ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 11, 2001
1:07 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Scott Ogan, Vice Chair (via teleconference)
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz

MEMBERS ABSENT

Representative Albert Kookesh

COMMITTEE CALENDAR

HOUSE BILL NO. 86
"An Act relating to civil liability for certain false or improper allegations in a civil pleading or for certain improper acts relating to a civil action."

- HEARD AND HELD

HOUSE BILL NO. 135
"An Act relating to municipal fees for certain police protection services."

- MOVED CSHB 135(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 214
"An Act relating to a civil action against a person under 21 years of age who enters premises where alcohol is sold or consumed."

- MOVED CSHB 214(L&C) OUT OF COMMITTEE

HOUSE JOINT RESOLUTION NO. 12
Proposing amendments to the Constitution of the State of Alaska relating to hunting, trapping, and fishing.

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 67

"An Act requiring proof of motor vehicle insurance in order to register a motor vehicle; and relating to motor vehicle liability insurance for taxicabs."

- SCHEDULED BUT NOT HEARD

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 68
"An Act relating to civil liability for transporting an intoxicated person or for driving an intoxicated person's motor vehicle; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HB 86
SHORT TITLE:CIVIL LIABILITY FOR IMPROPER LITIGATION
SPONSOR(S): REPRESENTATIVE(S)MULDER

Jrn-Date	Jrn-Page		Action
01/22/01	0144	(H)	READ THE FIRST TIME - REFERRALS
01/22/01	0144	(H)	JUD, FIN
01/22/01	0144	(H)	REFERRED TO JUDICIARY
02/07/01	0269	(H)	COSPONSOR(S): ROKEBERG
04/11/01		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 135
SHORT TITLE:MUNICIPAL FEES: POLICE & FIRE SERVICES
SPONSOR(S): REPRESENTATIVE(S)GUESS

Jrn-Date	Jrn-Page		Action
02/21/01	0386	(H)	READ THE FIRST TIME - REFERRALS
02/21/01	0386	(H)	CRA
03/15/01		(H)	CRA AT 8:00 AM CAPITOL 124
03/15/01		(H)	Heard & Held
03/15/01		(H)	MINUTE(CRA)
03/20/01		(H)	CRA AT 8:00 AM CAPITOL 124
03/20/01		(H)	Moved CSHB 135(CRA) Out of Committee
03/20/01		(H)	MINUTE(CRA)
03/22/01	0681	(H)	CRA RPT CS(CRA) 5DP 1NR
03/22/01	0681	(H)	DP: MURKOWSKI, GUESS, KERTTULA, MORGAN,
03/22/01	0681	(H)	MEYER; NR: SCALZI
03/22/01	0681	(H)	FN1: ZERO(CED)

03/22/01	0695	(H)	JUD REFERRAL ADDED
03/22/01	0695	(H)	REFERRED TO JUDICIARY
04/11/01		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 214
SHORT TITLE:CIVIL ACTION AGAINST MINORS IN BARS
SPONSOR(S): REPRESENTATIVE(S)MEYER

Jrn-Date	Jrn-Page		Action
03/26/01	0729	(H)	READ THE FIRST TIME - REFERRALS
03/26/01	0729	(H)	L&C, JUD
04/03/01	0830	(H)	COSPONSOR(S): DYSON
04/10/01		(H)	L&C AT 3:00 PM CAPITOL 120
04/10/01		(H)	Moved CSHB 214(L&C) Out of Committee
04/10/01		(H)	MINUTE(L&C)
04/11/01	0954	(H)	L&C RPT CS(L&C) 6DP
04/11/01	0954	(H)	DP: HAYES, MEYER, ROKEBERG, HALCRO,
04/11/01	0954	(H)	CRAWFORD, MURKOWSKI
04/11/01	0954	(H)	FN1: ZERO(REV)
04/11/01		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DALE ANDERSON, Staff
to Representative Eldon Mulder
Alaska State Legislature
Capitol Building, Room 507
Juneau, Alaska 99801
POSITION STATEMENT: Assisted with the presentation of HB 86.

REPRESENTATIVE ELDON MULDER
Alaska State Legislature
Capitol Building, Room 507
Juneau, Alaska 99801
POSITION STATEMENT: Testified as the sponsor of HB 86.

CHARLES E. COLE, Attorney
406 Cushman Street
Fairbanks, Alaska 99701
POSITION STATEMENT: Expressed concerns with, and testified in opposition to, HB 86.

GERALD BROOKMAN
715 Muir Avenue

Kenai, Alaska 99611
POSITION STATEMENT: Testified in opposition to HB 86 and suggested an amendment.

WEVLEY W. SHEA, Attorney
329 F Street, Suite 222
Anchorage, Alaska 998501
POSITION STATEMENT: Testified in opposition to HB 86 and answered questions.

BRUCE BOOKMAN, Attorney
1029 West 3rd
Anchorage, Alaska 99501
POSITION STATEMENT: Testified in opposition to HB 86.

PAM LaBOLLE, President
Alaska State Chamber of Commerce
217 2nd Street, Suite 201
Juneau, Alaska 99801
POSITION STATEMENT: Testified in support of HB 86 and answered questions.

STEPHEN CONN, Executive Director
Alaska Public Interest Research Group (AkPIRG)
PO Box 101093
Anchorage, Alaska 99503
POSITION STATEMENT: Testified in opposition to HB 86 and suggested that instead, the Alaska Judicial Council could review the effectiveness of Civil Rule 11.

JOHN SUDDOCH, Attorney
500 L Street, Suite 300
Anchorage, Alaska 99501
POSITION STATEMENT: Testified in opposition to HB 86.

ALLAN E. TESCHE, Member
Anchorage Assembly
1032 G Street
Anchorage, Alaska 99501
POSITION STATEMENT: Expressed concerns regarding HB 86; testified in support of HB 135 and answered questions.

REPRESENTATIVE GRETCHEN GUESS
Alaska State Legislature
Capitol Building, Room 112
Juneau, Alaska 99801
POSITION STATEMENT: Testified as the sponsor of HB 135.

MARK MEW, Deputy Chief
Anchorage Police Department
4501 South Bragaw
Anchorage, Alaska 99507
POSITION STATEMENT: Testified in support of HB 135.

LAUREE HUGONIN, Director
Alaska Network on Domestic Violence and Sexual Assault (ANDVSA)
130 Seward Street, Room 209
Juneau, Alaska 99801
POSITION STATEMENT: Expressed concerns with HB 135.

ACTION NARRATIVE

TAPE 01-62, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Representatives Rokeberg, Ogan (via teleconference), Coghill, Meyer, and Berkowitz were present at the call to order. Representative James arrived as the meeting was in progress.

HB 86 - CIVIL LIABILITY FOR IMPROPER LITIGATION

Number 0157

CHAIR ROKEBERG announced that the first order of business would be HOUSE BILL NO. 86, "An Act relating to civil liability for certain false or improper allegations in a civil pleading or for certain improper acts relating to a civil action."

Number 0211

DALE ANDERSON, Staff to Representative Eldon Mulder, Alaska State Legislature, assisted with the presentation of HB 86. He explained that HB 86 has been effectively characterized by its long-established title as the "frivolous lawsuit prevention act"; it will prevent frivolous lawsuits by requiring parties to a lawsuit, and their attorneys, to be truthful and responsible in their pleadings. This bill discourages false statements and claims in litigation, and encourages responsibility by all parties and their attorneys. It requires more careful and focused preparation of pleadings. This bill creates, in statute, an obligation for litigants and attorneys to make reasonable efforts to ensure those claims have a reasonable

basis in fact and are valid under existing law. If the claim is intentionally false, both the attorney and the party can be assessed damages. Currently, there is no effective way of holding parties responsible for frivolous pleadings or claims. Frivolous pleadings and claims increase the costs of litigation for all the parties involved, in addition to escalating the cost of our judicial system.

MR. ANDERSON went on to say that HB 86 also provides that if a party makes an intentional false statement of material fact, the court shall dismiss the claim to which the false claim relates. Attorneys, as well as their clients, will be required to research their claims to ensure they are factually supported before filing a lawsuit. This bill will eliminate the "boilerplate" pleadings in lawsuits, and it encourages responsible and focused pleadings. Boilerplate pleadings include everything anyone could ever imagine could have happened, rather than focusing on those specific issues that actually did occur. [For the reader's benefit, please note that "boilerplate" is given a different meaning in Black's Law Dictionary.] Those extraneous pleadings are expensive for innocent parties to litigate and work through, and are most often thrown out [of court]. They simply cause one party, and the court system, to expend significant dollars to pare down to the real issues [of the case].

Number 0365

MR. ANDERSON also explained that many [lawsuits] are often less expensive to settle than to litigate, regardless of their merits. This bill does not affect suits filed in good faith; it will, however, deter those without merit. A system allowing deceit to be rewarded, because it is more costly to litigate than to capitulate, must be changed. This bill assigns financial liability to those who sign a civil pleading with the intention of asserting allegations and defenses that are false; to those who initiate or sign a civil pleading without first determining that it has a reasonable basis in fact and law; and to those who continue a claim or defense after determining the claim or defense does not have a reasonable basis in fact and law. He concluded by saying that the basic purpose of HB 86 is to preclude bad-faith litigation by providing meaningful sanctions likely to be enforced, if such conduct occurs, and at the same time to provide effective remedies to parties who are injured by such conduct. Those who are trying to tell the truth will have nothing to fear from this provision, since it would

only apply if the trier of fact finds that a party has made an intentional false statement of material fact.

