ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 8, 2002
1:45 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair

OTHER LEGISLATORS PRESENT

Representative Harry Crawford

COMMITTEE CALENDAR

HOUSE BILL NO. 317
"An Act relating to stalking and amending Rule 4, Alaska Rules of Civil Procedure, and Rule 9, Alaska Rules of Administration."

- MOVED CSHB 317(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 295
"An Act relating to prohibiting the use of cellular telephones when operating a motor vehicle; and providing for an effective date."

- HEARD AND HELD

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 316
"An Act relating to trusts, including trust protectors, trustee advisors, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment; and providing for an effective date."

- MOVED SSHB 316 OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 317
SHORT TITLE:STALKING & PROTECTIVE ORDERS
SPONSOR(S): REPRESENTATIVE(S)CRAWFORD

Jrn-Date	Jrn-Page		Action
01/14/02	1958	(H)	PREFILE RELEASED 1/11/02
01/14/02	1958	(H)	READ THE FIRST TIME - REFERRALS
01/14/02	1958	(H)	JUD, FIN
01/28/02	2086	(H)	COSPONSOR(S): GUESS
03/06/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/06/02		(H)	Heard & Held MINUTE(JUD)
03/18/02	2593	(H)	COSPONSOR(S): DYSON
04/08/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 295
SHORT TITLE:PROHIBIT CELL PHONE USE WHEN DRIVING
SPONSOR(S): REPRESENTATIVE(S)LANCASTER

Jrn-Date	Jrn-Page		Action
01/14/02	1952	(H)	PREFILE RELEASED 1/4/02
01/14/02	1952	(H)	READ THE FIRST TIME - REFERRALS
01/14/02	1952	(H)	JUD
01/14/02	1952	(H)	REFERRED TO JUDICIARY
03/18/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/18/02		(H)	Scheduled But Not Heard
03/27/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/27/02		(H)	-- Meeting Canceled --
04/08/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 316
SHORT TITLE:POWERS OF APPOINTMENTS/TRUSTS/CREDITORS
SPONSOR(S): REPRESENTATIVE(S)MCGUIRE

Jrn-Date	Jrn-Page		Action
01/14/02	1958	(H)	PREFILE RELEASED 1/11/02
01/14/02	1958	(H)	READ THE FIRST TIME - REFERRALS
01/14/02	1958	(H)	JUD
03/01/02	2438	(H)	SPONSOR SUBSTITUTE INTRODUCED
03/01/02	2438	(H)	READ THE FIRST TIME - REFERRALS
03/01/02	2438	(H)	JUD
04/08/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DAVID D'AMATO, Staff
to Representative Harry Crawford
Alaska State Legislature
Capitol Building, Room 426
Juneau, Alaska 99801
POSITION STATEMENT: On behalf of the sponsor, Representative Crawford, presented Version R of HB 317.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
PO Box 110300
Juneau, Alaska 99811-0300
POSITION STATEMENT: Noted that the administration supports HB 317.

REPRESENTATIVE KEN LANCASTER
Alaska State Legislature
Capitol Building, Room 421
Juneau, Alaska 99801
POSITION STATEMENT: Sponsor of HB 295.

JUSTIN CARRO, Intern
to Representative Ken Lancaster
Alaska State Legislature
Capitol Building, Room 421
Juneau, Alaska 99801
POSITION STATEMENT: Assisted with the presentation of HB 295.

MARY MARSHBURN, Director
Division of Motor Vehicles (DMV)
Department of Administration (DOA)
3300B Fairbanks Street
Anchorage, Alaska 99503
POSITION STATEMENT: Provided comments during discussion of HB 295.

DAVID HUDSON, Captain
Administrative Services Unit
Central Office
Division of Alaska State Troopers (AST)
Department of Public Safety (DPS)
5700 East Tudor Road
Anchorage, Alaska 99507-1225

POSITION STATEMENT: Provided comments during discussion of HB 295.

MARK LOSCHKY, Regional Director
External Affairs
AT&T Wireless Services, Inc.
617 Eastlake Avenue East
Seattle, Washington 98109
POSITION STATEMENT: Testified in opposition to HB 295.

ROGER BURNS
2559 Dale Road
Fairbanks, Alaska 99709
POSITION STATEMENT: Testified in opposition to HB 295.

MARY ANN PEASE, Vice President
Corporate Communications
Alaska Communications Systems (ACS)
600 Telephone Avenue
Anchorage, Alaska 99503
POSITION STATEMENT: Provided comments during discussion of HB 295.

JOAN PRIESTLEY, M.D.; Associate
Assembly of Learning and Health (ph)
3705 Arctic Boulevard
Anchorage, Alaska 99503
POSITION STATEMENT: Testified in opposition to HB 295.

REPRESENTATIVE LESIL McGUIRE
Alaska State Legislature
Capitol Building, Room 418
Juneau, Alaska 99801
POSITION STATEMENT: Sponsor of SSHB 316.

STEPHEN E. GREER, Attorney at Law
PO Box 24-2903
Anchorage, Alaska 99524-2903
POSITION STATEMENT: Assisted with the presentation of SSHB 316 and responded to questions.

DOUGLAS J. BLATTMACHR, President
Chief Executive Officer (CEO)
Alaska Trust Company
1029 West Third Avenue, Suite 601
Anchorage, Alaska 99501-1981

POSITION STATEMENT: Testified in support of SSHB 316 and responded to questions.

