ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 2, 2003
1:05 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 214
"An Act relating to the recovery of punitive damages against an employer who is determined to be vicariously liable for the act or omission of an employee; and providing for an effective date."

- MOVED CSHB 214(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 212
"An Act relating to trusts, including trust protectors, trustee advisors, transfers of property in trust, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment."

- HEARD AND HELD

HOUSE BILL NO. 92
"An Act relating to reports by members of the clergy and custodians of clerical records who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect."

- HEARD AND HELD

HOUSE BILL NO. 164

"An Act relating to the state's sovereign immunity for certain actions regarding injury, illness, or death of state-employed seamen and to workers' compensation coverage for those seamen; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HB 214
SHORT TITLE:PUNITIVE DAMAGES AGAINST EMPLOYERS
SPONSOR(S): REPRESENTATIVE(S)SAMUELS

Jrn-Date	Jrn-Page		Action
03/26/03	0640	(H)	READ THE FIRST TIME - REFERRALS
03/26/03	0640	(H)	JUD
03/28/03	0689	(H)	COSPONSOR(S): ROKEBERG, MEYER
03/31/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/31/03		(H)	Heard & Held -- Meeting Postponed to 3:00 PM -- MINUTE(JUD)
04/02/03	0750	(H)	COSPONSOR(S): MCGUIRE, HAWKER
04/02/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 212
SHORT TITLE:POWERS OF APPOINTMENTS/TRUSTS/CREDITORS
SPONSOR(S): REPRESENTATIVE(S)MCGUIRE

Jrn-Date	Jrn-Page		Action
03/24/03	0618	(H)	READ THE FIRST TIME - REFERRALS
03/24/03	0618	(H)	L&C, JUD, FIN
03/26/03	0652	(H)	L&C REFERRAL WAIVED
04/02/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 92
SHORT TITLE:CLERGY TO REPORT CHILD ABUSE
SPONSOR(S): REPRESENTATIVE(S)LYNN

Jrn-Date	Jrn-Page		Action
02/12/03	0186	(H)	READ THE FIRST TIME - REFERRALS
02/12/03	0186	(H)	STA, HES
02/19/03	0257	(H)	COSPONSOR(S): KERTTULA
03/06/03		(H)	STA AT 8:00 AM CAPITOL 102
03/06/03		(H)	Heard & Held

			MINUTE(STA)
03/18/03		(H)	STA AT 8:00 AM CAPITOL 102
03/18/03		(H)	Moved CSHB 92(STA) Out of Committee
			MINUTE(STA)
03/24/03	0622	(H)	JUD REPLACES HES REFERRAL
03/26/03	0633	(H)	STA RPT CS(STA) NT 5DP 1NR 1AM
03/26/03	0633	(H)	DP: GRUENBERG, SEATON, HOLM, LYNN,
03/26/03	0633	(H)	DAHLSTROM; NR: WEYHRAUCH; AM: BERKOWITZ
03/26/03	0633	(H)	FN1: ZERO(HSS)
03/26/03	0633	(H)	FN2: ZERO(LAW)
03/26/03	0633	(H)	REFERRED TO JUDICIARY
04/02/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

RAY R. BROWN, Attorney at Law
Dillon & Findley, PC
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns about HB 214 and explained changes that he and Mr. Schneider had suggested; answered questions.

MICHAEL R. WIRSCHEM, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: Followed up on previous testimony on HB 214, offering statistics from the Alaska Judicial Council with regard to punitive damages.

JIM WILSON
Coastal Helicopters
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 214.

MARCIA R. DAVIS, Vice President and General Counsel
Era Aviation, Inc.
Anchorage, Alaska
POSITION STATEMENT: Provided information relating to HB 214.

MICHAEL J. SCHNEIDER, Attorney at Law
Law Offices of Michael J. Schneider, PC
Anchorage, Alaska
POSITION STATEMENT: Answered questions relating to HB 214 and changes that he and Mr. Brown had proposed.

VANESSA TONDINI, Staff
to Representative Lesil McGuire
House Judiciary Standing Committee
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified on behalf of the sponsor of HB 212, Representative McGuire.

STEPHEN E. GREER, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: Noted that HB 212 has widespread support.

DOUGLAS BLATTMACHR, President
Alaska Trust Company
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 212.

ROBERT MANLEY, Member
Hughes Thorsness Powell Huddleston & Bauman, LLC
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 212.

JONATHAN BLATTMACHR, Attorney
Milbank, Tweed, Handley & McCloy
New York, New York
POSITION STATEMENT: Urged the committee's support of [CSHB 212, Version I].

DAVID SHAFTEL, Estate Planning Attorney
Anchorage, Alaska
POSITION STATEMENT: Relayed that all [of the members of the informal group of which he is a part] recommend the adoption of [CSHB 212, Version I].

RICH HOMPESCH, Attorney
Fairbanks, Alaska
POSITION STATEMENT: Noted that there is support for [CSHB 212, Version I] in Fairbanks.

RICHARD THWAITES, Estate Planning Attorney;
Chairman, Alaska Trust Company
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 212.

REPRESENTATIVE BOB LYNN

Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 92.

FLOYD SMITH, Consultant
Alaska District Council of the Assemblies of God
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 92, and suggested changes.

WILLIAM MOFFATT, Staff
to Representative Bob Lynn
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Assisted with the presentation of HB 92.

JOANNE GIBBENS, Program Administrator
Central Office
Division of Family & Youth Services (DFYS)
Department of Health & Social Services (DHSS)
Juneau, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 92, suggested a change, and responded to a question.

TED BOATSMAN, Reverend
and Superintendent
Alaska District Council of the Assemblies of God
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 92.

CHIP WAGONER, Lobbyist
for the Alaska Catholic Conference
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 92 and of placing the term "neglect" back in the bill, and responded to questions.

ACTION NARRATIVE

TAPE 03-28, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:05 p.m. Representatives McGuire, Anderson, Holm, Ogg, Samuels, and Gara were present at

the call to order. Representative Gruenberg arrived as the meeting was in progress.

HB 214 - PUNITIVE DAMAGES AGAINST EMPLOYERS

Number 0093

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 214, "An Act relating to the recovery of punitive damages against an employer who is determined to be vicariously liable for the act or omission of an employee; and providing for an effective date."

Number 0172

CHAIR McGUIRE asked whether anyone wished to testify; hearing no response, she then closed public testimony.

The committee took an at-ease from 1:10 p.m. to 1:12 p.m.

Number 0196

CHAIR McGUIRE brought attention to written amendments provided by Representative Gara. Amendment 1 read [original punctuation provided]:

Page 2, line 2. After "acted"
Delete: "recklessly"
Insert: "negligently"

Amendment 2 read [original punctuation provided]:

Page 2, line 2. After "employing"
Insert: ", supervising or retaining"

[A third amendment, never formally offered, would amend page 2, line 1, by deleting "and" and inserting "or" after "omission".]

CHAIR McGUIRE reopened public testimony.

Number 0275

RAY R. BROWN, Attorney at Law, Dillon & Findley, PC, informed members that his letter [dated April 2, 2003, also signed by Michael J. Schneider] fairly outlines his responses to comments about Laidlaw Transit, Inc. v. Crouse placed on the record at the previous hearing of HB 214. He specified that the letter

relays concerns about how far HB 214 goes and that the bill doesn't track the [Restatement (Second) of Agency]. He strongly urged the committee, if it takes action on the bill, to look at Section 909 of the Restatement (Second) of Torts, which he said Section 217(c) of the Restatement (Second) of Agency refers to and relies upon for interpretation and illustration.

