.html](http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/dorf/20030528.html)*

There are two satisfactory answers to the worry that supporting anti-feticide laws undermines Roe.

First, laws treating feticide as murder do not need to define fetuses as persons. California's law is illustrative. It defines murder as the killing of a human being or a fetus.

Second, there is nothing especially troubling about permitting the law to define the word "person" differently for different purposes. Statutes routinely define various words, including "person," so that they will mean exactly what the legislature intends in a particular context, and even general constitutional language can be interpreted differently depending upon the context. Corporations, for example, are "persons" under the Fourteenth Amendment in the sense that their property cannot be taken without fair processes, but not in the sense that they are entitled to vote on equal terms with natural persons.

*Roe v. Wade* said that states are not obligated to treat fetuses as persons. It also said that in a conflict with the constitutional liberty of a pregnant woman seeking an abortion before the fetus is capable of survival outside the womb, the fetus may not be given the same rights as the woman. However, that certainly does not mean that there are no circumstances in which fetuses can be given legal protection. Again, it all depends on the context.

Consider another analogy. Cats and dogs are not "persons" under the Fourteenth Amendment. Yet surely there is nothing constitutionally suspect about laws forbidding cruelty to animals, even though they limit the liberty of those who would perpetrate such acts of cruelty. Indeed, there would be no inherent constitutional problem with terming a malicious cat or dog killing "murder"-- though imposing too severe a sentence for that act might run afoul of the Eighth Amendment's ban on cruel and unusual punishment.

In sum, so long as respecting the rights and interests of fetuses does not conflict with the right of a woman to decide whether to terminate her pregnancy, there is no necessary contradiction between the abortion right established in *Roe* and feticide laws.

### **Professor Sherry F. Colb, Rutgers Law School**

*The following is excerpted from an essay on [www.findlaw.com](http://www.findlaw.com) by Professor Sherry F. Colb of Rutgers Law School, titled, "Is Killing an Undiscovered First-Trimester Fetus Murder in California? The Answer Probably Is, and Should Be, 'Yes'," January 28, 2004, <http://writ.findlaw.com/colb/20040128.html>*

### UNBORN VICTIMS OF VIOLENCE AND ROE V. WADE, 3

Earlier this month, the California Supreme Court heard argument in a case raising important issues about how the crime of fetal murder is to be defined in the State of California. The Justices' questions and comments to counsel during oral argument suggest that they are inclined to rule that a defendant can be guilty of murder for killing the fetus of a woman who neither the defendant, nor the woman herself, knew was pregnant. Though seemingly draconian, this result is both sensible and fair, upon close analysis. . . .

First, in the current case, when defendant Harold Taylor shot his ex-girlfriend Patty Fansler to death in 1999, neither the victim nor Taylor knew that Fansler was pregnant. In killing her, the defendant accordingly did not intentionally or knowingly cause the death of anyone other than his ex-girlfriend.

Second, unlike in *Keeler*, where the fetus was viable and could probably have been born alive and healthy on the very day that the killing took place, Patty Fansler's fetus was nowhere near viability, at somewhere between eleven and thirteen weeks gestation -- that is, within, or just at the end of, the first trimester of pregnancy.

Upon first considering the Taylor prosecution, it might seem that the killer's ignorance about his ex-girlfriend's pregnancy should be an absolute bar to a murder conviction. Having had no idea that the fetus even existed, how could Taylor possibly be guilty of "murdering" it?

The answer is that he could not, if he had lacked any sort of murderous intention, knowledge, or recklessness. Had Taylor, for example, accidentally caused a miscarriage by slipping on a crowded subway platform and consequently knocking a pregnant woman to the ground, he could not be prosecuted for murder. Our case, however, is notably distinct from this hypothetical scenario. The actual Harold Taylor intentionally killed his ex-girlfriend by shooting her to death. His behavior was in no way accidental, and he was in fact subsequently convicted of second-degree murder for killing Fansler. In the process of deliberately killing his intended victim, however, he unwittingly also killed her fetus.

A truer analogy, then, is not to the man who slips on a subway platform but rather to the man who shoots at a woman who is lying in her bed but whose bullet kills not only the woman but also a child concealed underneath the woman's blanket. Though the shooter did not know about the child when he aimed his gun, his actions were nonetheless intentional, and he specifically meant for those actions to result in a person's death. . . .

So it was for good reason that the Justices on the California Supreme Court appeared, during the arguments, unconvinced that Harold Taylor's conviction for murder of a fetus should be overturned on appeal in the absence of proof that he knew of the fetus's existence. . . .

The fact that a fetus is not yet born, or even viable, speaks not to the value of that fetus but only to the consequences of terminating an unwanted pregnancy. Lack of viability -- and the location of a growing fetus inside a mother who is prepared to carry that fetus -- thus do nothing to mitigate the homicide of a sentient, living creature. California law in its current incarnation properly affirms that premise.

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U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 24 2004

The Honorable Mike DeWine  
United States Senate  
Washington, DC 20510

Dear Senator DeWine:

The Department of Justice is happy to respond to your March 24, 2004, inquiry concerning the substitute amendment proposed by Senator Feinstein to H.R. 1997, the Unborn Victims of Violence Act, which the Senate is to consider shortly.

