

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

April 15, 2002

1:28 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

**COMMITTEE CALENDAR**

HOUSE BILL NO. 319

"An Act relating to civil liability for commercial recreational activities; and providing for an effective date."

- MOVED CSHB 319(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 124

"An Act prohibiting nursing facilities and assisted living homes from employing or allowing access by persons with certain criminal backgrounds, with exceptions."

- HEARD AND HELD

**PREVIOUS ACTION**

BILL: HB 319

SHORT TITLE:RECREATIONAL ACTIVITY LIABILITY

SPONSOR(S): REPRESENTATIVE(S)KOTT

Jrn-Date	Jrn-Page		Action
01/14/02	1958	(H)	READ THE FIRST TIME - REFERRALS
01/14/02	1958	(H)	L&C, JUD
02/11/02	2210	(H)	COSPONSOR(S): DYSON
03/13/02		(H)	L&C AT 3:45 PM CAPITOL 17
03/13/02		(H)	Moved CSHB 319(L&C) Out of Committee

03/13/02		(H)	MINUTE(L&C)
03/15/02	2542	(H)	L&C RPT CS(L&C) NT 1DP 6NR
03/15/02	2542	(H)	DP: KOTT; NR: ROKEBERG, MEYER, HAYES,
03/15/02	2542	(H)	CRAWFORD, HALCRO, MURKOWSKI
03/15/02	2542	(H)	FN1: ZERO(CRT)
03/27/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/27/02		(H)	-- Meeting Canceled --
04/10/02		(H)	JUD AT 1:00 PM CAPITOL 120
04/10/02		(H)	Scheduled But Not Heard
04/15/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 124

SHORT TITLE:NURS.HOME/ASSISTED LIV. EMPLOYEES/VISITOR  
 SPONSOR(S): REPRESENTATIVE(S)HALCRO

Jrn-Date	Jrn-Page		Action
02/09/01	0282	(H)	READ THE FIRST TIME - REFERRALS
02/09/01	0282	(H)	HES, JUD
03/07/01	0501	(H)	COSPONSOR(S): DYSON
03/15/01		(H)	HES AT 3:00 PM CAPITOL 106
03/15/01		(H)	Heard & Held
03/15/01		(H)	MINUTE(HES)
03/19/01	0656	(H)	COSPONSOR(S): STEVENS
03/20/01		(H)	HES AT 3:00 PM CAPITOL 106
03/20/01		(H)	<Bill Canceled>
03/22/01		(H)	HES AT 3:00 PM CAPITOL 106
03/22/01		(H)	Heard & Held
03/22/01		(H)	MINUTE(HES)
04/17/01		(H)	HES AT 3:00 PM CAPITOL 106
04/17/01		(H)	Moved CSHB 124(HES) Out of Committee
04/17/01		(H)	MINUTE(HES)
04/19/01	1061	(H)	HES RPT CS(HES) NT 4DP 3NR
04/19/01	1062	(H)	DP: CISSNA, WILSON, STEVENS, KOHRING;
04/19/01	1062	(H)	NR: JOULE, COGHILL, DYSON
04/19/01	1062	(H)	FN1: (HSS)
04/19/01	1062	(H)	REFERRED TO JUDICIARY
04/19/01	1062	(H)	FIN REFERRAL ADDED AFTER JUD
03/25/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/25/02		(H)	<Bill Postponed>
04/15/02		(H)	JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

LINDA SYLVESTER, Staff  
to Representative Pete Kott  
Alaska State Legislature  
Capitol Building, Room 204  
Juneau, Alaska 99801

POSITION STATEMENT: Presented HB 319 on behalf of the sponsor,  
Representative Kott.

MIKE WINDRED, President  
Juneau Chapter  
Alaska Travel Industry Association (ATIA)  
9085 Glacier Highway, Number 301  
Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of HB 319 and  
responded to questions.

AL CLOUGH  
PO Box 241003  
Douglas, Alaska 99824

POSITION STATEMENT: Testified in support of HB 319 and  
responded to questions.

KIP KNUDSON, Era Aviation, Inc.  
6160 Carl Brady Drive  
Anchorage, Alaska 99502

POSITION STATEMENT: Testified in support of CSHB 319(L&C).

ROBERT WAGSTAFF, Attorney  
425 G Street  
Anchorage, Alaska 99501

POSITION STATEMENT: Testified in opposition to HB 319 and  
responded to questions.

BRUCE BARKER, Vice President  
General Manager  
Mount Roberts Tramway  
15902 Glacier Highway  
Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of HB 319 and  
responded to questions.

CHRISTOPHER KNIGHT, Staff  
to Representative Andrew Halcro  
Alaska State Legislature  
Capitol Building, Room 414  
Juneau, Alaska 99801

POSITION STATEMENT: Presented HB 124 on behalf of the sponsor, Representative Halcro.

ALISON ELGEE, Deputy Commissioner  
Office of the Commissioner  
Department of Administration (DOA)  
PO Box 110200  
Juneau, Alaska 99811-0200

POSITION STATEMENT: During discussion of HB 124 provided comments on behalf of both the DOA and the Department of Health & Social Services (DHSS).

LISA CARESS-BEU, President  
Center for Advocacy and Rights of the Elderly (CARING)  
2420 Chinook Avenue  
Anchorage, Alaska 99516

POSITION STATEMENT: Testified in support of HB 124.

AILEEN HERRING, Vice President  
Center for Advocacy and Rights of the Elderly (CARING)  
8821 Emerald Drive  
Anchorage, Alaska 99502

POSITION STATEMENT: Testified in support of HB 124.

#### **ACTION NARRATIVE**

TAPE 02-48, SIDE A  
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:28 p.m. Representatives Rokeberg, James, Coghill, and Meyer were present at the call to order. Representatives Berkowitz and Kookesh arrived as the meeting was in progress.

#### **HB 319 - RECREATIONAL ACTIVITY LIABILITY**

Number 0050

CHAIR ROKEBERG announced that the first order of business would be HOUSE BILL NO. 319, "An Act relating to civil liability for commercial recreational activities; and providing for an effective date." [Before the committee was CSHB 319(L&C).]

Number 0071

LINDA SYLVESTER, Staff to Representative Pete Kott, Alaska State Legislature, sponsor of HB 319, said, on behalf of Representative Kott, that over the past 20 years, many recreation-oriented states have enacted statutes defining the "inherent risk doctrine" pertaining to commercial recreational activities. Theoretically, the common law has held that a recreation provider has no duty to protect the participants from the inherent risks of the recreational activity, and no corresponding liability to participants for injury or loss resulting from those inherent risks. However, in the real world, she remarked, recreational providers can and very often have been held responsible if a court or a jury finds that the inherent risk has caused the participant's injuries. Unfortunately, the line between the inherent risk and negligence is often blurred.

MS. SYLVESTER offered that "negligence" is [construed as] a provider's failure to fulfill a duty owed to the participant, the duty generally being to exercise reasonable care under the circumstances. The inevitability of a certain level of danger in a sport is recognized in law by the means of the concept of inherent risk. She suggested that most providers will state that although they've rarely been taken to court, they must frequently fend off threats of lawsuits. Many of these types of claims will not stand up in court, but fighting them is costly for businesses in terms of legal expenses, insurance premiums, and settlement costs. Because of the court's inconsistent decisions over these principles, many states have taken an alternative path and enacted statutes [regarding] "recreation law."

MS. SYLVESTER explained that some states have enacted statutes that cover one [or two activities]; for example, Colorado has a "ski and equine Act." These statutes attempt to define the types of inherent risks specific to the activity. She noted that Representative Coghill has sponsored a bill regarding [civil liability as it pertains to livestock activity].

CHAIR ROKEBERG added that there is already a statute pertaining to skiing.

Number 0290

MS. SYLVESTER confirmed this, adding that it is a very detailed [statute]. She went on to explain that Nevada has a statute that covers amusement and recreational activities: "before one boards a roller coaster at [the] New York, New York [Hotel &

Casino], signage - ample signage - instructs the participant that by boarding the ride, they specifically understands the inherent risks." Thus, if a claim for damages is made, the operator would not be liable for damages that resulted from the inherent risks of that activity. In another example that occurs in the state of Nevada, where they have parachuting activities, prior to initiating the activity, the participant is briefed, he/she signs a contract specifically indicating an understanding of the specific risks involved in skydiving, and the person is actually videotaped during that interview.

