

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

May 10, 2002

1:58 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 363(STA) am

"An Act relating to communications and elections, to reporting of contributions and expenditures, and to campaign misconduct in the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date."

- MOVED HCS CSSB 363(JUD) OUT OF COMMITTEE

SENATE BILL NO. 364

"An Act relating to medical services under the state Medicaid program."

- MOVED SB 364 OUT OF COMMITTEE

PREVIOUS ACTION

BILL: SB 363

SHORT TITLE: CAMPAIGN COMMUNICATIONS & DISCLOSURES

SPONSOR(S): RLS

Jrn-Date	Jrn-Page		Action
04/18/02	2840	(S)	READ THE FIRST TIME - REFERRALS
04/18/02	2840	(S)	STA
04/23/02		(S)	STA AT 3:30 PM BELTZ 211

04/23/02		(S)	Heard & Held
04/23/02		(S)	MINUTE(STA)
05/04/02		(S)	STA AT 1:30 PM BELTZ 211
05/04/02		(S)	Moved CS(STA) Out of Committee -- Time Change --
05/04/02		(S)	MINUTE(STA)
05/06/02	3175	(S)	STA RPT CS 4DP NEW TITLE
05/06/02	3175	(S)	DP: THERRIAULT, PHILLIPS, STEVENS,
05/06/02	3175	(S)	DAVIS
05/06/02	3175	(S)	FN1: (ADM)
05/06/02	3175	(S)	FN2: ZERO(GOV)
05/06/02	3175	(S)	FIN REFERRAL ADDED AFTER STA
05/07/02		(S)	FIN AT 9:30 AM SENATE FINANCE 532
05/07/02		(S)	Moved Out of Committee -- Time Change --
05/07/02		(S)	MINUTE(FIN)
05/07/02	3198	(S)	FIN RPT CS(STA) 5DP 1NR
05/07/02	3198	(S)	DP: DONLEY, KELLY, GREEN, WILKEN,
05/07/02	3198	(S)	LEMAN; NR: AUSTERMAN
05/07/02	3198	(S)	FN3: (ADM)
05/07/02	3199	(S)	FN2: ZERO(GOV)
05/07/02		(S)	RLS AT 11:45 AM FAHRENKAMP 203
05/07/02		(S)	MINUTE(RLS)
05/07/02	3202	(S)	RULES TO CALENDAR 5/7/02
05/07/02	3202	(S)	READ THE SECOND TIME
05/07/02	3203	(S)	STA CS ADOPTED UNAN CONSENT
05/07/02	3203	(S)	ADVANCED TO 3RD READING FLD Y14 N5 E1
05/07/02	3203	(S)	ADVANCED TO THIRD READING 5/8 CALENDAR
05/08/02	3237	(S)	READ THE THIRD TIME CSSB 363(STA)
05/08/02	3237	(S)	RETURN TO SECOND FOR AM 1 UNAN CONSENT
05/08/02	3238	(S)	AM NO 1 ADOPTED UNAN CONSENT
05/08/02	3238	(S)	AUTOMATICALLY IN THIRD READING
05/08/02	3238	(S)	PASSED Y19 N- E1
05/08/02	3238	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/08/02	3244	(S)	TRANSMITTED TO (H)
05/08/02	3244	(S)	VERSION: CSSB 363(STA) AM
05/09/02	3460	(H)	READ THE FIRST TIME -