The Department has major concerns with Senator Feinstein's substitute amendment ("substitute"). H.R. 1997, as introduced, prohibits conduct that results in injury or death to the unborn child, which conduct is punished in the same way as it would be punished by federal law if the object of the conduct had been born. Because the substitute removes any reference to the unborn child, the prohibited conduct in the substitute cannot be the injury or death of the child. Instead, the offenses it apparently creates are "termination of a pregnancy" and "interruption of the normal course of the pregnancy."

However, the substitute then states that it prohibits prosecution for "conduct relating to any medical treatment of the pregnant woman, or matters related to the pregnancy." Because "termination of a pregnancy" and "interruption of the normal course of the pregnancy" are both "matters related to the pregnancy," a court interpreting the exception expansively, rather than reading it as only prohibiting prosecution for medical treatment related to the pregnancy that leads to termination or interruption, could come to the conclusion that there can be no prosecution for the very offenses the substitute purports to create.

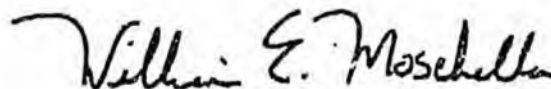
Additionally, by omitting any reference to the unborn child, but retaining language contained in H.R. 1997 as introduced, the substitute appears to create an ambiguity that likely leaves an offense, could one be found, without a corresponding penalty. The substitute provides that punishment for an offense proscribed by the legislation is the same as the punishment provided under Federal law had the "injury or death occurred" to the pregnant woman.

The Honorable Mike DeWine  
Page Two

In H.R. 1997, the object of the "injury or death" was the unborn child. However, in the substitute, the "injury or death" provision has no object, because the only victim under the substitute is the woman herself. Because there are currently no penalties in federal law for the offenses of "termination of a pregnancy" or the "interruption of the normal course of pregnancy," there would be no penalty even assuming that a successful prosecution could be brought.

We appreciate the opportunity to provide these comments. Please do not hesitate to contact this office should you have further questions on this issue.

Sincerely,

A handwritten signature in cursive script that reads "William E. Moschella".

William E. Moschella  
Assistant Attorney General

TO: Senate Judiciary  
FROM: Linda K. Wilson, Deputy Public Defender  
RE: SB 219  
DATE: 4/16/04

---

**WRITTEN TESTIMONY:**

Chairman Seekins, and members of the Committee:

Thank you for allowing me to submit this written testimony on SB 219.

The Public Defender Agency has submitted an indeterminate fiscal note on this bill that you should have in your packet, but I wanted to submit written testimony on the legal aspects of this bill that might not have a noticeable fiscal impact.

The Agency has some concerns about Section 2 in particular. That section creates two new offenses for assaults on unborn children. The first at page 3, lines 1 –8, makes it a C felony to cause serious physical injury to an unborn child if that child is subsequently born alive. Similarly, at page 3, lines 9-16, it makes it an A misdemeanor to intentionally place a pregnant woman in fear of death of her unborn child or cause physical injury to an unborn child and the child is later born alive. The concerns center around whether this new offense would be used to prosecute mothers who do not follow good prenatal care, like moms who drink during pregnancy or use drugs and their child is born with FAS/FAE or other drug related injuries or disorders. If it were used to prosecute these moms, it might further deter them from seeking appropriate medical care because of the fear of exposing them to criminal charges. Also would it be used against a person who might have caused some injury to a fetus during pregnancy, but then by the time a child was born, the baby was fine and there were no injuries? How would a physical injury to an unborn child be proven? The definition of "physical injury" in AS 11.81.900(45) includes "physical pain or an impairment of physical condition." How would you prove pain to a fetus? The definition of "serious physical injury" might also prove problematic if this bill passes. There are two ways to commit serious physical injury under the definition in AS 11.81.900(55). The first, subsection (A), only requires "physical injury caused by an act performed under circumstances that create a substantial risk of death." Arguably, drinking and using drugs during pregnancy might certainly be considered circumstances that create a substantial risk of death to the fetus.

The above concerns may be characterized as unintended consequences from the passage of the bill, but they are significant. I hope that this committee will consider these concerns when hearing the bill.

Thanks again, Linda Wilson, Deputy Director, Public Defender Agency

SB

244

**GARY WILKEN**

SENATOR  
Fairbanks

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## MEMORANDUM

TO: Senator Ralph Seekins, Chairman  
Judiciary Committee

FROM: Senator Gary Wilken *Gary Wilken  
sp*

DATE: January 15, 2004

RE: Senate Bill 244 – Increase Fine For School Zone Violations

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I respectfully request that Senate Bill 244, Increase Fine For School Zone Violations, be scheduled for a hearing before the Senate Judiciary Committee.

Senate Bill 244 doubles the fine assessed for a motor vehicle violation in a school zone, not to exceed \$600.00. This legislation reconfirms our commitment to safety for all, but especially for children.

Thank you for your cooperation and assistance in scheduling a hearing.

## GARY WILKEN

SENATOR  
Fairbanks

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## 3 STATEMENTS – 3 FACTS

### SENATE BILL 244 Increase Fine For School Zone Violations

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#### 3 Statements:

- 1) Senate Bill 244 will heighten the awareness of drivers in school zones to slow down and be more cautious.
- 2) Senate Bill 244 elevates the seriousness of school zone violations.
- 3) Senate Bill 244 will help keep our children safer when walking to and from school by slowing traffic down.

#### 3 Facts:

- 1) Senate Bill 244 doubles the fine for violations committed in a school zone.
- 2) Under the passage of Senate Bill 244, the maximum fine will be raised to \$600.
- 3) Signage will be posted in school zones to inform drivers of the double fine.