REPRESENTATIVE BERKOWITZ said he recalled, as part of the tort reform debate, that there were some strong statements against punitive damages, and yet, he pointed out, one of the core values of HB 86 is a punitive motive to deter others from similar conduct. He asked how this fits in with tort reform's theme of avoiding punitive damages.

Number 0553

REPRESENTATIVE ELDON MULDER, Alaska State Legislature, sponsor of HB 86, responded by mentioning that someone has said, "I don't mind punishing lawyers, especially those that don't represent the truth."

REPRESENTATIVE BERKOWITZ noted that as part of tort reform, there were some settlement statistics that were supposed to be gathered. He asked whether Representative Mulder had a chance to review those statistics prior to creating HB 86.

REPRESENTATIVE MULDER replied that he had not.

REPRESENTATIVE BERKOWITZ asked whether anyone has any idea how pervasive the problem [of frivolous lawsuits] is.

REPRESENTATIVE MULDER said he is not sure that the statistics referred to necessarily applied to HB 86. He suggested that tort reform is substantially a different issue from the one addressed by HB 86. He explained that his intentions are threefold. First, he wants to provide an additional level of comfort and confidence to the public so that people feel that they can go to court and have a fair hearing; he said he thinks it is an intimidating situation and that people don't currently feel that there is a "level playing field." Second, he said, he wants to diminish the opportunity for frivolous lawsuits and make it possible for folks who are truly innocent to stand up and declare their innocence. And his third goal, he said, is to enable individuals who are innocent to defend themselves and to have the opportunity to "be made whole." He suggested that currently if an individual defends himself/herself in court, that person cannot be made whole, notwithstanding attorneys' claims that there is opportunity to be made whole. The reality is, he added, if a person defends himself/herself rigorously under the law today, it costs a lot of money, and the chances are that the person cannot be made whole through this process.

REPRESENTATIVE BERKOWITZ asked whether Representative Mulder had given any thought to Civil Rule 11 [of the Alaska Rules of Civil Procedure], which read in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation.

REPRESENTATIVE BERKOWITZ asked whether Representative Mulder wasn't already, in essence, trying to put suspenders on a well-belted pair of pants.

REPRESENTATIVE MULDER opined that experience has shown that Civil Rule 11 has not been effective in deterring abuses. There has been considerable confusion as to, one, the circumstances that should trigger striking a pleading or motion, or taking disciplinary action; two, the standard of conduct expected of attorneys who sign pleadings and motions; and, three, the range of available and appropriate sanctions. Consequently [Civil Rule 11] has not been an effective tool, and he suggested that statistics will show that [Civil Rule 11] is very seldom used.

Number 0800

REPRESENTATIVE BERKOWITZ indicated that this, too, is his point: the legislature would be passing a fairly substantial piece of legislation that's going to impact litigation, and yet there has been no evidence that it's needed, other than from anecdotes.

REPRESENTATIVE MULDER offered that if there is no problem, then attorneys should not have any objections to being statutorily held to the standard that they are expected to not lie in court.

REPRESENTATIVE BERKOWITZ countered that this is already the expectation.

CHAIR ROKEBERG asked what Representative Berkowitz's knowledge is regarding the enforcement of [Civil Rule 11].

REPRESENTATIVE BERKOWITZ, after noting that he is not a civil attorney, said that to his knowledge, it is rarely used because most attorneys understand that their professional reputation [is dependent on not lying in court]. He added, "It's the same as in this body: you can only get away with stretching the truth so many times and then your professional life is over, and most attorneys are well aware of that, as with any profession." Further, he stated that there are existing sanctions for deliberately abusing the process. He added that he thinks this modification of the process works a lot of mischief.

Number 0891

CHARLES E. COLE, Attorney, said that he had testified four years ago in opposition to a bill similar to HB 86, and wanted to include reference to that testimony as part of the record today. He said that during his prior testimony, he had spoken primarily about the effect of Civil Rule 11, and about the federal experience with the amendment of Civil Rule 11, which was designed to toughen up the standards imposed upon attorneys and the signing of pleadings and other documents. He had explained that the "toughening up" of Civil Rule 11 by that prior legislation caused trouble in the federal courts; it got to where "the tail was wagging the dog," and there was so much litigation over Civil Rule 11, as part and parcel of civil litigation, that "they" finally had to "junk" the standards and return to the "federal Rule 11." Mr. Cole, although he is former attorney general for the State of Alaska, noted that he is testifying today on behalf of himself, and his goal is to tell the committee about his experience in the practice of civil law, which goes back to when he started practicing civil law in the territorial courts in Alaska in 1954. He added that most of his experience is related to commercial litigation.

MR. COLE said that he has talked to lawyers throughout the state, and they have not told him that there is a problem regarding [frivolous lawsuits]; by and large, the system works reasonably well, he added. Not only has he not heard complaints on this issue from lawyers, but he has not heard any complaints from judges in the state either. He opined that if the judicial system were experiencing a problem of specious pleadings, claims, or defenses, he would have heard about it.

MR. COLE offered the following example as a practical illustration of what he envisions would occur should HB 86 pass:

Take an airplane accident on the North Slope - air taxi operator flying across the North Slope, four or five passengers in the airplane, en route from Barrow, say, to Prudhoe Bay. The engine starts running a little rough, pilot says, "Gee, what should I do?" Rather than land at Prudhoe Bay - the closest place - he says, "I think I'll try to go back to Barrow where there is maintenance." So he doesn't go to the nearest airport, which the rules say you ought to do. The engine quits on the way back to Barrow - people badly injured - goes to a lawyer. Lawyer for the plaintiffs investigates the case thoroughly and says, "Gee, I'll sue the pilot, I'll sue the air taxi operator, I'll sue Continental Motors for the engine. ... Took a look at those pistons - evidence of detonation - so I'll sue the piston manufacturer, and I'll sue Cessna too."

Number 1140

And he takes a lot of time - maybe six months or so preparing the case, getting the facts together - files the complaint, serves Continental ... in Pennsylvania and serves Cessna in Wichita, serves the air taxi operator. Cessna sends the complaint to the insurance company and eventually gets the pleading. The insurance company calls the lawyer in Fairbanks and says, "Gee, we've got to file an answer to this complaint in 20 days - 15 days are up - can you represent us?" Lawyer says, "Sure, I'll represent you." "Well, protect us ... we've only got five days to answer." He says, "OK." He calls up the other lawyer and says, "Gee, I need a little extension of time; I just got this complaint, and I have to do something - answer it. Can't file a default to be taken."

The plaintiffs lawyer says, "Look, I've been working on this case a long time, I'm getting personal with my clients, they're pushing me, I can't give you an extension of time." But, well, OK, he's a good guy, so he gives you 15-20 days. So then the lawyer looks at this bill and he says, "Gee, ... I can't sign that [pleading] before making reasonable inquiry and forming a reasonable belief in the existence of the facts upon which the claim - my defense - is based - can't deny negligence, can't deny anything was wrong

with the design of the airplane until I make a reasonable inquiry into the facts."

Well, you know how long it takes to make a reasonable inquiry into the facts of that airplane accident? Of the qualifications of the pilot, whether he was trained? Looking at that piston, and seeing what happened, and why that engine quit? I mean, you know, hey, the lawyer says, "You think I'm going to sign that, and put in an answer? I haven't made any reasonable inquiry in five days." Just won't do it. Can't do it. So he's in this position, Cessna's in [the] position, the insurance company [is] in the position, and he has to say, "Hey, you know, can't sign the civil pleading, and if I don't sign the civil pleading, we'll take ... a default judgment." So, you know, what happens under this bill?

Number 1297

So he says, "Well, I'll tell you what I'll do, ... I'll get Cessna to indemnify me .... You think I'm going to file an answer and get sued for punitive damages? I haven't made any reasonable inquiry. I have to take discovery. I have to get the production to documents about the expert examination and teardown of that engine." That will take months and years, and that's [what] litigation and discovery and depositions is all about - for people to find out what really happened. That's what we do. ...

This is how it works. So the lawyer gets the complaint from the insurance company, and he calls the lawyer and says, "Can you give me a few days to answer?" The lawyer's a good guy and they work together all the time, they deal with these problems, so he says, "Sure." So they file an answer.

Then we have initial discovery under court rules: everybody has to give each other all the evidence they have - the photographs, the expert reports - and they exchange it under the court rules, and it works; everybody gets a pretty good sense of the case. If they want some more, well, let's do a little discovery, so they do discovery. Everybody starts finding about the case ... what the facts are, which maybe takes a year to get these expert reports, to

take the depositions of the pilot, of the manufacturer, and so forth.