MR. BROWN alluded to the portion of his letter [on pages 2-3] that quotes from the Restatement (Second) of Torts as follows:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

MR. BROWN offered his belief that the stated purpose of the bill wouldn't protect employees adequately, particularly if one looks at the language proposed in the bill versus that in Section 909 of the Restatement (Second) of Torts. He said the principal difference, as pointed out [in his letter], is that under the Restatement (Second) of Torts, not only the employer is couched in terms of the principal; rather, it includes - which it should, he opined - the managerial agent who is authorized.

Number 0380

MR. BROWN highlighted the significance of the fact that included [in subsection (b) of the Restatement (Second) of Torts, quoted previously] is recklessness not only in employing, but also in retaining, since it says "or retaining". Referring to testimony by him and Mr. Schneider at the bill's previous hearing, he explained that not just the employment of the individual is problematic; it is also the supervision and training, which gets to the issue of whether the employer should have retained a person, notwithstanding the fact that [the employer] had

exercised due diligence in the hiring process. Mr. Brown also noted that subsections (c) and (d) [of the Restatement (Second) of Torts, cited above] include the terms "managerial capacity" and "managerial agent". He said those terms are significant.

MR. BROWN proposed, in the worst-case scenario, that the committee adopt the language of Section 909 of the Restatement (Second) of Torts. However, for adequate balance between protecting the employer and employee, he suggested [as put forth in his letter on page 3, that the committee adopt Section 909 of the Restatement (Second) of Torts, except] to add ["supervising"] to subsection (b), so that it would read "employing, supervising, or retaining", and to change "reckless" to "negligent". That would fully protect the well-reasoned concerns raised by the representative from ERA [Aviation, Inc.] who testified at the bill's previous hearing, he told members.

Number 0480

CHAIR McGUIRE indicated those issues would be taken up by the committee when considering the written amendments.

Number 0518

MICHAEL R. WIRSCHEM, Attorney at Law, informed members that since his previous testimony, he had done research on what the Alaska Judicial Council (AJC) has found. He noted that he would summarize the three studies posted on the AJC's web site. Reporting that the first study was done between 1985 and 1995 through the court system, he said the AJC looked at 223 tort jury verdicts and found 17 awards of punitive damages in 15 different cases during those ten years.

MR. WIRSCHEM said the second study, done between September 1997 and May 1999, was a little different: it didn't track court system data, but data reported to the AJC by attorneys. For a total database of 1,685 cases reported, he said punitive damages were asked for in only 108 cases, and only 5 settlements included amounts for punitive damages.

MR. WIRSCHEM told members that the third study involved reports to the AJC between June 1, 1999, and December 1, 2000, a period of 18 months. In the entire database of 2,951 cases, including 83 trials, he said punitive damages were requested in 17 percent of the reported cases, but awarded in only 8 cases - less than 1 percent. One award was statutorily required; the others followed trial.

CHAIR McGUIRE thanked Mr. Wirschem for providing the foregoing information requested by the committee.

Number 0695

JIM WILSON, Coastal Helicopters, testified in support of [HB 214]. Noting that in his business, pilots can be gone multiple weeks at a time without direct supervision, Mr. Wilson said [the company] goes through extensive training programs to make sure pilots know what they're supposed to be doing and how they're supposed to be doing it. He provided an example of an accident 10 or 11 years ago, as follows:

> This particular pilot was out on the job. And we have a mirror that we use to look at external loads when they're carrying it. Well, this pilot had moved the mirror up so he could see his landing gear. And in training we teach them to look out the aircraft when they're landing in small locations or areas where they may not be stable, so that they can detect any movement of the aircraft.
>
> Well, this particular pilot landed on one of those spots, took his eyes from the outside, ... looked at the mirror [inside], and while he was doing that, the aircraft slid forward and he hit a tree. And, fortunately for us, no one was injured. But ... it was a clear case that the pilot was not ... following established procedures, and we could have been victim to the punitive damages ... had there been injuries or death.

Number 0835

REPRESENTATIVE GRUENBERG observed that Mr. Brown and Mr. Schneider had provided both Section 217(c) of the Restatement (Second) of Agency and Section 909 of the Restatement (Second) of Torts. He asked whether those two sections are identical.

MR. BROWN noted that Section 909 of the Restatement (Second) of Torts says it is duplicated by Section 217(c), and that he therefore assumes it is true. He suggested the Laidlaw case lays out the criteria under Section 217(c), but said he hadn't compared the language to see whether it is identical.

REPRESENTATIVE GRUENBERG said it appeared Mr. Brown and Mr. Schneider also included the commentary to Section 909 and case citations to that. He asked whether there are additional citations and commentary to Section 217(c) and, if so, whether they are the same.

MR. BROWN indicated he hadn't looked at the commentary because he'd relied upon his own experience that if Section 909 says that Section 217(c) looks to the Restatement [(Second)] of Torts for comment and illustrations, he'd felt he could assume they would be nearly identical or identical. He added that another 60 pages of cases go along with this. He offered to fax those.

REPRESENTATIVE GRUENBERG said that wasn't necessary. He then asked whether Mr. Brown prefers the Restatement language to the language of the current bill.

MR. BROWN responded, "Absolutely."

Number 0975

MARCIA R. DAVIS, Vice President and General Counsel, Era Aviation, Inc. ("ERA"), informed members that she had a copy of Section 909 of the Restatement (Second) of Torts and Section 217(c) of the Restatement (Second) of Agency. She said the only difference in the listing of the four exemptions in those two sections is that the Restatement (Second) of Torts references "the principal or a managerial agent" in all four clauses [except for subsection (c)]. By contrast, the Restatement (Second) of Agency only says "the principal" in each of those, except for subsection (d), which talks about the agent. She observed that the comments are lengthier in the [Restatement (Second) of] Torts.

Number 1101

REPRESENTATIVE GRUENBERG said it seems the language from the Restatement (Second) of Torts would be preferable to that from the Restatement (Second) of Agency.

MS. DAVIS responded, "In terms of what is preferable or not preferable, what we're trying to do is ... put this in the context of an employer ... as a principal, and then, if you want to expand the scope: employer, and then describe how far down the chain you go." She said that seems to be the debate.

Number 1080

REPRESENTATIVE GARA referred to the proposed amendment from page 3 of the letter from Mr. Brown and Mr. Schneider discussed previously, which suggested the legislation should be amended to adopt Section 909 except to change subsection (b) to read as follows:

> The agent was unfit and the principal or a managerial agent was negligent [reckless] in employing, supervising or retaining [employing, retaining] him, or ...

REPRESENTATIVE GARA said each amendment he'd handed out addresses a different part of that sentence. He asked Mr. Brown or Mr. Schneider to explain what kinds of cases might not be covered under the original bill, what kind of conduct would be drawn in [if it were amended], and what problem the bill tries to prevent. Addressing a recommendation in the letter [proposed by his own Amendment 1 to change "recklessly" to "negligently" on page 2, line 2], he said:

> Under the current bill, in order for ... an employer or a corporation to be held liable for punitive damages, first ... the employee will have had to have been reckless. But then, under this bill, we'll have to show that the employer was reckless in hiring the reckless employee. You change that to "the employer only has to be negligent in hiring or retaining that employee". Why, ... in your view, does that make things better?

Number 1157

MICHAEL J. SCHNEIDER, Attorney at Law, Law Offices of Michael J. Schneider, PC, replied:

> The sponsor statement says that the intent of the bill is to ... take an employer who's behaving appropriately, who's done nothing wrong, who is truly innocent of any wrongdoing, and insulate them from vicarious punitive-damage liability. And, indeed, in Ms. Davis's comments a couple of days ago, she gave an example where the employer really did nothing wrong - did everything right - and ... expressed some consternation at the injustice of suffering punitive-damage exposure under those circumstances.