**GARY WILKEN**

SENATOR  
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## SPONSOR STATEMENT

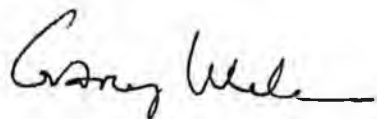
### Senate Bill 244 Increase Fine For School Zone Violations

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Senate Bill 244 doubles the fine assessed for motor vehicle or traffic offenses committed in a school zone. This bill mirrors a law passed by the Alaska State Legislature in 1998, which doubled the fine for violations committed in a highway work zone. Senate Bill 244 not only elevates the seriousness of school zones violations, but also reconfirms our commitment to the safety of children.

Because of the high concentration of children walking to and from school, most often in poor visibility conditions, drivers need to be ever vigilant in a school zone. Appropriate signage will alert drivers of the double fine and will remind them to slow down and be extra cautious.

Please join me in protecting our children by endorsing and passing Senate Bill 244.



# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB244-ACS-TC-1-23-04  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Offenses committed in school zones BRU Alaska Court System  
 Component Trial Courts  
 Sponsor Senator Wilken  
 Requester \_\_\_\_\_ Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The Alaska Court System does not anticipate any fiscal impact from the passage of SB 244.

Prepared by: Doug Wooliver Administrative Attorney Phone 463-4750  
 Division Alaska Court System Date/Time 1/23/04 9:03 AM  
 Approved by: Stephanie Cole Administrative Director by Doug Wooliver Date 1/23/2004  
 Agency Alaska Court System

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB244-DPS-AST-1-26-04  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DPS  
 Title Increase Fines for School Zone Vio. RDU Alaska State Troopers  
 Component AST Detachment  
 Sponsor Sen. Wilken  
 Requester Senate Judiciary Component No. 2325

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill will double the amount of a fine imposed for traffic infractions committed in a school zone. This in essence, will make the penalties for these infractions the same as the penalties for traffic infractions committed in highway work zones.

To implement the provisions of this bill, the Department of Public Safety will be required to work with the Department of Transportation to modify existing traffic regulations. The cost of accomplishing the regulation changes is anticipated to be minimal.

No fiscal impact to the Department of Public Safety is anticipated.

Prepared by: Lt. Al Storey  
 Division: Alaska State Troopers  
 Approved by: Commissioner William Tandeske  
 Agency: Department of Public Safety

Phone 269-4532  
 Date/Time 1/29/04 10:32 PM  
 Date 1/29/2004

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**13 AAC 02.325. SPECIAL SPEED LIMITATIONS.** (a) No person may drive a motor-driven cycle when lights are required to be turned on as prescribed under 13 AAC 04.010 at a speed greater than allowed by the intensity of the headlights as provided by 13 AAC 04.320.

(b) No person may drive a vehicle which is towing a mobile home at a speed greater than 45 miles per hour.

(c) No person may drive a vehicle equipped with lighted headlights described in 13 AAC 04.020(g) at a speed greater than is reasonable and prudent under the conditions specified in 13 AAC 04.010.

(d) No person may drive a vehicle at a speed in excess of 20 miles per hour when passing a marked public school or playground crosswalk that is posted with an official school, school crossing or speed-control sign. The speed zone at the crosswalk extends 300 feet in either direction from the marked crosswalk.

(e) No person may drive a vehicle passing a school bus displaying alternately flashing yellow lights as provided in 13 AAC 04.097(b) at a speed greater than 20 miles per hour.

(f) No person may drive a vehicle or a combination of vehicles over a bridge or other elevated structure or through a tunnel or underpass constituting a part of a highway, ferry facility or city street at a rate of speed or with a gross weight or of a size which is greater than the maximum speed or maximum weight or size designated by an official traffic-control device. (In effect before 7/28/59; am 12/15/61, Register 3; am 8/10/66, Register 22; am 12/31/69, Register 31; am 6/28/79, Register 70; am 10/2/92, Register 123)

Authority: AS 28.05.011

**13 AAC 02.330. RACING ON HIGHWAYS.** (a) No person may participate in a race between motor vehicles upon a public highway, except as provided in AS 05.90.001.

(b) As used in this section, "race" means the use of one or more vehicles in attempting to outgain or outdistance another vehicle or while comparing or contesting relative speeds or powers of acceleration of the vehicles over a specified or unspecified distance or route, whether or not the speed exceeds the maximum prescribed by law (Eff 12/31/69, Register 31; am 6/28/79, Register 70; am 10/2/92, Register 123)

Authority: AS 28.05.011

## ARTICLE 8. STOPPING, STANDING, AND PARKING.

Section	Section
340 Stopping, standing, or parking on highway and in other locations	350 (Repealed)
345 Officers authorized to remove vehicles	355 (Repealed)
	360 (Repealed)
	365 Additional parking regulations

Section	Section
tions made in driver improvement interview	280. (Repeated)
270. (Repeated)	285. Administrative review of suspension for point accumulation
275. Form of notice of suspension for point accumulation	290. Definitions

**13 AAC 08.210. DEMERIT POINT SCHEDULE.** For purposes of administratively identifying habitually reckless or negligent drivers and habitual or frequent violators of traffic laws and in order to identify problem drivers, the following violations will be accorded these corresponding numerical weights upon conviction:

Violation or Type of Violations	Point Value
(1) except as provided in (18) of this section, driving while license cancelled, suspended, or revoked, or in violation of license limitation .....	10
(2) except as provided in (20) of this section, driving while intoxicated .....	10
(3) reckless driving .....	10
(4) speed contest-racing .....	10
(5) fleeing or attempting to elude a police officer .....	10
(6) leaving scene of accident .....	9
(7) negligent driving .....	6
(8) failure to yield right-of-way to authorized emergency vehicle .....	6
(9) failure to stop for school bus while bus is loading or unloading .....	6
(10) failure to obey official traffic control device in school zone, playground crosswalk, or park .....	6
(11) speeding:	
in school zone or playground crosswalk .....	6
3 — 9 miles per hour over limit .....	2
10 — 19 miles per hour over limit .....	4
20 or more miles per hour over limit .....	6
(12) violation of oversize or overweight permit pertaining to restriction on speed:	
3 — 9 miles per hour over limit .....	2
10 — 19 miles per hour over limit .....	4
20 or more miles per hour over limit .....	6
on hours of operation .....	3
(13) careless driving .....	4
(14) following too closely .....	4
(15) failure to stop or yield .....	4
(16) assault with vehicle .....	10
(17) negligent homicide or manslaughter with a vehicle .....	10

Violation or Type of Violations	Point Value
(18) driving a commercial motor vehicle while commercial driver's license disqualified, cancelled, suspended, revoked, or in violation of a license limitation .....	10
(19) driving a commercial motor vehicle after being ordered "out of service" under 49 C.F.R. 396.9(c) or AS 28.33.130(c) ...	6
(20) driving a commercial motor vehicle while intoxicated or under the influence of a controlled substance .....	10
(21) all others .....	2

(Eff. 11/4/74, Register 52; am 3/29/75, Register 53; am 12/1/78, Register 68; am 9/28/80, Register 76; am 3/28/82, Register 81; am 10/2/92, Register 123; am 10/1/94, Register 131)

Authority: AS 28.05.011      - AS 28.15.221      AS 28.32.080

**13 AAC 08.220. POINT ACCUMULATION — APPLICATION TO DRIVER RECORD; COVERAGE.** (a) Repealed 12/1/78.

(b) Coverage and Application to Operators. 13 AAC 08.210 -- 13 AAC 08.290 apply to all operators of motor vehicles in this state, whether licensed or unlicensed in this state.

(c) Point Accumulation — Action by Department. Upon the accumulation of six demerit points in any consecutive 12-month period or upon the accumulation of nine demerit points in any consecutive 24-month period, as reflected by a person's driving record, the department will send a warning letter advising the person of his present driving status and the possibility of future action against the person's driver's license by the department. The warning letter will be sent by regular first class mail to the current address of the person as listed in the department's records.

(d) Repealed 12/1/78.  
(Eff. 11/4/74, Register 52; am 12/1/78, Register 68; am 3/28/82, Register 81)

Authority: AS 28.15.221      AS 28.15.231

**13 AAC 08.230. SUSPENSION OR REVOCATION OF DRIVING PRIVILEGE -- DURATION.** (a) The department will suspend a person's driving privilege for one month upon an initial accumulation of 12 or more points as the result of offenses committed during any consecutive 12-month period or 18 or more points as a result of offenses committed during any consecutive 24-month period.

(b) If within 24 consecutive months from the effective date of a prior suspension for point accumulation a person again accrues demerit points requiring the withdrawal of a driving privilege, the driving privilege will be suspended for three months.

(9) "season" means one calendar year beginning October 1 and ending September 30;

(10) "snowmobile" means a self-propelled vehicle primarily designed or altered for travel on snow or ice when supported in part by skis, belts, or cleats; "snowmobile" does not include machinery used strictly for the grooming of snowmobile trails or ski slopes. (§ 1 ch 134 SLA 1998)

## Chapter 40. General Provisions.

Section	Section
50. Penalties for violations of law, regulations, and municipal ordinances	100. Definitions for title
60. Breath test result validity	110. Short title
70. Fines for offenses committed within highway work zones doubled	

**Sec. 28.40.050. Penalties for violations of law, regulations, and municipal ordinances.** (a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(b) A person convicted of a misdemeanor for a violation of a provision of this title for which another penalty is not specifically provided is punishable by a fine of not more than \$500, or by imprisonment for not more than 90 days, or by both. In addition, the privilege to drive or the registration of vehicles may be suspended or revoked.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordinance does not correspond to a provision of this title, is guilty of an infraction and is punishable by a fine not to exceed \$300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the loss of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221 — 28.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

(e) [*Repealed, § 5 ch 85 SLA 1987.*] (§ 50-1-8 ACLA 1949; am § 12 ch 241 SLA 1976, am §§ 22, 23 ch 144 SLA 1977; am § 5 ch 85 SLA 1987)

Revisor's notes. — Formerly AS 28.35.230. Re-numbered in 1984.

### NOTES TO DECISIONS

This section governs the penalties for violations of this title, and creates three categories of traffic offenses: felonies, misdemeanors and infractions. *State v. Clayton*, 584 P.2d 1111 (Alaska 1978).

Violations of AS 28.36.050(a) are punishable under this section. *Druhosh v. State*, 442 P.2d 44 (Alaska 1968).

**Prerequisite to suspension of license or privilege to drive.** — A driver's license or privilege to drive cannot properly be suspended unless the driver was in fact licensed or otherwise actually privileged to drive a motor vehicle within the state. *Roberts v. State*, 700 P.2d 815 (Alaska Ct. App. 1985).