And then the people say, "Humph, let's have a settlement conference. The court maybe will have a separate conference. If they're good lawyers - experienced lawyers - they'll sit down and say, "Look, I've taken a look at this stuff, and I think you have a liability case, you've got some damage." And they sit down and they settle these cases. And it works. And everybody knows when you put in an answer denying negligence -- who'd put in an answer admitting negligence when you first get the complaint? Would you want your lawyer to do that? Say, "Oh, I got sued for [an] automobile accident, ... and just either don't answer or admit negligence." Nobody does that. The insurance companies don't want that to happen.

Number 1432

Now, let me just make the comment about "sign the civil complaint with the intention of asserting the allegations that are false." Well, you remember the Shadow .... We used to say, "You know what evil lurks in the heart of man? The Shadow knows (and his girlfriend)." Well, this is open season on each other's lawyers. ... Each lawyer will ... wind up suing the other lawyer, and say, "You know, you [were] false when you signed that negligence complaint." And I'll say, "You were intentionally making false claims when you alleged negligence." And pretty soon, you get these lawyers suing each other for all this malicious stuff.

And you know who pays? I'll tell you who pays: it's the clients who pay. The last thing you people want - the last thing the public wants - in the judicial system and the resolution of disputes is lawyers suing lawyers. Lawyers who get it done - lawyers who do the best job for their clients - are the lawyers who are low-key, get along with the other lawyers, who are recognized as professionals, whose word is good, whose pleadings are good, research is good. We resolve those cases (not me, but those lawyers); that's why the system works. And I urge you: don't tinker with the system. It's working, and it's working well.

REPRESENTATIVE JAMES said that Mr. Cole's testimony almost makes her point that there is a problem, and she mentioned that ordinary people are not aware of all the specifics illustrated by the example. She recounted that she has had the experience of having a lawyer and a defendant lie about her, and her only recourse was to sign an affidavit that said the claim wasn't true. She added that neither she nor the other party had any evidence either way; thus either side could have prevailed, which, she said, she didn't think was fair. She posited that the other party knew full well that they were making up a story. "What kind of a defense do I have in that case?" she asked.

Number 1563

MR. COLE offered that the defense in such a situation is that "the system works." He said he has found, over the years, that juries do a good job; they get it about right. Once in a while, he acknowledged, it goes wrong; the system's not perfect, but the system really works. The juries get it right and the judges do a good job, and sometimes there are bad results, but the case gets to the supreme court and it corrects the egregious errors. He said he can't say that the system is perfect, but he opined that it is a great system.

REPRESENTATIVE JAMES, expressing her belief that in her particular case, the claim was contrived to make the opposing party's case, asked whether Mr. Cole condones that type of behavior.

MR. COLE said, "Of course not." He then added that his experience has been that so often it's not just all on one side. It's the plaintiff claiming the defendant is a liar, and the defendant claiming the plaintiff is a liar. He said he hears all the time, "They lied." The solution, he posited, is to let the system work its magic.

REPRESENTATIVE JAMES offered that although the system is the best we have, it has room for improvement.

Number 1647

CHAIR ROKEBERG called an at-ease from 1:35 p.m. to 1:36 p.m., during which time he turned the gavel over to Representative James.

REPRESENTATIVE BERKOWITZ noted that Mr. Cole's hypothetical example puts the defendants at a huge disadvantage if HB 86 were

to pass, because the defendants wouldn't have the time to do the investigation necessary. And although he acknowledged that a lot of small businesses had sent in testimony in favor of HB 86, he said it would seem to him to be counterintuitive for them; they'd be in a bad position.

MR. COLE affirmed that from his perspective, HB 86 gives a great advantage to the plaintiff because before the complaint has been filed, the plaintiff has had the advantage of having, in some ways, almost an infinite period of time (aside from the statute of limitations) in which to prepare the case. Then the summons is served, and the answer has to be filed within 20 days. In the face of HB 86, he opined, the defense lawyer would be unable to sign an [answer] because he/she knows nothing about the case; there has been no opportunity to investigate.

MR. COLE commented that this is just an example of the problem with HB 86 in a personal injury case, and he suggested the committee consider a case wherein a subcontractor sues a general contractor for canceling the contract for nonperformance. He offered that no default could be alleged in such a case until the site is examined, and he added that this can sometimes involve reading 5,000 pages of daily reports, and it may take two years before getting a good sense of what happened on the job. He opined that no lawyer who is concerned about legal liability is going to file an appropriate answer in those circumstances in the face of HB 86. In such a situation involving contractors and subcontractors, the timelines are not sufficient; this sort of system won't work, he predicted. He added that the insurance companies and the defendants who are small-business owners will be the people who are going to "pay the piper" if HB 86 passes, not the plaintiff's lawyer.

REPRESENTATIVE BERKOWITZ said, "We know that there's bad apples out there. What happens to those bad apples?" What can be done under existing statute and existing court rules to people who are perpetrating frauds on the court and doing things that "we" don't like, such as telling lies, he asked.

MR. COLE responded that there is [Civil Rule 11]. He then posed the question, "Does it work effectively?" And he answered that in his view, it works pretty well. He suggested that letting the system work is the only viable solution to "the bad apple." He remarked that he has seen insurance-defense answers that have 12 affirmative defenses, and that he is exasperated [by] "'Failure to state a claim on which relief can be granted,' when you follow the official form for notice pleading that's right in

the federal rules." He added, "It takes me time to cut it out, so ... I just ignore it and say, 'Oh well, that'll go away' - as it really does." He again advocated for just allowing the [current] system to work.

Number 1874

REPRESENTATIVE BERKOWITZ argued that it seems to him that there would be a tort claim against someone who lied and ran up costs, and that there are possible criminal charges that can [be filed].

MR. COLE countered that he had a client tell him the other day, "We should stop this stuff; we should file perjury charges against this state bureaucrat because he lied about that." Mr. Cole said he told his client to forget it; it's not going to happen. He opined that it would be nice to get district attorneys to prosecute every perjurer for perjury, but he intimated that it cannot be done.

REPRESENTATIVE BERKOWITZ observed that the charge of perjury is available.

MR. COLE agreed that the charge is available.

REPRESENTATIVE JAMES again noted that Mr. Cole is simply making her point [in favor of HB 86]. She referred to Mr. Cole's first example. She said although it appears that the situation is in favor of the plaintiffs, the plaintiffs don't know whether the charges they have made are true, any more than the defense knows. She surmised, then, that in this example the plaintiffs' [attorney] would be just as guilty [of specious claims] as the defense attorney would be in denying them without proper investigation.

MR. COLE responded that economics take care of these types of situations. He opined that the plaintiff's lawyers are not going to spend all the time and money needed to prepare the case if they do not think they have a good case and will be able to recover costs. He added that attorneys generally work on a contingent fee basis, and that they are not served well by filing specious claims because they lose their time and money. He offered that insurance companies ought to be tougher and not settle cases if they don't think the claims are good; insurance companies shouldn't pay off claimants just to keep from paying the cost of defense. He posited that this solution would go

further towards stopping frivolous lawsuits than any changes to statute could accomplish.

REPRESENTATIVE JAMES countered that many defendants are not insurance companies; they're just small-business people who end up settling specious claims because they cannot afford the time and money, or interruption in their lives, to fight the claims. She opined that this is the purpose behind HB 86 - to stop the kinds of specious claims that are filed simply in the hopes that the defendants will not have the time or money to argue the claims, and will thus settle.

MR. COLE observed that the plaintiff has the burden of that litigation too - it's not free for them either. He pointed out that the economics [of the situation] works its magic on both sides of the fence.

Number 2010

GERALD BROOKMAN testified via teleconference, and noted that he is not an attorney. The only lawsuit he has ever been a party to was a small claims action that he brought against another party who had built a driveway across some property that Mr. Brookman owned; he prevailed. This statement was by way of explaining that prior to today, he had never heard of Civil Rule 11. He said that HB 86 might seem reasonable on the face of it, but when he reads terms in it such as "reasonable inquiry and forming a reasonable belief", he said it seems to him that the word "reasonable" is very subjective. He suggested that if HB 86 is going to pass out of committee, then on [page 1, line 10, and other locations in HB 86] "good faith" should be substituted for "reasonable". He finalized his comments by saying, "It just seems to me that this bill doesn't pass the smell test; I think you ought and take it out to a crossroads and bury it with a stake through its heart at midnight."

Number 2124

WEVLEY W. SHEA, Attorney, testified via teleconference and noted that he had spoken in opposition to a similar bill (HB 42) last year. He mentioned that he had written a detailed letter to Senator Taylor on this issue last year as well. He indicated that he agreed with Mr. Cole's comments that the system works very well as it is. He added that under the [Alaska Rules of Professional Conduct] Section 3.1 deals with meritorious claims and contentions, and 3.3 deals with candor towards the court.

He offered that when used by the court, [Civil Rule 11] sanctions are very effective.

MR. SHEA said that he primarily represents small businesses owners, and has done extensive public interest litigation relating to voter fraud. He reiterated his belief that the current system works very well. He reported that he has not seen any indication of the problems alluded to by the sponsor of HB 86. Although there might be occasions when overzealous, inexperienced counsel make mistakes, overall he did not see frivolous litigation taking place. He commented that he is currently working on a case of racial discrimination, and he opined that the system will work even for this situation, which he characterized as having bizarre circumstances.