MS. SYLVESTER said that Wyoming and Vermont have enacted broad "recreation safety Acts" that cover all recreational activities. These states' statutes, she noted, generally define "inherent risks" but do not include an exhaustive list of the risks or a list of the provider's duties. She referred to the Alaska Ski Safety Act, in which a skier's participation indicates that he/she has accepted the inherent risks of skiing, and thus the ski area operator is shielded from liability if an injury results from the inherent risks of that activity. Similar to the Alaska Ski Safety Act, HB 319 identifies the responsibilities of both the participant and the operator. Another area for which Alaska has developed similar statutes, she noted, pertains to private landowners on unimproved land.

MS. SYLVESTER stated:

Noting that participation in outdoor recreation carries with it many inherent risks, HB 319 seeks to decrease the uncertainties regarding the legal responsibilities for injury or loss. House Bill 319 establishes the responsibility of commercial recreation businesses, and the responsibilities of persons who elect to participate in these activities. It addresses guidelines that the operators and participants must follow to minimize the possibility of accidents. Commercial businesses are still responsible for meeting the safety standards and providing trained and competent personnel, as outlined in [proposed Sec. 05.50.040]. As well, any recreation provider, of course, would be liable for negligence. This is just dealing with ... damages that are associated with the inherent risks of the activity.

Number 0495

However, HB 319 will add the presumption that a participant accepts the inherent risk of a commercial recreation activity and ... has played a part in any losses resulting from the inherent risk. The legislation will decrease uncertainties regarding the legal responsibilities for injuries, and encourage the continued viability of responsible businesses that offer commercial recreational activities to the public. This bill will avoid unfair and unreasonable claims that make it difficult to provide these types of activities, which are synonymous with the Alaskan lifestyle and visitor expectations. Likewise, a non-paying guest who is transported by a noncommercial aircraft or watercraft is considered to have assumed the same inherent risks [as] the commercial recreation user.

MS. SYLVESTER added:

The addition of Section 3 amends Title 9 - Actions, Immunities, Defenses, and Duties - by adding a section that shields owners or operators of watercraft and aircraft under certain circumstances related to their guests. Again, the intent is to provide clarity, to set out the responsibilities of the aircraft and watercraft owners. It would prevent the family of a pilot from [incurring] losses due to anything other than negligence.

REPRESENTATIVE BERKOWITZ posed the question: "So, I'm flying on ... frequent flyer miles - what is that?"

MS. SYLVESTER replied:

It would be [as] a guest passenger. ... If you were flying with your friend, flying out fishing, and you were ... his guest, barring negligence, if the plane crashed or you were injured, and it was due to the inherent risk, and you were notified by the owner that he wasn't insured, ... he would be shielded.

REPRESENTATIVE BERKOWITZ said: "I don't see where the restriction would be only to ... noncommercial."

MS. SYLVESTER indicated that that restriction could be found in Section 3, page 3, line 24.

Number 0619

REPRESENTATIVE BERKOWITZ posed the scenario in which he is flying on Alaska Airlines using airline miles.

MS. SYLVESTER said:

It's still -- what the term would be is -- there's no compensation for the transportation, and we're proposing to add the additional definition from the [Federal Aviation Administration (FAA)] that states, "Not for hire." And a commercial common carrier would never be considered to be not for hire or no compensation being exchanged.

REPRESENTATIVE BERKOWITZ said: "That's currently not -- ... my concern is correct, in other words."

CHAIR ROKEBERG said: No.

MS. SYLVESTER added: "No, I don't think so."

CHAIR ROKEBERG noted that the sponsor of HB 319 has requested that the committee adopt a clarifying amendment: after the word "transportation" - on page 3, line 25 - add "or hire". Such would further clarify the language regarding not being compensated for transportation, he suggested.

REPRESENTATIVE BERKOWITZ surmised: "So the language as it's currently written doesn't factor in my concern."

CHAIR ROKEBERG said: "Not being -- you're being compensated if you're on Alaska Airlines; or ... the tort feason would be ... compensated."

MS. SYLVESTER, in an attempt to clarify, offered the following:

Our concern ... was when pilots go out and ... share expenses. The concern came from a private pilot that that might be construed under federal FAA regulations to be "for hire." So, the definition for a private pilot is, "A private pilot ... may not, for compensation or for hire, act as a pilot in command of an aircraft."

CHAIR ROKEBERG said, "When you're paying for the gas, was the issue here; not if you're on Alaska Airlines."

Number 0769

MS. SYLVESTER indicated agreement and said that adding "not for compensation or for hire" would address the concern that the FAA might consider sharing expenses as compensating the pilot.

REPRESENTATIVE BERKOWITZ asked to see the amendment.

CHAIR ROKEBERG suggested that Ms. Sylvester finish her presentation first.

MS. SYLVESTER continued:

What I would like to say in conclusion is that the industry that we have is in need because of the current landscape with the litigious society that we live in. And I would propose that what we're attempting to do here is a legitimate effort of our state, because we've got an environment where ... the aircraft and watercraft passengers have been impacted tremendously in the lack of availability of insurance. And likewise, with the recreational providers, the same type of a situation has developed.

MS. SYLVESTER, referring to Representative Coghill's legislation regarding [civil liability as it pertains to livestock activity], read from the 2/6/02 Senate Judiciary Committee minutes, in which Senator Taylor was summarized as saying:

One problem was perception, accurate or not, of specious law suits being brought. Another being the insurance industry uses these specious bits of litigation to overcharge for a liability policy.

MS. SYLVESTER concluded that that is exactly the situation now, wherein private pilots cannot afford insurance. She said that insurance is available from airport to airport, but it is not available "if you go off airport." It's escalating, she added, to the point that there are fears that, very shortly, small airplane carriers will not be able to purchase liability insurance at all. She mentioned that other pending legislation is attempting to address those [fears].

Number 0907

REPRESENTATIVE BERKOWITZ said, "I hear you say that the insurance is, essentially, prohibitively expensive, but this is yet another tort reform bill, and I'm wondering where the companion legislation is that would actually control the insurance costs."

MS. SYLVESTER replied: "One of the stated mechanisms of controlling insurance costs is by limiting the payouts."

REPRESENTATIVE BERKOWITZ asked, "Stated by whom?"

MS. SYLVESTER replied, "By the Division of Insurance, actually."

CHAIR ROKEBERG noted that the week prior, the committee heard an update from the Division of Insurance "on this issue."

REPRESENTATIVE BERKOWITZ relayed that according to his understanding, one of the reasons that the costs to the carriers is going up is that there were fewer insurance companies.

CHAIR ROKEBERG agreed, adding that there are fewer air carriers as well, "due in part to the increased cost of insuring their seat miles."

REPRESENTATIVE BERKOWITZ noted, "There is other legislation that directly addresses that issue."

CHAIR ROKEBERG agreed, but pointed out that "this is for non-hires; the other legislation is for aircraft carriers that are for hire."

REPRESENTATIVE JAMES opined that the issue is whether there is any insurance available. She posited that "we need to define just exactly what the responsibility is of these people," including the responsibility to investigate whether a specific activity has any inherent risks before engaging in that activity. She remarked that the act of flying in an airplane has more inherent risk than not flying in an airplane.

REPRESENTATIVE BERKOWITZ asked to be shown some empirical evidence of "these assertions," adding, "I'm curious to know how many cases we're talking about; what ... are the dimensions of the problem we're trying to fix."

MS. SYLVESTER indicated that she could obtain that information.

CHAIR ROKEBERG mentioned that testimony in the House Labor and Commerce Standing Committee indicated to him that there is frequent litigation that almost verges on vexatious, and without appropriate legislation, the state won't have any control over the situation. He opined that the sponsor of HB 319 "wants to alert the judiciary that we, as a matter of public policy, want to take the inherent risk of an activity into greater account when apportioning any awards that would be forthcoming."

MS. SYLVESTER indicated that that is a fair interpretation of the sponsor's intent.

Number 1158

MIKE WINDRED, President, Juneau Chapter, Alaska Travel Industry Association (ATIA), mentioned that he has worked for Alaska Travel Adventures, Inc., for approximately 19 years. He said:

I'd just like to fill you in and answer some questions with [regard] to what I think [HB 319] will do for our industry and for our company specifically. I'd just like to start off by saying that this bill really shouldn't be necessary, but it is. We live in a pretty litigious society, obviously, and the ability to take someone to court over almost anything is a sacred act. But it's also a very expensive act. And that's kind of where we'll get into the heart of this ... with [regard] to why you don't see ... a lot of trials over smaller claims; [it] is because you can't seriously go to trial and not spend about [\$20,000 to \$30,000] if you're going to defend yourself vigorously.