> The language that we suggest tracks that idea. If you are truly innocent, you're not going to get stuck with punitive-damage exposure. On the other hand, ... if the employer is negligent - has acted unreasonably in hiring, [retaining], supervising the employee - they're not innocent. They're a big part of the problem. And under those circumstances, it would seem to me, good public policy would dictate that they enjoy punitive-damage exposure, albeit vicarious exposure. ... It lowers the bar ... in terms of how bad their conduct has to be: recklessness ... is a further or farther deviation from the "reasonableness" standard than negligence is. And under the language we would suggest, if they are negligent, they can be vicariously on the hook for punitive damages.

Number 1248

REPRESENTATIVE GARA inquired about the need for his amendment [never formally offered, but mentioned previously as one of the three written amendments] that would change "and" to "or" on page 2, line 1.

MR. BROWN or MR. SCHNEIDER clarified that the suggestion [in the letter, page 3] was "agent was unfit and". He added, "If the agent was unfit and ... there is some wrongdoing on the part of the employer, we think the employer ought to be stuck vicariously."

REPRESENTATIVE GARA indicated that that particular amendment was the result of a misunderstanding, then.

CHAIR McGUIRE requested that testifiers on teleconference identify themselves when speaking.

Number 1369

MR. BROWN, on another subject, told members:

> I'm not trying to speak disparagingly about any religious group at all. I will confess that I am Catholic, so I'm not trying to condemn the Catholic Church. But the way this is presented and has been submitted ... in the proposed House bill, I doubt very seriously if, under those circumstances, ... any of the victims of sexual abuse could bring any claims against the archdiocese in any of the major

> metropolitan areas where these claims have been raised by victims of sexual abuse. I think it would be that difficult. ... That's why we [have] proposed the language of "negligence". ... I don't think they've centered on the Catholic Church by any means, but I think that's why the language is such as it is in Section 909, to ... expand the base of persons liable and responsible.

Number 1419

MS. DAVIS conveyed concern that [Amendment 1, which would change "recklessly" to "negligently"] turns on its head the whole concept that punitive damages are awarded when there has been outrageous or reckless conduct. She said:

> Granted, we're talking about the underlying reckless employee, and then you step up to an employer; yet the Restatement in both sections uses the word "reckless", and ... I would pause long and hard before I'd change that standard or lower it down, because we essentially are converting the employer's liability here from a punitive standard to more of a compensatory standard. And I would probably take issue that individuals harmed [by someone from the] Catholic Church would ... (indisc.) the compensation under the compensatory side for pain and suffering, emotional trauma, et cetera, and then the issue for [punitive damages] can and should be based on a "reckless" standard.

Number 1475

REPRESENTATIVE GARA offered his understanding that although changing ["recklessly" to "negligently"] lowers the level of care required before an employer is held liable, the bill raises the bar by saying that employers who automatically would have been liable now would be liable only if negligent or reckless.

Number 1523

REPRESENTATIVE SAMUELS, sponsor of HB 214, said the "reckless" standard already is in both Section 909 and Section [217(c)] of the respective restatements, and that he considers this a clarification of what the courts already have come out with.

REPRESENTATIVE GARA replied that it isn't the law followed in Alaska or lots of other states. He cautioned that adopting this bill will radically change Alaska's law.

Number 1530

REPRESENTATIVE OGG asked whether using the word ["negligently"] here would raise the present standard in law for the employer's duty.

MS. DAVIS said the employer already has a duty to act reasonably in hiring and retaining employees. She explained:

> The problem that we're dealing with here is, this is a bill that's a bit attenuated. This is a bill that deals with the employer's vicarious liability for the wrongs of an employee, apart from its own duty and its own obligation. So I have a little bit of a hard time grasping the concept of duty that's been overlaid over vicarious liability. Duty is usually a direct liability, not a vicarious liability. So I get confused with the use of "duty" here.
>
> But if we look in terms of ... threshold of liability, currently under the Alaska Supreme Court's rule, ... they basically have a scope-of-employment rule that just says, "Whatever that reckless employee is doing, as long as they're engaged in the pursuit of that employer's business, the employer is liable, period - ... end of discussion, end of inquiry. We don't care whether the employer was a bad guy [or a] good guy - doesn't matter." So what we're doing here with this rule of law is, we're trying to ... take away the strict liability and say, "No, for punitive damages you will only be liable for that employee's punitive damages if these sets of conditions are met."
>
> So, by virtue of the bill, we are ... raising the bar for an employer's exposure to punitive damages that have been imposed on the employee. We are not changing in any way the employer's duties and direct obligations with respect to its own compensatory and its own punitive damages.

Number 1638

MS. DAVIS, in reply to further questions from Representative Ogg, explained:

> There's a step from innocent to negligent to gross negligent to what we call reckless and outrageous, all the way to intentional. ... We're moving to not intentional, but reckless. And ... we picked that because that is what is already contained in the complicity rule that's adopted by other jurisdictions that have adopted the restatements.

CHAIR McGUIRE suggested that summarized the entire bill and the amendment.

Number 1682

REPRESENTATIVE GRUENBERG asked Mr. Brown or Mr. Schneider to respond to Representative Ogg's question of whether this change to ["negligently"] would alter current Alaska law.

AN UNIDENTIFIED SPEAKER responded that it would change Alaska law and make it more difficult to obtain punitive damages for vicarious liability. In reply to a further question from Representative Gruenberg, he said:

> This would move it to negligence for ... tortious conduct. Remember, ... to even get to the "vicarious" question, there still has to be outrageous conduct proven ... as to the conduct ... of the agent, even to get to this question, and then you have to jump over the next hurdle, under ... our proposed language, of showing that the employer was negligent in employing, supervising, or retaining. So it's a double hurdle.

Number 1740

CHAIR McGUIRE, offering her understanding that there were no further testifiers, again closed public testimony.

Number 1758

REPRESENTATIVE GARA moved to adopt Amendment 1 [text provided previously].

REPRESENTATIVE SAMUELS objected.

REPRESENTATIVE GARA explained that Amendment 1 was offered in recognition of the sponsor's concern that there should be some culpability by an employer before being held liable for an employee's reckless conduct. Calling it a middle ground, he said it makes the law more protective of employers than it is today, but not as protective as without the amendment. He offered that it is good policy because it will never happen that someone shows that an employer was reckless in hiring somebody who then engaged in reckless conduct, since the standard for recklessness is incredibly high. He mentioned previous testimony about how rarely punitive damages are awarded.

REPRESENTATIVE GARA referred to a handout on [cases relating to] negligence, noting that the first page says that to receive punitive damages, [a plaintiff] must show reckless indifference to the rights of others and a conscious action in deliberate disregard of those rights - a very high standard. He also indicated the law says that cases involving punitive damages require much more evidence of being right than required in a normal civil case: the standard is clear and convincing evidence, somewhere between the normal civil standard and the criminal standard. He said the protections already exist.

Number 1836

REPRESENTATIVE GARA provided an example of a school bus company that pays employees the $12 an hour that its profit margin allows, recognizing that some employees will be very good, but others may not be the best in the world. The company hires somebody with a history that isn't terrible, but includes lack of diligence and perhaps laziness. If that driver decides not to bother to put the tire chains on when conditions are icy, Representative Gara suggested that is probably reckless conduct on the part of the driver, but said the question is whether to hold the employer liable. He remarked:

> Depending on the warning signs the employer had that this was a lazy person who might have a propensity not to take the proper precautions when he's charged with protecting the lives of a hundred children, maybe [the employer should be held liable or] maybe not. But if we said the employer had to be reckless in making the hiring decision in the first place, there's no way the school bus company would ever be held responsible for hiring somebody who put children in danger.

