ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 21, 2001
11:24 a.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Scott Ogan, Vice Chair [by teleconference]
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz

MEMBERS ABSENT

Representative Albert Kookesh

COMMITTEE CALENDAR

HOUSE BILL NO. 181
"An Act relating to the obligations of spouses, to insurance policies of spouses, to the nonprobate transfer of property on death to a community property trust, to the division of the community property of spouses at death, and to the Alaska Community Property Act; and providing for an effective date."

- MOVED CSHB 181(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 189
"An Act repealing statutory provisions relating to term limits and term limit pledges."

- MOVED HB 189 OUT OF COMMITTEE

HOUSE BILL NO. 174
"An Act relating to mental health information and records; and providing for an effective date."

- MOVED CSHB 174(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 228
"An Act relating to the offense of selling or giving tobacco to a minor, to the accounting of fees from business license endorsements for tobacco products, to the disclosure of certain confidential cigarette and tobacco product information, to notification regarding a cigarette manufacturer's noncompliance

with the tobacco product Master Settlement Agreement, to business license endorsements for sale of tobacco products, to citations and penalties for illegal sales of tobacco products; and providing for an effective date."

- HEARD AND HELD

PREVIOUS ACTION

BILL: HB 181
SHORT TITLE:COMMUNITY PROPERTY
SPONSOR(S): REPRESENTATIVE(S)MURKOWSKI

Jrn-Date	Jrn-Page		Action
03/14/01	0585	(H)	READ THE FIRST TIME - REFERRALS
03/14/01	0585	(H)	JUD
03/27/01	0747	(H)	COSPONSOR(S): MCGUIRE
04/21/01		(H)	JUD AT 11:00 AM CAPITOL 120

BILL: HB 189
SHORT TITLE:REPEAL TERM LIMITS/TERM LIMITS PLEDGES
SPONSOR(S): JUDICIARY

Jrn-Date	Jrn-Page		Action
03/16/01	0626	(H)	READ THE FIRST TIME - REFERRALS
03/16/01	0626	(H)	STA, JUD
04/12/01		(H)	STA AT 8:00 AM CAPITOL 102
04/12/01		(H)	<Bill Postponed to 4/19>
04/19/01	1062	(H)	STA RPT 6DP
04/19/01	1063	(H)	DP: STEVENS, CRAWFORD, JAMES, FATE,
04/19/01	1063	(H)	HAYES, COGHILL
04/19/01	1063	(H)	FN1: ZERO(GOV)
04/19/01		(H)	STA AT 8:00 AM CAPITOL 102
04/19/01		(H)	Moved Out of Committee
04/19/01		(H)	MINUTE(STA)
04/21/01		(H)	JUD AT 11:00 AM CAPITOL 120

BILL: HB 174
SHORT TITLE:MENTAL HEALTH INFORMATION AND RECORDS
SPONSOR(S): RLS BY REQUEST OF LEG BUDGET & AUDIT

Jrn-Date	Jrn-Page		Action
03/12/01	0543	(H)	READ THE FIRST TIME - REFERRALS

03/12/01	0543	(H)	HES, JUD
04/17/01		(H)	HES AT 3:00 PM CAPITOL 106
04/17/01		(H)	Moved Out of Committee
04/17/01		(H)	MINUTE(HES)
04/18/01	1027	(H)	HES RPT 5NR 2AM
04/18/01	1027	(H)	NR: COGHILL, WILSON, JOULE, STEVENS,
04/18/01	1027	(H)	DYSON; AM: KOHRING, CISSNA
04/18/01	1028	(H)	FN1: ZERO(HSS)
04/21/01		(H)	JUD AT 11:00 AM CAPITOL 120

BILL: HB 228
SHORT TITLE:SALE OF TOBACCO PRODUCTS
SPONSOR(S): REPRESENTATIVE(S)HARRIS

Jrn-Date	Jrn-Page		Action
04/02/01	0809	(H)	READ THE FIRST TIME - REFERRALS
04/02/01	0809	(H)	L&C, JUD, FIN
04/03/01	0831	(H)	COSPONSOR(S): HUDSON, MURKOWSKI
04/17/01	1021	(H)	COSPONSOR(S): KERTTULA
04/18/01	1053	(H)	COSPONSOR(S): CRAWFORD
04/18/01		(H)	L&C AT 3:15 PM CAPITOL 17
04/18/01		(H)	Moved CSHB 228(L&C) Out of Committee
04/18/01		(H)	MINUTE(L&C)
04/20/01	1092	(H)	L&C RPT CS(L&C) NT 5DP 1AM
04/20/01	1093	(H)	DP: CRAWFORD, HAYES, MEYER,
04/20/01	1093	(H)	ROKEBERG, MURKOWSKI; AM: KOTT
04/20/01	1093	(H)	FN1: ZERO(REV)
04/20/01	1093	(H)	FN2: (LAW)
04/20/01	1093	(H)	FN3: (HSS)
04/20/01	1093	(H)	FN4: (CED)
04/21/01		(H)	JUD AT 11:00 AM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE LISA MURKOWSKI
Alaska State Legislature
Capitol Building, Room 408
Juneau, Alaska 99801
POSITION STATEMENT: Sponsor of HB 181.

STEPHEN E. GREER, Attorney
PO Box 24-2903
Anchorage, Alaska 99524-2903

POSITION STATEMENT: Assisted with the presentation of Version L of HB 181, and proposed Amendment 1.

DAVID G. SHAFTEL, Attorney
550 West 7th Avenue, Suite 705
Anchorage, Alaska 99501
POSITION STATEMENT: Assisted with the presentation of Version L of HB 181.