So that's why you don't see as much litigation as you would, because it's pretty easy to settle those things for a lot less. And our society has learned - started to learn - what those dollar amounts are, to keep it from going to trial. It's become so expensive, it is getting very difficult for recreation providers to be able to actually get insurance, or - how much are they putting out of their pocket besides the insurance costs. As an example, Alaska Travel Adventures' insurance has gone up about 20 percent in the last year, and it's primarily due to the number of claims that go in. And even if we settle them ourselves, which usually is what happens, we still obviously have

to notify the insurance company anytime there's a claim that happens.

Number 1275

MR. WINDRED, in response to a question, explained:

Alaska Travel Adventures has thirteen daytrips in Southeast Alaska: four of them in Ketchikan, four in Juneau, one in Sitka, ... [and] two in Skagway. And we do everything from whitewater river rafting to mountain-lake canoeing, jeep trips, salmon bakes - ... pretty classic soft adventures. We also have RV [recreational vehicle] parks up north and motor home trips throughout the state, and we'll service probably about 150,000 clients over the course of the five months of the summer. So [Alaska Travel Adventures is] one of the larger day-tour operators in the state.

CHAIR ROKEBERG inquired: "And you've indicated that your claims have gone up, and that's one reason you suspect you've had [an] increase in premium write-ups?"

MR. WINDRED said that there are a lot of other reasons, besides claims, why insurance rates go up, particularly for air carriers; the terrorist attacks of September 11, 2001 ("9/11") obviously had a fairly large impact on the air carrier industry, though it did not have as much of an impact with regard to the travel industry's insurance rates. He noted that most people in the travel industry had a pretty good idea of what was happening with insurance rates before the 9/11 attacks happened; just the frequency of fighting off small claims affects "your 'mod rate' with an insurance [company], and that goes up." He mentioned that some of these small claims are the result of someone tripping over a rock, or of someone, "just out of sheer klutziness," trying to get their vacation paid for. He added that such cases have to be defended fairly vigorously.

CHAIR ROKEBERG asked how many lawsuits have been filed against Alaska Travel Adventures over the last several years.

MR. WINDRED said probably two or three within the last five years. He indicated that most claims don't get that far because of the expense [of going to trial]. He said: "There's kind of a magic number of about \$10,000 per person that everybody knows, and I think where this bill would help us is in the ability to state some statutes and keep it from getting to that point." He

added that it would be helpful to be able to have his company's attorney simply write the claimant's attorney, cite the specific statute, and either get the claim dropped or limit it to something reasonable such as medical expenses.

MR. WINDRED, in conclusion, indicated that his industry is concerned about fairness. He offered that it is in an operator's best interest to maintain equipment, train employees well, inform the participants of the inherent risks - either through written statements or through videos or some other method that can be substantiated - and keep accurate records. He remarked that most of the claims his company sees have to do with somebody tripping over something, somebody dropping a camera in the water, or similar incidents. He suggested that in circumstances where something occurs as a result of an inherent risk, in making the decision to participate, a large portion of the responsibility for any ensuing outcome rests with the individual participant.

Number 1479

MR. WINDRED provided the following example:

Several years ago, we had somebody go on our river-rafting trip here in Juneau.... We give everybody a very good safety briefing in the bus, have them sign an acknowledgement form of the risks that are involved and that they're in generally good health, and when they get on the raft we go through the whole safety thing again and [explain], "Hey, the water ... starts off at 33 degrees and gets to a good balmy 35 or 36 [degrees] by the end of the river." But we had one gentleman who wasn't hanging on to the raft as was instructed; [he] fell off the raft during the rapids. We pull him out of the water a while later, and ... immediately had an ambulance there, took him to the hospital just to be checked out for hypothermia. And at that point we find out he'd just gone through a triple bypass about two weeks earlier. So, we had never been informed of that ... and he'd decided to go ahead and take that risk on his own.

MR. WINDRED posited that had something even more major happened to that individual, the family would have come after the company just for taking him on the trip. He said that this is a perfect example of where this legislation could really help. "At some

point people have to be responsible for their own decisions when choosing to participate in an activity," he added.

REPRESENTATIVE BERKOWITZ, noting that Mr. Windred had indicated that claims had gone up and insurance rates had gone up, asked, "Can you tell me how much?"

MR. WINDRED said: "About 20 to 25 percent."

REPRESENTATIVE BERKOWITZ asked whether that was the percentage for both the increase in claims and the increase in insurance rates.

MR. WINDRED attempted to clarify that the number of claims hasn't really gone up; but, he opined, the insurance rates have gone up because of the number of claims.

CHAIR ROKEBERG asked whether that was "year over year."

MR. WINDRED replied: "Fairly consistently; some of it has to do with negotiating with insurance companies, but over the last couple of years it's been 20 percent."

Number 1569

REPRESENTATIVE BERKOWITZ surmised, then, that Mr. Windred is indicating that the number of claims has roughly held steady, but the insurance costs have risen.

MR. WINDRED agreed, adding:

Over the last, I'd say, five years it has. Previous to that it's gone up pretty tremendously, I think because people - the traveling public - is getting more educated about going after an operator to pay for the cost of their vacation or ... they want to make a little money off of something that happened that maybe wasn't even an operator's fault.

REPRESENTATIVE BERKOWITZ said:

I'm sympathetic to the problems of small businesses with frivolous suits, having endured some. But I'm having a hard time seeing the correlation here, when the ... number of claims have been essentially flat and the insurance rates have gone up 20 to 25 percent,

... what the linkage is between claims and the rates.  
Have the amount of the claims gone up?

MR. WINDRED replied that to some degree, the amount of the claims has gone up, and suggested that the types of claims also [influence rates]. He elaborated:

Previously a lot of the claims that we fought were not things that we needed to turn in to the insurance company, as they were for damaged equipment, et cetera. And now people ... - the traveling public - have become so well educated that the story has seemed to [grow] in terms of what's happened in the accident. So ... it becomes very important for us, if it looks like there's a potential that this might go to trial or that it's a serious claim, that that gets reported to the insurance company.

REPRESENTATIVE BERKOWITZ asked whether the demographic of the client base has changed.

MR. WINDRED indicated that the average age of clients has actually gone down slightly over the years.

Number 1652

REPRESENTATIVE BERKOWITZ surmised, then, that Mr. Windred is indicating: "The trends are, you've got healthier people, same number of claims, slightly higher cost of claims, but greatly increased cost of insurance.

CHAIR ROKEBERG mentioned that [this increase] may or may not be attributable to the high level of awards.

REPRESENTATIVE JAMES asked Mr. Windred: "When you're counting these claims ..., you're just counting your own?" Or do the numbers reflect other companies? Are they statewide numbers or nationwide numbers?

MR. WINDRED said, "That's just within our company."

REPRESENTATIVE JAMES opined that because insurance companies have a broad base for what establishes their costs, unless all the factors are known, "I don't think it's measurable."

MR. WINDRED offered that there were two things to keep in mind about insurance: First of all, there is the general rate that

is set by the state, but then there is also an "experience mod" for each company. For example, one rafting company can haul the exact same number of clients as another rafting company in the same area, and they won't have the same insurance rate because each company's "experience mod" is different.

CHAIR ROKEBERG said he assumes that the insurance rates for that type of business are going to be extraordinarily high because it is a risky business. He suggested that in future litigation, legislation such as HB 319 would ensure that responsibility - in the form of monetary judgment - is apportioned more fairly.

MR. WINDRED agreed. Using the aforementioned incident as an example, he said one of the issues that might have had to be settled in court was whether the company was at fault for the man falling into the water; if HB 319 passes and should a similar case go to trial, the court might find that the participant, through his/her own negligence, contributed to the incident and became subject to the inherent risks of the activity because he/she did not follow instructions. He offered that HB 319 would set up standards that companies in this industry would have to measure up to. For example: "If, as a company, ... we didn't maintain our equipment or we couldn't prove that we maintained our equipment or we couldn't prove that we had told ... [clients] about an inherent risk, then this legislation says that we ... [can be held] civilly liable.

Number 1782

REPRESENTATIVE BERKOWITZ asked: But in that instance, ... the gentleman who fell overboard didn't sue, did he?

MR. WINDRED said he had not.