05/09/02	3460	(H)	REFERRALS
05/10/02		(H)	JUD
			JUD AT 1:00 PM CAPITOL 120

BILL: SB 364

SHORT TITLE: MEDICAID PAYMENTS FOR ABORTIONS

SPONSOR(S): RLS BY REQUEST

Jrn-Date	Jrn-Page		Action
04/18/02	2840	(S)	READ THE FIRST TIME - REFERRALS
04/18/02	2841	(S)	FIN
04/23/02		(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/23/02		(S)	-- Meeting Canceled --
04/23/02		(S)	FIN AT 4:00 PM SENATE FINANCE 532
04/23/02		(S)	Moved Out of Committee
04/23/02		(S)	MINUTE(FIN)
04/24/02	2920	(S)	FIN RPT 5DP 2DNP 1NR
04/24/02	2920	(S)	DP: KELLY, GREEN, OLSON, LEMAN, WARD;
04/24/02	2920	(S)	DNP: DONLEY, AUSTERMAN; NR: WILKEN
04/24/02	2920	(S)	FN1: INDETERMINATE(HSS)
05/01/02		(S)	RLS AT 10:30 AM BELTZ 211
05/01/02		(S)	-- Location Change --
05/01/02		(S)	MINUTE(RLS)
05/06/02	3182	(S)	RULES TO CALENDAR 1OR 5/6/02
05/06/02	3185	(S)	READ THE SECOND TIME
05/06/02	3186	(S)	ADVANCED TO 3RD READING FLD Y13 N6 E1
05/06/02	3186	(S)	ADVANCED TO THIRD READING 5/7 CALENDAR
05/07/02	3208	(S)	READ THE THIRD TIME SB 364
05/07/02	3208	(S)	PASSED Y12 N7 E1
05/07/02	3208	(S)	ELLIS NOTICE OF RECONSIDERATION
05/08/02	3221	(S)	RECON TAKEN UP - IN THIRD READING
05/08/02	3221	(S)	PASSED ON RECONSIDERATION Y12 N8
05/08/02	3244	(S)	TRANSMITTED TO (H)
05/08/02	3244	(S)	VERSION: SB 364
05/09/02	3460	(H)	READ THE FIRST TIME - REFERRALS
05/09/02	3460	(H)	JUD, FIN

05/09/02 (H) JUD AT 4:00 PM CAPITOL 120
05/09/02 (H) Heard & Held
MINUTE(JUD)
05/10/02 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JOE BALASH, Staff
to Senator Gene Therriault
Alaska State Legislature
Capitol Building, Room 121
Juneau, Alaska 99801

POSITION STATEMENT: As committee aide for the Senate State Affairs Committee, which had rewritten the bill substantially, presented SB 363 on behalf of the Senate Rules Committee, sponsor.

KAREN VOSBURGH, Executive Director
Alaska Right to Life, Inc.
PO Box 1847
Palmer, Alaska 99645

POSITION STATEMENT: Testified in support of SB 364.

SENATOR DONNY OLSON
Alaska State Legislature
Capitol Building, Room 510
Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of SB 364.

REPRESENTATIVE FRED DYSON
Alaska State Legislature
Capitol Building, Room 104
Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of SB 364.

GEORGE UTERMOHLE, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Terry Miller Building, Room 329
Juneau, Alaska 99801

POSITION STATEMENT: Responded to questions as the drafter of SB 364.

ACTION NARRATIVE

TAPE 02-63, SIDE A

Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:58 p.m. Representatives Rokeberg, James, Coghill, and Meyer were present at the call to order. Representatives Ogan, Berkowitz, and Kookesh arrived as the meeting was in progress.

SB 363 - CAMPAIGN COMMUNICATIONS & DISCLOSURES

Number 0043

CHAIR ROKEBERG announced that the first order of business would be CS FOR SENATE BILL NO. 363(STA) am, "An Act relating to communications and elections, to reporting of contributions and expenditures, and to campaign misconduct in the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date."