GAIL FENUMIAI, Election Program Specialist
Division of Elections
Office of the Lieutenant Governor
PO Box 110017
Juneau, Alaska 99811-0017
POSITION STATEMENT: Provided the Division's position on HB 189 and answered questions.

REPRESENTATIVE HUGH "BUD" FATE
Alaska State Legislature
Capitol Building, Room 416
Juneau, Alaska 99801
POSITION STATEMENT: Presented HB 174 on behalf of the Joint Committee on Legislative Budget and Audit.

ELMER LINDSTROM, Special Assistant
Office of the Commissioner
Department of Health & Social Services (DHSS)
PO Box 110601
Juneau, Alaska 99811-0601
POSITION STATEMENT: During discussion of HB 174, assisted with the bill's presentation and answered questions regarding proposed Amendment 1; During discussion of HB 228, provided the department's position and answered questions.

ANNE HENRY, Special Projects Coordinator
Central Office
Division of Mental Health & Developmental Disabilities
Department of Health and Social Services (DHSS)
PO Box 110620
Juneau, Alaska 99811-0620
POSITION STATEMENT: During discussion of HB 174, answered questions related to gathering client data.

PAT DAVIDSON, Legislative Auditor
Legislative Audit Division
Legislative Agencies & Offices
PO Box 113300

Juneau, Alaska 99811-3300
POSITION STATEMENT: Assisted with the presentation of HB 174 and answered questions.

JOHN MANLY, Staff
to Representative John Harris
Alaska State Legislature
Capitol Building, Room 513
Juneau, Alaska 99801
POSITION STATEMENT: Presented HB 228 on behalf of Representative Harris, the sponsor.

EDWIN J. SASSER, Tobacco Enforcement Coordinator
Division of Public Health (DPH)
Department of Health & Social Services (DHSS)
PO Box 110616
Juneau, Alaska 99811-0616
POSITION STATEMENT: During discussion of HB 228, answered questions relating to enforcement.

DWAYNE D. JONES, Anchorage Police Department (APD)
4801 South Bragaw Street
Anchorage, Alaska 99508
POSITION STATEMENT: During discussion of HB 228, provided testimony related to enforcement procedures.

DAN BRANCH, Assistant Attorney General
Commercial Section
Civil Division (Juneau)
Department of Law (DOL)
PO Box 110300
Juneau, Alaska 99811-0300
POSITION STATEMENT: During discussion of HB 228, answered questions relating to the drafting of page 7, lines 6-7.

ACTION NARRATIVE

TAPE 01-70, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 11:24 a.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 181 - COMMUNITY PROPERTY

Number 0088

CHAIR ROKEBERG announced that the first order of business would be HOUSE BILL NO. 181, "An Act relating to the obligations of spouses, to insurance policies of spouses, to the nonprobate transfer of property on death to a community property trust, to the division of the community property of spouses at death, and to the Alaska Community Property Act; and providing for an effective date."

Number 0094

REPRESENTATIVE LISA MURKOWSKI, Alaska State Legislature, sponsor of HB 181, noted that in 1998, the legislature passed the Alaska Community Property Act, which allows married couples to characterize some or all of their assets as community property. Since implementation of that Act, those who deal with estate planning and trusts on a day-to-day basis have identified certain statutes requiring improvement and adjustment. She proffered HB 181 as a means of amending and strengthening those community property statutes.

REPRESENTATIVE MURKOWSKI explained that the first area addressed by HB 181 is the extent to which a creditor can reach a couple's community property. Section 1 provides that a creditor can only reach the separate property of the debtor spouse and that spouse's half of jointly held property. The second area addressed by HB 181 relates to transfers of property to a community property trust by beneficiary designation, whereby certain property such as life insurance policies and Individual Retirement Accounts (IRAs) can be transferred to a community property trust by designating the trust as the beneficiary of the property.

REPRESENTATIVE MURKOWSKI said the third area addressed by HB 181 clarifies the sources of funds used to purchase life insurance, in that it will be presumed that the spouse who buys the life insurance has used his/her own property to purchase that life insurance. In addition, HB 181 will expand the category of "family member" to include ancestors or descendants of either spouse. Typically, community property funds may be used by a couple to purchase their life insurance, and when the primary beneficiaries are family members, then it is presumed that both spouses consented to the choice of beneficiaries. The fourth area addressed by HB 181 is the division of community property at death. Section 4 clarifies that "different items can be

allocated to the spouse's share as long as each spouse's share receives half of the total aggregate value of the community property."

Number 0431

REPRESENTATIVE JAMES made a motion to adopt the proposed committee substitute (CS) for HB 181, version 22-LS0567\L, Bannister, 4/19/01, as a work draft. There being no objection, Version L was before the committee.

REPRESENTATIVE MURKOWSKI added that Version L clarifies "that these favorable presumptions with the trust are only available to the portion of the trust that's for the benefit of the family member."

Number 0501

STEPHEN E. GREER, Attorney, testified via teleconference and explained that Section 3 of Version L, which is in reference to life insurance, provides a safety net provision in the event that an estate plan is audited by the Internal Revenue Service (IRS). Currently, if a life insurance policy is purchased for one spouse via a community property account, half the policy is considered to be owned by the insured spouse and the other half by the uninsured spouse, which negates any estate-tax benefits that would be derived if the policy were owned solely by the insured spouse. He said Version L expands the list of individuals for whom a policy can be [made] payable to, and is considered to be done with the consent of the uninsured spouse. He noted that this presumption could always be overcome by the testimony of the uninsured spouse.