REPRESENTATIVE BERKOWITZ said: "[So] we're sort of going on this hypothetical supposition that his estate would have sued had he died...."

MR. WINDRED agreed. He mentioned that there have been other incidents very similar to the example given. Elaborating about one such incident, he said: "A tree falling on somebody in a raft, for instance, act of God, went to court, spent years in court, (indisc.) absolutely nothing that the company could do;... it was several hundred thousand dollars in [attorney] fees over this."

REPRESENTATIVE BERKOWITZ surmised that the insurance company paid those fees.

MR. WINDRED acknowledged that was true, adding that of course the insurance rates went up, everything but the deductible. He said that his company spends about \$30,000 a year - basically buying people off because they have made some poor choices - in order to keep things from going to court.

REPRESENTATIVE BERKOWITZ remarked: "Thirty thousand dollars for 150,000 people."

CHAIR ROKEBERG remarked: "That's just nuisance settlements though; that doesn't include their other stuff."

REPRESENTATIVE BERKOWITZ commented: "Those would not be the 'vexatious cases,' then, would they?"

CHAIR ROKEBERG said: "Yes, they would."

REPRESENTATIVE BERKOWITZ replied: "Not if they're not nuisance."

Number 1878

AL CLOUGH, after mentioning that he is a private aircraft owner and operator, said that it is not uncommon to fly family, friends, associates, or friends of friends from one destination to another or out on hunting, fishing, sightseeing, or various other types of recreational trips. These are noncommercial, uncompensated, not-for-hire activities, and, he explained, the FAA does not allow fees to be charged for these types of flights. In addition, the FAA regulations specify what kind of expenses can be shared by the pilot and the passengers, and it is a very limited list. He said that according to his understanding of HB 319, it provides some level of relief for the aircraft operator and the small vessel operator should there be some sort of incident. He added that commonly, the types of flights that he would be taking people on would be to remote airstrips, gravel bars, beaches, lakes, rivers, or saltwater; these are unimproved landing sites with a whole host of potential hazards, not to mention that there are potential problems with the weather en route.

MR. CLOUGH said that as an aircraft owner and operator, he certainly wouldn't have any [compunction] against placarding his aircraft with notice that it is uninsured. He added, "The

majority of my flying friends and associates operate uninsured aircraft for private enterprises." He mentioned that a friend of his recently rebuilt an aircraft and the net value of it is now in excess of \$100,000; when his friend inquired about insurance, he learned that it would cost over \$10,000 a year and would include severe restrictions regarding where the insurance would remain in effect. Mr. Clough relayed that his friend has chosen to simply try to fly carefully for the next ten years rather than getting that insurance.

CHAIR ROKEBERG asked if that was just for liability insurance.

MR. CLOUGH, after nodding his head in the affirmative, went on to say: "There is some insurance available that is very restricted, though I've [spoken] to some people I know ..., and they said they had just received questionnaires that were much more detailed than ever before, and this is backlash over 9/11." He said that of the 20 to 25 friends and associates whom he knows that do fly for private enterprise, only one person has insurance. He remarked that his insurance comes in the form of "an extra piece of rope on the aircraft."

Number 2005

MR. CLOUGH, with regard to the aviation portion of HB 319, relayed the following analogy:

I'm an owner of a hangar here at Juneau. It was a four-unit hangar complex, [but] we recently added four units on to them, [and] the net value of this whole project's approaching \$1 million now.... The insurance prior to 9/11 for an aircraft hanger - not contents insurance - was about \$300 a year per hangar bay; this is private noncommercial. Immediately after 9/11, we were informed by the insurance underwriter that they were not going to reissue the policy for the ensuing year. And we finally found somebody that would insure and it went up 25 percent for a brand new building with no contents insurance. But this is the type of thing - I'm sure you've heard elsewhere in aviation - that [is] the backlash over 9/11.

In all honesty I can't say ... how this bill would directly lead to ... insurance ... that would be affordable for private aviators, or give some level of comfort to our estates ..., but it seems to me [to be] a good start in the right direction. Right now it's

pointless to try to get insurance that's going to do what you want to do as a small aircraft owner. And [so I] just tell people ... what my experience is and what the age of the aircraft is and what we're doing. If they choose not to get in, that's their own choice. [I personally have] not refused to get in people's aircraft, but I have opted out of getting in people's vessels in years past because of my personal experiences; I wasn't comfortable with ... what was in front of me.... I can't assure you that this would make insurance affordable to aircraft [owners] - I'm not in the insurance business - but it seems that it would offer some relief and perhaps lead in that direction, and I personally support it.

Number 2086

REPRESENTATIVE BERKOWITZ asked Mr. Clough if he's had a chance to look at, and compare with HB 319, other pending legislation regarding air carriers.

MR. CLOUGH said he had not yet done so. He added, "I know there is a lot of effort [on] that end, and I am more than somewhat familiar with the battles that the air carriers are facing now, especially the '135 operators,' and it's scary and it looks like it's going to get worse."

CHAIR ROKEBERG referred to Section 3 of HB 319. He noted it describes "compensation" as: "a substantial payment in money, services, or materials, but does not include a token payment." He asked Mr. Clough to describe what expenses are customarily shared between pilot and passengers.

MR. CLOUGH said that the FAA allows gas expenses and other of the aircraft's direct operating expenses to be shared on a pro rata basis.

REPRESENTATIVE BERKOWITZ noted that sometimes a pilot will fly friends into a remote area to go hunting or fishing, and is then given some of the catch in trade." He asked whether such a practice would constitute "a substantial payment in ... materials".

MR. CLOUGH said he could not speak to that particular issue, reiterating that the customary practice is to essentially share fuel. He said that when he is operating as a private pilot operating a private aircraft, if he were to ask passengers to

pay for all of the direct costs of the airplane's operation, he would be in violation of FAA regulations; the FAA would view it as "operating for hire."

CHAIR ROKEBERG mentioned that he was "not sure that ... [Alaska's] fish and game laws allow bartering and trading for urban residents."

Number 2238

KIP KNUDSON; Era Aviation, Inc. ("Era"); testified via teleconference in favor of CSHB 319(L&C). He said:

We feel the bill will, over the long term, have a direct impact on our insurance rates. Just so you know, the part of our operation that is relevant to this legislation is our helicopter flightseeing tours, where passengers board an aircraft in an urban area and fly up to a remote area and usually get out of the helicopter and have some sort of recreational activity. That might be as simple as walking around on a streambed or as complicated as getting off on a glacier and getting on a dogsled. Currently, Era Aviation briefs passengers, prior to their getting on the aircraft, about the inherent dangers of that recreational activity that they're about to engage in.

As far as I can tell, this legislation does not address the liability issues associated with getting to and from the recreational activity; that's dealt with in other statutes and other pieces of legislation that the committee currently has before it. I am probably specifically kept out of the loop on the number of claims and nuisance suits brought against Era, but based on the questioning brought [up] today, I'd be happy to spend time with any members talking about that number with our corporate counsel. But the ... typical one that you may hear over and over is: a passenger gets on a helicopter in Juneau, they fly up to a glacier, they get off the helicopter, they're walking around on the glacier, they slip and fall, and then either [there is] a charge that a claim will be brought or a claim is brought. And that's were this specific piece of legislation will of great assistance.

Number 2322

MR. KNUDSON continued:

Now, it hasn't been discussed, but a carrier or an operator does not have to give the briefing that is outlined in this piece of legislation. And then, if they do not, they don't (indisc.) the initial protection. Era is very excited about giving a more detailed briefing, and we'll be doing that regardless of whether the legislation passes or not. But of course, if this piece of legislation passes, then our protection on some of these claims will be greater.

One thing that Era does have slight heartburn with ... is the language that's contained on page 3 of the bill. Starting on line 2 there's the discussion of first aid and cardiopulmonary resuscitation [CPR] training. We think that application may be a little broad. (Indisc.) a summer operation, we'd talked about employees responsible for assisting participants; that could be the customer service agent that actually takes the money, [it] could be the line service agents that are on the ramp getting the helicopter into the air, it could [even] be ... the guy that's feeding the dogs on [the] glacier.

So ... we have proposed ... language that would say that the people directly responsible for the recreational activity have that training. So, instead of training hundreds of summer hires, we could train 20 to 30 summer hires that are specifically engaged in the recreational activity, and that is walking on a glacier or in the dog sled.

CHAIR ROKEBERG asked whether that proposed language has been submitted to the committee.