**Generic penalty provision.** — Subsection (b) is not a penalty provision dealing specifically with the offense of driving while license suspended; rather it is a generic penalty provision, broadly applicable to violations of all Title 28 provisions for which the specific penalties are given. *Roberts v. State*, 700 P.2d 815 (Alaska Ct. App. 1985).

**Meaning of "law" in subsection (c).** — The term "law," as used in subsection (c) of this section, refers to statutory enactments of the Alaska legislature and cannot be read to include the provisions of municipal ordinances. *Anderson v. Municipality of Anchorage*, 645 P.2d 205 (Alaska Ct. App. 1982).

**Nature of "correspondence" between ordinance and statute required by subsection (c).** — The requirement of correspondence stated in subsection (c) of this section calls for a level of similarity between a municipal ordinance and a provision of AS 28 that would make the ordinance a functional equivalent of its statutory counterpart. *Anderson v. Municipality of Anchorage*, 645 P.2d 205 (Alaska Ct. App. 1982).

**The legislature's purpose in enacting subsection (d)** was to eliminate the criminal stigma from minor traffic offenses while keeping the enforcement of such offenses within the criminal system's procedures. *State v. Clayton*, 584 P.2d 1111 (Alaska 1978)

A prosecution for a traffic infraction is a quasi-criminal proceeding to which certain criminal procedures including the issuance of warrants are applicable. *State v. Clayton*, 584 P.2d 1111 (Alaska 1978).

Although the language in subsection (d) with regard to an infraction not being considered a criminal offense nor a fine therefor a criminal punishment indicates that the legislature did not intend to make minor traffic offenses criminal offenses, it does not follow that the legislature by labeling infractions "noncriminal" meant that they are civil in nature and thus that criminal procedures are not available for the enforcement of infractions. *State v. Clayton*, 584 P.2d 1111 (Alaska 1978).

Notwithstanding the legislative labeling of a traffic infraction a noncriminal offense by this section, it retains many criminal terms, such as "convicted," "violation," "guilty," "punishable by a fine." *State v. Clayton*, 584 P.2d 1111 (Alaska 1978).

An infraction is not an offense for double jeopardy purposes. *Carlson v. State*, 676 P.2d 603 (Alaska Ct. App. 1984).

Jury trial. — AS 28.10.105(a) (now repealed) and the other registration statutes in pari materia do not specify a violation of the registration statutes as an infraction, and thus under this section, such a violation is a misdemeanor punishable by up to 90 days'

imprisonment, and entitling a defendant to a jury trial, denial of which right constitutes prejudicial error, requiring a new trial. *Epperly v. State*, 648 P.2d 609 (Alaska Ct. App. 1982).

Traditional use of criminal process not affected. — In the absence of express contrary declaration, the legislature did not intend by the enactment of subsection (d) to affect the traditional use of the criminal process for enforcement of traffic infractions. *State v. Clayton*, 584 P.2d 1111 (Alaska 1978).

This section makes no changes in the traditional mode of proceeding in criminal matters with the exception of its declaration that a person cited with an infraction does not have a right to trial by jury or to court-appointed counsel. The action is brought in the name of the state; it is commenced by the filing of a complaint by a law enforcement official, it is prosecuted by the district attorney. The exceptions appear to merely codify existing constitutional law. *State v. Clayton*, 584 P.2d 1111 (Alaska 1978).

Applied in *Manderson v. State*, 655 P.2d 1320 (Alaska Ct. App. 1983).

Stated in *Francis v. Municipality of Anchorage*, 641 P.2d 226 (Alaska Ct. App. 1982).

Quoted in *State v. Dutch Harbor Seafoods, Ltd.*, 965 P.2d 738 (Alaska 1998).

Cited in *Lowry v. State*, 655 P.2d 780 (Alaska Ct. App. 1982).

Collateral references. — 7A Am Jur 2d, Automobiles and Highway Traffic, § 204.

61A C.J.S., Motor Vehicles, §§ 588 to 595.

**Sec. 28.40.060. Breath test result validity.** Except for an offense under AS 28.35.280, if an offense described under this title requires that a chemical test of a person's breath produce a particular result, and the chemical test is administered by a properly calibrated instrument approved by the Department of Public Safety, the result described by statute is not affected by the instrument's working tolerance. (§ 17 ch 143 SLA 1996)

Effective dates. — Section 17, ch. 143, SLA 1996, which enacted this section, took effect on November 8, 1996.

Editor's notes. — Section 22, ch. 143, SLA 1996 provides that "Sections 1-13 and 17-21 of this Act

apply only to acts committed on or after November 8, 1996 except that to the extent that the amendments made by §§ 6, 7, 10, 11, and 18-21 of this Act involve prior convictions, those prior convictions may have occurred before, on, or after November 8, 1996."

#### NOTES TO DECISIONS

Effect of section on definition of driving while intoxicated. — The practical effect of this section is to modify the definition of driving while intoxicated under AS 28.35.030(a)(2); the fact that a driver's true blood-alcohol or breath-alcohol level may be slightly lower, due to Intoximeter's acknowledged margin of error, is no longer relevant to guilt under AS 28.35.030(a)(2). *Mangapane v. Municipality of Anchorage*, 974 P.2d 427 (Alaska Ct. App. 1999).