MR. GREER, in response to questions, reiterated that Version L provides a safety net and removes the foibles that can create havoc with an estate planner and his/her clients. He said he did not see any downside to HB 181, or anything in it that might be controversial. He noted that Section 1 reflects current law with regard to what property is held liable for a debtor spouse's obligation; it simply clarifies how community property stands in relationship to current law in the event of a spouse's death.

Number 0877

DAVID G. SHAFTEL, Attorney, testified via teleconference and explained that existing law essentially makes Alaska a separate

property state. By default, a husband and wife's property is owned as separate property. Therefore, if the husband incurs an obligation - because of negligence, for example - during the course of his occupation, then his separate property is liable for that obligation, but his wife's property is not. Similarly, if the couple owned their property jointly - as tenants in common, for example - if one spouse incurs an occupational liability, only that spouse's half of the jointly held property is liable for that obligation. By comparison, in community property states, there are a number of different rules regarding the extent to which community property is going to be liable for one spouse's obligations.

MR. SHAFTEL offered that Version L will simply bring into conformity Alaska's optional community property system with its separate property system, so that if one spouse - not both spouses - incurs a liability, then that spouse's separate property and one-half of their community property will be liable for that obligation. Consequently, the other spouse's separate property and his/her half of their community property would not be liable for that obligation. He added that there is also a provision in Version L that says if the liability is incurred by both spouses, then all the community property is responsible for that liability. For example, if a couple purchases - together - some investment property, then all of the community property would be liable for any obligations.

REPRESENTATIVE BERKOWITZ asked Mr. Shaftel whether he has heard any criticism of HB 181.

MR. SHAFTEL said that he has not heard any criticism of HB 181 from among the people who work with "this rule". As a matter of fact, he added, the criticism is directed toward the current statute because it creates an ambiguity that will result in extra litigation. He noted that a community property system is a very attractive and advantageous way for a married couple to own their property; most of his clients, he said, want to take advantage of this system but the cloud of ambiguity regarding community property liability prevents them. He opined that Version L will provide a fair way of resolving this ambiguity, and is entirely consistent with rules governing property held jointly as tenants in common. In response to a question, he pointed out that Version L would not affect division of property during a divorce because the "just and equitable rule" would still be used; thus family law attorneys would not object to Version L either.

Number 1300

CHAIR ROKEBERG asked whether HB 181 is simply resolving a creditors' rights issue.

MR. SHAFTEL said, "Yes, it is."

REPRESENTATIVE BERKOWITZ, referring to language in Section 1, subsection (k), suggested that essentially one spouse could be bankrupted without significantly impacting the other. He said that this raises questions about the impact on property settlements pursuant to a divorce situation. He said he would like to hear from a family law practitioner regarding what impact HB 181 might have in a divorce situation.

MR. SHAFTEL asserted that [subsection (k)] is not new; it is existing law. He said that subsection (j) is new, but subsection (k) merely restates existing law under AS 34.77.070, which says that an obligation incurred during marriage by both spouses will be satisfied from both their separate property and their community property. He explained that one of the changes proposed by Version L is to do away with the concept - found in AS 34.77.070(c) - that an obligation incurred by one spouse in the interest of the marriage or the family will be satisfied from the community property as well as the property of the spouse who incurred that obligation. In its place subsection (j) will provide that when one spouse incurs an obligation, either before or during marriage, that obligation may be satisfied only from that spouse's separate property and from that spouse's interest in the community property.

MR. SHAFTEL also explained that the existing law pertaining to the division of community property upon divorce stipulates that a just and equitable standard will be used for both community property and separate property; Version L does not change that law. He reiterated that this is not a family law issue; it is, at most, a creditors' rights issue. Version L is fair to the creditor and to the non-negligent spouse, he added. It will result in the same rule being applied to community property as with separate property: the negligent spouse's separate property and his/her half of the community property is all that should be liable for an obligation incurred only by that spouse. If, on the other hand, both spouses participated in the negligence, the legal system already resolves those kinds of issues; Version L should in no way affect those procedures.

Number 1640

CHAIR ROKEBERG asked whether community property (or separate property) has to be liquidated in order to satisfy a creditor's claim.

MR. SHAFTEL said that depends; it could result in a forced sale if that is the only way to satisfy the obligation. What may happen is that the creditor could attach the property and become owner of that half interest, but what most likely - and practically - occurs, is that the property is sold and half of the proceeds go to the creditor and half go to the non-liable spouse. In response to a further question, he affirmed that when a person enters into an optional community property agreement, he/she can stipulate what is held as community property. Through an agreement or a community property trust, a couple can say what portions of their property are to be considered separate property and what portions are to be considered community property. One example he said he is familiar with is when one spouse has inherited property and wishes to keep it separate; another example is when one spouse is in business with other individuals and wishes to keep the business holdings separate from any community property.

MR. SHAFTEL, with regard to the division of community property at death, explained that Version L fleshes out current statute by adding the provision which clarifies that at death, one half of the property is owned by the deceased spouse and the other by the surviving spouse. It also establishes what is called an aggregate form of ownership of property, which allows different items of the community property to be allocated to the separate halves so that not every item has to be divided equally as long as the aggregate value is divided equally. He said that this often comes into play with pension or IRA accounts because it is almost always preferable to have the surviving spouse receive these accounts and simply fund the deceased spouse's "bypassed trust" with other community property assets. He noted that this provision of Version L eliminates some federal income tax arguments that might otherwise exist, and is a strong addition to the Alaska Community Property Act.

Number 1909

MR. SHAFTEL explained that Section 2 of Version L allows transfers to a community property trust by beneficiary designation, which means that if a person has an IRA account, he/she can name a community property trust as a beneficiary of that account and then the IRA will be considered community

property. This will facilitate estate planning by Alaskans as well as facilitate the use of Alaska community property trusts by nonresidents should they chose to use an Alaskan trustee.