MR. KNUDSON indicated that Ms. Sylvester has that proposed language.

TAPE 02-48, SIDE B  
Number 2390

MS. SYLVESTER confirmed that this proposed language had been discussed with the sponsor, and noted that he felt that such a change should be left up to the committee's discretion because it would be limiting the responsibilities of the providers

somewhat. She pointed out that on [lines 2 and 3], it says, "employees who are responsible for assisting in the actual performance of a commercial recreational activity". This language, she opined, would be construed as the actual raft guide, for example, since the word "actual" tends to limit who that language would apply to. She said that while it is not the sponsor's intent to burden any industry, having CPR and first aid training is not a bad thing. She said that should there be an amendment to address this issue, it would simply involve adding the word "directly" in front of "responsible" on page 3, line 2.

Number 2298

ROBERT WAGSTAFF, Attorney, testified via teleconference in opposition to HB 319 after mentioning that he is also a pilot. He said:

I've been a lawyer for 35 years and a pilot for the same; I started to fly when I was in law school. A lot of my law practice is focused upon aircraft-crash litigation, and [with regard to] my flying, at this point I have about 10,000 hours in the air and hold an airline-transport pilot rating and have owned numerous aircraft and own several now. ... I want to approach this ... from ... an aviation perspective. When I take a guest in my aircraft - which from time to time I do, I invite a friend to go fishing, and they're looking forward to a good, safe, pleasant, successful day - they trust me completely with their lives and safety.

They trust me to get the weather briefing. They trust that I'm knowledgeable and current on my aircraft and its operating limitations, as well as my own. They trust my judgment that I will take them to a place that is reasonably safe and [that] I will not put them in a position that may be hazardous to them and that they may suffer injury from. They have no knowledge of aviation. They have no knowledge of the [weather conditions] - they haven't got their own weather briefing. They have no knowledge of the risk of the operation of the aircraft in currents; for example, ... if you're taking someone fishing in a river situation, landing on floats in the river ... can be quite tricky and can also be quite dangerous.

In terms of their assumption of risk or knowing really what they're getting into, they don't have a clue about how really, truly dangerous an operation such as this can be. They are trusting their lives and safety solely to me, and that's a responsibility that I have. And I don't insure their safety; if the engine fails through no fault of mine, I'm not going to be held liable for that, or if there is some act of God that causes them injury, I'm not liable for that. But I'm going to be liable for my negligence when I do something that a reasonably prudent person would not do; when I "push weather" through [Lake Clark] Pass simply because I want to spend the night in Anchorage and not at Lake Clark, I'm going to be responsible for that, as well I should be.

Number 2173

MR. WAGSTAFF continued:

What this bill seems to say, or what it really does, is eliminate that responsibility by saying, "Well, the person knows it's dangerous, so whatever happens, they're on their own." Well, they may know it's dangerous, but they really do not know the actual risk, or appreciate the risk, or have any control whatsoever over what happens. Once we take off, my passenger, my guest, is totally at my mercy. There's nothing they can do about anything at that point other than pray and hope that their trust is not misplaced. And if I abuse that trust, or if I'm negligent, I'm going to be responsible for it. And this [proposed] statute seems to not recognize that very important public policy that I should be responsible for my negligence when I take a guest up who's intrusting himself to me and they have absolutely no control over what happens.

... I'm speaking primarily at this point to the guest aspect of the [proposed] statute, but ... what I'm saying applies equally to commercial operators, and you would hope more so when the passenger's actually paying for the service - something that at the least should make a higher degree of responsibility. In terms of insurance, I have insurance; I have liability insurance and "hull insurance." The liability insurance, to me, seems very reasonably priced. The

hull insurance can get quite expensive: at least 8 to 10 percent of the aircraft value for landing off airports, ... [and] floatplane operations are generally - except for Lake Hood - off an airport. But I have hull insurance as well. The liability [insurance] is affordable ... - I hesitate to say reasonably priced, but it certainly is not unreasonable - and it is obtainable.

Number 2081

MR. WAGSTAFF added:

It would encourage me not to have insurance - I think I'd have it anyway, I know I would - but ... this particular bill ... seems to encourage the lack of insurance. Another point I'd like to make [is] in terms of ... the inherent risk. In the years that I've been flying, I knew a lot of people who were flying, or pilots that are no longer with us, that have been killed. And these are not just people that I knew who they were or recognized the name; these are people that if I saw on the street before the accidents - their accidents - I would have stopped and talked to them. They were acquaintances; we knew each other's name. And probably 20 years ago, I realized I was forgetting their names - there were so many of them - and it was hard to keep them straight. And so I made a list that, unfortunately, I still update frequently.

And in the 35 years I've been flying, there're over 50 people that I know personally [who] were pilots that have been killed in aviation. And, without exception, and I mean literally without exception, there's not one person whose death was not optional - it did not need to happen: error of judgment in weather, trying to fly beyond their own or their equipment's limitations - the various things that go into making an aircraft accident. There've been some engine failures that were attributable to maintenance, but in the cases in which it happened, they knew about it; they went ahead anyway and took a chance, and suffered the consequences.

Now, that's the reality of aviation, and to say that someone assumes that responsibility when they

innocently take a ride with someone, they have no knowledge what they're getting into. Their decision is based completely on trust and the superior knowledge of the pilot, and the responsibility is great. So I think that this is really bad public policy, and I also question the real need for it, because insurance is available and obtainable, at least for me....

Number 1968

MR. WAGSTAFF concluded:

I heard a lot of things said today about, "Well, this doesn't apply to negligence." Well, it does - as I read it. And the idea of cost sharing - I heard that initially explained; it was backwards from ... the way it really is, as far as the FAA is concerned. And ... I'm not sure what problem's being addressed here; if there's an insurance crises or insurance rates that [you're] concerned with, there's absolutely no linkage between this legislation and any reduction of insurance, nor is there any relief suggested. So I question the reason for this - the need for it; the policy seems reversed. I think that people should be responsible for their negligence: [If] they don't insure, they're responsible when they do not do something that a reasonably prudent person should do.

MR. WAGSTAFF, in response to questions, said that he has represented both sides - both victims and operators - in aviation-related disputes, and that when he represents an operator, although it is the insurance company that pays the legal fees, he is actually working for the operator, and does not and cannot directly represent the insurance company.

REPRESENTATIVE BERKOWITZ referred to Section 3 [subsections (b)(2)(A) and (B)] and asked for an explanation. He said: "In essence, as I read it, it says this section doesn't apply to a civil action if the owner has insurance or if he doesn't have insurance but tells people about [it] - that he doesn't have insurance." He said that he is wondering how that would have practical application.

MR. WAGSTAFF said that from an economic standpoint, [that language] would encourage an operator to not have insurance. He observed:

This idea of linking liability with the existence - or nonexistence, in this case - of insurance seems contra to the basic concept - legal concept - in tort law that insurance is irrelevant. ... The existence or nonexistence of insurance can never be mentioned to a jury because it's thought, and I think rightly so, that [it] will somehow skew their decision ... one way or the other. And this linkage here, I really question it from a policy standpoint. And also it seems to operate in the wrong direction.

Number 1801

REPRESENTATIVE BERKOWITZ asked for clarification regarding the term "owner or operator": "If I own an airplane and I let you use it, you would be the operator? And [if] something happens to you while you're operating it, how would that play out just on the basis of the first sentence?"

MR. WAGSTAFF, referring to the term "owner or operator", said that that language is not unusual, but it generally applies to commercial operations; for example, the "owner" is the air-taxi company or the air carrier, and the "operator" is an employee. He opined that that language would be inappropriate for "a guest situation with a private pilot" because, as is the case with him, he is both owner and operator. He added, "I guess ... some people do have corporations that own their aircraft in an attempt to avoid liability, so I guess it could cover that."

REPRESENTATIVE BERKOWITZ said:

If I let my wife use my boat, and something happens to her ... Or a friend uses my boat and something happens to him or her ... I'm just unclear on the interplay. You've got all these disjunctives running around in that sentence and it's sort of confusing to unscramble.

MR. WAGSTAFF agreed.

Number 1698

BRUCE BARKER, Vice President, General Manager, Mount Roberts Tramway, testified in favor of HB 319. He said:

I would like to encourage you to pass this legislation. We feel that this would be of benefit to us ... [as] the second highest visitor activity in the state after the White Pass Railroad. We do about 200,000 visitors a year.... And I think we need to keep in mind, one of the main purposes of this is not so much to base the legislation on what has happened, but [on] what we might avoid in the future - ... the nuisance suits, which are extensive....