MR. SHEA remarked that HB 86 merely duplicates what is currently in place, adding that he thinks it will increase litigation. He suggested that the goal of emphasizing professionalism within the legal system can be accomplished in a way that is not compounded by lawyers suing lawyers.

REPRESENTATIVE BERKOWITZ, for clarification, asked whether Mr. Shea thinks that HB 86 will increase the costs of litigation, particularly for small businesses.

MR. SHEA affirmed he did think this. He added that although HB 86 might not necessarily give an advantage to the plaintiff's lawyers, it certainly presents a disadvantage to lawyers who do insurance defense work. He explained that according to his knowledge, when experienced, plaintiff's personal-injury lawyers take cases, they evaluate the cases very thoroughly; he opined that all HB 86 does is compound the situation.

REPRESENTATIVE BERKOWITZ asked what kind of sanctions could be imposed on an attorney who violate the [Alaska Rules of Professional Conduct].

Number 2344

MR. SHEA reported that sanctions can be both publicly and privately assessed and can consist of fees, suspension, or disbarment from practice; he noted that word gets out quickly when someone intentionally misrepresents the facts or is not straightforward. He added that he has not seen any situations of fraudulent pleadings or intentional misrepresentations to the court, even though he has been practicing law in Alaska for well over 20 years. He remarked that under the current system, the

court addresses any instances of overreaching by counsel, and he has no problem bringing such instances to the attention of the court or the Alaska Bar Association.

REPRESENTATIVE JAMES remarked that HB 86 appears to her to be aimed at the plaintiff and not the defendant. She then asked Mr. Shea whether he believed that in many situations, plaintiffs have to manufacture a case in order to initially file and are assuming that something is a certain way without definite knowledge.

MR. SHEA said no, he did not think that plaintiffs' attorneys try to manufacture or create anything. Notwithstanding Representative James's description of her bad experience, he explained that when an experienced plaintiff's attorney is approached for a case, he/she evaluates each case totally, from both a financial point of view and a factual point of view, and if a case isn't any good, he/she will say so. In his own practice, he noted, he only takes about one case out of every ten potential cases that come to him; these are very complex cases, sometimes involving civil RICO [Racketeer Influenced and Corrupt Organizations Act] charges or claims against the State of Alaska, and he spends hours with each potential client (free of charge), evaluating the information to determine whether there is a chance of winning the case.

TAPE 01-62, SIDE B
Number 2480

MR. SHEA mentioned that in the public-interest litigation cases he was involved in regarding the 1994 election, the State of Alaska, in its defense, had ten attorneys and four paralegals. He added that anybody bringing litigation against an insurance company or other major entity is faced with an uphill battle. He commented that in order to simply evaluate such cases, he asks for $30,000 upfront; he said he does not take cases on a contingency fee basis or pro bono. He reiterated that experienced plaintiff's lawyers look at cases really hard before proceeding.

REPRESENTATIVE JAMES, referring to Mr. Cole's first example regarding the airplane accident, pointed out that the plaintiff, in expanding the claims to include all the different entities, had to be simply assuming fault.

MR. SHEA suggested that Representative James misunderstood the point Mr. Cole was attempting to make with that example. Mr.

Shea offered that Mr. Cole was saying that there is a statute of limitations of one or two years - whatever is within the contract - in which the plaintiff's lawyer has to evaluate the possible causes of the accident from that first overview as best as he/she can, to determine all the possible litigants, because once notice is given to the parties, other parties cannot be brought in later if the statute [of limitations] has run. He again reiterated that the system works really well as it is, and that it would be bad to tinker with it.

Number 2309

BRUCE BOOKMAN, Attorney, testified via teleconference. By way of background, he said he has been in Alaska since 1967 and has been working for the last 20 as a defense attorney in a large interstate firm. He stated that he is familiar with attorney discipline; he served on the [Alaska Commission on Judicial Conduct (ACJC)] - for four years - and the disciplinary committee of the [Alaska Bar Association (ABA)], and has occasionally done plaintiffs' legal malpractice suits and defended grievances. He added that he is also the president of the Alaska chapter of the American Board of Trial Advocates, which is a group of experienced trial lawyers with both defense lawyer and plaintiff lawyer representation. He announced that he is very much against HB 86, and that he agrees with the previous comments to that effect.

MR. BOOKMAN remarked that there are a lot of standards in place already, as well as remedies for people who are injured in the judicial system itself. There are the [Alaska Rules of Professional Conduct], Civil Rule 11, and criminal statutes (it has always been a felony to commit perjury); hence there is no need to set further standards of honesty, he opined. He said he understood the committee's concern that these remedies aren't often used, but he offered that there are a lot of reasons for that, and that simply adding more remedies isn't going to change the fact that the remedies aren't often used. He explained that one of the reasons the remedies aren't often used is that the cases are vary rarely "black and white." It's not so easy to find out who is telling the truth and who isn't, he added.

Number 2240

MR. BOOKMAN recounted that when he was a young public defender, he was convinced, in every single case he tried, that at least one of the prosecution witnesses was lying, and usually he thought it was the police who were lying. He posited that young

prosecuting lawyers probably also think that all defense witnesses are lying. He explained that this is a common perception held by young, inexperienced litigators, particularly when they get committed to the cause of the client. He added, "And yet, the whole system is set up to sort that out, and, to a judge, it's not so clear, and to a jury it's not so clear; both sides think the other side is lying, and that's really what the whole procedure is aimed at trying to decide."

MR. BOOKMAN reported that he recently served as an arbitrator in an uninsured motorist claim. The plaintiff was hurt; she testified that she had whiplash and that she couldn't get up off the couch all summer long because of that whiplash. The defendant's lawyer pointed out that the plaintiff had told the doctor that it hurt when she did any gardening or went dancing. The plaintiff still claimed that she couldn't get off the couch. Mr. Bookman said that as an arbitrator (and as primarily a defense lawyer), he thought that the plaintiff was lying, but the other two arbitrators did not think that at all; they thought she was kind of exaggerating and that what she really meant was that it hurt a lot, and they were quite sympathetic. "We just differed," he added, and explained that "you" don't want to have a whole lawsuit turn on this; that's what lawsuits are about - people have different opinions.

MR. BOOKMAN, to present a further example, said that he once had a large product-manufacturing case wherein his client testified that he couldn't recall ever testing a particular product. However, the other lawyer presented a deposition from this same client on an unrelated case related to the same product from a couple of years earlier; the client at that time had stated, "Gee, I'll never forget the time we tested that product." The other lawyer then claimed that Mr. Bookman's client had committed perjury. Mr. Bookman, taking into account that recollections change as time passes, noted that he could not tell whether his client had committed perjury since, in this example, a couple of years had gone by between the two cases; he added that he did not want the lawsuit to hinge on this collateral fact. Things are not very clear in lawsuits, he said, especially the bigger and more complicated ones.

Number 2114

MR. BOOKMAN pointed out that in many of the large cases that he is familiar with, people in different departments of businesses have different perceptions about how the company operates - they remember things differently - and the recollections aren't going

to agree, and it's not going to be clear. "You" don't want to make a whole lawsuit depend upon whether somebody believes that somebody else was actually intentionally telling a lie. Some people who are truly mistaken sound very sure of their testimony. He remarked that he also questions the materiality problem. What is going to be a material fact? What if somebody makes a statement, "Our document retention policy was that we threw away these documents," and somebody else from the company says, "Well, we saved our documents, so, I don't think there was a document retention policy." Is that a material fact, he asked, if there were documents that would have helped one side or another?

MR. BOOKMAN said that it is pretty easy to say, "People shouldn't ... go to court and lie," but it is much more complicated than that. With regard to the effects of HB 86, he predicted that defense costs are going to go up, and that insurance company costs are going to go up, which will tend to push rates up.

MR. BOOKMAN referred to language in HB 86 that says, "If the trier of fact determines that a party to a civil action intentionally made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall dismiss the claim". He pointed out that the language does not stipulate when. As soon as possible, somebody is going to make that charge, and thus he envisions the case will be dismissed without ever getting to the merits of the case. He asserted that this will result in two lawsuits taking place at the same time. And if one of the clients is defended by an insurance company lawyer, he explained, and the claim is made that somebody in the defendant's party lied, the insurance company is not going to want to defend against that claim because, if true, it would be considered intentional misconduct and could be a violation of policy; therefore, the client may find himself/herself without counsel. Mr. Bookman concluded by observing that adoption of HB 86 will result in "an incredible mess."

Number 2014

PAM LaBOLLE, President, Alaska State Chamber of Commerce, stated that her organization is in support of HB 86. She suggested that HB 86 is not directed at those who make honest errors or at ethical attorneys, and she acknowledged that most people in the legal profession are ethical. Rather, HB 86 is directed towards people who would use the system as a way of clouding an issue;

those who would file a suit with the hope of forcing an out-of-court settlement from a defendant who cannot afford full litigation; or those who would intentionally use false allegations and/or charges to cause people to enter into, expand, or maintain litigation and incur extra costs. She opined that if [frivolous lawsuits] are, indeed, not a common problem, then adopting HB 86 shouldn't increase litigation costs.