> If the purpose is to make sure that there's some culpability on the part of an employer, I think we do that by saying the employer shall act without negligence in hiring and employing its workers. [That] addresses the specific concern made in the sponsor statement. It addresses the specific concern we discussed the other day - it's whether we're holding employers liable for things that they've done wrong or whether we're holding them liable for things where they've done nothing wrong. So that's the purpose of the one-word change.

Number 1908

REPRESENTATIVE SAMUELS maintained his objection, saying the bill does nothing to change "the direct punitive damages that can be awarded to the company in direct liability." With regard to the statistics provided by [Mr. Wirschem] about awards of punitive damages, he said the point is that the hammer is always there, and it helps in the settlement with regard to the rest of the damages. He indicated that every small-business owner fears being put out of business by having to pay punitive damages. He said that if a company does its best and has good policies and procedures as well as drug testing, for example, and yet something happens when an employee makes his or her own decisions, the entire company is at risk. Expressing sympathy with Mr. Wilson, whose employees leave town for weeks on end, Representative Samuels asserted his belief that [the helicopter] industry is the most regulated on the planet. He added:

> I can guarantee one more thing: If you say "negligently", that becomes the argument and you lose the argument every time, and once again, here comes the hammer - you were negligent because you didn't specifically say [the helicopter pilot] couldn't draw the mirror up four inches; you said, "Don't use the mirror." Well, ... there comes the argument again. ... If you're doing the absolute best that you can as an employer, then you should have some rights, too.

Number 1985

A roll call vote was taken. Representatives Ogg, Gara, and Gruenberg voted in favor of Amendment 1. Representatives Holm, Samuels, Anderson, and McGuire voted against it. Therefore, Amendment 1 failed by a vote of 3-4.

REPRESENTATIVE GARA brought attention to [Amendment 2, text provided previously]. Referring to prior discussion, he offered his belief that it makes the law say clearly what the sponsor intends, since it includes supervising or failing to fire [an employee] to the extent that an employer is liable for recklessly employing someone. Therefore, Amendment 2 makes the bill read that an employer is liable if the employer acted recklessly in employing, supervising, or retaining the employee.

Number 2050

REPRESENTATIVE GARA moved to adopt Amendment 2.

REPRESENTATIVE SAMUELS objected for the purpose of discussion. He told members, "We certainly mean the hiring and the continued employment; we don't mean if you hire somebody and then you know they're bad after you hire them that you should be let off the hook, because you shouldn't."

The committee took an at-ease from 1:50 p.m. to 1:51 p.m.

CHAIR McGUIRE relayed that it was decided [during the at-ease] to have a friendly amendment to Amendment 2 such that "or retaining" would be inserted after "employing" on page 2, line 2. Thus Amendment 2, as amended, no longer would contain the word "supervising".

Number 2107

REPRESENTATIVE GARA explained: "We had a discussion over this amendment of the amendment. And I guess we feel that there are some circumstances where, then, bad supervising might be encompassed under this language. And the intent is just to leave it for the courts." He asked whether that is fair.

REPRESENTATIVE SAMUELS pointed out that supervisors sometimes don't make company policy.

Number 2139

REPRESENTATIVE HOLM remarked that supervision doesn't need to be included because a company wouldn't employ someone without the idea of supervising that person. He said the implication of supervision is inherent in employment.

Number 2147

REPRESENTATIVE GRUENBERG disagreed that the term "supervision" is within the legal concept of hiring. He said that usually in the law, "employing" is the decision of whether to hire someone; it is very different from decisions after the person has been hired. That is why he thought [including "supervision"] was in line with the intent of the bill, he said, expressing hope that Representative Samuels would revisit his objection.

CHAIR McGUIRE suggested that a decision to retain or not to retain a person speaks for itself. If an employee has been driving a tractor while drunk and the company decides not to fire the person, she offered her belief that the company has just allowed that risk to continue.

REPRESENTATIVE GRUENBERG agreed, but suggested that a decision about retaining an employee is less inclusive than supervision, which could be just letting someone do the job without supervision. He emphasized the importance of including ["supervising"].

CHAIR McGUIRE pointed out that nowhere in [the relevant sections of the Restatement (Second) of Torts or the Restatement (Second) of Agency] is the word "supervised" contained.

Number 2230

REPRESENTATIVE GARA suggested perhaps the amendment wasn't needed in the first place, and said:

> But we wanted to make sure it was clear to the courts. I think Representative Holm is right that the intention of the word "employing" means the whole gamut, from hiring to ... terminating. But we wanted to make sure that it did, and so we put employing and retaining. I feel very comfortable that the whole concept is covered by the amendment we've offered, but ... there was a definitional problem that Representative ... Samuels raised about using the word "supervisory", and I'm comfortable that we've addressed everybody's problems the way ... we've dealt with it here.

Number 2257

REPRESENTATIVE GRUENBERG conveyed confidence that the members understand the use of the word "employing" here, and suggested there may be another way to do this. Although he said he would

withdraw his objection [to removing "supervising"], Representative Gruenberg emphasized that the legislative history should be crystal clear "that we mean to include within the phrase 'employing or retaining' the concept of supervising too."

REPRESENTATIVE SAMUELS announced that he was withdrawing his objection Amendment 2, as amended.

Number 2310

CHAIR McGUIRE asked whether there was any objection to adopting Amendment 2, as amended. There being no objection, it was so ordered.

REPRESENTATIVE GRUENBERG moved to adopt Amendment 3, a modification of Amendment 1, which had failed to be adopted. He specified that on page 2, line 2 [after "acted"], the amendment would delete "recklessly" and insert "grossly negligently".

REPRESENTATIVE SAMUELS objected, citing the argument stated previously [for Amendment 1].

Number 2341

REPRESENTATIVE OGG, noting that he hadn't spoken to Amendment 1, referred to the conduct described by Representative Samuels and suggested that someone acting that way generally wouldn't be declared negligent by a court. He explained:

> If you acted in good faith and followed all the standards as you described them, a person would not be negligent. However, under the present law they would have been liable for strict liability under this "vicarious" concept. I'm a little uncomfortable jumping up four steps ... in passing a change like this. I see that the "negligent" doesn't go, but I'm happy to go with this one, the "gross negligent". That's jumping up two steps, and you're covered beyond that conduct that would have been safe under "negligent".

TAPE 03-28, SIDE B
Number 0001

REPRESENTATIVE GARA said he'd rather have ["negligently"] but supports the current amendment as an alternative.

REPRESENTATIVE GRUENBERG indicated he was trying to reach some middle ground and craft a bill that the entire committee could support.

A roll call vote was taken. Representatives Gara, Gruenberg, and Ogg voted in favor of Amendment 3. Representatives Holm, Samuels, Anderson, and McGuire voted against it. Therefore, Amendment 3 failed by a vote of 3-4.

Number 2302

REPRESENTATIVE GRUENBERG began discussion of Amendment 4. He said he understood the intent of the bill, which is to adopt the restatement language, and that he understood from people who oppose the bill that the restatement language itself would be preferable to the language of the bill.

REPRESENTATIVE GRUENBERG [moved to adopt Amendment 4], in lieu of the bill, to adopt Section 909 of the Restatement (Second) of Torts.

CHAIR McGUIRE declared the foregoing to be out of order.

REPRESENTATIVE GRUENBERG requested an appeal of that ruling.

The committee took an at-ease from 2:04 p.m. to 2:05 p.m.

Number 2280

REPRESENTATIVE GRUENBERG [renewed his motion to adopt Amendment 4] to adopt Section 909 of the Restatement (Second) of Torts in lieu of the bill.

REPRESENTATIVE SAMUELS objected.

REPRESENTATIVE GRUENBERG explained, "The restatement has been thought through by the best legal minds. It has commentary. It has all kinds of cases construing it. We're buying a known quantity here. And if that's the intent of the bill, let's adopt the restatement."