We feel that this would go a long way in helping us avoid some of those [situations] where we're being sued because somebody wasn't watching where they were going and fell off the trail, or had a heart attack on the mountain and had to take the tram down and didn't make it. There's a number of situations like that that occur. We do our best to try to make our paying guests aware of the environment that they're entering; particularly this time of year - early in the season - we have lots of snow on top of the tram right now, more than I've ever seen ... in the four years I've been here. So we will have trails that are covered with ice; we do have areas that melt out holes underneath the snow that people can fall into.

MR. BARKER showed the committee a sign that he had brought with him, and said:

This is a sign that we use early in the season. There's only two places where the public can get away from the mountain station of the tram, and we have signs posted at both spots. Last year I had an elderly woman who had gone right past this sign, gotten off of the trail, got lost, fell into a hole, got stuck in the snow, somehow got herself back to [the] tram, her husband found her, and her hands were cut up from grabbing on little branches of trees. And she [was] very unhappy and felt that I had a very large amount of responsibility in how she got lost out there, even though she walked right past this sign. And I did point the sign out to her, and she understood that she had walked right past this sign and didn't read it.

Number 1556

I was very kind to her and took care of her and made sure she was happy and bought her and her husband dinner, and they went away happy. We've also had a number of injuries on the mountain where people have broken their ankle or broken their wrist ... - mostly it's due to falling off a trail. And I have always gotten them quickly to the hospital, and paid for the ambulance, paid for their deductible - if there was a deductible - and been happy to do that without getting into [a] nuisance suit, which, as [Mr. Windred] pointed out, can be very expensive.

MR. BARKER showed the committee another sign he'd brought with him and said that it was what he was going to have made up for the coming season. He said that it addresses the ice and mud situation a little bit more specifically.

CHAIR ROKEBERG surmised that not all of Mr. Barker's clientele are English speaking.

MR. BARKER said that is correct, although the majority do speak English. In response to a question, he confirmed that his company also uses [signs with] international symbols.

REPRESENTATIVE JAMES surmised that even if HB 319 were to become law, Mr. Barker would continue to treat clients who have had similar difficulties in the same manner because negative publicity is bad for business.

REPRESENTATIVE BERKOWITZ asked Mr. Barker how many lawsuits were brought against his company last year.

MR. BARKER indicated that he has never had any lawsuits filed against his company.

CHAIR ROKEBERG suggested that HB 319 would enable companies to "practice preventative law."

MR. BARKER indicated that they strive to do so as much as possible. He mentioned the term "guest services," and said that these include taking care of the guests, making sure they're happy, addressing their needs, giving them more than what they were anticipating. By doing these things, he added, "you always win." He said that the main reason that his company would like to see HB 319 pass is that even though "I haven't been sued in six years, I will get sued, and right now I have a lost person on the mountain - he's been lost since September 10 - and how

that's going to fall out, I have no idea, but ... I hope that we recover his body this year." He added, "His wife is going to come back up, and we've been communicating with her," but this is the type of situation for which it would be very beneficial to have this bill in place.

Number 1390

MR. BARKER, in response to a question regarding this lost individual, explained:

He was a 79-year-old Japanese-American, had advanced Alzheimer's, was with his wife and brother-in-law, the brother-in-law was assigned the responsibility of watching him, was sitting at the top of the tram ... in a public place, and the brother-in-law went over, going to take a picture, turned around and he was gone. And we haven't found him; it's a very interesting situation. ... We called in "search and rescue," looked ... a big part of the evening. The next morning, of course, was 9/11, and all our rescue ... people, all the authorities - fire department, et cetera, et cetera - were totally wrapped up in emergency reactions to that. We were lucky enough to get a helicopter in the air with an infrared sensor - who covered the whole top of the mountain out of the trees and didn't find a thing.

REPRESENTATIVE BERKOWITZ asked Mr. Barker whether his [insurance] premiums have gone up in that time.

MR. BARKER said: "We have been informed by our insurance company that our premiums are going up; 30 to 50 percent is what my insurance company quoted us. Luckily we ... had signed our new contract prior to September 11."

REPRESENTATIVE BERKOWITZ said: "I'm unclear why this specific bit of legislation would take a substantial bite out of that 30 to 50 percent."

MR. BARKER replied:

Well, what this legislation would do is it would prevent a nuisance suit against me, which would lead to an increase in my rates; as [Mr. Windred] pointed out, insurance companies base their rates on what they

call an "experience mod," and as your "experience mod" increases, then your rates increase.

Number 1293

REPRESENTATIVE BERKOWITZ pointed out, however, that:

As I understand it, you haven't had any nuisance suits, and yet your rates have already gone up 30 to 50 percent. And it seems to me that maybe the focus ought to be on the insurance companies who've actually cost you money, as opposed to these suits, which haven't.

MR. BARKER said:

Again, ... I'm thinking about the future; I'm not thinking about ... what has happened in the past. I haven't had any suits, but I will have suits in the future; it's guaranteed in our litigious society, and this is what [we wish] to avoid, and that's why we support this legislation.

REPRESENTATIVE BERKOWITZ asked Mr. Barker whether he would also be supportive of legislation that affected the insurance rates directly.

MR. BARKER asked whether Representative Berkowitz was referring to liability caps.

REPRESENTATIVE BERKOWITZ said no; liability caps pertain to the "damage end of things". He clarified that he was referring to legislation that would affect insurance rates.

MR. BARKER indicated he would be supportive of legislation that would keep insurance rates under control.

REPRESENTATIVE MEYER asked Mr. Barker whether his company posts signs warning people of bears and other wildlife. He also asked who would be responsible if a bear were to chase one of the passengers.

MR. BARKER said they did have "the typical bear signs at both trailheads that warn people that bears are around, and it's the same sign that you see on all the trailheads throughout town; Trail Mix [Inc.] puts those up for us."

REPRESENTATIVE JAMES mentioned that she is not specifically focused on lowering insurance rates, because that may only result in there being fewer insurance companies, which could result in insurance not being available at all. She said that she understood the concerns regarding nuisance suits.

Number 1118

CHAIR ROKEBERG made a motion to adopt Conceptual Amendment 1: On page 3, line 25, after the word "compensated" insert "or hired". That portion of the bill would then read: "if the owner or operator is not being compensated or hired for the transportation." He remarked that such language is consistent with FAA language.

REPRESENTATIVE BERKOWITZ asked:

Are you trying to say, "is neither being compensated nor hired"? Or are you trying to say, "is not being compensated or is being hired"?

CHAIR ROKEBERG, after consulting with committee staff, reminded members that it is a conceptual amendment; thus the drafter and committee staff will ensure that the appropriate language is inserted.

Number 1030

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

CHAIR ROKEBERG, referring to the suggested change regarding CPR and first aid training, indicated that he is satisfied that the current language is clear that only the employees directly responsible for participants [during] the recreational activity will be required to have that training.

REPRESENTATIVE JAMES indicated agreement; it "probably wouldn't apply" to "ticket agents or anything like that."

REPRESENTATIVE BERKOWITZ said: "It seems to me that you're putting an excessive burden on business ... with this paragraph." With regard to the tram, for example, the current language could apply to everybody who opens and closes the tram doors, or everyone who takes a ticket, or all the greeters; they are all directly "responsible for assisting participants in the actual performance of a commercial recreational activity", he

added. Referring to raft trips, he indicated that the same could be said of everybody who drives a bus, paddles a boat, or cooks [for the passengers]; because they are all directly responsible for assisting participants, according to the current language they would all be required to have this training.

CHAIR ROKEBERG said he disagrees and therefore infers that the language does need clarification.

REPRESENTATIVE JAMES indicated that according to her understanding of Representative Berkowitz's interpretation of the current language, simply adding "directly" won't clarify the issue.

CHAIR ROKEBERG said he would concede that there is ambiguity in the current language and thus it is subject to interpretation.

Number 0858

CHAIR ROKEBERG made a motion to adopt Conceptual Amendment 2: "The [paragraph] (2) on page 3 [lines 2-5] be narrowed in its scope to mean only those people that are directly and actually participating in the activity with the client, and therefore having a limitation on it."

REPRESENTATIVE BERKOWITZ asked how "commercial recreational activity" is defined.