Number 0067

JOE BALASH, Staff to Senator Gene Therriault, Alaska State Legislature, committee aide for the Senate State Affairs Committee, which had rewritten the bill substantially, presented SB 363 on behalf of the Senate Rules Committee, sponsor. He explained that the bill is an attempt to get "some kind of disclosure on 'issue ads.'" He relayed that the Alaska Public Offices Commission (APOC) has predicted that issue ads will play a very large role in the upcoming fall campaign. He noted that according to Legislative Legal and Research Services, "there really isn't anything you can compel on a communication or ad that is purely issues-based." If there is no mention of a candidate, "basically you can't touch it" because the First Amendment protects it, he opined. He continued:

So what we decided to do then was take a look around; we took a look at McCain-Feingold - or Shays-Mehan is actually the version that passed and the President signed into law - and looked to see how they kind of took a crack at this, and [we] came up with what's now in the bill in Sections 8 and 9. And basically what we've come up with is a bright-line test, so that the public will know, when ... they are speaking purely about issues, ... that they're ... out of bounds, if you will; they're not covered by any of the APOC regulations. And if you expressly advocate for a candidate, you clearly are under the limits.

And we created this other kind of middle part, this gray area ... in between express advocacy and issue advocacy, and tried to carve out this electioneering definition. And so if anybody mentions or ... if they identify a candidate, [and] discuss an issue of national, state, or local political concern, and attribute a position on that issue to the candidate identified, and it occurs 30 days before a primary or municipal election, or 60 days before a general election, then it must come from allowable sources - the funds used to pay for that - subject to all of the same restrictions that you as candidates would be required to abide by.

So, the other parts of the bill -- in [the Senate] State Affairs [Committee] we heard from APOC ... that this year the commission ... [is] going to begin to assess the civil penalties for failure to provide a contributor's statement - a 15-5 [form]. And so we discussed ... with APOC the history of the 15-5 [form], and really what it provides is a tool ... for the public to know what's going on....

Number 0349

MR. BALASH concluded:

As candidates, when you file your reports, you have to disclose not only your expenditures but all of your contributors. So it's almost a duplication of efforts, or I guess it really is a duplication when a contributor's forced to send in a form. So, bottom line was, the commission didn't appear to have a problem with going ahead and just removing the 15-5 [form] altogether, ... as long as we retained a way to track ... large contributions to ballot proposition groups.

MR. BALASH, in response to a question, noted that Section 11 of SB 363 repeals the statute pertaining to the 15-5 form. In response to another question, he said:

The case law on the First Amendment ... relating to elections, the most prominent decision is the ... Buckley v. Valeo [424, U.S. 1 (1976)] decision, and what the [United States Supreme] Court said was that

if you're going to place any kind of a burden on speech, whether it be ... disclosure of where the money came from, whether it's ... simply a "paid for by" statement, anything, there has to be a compelling state interest. Now, when you're talking about a candidate for election who will be going into office and making decisions that affect the public, there's a concern that the money used to pay for those ads might influence that person's decision making once they're in office, and so there's a threat of corruption - or at least ... the appearance of a threat of corruption.

And so, because there's that compelling interest, the [United States Supreme] Court said it's okay to put burdens on speech in those situations. But when you're simply out speaking on an issue - income taxes, for an example - and ... all you want to talk about are the pros and the cons of an income tax, and you don't mention a candidate, you don't mention a ballot proposition, you don't mention political actors at all, you're just simply talking about an income tax, there's no threat of corruption, there's not even the appearance of a threat of corruption. So, without a compelling interest, you can't place a burden on that speech. And that's my understanding of the case law, at any rate.

REPRESENTATIVE JAMES suggested that for some issues, the public ought to know what group is speaking. She said that would then be the compelling state interest.

MR. BALASH said: "That was the ... desired goal of the original version of the bill. I'm not up to speed on the specific case law, but you may not be able to get there; we weren't able to find a way."

REPRESENTATIVE JAMES noted that she has no problem with freedom of speech, but wants to know who is doing the speaking.

Number 0770

REPRESENTATIVE BERKOWITZ turned to Section 9. He said that the definition of "communication" seems rather sweeping and might suffer some criticism as being overbroad from a constitutional perspective. He asked Mr. Balash, "Where is communication used that would require this definition to apply?"

MR. BALASH said, "It's used in the 'paid for by' section of the statutes; I think the cite is [AS] 15.13.090, and that's page 2, Section 5, of the bill."