MS. LaBOLLE said that her organization feels that all it takes is just one person having to spend a great deal of time in court because someone lied simply to bring that person extra grief, [to justify adoption of HB 86]. She added that the issue is to ensure that professional people know that they cannot intentionally lie. If someone files a frivolous lawsuit to intentionally cause a loss, and the claims are not true, that person should be punished.

REPRESENTATIVE JAMES asked if Ms. LaBolle had any specific examples to illustrate her points.

MS. LaBOLLE replied that she did not; she explained that it is difficult to find people willing to divulge the circumstances surrounding a lawsuit because disclosure can sometimes set the stage for further legal problems. She implied that her organization supports HB 86 on a philosophical basis; lawyers who intentionally lie to further their efforts should be punished, she reiterated.

REPRESENTATIVE BERKOWITZ questioned the fact that even though Ms. LaBolle did not have any specific examples of frivolous lawsuits, she is still not comfortable with the current standards in terms of criminal penalties, professional conduct rules, and civil penalties, all of which already exist.

MS. LaBOLLE countered by questioning how bad a person's actions have to get before sanctions are placed on that person. She observed that there is a tendency to "not air the dirty laundry" until the actions get so bad that they cannot be ignored.

Number 1740

REPRESENTATIVE BERKOWITZ reported that there was a headline in one of yesterday's newspapers about attorney discipline. He then stated that he is very concerned about driving up costs for small businesses, and he noted that all the testimony heard

today predicts that adoption of HB 86 will do just that - drive up costs for small businesses.

MS. LaBOLLE responded that it is likely to be the small business owner or individual who is in court in the first place, merely because someone brought a false charge, or because an attorney did not bother to find out the details of the case before bringing charges. She pointed out that small businesses incur costs in these situations already, and she added that her organization does not believe that HB 86 will drive up costs.

REPRESENTATIVE BERKOWITZ asked Ms. LaBolle whether she has anything to substantiate this belief.

MS. LaBOLLE said she did not, and added that the belief is based on common sense.

REPRESENTATIVE BERKOWITZ asked, "Common to whom?"

REPRESENTATIVE JAMES suggested common to everybody except attorneys.

REPRESENTATIVE BERKOWITZ remarked, "Perhaps y'all ought not hire us, then."

MS. LaBOLLE remarked that her comments were not, in any way, meant to sound negative or pejorative against the prior testifiers, most of whom are attorneys.

REPRESENTATIVE JAMES turned the gavel back over to Chair Rokeberg, who had returned.

Number 1605

STEPHEN CONN, Executive Director, Alaska Public Interest Research Group (AkPIRG), testified via teleconference and said that AkPIRG is a consumer advocacy group. He said he could assure the committee that his client group, which in part consists of the 1,000-plus membership of the Alaska Alliance of Injured Workers, perceives the problem to be a lack of access to the justice system - a lack of available legal representation. He added that his client group would further perceive HB 86 not as a frivolous lawsuit prevention Act, but, instead, as a bill that provides fodder for multiple lawsuits - often frivolous - and which will flood the court with litigation among attorneys while would-be clients stand outside of the process, watching. He remarked that he hopes the fiscal notes reflect the increase

in judges and court bureaucracy that will be devoted exclusively to an attempt to employ the vague standards encompassed in HB 86. He opined that the proposed remedy is worse than the problem alluded to by proponents of HB 86.

MR. CONN suggested that if there is a need to examine Civil Rule 11 more closely, then the legislature could simply provide that the [Alaska Judicial Council] do so, as was done during tort reform. In this way, any solution could be grounded in reality rather than in an ideological spat between some representatives of the chamber of commerce and the legal community. Those of "us" who are clients with real claims and real needs feel that they are being denied access to the system, he reiterated. He stated that HB 86, at worst, would chill due process, and, further, that it would perhaps discourage attorneys from representing this class of would-be consumers in the justice process because of the need to do further investigation to assure themselves that they are not going to be sued by other attorneys, or fall into a maze of lawsuits and counter lawsuits.

MR. CONN, in conclusion, said that he certainly sympathizes with the sponsor of HB 86 and with the concerns of the business community about frivolous lawsuits. In examining HB 86, however, more as an academic rather than as a practitioner, and knowing full well that lack of representation is a pandemic problem for many consumers with real-life injuries and justice concerns, he opined that HB 86 does not pass the test. He encouraged the committee to "vote it down" and seek an alternative remedy to the perceived problem.

Number 1361

JOHN SUDDOCH, Attorney, testified via teleconference and said he primarily does "plaintiff work" along with some "defense work." With regard to the topic of parties' lying, he explained that the committee should realize that if HB 86 passes, it will make Alaska a distinct jurisdiction because it will be the only jurisdiction that has such a law; Alaska will be the only jurisdiction in the Western world that would choose to turn the outcome of civil litigation - the search for the truth - into a search for whether somebody has lied on some particular matter (large or small), and then say that's "the whole shootin' match." Everything will turn not on the truth, but on whether somebody lied, and he offered that this is a sufficiently radical proposition that it has been adopted nowhere else in the Western world.

MR. SUDDOCH cautioned the committee that before they adopt a provision of such breathtaking scope - such a breathtaking effect on the civil justice system, which is one of the jewels of Alaska constitutional law - they should really take a hard look at it. He then pointed out that for so radical a provision, there is virtually no framework provided as to how this would work procedurally in the real world. He submitted the following scenario as typical of how adoption of HB 86 would influence the process:

> A lawsuit will be filed. Now there is a new way to win this lawsuit. One way, of course, is to be correct on the facts - to be correct and have a just case. The other way that has now come about to win this lawsuit is to show that somebody is lying. So, as a lawyer, at least half of my focus now has to be dedicated not on finding the truth, but on finding a lie. And so what I do as counsel for the plaintiff is sit down with my plaintiff and I say, "You cannot lie. ... Swear to me you will not lie, I beg of you - because my financial future is now wrapped up in yours. I've spent a bunch of dough, and if you lie, it's all for naught." And so I have to control my one person.

Number 1147

> Perhaps during the deposition of my plaintiff, he says at one point, "I don't remember." Maybe he says that five or ten times. That becomes significant. Maybe later something will show that he ought to have remembered, and when he says, "I didn't remember," somebody could say, "Well, that was a lie." Now we proceed to depositions of the defendants - say there [are] three corporations that are defendants. Whereas, before, I might take one deposition as the plaintiff's lawyer, now there is an entirely new strategy for winning: it's finding a lie. So perhaps rather than taking one deposition of corporate witnesses, I take ten - ten of each.
>
> Now, ... instead of the three depositions, we've done thirty, and my goal, of course, is to find somebody in that corporation who is not very bright, not very emotionally stable, shoots from the hip, can be badgered, can be angered, whatever it takes to get that person out on limb and see if he will commit a

lie. Because, after all, if he commits a lie, he hands me the lawsuit on a platter - a terrible, terrible vulnerability for a corporation and insurance company. How on earth could they control whether or not one particular executive goes around the bend and tells a lie in a deposition? And, of course, all might turn on that; millions of dollars might change hands on the circumstance of one executive having a bad day and telling untruths.

Then we proceed to trial. Suppose that the parties have each said, "We identified 25 lies, each, in the depositions, and we want those to go to the jury." Well, the jury is the finder of fact. And then, say, during the trial, 25 different times somebody pops up and says, "Your Honor, that's a falsehood. I want that to go to the jury." So at the end of the case, there is final argument. Half the final argument is dedicated to who was lying and who was telling the truth on various points because every one of these allegations of lying is a potential landmine which decides the case.

Number 1010

And then the case goes to the jury, and the jury instructions are ten pounds because the jury has to decide 50 different times whether somebody was telling the truth or was telling lie, and each of those could decide the case. Now, what is a lie as far as the jury is instructed? The jury is instructed, "You look at each of those allegations of lying, and if you find that it is just a tiny bit more probable that the assertion is not true - if it's a 51-to-49 likelihood that it's not true - then you must find that it was a lie," and the lawsuit will be over. And, of course, we don't know what happens if the jury finds that both sides have been lying; maybe they cancel out, or maybe if one side lies three and the other side lies two, ... on and on.

So the jury decides the case, ultimately, if any of those 50 allegations of lying are found by three-fourths of the jury (we don't have a unanimous verdict, of course, in Alaska) to be 51-to-49 more probably a lie, the lawsuit is over. And then what happens? What is the insurance company [to] say to

the corporation? The insurance company says, "We don't cover you .... You lost this lawsuit because of your intentional conduct; we don't cover you for that. You're uninsured; for that you're on your own." And the plaintiff says, "Oh, no, what do you mean, you're uninsured? We want you to be insured." And, so, there is a whole [other] series of insurance litigation that starts.