DAVID G. SHAFTEL, Attorney
550 West 7th Avenue, Suite 705
Anchorage, Alaska 99501
POSITION STATEMENT: Urged the committee's support of SSHB 316 and responded to questions.

ACTION NARRATIVE

TAPE 02-45, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting back to order at 1:45 p.m. Representatives Rokeberg, James, Coghill, Meyer, Berkowitz, and Kookesh were present at the call to order. [For minutes on the Division of Insurance update, see the 1:15 p.m. minutes for this date.]

HB 317 - STALKING & PROTECTIVE ORDERS

Number 0021

CHAIR ROKEBERG announced that the first order of business would be HOUSE BILL NO. 317, "An Act relating to stalking and amending Rule 4, Alaska Rules of Civil Procedure, and Rule 9, Alaska Rules of Administration." [Adopted as a work draft on 3/6/02 was the proposed committee substitute (CS) for HB 317, version 22-LS1258\J, Luckhaupt, 3/5/02.] Chair Rokeberg noted that the committee also had for its consideration the proposed committee substitute (CS) for HB 317, version 22-LS1258\R, Luckhaupt, 4/5/02.

Number 0029

REPRESENTATIVE BERKOWITZ moved to adopt the proposed committee substitute (CS) for HB 317, version 22-LS1258\R, Luckhaupt, 4/5/02, as a work draft. There being no objection, Version R was before the committee.

Number 0072

DAVID D'AMATO, Staff to Representative Harry Crawford, Alaska State Legislature, sponsor, said, on behalf of Representative Crawford, that to alleviate concerns expressed by the committee,

Version R does not include the mandatory arrest provisions regarding child protective injunctions. He elaborated:

> [Subsections (a)(1) and (2) of Section 1] simply identify how someone goes about committing the crime of violating a protective order. [Subsection (a)(1)] indicates that that section is a domestic violence protective order, and [subsection (a)(2)] indicates that it is now a new ... [paragraph] for a stalking protective order. Section 2 of the bill ... redefines a domestic violence protective order on [page 2, line 6]; that's redefined as AS 11.56.740(a)(1), which, as I stated earlier, just refers only to the domestic violence protective order, which is already in law. So, there's no mandatory arrest for a stalking protective order under ... [Version R].
>
> Section 3 gets into the particulars of the stalking protective orders, and this - again, to accommodate the committee - follows the domestic violence protective-order language as closely as it can while still maintaining that it's acting as a stalking protective order. In this regard, the bill was modified to that method to make it easier for practitioners to understand what the legislative intent was. ... Nothing else has really changed in terms of the definitions; it's just simply followed the domestic violence protective-order bill, which was the majority of the committee's concern.

Number 0235

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said simply that the DOL supports HB 317.

Number 0333

REPRESENTATIVE JAMES moved to report the proposed committee substitute (CS) for HB 317, version 22-LS1258\R, Luckhaupt, 4/5/02, out of committee with individual recommendations and the [accompanying] fiscal notes. There being no objection, CSHB 317(JUD) was reported out of the House Judiciary Standing Committee.

CHAIR ROKEBERG called an at-ease from 1:50 p.m. to 1:52 p.m.

HB 295 - PROHIBIT CELL PHONE USE WHEN DRIVING

Number 0360

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 295, "An Act relating to prohibiting the use of cellular telephones when operating a motor vehicle; and providing for an effective date."

Number 0438

REPRESENTATIVE KEN LANCASTER, Alaska State Legislature, sponsor, offered that HB 295 will help ensure the safety of Alaska's roadways by limiting the use of cellular telephones ("cell phones") in motor vehicles to only "hands-free" units. He remarked that new technologies are available for hands-free cell phones, and indicated that HB 295 encourages the use of those type of units in motor vehicles. He remarked that AT&T Wireless Services, Inc., is giving away a hands-free unit with every cell phone that it sells, and that there are mechanisms with which to convert a car radio into a speaker for a cell phone, thus turning a regular cell phone into a hands-free unit. He suggested that encouraging "non-use" of [regular] cell phones will save lives, adding that "everyone must share the road, and we all share in the safety concerns of others."

REPRESENTATIVE JAMES referred to subsection (c) [of the proposed committee substitute (CS) for HB 295, version 22-LS1176\F, Ford, 2/11/02 ("Version F")], which says, "'cellular telephone' does not mean a citizens band radio". She noted that a lot of people - for example, those in the trucking industry - depend on citizens band (CB) radios, and asked why using a cell phone is different from using a CB radio.

REPRESENTATIVE LANCASTER said that he did not know that it is any different; however, HB 295 is not attempting to limit the use of a technology - such as that for CB radio - that already has a commercial use established. He mentioned that the types of CB radios that he was familiar with had the capability of being used in a hands-free manner, and he is assuming that the same is true of modern versions.

REPRESENTATIVE MEYER, acknowledging that using a cell phone while driving can be distracting, noted that handouts in members' packets list several other types of driving distractions: things outside the vehicle, other occupants, adjusting audio equipment and climate controls, eating and

drinking, to name a few. He pondered whether, while the legislature is attempting to limit cell phone use and thereby the distraction caused by such use, some of those other types of distractions ought to be regulated as well.