MR. GREER explained that Amendment 1 simply conforms AS 34.77.120(e) to the changes incorporated by Version L regarding the presumptions pertaining to an insured spouse.

Number 2007

CHAIR ROKEBERG made a motion to adopt Amendment 1, which read [original punctuation provided]:

> AS 34.77.120(e) is amended to read:
>
> This section does not affect the ownership interest or proceeds of a policy unless a spouse **or a trust described in (b)(7) of this section** is designated as an owner or on the records of the policy issuer and community property is used to pay a premium on the policy.

There being no objection, Amendment 1 was adopted.

MR. GREER, in an attempt to allay Representative Berkowitz's concerns regarding property divisions during a divorce, said that HB 181 does not affect family law at all; it will not affect the "rights or obligations of the spouse with respect to each other with community property."

Number 2129

REPRESENTATIVE MEYER moved to report the committee substitute (CS) for HB 181, version 22-LS0567\L, Bannister, 4/19/01, as amended, out of committee with individual recommendations and the accompanying fiscal note. There being no objection, CSHB 181(JUD) was reported from the House Judiciary Standing Committee.

HB 189 - REPEAL TERM LIMITS/TERM LIMITS PLEDGES

Number 2148

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 189, "An Act repealing statutory provisions relating to term limits and term limit pledges."

CHAIR ROKEBERG, speaking on behalf of the House Judiciary Standing Committee, sponsor of HB 189, said he is very pleased with the bill. He explained that it repeals those provisions of Alaska's election law that relate to what he called the "scarlet letter" or the "gold star" that appears on the ballots indicating term limit pledges. "Recently, the United States Supreme Court held that the provisions as they relate to this issue are unconstitutional under the Elections Process provisions delegated to the states by the [U.S.] Constitution," he said. So those provisions that apply to members of the U.S. House of Representatives and the U.S. Senate as relate to term limits are unconstitutional under the Cook v. Gralike decision [in committee members' packets].

CHAIR ROKEBERG further pointed out that half of the sections from AS 15.15.500 through AS 15.15.535 were found to be unconstitutional according to the attorney general's opinion in 1998, so they have not been enforced. They, too, relate to the congressional members, he said.

Number 2239

CHAIR ROKEBERG said he thinks "the overwhelming testimony and logic" is that the Cook v. Gralike case also applies to the state level. He said the Alaska law changed the "scarlet letter," indicating that a candidate did not support term limits, into a "gold star," indicating that the candidate had pledged to support term limits. The Idaho Supreme Court in a December 6, 2000, ruling, found that "gold star" provisions are unconstitutional because they infringe on the fundamental right to vote and that there was no compelling state interest to continue printing them on the ballot.

CHAIR ROKEBERG said he takes up [term limits and term limit pledges] "with some trepidation" because the statutes that HB 189 would delete came into state law through the initiative process and represent the will of the majority of the people of Alaska that term limits be applied statutorily. "But what this does is ... broadcast a particular point of view on the election ballot, which I think is sacrosanct, and I think gives ... an ... advantage ... to a particular candidate. And I think that it's a complete abridgment of the right of ... suffrage and free speech." He said he was very disappointed when the lieutenant governor certified the initiative because he felt at the time it was not right.

CHAIR ROKEBERG continued:

> Particularly galling is the fact that I, for my entire political career, have indicated that I believe in the concept of term limits. But I've found that the longer I stay down here [in the legislature], the more I recognize that it takes a certain amount of time even to learn this job, but I do believe that certain people overstay their limits. So I have ... my own idea: the concept that somebody should serve no more than eight years in one house and twelve years altogether consecutively; but that's at variance with the term limit pledge {now in statute]. To be consistent under the state law, you have to agree precisely with the concept that you can only serve eight years in sixteen years. So, therefore, I really take umbrage with this because even though I agree conceptually in the idea, if I don't agree precisely with the dictates of that initiative law, then that makes me the bad guy.

REPRESENTATIVE ROKEBERG said he was very pleased to see the ruling of the United States Supreme Court and the Idaho court. He said that in the House State Affairs Standing Committee (HSTA), there was testimony that the Alaska Civil Liberties Union (AkCLU) was going to bring a case on this particular item, and because of this bill, they're going to wait and see if the bill has success in passage. "So ... we can avoid a lawsuit and cluttering our courts up with this issue -- and the expense," he said.

Number 2363

REPRESENTATIVE MEYER asked if the committee would be hearing testimony from the AkCLU.

CHAIR ROKEBERG said no, and that he seemed to have misplaced the package given to him the other day by Jennifer Rudinger of the AkCLU. He said she had testified at the HSTA meeting, describing the Idaho case in relation to Alaska law.

Number 2397

REPRESENTATIVE BERKOWITZ prefaced his testimony by saying he is not a supporter of term limits. He said he had couple of points he would like to make about the inefficacy of the term limit pledge. He has noticed that a lot of people take the term limit

pledge and then violate it, which seems to him to defeat the purpose of taking the pledge.

REPRESENTATIVE BERKOWITZ continued:

> The second thing I would like to point out, and I want to congratulate you for making the point, that it's ridiculous to post someone's political position on the ballot. You know I offered an amendment the other day on the floor that would strike "political position" from the ballot, that is to say, strike someone's political affiliation from the ballot, which is also a form of advertisement, and if the title [of HB 189] was slightly larger here, I would move [to fit that in]. But I appreciate your sentiment, and I think that consistency would show that you would support my position that removal of the term limit pledge would also support removal of party affiliation from the ballots.