REPRESENTATIVE SAMUELS offered his understanding that the drafters of the bill, when including "the act or omission", were changing things to suit the Alaska Statutes. He indicated that that is why [the restatement] wasn't used as the bill.

Number 2239

REPRESENTATIVE GRUENBERG said he'd consider it a friendly amendment if Representative Samuels wanted to say "an act or omission by an agent". He indicated the desire to "buy a known quantity" and do what has been adopted across the country.

REPRESENTATIVE SAMUELS maintained his objection, suggesting he needed to do more research on it. He said, "To me, it says the same thing." He added that the key point of the entire legislation, as brought up by Representative Gara, is the negligence versus recklessness.

REPRESENTATIVE GRUENBERG countered, "It says in (b), which is the section we were dealing with, the word is 'reckless'."

REPRESENTATIVE SAMUELS said he understood, and added, "That's where we got it from."

CHAIR McGUIRE explained that she'd ruled Representative Gruenberg's motion out of order previously because the amendment was to rewrite a bill. She requested a vote.

REPRESENTATIVE SAMUELS expressed concern about unintended consequences.

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 4. Representatives Samuels, Anderson, Ogg, Holm, and McGuire voted against it. Therefore, Amendment 4 failed by a vote of 2-5.

Number 2163

REPRESENTATIVE HOLM moved to report HB 214, as amended, out of committee with individual recommendations and the accompanying fiscal note(s).

CHAIR McGUIRE asked whether there was any objection.

REPRESENTATIVE GARA noted his objection, but suggested moving the bill to the House floor.

CHAIR McGUIRE announced that there being no further objection, [CSHB 214(JUD)] was reported from the House Judiciary Standing Committee.

The committee took two brief at-eases from 2:10 p.m. to 2:11 p.m.

HB 212 - POWERS OF APPOINTMENTS/TRUSTS/CREDITORS

Number 2110

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 212, "An Act relating to trusts, including trust protectors, trustee advisors, transfers of property in trust, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment."

CHAIR McGUIRE, speaking as the sponsor of HB 212, informed the committee that HB 212 is a product of work done since 1997, when the legislature passed the original trust Act, which put into place a policy that the trust industry would be a part of Alaska's economy. There have been good results from this, she opined, noting that every year, there are modifications to the original Act in order for Alaska to remain competitive with other states.

Number 2047

VANESSA TONDINI, Staff to Representative Lesil McGuire, House Judiciary Standing Committee, Alaska State Legislature, explained that a proposed committee substitute (CS) represents a continuing attempt to keep Alaska's trust laws competitive with other states, such as Delaware. Alaska has a unique tax structure in that it's virtually nonexistent, and in order to take advantage of this, in 1997 the Alaska State Legislature decided to venture into the trust industry. The trust industry has brought jobs and money to the state and this has resulted in a capital base increase for investment purposes. Ms. Tondini said that the trust Act has been a success by all accounts; however, in order to remain competitive, Alaska must stay on top of the changes made by other states.

MS. TONDINI explained that HB 212 makes changes to the [law pertaining to spendthrift trusts] and adds the ability to have a trust protector and trust advisor, similar to Delaware law. The aforementioned abilities allow the settlor to have as much control as possible when the settlor decides to give a gift or create a trust.

Number 1957

MS. TONDINI, in response to Representative Anderson, explained that the only change encompassed in the CS is in Section 7.

Language was added to the section dealing with subjecting appointed property to the claims of the donee's creditor. The original bill merely stipulated that the power of appointment is permitted under [paragraphs] (1)-(2), only mentioning the donee's estate. Basically, the language added is as follows: "is permitted by the donor of the power to appoint the property to the donee, the creditors of the donee, the donee's estate, or the creditors of the donee's estate;". She explained that the language was changed in order to conform this section so that it also applies to inter vivos powers of appointment because the donee's estate would only be applicable under testamentary power of appointment.

Number 1895

STEPHEN E. GREER, Attorney at Law, informed the committee that his practice is limited to estate planning. Mr. Greer clarified that HB 212 isn't special interest legislation, rather this legislation is meant to refine Alaska's present trust law. Since this law was originally passed in 1997, there has only been one amendment in 1998. However, Delaware has amended its statute six times. Mr. Greer also informed the committee that there is widespread support for HB 212.

Number 1787

REPRESENTATIVE SAMUELS moved to adopt the proposed committee substitute (CS) for HB 212, Version 23-LS0471\I, Bannister, 4/1/03, as the work draft. There being no objection, Version I was before the committee.

Number 1767

DOUGLAS BLATTMACHR, President, Alaska Trust Company, simply announced support for HB 212, which he believes will improve Alaska's trust laws and help the state continue to attract trust business.

Number 1748

ROBERT MANLEY, Member, Hughes Thorsness Powell Huddleston & Bauman, LLC, informed the committee that he has been practicing as a trust and estates attorney for about 25 years. He specified that he is only representing himself. Mr. Manley noted his support of HB 212. He explained that his clients use trusts to reduce estate gift tax and to preserve family assets.

MR. MANLEY directed attention to Section 1, which offers statutory confirmation for the office of trust protector and trust advisor. A trust protector is commonly used in trusts. A trust protector, he explained, acts as a court of appeals for the surviving spouse if the institutional trustee is unreasonable. This trust protector is particularly important in perpetual or long-term trusts. He said this [change] and others make Alaska's trust law better.

Number 1640

JONATHAN BLATTMACHR, Partner, Milbank, Tweed, Handley & McCloy, informed the committee that he is a member of the Alaska, California, and New York Bar [Associations]. He said that his firm has had dozens of clients who have created trusts in Alaska. This legislation will allow Alaska to stay in the forefront of the trust business, which is a free and clean business no matter the location. The aforementioned is why so many jurisdictions are trying to better their laws. Even New York is considering making changes, including possibly eliminating its income tax on trust income. Alaska already enjoys that. Mr. J. Blattmachr urged the committee's support of the legislation. He echoed earlier testimony that [the trust industry] is one in which one must constantly keep ahead and thus this won't be the last time that there will be a request to make changes to better Alaska's law.

REPRESENTATIVE GRUENBERG noted that committee members should've received comments from the Alaska Child Support Enforcement Division (CSED). Basically, he remarked, the CSED speaks on behalf of one class of creditors: those who are owed child support. However, he believes that many of the CSED's comments reflect the views of other creditors. Representative Gruenberg surmised that the CSED views one of the problems with HB 212 as being that it allows people to shield their assets from legitimate creditors. Since the only contact the settlor or donor has to make with Alaska is to create a trust in Alaska, people with no contact at all with the state could use the state as a haven for avoiding creditors. Therefore, Representative Gruenberg noted he was concerned with some of the provisions allowing people to use [trusts] as a shield for creditors, because the bar is raised for proving fraud in various areas.

MR. J. BLATTMACHR recalled his involvement in Alaska's original legislation in 1997 when he met with a number of departments, including those charged with the duty of [collecting] child support. The existing law, he remarked, specifies that no one

can create an Alaskan trust and avoid the claims for child support if that individual is behind in child support payments. Furthermore, with these type of trusts, no matter whether they are created in Alaska, Delaware, Rhode Island, or Nevada, one cannot receive a discharge in bankruptcy for child support in the United States. Therefore, even if a parent decides to catch-up on his/her child support, that parent can't then place his/her assets in a trust in Alaska in order to never pay any more child support.