CHAIR ROKEBERG pointed out that it is defined on page 3, [lines 17-20].

Number 0773

CHAIR ROKEBERG noted that there were no objections to Conceptual Amendment 2. Therefore, Conceptual Amendment 2 was adopted.

Number 0760

REPRESENTATIVE JAMES moved to report CSHB 319(L&C), as amended, out of committee with individual recommendations and the accompanying zero fiscal note.

Number 0753

REPRESENTATIVE BERKOWITZ objected. He said:

It seems to me that this is an anti-business bill ... because of the requirements that I spoke to earlier. The definitions of "commercial recreational activity" as well as "recreational activity" are so broad that they would in essence account for anything that took place outdoors, anywhere.... And I don't think it solves the problem that it's intending to solve, which is to lower the costs of doing business in the state, and it certainly doesn't provide additional safety precautions for consumers of these outdoor recreational activities. And, therefore, because it serves no good public purpose whatsoever, I oppose it.

CHAIR ROKEBERG said he disagrees.

REPRESENTATIVE JAMES said she, too, disagrees. She surmised that the bill recognizes that there is an inherent risk to [certain activities], and stipulates that just because someone gets hurt after choosing to participate in an activity, he/she will not necessarily receive compensation.

Number 0676

A roll call vote was taken. Representatives Coghill, Meyer, James, and Rokeberg voted to report CSHB 319(L&C), as amended, out of committee. Representatives Berkowitz and Kookesh voted against it. Therefore, CSHB 319(JUD) was reported out of the House Judiciary Standing Committee by a vote of 4-2.

CHAIR ROKEBERG called an at-ease from 2:55 p.m. to 2:56 p.m.

HB 124 - NURS.HOME/ASSISTED LIV. EMPLOYEES/VISITOR

Number 0639

CHAIR ROKEBERG announced that the last order of business would be HOUSE BILL NO. 124, "An Act prohibiting nursing facilities and assisted living homes from employing or allowing access by persons with certain criminal backgrounds, with exceptions." [Before the committee was CSHB 124(HES).]

Number 0629

REPRESENTATIVE COGHILL moved to adopt the proposed committee substitute (CS) for HB 124, version 22-LS0087\R, Lauterbach, 4/3/02, as a work draft. There being no objection, Version R was before the committee.

Number 0592

CHRISTOPHER KNIGHT, Staff to Representative Andrew Halcro, Alaska State Legislature, sponsor, said, on behalf of Representative Halcro, that the impetus for HB 124 came from senior advocacy groups that were interested in "putting 'barrier crimes' into statute." He noted that a number of senior long-term care advocates and nursing facility advocates have been worried about individuals who have [committed] serious offenses being hired to work in such facilities. He added that [Version R] defines what constitutes a serious offense. He explained that currently, the Department of Administration (DOA) and the Department of Health & Social Services (DHSS) have the statutory authority to adopt "regulations for 'barrier crimes.'" After numerous years, he added, one department has done so.

MR. KNIGHT noted that Version R adds the requirement that potential employees provide a sworn statement that they have not been convicted of any offenses in which the victim was a resident of a nursing facility and/or a long-term care facility. He added that by requiring a sworn statement, "we've removed the fiscal note."

CHAIR ROKEBERG asked Mr. Knight what he means by "barrier crime."

MR. KNIGHT said:

We call this the "'barrier crimes' legislation," and the idea is that those individuals who've been convicted of heinous crimes - serious offenses - should not ... [be allowed] to work in our long-term care facilities and nursing facilities. And [I] think it's [an] important measure ...; protection and care of our elders should be of the highest priority.

CHAIR ROKEBERG again asked what is meant by the term 'barrier crime.'

MR. KNIGHT said:

It's kind of just a colloquial word used when we put into statute preventative measures from higher and/or -- I guess just limit one's abilities concerning their criminal record.

Number 0448

ALISON ELGEE, Deputy Commissioner, Office of the Commissioner, Department of Administration (DOA), remarked that she is speaking on behalf of both the DOA and the Department of Health & Social Services (DHSS). She said:

We certainly support the general concept that Representative Halcro is trying to address here. However, we do have some concerns over the language that is used in the proposed committee substitute for HB 124. We have made copies ... of what has been adopted in a joint regulation project by the Department of Administration and the Department of Health & Social Services for our assisted-living licensing function. Now, these do not apply to nursing homes, but the nursing home certification and licensing staff have said that they are interested in adopting corresponding regulations for the nursing home industry, so that we've got a similar regulation format for both environments of long-term care. They simply have not gotten those regulations adopted yet because of the numerous other projects they've got on their plate right now.

One of the things that we've done, in terms of adopting these regulations, is we've taken an approach where we have some crimes that ... create a permanent bar for employment in the long-term care industry, and those are listed ... as "Absolute Barrier Crimes," and you'll see that in the spreadsheet. So somebody who's convicted [of] one of these crimes can never ever be employed in a long-term care environment or in an assisted living environment, which is what these regulations apply to. We have then, after identifying the absolute barriers, ... identified barriers that are time-barred. So, if you have committed the crimes that are listed under "10-Year Barrier Crimes" within the past 10 years, you're not eligible for employment in an assisted living environment. There are crimes where you're time-barred for five years, and there [are] a couple of crimes that are listed as two-year bars.

Number 0280

MS. ELGEE continued:

This allows [some discretion for] people who have committed crimes, and ... the case you'll find most frequently is somebody who's committed a crime in their youth, and ... 20 years later there's been no criminal history in between that youthful offense and today. And the language that's contained in the committee substitute for [HB 124] would not distinguish; it would make most of the crimes that we have put into our barrier-crime regulations permanent barriers. And that is by virtue of the language that is contained in both sections; first, in the nursing home section on page 2, line 14: "a serious offense, as defined in AS 12.62.900". This makes that serious offense a permanent bar to employment. [Alaska Statute] 12.62.900 is any felony offense. So we would not have that opportunity to differentiate between the degree of time, or the length of time, since that crime was committed.

We also are aware of ... an article ... regarding a Pennsylvania court ruling, (indisc. - coughing) published in January of this year. [The] state of Pennsylvania attempted to adopt similar legislation that just had this broad-sweeping "any criminal offense, you never can work in long-term care" kind of approach. And the courts in Pennsylvania ruled that as being too broad, and said, essentially, that there ... needed to be a nexus between the crime and the employment environment in order for you to be able to bar somebody permanently from ever being able to participate in that employment environment. I've checked with our attorneys, and they believe that [with] a permanent bar, such as proposed in HB 124, that our courts would rule very similarly to the Pennsylvania courts.

Number 0102

MS. ELGEE concluded:

That said, we have no objection to the language that is in [HB 124] requiring the sworn statement that the crimes have never been [committed]; this would allow us to put a zero fiscal note on this bill. And if the legislature wants to actually embody in statute more explicit direction in barrier crimes, we would suggest

that you model the statutory language after the regulations that we have adopted.

CHAIR ROKEBERG inquired: "You're not suggesting we should adopt, by reference, your regulations in statute?"

MS. ELGEE replied: "I think that's backwards, Mr. Chairman; I was suggesting that you actually write into statute ... permanent barriers and list all the crimes ..."

CHAIR ROKEBERG interjected, remarking that were they to do that, the bill would become very long.

MS. ELGEE concurred. She went on to say:

We're very happy, Mr. Chairman, just maintaining this definition in regulation; we think this works very well. And when Representative Halcro started this particular legislation, we had not finished the [adoption] of regulations. But we have, since that time, actually gotten these regulations adopted; they were in a public hearing process last year when this [bill was started].

TAPE 02-49, SIDE A  
Number 0001

CHAIR ROKEBERG mentioned that it took the sponsor three months to request that the bill be heard in the House Judiciary Standing Committee.

REPRESENTATIVE JAMES said that she agreed with Ms. Elgee that youthful indiscretions should not become a permanent bar to employment. She mentioned that some people, early in life, have had alcohol or drug problems, but have since turned their lives around, and those people should not automatically be barred from working in this field. "We have a tough time getting people to work in these jobs; they're not easy, [and] you've got to have a lot of compassion," she added. She noted that after quickly looking over the list provided by Ms. Elgee, she did not see any problems with it.