Number 2445

REPRESENTATIVE OGAN commented that it was an interesting discussion about removing the indication of party. "I guess if I was a member of certain parties, I wouldn't want that on the ballot either," he said.

CHAIR ROKEBERG asked Representative Ogan if he had any problem with the constitutionality of the repeal proposed by HB 189.

REPRESENTATIVE OGAN said he did not.

TAPE 70, SIDE B
Number 2475

GAIL FENUMIAI, Election Program Specialist, Division of Elections, Office of the Lieutenant Governor, came forward to testify. She said:

> The division does not have any problem with the repeal of this law. The first sections of statute that you mentioned were already not being enforced by the division because they had been deemed unconstitutional and our attorney general had advised that before the Idaho case came out. But the Idaho case said the unconstitutionality of the first sections ... probably

would have trickled down and applied to the voluntary term limits sections as well.

Number 2464

REPRESENTATIVE MEYER noted that he has not seen anything in the news about this being ruled unconstitutional. "It does concern me a little bit that this was passed by initiative and ... now we're going to make it unlawful," he said. "But I think if the public knew that it was unconstitutional and what we're doing is just correcting that mistake, it would probably be more acceptable."

CHAIR ROKEBERG explained that the decision in the Idaho case was a very recent one, handed down February 28, 2001.

REPRESENTATIVE MEYER asked if a person who signed the pledge to run for no more than eight years is still bound by that pledge.

MS. FENUMIAI said she thinks that if someone had signed a pledge in the 2000 election, the pledge now would be null and void.

REPRESENTATIVE MEYER sought further clarification: "I guess my point is, if somebody signed a pledge saying that they would only run for eight years and then they continue for 12 or 14 or 16, there's nothing to stop that, right?"

CHAIR ROKEBERG volunteered:

> As a matter of fact, on that point, Representative Meyer, I had the occasion when this was on the ballot to talk to the author of the initiative, Bob Bell, ... and he told me that I shouldn't be upset because the way the initiative was drafted, the effectiveness wasn't until the effective date of the initiative. So therefore, even though I may have spent a few years already serving, ... the eight-year bell toll didn't start until it became law.

CHAIR ROKEBERG said he thinks it is a political issue, "Like I say I support term limits and I'm going to have to live with that if I decide to run in the next election."

Number 2369

REPRESENTATIVE OGAN moved to report HB 189 out of committee with individual recommendations and the accompanying zero fiscal

note. There being no objection, HB 189 was reported out of the House Judiciary Standing Committee.

HB 174 - MENTAL HEALTH INFORMATION AND RECORDS

[Contains discussion of CSSB 135(HES), the companion bill to HB 174.]

Number 2354

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 174, "An Act relating to mental health information and records; and providing for an effective date." [HB 174 is sponsored by the House Rules Standing Committee by request of the Legislative Budget and Audit Committee]

Number 2330

REPRESENTATIVE HUGH "BUD" FATE, Alaska State Legislature, speaking on behalf of the Joint Committee on Legislative Budget and Audit (LB&A), noted that HB 174 is a companion bill to SB 135. He explained that the state auditor and the Department of Health & Social Services (DHSS) recommend the changes encompassed by HB 174 in order to allow the state to better track direct grant moneys that are given to community mental heath providers. He said HB 174 does two things: It complies with the auditor's report, which recommends reporting actual consumer data, and it holds agencies harmless for being sued by the consumer for breach of confidentiality if such should ever occur. He added that HB 174 is really about accountability for state grant funds.

REPRESENTATIVE FATE noted that Amendment 1, [22-LS0684\A.1, Lauterbach, 4/20/02] will make HB 174 identical to CSSB 135(HES), the current version that is advancing in the Senate. Amendment 1 reads as follows:

> Page 4, following line 26:
> Insert a new bill section to read:
> "*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:
> DATA FROM PRIOR YEARS. (a) As a condition of receiving state money for state fiscal year 2002 under AS 47.30.520 - 47.30.620, 47.30.660 - 47.30.915, or AS 47.31, the entity eligible for the state money shall agree to furnish the Department of Health and Social Services with confidential and other

information about recipients of services paid for, in whole or part, with state money during state fiscal years 2000 and 2001 under AS 47.30.520 - 47.30.620, 47.30.660 - 47.30.915, or AS 47.31. The entities governed by this subsection shall comply with regulations of the department regarding the submission of the information required under this subsection.

(b) The department may review, obtain, and copy the information submitted under (a) of this section. The department may also obtain information of the type described in (a) of this section from the patient who received the services described in (a) of this section and review or copy that information.

(c) Records and information obtained by the department under this section are medical records, shall be handled confidentially, and are exempt from public inspection and copying under AS 40.25.110 - 40.25.120. The records and information may be copied and disclosed under regulations established by the department only under the same circumstances as provided for confidential records under AS 47.30.845, as amended by sec. 4 of this Act.

(d) The department may review the information obtained under this section to evaluate compliance with the applicable statutes and grant contracts. However, the department may not use the information furnished under this section to impose civil or administrative penalties for failure to comply with applicable statutes and contracts. The department may use the information to establish a database on which to base future management practices and to impose restrictions and conditions on use of state money in fiscal year 2002 and later.

(e) In this section, "department" means the Department of Health and Social Services."

Renumber the following bill section accordingly.