REPRESENTATIVE BERKOWITZ asked whether any thought had been given to "adding mass phone calls, which is a new campaign technique, to that list." He added that now that he knows that the definition in Section 9 applies to one discrete area, "it might be appropriate to transfer this definition to that one discrete section."

MR. BALASH said although SB 363 is not intended to be either an exhaustive or exclusive list, if "'direct dialing' is something the committee wanted to add ..."

CHAIR ROKEBERG interjected to say, "I hope this was [an] exclusive list because, being a politician that has to read the statutes every election, I would like to make sure there's no loose ends out there."

MR. BALASH said, "When we were coming up with a list, we didn't pretend to have everything in mind, and would be open to suggestions for additions or even subtractions."

CHAIR ROKEBERG asked whether "telephonic campaigning" is addressed elsewhere.

MR. BALASH said that there is a prohibition on making "factually false statements" over the phone. He also mentioned that APOC treats a "push poll" differently from "a poll" in terms of defining and treating it as an expenditure.

Number 1078

REPRESENTATIVE BERKOWITZ made a motion to adopt Conceptual Amendment 1: on page 4, line 24, add "or automatic telemarketing". There being no objection, Conceptual Amendment 1 was adopted.

Number 1218

REPRESENTATIVE BERKOWITZ made a motion to adopt Amendment 2: on page 2, line 25, delete "and address". He said, "It always strikes me as being a peculiar component of a television ... or radio ad - 'Paid for by Ethan Berkowitz for State House' - and then ... listing the entire address."

REPRESENTATIVE JAMES posited that the purpose of listing an address on such an ad is so that the public will know how to contact the individual or group paying for that ad.

REPRESENTATIVE BERKOWITZ said, "It's been sort of my experience in observing campaigns that usually what happens is, someone makes a mistake - they'll transpose numbers or the numbers won't be the right size - and that becomes an APOC issue."

CHAIR ROKEBERG said he agrees with Representative James, adding, "If you have a straw group or a group that was put together as a subterfuge, and if they don't have an address, you don't know who you're talking about."

Number 1319

REPRESENTATIVE BERKOWITZ acknowledged that point and withdrew Amendment 2.

NUMBER 1320

REPRESENTATIVE BERKOWITZ made a motion to adopt a new Amendment 2: on page 2, line 27, change "must" to "may". He remarked that having timed several radio ads, he doesn't have a campaign chairperson because having to identify that person would take up a lot of [airtime].

REPRESENTATIVE JAMES and CHAIR ROKEBERG agreed.

Number 1363

CHAIR ROKEBERG noted that there were no objections to the new Amendment 2; therefore, Amendment 2 was adopted.

MR. BALASH noted that the adoption of any amendments will trigger a concurrence vote.

REPRESENTATIVE BERKOWITZ referred to Section 4, and asked why the amount listed is \$500 instead of the \$100 it is for individual candidate campaigns. "Why are we not making this exactly parallel?" he asked.

MR. BALASH replied:

The ballot proposition group will have to submit a report prior to the election - I think that the timing is 7 days, maybe 30 days - and they will go in and

identify sources of contributions ... that are over \$100. However, this provision is a way to get information out to the public ... so that the public knows when large sources of funding are coming into a ballot proposition group, sooner than the ... the 30 days before an election. If there were a particular item on the ballot, going to appear on the ballot, nobody would know how much money had been raised by the particular group supporting or opposing that item, and this is a tool to help ... track that throughout the course of the year.

CHAIR ROKEBERG asked whether there are any reporting requirements for these groups now.

MR. BALASH said yes.

CHAIR ROKEBERG asked, "Then what are we doing differently ... in adding this subsection?"

MR. BALASH said, "We're adding a requirement ... for contributions to be reported."

CHAIR ROKEBERG responded: "But they're not now? You just said they were."

REPRESENTATIVE JAMES added, "More than \$500 to a group ...; this is not the group, but it's to the group."