Number 0114

LISA CARESS-BEU, President, Center for Advocacy and Rights of the Elderly (CARING), testified via teleconference in support of HB 124. She said:

As president of Alaska's only citizen advocacy group for [protection of the rights] of the elderly, I urge you to support this bill. Alaska currently has no law that prohibits nursing homes and assisted living homes from employing and retaining individuals with criminal backgrounds.... How has Alaska allowed this situation to continue unanswered? Now is the time to raise the bar of expectation when it comes to the care of the vulnerable elderly in our state. Residents in long-term care facilities are often incapable of communicating situations of abuse, neglect, or financial misappropriation. They're depending on us to provide for their safety.

Individuals with a history of criminal activity that may be working in or seeking employment in Alaska's nursing and assisted living homes must not be allowed to prey on our most vulnerable senior citizens. Administrators of long-term care facilities have complained that to prohibit individuals with criminal backgrounds from working in their homes shrinks an already depleted labor pool to a point where acceptable staffing ratios are impossible to maintain. This is a nationwide problem; good caregivers are increasingly difficult to attract. However, this is no excuse for employing persons ... [with] known criminal histories. Under no circumstances should a person that is no longer able to communicate their needs be subject to [receiving] intimate care from a person with a known criminal history....

Number 0241

MS. CARESS-BEU concluded:

A 1999 ... legislative audit done on the Alaska [Pioneers'] Home system [shows] that they employed four people that had been convicted of sexual abuse. Would you want one of those employees to be responsible for bathing your mother or father? You would never consider allowing a person with such [a] history to be employed in [the] care of our children. Why are our frail elders less deserving of our protection? It's frightening to know that assisted living homes and nursing homes in Alaska currently employ people who've been terminated from previous

jobs for substantiated abuse ... [of] long-term care residents.

Must residents and their families continue to suffer the employment of people with criminal convictions? Please take this opportunity to help protect Alaska's residents of long-term care from predators roaming the halls of the place that they are to think of as their home. I applaud Representatives Halcro, Hayes, Dyson, and Stevens for taking a stance to protect Alaska's long-term care residents; I ask the rest of this committee to join them and pass HB 124. Thank you.

Number 0318

AILEEN HERRING, Vice President, Center for Advocacy and Rights of the Elderly (CARING), testified via teleconference in support of HB 124. She said:

I believe that [HB 124] will provide added protection to ... vulnerable elderly adults living in ... nursing and assisted living homes from predators working as caregivers. My late father, Frank Y. Swanson, was a resident of the Sitka and Anchorage [Pioneers'] Homes for five years. Currently there is no law to prohibit nursing and assisted living homes from employing individuals with criminal backgrounds. The 1999 legislative audit lists four individuals employed by the [Pioneers'] Homes that have been convicted of sexual assault. Logic would tell us that we do not want our children cared for by individuals with convictions of theft, rape, pedophilia, or abuse. Why don't we offer the same protection to the vulnerable elderly adult?

House Bill 124 will not place any additional financial burden on the state, and would help ensure that the rights and safety of the residents would be protected. I have a personal interest in [HB 124] being passed and implemented so that the frail and ... vulnerable residents in ... nursing and assisted living homes who often have no voice in their care are assured a safe environment in their declining years. My father died under suspicious circumstances at APH [Anchorage Pioneers' Home], and the suspected caregiver is still employed as a caregiver. I just want to urge you to pass [HB 124]; it's a very critical bill, and any

crime against the elderly in a nursing or assisted living home is totally unacceptable. Thank you.

CHAIR ROKEBERG mentioned that he remembered Ms. Herring's father.

MR. KNIGHT, commenting on points raised by Ms. Elgee, said:

She says this is a broad-sweeping measure. If you look at the definition of serious ... offense, which is ... currently in statute, we talk about ... any felony ... offense. We currently require that if you want to vote, you can't be convicted of any felonies, so that is a barrier crime that's currently within our statutes. Crime involving domestic violence, crimes involving sexual assault/sexual abuse of a minor, incest, unlawful exploitation of a minor, indecent exposure, contributing to the delinquency of a minor, distribution of pornography, prostitution - these are all serious crimes, they're not broad-sweeping measures. We're not talking about reckless driving misdemeanor B or C charges. We're talking about pretty serious crimes.

Number 0532

If you've been convicted of these, you certainly shouldn't be allowed to work in a nursing facility where you have vulnerable adults. And that's all we're trying to get across here. Our senior advocates are very concerned about regulations; regulations are not permanent measures.... They can be changed next week, next year.... As we all know, ... regulations come and go as administrations come and go, and we feel that we need to have something within the statute that has some substance - some teeth - and it's important to get something in there.

The regulations that the Department of [Health & Social Services] adopted took five years in the making. They had the statutory authority five years ago; it took five years to get ... something into regulation. The Department of Administration, for nursing facilities, has yet to adopt regulations; granted, with the threat of this (indisc.) legislation, they certainly want to get regulations

into place, but I think ... we need to take some measures here.

CHAIR ROKEBERG asked whether it is the sponsor's intent to have a higher level of barrier than the departments have.

MR. KNIGHT said he would not comment on that issue. He added: "I do know that if you look at the regulations, and I'm not going to waste the committee's time as far as ... trying to look for parallels within the regulations and serious crime offense ..."

CHAIR ROKEBERG interjected to say that he was looking at "5-Year Barrier class C felony 'failure to register as a sex offender or child kidnapper in the first degree'." He noted that with this "failure to register" crime, it can be presumed that one has already committed a sex offense.

MR. KNIGHT agreed. He added: "We're trying to put some teeth in this statute ...; ... the regulations that the department has adopted will not be negated by our adoption of the statutes." Both would be in effect, he remarked; the [departments] would still have the authority to change their regulations.

CHAIR ROKEBERG remarked to Mr. Knight that he appeared to be in direct opposition to the department.

MR. KNIGHT disagreed.

CHAIR ROKEBERG said that instead of sending HB 124 to a subcommittee, he would rather give Mr. Knight and the sponsor time to work with the departments to develop something acceptable to all parties.

Number 0683

REPRESENTATIVE JAMES mentioned that she has known people who have made terrible mistakes in their youth. She also reminded members that she has often spoken against jumping to make people felons at a young age. Making someone a felon when he/she is young can destroy that person's life rather than fixing it, she added. She mentioned that she was raised to believe in the concept of forgiveness, and that considering the low number of people who are even willing to work in this field, she did not want to say that [every felon] is automatically permanently barred from that type of employment. She said, "You've got to make that evaluation on who they are today, what they have been

doing over the last number of years, and what their behavior is like." She also said:

Drugs and alcohol make a big change in people's lives, and when they can get over that, and many of them do ... , there's a complete change in their behavior. I don't want to rule them out and tell them that their life is no good. So, I would rather have something that is a little more ... permissive in some certain cases.... When we need a lot of people to treat ... [elderly] people compassionately and take care of them in their vulnerable age, I agree that we need to have people who are serious about doing it and doing it right, but I don't want to exclude [people] to the point that we don't ... have anybody to do it.

REPRESENTATIVE BERKOWITZ asked whether including an element of discretion in HB 124 would assuage some members' concerns.

REPRESENTATIVE JAMES said it certainly would, adding, "I just don't want to write people off if they've worked really hard to rehabilitate themselves."

REPRESENTATIVE BERKOWITZ said: "So, you could do it with unlocking presumptions, then."

Number 0832

MR. KNIGHT said:

I've got a grandmother currently that has Alzheimer's, ... and she lives in a nursing facility back in South Carolina. And ... we come from a good Christian family, she was a good Christian lady growing up, and ... on a personal level, I'd have some serious issues with someone who'd been convicted of sexual assaults and sexual abuse of a minor working with my grandmother who's mentally impaired.... That raises some serious concerns for me, and I know some of that's covered - there are some parallels - within current existing regulations, but I think that we have an opportunity to put something in statute that's going to be lasting.

REPRESENTATIVE JAMES acknowledged that she has the same concerns, but added that when [the crime] of domestic violence is included, it raises a whole different issue.

CHAIR ROKEBERG asked Ms. Elgee to recap the current status regarding the adoption of the aforementioned regulations.

MS. ELGEE said:

The regulations for the assisted living environment, which cover both the Department of Administration and the Department of Health & Social Services, were adopted last August. And I would like to clarify that even ahead of this absolute laundry list, so that everybody ... knew what the ground rules were, we were conducting criminal background checks. It was just that we did not have a black and white list that says "yes" to this one, and "no" to that one.

CHAIR ROKEBERG announced that the HB 124 [Version R] would be held over.

**ADJOURNMENT**

Number 0904

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:18 p.m.