Number 2252

ELMER LINDSTROM, Special Assistant, Office of the Commissioner, Department of Health & Social Services (DHSS), explained that Amendment 1 will allow [the DHSS] to collect data for fiscal years (FYs) 2000 and 2001 in order to build a "baseline." After noting that HB 174 will be effective the next fiscal year, he said that [the DHSS] concurs with the legislative auditor that without Amendment 1, it would in fact be two or three years

before [the DHSS] would have the kind of baseline and accountability information that the auditor recommends.

CHAIR ROKEBERG asked Mr. Lindstrom whether he was aware of the Health Care Financing Administration's (HCFA) "deadline on confidentiality and the privacy of medical records."

MR. LINDSTROM, after noting that he is not an expert on that federal law, assured the committee that [the DHSS] is acutely aware of it, and that anything [the DHSS] does via HB 174 will be consistent with [the HCFA] requirements. He explained that a past legislative audit as well as the most recent one have taken [the DHSS] to task for not being able to collect this data. The prior audit was requested by the Senate Finance Committee when it noticed that Medicaid expenditures for community mental health services had grown exponentially; prior to 1991 or 1992 there was no Medicaid funding going into mental health centers, but once that was allowed, expenditures grew from nothing to $5 million to $10 million to $20 million, and are now in excess of $50 million.

MR. LINDSTROM added that [the DHSS] has excellent client data on the Medicaid program, but the same entities that are beginning to aggressively bill Medicaid are also grantees of the Division of Mental Health & Developmental Disabilities. [The DHSS], however, does not have the management information - the client data - that would enable it to monitor how those general fund (GF) grants are being spent. He concurred with Representative Fate that HB 174 resolves an accountability issue.

CHAIR ROKEBERG mentioned that the provisions of HB 211, what he calls the "Alaska patients' bill of rights", will take effect July 1, 2001 for managed care entities; [HB 211] will cover most health insurers in Alaska, and contains a strict confidentiality provision, which goes well beyond any "opt in" requirements and requires the consent of the patient in order to release of any information.

MR. LINDSTROM, after noting that he has been with the department for ten years, remarked that he has no recollection of [the DHSS] ever breaching patient confidentiality; [the DHSS] has patient records, medical records, and confidential information in virtually "every bit of book of business that we have in the department and we ... are acutely sensitive to [confidentiality]."

Number 2036

CHAIR ROKEBERG said he only brings up the topic because:

> We have the HCFA privacy regulations; we've got the Alaska patients' bill of rights; we have the GLBA (the Gramm-Leach-Bliley Act), where the private sector is going to go through ... mandated "opt in" medical records provisions for all medical information from insurance companies; to say nothing of our own privacy provisions of our constitution.

REPRESENTATIVE BERKOWITZ asked for an example of the type of confidential information that [the DHSS] will be reporting.

Number 1992

ANNE HENRY, Special Projects Coordinator, Central Office, Division of Mental Health & Developmental Disabilities, Department of Health and Social Services, explained that the kind of information that the division is trying to gather is found on what is called the "Aurora" form - the admission form. A unique identifier (which consists of the client's initials, date of birth, and the last four digits of his/her social security number) is created from that information; the division does not use the client's full name or full social security number. Attached to the identifier will be information such as the client's diagnosis, living situation data, legal situation, and his/her general function level. The identifier will later be used to link that client to what is called the "encounter," which is when the person comes in for treatment on any given day; that information will be matched up with that service, the cost of that service, and the amount of time that service took, so that the division can build a profile detailing how much each individual is using certain services. This information will then be used to make program decisions.

MS. HENRY added that all of the information gathered is encrypted at the mental health center before it is sent into the department, where it is then handled by two different individuals who will be the only people in the state that have the code to decrypt and access that information. She said that as far as the division is able to discern at this time, the deadline established for the privacy portion of the federal Health Insurance Portability and Accountability Act (HIPAA) will be about two years. She said that the division believes it has established the same standards as the federal regulations. In response to questions, she said that HB 174 will enable the

division to provide the legislature as well as the Alaska Mental Health Trust with performance measures. In defense of Amendment 1, she explained that it will enable the division to gather two years' worth information to form a baseline; then, via HB 174, the division can require mental health providers to continue to submit data, and thus the division will be able to track expenditures and patterns of mental health problems in different locations.

Number 1791

PAT DAVIDSON, Legislative Auditor, Legislative Audit Division, Legislative Agencies & Offices, mentioned that the impetus for HB 174 was the result of a couple of audit reports detailing the escalating cost of community mental health programs. Between 1992 and 1997 the numbers went from zero Medicaid dollars up to $15 million; the state's share went from $31 million to $39 million. The questions asked as a result of this growth were: "What's going on?" and, "Is this being well managed?" What the Legislative Audit Division found is that with regard to Medicaid, sufficient information was being collected so that the [DHSS] could analyze its regulatory efficiency, but when it came to state grants, the Legislative Audit Division ran into a wall because, while Medicaid is a fee for service, state grants were going out without any identification of who was being served or what services were being provided. She said she believes that HB 174 will allow such information to be collected, and that it will enhance the [DHSS's] ability to account for those millions of dollars that go out in state grants.

REPRESENTATIVE FATE mentioned that HB 174 is accompanied by a zero fiscal note from [the DHSS]. He added that HB 174 will allow [the DHSS] to comply with the Legislative Audit Report.

CHAIR ROKEBERG asked whether any state [grant] funds go to private providers of mental health services.

MS. HENRY replied that to her knowledge, all of [the entities that receive state grant funds] are "community mental health nonprofits." She pointed out that HB 174 speaks specifically to community mental health centers.

Number 1572

REPRESENTATIVE BERKOWITZ made a motion to adopt Amendment 1 [text provided previously].

Number 1570

REPRESENTATIVE COGHILL objected for the purpose of reviewing Amendment 1. After doing so, he withdrew his objection.