CHAIR ROKEBERG asked: "Well, what are the reporting requirements for a group now? This is for an issue? A noncandidate? Don't they have the 7- and 10-day report and 30-day report requirement?"

Number 1497

MR. BALASH said: "Yes ..., that's correct. The first report they will submit to APOC will be 30 days prior to the general election. And if somebody were to send a check for \$600,000 in June, nobody would know until 30 days before the election. [Section 4] is requiring the contribution itself to trigger a report."

REPRESENTATIVE BERKOWITZ mentioned that the amount listed in Section 4 does not appear to be cumulative like it is for individuals.

MR. BALASH referred to page 2, line 13, and said according to that language, "once they've gone over \$500, it is intended to be a cumulative report."

REPRESENTATIVE BERKOWITZ disagreed. He said, "It could be two \$500 contributions within a single period: there's more than one \$500 contribution."

REPRESENTATIVE JAMES pointed out that it would be "30 days from the time it went over \$500, though, so ... the date that it's due is 30 days after it went over \$500."

REPRESENTATIVE BERKOWITZ remarked, however, that according to the way Section 4 is written:

You could give a check on the first of the month, and another on the second of the month, and then do the same reporting on the beginning of the next month for two checks for \$500 each, [whereas] if you give a \$250 check and a \$250 check aggregating to \$500, that arguably wouldn't have to be reported.

MR. BALASH, in response to a question, acknowledged that "you can't put a limit on ... contributions to a ballot proposition group."

REPRESENTATIVE BERKOWITZ noted that according to the way Section 4 is written, "you could contribute \$500 and not make a declaration; if you make a contribution of \$501, then you have to make the declaration."

Number 1759

CHAIR ROKEBERG made a motion to adopt Conceptual Amendment 3: "on page 2, line 11, after 'contributing' add '\$500 or more calculated on a cumulative basis' or words to that effect, and deleting 'more than \$500'." There being no objection, Conceptual Amendment 3 was adopted.

Number 1793

REPRESENTATIVE JAMES moved to report CSSB 363(STA) am, as amended, out of committee with individual recommendations and the [accompanying] fiscal notes. There being no objection, HCS CSSB 363(JUD) was reported from the House Judiciary Standing Committee.

CHAIR ROKEBERG called an at-ease from 2:31 p.m. to 2:34 p.m.

SB 364 - MEDICAID PAYMENTS FOR ABORTIONS

Number 1819

CHAIR ROKEBERG announced that the last order of business would be SENATE BILL NO. 364, "An Act relating to medical services under the state Medicaid program."

Number 1839

KAREN VOSBURGH, Executive Director, Alaska Right to Life, Inc., testified via teleconference in support of SB 364. She said:

This is a very good bill, and it is necessary to restrict the Medicaid funding to cover ... only those abortions that are medically necessary, instead of using abortion as form of birth control, which is - as everybody knows here, I'm sure - that about 95 percent of all abortions are for birth control only. So, I'm not only speaking for myself and for the Right to Life board, but there are almost 60,000 in our Right to Life database, too, that are right behind me on this. So I just want you to know that there are -- and there's more than that, this is just only in our database, there are many more people that are pro-life that aren't in our database.

So people, for the most part, do not want abortion for any reason such as what was laid down - you know, ... the term "health of the mother" when it was first brought down with Roe v. Wade and Doe v. Bolton. You know, everybody knows that, too, that the "health of the mother" refers to physical, or emotional, or psychological, a woman's age, familial, social, or economic reasons, and so this cannot be deemed "medically necessary." "Medically necessary" is what this bill says it is, and I think it's [a] good bill, so please do hear it and pass it out.

Number 1974

SENATOR DONNY OLSON, Alaska State Legislature, testified in support of SB 364. After noting that he has been licensed as a medical doctor since 1984 and had served on the State Medical Board for six years, he said that SB 364 does not address the

issue of whether abortion is permitted; instead, it addresses the issue of which abortions will be paid for with state funding. He indicated that he, along with others opposed to SB 364, is opposed to having his tax dollars used for a procedure that he feels is inappropriate.