Number 0611

REPRESENTATIVE LANCASTER alluded to the synopsis of a study conducted in England that indicates that there is:

> Some kind of a factor that enters into your thought process as you get focused on your phone call. You actually get more than distracted versus reaching for the cup of coffee or [something else in the vehicle]. It's a different thought process that goes along with trying to concentrate on what somebody is saying on the phone and what your answer or response may be; and apparently the cell phone is the ... largest distracter of all of them. And so, ... apparently this study ... proves that point, that the cell phone is more distracting than any of the others.

REPRESENTATIVE MEYER, referring to a chart produced by [the National Accident Sampling System (NASS) Crashworthiness Data System (CDS)], noted that cell phone use is one of the least distracting of all of the distractions listed.

REPRESENTATIVE JAMES said she agrees that cell phone use can be distracting, and noted that although she has no difficulty talking and ending a call on a cell phone while driving, if she has to dial a number while driving, she simply pulls off to the side of the road to place the call. She mentioned that she has noticed that many drivers have their car stereo systems playing so loudly that she cannot see how those drivers can concentrate on anything else. She remarked that if she were to choose which type of driving distraction to target first, it would be the distraction of playing a car stereo system too loudly, rather than using a cell phone.

CHAIR ROKEBERG noted that a few years ago he sponsored legislation prohibiting loud vehicle sound systems, but it did not pass. He then requested an explanation of the differences between Version F and the original HB 295.

Number 0854

JUSTIN CARRO, Intern to Representative Ken Lancaster, Alaska State Legislature, sponsor, explained that Version F includes a provision allowing cell phone use during an emergency, for the reporting of a crime, or during the performance of duties by emergency services personnel. Also, Version F specifies "driving a motor vehicle" instead of "operating a motor vehicle" - this change allows drivers who have pulled off to the side of the road to use a regular cell phone - and that the term "highway" has been changed to "public roadway" so that more areas are included. And, as Representative James noted, Version F contains language specifying that a "'cellular telephone' does not mean a citizens band radio". Version F also contains a provision allowing the fine to be waived upon the completion of a driver safety education course; this provision recognizes the need to educate society. In response to a question, he confirmed that violation of this proposed law would result in an infraction.

Number 0919

REPRESENTATIVE MEYER moved to adopt the proposed committee substitute (CS) for HB 295, version 22-LS1176\F, Ford, 2/11/02, as a work draft. There being no objection, Version F was before the committee.

REPRESENTATIVE KOOKESH, noting that it appears that Congress is looking to implement similar restrictions nationally, asked whether it would be beneficial to "do it before they require us to do it."

MR. CARRO said that the last he'd heard, that proposed federal legislation "wasn't going to really go anywhere." He opined that if similar federal legislation is proposed in the future, it would just be in addition to a state law, should HB 295 pass.

REPRESENTATIVE KOOKESH said he is interested in knowing why the proposed federal legislation didn't pass, and what the reasoning is behind having the state adopt HB 295 - whether there are statistics that show what "this distraction" is actually causing, in terms of accidents in Alaska.

REPRESENTATIVE LANCASTER said that for him it is strictly a safety issue, and remarked that while driving around in his community - the Soldotna-Kenai area - he has seen a number of "people off in the ditch," for example, because of inattention while driving and talking on the cell phone. He also relayed that insurance companies now prohibit their employees from

talking on their cell phones while driving, unless it is a hands-free unit, because of accidents and costs associated with insurance claims from those accidents.

REPRESENTATIVE KOOKESH again asked whether there were any statistics that led to the development of HB 295. "'The sky is falling' scenario doesn't work very well with me; I want to see a reason why we're doing this," he said.

Number 1045

MR. CARRO said:

> There are no specific Alaskan statistics because we don't collect them, but they have changed their reporting forms to reflect it now, so those statistics will be available in a few years. But as far [as] ... national statistics go, ... using cell phones usually result in one of two things: either failing to stop and striking something, or swerving out of their lane and causing an accident to [indisc.] vehicle. But the liability for negligence, if it causes an accident -- for example, one suit cost a driver $3 million when there was a death involved.
>
> And there are between 500 and 1,000 fatalities each year, nationally, related to driving with a cell phone. And for each of those accidents, there are 660 more accidents happening which involve damage to property, ranging anywhere between ... $300 and $65,000 per year - total - with an average cost of $37,000 in damages per accident. Eighty five percent of the people surveyed in a national survey said they use a cell phone while driving, and that results in roughly 75 million people a day talking on their phones while they're driving - nationally - which adds to a large number of distractions.

CHAIR ROKEBERG asked what the increase has been in the "national GDP [gross domestic product] labor productivity" due to those 75 million people using their cell phones. He said he suspects that "it'd be pretty significant."

REPRESENTATIVE LANCASTER countered, "I'd suggest that one life isn't worth that."

REPRESENTATIVE KOOKESH asked whether a person violating this proposed statute would be charged with reckless driving.

MR. CARRO said: "It would be a fine above and beyond normal reckless driving" and specifically targets cell phone use. In response to another question, he said that there would not be a point deduction for this particular violation.

REPRESENTATIVE JAMES remarked that dialing a phone number while driving, not simply talking on the phone, creates the main distraction; therefore, since even with a hands-free unit a person still has to dial a phone number, he/she would still be distracted. She mentioned that not everyone can be expected to get a voice-activated unit.

CHAIR ROKEBERG suggested that Congress's delay in passing this type of legislation stems from a desire to wait until the technology for voice-activated units improves and becomes more available.