And, of course, there's the constitutional litigation that ensues because part of this is obviously unconstitutional. How can you take from the plaintiff or a defendant vast sums of money in penalty for what might be, in the end, a very minor, scarcely material lie? We have the United States Supreme Court saying under [the] punitive damages context, "You can't punish a corporation $50 million for a barely minor incident; that's a violation of due process." Well, how can [you] punish a corporation $50 million for a minor lie by one of its executives? Or how can you take away from a catastrophically, maybe, paralyzed plaintiff? How can you take away his $10 million claim because he lied about whether he smoked marijuana or something like that? The Supreme Court would have to say that's a violation of due process; the penalty is so capricious and unrelated to the offense.

Number 0851

MR. SUDDOCH, in conclusion, implored the committee to realize that HB 86 is not simply addressing "a minor mom-and-apple-pie" issue here. He stated, "This is the big one. And before you go down this road, I would suggest you listen to a vast range of people who know what they're talking about."

REPRESENTATIVE JAMES remarked that she has listened to a lot of testimony, and that "they're" missing part of HB 86 [page 2, lines 7-13]:

(b) If the trier of fact determines that a party to a civil action intentionally made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall dismiss the claim or defense to which the false statement relates. If the civil action involves multiple claims or defenses and the false statement does not apply to all

claims or defenses, the dismissal required under this subsection shall apply only to those claims or defenses to which the false statement directly relates.

REPRESENTATIVE JAMES said that the last testifier had examples that did not relate to this at all; she added, "He said it was going to be kicked out if there is any lie told, and that's not true in this bill."

REPRESENTATIVE BERKOWITZ said, "I take issue with that; I believe Mr. Suddoch went on at great length about how the trier of fact - that is the jury - would have to sit in a room and say, 'How many people told a lie, and which lies are worth more, what if both sides are lying?'" He offered that this testimony did discuss [subsection] (b), and that [subsection] (b) is, in fact, part of the problem.

Number 0717

ALLAN E. TESCHE, Member, Anchorage Assembly, testified via teleconference and noted that his comments regarding HB 86 are on behalf of himself as a lawyer, not on behalf of any other entity, and that he has been a lawyer in Alaska for about 25 years. He remarked that the operative word on [page 1] line 6 appears to be "person"; he said that he did not know whether that includes people other than attorneys. The testimony thus far, he commented, seems to be directed at attorneys, and is presented by attorneys. He offered that "person" would also apply to "laypersons" who file and pursue litigation on their own, and he posited that this raises a number of questions. He acknowledged that there is a fairly sophisticated process for attorney discipline and supervision through the bar for knowing misrepresentation, and yet, in many respects there is very little that prevents or deters misrepresentation or lying on the part of pro se litigants. He suggested that this is a distinction that should be considered.

MR. TESCHE expressed concern that HB 86 could be turned into a terrible weapon against people who exercise their right to access the court for redress, and he suggested that great caution is warranted. He noted that in his 25 years of experience as an attorney, he can only think of one possible instance in which another attorney has done something that might come within the purview of HB 86; but even that instance, he added, would require a couple of weeks of litigation to sort out. With respect to pro se litigants, he offered, there is the

potential for more problems. He acknowledged, however, that on balance, he agrees with what others have stated: there does not appear to be a problem that is so serious that it warrants this kind of treatment.

MR. TESCHE, in conclusion, commented that it may feel good to pass this kind of [legislation], and the legislature can then tell constituents, "By golly, we're working hard for you to make sure that we crack down on those lawyers, and we've cracked down on the lying in the judicial system." However, HB 86 doesn't do it in a way that would be effective. If legislators really feel that there is a problem that needs to be solved, he added, it could be handled much more narrowly by taking a look at Civil Rule 82. If the idea in Alaska is to deter litigation and at the same time make prevailing parties whole, legislators might want to look at appropriate ways of increasing recoveries under Civil Rule 82, so that the prevailing party - after a fair trial based on the merits of the case - could be reimbursed and be made whole. He opined that this would be a better solution to the problem - assuming that there really is a problem - rather than adopting HB 86.

CHAIR ROKEBERG commented that he recognizes that there are substantial difficulties with HB 86, and he offered that the committee might want to take a different approach. [HB 86 was held over.]

HB 135 - MUNICIPAL FEES: POLICE & FIRE SERVICES

Number 0264

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 135, "An Act relating to municipal fees for certain police protection services." [Before the committee was CSHB 135(CRA).]

Number 0200

REPRESENTATIVE MEYER made a motion to adopt the proposed committee substitute (CS) for HB 135, version 22-LS0421\P, Cook, 4/11/01, as a work draft. There being no objection, Version P was before the committee.

Number 0137

REPRESENTATIVE GRETCHEN GUESS, Alaska State Legislature, testified as the sponsor of HB 135. She explained that HB 135

allows municipalities that so choose to charge residential owners for excessive use of police visits with some qualifications. She pointed out that the definition of excessive use and the amount of the fee are left to the municipality to determine. Representative Guess said, "My goal is to make this tool available to municipalities and not to burden them with any state mandates or too many sideboards for them to do their job." However, there are two exceptions, for domestic violence and potential stalking. In such instances, [she said she] doesn't want to charge those people or discourage them from calling. This bill is aimed at residential owners and landlords who aren't responsible for the tenants or themselves when there is a nuisance in a neighborhood. Furthermore, she explained that HB 135 specifies that the ordinance would require actual notice to a property owner in order to ensure that the property owner would know that there would be a fee if corrective action isn't taken.

TAPE 01-63, SIDE A
Number 0001

REPRESENTATIVE GUESS noted that the bankers had some problems with a previous version of HB 135. The language in question has been cleaned up and thus the bankers now support the bill. Representative Guess reiterated that the purpose of HB 135 is to provide municipalities with one more tool to hold people accountable for their actions. She mentioned that the Anchorage Police Department, the Fairbanks Police Department, and the cities of Anchorage and Fairbanks are in support of HB 135.

Number 0090

REPRESENTATIVE JAMES remarked that one of the things she likes about HB 135 is that the police would have to notify the landlord of visits to his/her property. Often, the landlord doesn't know of such police visits and would probably appreciate that knowledge. Representative James related her belief that the Landlord Tenant Act didn't include the ability to evict a person receiving excessive amounts of police visits. Therefore, she said she thinks that this bill could "reach over there" if the sponsor so desired. She noted her desire to place an emphasis on that in HB 135; she asked if Representative Guess would object.

REPRESENTATIVE GUESS replied no. She mentioned that she is currently having an amendment to the Alaska Landlord Tenant [Act] drafted to have that corrective action taken if this bill

passes. She offered to ask Tam Cook, Director, Legal and Research Services, if such would be allowed under the title of HB 135. She noted that she had planned to have the corrective action encompassed in another bill.

CHAIR ROKEBERG remarked that it would probably be better if this concept could be incorporated under the current title of HB 135 because another piece of legislation could be avoided.

Number 0250

REPRESENTATIVE OGAN posed a situation in which neighbors don't like each other and one neighbor calls the police, which results in the neighbor's receiving a fine. In such a situation, there could be a due process problem because of the person receiving a fine without ever really committing a crime. He noted his assumption that this is a civil fee. Representative Ogan expressed concern with the ability of people to harass their neighbors if they don't like them.

REPRESENTATIVE GUESS pointed out that HB 135 addresses excessive calls and she reiterated that the municipality would define "excessive". Furthermore, she expressed her attempt to keep as much of the control as possible at the local level in order that the local authorities can take into consideration the local situation and false reporting. Therefore, it is left to local municipalities to address.

REPRESENTATIVE OGAN remarked that he would feel better if the complaints resulted in something for which the person was [charged]. He expressed concern with possible abuse.

REPRESENTATIVE BERKOWITZ pointed out that filing a false police report is already a crime.

Number 0531

REPRESENTATIVE MEYER explained that he co-sponsored this legislation because there is a problem in Anchorage, especially with absentee landlords. Often, there is a lot of police attention given to these properties as well as taxpayer dollars. Therefore, Representative Meyer felt that this is an attempt to encourage absentee landlords to take corrective action or help pay for some of the expenses. Representative Meyer commented that HB 135 has achieved concurrence from both the Anchorage mayor's office and the Anchorage Assembly.

REPRESENTATIVE OGAN surmised that this legislation might result in the net effect of moving undesirable folks from Anchorage to the Mat-Su Valley, which is not a municipality and is served by the State Troopers. The State Troopers are not allowed to charge for excessive calls.

CHAIR ROKEBERG expressed concerns similar to that of Representative Ogan in regard to apartment dwellers.

REPRESENTATIVE JAMES indicated she was concerned about whether there is due process for the tenant or the landlord. She questioned whether it should be addressed in HB 135.

Number 0713

REPRESENTATIVE COGHILL remarked that he gets nervous when liens are placed on property. He informed the committee that Fairbanks has approximately six hotel establishments that rent to transient people. The police are often called to these places. He expressed the need to address such situations via HB 135.

REPRESENTATIVE GUESS pointed out that HB 135 currently focuses on residential property and that hotels are commercial property.

CHAIR ROKEBERG mentioned his experience in defining residential real property under Alaska's statutes, which [define] residential real property as being [property that is smaller than] a four-plex. Therefore, he asked if Representative Guess would oppose adoption of that.

REPRESENTATIVE GUESS expressed her willingness to consider it, but she wanted to take more time because some of the problems are with the larger apartment buildings.