REPRESENTATIVE BERKOWITZ asked: "Would you think that pacifists shouldn't pay federal income tax because part of the money goes to the Department of Defense? Would you think that atheists shouldn't use money if, say, the faith-based initiative goes through?"

SENATOR OLSON opined that issues involving pacifists and atheists are far different than an issue that involves a therapeutic procedure which requires a physician.

CHAIR ROKEBERG asked Senator Olson to comment on the issue of whether to include situations involving fetal anomalies and nonviable fetuses in the category of an allowable reason to use Medicaid funding for an abortion.

SENATOR OLSON remarked that in addition to the serious types of cases that were given as examples in previous testimony, the term fetal anomaly can also be applied to instances in which a fetus simply has an extra digit. He suggested that if such a concept were to be included in SB 364, a more specific term should be used.

CHAIR ROKEBERG suggested the language, "abort a fetus that would not survive until live birth".

SENATOR OLSON said that the problem with that language is that it is very difficult for a physician to determine whether "a fetus will survive a live birth."

TAPE 02-63, SIDE B
Number 2370

SENATOR OLSON, in response to a question, said that if a fetus dies intrautero (ph), normally it results in a stillbirth. In response to another question, he indicated, however, that that does not occur all the time. He reiterated that it is very difficult to determine whether a fetus will make it to term. He noted that if an obstetrician makes such a determination, he/she will be doing so according to his/her "best opinion."

REPRESENTATIVE JAMES relayed that when her own fetus died, the doctor informed her that the fetus was no longer viable and recommended that it would be better for her to "let it come naturally." She said that while that may not be the "right way to go" in all situations, for her it proved to be the right choice and she suffered no ill effects to her health for having gone that route. She indicated that such a decision has to be between the individual woman and her physician.

CHAIR ROKEBERG asked Senator Olson whether the language in SB 364 would hinder him in his medical practice or cause him to alter his medical decisions regarding situations in which an abortion might be an appropriate procedure.

SENATOR OLSON said he does not have any problem with the language in SB 364.

REPRESENTATIVE BERKOWITZ asked Senator Olson how he would define "seriously endanger the physical health of the woman".

SENATOR OLSON said, "I would say that if ... a lady's health obviously - physical constitution - was in some way seriously, in a quite severe manner, was jeopardized."

REPRESENTATIVE BERKOWITZ asked, "Do you think that would be subjective from doctor to doctor?"

SENATOR OLSON said: "Oh, for sure. And I think that's one of the major reasons for this bill, here, is that the subjectivity is what has incensed a number of people." In response to further questions, he opined that removing the word "seriously" would cause the language to become vague, and that legislation on this issue needs to have language that gets away from a "vague and loose interpretation."

REPRESENTATIVE BERKOWITZ opined that as currently written, the language in SB 364 is not clear or instructive.

REPRESENTATIVE COGHILL reminded members that the issue before the committee revolves around public funding for abortions.

Number 1648

REPRESENTATIVE FRED DYSON, Alaska State Legislature, testified in support of SB 364. He relayed that with regard to abortion, the principal issue for many people is the issue of human rights, adding that in the act of an abortion, a human life is

at stake. He opined that when the patient is a pregnant woman, ethical doctors realize that they have two patients and must consider the well being of both. On the issue raised in previous testimony that nothing can be determined with 100 percent certainty, he opined that in cases where someone is not absolutely sure, he/she should choose life. He then recounted some cases of failed abortions.

REPRESENTATIVE DYSON opined that the committee should leave the word "seriously" in SB 364, indicating that it will ensure that abortions paid for with state funds are not performed for trivial reasons. He surmised that people intent upon having an abortion will be able to find some other method of paying for it. He said that according to his interpretation of every vote or poll taken on this issue, people do not favor public funding of "nonessential abortions." He said:

What you have here before you is a very good piece of legislation [and] I encourage you to let it stand as it is; it is exactly the will of the people, it protects human rights, and [it] avoids us being in a position of financing the termination of the lives of children whose only sin is that their presence is inconvenient and untimely.