Working tolerance of intoximeter. — In light of

the history of the intoximeter and its established working tolerance, the discussion in *Haynes v. State, Dep't of Public Safety*, 865 P.2d 753 (Alaska 1993), and the language of this section, it is clear that the legislature implicitly decided that a .01 percent working tolerance was "tolerably inaccurate," and, therefore, irrelevant to the driver's guilt under AS 28.35.030(a)(2), and not in violation of state or federal due process rights. *Bushnell v. State*, 5 P.3d 889 (Alaska Ct. App. 2000).

**Sec. 28.40.070. Fines for offenses committed within highway work zones doubled.** Whenever a person violates a provision of this title or a regulation adopted under the authority of this title within a highway work zone, notwithstanding the amount of the fine or the maximum fine set under this title, the fine, or maximum fine, is double the amount provided in this title. (§ 2 ch 64 SLA 1998)

State of Alaska  
 Department of Public Safety  
 School Zone Violations  
 FY 2003

School Zone Citations				
Agency	S50	S91	S99	Total
Alaska State Troopers	1	2	23	26
Anchorage Police Department	2	32	376	410
Fairbanks Police Department	0	0	10	10
Juneau Police Department	0	0	14	14
Ketchikan Police Department	0	0	2	2
Palmer Police Department	0	0	3	3
Sitka Police Department	0	0	7	7
Skagway Police Department	0	0	2	2
Wasilla Police Department	0	0	7	7
				0
All Agencies Total	3	34	444	481

Citation Descriptions
S50 - Speed-School Zone _____ (allows recording of exact speed)
S91 - Speed 41 mph over or more (School Zone) *
S99 - Speed School Zone

\*Note: Per DMV the S91 code is intended to be used for School Zone speeding violations.  
 It appears it has been used to record non-School zone speeding violations in some cases

Dear Senator Wilken,

December 31, 2003

My name is Bob Myers. I am the day custodian at Anne Wien Elementary, in the Fairbanks Northstar Borough School District. Anne Wien is located on Danby Street in Fairbanks.

One of my morning duties is as a crossing guard on Danby Street. We have military housing across Danby and we have two intersections that feed military students to Anne Wien and Randy Smith Middle School. Due to funding, we have only one crossing guard from Laidlaw Transportation. Leslie Campbell, our Principle at Anne Wien, has asked me to be the crossing guard at the other one. I have been doing this for four years.

In four years, I have seen many things at this intersection. Danby's speed limit is normally 40 but reduces to 20 during crossing hours. Speeding is a daily occurrence. Peak time for my students to cross is at the same time as the peak of the morning rush hour. Other experiences I have encountered include cars running through my stop sign, with students in the crosswalk and cars sliding sideways at me on slick roads.

In four years, I have had a lot of time to think about ways to make things safer for MY KIDS. Some of the things I have done are using my cell phone to call the number on the side of speeding commercial vehicles, including the school busses. I wrote a Letter to the Editor of the Fairbanks Daily News-Miner. I park my personal vehicle next the road and hang banners on it, with slogans as reminders such as : Want to save some money? Just keep it under twenty. or 20 MPH feels like a crawl. doesn't it?

These things have helped some, but not enough. The Fairbanks Police help as much as they can, considering their budget.

This summer, while traveling Alaska Highways, I encountered construction zones and they had these brightly printed signs announcing "Double Fines" for traffic violations in these zones. My question then is this: If we want to protect or construction workers like this, why not or children?

In my own experience, the signs currently in the school zones are not big enough, are not bright enough and don't point to a big enough penalty. The flashing lights are located on a few poles along the school zone route.

In Florida, the school zone signs are much larger, and suspended over the roadway, with flashing lights on these.

In my opinion, our kids could be much safer with brighter larger signs, better placed and with warnings of more sever penalties, such as construction zones have.

Senator, I was delighted this morning when Shirley, from your office, called me and told me you had felt this a good idea and planned to introduce a bill to address the added safety of our children.

I thank you for taking this on and I look forward to tracking this bill through the legislative process.

Sincerely,

Bob Myers  
2084 Lakeview Terrace  
Fairbanks, AK 99701

Home Phone 907-451-7212  
Fax 907-451-7128  
Cell 907-378-6267  
E-Mail myers@northstar.k12.ak.us



## FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

520 FIRB Avenue

Fairbanks, Alaska 99701-4756

(907) 452-2000

www.northstar.k12.ak.us

January 23, 2004

The Honorable Gary Wilken  
Alaskan Senate  
State Capitol Building  
Juneau, Alaska 99801-1182

Dear Senator Wilken:

It has been brought to my attention that you are sponsoring legislation that would address fines for offenses committed within school zones through SB244, specifically a fine or bail would in essence double if committed within a school zone.

As superintendent of an urban school system, I wholeheartedly support this concept. Approximately two-thirds of our 15,000 students walk to school each day. The majority of our school year these children walk in dark conditions, oftentimes without the advantage of streetlights or sidewalks while their visibility may be hindered because of being dressed in winter gear. As you can imagine, our younger students may forget traffic safety when they get excited as they see their friends close to the school grounds. We do what we can for safety by hiring crossing guards, teaching traffic safety, sewing reflective tape on outer wear, etc., but alerting drivers about higher traffic fines in school zones cannot hurt and would be one more measure of safety.

I believe it is a good idea to bring to the forefront that drivers need to obey the traffic speeds in school zones or pay double the consequence. This has been the case in other states and I am proud that Alaska is willing to make this worthwhile step in the protection of our youngsters.

Please count me as a supporter of SB244.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ann E. Shortt". The signature is fluid and cursive.