Number 0847

MARK MEW, Deputy Chief, Anchorage Police Department (APD), testified via teleconference. He noted that he had sent a letter of support to Representative Guess. The Anchorage Police Department supports HB 135. Mr. Mew said that it is nice that this bill allows the ordinance to be crafted at the local level. In regard to the discussion surrounding larger apartment buildings, Mr. Mew thought such locations would be a logical application of this law. He mentioned that APD had responded to a large apartment building more than 250 times a year for about three years in a row; the owner also owned about three other

buildings, all of which had significant responses as well. Therefore, this bill is a way to ferret out such owners, contact them early, and recover some of the costs. Mr. Mew reiterated his support.

MR. MEW turned to Representative James' remarks regarding notice to the property owner. Mr. Mew agreed with providing the property owner notice before fining a person. He understood Representative James to read HB 135 as providing notice to the property owner each time the police go to the property. However, Mr. Mew expressed his hope that the language is broad enough that the police would notify the property owner after a specified threshold. If that's not the case, he wasn't certain that the police would be able to notify each property owner each time the police respond. He noted his preference for there to be a computer system that could screen out the logical candidates.

MR. MEW then turned to Representative Ogan's concerns regarding harassment. Mr. Mew agreed that hypothetically there could be a problem with that. However, he didn't believe that would be a large problem. He informed the committee that the enhanced 911 system collects peoples' names and locations; thus if there is one neighbor repeatedly calling in on another, that would be available as evidence of harassment or a false report. Mr. Mew reviewed how a computer system could provide data that could be sorted in order to determine who should receive letters.

Number 1213

REPRESENTATIVE JAMES related her perspective that it would be courteous to notify landlords that the police had responded to their property. However, she didn't believe that it was necessary to include in this legislation, but she indicated the hope that the municipality would view the landlord as an asset in these situations.

MR. MEW said he believes that 99 percent of the landlords would like to cooperate and don't want their places trashed. However, in his opinion, he believes there are some landlords whose market niche is exactly the opposite, and those folks are expensive to deal with. Mr. Mew informed the committee that APD is working with the landlords in Anchorage by offering a landlord/tenant school. In regard to notifying every landlord of each response, it often requires an investigation in order to determine who the landlord is. Mr. Mew reiterated that he

wasn't sure that [APD] could [notify the landlord of each response at his/her property].

REPRESENTATIVE OGAN related his belief that by getting landlords to be more responsible, these [problem] people would be dispersed throughout the community. Specifically, he is concerned that these people would move to the Mat-Su Valley. Although Representative Ogan related his belief that HB 135 is well-intentioned, he did have concerns due to possible residual effects. He indicated that changing the bill such that it would allow troopers to fall under this as well would provide him more comfort. Representative Ogan inquired as to where these tenants are going to go if their landlords clean up their act.

Number 1460

ALLAN E. TESCHE, Member, Anchorage Assembly, testified via teleconference. Mr. Tesche remarked that this legislation is primarily intended to address drug houses, illegal alcohol establishments, and gambling in urban areas. Mr. Tesche noted that he is speaking from experience with Anchorage's attorney's office as well as personal experience with a "crack house" in his own neighborhood.

MR. TESCHE turned to the fact that HB 135 currently only applies to residential properties. He strongly recommended that this bill not be limited to four-plexes because some of the larger complexes have some of the most serious problems. The amendments made in House Community and Regional Affairs Standing Committee (HCRA) were excellent because they make it clear that there must be a warning to landlords, actual notice to the property owner, and consideration of a good-faith effort to take corrective action by a landlord. Mr. Tesche emphasized that the most important aspect of HB 135 is that it allows local governments the ability to craft the ordinance. This committee could, over the next several days, carve out all of the due process [provisions] and definitions necessary to make the ordinance work. However, if municipalities are not trusted to pass such ordinances, then this bill shouldn't pass the legislature. Mr. Tesche related his belief that local governments can pass responsible local legislation along the guidelines established in statute.

Number 1602

MR. TESCHE turned to the earlier mention of an amendment to the Landlord Tenant Act in order to make it easier for landlords to

deal with these problems. He felt such a change would be acceptable as long as the changes were fair to both the landlord and the tenant. However, he hoped that such amendments wouldn't slow the progress of HB 135 through the legislature. He then turned to the mention of neighborhood feuds; this bill doesn't authorize or sanction private causes of action for private disputes. Neighborhood feuds could be addressed at the local level. He related his belief that Representative Ogan's concern is misplaced, as is the notion that HB 135 is shifting problems from Anchorage to the Mat-Su Valley. Therefore, Mr. Tesche predicted that this bill would result in Anchorage's cleaning itself up. Furthermore, if problems do arise in the Mat-Su Valley, then corrective legislation could be considered. In conclusion, Mr. Tesche urged support of HB 135.

CHAIR ROKEBERG agreed that large multi-family dwellings should not be excluded. However, he noted that he is considering offering an amendment that would provide the owner of the property an affirmative defense if [the property owner] is given notice to quit that is delivered prior to the imposition of the fee. He asked if such an amendment would be appropriate.

MR. TESCHE answered that on the surface the amendment sounds reasonable; however, he said that he would have to think about it.

CHAIR ROKEBERG pointed out that under either the Landlord Tenant Act or common law, there is a requirement of 30 days' notice for noncause. He said that a tenant could conceivably be in place for 59 days before he/she has to quit the premises, if it is not for failure to pay rent.

REPRESENTATIVE JAMES indicated that there is some new language in the Landlord Tenant Act regarding [the notice].

MR. TESCHE reiterated that on the surface [Chair Rokeberg's amendment] sounds reasonable. He pointed out that on page 2, line 2, of Version P it states that "the property owner is not liable for the fee if that action is promptly taken." Mr. Tesche offered that this language provides a clear guideline to the municipalities to establish something by perhaps defining an "appropriate corrective action." He said this would probably be addressed at the local level.

CHAIR ROKEBERG remarked that he wasn't surprised by Mr. Tesche's comments. However, "we" have some proprietary issues with what

should be in statute in terms of granting powers to local assemblies.

MR. TESCHE commented, "That is a policy decision that the legislature alone will decide."

REPRESENTATIVE JAMES expressed the need to review the Landlord Tenant Act because she recalled that there were revisions regarding drug uses. However, she felt that this should be separate from HB 135 due to the need for a change in the title.

[There was discussion regarding how the committee should proceed with this bill.]

Number 1919

LAUREE HUGONIN, Director, Alaska Network on Domestic Violence and Sexual Assault (ANDVSA), noted her appreciation of the exceptions for domestic violence and stalking. She noted that she has brought forward a further concern regarding an exception for victims of sexual assault, although she realized the difficulty in crafting language "that specifies ... the statute that you don't want them to charge." She explained that with domestic violence and stalking there are often repeated acts, whereas with sexual assault there would not be, although the victim may request police to do drivebys and check the premises for prowlers. She expressed her hope of working with the sponsor to find a solution. However, there is a national and state history that illustrates that law enforcement has not always responded promptly in cases of domestic violence or sexual assault. Ms. Hugonin acknowledged that [HB 135] aims to discourage repeat visits of law enforcement. However, she has folks with whom she wanted to encourage law enforcement to make visits as necessary and not have the individual charged. Ms. Hugonin noted that she has not been able to craft language that would help address the sponsor's concern. Although she didn't necessarily want to stall HB 135, she felt that it was an important matter that should be dealt with.

Number 2039

REPRESENTATIVE JAMES remarked that Ms. Hugonin's concern could be dealt with at the local level, where it could be made more specific than in HB 135. She asked if Ms. Hugonin would be comfortable with the committee's moving the bill.

MS. HUGONIN related her reluctance to say "comfortable," although she understood the [need for] immediacy. Ms. Hugonin said, "Victims of sexual assault should not have to pay for repeated visits from law enforcement when they're asked to go to their residence."

REPRESENTATIVE BERKOWITZ announced his intent, in voting for this legislation, that victims of sexual assault wouldn't be required to pay the cost for repeated calls to law enforcement. He said he was sure that was the intent of every member of the committee.

CHAIR ROKEBERG asked, "What if they are spurious calls?" He said that the municipality could make an exception for [spurious calls].

REPRESENTATIVE BERKOWITZ explained that the intent is for the municipality to exhibit special sensitivity to the victims of sexual violence because some of the residual effects require the police to make additional responses to the [victim's] residence.

REPRESENTATIVE JAMES reiterated that at the local level it could be determined whether these are the calls that they want to stop or don't want to stop.

REPRESENTATIVE MEYER, as a former member of the Anchorage Assembly, said he would guarantee that domestic violence and sexual assault would be made an exception.

CHAIR ROKEBERG asserted that sexual assault is not included in HB 135.

REPRESENTATIVE BERKOWITZ said that HB 135 does include sexual assault because domestic violence is defined in AS 18.66.990 as a crime against a person under AS 11.41, which includes sexual assault statutes.