REPRESENTATIVE DYSON, in response to a question regarding nonviable fetuses, indicated that an abortion should only be performed in those circumstances where it is absolutely certain that the fetus is dead.

REPRESENTATIVE JAMES reiterated that sometimes it is better to let a dead fetus come out naturally, rather than performing a medical procedure. In response to questions, she remarked that "medically necessary" as defined by "seriously endanger" is something that will be determined by the doctors in those situations, and that those determinations should not be questioned; she acknowledged that different doctors could come to different conclusions, and noted that a woman has the right to go see a different doctor for a second opinion.

Number 1035

CHAIR ROKEBERG turned to language on page 2, lines 5 and 6: "the medication required to treat the illness would be highly dangerous to the fetus". He asked: "if, in fact, you're endeavoring to protect the fetus, why do we have to have it [be] "highly dangerous"? Why not just "dangerous"?"

REPRESENTATIVE DYSON suggested using the term "slightly dangerous".

CHAIR ROKEBERG opined that "slightly" poses the same problem as "highly" in that they and some of the other words used in SB 364 are setting subjective standards. "We're raising the bar with a subjective standard," he warned, adding, "I think it's very poor legal drafting." He again suggested that just "dangerous to the fetus" is sufficient.

REPRESENTATIVE DYSON said he agrees with Chair Rokeberg on that point.

CHAIR ROKEBERG, turning to language in [subsection] (b), he noted that the word "serious" is already used as a qualifier on page 1, line 12; therefore, including the terms "significantly" and "seriously" in [subparagraphs] (A) and (B), respectively, would be redundant and would raise the issue of subjectivity.

REPRESENTATIVE JAMES remarked that every single possible set of specific conditions cannot be listed in statute, adding that some measure has to be set, after which it will be up to the individual woman and her physician to make the determination. She also remarked that the goal of SB 364 is to eliminate [public funding for] unnecessary abortions, adding that "when you try to determine what's necessary, you have to have a bar somewhere, [and] I don't know that this gets us there, but it's better than what we have."

CHAIR ROKEBERG opined that the legislature has the duty of determining what constitutes "medically necessary" and must do so by defining it with language that is clear rather than subjective. He then referred to the words "significantly" on page 1, line 14; "seriously" on page 2, line 1; and "highly" on page 2, line 5. He asked the drafter whether using those words as qualifiers was intended to raise the bar, and what his interpretation of that language is.

Number 0813

GEORGE UTERMOHLE, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, acknowledged that using those words does have the effect of raising the bar.

CHAIR ROKEBERG turned to the word "serious" as it is used on page 1, line 12. He asked, "It sets up each of the [paragraphs] underneath it as having to be of a serious nature, does it not?"

MR. UTERMOHLE said, "The term "serious" modifies "serious adverse physical condition" and "serious psychological illness".

CHAIR ROKEBERG surmised, then, that statutorily, the bill speaks of a "serious adverse physical condition" and a "serious psychological illness" before "we even add the other provisions of the bill to the interpretation."

MR. UTERMOHLE said, "Yes, Mr. Chairman, that is your starting point."

CHAIR ROKEBERG asked Mr. Utermohle what would be the impact of removing "seriously" from page 2, line 1.

MR. UTERMOHLE said that doing so would "reduce the restrictions on [a physician's] determination as to what endangers the health of a woman." In response to a question, he indicated that the same could be said regarding the removal of "highly" from page 2, line 5.

REPRESENTATIVE BERKOWITZ asked, "Could you in any way quantify what 'seriously endanger' or 'highly dangerous', what the distinction is, or ... if there's a numerical quantification that would apply?"

MR. UTERMOHLE said, "Most certainly not; we're talking about subjective terms here."