Ann E. Shortt, Ed. D.  
Superintendent of Schools  
/plh

SB

246

23-LS1387H  
Luckhaupt  
5/4/04

**CS FOR SENATE BILL NO. 246( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): SENATORS LINCOLN, Davis, Ellis**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the commission of an offense or a juvenile delinquency act involving**  
2 **the victim's actual or perceived race, sex, color, creed, physical or mental disability,**  
3 **sexual orientation, ancestry, or national origin; relating to sentencing, informal**  
4 **adjustment, and adjudication for those offenses and acts; relating to a diversity**  
5 **tolerance program for certain juvenile delinquency acts; relating to a civil cause of**  
6 **action for certain acts involving discriminatory harassment; and providing for an**  
7 **effective date."**

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

9 **\* Section 1. AS 09.55 is amended by adding a new section to read:**

10 **Sec. 09.55.670. Discriminatory harassment action. (a) An individual may**  
11 **maintain a civil action for discriminatory harassment against another, or against the**  
12 **parent or legal guardian of a minor, who has caused physical injury to the individual,**  
13 **or damage to the property of the individual, with the intent to intimidate or harass the**

1 individual because of the individual's actual or perceived race, sex, color, creed,  
2 physical or mental disability, sexual orientation, ancestry, or national origin.

3 (b) An action may not be maintained under this section against

4 (1) the state, an agency or instrumentality of the state, or a political  
5 subdivision of the state;

6 (2) an agent, officer, or employee of an entity described in (1) of this  
7 subsection;

8 (3) an individual working in or responsible for the operation under  
9 AS 47 of a foster, receiving, or detention home or children's institution, regarding the  
10 acts of an unemancipated minor in the charge or custody of the home or institution; or

11 (4) an employee of or a volunteer with a nonprofit corporation that  
12 designates shelters for runaways under AS 47.10.392 - 47.10.399, regarding the acts of  
13 a minor sheltered in a shelter for runaways, as defined in AS 47.10.399.

14 (c) Compensatory and punitive damages may be awarded to a prevailing  
15 claimant in an action brought under this section. An award of damages against the  
16 parent or legal guardian of a minor under this section must be based upon the reckless  
17 conduct of the parent or legal guardian having actual care and custody of the minor.

18 (d) An award of damages under this section does not preclude an individual  
19 from seeking other remedies available under other law.

20 \* Sec. 2. AS 12.55.085(f) is amended to read:

21 (f) The court may not suspend the imposition of sentence of a person who

22 (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260  
23 - 11.41.320, 11.41.410 - 11.41.530, or AS 11.46.400;

24 (2) uses a firearm in the commission of the offense for which the  
25 person is convicted; [OR]

26 (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony  
27 and the person has one or more prior convictions for a misdemeanor violation of  
28 AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction  
29 having substantially similar elements to an offense defined as a misdemeanor in  
30 AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall  
31 be considered to have a prior conviction even if that conviction has been set aside

1 under (e) of this section or under the equivalent provision of the laws of another  
2 jurisdiction; or

3 (4) is convicted of an offense and knowingly directed the conduct  
4 constituting the offense at a victim because of that person's actual or perceived  
5 race, sex, color, creed, physical or mental disability, sexual orientation, ancestry,  
6 or national origin.

7 \* Sec. 3. AS 12.55.125(c) is amended to read:

8 (c) Except as provided in (i) of this section, a defendant convicted of a class A  
9 felony may be sentenced to a definite term of imprisonment of not more than 20 years,  
10 and shall be sentenced to the following presumptive terms, subject to adjustment as  
11 provided in AS 12.55.155 - 12.55.175:

12 (1) if the offense is a first felony conviction and does not involve  
13 circumstances described in (2) of this subsection, five years;

14 (2) if the offense is a first felony conviction

15 (A) other than for manslaughter and the defendant

16 (i) possessed a firearm, used a dangerous instrument, or  
17 caused serious physical injury during the commission of the offense,  
18 seven years;

19 (ii) [OR] knowingly directed the conduct constituting  
20 the offense at a uniformed or otherwise clearly identified peace officer,  
21 fire fighter, correctional employee, emergency medical technician,  
22 paramedic, ambulance attendant, or other emergency responder who  
23 was engaged in the performance of official duties at the time of the  
24 offense, seven years; or

25 (iii) the defendant knowingly directed the conduct  
26 constituting the offense at a victim because of that person's actual  
27 or perceived race, sex, color, creed, physical or mental disability,  
28 sexual orientation, ancestry, or national origin, seven years;

29 (B) for manslaughter and the conduct resulting in the  
30 conviction was knowingly directed towards a child under the age of 16, seven  
31 years;

1 (C) for manslaughter and the conduct resulting in the  
2 conviction involved driving while under the influence of an alcoholic  
3 beverage, inhalant, or controlled substance, seven years;

4 (3) if the offense is a second felony conviction, 10 years;

5 (4) if the offense is a third felony conviction and the defendant is not  
6 subject to sentencing under (l) of this section, 15 years.

7 \* Sec. 4. AS 12.55.125(d) is amended to read:

8 (d) Except as provided in (i) of this section, a defendant convicted of a class B  
9 felony may be sentenced to a definite term of imprisonment of not more than 10 years,  
10 and shall be sentenced to the following presumptive terms, subject to adjustment as  
11 provided in AS 12.55.155 - 12.55.175:

12 (1) if the offense is a second felony conviction, four years;

13 (2) if the offense is a third felony conviction, six years;

14 (3) if the offense is a first felony conviction, and the defendant  
15 knowingly directed the conduct constituting the offense at a victim because of  
16 that person's actual or perceived race, sex, color, creed, physical or mental  
17 disability, sexual orientation, ancestry, or national origin, four years.