MR. J. BLATTMACHR said that won't work because there is an explicit provision in the United States bankruptcy law that says child support, alimony, and eight other categories, including intentionally harming someone, cannot be discharged. The ability to obtain the child support at some point, even after the child is of majority, [is still there] because the trust will be in Alaska and before the court. The court could specify that whenever this individual receives a distribution - the individual who is behind in child support payments - there must be notice to the child welfare division, to the custodial parent, and to the child if the child is an adult. Therefore, those assets can be attached. He noted that he met with [CSED in 1997] and the division withdrew its opposition once the aforementioned was explained.

MR. J. BLATTMACHR turned to the general question of taking advantage of creditors. Throughout the United States, in every state, a person can transfer assets to someone else either outright or in trust. Once those assets are transferred, those assets are no longer [available] for the claims of that person's creditors unless the creditor can prove it was a fraudulent transfer. For example, in 1994 when Mr. J. Blattmachr's firm first started making money, he took his extra profits and placed them in trust for his wife. This was before Alaska's trust Act was enacted, so he created the trust under New York's laws. This means that the assets are completely immunized against his creditors and against his wife's creditors - since she didn't create the trust - unless the creditor can prove that it was a transfer to defraud a known creditor. Alaska law essentially says the same thing.

MR. J. BLATTMACHR noted, however, that Alaska has allowed for a pure discretionary beneficiary, which would forever prevent permanently subjecting the assets of the trust to the claims of creditors. The aforementioned is in line with the federal law specifying that a pension plan is forever protected from claims of creditors. Therefore, he said, he didn't believe [HB 212]

does anything extraordinary. The changes made [in the CS] include clarifying during litigation where the burden of proof will fall, and providing the judge an easier time in determining whether there is a fraudulent claim. The [CS] also changes the charitable remainder trust, which is a trust that an individual creates which will ultimately go to charity, such that the interest in the charitable remainder trust is protected from claims of creditors. Charitable remainder trusts are a creature of federal law, and although it's possible that federal law would provide protection, [the desire with the CS] is to make that clear in Alaska.

Number 1107

DAVID SHAFTEL, Estate Planning Attorney, began by informing the committee that he is a member of the informal group of estate planning attorneys that have worked on improving the trust statutes in Alaska. A number of good statutes have been enacted since 1997 he opined. He relayed that the informal group feels that this particular statute continues to clarify in Alaska law as it relates to trusts. As a practicing estate planning attorney who deals with clients daily on these matters, Mr. Shaftel said that the residents of Alaska have benefited tremendously from the legislature's work in this area. He related that all [of the members of the informal group] recommend this legislation.

REPRESENTATIVE GARA noted that in his district there is a ground swell of support for this legislation.

Number 0933

RICH HOMPESCH, Attorney, informed the committee that there is support for this legislation in Fairbanks. He concurred with the comments of the previous witnesses. There is no doubt that Alaska has seen an increase in its trust business since 1997, he remarked, and relayed his belief that this legislation will further nurture the trust industry in Alaska.

Number 0884

RICHARD THWAITES, Estate Planning Attorney; Chairman, Alaska Trust Company, informed the committee that he has been an estate planning attorney in Alaska for 29 years and has been involved with the development of the original trust legislation. He remarked that the trust industry is a competitive industry, and that more and more practitioners are coming to Alaska and using

the Alaska trust system. This legislation helps Alaska stay [at the top of the trust industry], he added.

REPRESENTATIVE GARA returned to the situation in which there isn't enough money to pay a child support obligation when a trust is created. Although he said that he feels comfortable that it's not a problem, he requested that Mr. Thwaites comment on the matter. He asked if his understanding is correct that before a trust is signed and authorized in this state, an affidavit of solvency is signed, and that the Affidavit of Solvency includes a paragraph in which the applicant swears that he/she has no debts beyond their ability to pay and that creating a trust won't thwart the individual's ability to fulfill his/her financial obligations. He asked if that paragraph is signed for each trust in the state.

MR. THWAITES answered that the Affidavit of Solvency document included in the committee packet is one the Alaska Trust Company requires before accepting a trust for administration. He opined that generally speaking, an estate planning attorney should have some such document. He pointed out that the document used by the Alaska Trust Company specifies that no more than half of an individual's resources are being placed in a trust. He noted that there is a similar concept in the securities law for a qualified investor. There is no intention, he said, for these [trusts] to be used to defraud creditors. Furthermore, the cost of establishing and administering these trusts is fairly significant and, thus, it isn't something that a smaller estate would undertake.

Number 0603

REPRESENTATIVE GARA asked if it's standard to receive some assurance [similar to that provided by the Affidavit of Solvency] before a trust is entered into.

MR. THWAITES noted that there are five competitors in the [trust] industry in Alaska and due to privacy laws, he couldn't speak to the practices of the competitors. He specified that [the Alaska Trust Company] has always [used the Affidavit of Solvency document].

MR. SHAFTEL pointed out that if the transfer results in the settlor being insolvent, that in itself is a strong form of evidence that the trust was created with an intent to evade creditors. With regard to the practice of attorneys, Mr. Shaftel relayed his belief that since 1997, [practically all] of

the estate planning attorneys in Anchorage have used the Affidavit of Solvency and have required financial statements with CPA verification as well as an agreement from the client which specifies that all of the representations of the client's financial condition are accurate. He relayed his belief that the practitioners are very careful that the trust isn't used to evade existing creditors.

MR. GREER concurred with Mr. Shaftel's comments. He recommended that those having questions with regard to the Alaska experience with self-settled trusts read Mr. Shaftel's article on the matter.

CHAIR McGUIRE noted that Mr. Shaftel's article is part of the committee packet.

Number 0356

MR. J. BLATTMACHR concurred with Mr. Shaftel that if an individual makes a transfer and renders himself or herself insolvent, that's a per se a fraudulent transfer. For example, if an individual with debts of a million dollars takes assets worth $300 million and transfers them to an Alaska trust, the individual has made a fraudulent transfer and the trust, under Alaska law, will not provide any asset protection. That is the rule throughout the United States and hasn't been changed by prior Alaska legislation or this legislation. Additionally, in order to perform an Alaska trust, the individual has to be up to date with child support payments. Therefore, this legislation would seem to encourage people to catch up.

MR. J. BLATTMACHR said that from experience with his own practice, virtually all banks, trust companies, and attorneys insist upon a statement of solvency because assisting someone in bankruptcy fraud is a go-to-jail crime under federal law and makes the [attorney] secondarily liable for damage done to creditors. Therefore, every attorney that he knew of who performs asset protection is extremely careful to ensure that there is nothing that will render a particular creditor insolvent, because of the possibility of being civilly liable for it and the possibility of going to jail. Every year people are prosecuted in the U.S. and sent to prison for bankruptcy fraud.

MR. D. BLATTMACHR offered his understanding that most institutions use the [Affidavit of Solvency] document or one similar to it.

Number 0189

REPRESENTATIVE GRUENBERG asked if there is currently a requirement in law that the settlor file an Affidavit of Solvency.

MR. THWAITES answered, "Not that I'm aware of."

REPRESENTATIVE GRUENBERG pointed out that with real estate transactions, the legislature has required a disclosure statement to be given to the buyer for the purpose of protection against real estate fraud. [The Affidavit of Solvency] would provide various protections. Therefore, he asked if those behind this legislation would have a problem with requiring that the settlor maintain such an affidavit on file, with its filing being a continuing Affidavit of Solvency and, thus, requiring any change to be disclosed under oath.

MR. THWAITES said he didn't want Alaska to have a list of negative checks against Alaska's trust industry in its competition with Nevada, Rhode Island, and Delaware.

REPRESENTATIVE GRUENBERG countered that he didn't want to have a lot of people defrauding creditors, which he viewed as higher public policy.