Number 1540

CHAIR ROKEBERG noted that there were no further objections to Amendment 1. Therefore, Amendment 1 was adopted.

Number 1532

REPRESENTATIVE MEYER moved to report HB 174, as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 174(JUD) was reported from the House Judiciary Standing Committee.

HB 228 - SALE OF TOBACCO PRODUCTS

Number 1501

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 228, "An Act relating to the offense of selling or giving tobacco to a minor, to the accounting of fees from business license endorsements for tobacco products, to the disclosure of certain confidential cigarette and tobacco product information, to notification regarding a cigarette manufacturer's noncompliance with the tobacco product Master Settlement Agreement, to business license endorsements for sale of tobacco products, to citations and penalties for illegal sales of tobacco products; and providing for an effective date." [Before the committee was CSHB 228(L&C).]

Number 1477

JOHN MANLY, Staff to Representative John Harris, Alaska State Legislature, presented HB 228 on behalf of Representative Harris, the sponsor. He explained that Representative Harris, as chairman of the House Finance Subcommittee on the Department of Health and Social Services (DHSS) budget, became quite alarmed to learn that Alaska is going to lose $1.5 million of a substance abuse grant from the federal government as a penalty because too many Alaskan merchants sell cigarettes to kids. He said HB 228 attempts to bolster the state's efforts to stop those sales.

MR. MANLY noted that because of changes that occurred in the House Labor and Commerce Standing Committee (HL&C), the fines have been reduced and have been relocated from the criminal statutes to the civil statutes. He opined that "the hammer" for a merchant who sells tobacco [products] to minors is the suspension of his/her ability to sell tobacco products at all. He noted that current law merely provides for a $300 fine for the clerk who sells a tobacco product to a minor. The current version of HB 228 includes an additional $300 fine for the endorsement holder and a 20-day suspension of the tobacco endorsement. He confirmed that the fine for the clerk remains $300 regardless of how many repeat offenses occur, but the fine for the endorsement holder and the length of time the endorsement is suspended increases with each repeat offense: $300 for a first offense, $500 for a second offense, $1,000 for a third offense, and $2,500 for a fourth [or subsequent] offense.

MR. MANLY relayed that the sponsor is interested in affecting any ongoing sales to minors by these businesses; thus the suspension of the endorsements is really the hammer in HB 174.

CHAIR ROKEBERG mentioned that he is concerned that the fines proposed by HB 228 are too high.

REPRESENTATIVE MEYER noted that the problem is one of preventing kids from getting tobacco products. He remarked that Anchorage has improved but could improve more, in addition to making improvements in the rural areas. He said putting all the tobacco products behind the counter is going to help prevent access by minors, but more should also be done.

Number 1087

REPRESENTATIVE OGAN relayed that some minors whom he knows have informed him that they are able to simply go into stores and purchase tobacco products; hence, enforcement is often lacking. Notwithstanding this and the fact that $1.5 million of federal funds will be lost because of these violations, he said he still has concerns regarding the expansion of [the DHSS's] enforcement authority.

Number 0992

ELMER LINDSTROM, Special Assistant, Office of the Commissioner, Department of Health & Social Services (DHSS), explained that Section 10 gives authority to the DHSS to issue citations.

Conceptually, what [the DHSS] is doing currently and wants to continue to do is contract with local law enforcement agencies to undertake this activity. Historically, local law enforcement has not been aggressive in enforcing the tobacco laws; they have limited resources and have had to set priorities, and this issue, unfortunately, has not risen to the top of their list. Part of the funding provisions of HB 228 will go towards continuing and increasing the contracts with local law enforcement so that they can do "undercover buys" and other enforcement activities. He noted, however, that there will be locations in the state where either there is no local law enforcement or local law enforcement (for whatever reason) is unable or unwilling to participate; yet the state is still going to have an obligation under the federal law to do enforcement activities in all areas of the state. He explained that Section 10 is a fall back provision that will give [the DHSS], in the absence of local law enforcement, the authority to initiate its own enforcement activities. It is the desire of [the DHSS] to use persons who have a law enforcement background in order to ensure that these activities are undertaken appropriately.

Number 0862

EDWIN J. SASSER, Tobacco Enforcement Coordinator, Division of Public Health (DPH), Department of Health & Social Services (DHSS), noted that he himself is a retired law enforcement administrator. He said he is currently putting together contracts, and speaking and negotiating with 15 different police chiefs across the state. There are agreements and contracts ready to go for this period; he noted that this was also done last year, very successfully, with three jurisdictions. He said he anticipates that [these contracts] will grow, and thus a majority of activity for the enforcement of tobacco laws (especially those related to selling to minors) will be through the contracts that [the DHSS] will have with local police.

MR. SASSER, too, noted that there are a number of areas that either have no local police or, for one reason or another, the local police don't want to get involved personally. However, through the meetings that he is having with the police chiefs, he has been assured that if he is in their area and lets them know that he is there and working, they'll provide support and backup should he need it. He explained that in areas of the state that do not have borough police protection, since the Department of Public Safety (DPS) is tasked with other things, he could be the only person in those areas enforcing the tobacco laws. He noted that he is an experienced officer and thus feels

comfortable in that role, and that he has participated in this type of activity with the full knowledge and support of whatever local agencies are in those areas.

REPRESENTATIVE OGAN said he is wondering what tactics are used to enforce tobacco laws in rural villages where new faces in town are closely scrutinized.