Number 1339

MARY MARSHBURN, Director, Division of Motor Vehicles (DMV), Department of Administration (DOA), testified via teleconference. She said that use of cell phones falls into a category that the DMV calls distractive driving, and the overall field of distractive driving is driver inattention, during which the driver doesn't sufficiently address the factors for safe operation of the vehicle - primarily because his/her attention state is limited. Some of the things that go into distractive driving include what is known as "looked but didn't see," in which the driver has some sort of flawed visual surveillance; inattention - preoccupation with competing thoughts; or internal distractions such as turning to referee the kids fighting in the back seat or turning to look toward the passenger. Compounding all of these are the technological advances that have taken place in the auto industry - compact disk (CD) players, DVD players, navigation aids, and electronic seat adjustments - all of which contribute to distractive driving.

MS. MARSHBURN said the issue of what effect cell phones have on driving has received national attention: specifically, whether they increase the risk of crashes and, if they do, what should be done about them. She relayed that according to the information which she has read, there are a number of states that have begun to look at this issue. What has come across, however, is that there is an almost universal lack of

statistics, mostly because, since the use of cell phones is a fairly recent phenomena, accident reports hadn't connected cell phone use to an accident by saying that a person was using a cell phone at the time. She explained that currently, Alaska does not have any such statistics; however, the accident report has been modified, and so those statistics will be available in the future.

MS. MARSHBURN pointed out that the national effort has been geared toward education and data collection, rather than the passage of laws. Anecdotally, National Highway Traffic Safety Administration (NHTSA) information reports and reports gathered from other states indicate that in terms of distraction, using a hands-free cell phone is no better than using a hand-held cell phone. The problem with using a cell phone is two fold, she said: one, the driver is physically removing his/her hand from the steering wheel, and second - and more important - is the fact that the driver, in order to have a conversation, must be actively engaged - it is an interactive process - unlike simply having one's thoughts wander off the task of driving. Therefore, when it comes to the distraction that is posed cognitively, that occurs regardless of what type of cell phone is used.

MS. MARSHBURN concluded by saying that the fiscal impact of HB 295 on the DMV would be minimal; using a cell phone while driving would simply be added to the list of violations, and the driver safety education course offered as an alternative to paying the fine is already available on-line.

Number 1587

DAVID HUDSON, Captain, Administrative Services Unit, Central Office, Division of Alaska State Troopers (AST), Department of Public Safety (DPS), testified via teleconference, confirming that with the updated motor vehicle collision report forms, it is now possible to collect data regarding cellular phone usage. He explained that there are currently three [laws] which could be utilized when a person's driving behavior becomes erratic, or causes an accident, because of cellular phone use. He said those three [laws] are: reckless driving - [AS 28.35.040]; negligent driving - [AS 28.35.045]; and driver to exercise care - 13 ACC 02.545 - which says, "Every driver of a vehicle shall exercise care to avoid colliding with a pedestrian, an animal or another vehicle", and which is generally used in cases of driver distraction, as was recounted by Ms. Marshburn.

REPRESENTATIVE JAMES noted that there is a difference between those laws and HB 295 in that HB 295 could be applied even in situations in which a person is not driving erratically; law enforcement officers could issue tickets to persons that are simply seen holding a cell phone to their ear while driving.

REPRESENTATIVE COGHILL asked Captain Hudson whether observing someone applying makeup while driving would give him cause to stop that person under the aforementioned laws.

CAPTAIN HUDSON said that if he saw someone applying makeup while driving, but the person was driving at a safe speed in a straight line and not creating any hazardous conditions, he would not pull that driver over.

Number 1812

MARK LOSCHKY, Regional Director, External Affairs, AT&T Wireless Services, Inc., testified via teleconference, and said that AT&T Wireless respectfully opposes HB 295. He said:

> We understand that driving safely is the first priority when operating a motor vehicle, and for that reason AT&T Wireless has been promoting safe and responsible driving for several years. We have developed and continue to provide tools to encourage safety and responsibility as our customer's first concern when operating a motor vehicle.

MR. LOSCHKY noted that his company produces a handout that provides safety tips pertaining to the use of cellular phones while driving, adding that the handout did not, however, specifically reference voice-activated units. He briefly mentioned some of the features available and soon to be available with cellular phone products. He offered AT&T Wireless's belief that education and the strict enforcement of existing traffic laws are the best way to encourage drivers to remain focused on the road. He said that he is unaware of any statistics indicating that simply requiring hands-free units will increase safety. He mentioned that none of the reports referred to in his company's handout recommend mandating the use of hands-free devices, and that states which have conducted studies on this issue have not found statistical justification for adopting a hands-free requirement. He, too, noted that the [NASS CDS] chart indicates that of the many types of driver distractions that contribute to accidents, cell phone use makes

up only a small portion of the total; thus he surmised that the hands-free requirement is not warranted.

Number 2065

ROGER BURNS testified via teleconference in opposition to HB 295. After noting that he is an amateur radio operator, he opined that there will always be drivers who are easily distracted from the task of driving; that education and improved technology - and increasing familiarity with that technology - are key factors to eliminating problems caused by cell phone use; and that having a conversation on a cell phone is just as distracting as having a conversation with a passenger. He suggested that the committee should not pass HB 295.