MR. J. BLATTMACHR remarked that requiring the grantor to put in an Affidavit of Solvency at the inception of the trust would be potentially good for Alaska. However, he said he thought one would be crazy to do it if it would render the individual insolvent, because of the possibility of going to jail. Furthermore, it's a fraudulent transfer and the creditor can get [the funds] under the law of all states. He opined that making someone prove that he/she is solvent before being allowed to create a trust demonstrates the seriousness of the matter to someone who might be considering such an option for the purpose of evading creditors.

TAPE 03-29, SIDE A
Number 0025

MR. J. BLATTMACHR noted, however, that it may not be helpful to require a grantor to continue to give such affidavits of solvency. As long as a grantor creates a trust in good faith, without intention to defraud, and is not insolvent at that time, the fact that he/she later becomes insolvent is ignored under

the law. Thus, although it might be good to require an affidavit proving solvency when initially establishing a trust, to require one periodically afterwards would not be practical, since it would not have any legal impact.

MR. THWAITES agreed.

CHAIR McGUIRE opined that requiring an affidavit initially is a good suggestion and furthers the legislation's intent.

REPRESENTATIVE GRUENBERG, after noting that it is very difficult to litigate fraudulent transfer cases and prove an intent to defraud, turned to the concerns provided in writing by the Child Support Enforcement Division (CSED), specifically the concern pertaining to Section 3, page 3, lines 11-12. The CSED document says in part:

> Section 3 of the bill increases the proof required to prove intent to defraud creditors. Currently, we only have to prove that the person intended in part to defraud creditors. ... If the bill passes, we will have to prove that defrauding creditors was the primary intent ....

REPRESENTATIVE GRUENBERG posited that the CSED is concerned that use of the phrase, "made with the primary intent to defraud" raises the burden of proof.

MR. J. BLATTMACHR opined that the CSED's concern is irrelevant because, in order to create an effective "Alaska trust" to begin with, one must be up to date with child support payments. He acknowledged, however, that perhaps that phrase may make it harder for a general creditor to prove that the transfer was made with the intent to defraud.

REPRESENTATIVE GRUENBERG asked whether, in order to set aside the fraudulent conveyance under Alaska law, it must be shown that the primary intent was to defraud, or whether all that is needed is to show that it was an intent in part.

Number 0360

MR. GREER said that under Alaska law, the burden of proof is a preponderance of the evidence. The reason for inserting the word primary, he explained, is that rarely will an individual admit to a fraudulent conveyance. Instead, what it comes down to is letting the trier of fact determine whether or not certain

badges of fraud exist. He mentioned that according to the First Nat'l Bank v. Enzler case, there are a number of factors that can be badges of fraud, one of which is simply a transfer to a child. He opined that insertion of the term primary was not intended to raise the burden of proof beyond a preponderance of the evidence; rather, it simply clarifies that the trier of fact is allowed to weigh all of the circumstances. Thus, for example, if it is found that a trust was created for the benefit of a child, that fact, in and of itself - that it was a transfer to a child - would not be sufficient to constitute a fraudulent conveyance.

REPRESENTATIVE GRUENBERG noted that Version I, on page 4, lines 29-30, keeps the current standard of a preponderance of the evidence. He relayed that his concern is not about the quantum of proof - which is a preponderance of the evidence rather than the standard of clear and convincing that is used in Delaware - and it is not about the badges of fraud. Instead, his concern, he said, is that under HB 212, "you're going to have to prove ..., to set it aside, that the primary intent was to defraud a creditor." He said that he could not recall whether, under the Enzler case, other cases, and current law, it must be proven that the intent to defraud is a primary intent. He said that his feeling is that the CSED is correct, and that currently, as long as there was "an intention" to defraud, the conveyance can be set aside.

MR. GREER replied:

> It can only be set aside if it's shown by a preponderance of the evidence that it was the intent of the settlor, in transferring the assets to the trust, ... to defraud [the] CSED. If they can establish that, by a preponderance of the evidence, then that transfer can be set aside. That's how I see the law now, and how I continue to see the law even under this bill.

Number 0578

REPRESENTATIVE GRUENBERG said, "So ... if that were one of many intentions, ... under current law it would be sufficient if you could show that that was an intention; it would not, under current law, have to be the primary intention. Right?"

MR. SHAFTEL remarked that for 70 to 80 percent of his clientele, asset protection is always a concern, as are tax reduction and

asset management. The point is, he added, if someone has multiple intents, one of which is asset protection, he/she will say that asset protection for a relative or spouse is one of his/her intentions. Thus, if that is enough to set aside a transfer, he warned, that does away with a lot of bona fide estate planning. He opined that HB 212, including this provision, closes gaps in the current law relating to trusts and the protection that trusts provide, and clarifies the areas of that law that are of concern to those associated with the trust industry. He opined that current law is ambiguous and could be construed a number of different ways. He said that if one's primary intent is to defraud a creditor, then that transfer should be set aside; however, if asset protection is just one of ten different intentions, for example, then it should not be enough.

REPRESENTATIVE GRUENBERG turned to the word "defraud" on page 3, line 13. He opined that the distinction between "defraud" and "asset protection" is not simply a "nice" distinction. Defrauding means to act dishonestly with the intent, basically, to steal money or [avoid a creditor's claim]; it does not mean, in the general sense, to protect money from potential future creditors. For this reason, he indicated, he is concerned because the language now stipulates that the intent to actually defraud a bona fide current creditor must be a "primary" intention.

MR. SHAFTEL opined that HB 212 would provide clarity in the very area that Representative Gruenberg has concerns about. He suggested that current language could allow a trier of fact to go astray and set aside a transfer simply because asset protection was goal.

REPRESENTATIVE GARA asked whether, if the language was altered to read "intent to defraud" instead of "primary intent to defraud", that would interfere with Alaska's ability to be competitive in the trust market.

MR. THWAITES remarked that it would hinder Alaska's ability slightly because other states' statutes are a little clearer, adding that the goal of this legislation is to keep up with those other states.

Number 0989

CHAIR McGUIRE made a motion to adopt Conceptual Amendment 1: "I want to allow the bill drafters an opportunity to work it [into]

the right place, but, essentially, it will say, 'A settlor of a trust is required to sign an affidavit of solvency prior to the creation of a trust.'"

REPRESENTATIVE GRUENBERG said he strongly supports Conceptual Amendment 1, but cautioned that the term "affidavit of solvency" will have to be carefully drafted so that it is similar to what "we have been given."

CHAIR McGUIRE agreed, and assured members that committee staff would ensure that all aspects of such an affidavit are considered.

REPRESENTATIVE GARA objected for the purpose of discussion. He posited that they were trying to get at the same thing, but said that if one could envision someone who is trying to defraud a beneficiary of a child support payment, one could also envision that that same person would try to get a trust drafted before child support kicks in. Therefore, he opined, "you would want to include that the person will have to state under oath that they're not planning to defraud an anticipated child support payment.

CHAIR McGUIRE said, "I like it - good friendly amendment - I like it." [Conceptual Amendment 1 was treated as amended.]

REPRESENTATIVE GARA added: "But I don't think we have to include that whole trust document. I think just the concepts that you've discussed can be written down much more briefly than incorporating a whole affidavit."

CHAIR McGUIRE agreed. She asked whether there were any further objections to Conceptual Amendment 1 [as amended]. There being none, Conceptual Amendment 1 [as amended] was adopted.

REPRESENTATIVE GRUENBERG said he still has concerns about the intent language on page 3, lines 11-13, because it is so difficult to prove fraud in the courtroom. He asked that the legislation be held over for the purpose of allowing him an opportunity to discuss this issue further with the [interested parties].

CHAIR McGUIRE agreed to hold HB 212 [Version I, as amended] over until [the next meeting].