REPRESENTATIVE BERKOWITZ asked, "Is there a distinction between 'seriously endanger' on page 2, line 1, and 'highly dangerous' on page 2, lines 5 and 6?"

MR. UTERMOHLE said, "Those relate to two different standards, one related to 'seriously endanger' as opposed to 'highly dangerous'."

Number 0579

REPRESENTATIVE BERKOWITZ asked: "Which is higher? Or which is more serious?"

MR. UTERMOHLE said, "They're applied to different contexts and rely upon the expertise of the doctor to apply those terms."

REPRESENTATIVE BERKOWITZ said, "So you couldn't say, if you were to do a risk assessment, ... that 'highly dangerous' is aggravated above 'seriously endanger', or the other way around?"

MR. UTERMOHLE said, "No, I could not."

REPRESENTATIVE BERKOWITZ observed that [paragraphs] (1)(B) and (2) (B) are not parallel in that paragraph (1)(B) uses the term "seriously endanger", whereas paragraph (2)(B) refers only to "endangered".

REPRESENTATIVE DYSON said that he has no objection to adding the word "seriously" to paragraph (2)(B) on line 7. In response to a question, he agreed that he feels that the language currently in SB 364 gives physicians enough latitude to make determinations based on their independent judgment. He surmised that if a physician makes the determination, in a particular case, that the woman is better served by having an abortion, he/she will probably go ahead and perform that abortion; the question then becomes one of "who gets billed" for those procedures.

CHAIR ROKEBERG, after noting that no one else wished to testify, closed the public hearing on SB 364.

Number 0139

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

Page 1, line 12, through page 2, line 8:

Delete all material and insert:

"physician that the abortion is medically necessary to

(1) treat a serious

(A) adverse physical condition of a pregnant woman that

(i) either is caused by the pregnancy or would be significantly aggravated by continuation of the pregnancy; and

(ii) would seriously endanger the physical health of the woman if the pregnancy were not terminated by an abortion; or

(B) psychological illness of a

pregnant woman who requires medication for treatment of the illness if

(i) the medication required to treat the illness would be highly dangerous to the fetus; and

(ii) the health of the woman would be endangered if the medication was not taken during the pregnancy; or

(2) abort a fetus that would not survive until live birth."

Page 2, line 13, following "(3)":

Insert "'live birth" has the meaning given in AS 18.50.950;

(4)"

Number 0138

REPRESENTATIVE JAMES objected.

CHAIR ROKEBERG remarked that Amendment 1 basically just adds the phrase "abort a fetus that would not survive until live birth".

REPRESENTATIVE OGAN surmised that making such a determination would be difficult to do, and remarked that he finds the addition of that term objectionable.

REPRESENTATIVE JAMES said that although there may be some circumstances in which aborting a fetus that would not survive until live birth would be appropriate, she objects to paying for such a procedure with state funds.

TAPE 02-64, SIDE A
Number 0072

A roll call vote was taken. Representatives Berkowitz, Kookesh, James, Ogan, Coghill, and James voted against Amendment 1. Representative Rokeberg abstained from voting. Therefore, Amendment 1 failed by a vote of 0-6.

Number 0104

REPRESENTATIVE COGHILL moved to report SB 364 out of committee with individual recommendations and the accompanying fiscal note.

Number 0124

REPRESENTATIVE BERKOWITZ objected. He said, "This bill is severely constitutionally flawed, for the reasons that are outlined in the ... [State Dept. of Health & Social Services v. Planned Parenthood of Alaska, et al. (07/27/2001) sp-5443] case, and also because, based on the testimony I've heard here today, it's clearly vague beyond any sort of (indisc. - voice faded away).

Number 0190

A roll call vote was taken. Representatives James, Ogan, Coghill, Meyer, and Rokeberg voted to report the bill from committee. Representatives Kookesh and Berkowitz voted against it. Therefore, SB 364 was reported out of the House Judiciary Standing Committee by a vote of 5-2.

ADJOURNMENT

Number 0202

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:40 p.m.