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MEMORANDUM March 6, 2014

SUBJECT: CSSB 128(JUD): Legal issues (Work Order No. 28-LS1001\Y)

TO: Senator John Coghill
Attn: Jordan Shilling

FROM: Kathleen Strasbaugh
Legislative Counsel

You have asked three questions about CSSB 128(JUD), Draft, "Y" version.

1. Does the word "send" in proposed AS 11.61.120(a)(7) cover posting to social media sites? I believe the answer to this question is yes. Since the bill as presently drafted does not go on to require that the information be conveyed to a particular person, it is my opinion that it would cover a posting.

2. Is there a problem referring to "significant damage" to property where the value of the property is not specified? In my opinion the answer is yes. The problem could be resolved either by removing the reference to property damage, or being more specific about the type or value of the property. The "Y" version seems to also provide for criminal liability with regard to property both when there is a reasonable fear of significant damage (p. 2, lines 8 - 10) and when any fear (presumably reasonable or unreasonable) of significant property damage is caused.

3. Are there first amendment problems with the bill? There can be potential constitutional issues with criminal statutes that penalize expressive conduct. The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In a case relevant to this bill by analogy, the court applied this doctrine to an Anchorage Municipal Ordinance regarding harassing or annoying telephone calls. *Jones v. Municipality of Anchorage*, 754 P.2d 275, 279 (Alaska App. 1988). The court found that the ordinance was not void for vagueness:

> As we have already noted, the scope of the challenged ordinance is limited to repeated or anonymous telephone calls, and the ordinance applies to such calls only when the specific and exclusive purpose of the caller is to annoy, molest, abuse, or harass the listener or the listener's family. Thus, the express terms of the ordinance, when accorded their plain meaning, restrict speech only when it is essentially noncommunicative -- in other words, only when the speech is devoid of any substantive information and

> is solely and specifically intended by the speaker to evoke an adverse emotional response from the listener.
>
> So construed, the restriction on speech that results from the challenged ordinance closely resembles, and does not significantly exceed, the type of restriction contained in provisions aimed at prohibiting fighting words that are likely to provoke immediate, violent reaction. We perceive little possibility that the ordinance, as we interpret it, poses any appreciable risk of chilling the legitimate exercise of free speech.

The *Jones* court noted that, where the criminal conduct in a statute is made to "hinge on the subjective reactions of others," the statute may be void for vagueness. *Id.* In addition, the court noted that speech may only be regulated by a penal statute in exceptional circumstances, when the speech incites or directs imminent lawless action, such as the fighting words discussed above. *Id.*[1]

In proposed AS 11.61.120(a)(7), certain electronic communications containing fighting words may withstand a challenge to the regulation of speech, if the speech being regulated is not protected speech. However, in the bill, where the speech being regulated relates to the subjective reaction of the victim, goes beyond "fighting words," and is viewed by the court to include speech that is protected, a court could find that the statute is vague for overbreadth where it chills speech protected by the First Amendment to the United States Constitution. The outcome of a challenge to AS 11.61.120(a)(7) will be fact dependent and it will be difficult to predict how a court will rule in any particular case. The facts in *Jones* do bear some similarity to the facts that might arise under the bill. The defendant in *Jones* called frequently, and left abusive, obscene messages, including racial slurs, name calling, insults regarding appearance and race, and descriptions of sexual activities in embarrassing detail. *Id.* at 277. The court noted also:

> By specifying that "*the* purpose" of the caller, rather than merely "*a* purpose," must be to annoy, molest, abuse, or harass, the challenged ordinance makes it abundantly clear that it was meant to cover only those calls whose sole purpose is to annoy, molest, abuse, or harass. Accordingly, although the challenged ordinance has not previously been subjected to judicial construction, we believe its meaning is reasonably clear on its face.

Id. at 278 - 79. If the conduct precipitating the harm falls well within the statute, it may be that a conviction would be upheld.

If I may be of further assistance, please advise.

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[1] *See also, Peterson v. State*, 930 P.2d 414 (Alaska App. 1996).