Number 2121

MARY ANN PEASE, Vice President, Corporate Communications, Alaska Communications Systems (ACS), testified via teleconference, and said that ACS is a strong advocate of cellular phones being used responsibly. She elaborated:

> While we do not oppose HB 295 - we realize that safety is a very key issue - we do hope that you take note of some of the instances where this bill could pose some problems. As Representative Meyer stated ..., cellular phones are just one of the many distractions, and we've been hearing about some of those distractions from many of the people that testified here today. Pulling over to place a call is a safe practice, and one that our customers, we hope, use. It is just one of the many safety tips we provide to our customers, and there are numerous other safety tips that are out there and are available. But you know there are other sides to cellular phone use as well, and many times cellular phones have come in and been true savers when it come to an emergency situation.
>
> So even though there are some negatives associated with them being used irresponsibly, there are the responsible users of cell phones that have provided safety and health and emergency service, and others, that would not have been available without the use of cellular phones. Every single one of the cellular phones that ACS sells today ... come equipped with a hands-free-type device - more like a headset - that

can be placed on the phone and used, and it's available at very nominal prices; sometimes they're even given away with the phone as part of an offering. The hands-free kits are also available; they are slightly more expensive. It's when you get into the issue of truly voice-activated cellular phones that you're talking about phones that are slightly more expensive - they are available on the higher model cars - and are also limited in the choices that are being offered by a "cell company."

REPRESENTATIVE BERKOWITZ asked whether there is a difference in the accident rate between "hand-held and [hands-free] use of cell phones."

MS. PEASE indicated that she is not aware of any statistics that show whether there is such a difference. She noted that hands-free units are not truly hands-free. "You still have to use the pad on the phone to place your call; the only time it's hands-free is when you're responding to the call or you're talking on the phone," she added.

CHAIR ROKEBERG said that that was not necessarily true, noting that the unit in his car has voice recognition.

MS. PEASE replied, however, that that type of voice recognition system is one if the high-end vehicle options. She noted that the hands-free, voice-activated unit available from Motorola, Inc., is not that state of the art with regard to its voice recognition and is sometimes difficult to use.

REPRESENTATIVE BERKOWITZ remarked that even that system is somewhat expensive.

Number 2273

JOAN PRIESTLEY, M.D.; Associate, Assembly of Learning and Health (ph), testified via teleconference, explaining that her organization is devoted to increasing the public's education and awareness of certain issues. She said that she wanted to speak in opposition to HB 295 on behalf of both herself and her organization. She, too, spoke of the [NASS CDS] chart, saying that that chart illustrates information obtained from a study that examined 5,000 accidents over a four-year period. She said that this study concludes: "Distracted drivers who crash their vehicles are more likely to have been engrossed in changing a

CD, eating a hamburger, or quieting a toddler than by using their cellular phones." She continued:

> They found that [29.5] percent of distracted drivers said that some other distraction - something outside the car, or other problems - caused them to crash, ... and only 1.5 percent blamed their cell phones. And [these statistics] seemed to be age related: those under 20 were most likely to be adjusting the radio or CD player, drivers 20 to 29 were most likely to be distracted by other passengers, senior citizens were most likely to be distracted by something outside the car. Now, there are also unintended benefits and unintended burdens, I think, imposed by this legislation.
>
> The burdens, unfortunately, are going to be borne by the public. This is an infraction, which is not punishable by jail time, but infractions can turn into misdemeanors, if I'm correct, if people do not show up for their court date, and now you have a warrant out for someone's arrest for using a cell phone. You're going to punish this by a fine of up to $300 per incident, and I believe there is other legislation raising the limit to $500. We have to be very clear that what this legislation does is criminalize an innocent act.
>
> The trooper [Captain Hudson] wisely said that there is ample legislation already covering the minority of people who demonstrate irresponsible use of a cell phone, just as they could demonstrate irresponsible use of [an] eyelash curler while they're driving down the road. But if this legislation goes through, people don't need to be driving irresponsibly or negligently or recklessly; all they need to be doing is using a cell phone. So I hope you're clear that this legislation adds a new [section that criminalizes an otherwise innocent action].

TAPE 02-45, SIDE B
Number 2390

DR. PRIESTLEY continued:

> I should tell you I spoke to one of the men who run one of the driver's safety courses in Anchorage, and

he said that they are doubling [the] price of a driver safety education course partly, not completely, but partly in anticipation of a large influx of people having to take this course in order to avoid their fine because of this cell phone legislation. I also have a couple of other studies for you out of Europe. A study from London demonstrated that, I quote: "Drivers who listen to fast music in their cars are twice as liable to have an accident as those listening to slower tracks." And this summary also says that previous studies have shown a link between loud music and dangerous driving. And I will send you these other separate packets.

So, my question is -- actually my second point is: Where does this stop? The next thing will have to be, eliminate cell phones entirely, eliminate radios, eliminate passengers, eliminate cigarette smoking in cars - eliminate virtually anything which causes a distraction. And I should tell you, even as a physician, I caused a car to swerve from lane to lane a while back because I reached over to change the radio, and I acknowledge that. So radios, I think, are just as suspect as cell phones....

One more point about these ... other studies: some other people have said, "Who benefits from this?" And what they found was, when they followed the money, ... that the insurance industry ... - sometimes through several layers of organizations which trace back to insurance industries - [has] actually been the "funders," sometimes to a large extent, of some of these other studies. Why? Because the insurance industry will benefit from both ends. If you eliminate a minor distraction, which will decrease the accident rate however small [a] proportion, that's that many fewer payouts - claims - the insurance company has to make.