Number 2160

MS. HUGONIN said, "When they are domestic violence situations. There are situations of sexual assault that, of course, are not domestic violence." Ms. Hugonin said she appreciated the proclamation of Anchorage's intent, which she hoped would be the intent of municipalities statewide. However, she reiterated that there have been occasions in the past when law enforcement has refused to [respond] to situations of domestic violence and sexual assault. Although that hasn't happened in several years,

Ms. Hugonin said she still hears complaints regarding having to respond to such calls. Therefore, the public policy needs to be clear that the aforementioned calls are not the kinds of calls for which municipalities are meant to charge.

CHAIR ROKEBERG remarked that he didn't believe that HB 135 resolved [Ms. Hugonin's concern]. Furthermore, he didn't believe that it was solvable via drafting.

REPRESENTATIVE BERKOWITZ reiterated that it is an issue that can be handled at the local level. In response to Chair Rokeberg, Representative Berkowitz pointed out that municipalities can define that the fee may not be imposed.

CHAIR ROKEBERG surmised, then, that municipalities could have a list of exceptions.

REPRESENTATIVE JAMES mentioned that it was hard for her to believe that municipalities wouldn't hear [testimony on this issue] while creating the ordinance.

CHAIR ROKEBERG expressed concern with the possibility of having "the classic 'wolf' crier that might fit into one of those categories."

REPRESENTATIVE BERKOWITZ commented that government has moved away from the notion of discretion, even though everything can't be listed all the time. At some point, "we" must [acknowledge] that those in the field doing the job are qualified and will exercise good discretion. However, he acknowledged that there will be instances in which the wrong choice is made.

Number 2304

CHAIR ROKEBERG made a motion to adopt Conceptual Amendment 1:

> Page 1, line 7, after "property";
> Insert "including a multi-family dwelling over four units"

REPRESENTATIVE COGHILL reiterated that this bill is geared toward urban issues.

[There was discussion regarding what would be considered a commercial property.]

REPRESENTATIVE MEYER interjected that Representative Guess's intent was to exclude commercial property.

Number 2410

CHAIR ROKEBERG asked whether there were any objections to Conceptual Amendment 1. There being no objection, Conceptual Amendment 1 was adopted.

Number 2419

CHAIR ROKEBERG made a motion to adopt Conceptual Amendment 2, which he specified as follows: "providing that an affirmative defense for the owner of residential property, including multi-family dwellings over four units, is the notice to quit delivered to a tenant prior to the imposition of the fee."

REPRESENTATIVE BERKOWITZ objected for discussion purposes. He said the problem seems to be that an offending owner could evade responsibility simply by providing notice and not taking any subsequent action.

CHAIR ROKEBERG pointed out that a notice to quit is legal notice that is provided for under the Landlord Tenant Act, which says that "the notice to quit is delivered to the tenant." In response to Representative Berkowitz, he said that one would have to make a delivery of the actual notice. In further response to Representative Berkowitz, Chair Rokeberg offered that the notice to quit is a term of art meaning that [the tenant] leaves the premises.

REPRESENTATIVE JAMES noted that she liked [Conceptual Amendment 2] as a solution because it specifies that the landlord has the option to tell the tenant to get out.

TAPE 01-63, SIDE B
Number 2465

CHAIR ROKEBERG pointed out that Conceptual Amendment 2 is a conceptual amendment. He restated his amendment as follows: "An affirmative defense for the owner of residential property, including multi-family dwellings over four units, is the notice to quit delivered to a tenant prior to imposition of the fee."

MR. MEW turned to Conceptual Amendment 2. He posed a situation in which a building has 20 or 30 units, 10 of which are crack houses. Does [Conceptual Amendment 2] mean that after 200 calls

for service, there would be an attempt to bill the landlord for police activity? If the landlord served one eviction notice to one individual, would the process start over again? He noted that the crack dealers move around and thus it is difficult to know what is happening at any given time in each room. However, the end result is that the police are going to the same apartment complex 200 times a year for people that are living in different units at different times.

REPRESENTATIVE JAMES inquired as to [Mr. Mew's opinion] of adding the language that specifies that the notice to quit [would be delivered] to the offenders.

REPRESENTATIVE BERKOWITZ suggested that [language could be inserted] that says "municipalities may provide for an affirmative defense" and let the municipality determine the defense.

CHAIR ROKEBERG announced his preference to make that an affirmative defense. However, he noted his willingness to amend the amendment to provide for the "musical-chair tenant."

MR. MEW related his vision of how this would work in Anchorage. He anticipated that a notice of the intention to bill would be sent to the landlord, which would generate some discussion that [would set some goals for the landlord to attempt to work this out]. Mr. Mew viewed this as a long-range tool.

CHAIR ROKEBERG acknowledged that a situation as described by Mr. Mew could happen, which would defeat the purpose of his amendment.

MR. MEW informed the committee that many of the [callers] will not identify themselves, and provide no information. Although the police eventually learn to identify certain people, the [police] will never learn who the actual tenants are and the rooms to which they belong. Therefore, he believes it would be difficult to hang [the affirmative defense] on the landlord's being able to serve legal notice on one person. He felt that notice may be served on one apartment, but that would negate "your" effort.

Number 2270

CHAIR ROKEBERG made a motion to amend Conceptual Amendment 2, "to prohibit that tenant from moving from one unit to another

within the same dwelling, multi-family dwelling, or project thereof, under the same ownership."

Number 2248

REPRESENTATIVE BERKOWITZ objected and said he didn't believe that would address Mr. Mew's concern or get to the root of the problem.

REPRESENTATIVE JAMES pointed out that page 2 of Version P reads as follows: "The ordinance must also define 'appropriate corrective action' ... and provide that the property owner is not liable for the fee if that action is promptly taken." Therefore, she felt that it might be covered. Furthermore, the burden of defining this is placed on the municipality.

REPRESENTATIVE BERKOWITZ indicated agreement and remarked that it is local control.

REPRESENTATIVE JAMES continued by relating her belief that the property owners are being protected because they can take corrective action, and if they don't like it, they could go to court.

CHAIR ROKEBERG, speaking as a former landlord, said he would trust the assembly. He related his belief that it would be a bad body of law if there is statute on the books that can't be made an affirmative defense and doesn't result in an affirmative defense. Chair Rokeberg said, "And because of the way it's drafted right now, you could have up to 59 days where the landlord has no ability unless there is a provision for a nuisance ability to force that person out quicker."

REPRESENTATIVE BERKOWITZ related his understanding that Chair Rokeberg is concerned that the landlords would be "on the hook" even if they made a good-faith effort. Therefore, he suggested inserting language that says, "The landlord must make a good-faith effort to remediate the problem."

REPRESENTATIVE JAMES reiterated her belief that HB 135 already says that.

CHAIR ROKEBERG returned to Representative James' earlier statement that as a landlord, sometimes the only alternative is to deliver the notice to quit. Then, if the person overstays his/her statutory limit, law enforcement can oust him/her from the premises.

REPRESENTATIVE BERKOWITZ said that there are other things that can be done besides provided the notice to quit.

CHAIR ROKEBERG emphasized that this is a very tenant-friendly statute.

REPRESENTATIVE JAMES asked if a committee substitute could be brought before the committee.

Number 2077

CHAIR ROKEBERG announced that the committee could require that appropriate corrective action include a notice to quit. He asked if the committee wanted to do that. He said that could be considered Conceptual Amendment 2 [which would replace the previous Conceptual Amendment 2].

REPRESENTATIVE BERKOWITZ said that would be fine and removed his objection to [the new] Conceptual Amendment 2.

Number 2043

CHAIR ROKEBERG asked whether there were any objections to Conceptual Amendment 2, as restated. There being no objection, Conceptual Amendment 2 was adopted.

Number 2029

REPRESENTATIVE BERKOWITZ moved to report CSHB 135, version 22-LS0421\P, Cook, 4/11/01, as amended, out of committee with individual recommendations and the accompanying zero fiscal notes. There being no objection, CSHB 135(JUD) was reported from House Judiciary Standing Committee.

HB 214 - CIVIL ACTION AGAINST MINORS IN BARS

Number 2021

CHAIR ROKEBERG announced that the final order of business would be HOUSE BILL NO. 214, "An Act relating to a civil action against a person under 21 years of age who enters premises where alcohol is sold or consumed." [Before the committee was CSHB 214(L&C).]

Number 2009

REPRESENTATIVE MEYER, as the sponsor of HB 214, explained that there is an Anchorage ordinance that allows bars to prosecute underage minors who attempt to purchase alcohol with a fake ID. Many of the bars, including Chilkoot Charlie's and the Brown Jug, have used this effectively to prohibit underage people from attempting to enter a bar. He emphasized that the program is optional. The only requirement for the establishment is to place a sign saying that an underage individual would be prosecuted. [The bill packet] contains letters of support from the Anchorage Restaurant and Beverage Association (ARBA), Chilkoot Charlie's, and the Brown Jug. This legislation would make the program statewide in order to deter underage drinking.

CHAIR ROKEBERG asked if anyone wished to testify on HB 214. There being no one, the public testimony portion of HB 214 was closed. Chair Rokeberg inquired as to the wishes of the committee.

Number 1965

REPRESENTATIVE BERKOWITZ moved to report CSHB 214(L&C) out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 214(L&C) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 1947

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:44 p.m.