18 \* Sec. 5. AS 12.55.125(e) is amended to read:

19 (e) Except as provided in (i) of this section, a defendant convicted of a class C  
20 felony may be sentenced to a definite term of imprisonment of not more than five  
21 years, and shall be sentenced to the following presumptive terms, subject to  
22 adjustment as provided in AS 12.55.155 - 12.55.175:

23 (1) if the offense is a second felony conviction, two years;

24 (2) if the offense is a third felony conviction, three years;

25 (3) if the offense is a first felony conviction, and the defendant

26 (A) violated AS 08.54.720(a)(15), one year; or

27 (B) the defendant knowingly directed the conduct  
28 constituting the offense at a victim because of that person's actual or  
29 perceived race, sex, color, creed, physical or mental disability, sexual  
30 orientation, ancestry, or national origin, two years.

31 \* Sec. 6. AS 12.55.125(g) is amended to read:

1 (g) If a defendant is sentenced under (c), (d)(1), (d)(2), (d)(3), (e)(1), (e)(2),  
2 (e)(3), or (i) of this section, except to the extent permitted under AS 12.55.155 -  
3 12.55.175,

4 (1) imprisonment may not be suspended under AS 12.55.080;

5 (2) imposition of sentence may not be suspended under AS 12.55.085;

6 (3) terms of imprisonment may not be otherwise reduced.

7 \* Sec. 7. AS 12.55.135(d) is amended to read:

8 (d) A defendant convicted of assault in the fourth degree who knowingly  
9 directed the conduct constituting the offense at a uniformed or otherwise clearly  
10 identified peace officer, fire fighter, correctional employee, emergency medical  
11 technician, paramedic, ambulance attendant, or other emergency responder who was  
12 engaged in the performance of official duties at the time of the assault or knowingly  
13 directed the conduct constituting the offense at a victim because of that person's  
14 actual or perceived race, sex, color, creed, physical or mental disability, sexual  
15 orientation, ancestry, or national origin, shall be sentenced to a minimum term of  
16 imprisonment of

17 (1) 60 days if the defendant violated AS 11.41.230(a)(1) or (2);

18 (2) 30 days if the defendant violated AS 11.41.230(a)(3).

19 \* Sec. 8. AS 12.55.135 is amended by adding a new subsection to read:

20 (k) A defendant is convicted of a misdemeanor in AS 11 shall be sentenced as  
21 a worst offender if the court finds by clear and convincing evidence that the defendant  
22 knowingly directed the conduct constituting the offense at a victim because of that  
23 person's actual or perceived race, sex, color, creed, physical or mental disability,  
24 sexual orientation, ancestry, or national origin.

25 \* Sec. 9. AS 12.55.155(c)(22) is amended to read:

26 (22) the defendant knowingly directed the conduct constituting the  
27 offense at a victim because of that person's actual or perceived race, sex, color, creed,  
28 physical or mental disability, sexual orientation, ancestry, or national origin;

29 \* Sec. 10. AS 12.55.165 is amended to read:

30 Sec. 12.55.165. **Extraordinary circumstances.** (a) If the defendant is  
31 subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (d)(3), (e)(1), (e)(2),

1 (e)(3), or (i) and the court finds by clear and convincing evidence that manifest  
2 injustice would result from failure to consider relevant aggravating or mitigating  
3 factors not specifically included in AS 12.55.155 or from imposition of the  
4 presumptive term, whether or not adjusted for aggravating or mitigating factors, the  
5 court shall enter findings and conclusions and cause a record of the proceedings to be  
6 transmitted to a three-judge panel for sentencing under AS 12.55.175.

7 (b) In making a determination under (a) of this section, the court may not refer  
8 a case to a three-judge panel based on the defendant's potential for rehabilitation if the  
9 court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12),  
10 (15), (17), (18)(B), (20), (21), (22), or (28) is present.

11 \* **Sec. 11.** AS 47.12.060(b) is amended to read:

12 (b) When the department or the entity selected by it decides to make an  
13 informal adjustment of a matter under (a)(2) of this section, that informal adjustment

14 (1) must be made with the agreement or consent of the minor and the  
15 minor's parents or guardian to the terms and conditions of the adjustment;

16 (2) must give the minor's foster parent an opportunity to be heard  
17 before the informal adjustment is made;

18 (3) must include notice that informal action to adjust a matter is not  
19 successfully completed unless, among other factors that the department or the entity  
20 selected by it considers, as to the victim of the act of the minor that is the basis of the  
21 delinquency allegation, the minor pays restitution in the amount set by the department  
22 or the entity selected by it or agrees as a term or condition set by the department or the  
23 entity selected by it to pay the restitution;

24 (4) for a violation of habitual minor consuming or in possession or  
25 control under AS 04.16.050(d) must include an agreement that the minor perform 96  
26 hours of community work, provide that the minor's driver's license or permit, privilege  
27 to drive, or privilege to obtain a license be revoked for six months, and provide that  
28 the driver's license or permit, privilege to drive, or privilege to obtain a license be  
29 revoked for an additional six months if the informal adjustment is not successful  
30 because the minor has failed to perform community work as ordered, or has failed to  
31 submit to evaluation or successfully complete the education or treatment