Number 2295

DR. PRIESTLEY said:

And I do have a question for you because the wording is vague in the bill itself: It simply will impose an infraction, but when [we] go and read the statutes related to infractions, there may be points involved

also. So, are you going to give someone points on their license for merely using a cell phone, which can jack ... insurance company rates to the point where the people will forego their insurance and become an uninsured driver? And I think that's a potential public health problem that is an unintended ramification of this legislation.

And my final thought is, ... I personally think that this is an intrusive and restrictive [piece of] legislation; it ... represents the government acting as the "nanny state" ... in a place where [we have] ample legislation to already cover people who will misuse the privilege of using a cell phone while they're driving a car. I don't think that this kind of legislation is appropriate for a state that has had such a strong tradition of individual freedom and privacy. And I personally believe that this legislation really demeans the level of competency and responsibility that you impute to the public.... I would suggest respectfully that this bill needs to die a dignified, quiet death in this committee. Thank you for your time.

REPRESENTATIVE MEYER asked Dr. Priestley whether she believes that cell phone use provides a benefit from a "safety/emergency standpoint."

DR. PRIESTLEY said:

Absolutely. We all know what a tremendously unforgiving climate we live in up here; cell phones are a survival tool. You can never ban cell phones in this state. Just for safety reasons, it cannot happen. If you have points attached to someone's license for the mere instant use of a cell phone, without causing damage or driving recklessly, it's going to up their rates - that always happens. And I'm concerned that we're going to have more uninsured people who might later be involved in an accident, where they would have no coverage.

Number 2161

REPRESENTATIVE COGHILL noted that he gave his daughter a cell phone because of its safety benefits, relaying that she was able to use it to get police assistance during an instance when some

men tried to run her off the road while she was on the way to work early one morning.

CHAIR ROKEBERG announced that the committee would hold HB 295 [Version F] over.

HB 316 - POWERS OF APPOINTMENTS/TRUSTS/CREDITORS

Number 2129

CHAIR ROKEBERG announced that the last order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 316, "An Act relating to trusts, including trust protectors, trustee advisors, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment; and providing for an effective date."

Number 2092

REPRESENTATIVE LESIL McGUIRE, Alaska State Legislature, sponsor, said that SSHB 316 attempts to make Alaska's trust laws competitive with other states such as Delaware. She relayed that in 1997 the legislature passed the Alaska Trust Act, which she opined, has been a tremendous success by all accounts. Representative McGuire noted that last year she brought a bill before the committee that did some fine-tuning to that 1997 legislation, and that this area of law is continually changing; thus [SSHB 316] is before the committee today. Representative McGuire highlighted that SSHB 316 makes changes to the "spendthrift trust" area of the law, and adds the ability, similar to Delaware, to have a trust protector and a trust advisor. She pointed out that this ability allows the settlor to have as much control as possible when the decision to give money is made.

Number 1977

STEPHEN E. GREER, Attorney at Law, said that he is interested in ensuring that Alaska has the best trust laws. He noted that although his constituent base is the average Alaskan who wants to protect his/her family, passage of SSHB 316 will indirectly benefit the Alaska trust industry and allow it to remain competitive with trust industries in other states, particularly Delaware. Mr. Greer explained that because Alaska was the first state to pass trust laws, other states have since been able to draft improved legislation. Therefore, SSHB 316, while adding a

few new provisions, mainly clarifies what those in the estate planning community view the law to be.

MR. GREER pointed out that Sections 1 and 2 provide statutory authority for trust provisions that are commonly found in trusts. The legislation also provides clarity to the existing spendthrift provisions, which are presently found under AS 34.40.110. Furthermore, Section 3 adds two new provisions that pertain to "charitable remainder trusts, and grantor repaying unit trusts, and grant retained annuity [trusts]." He noted that these provisions are found in Delaware's law. Moreover, he added, this legislation restates the [American Law Institute's Restatement (Second) of Property ("Second Restatement of Property")] regarding the power of appointments and the extent to which property subject to a power of appointment should be protected from creditor claims.

REPRESENTATIVE BERKOWITZ turned to Section 1 and asked if that section requires the hiring of professional trust protectors because it has to be a disinterested party.

MR. GREER, in response, posed a situation in which he establishes a trust and the Alaska Trust Company, for example, is named as the trustee of that trust. However, he wants to ensure that the Alaska Trust Company isn't going to view [the trust] as a permanent position of employment for itself. Therefore, the settlor could name a disinterested party, a trust protector, that could be given the authority to remove or replace that [trustee] with the trustee of the [trust protector's] choice. Therefore, the provision is actually meant to protect the settlor's intent in creating the trust.

Number 1761

REPRESENTATIVE BERKOWITZ turned to Section 5, which clarified that fraudulent conveyance actions may only be brought against a settlor of a trust and only [with regard to] a specific transfer of assets, and noted that this would be a change to current law. He asked who else would be subject to fraudulent conveyance actions, what other assets might be consumed, and "how are we limiting the scope?"