MR. SASSER replied that it may very well be the case that new people stand out, but a survey conducted last year indicated that in 61 percent of the cases, those new faces were sold to anyway. He said "we" don't always use new faces; sometimes kids who live in the communities are used for "control buy" activities. Whatever the case, whether the people were recognized as local folks or not, the "buy" rate in the rural environment is still nearly two out of three successful attempts. The areas with the most contract activity with local law enforcement (for example, in the Fairbanks/Northstar areas) are down to a 21.5 [percent] noncompliance rate, with the goal being a 20 percent noncompliance rate. Statewide, he noted, the noncompliance rate is 33-34 percent, which means "we" still have a ways to go in most areas of the state.

Number 0630

REPRESENTATIVE MEYER asked Mr. Sasser whether he checks with village government before proceeding with enforcement activities, and whether there is any animosity regarding these activities.

MR. SASSER said he has not run into any animosity, although most of the activity in the villages thus far has merely been survey activity. He added that he has been working with Volunteer Public Safety Officers (VPSOs), that he has a memorandum of [understanding] (MOU) with the courts and the DPS going into place, and that he always touches base with the local police. He explained that his goal in this process is to take the time on the front end to put together a system that works for years to come. He noted that in the past, [the DHSS] has "done some hurry-up-collect-data" to satisfy federal reporting requirements. From a cost accounting standpoint and an effectiveness standpoint, it makes the most sense to merge the compliance and data collection process with enforcement whenever possible; it doesn't make any sense to buy two tickets to New Stuyahok, for example, when one will suffice. He said a goal is to combine enforcement with the data collection that the "feds" require and tie all of that into the vendor [advertisement] and

the other pieces of tobacco control; enforcement is just one small piece of tobacco control but it's the piece that his contracting officers and he can do something about.

CHAIR ROKEBERG asked Mr. Sasser to comment on the reluctance of local law enforcement officers in small communities to enforce the tobacco laws because of a fear of retribution.

MR. SASSER, after noting that he is no expert on this topic, said he has spoken with many VPSOs who have indicated that there are a number of laws that they are reluctant to administer because of the nature of a small community. There are also, in all fairness, a number of laws that they are not equipped to deal with; putting together an operation that involves employing an underage confidential informant to participate in an enforcement activity is one of those. As far as the larger departments go, he added, the argument that he hears is that felonies take priority over misdemeanors and misdemeanors take priority over violations; without "emphasis-patrol highway-dollars," certain types of "minor" violations would not be pursued. He added that this method of funding is an accepted practice in law enforcement.

Number 0316

CHAIR ROKEBERG said that he, too, has concerns about giving the DHSS the legal authority to issue citations for violations, which are one step below criminal activity. He asked whether the [DHSS] would have any objections to an amendment clarifying that [the DHSS] is contracting with local law enforcement and/or using designated personnel who are properly trained in determining probable cause and other legal issues.

MR. SASSER opined that neither he nor another appropriate agent from the DPH would necessarily need to meet the "police standards equivalency". He pointed out that in most cases, [the DHSS} will be contracting with local law enforcement, and under the authority granted by HB 228, will be able to use existing officers outside of their jurisdictions once some procurement difficulties are overcome. He noted that this is a narrow band of authority and involves training personnel - similar to the Food and Drug Administration (FDA) training - prior to investing them with the authority to cite. He offered to place any appropriate requirements within the protocols that he has established.

CHAIR ROKEBERG noted that currently there are no statutory "sideboards" included in HB 228. He said he would like to see an amendment that will narrow the list of who will have the authority to give out citations.

MR. LINDSTROM said that conceptually [the DHSS] agrees; along with the Department of Law (DOL), [the DHSS] will try to work up an appropriate amendment.

Number 0072

DWAYNE D. JONES, Anchorage Police Department (APD), testified via teleconference and explained that he is taking over the tobacco enforcement section of the APD. He noted that when they went into rural areas, the minors used for enforcement purposes did not, unfortunately, have any problems purchasing tobacco products from local stores.

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Number 0001

MR. JONES noted that the suspension of the tobacco endorsement is "a pretty big thing for these businesses out here." He mentioned a desire to bring the frequency of identification (ID) checks for the sale of tobacco products up to the same level as for the sale of alcohol.

MR. LINDSTROM, in response to questions regarding page 7, pointed out that the language stating, "Each day a violation continues after a citation for a violation has been issued constitutes a separate violation" refers to the requirements for signage - the sign that says no one can purchase tobacco products if they are under the age of 19 - and to the law relative to "loosies."

MR. SASSER added that this provision could also apply to an inappropriately placed vending machine. He explained that if a business receives a citation but does not respond, each additional day constitutes a separate violation.

CHAIR ROKEBERG pointed out that the language also refers to the statute pertaining to the sale of tobacco products to minors and is redundant.

MR. SASSER replied, "I don't know why [AS 11.76.]100 is included there.

CHAIR ROKEBERG requested that this provision be "cleaned up by Monday."

Number 0380

DAN BRANCH, Assistant Attorney General, Commercial Section, Civil Division (Juneau), Department of Law (DOL), explained that this language on page 7, lines 6-7, does refer to violation of Title 11 that involves the placement of vending machines. Current statute says that a vending machine cannot be placed in a location that is generally accessible to someone under the age of 19. If law enforcement issues a citation, and the vending machine is not moved, law enforcement can come back and issue another citation.

CHAIR ROKEBERG suggested that any cumulative effect of those penalties should be clarified via an amendment. He said he did not mind penalizing someone for selling tobacco products to minors, but opined that if it is simply a case of having a vending machine inadvertently placed in the wrong location, it is not fair to impose the same high penalties.

[HB 228 was held over.]

ADJOURNMENT

Number 0536

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 1:05 p.m.