MR. GREER clarified that this is not a change to existing law. He explained that the novelty of this trust legislation [AS 34.40.110] is that it has really always been the law. For example, a settlor may decide to give someone money, but, being uncertain as to how the money will be used, the settlor names a

trustee. Assuming there is a spendthrift provision - as recognized by the 1875 U.S. Supreme Court case, Nichols v. Eaton - attached to the trust, the beneficiary would have no ability to assign his/her interest in the trust. Moreover, none of the creditors of the beneficiary would be able to attach the interest, assuming that there has been no fraudulent conveyance in transferring the assets into that trust. The novelty of the 1997 law is that it allows an individual, while retaining discretionary interest in the trust, to create a trust and name a trustee, thus ensuring that no creditor of the [settlor] can attach these assets. Mr. Greer noted that three other states have passed laws that copy Alaska's trust laws.

MR. GREER explained that Sections 5 and 6 have to be read together. He pointed out that Sections 5 and 6(g) only deal with the self-settled trust, as just described, that allows the [settlor] to retain discretionary interest in the trust. Under current law, a preexisting creditor is allowed one year after the trust could have reasonably been discovered by that creditor [to be fraudulent] in which to bring a fraudulent conveyance action against [the settlor]. If that action is successful, the spendthrift provision would be held null and void. However, the problem is that the current statute doesn't contain a definition of a preexisting creditor. Therefore, Section 6(g)(1) and (2) provide the definition of a preexisting creditor.

Number 1587

MR. GREER offered an example of a contractor who builds a building that he believes has been built to the specifications. The contractor then decides to do some estate planning and subsequently transfers some property in trust. He explained that the problem with making a transfer in trust is that without maintaining a discretionary interest, the money is gone. Mr. Greer commented that people are hesitant to make such gifts unless they are extremely wealthy. In this example, the [settlor] maintains a discretionary interest and upon death the property will pass on to the children. Subsequent to the [settlor's] death, however, a lawsuit is brought against the settlor regarding the building that he built. The question becomes: at what point in time does the plaintiff have the ability to bring a fraudulent conveyance action against that contractor to attack the transfer in the trust?

MR. GREER related his belief that with the adoption of [Section 6(g)(1) and (2)], the plaintiff - [creditor] - must demonstrate either that the claim was asserted against the contractor prior

to the creation of the trust or that the fraudulent conveyance action is filed within four years of transfer to the trust. He reiterated that these provisions of SSHB 316 attempt to define a preexisting creditor.

REPRESENTATIVE BERKOWITZ inquired as to the source of the language for this legislation.

MR. GREER indicated that there is no specific source for this language.

Number 1430

DOUGLAS J. BLATTMACHR, President, Chief Executive Officer (CEO), Alaska Trust Company, testified via teleconference in support of SSHB 316, remarking that it improves Alaska law, makes Alaska competitive with Delaware, and clarifies some issues.

CHAIR ROKEBERG asked what would happen if an income tax was enacted on trust clients.

MR. BLATTMACHR answered that Alaska's trust clients from outside Alaska would leave within one year and go to Delaware, South Dakota, or Nevada because of the lack of an income tax on foreign trusts.

REPRESENTATIVE BERKOWITZ noted that he has cautioned against including trusts in with an income tax.

REPRESENTATIVE COGHILL asked if there would be any "interface problems" in applying SSHB 316 to existing trusts.

MR. BLATTMACHR responded that he didn't foresee any problems because [the legislation] merely recognizes things that are already included in most trusts.

MR. GREER clarified that only the ability for a settlor to create a charitable remainder trust would be prospective. All other provisions are retroactive and are commonly done in trust instruments; SSHB 316 merely provides the statutory authority to do so.

CHAIR ROKEBERG noted that the legislation does not make it mandatory to have a trust protector; if the owner of a trust desires a trust protector, he/she would have to specifically implement such provisions in his/her trust.

MR. GREER agreed, and confirmed SSHB 316 would allow a settlor to modify an existing trust to provide for a trust protector, but only on the condition that the trust can be amended or modified. He pointed out that there is another provision in Alaska law that allows for modifications or amendments if one returns to court, for instance.

REPRESENTATIVE BERKOWITZ asked if there is anything in statute that would preclude the appointment of a trust protector.

MR. GREER replied no.

REPRESENTATIVE BERKOWITZ inquired, then, whether Section 1 does anything other than codify existing practice.

MR. GREER said that it merely codifies existing practice.

Number 1189

DAVID G. SHAFTEL, Attorney, testified via teleconference. He informed the committee that as a member of the informal group of attorneys that has worked on trusts and related state legislation, and as someone who [deals] with these trusts, he agrees with previous testimony. Mr. Shaftel echoed earlier testimony that SSHB 316 clarifies various provisions already used in trusts now: "This bill clarifies that if a court ever needs to review these trusts and evaluate these provisions, that we have the support of the legislature that they have been statutorily authorized." He informed the committee that about a half dozen or so estate planning attorneys [in Alaska] have reviewed SSHB 316 and are in support of it, and he urged the committee's support.

REPRESENTATIVE BERKOWITZ directed attention to language in Section 3, page 3, line 7, which says: "the transfer was intended primarily [IN WHOLE OR IN PART] to hinder, delay, or defraud creditors or other persons under AS 34.40.010". He said he interpreted this language as a change to the burden of proof required by creditors, and asked Mr. Shaftel for his opinion.

MR. SHAFTEL said this language ensures that in the determination of whether one is going to "set aside a transfer," the motive to [hinder, delay, or defraud] must be a significant and substantial one. Therefore, the word "**primarily**" was inserted.

REPRESENTATIVE BERKOWITZ remarked that in his mind, "significant and substantial" is different than "**primarily**"; "significant and

substantial" could, for example, amount to 20-25 percent of the reason, while "**primarily**" would [necessitate] 51 percent of the reason.

MR. SHAFTEL replied, "Your point is accurate; I can't argue with it."

MR. GREER argued that the [aforementioned language] doesn't really change the law, noting that the motive will always be a question of fact decided by a jury. He pointed out that a transfer restriction can always set aside if one can prove that when the settlor created the trust, there was a fraudulent intent behind it. To prove the fraudulent intent, the plaintiff has to show that the primary purpose of the trust was to defraud the creditor. Therefore, he reiterated, he didn't believe this [language change] adds anything, noting that the main reason people create trusts is for estate planning purposes. In order to set aside the trust, the intent to defraud the creditor can't be merely 1 percent of [the trust]; rather, it has to be to "**primarily**" defraud the creditor. He opined that this is what the court would've had to find in the past.

Number 0896

REPRESENTATIVE BERKOWITZ related his view that [the language change regarding "**primarily**"] has added a second element to be proven. The existing statute requires proof of fraud; however, now the requirement is that [the fraud] is the primary intent. He said that it seems that the balance has been changed. Therefore, he said, he disagrees with Mr. Greer's assertion that [the language is] the same, since [that would mean that] "**primarily**" is equated with "in whole or in part". He opined that the two terms are not the same.

CHAIR ROKEBERG asked whether it was [the trust attorneys] or the drafter who suggested the use of "**primarily**".

MR. GREER replied that that language was suggested by [the trust attorneys].

REPRESENTATIVE JAMES, returning to the earlier example of a contractor who builds a building and then establishes a trust, and assuming that the time period pertaining to the contractor's liability hasn't expired, asked whether a fraudulent conveyance action could be made against [the settlor] simply because the trust existed.

MR. GREER, in response, posed a situation in which a builder builds a building, which he thinks is fine. Then the builder decides to transfer money to his children, but a lawsuit is subsequently filed against the builder. Therefore, the question is whether one can set aside a transfer for any reason at all. Mr. Greer said that [SSHB 316] specifies that a transfer can only be set aside if the [plaintiff] can show that the primary intent in transferring the assets to the children was to defraud creditors.

Number 0725

MR. SHAFTEL remarked that all estate planning involves some intent to protect assets. He related his belief that it would be a flimsy provision if all transfers could be set aside merely by proving that someone discussed asset protection with his/her attorney. He noted that almost all of his clients discuss asset protection to some degree, and that it is normal to do so. Therefore, this provision says that if the primary purpose of a transfer was to defraud creditors, then [the transfer] should be set aside. He opined that current law regarding this issue needs clarification because the language is vague.

REPRESENTATIVE BERKOWITZ agreed that the "in part" language is problematic because it implies that the least scintilla of evidence is sufficient, adding that this is not appropriate either. He remarked that it seems to him that if a "significant and substantial reason for the intent, not the primary reason, but a significant and substantial [reason] played into the transfer," then the individual shouldn't be allowed to benefit. He expressed concern with the requirement for proof of primary intent; "that's going to be difficult to get to."

REPRESENTATIVE JAMES commented that "significant and substantial" versus "primary" relates to intent. Although [protection of the trust] could be a substantial reason [for a transfer], it may not be the primary reason. She said she didn't [believe] that "significant and substantial" is equal to "primarily". She opined that the language is trying to convey that if most of the reason for establishing the trust is to defraud creditors, then the trust should be set aside.

REPRESENTATIVE BERKOWITZ agreed, but foresaw "in part" being interpreted as next to nothing, whereas "primarily" amounts to just over 50 percent of the reason, and "significant and substantial" could be somewhere in between.

MR. GREER remarked that the intent is to anticipate future problems. He said that he was unaware of any lawsuit being filed "under this section." He noted that if there is any possibility that a transfer might be set aside, the attorney won't do it. He remarked that this statute has not been abused.

Number 0421

REPRESENTATIVE COGHILL, referring to Section 5, observed that the aforementioned language is critical because the cause of action hinges on it.

MR. GREER said that Representative Coghill was correct. He pointed out that a transfer restriction, a spendthrift provision, will only be set aside under the four circumstances listed in [Section 3], and that (b)(1) specifies that the transfer is primarily shown to be a fraudulent transfer with respect to that creditor. The other circumstances: (b)(2) and (4) aren't being changed, although (b)(3) is being altered to allow for charitable remainder trusts, grantor retained annuity trusts, and unit trusts. Mr. Greer agreed that under (b)(1) of Section 3, in order for the creditor to set aside a transfer restriction, he/she has to establish that the transfer was intended primarily to defraud the creditor.

MR. SHAFTEL pointed out that Section 6 requires that an action or claim can only be brought when a "preponderance of evidence" has been demonstrated. Generally, when proving fraud, the burden of proof is higher, with clear and convincing evidence. By allowing 51 percent [with the use of "primarily"], SSHB 316 protects a plaintiff who is attempting to set aside a transfer to a trust. Use of the term "primarily" is consistent with a liberal burden of proof. He noted that the group he was involved with viewed [the use of "primarily"] as a compromise and agreed that "preponderance of the evidence" was the appropriate approach. Mr. Shaftel said that he felt it to be a balanced and fair approach, both for the settlor and for the plaintiff.

Number 0111

REPRESENTATIVE JAMES moved to report SSHB 316 out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, SSHB 316 was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 0093

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:20 p.m.