HB 92 - CLERGY TO REPORT CHILD ABUSE

Number 1169

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 92, "An Act relating to reports by members of the clergy and custodians of clerical records who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect." [Before the committee was CSHB 92(STA).]

The committee took an at-ease from 3:10 p.m. to 3:13 p.m.

Number 1190

REPRESENTATIVE BOB LYNN, Alaska State Legislature, sponsor, said that although no one is above the law, there must first be a law. He elaborated:

> One only has to read the national headlines to conclude it's long past time to mandate reporting by clergy of actual or suspected sexual abuse of children. Doctors, and nurses, and teachers already are required to report. Alaska's children and Alaska's faith community are Alaska's most important and valuable resources, and resources most worthy of protection. That's why I introduced HB 92 .... I believe HB 92 will be good for children, good for all of our churches, and good for Alaska.
>
> A couple points, please, before I proceed. Please understand that [it is] is not my intent to cast stones at any particular church, or any particular individual, or any particular group of individuals. As a point of information and to avoid any misunderstanding of my intent, I sent my proposed legislation to our [Legislative Legal and Research Services] in mid-December of 2002, ... long before some of the publicity we've seen recently involving one of our archbishops ....
>
> As another point of clarification or perhaps even disclosure, I'm a practicing Roman Catholic, active in my church, but I'm here testifying strictly as a legislator and strictly as a layperson. I can speak only of my personal lay-knowledge of church practices ..., and I don't speak for my personal church or anybody else's church or place of worship. I should also add, thankfully, there's been no personal

involvement of me or anyone in my family with any [of] the situations which [have] prompted me to introduce this bill.

Number 1308

REPRESENTATIVE LYNN continued:

Headlines don't tell the entire story. No church has a monopoly on sinners, whether they are clergy or non-clergy, and certainly no church has a shortage of people who find inaction more convenient than action. It is neither fair nor accurate to conclude from newspaper headlines that sexual abuse or failure to report abuse is territory limited to only one place of worship. A church [which] organizes a hierarchy of clergy, such as the Catholic Church and several others, may actually have an easier reporting situation than churches in which clergy report only to their own congregation, where there is not one boss, so to speak, and no single keeper of personnel records.

The point is, however a church is organized, the appalling failure of any [clergy] member to voluntarily report abuse should not become an excuse for bashing anyone's church. The surreptitiousness involving sexual mistreatment of children and a failure to report abuse [have] no denominational boundaries. [House Bill 92] is intended to protect our children and strengthen the entire spectrum of our faith communities by doing what common sense tells us needs to be done. All 50 states have some form of mandated reporting of sexual abuse of children, and many include clergy among the mandated reporters.

[House Bill 92] does, in fact, provide a reporting exception for penitential communication, commonly known as confession. The ... right of confession - in my faith family, we call it a sacrament - ... is not generally well understood outside churches that practice it. It's understandable that some may believe exclusion of mandatory reporting of confession in HB 92 is unfair to churches that don't practice a formal rite of confession. The only thing I can say is, this hearing and this bill are not the place to

debate the theology of confession or any other church doctrine or practice.

Number 1402

REPRESENTATIVE LYNN went on to say:

It may also not be commonly known that the right of confession is not limited to [the] Roman Catholic Church. Other churches have a similar special right of confession, including Episcopalians and the various orthodox churches such as the Greek Orthodox, Russian Orthodox, and the Orthodox Church of America. Some well-meaning person is sure to ask the question, and it's an understandable question, "What's more important, reporting child abuse or protecting the seal of confession?" And, frankly, the answer to that is above my pay grade, and I suppose God would have to answer that. The reality is, however, that the absolute protection of the seal of confession goes back to biblical days, and priests have suffered execution rather than reveal whatever is contained in a confession.

With this in mind, we can see that no state law is going to trump the seal of confession even though some states have seen fit to have this unenforceable law in their statute books. Whatever, HB 92 would probably encompass - and, admittedly here, I'm guessing - over 95-98 percent of the abuses they should be reporting, and better something than nothing. A case can also be made that everyone should be mandated to report sexual abuse and, in fact, some states have that very law. At some point perhaps we should visit that option, but ... now is the time to put clergy on the mandated reporting list. Of course, not every allegation of abuse is valid; properly reported, an allegation can be investigated and, [if] necessary, guilt or innocence [can] be determined by [a] proper court of law.

Number 1462

REPRESENTATIVE LYNN concluded:

There can be no due process of law, however, without a law. [House Bill 92] has a very broad range of

support, including the direct letters of support from the Russian Orthodox Diocese of Sitka and Alaska, the [Episcopal Diocese of Alaska], Pastor John Hunn of the Anchorage Grace Church, the government relations department of the Seventh-day Adventist Church, the Alaska Catholic Conference, and Anchorage Baptist Temple of which Jerry Prevo is the pastor. Mr. Chip Wagoner of the [Alaska] Catholic Conference is here with us today and he may be able to answer some of the questions as HB 92 pertains to his catholic community.

[House Bill 92] has had two hearings in the House State Affairs [Standing] Committee and two of your members were very positive participants in those hearings, and they'd be able to confirm how thoroughly we checked over this bill. In summary, no one of any age or situation should suffer sexual abuse. My bill simply adds clergy, who treat the health of the soul, to the current list of mandated reporters, a list that includes doctors, nurses, and teachers. I think the requirement for clergy to report suspected child abuse is both reasonable and too long overdue. [House Bill 92] is not a panacea - and no legislation is a panacea for anything - but it is a practical step in the right direction. Our faith communities and our children need the added protection of HB 92 to help root out perverts and their enablers, and to preserve the reputation of our faith communities. And with that said, I respectfully ask your support of HB 92.

Number 1545

FLOYD SMITH, Consultant, Alaska District Council of the Assemblies of God, said that there are three issues he wishes to discuss. One is the confidentiality clause, another is who is included as clergy, and the last is the immunity provision contained in the bill. He noted that Alaska District Council of the Assemblies of God comprise 84 churches ranging from the Arctic Slope to Wrangell; some of their churches have less than 100 [parishioners] and some have more than 2,500 or 3,000 [parishioners]. He warned that the Alaska District Council of the Assemblies of God will have some substantial difficulties meeting all the terms and conditions of HB 92 because of the wide variance in their churches' resources.

MR. SMITH relayed, however that his organization has now, and has had for many, many years, a zero tolerance policy with

regard to child abuse, adding that his organization routinely reports suspected child abuse. Regardless, he opined that HB 92 contains deficiencies. He turned to proposed Sec. 47.17.021 - reports by clergy members - which provides that there will be an exemption in reporting of child abuse if the child abuse is learned of during a penitential communication - in other words, during a confession. He said that Alaska District Council of the Assemblies of God would much prefer that the committee look instead at the Alaska Rules of Court, specifically Alaska Rules of Evidence Rule 506, which says in part, "A communication is confidential if made privately and not intended for further disclosure ...." He noted that in the Alaska Rules of Evidence Commentary, it says of Rule 506:

> It recognizes that the need for a private enclave for spiritual counseling is not confined to those whose religion requires confession, but extends to all who attempt to lead righteous lives with the aid and comfort of their religion and religious advisers.

MR. SMITH suggested that the committee may wish to consider replacing the word "penitential" with the word "confidential"; he opined that doing so would be in accord with Rule 506. He also suggested striking lines 19-23, from page 2, beginning with the words, "[who,] in the course of the discipline or practice of". He said that the problem with this language is that with regard to protestant denominations, the term "duty" - now located on page 2, line 22 - becomes a term of art, one which he finds almost impossible to define in terms of his organization's ministers.

Number 1782

MR. SMITH elaborated:

> We have an obligation, under our church discipline or custom or tenants or however you wish to phrase it, that when a parishioner or other person approaches a minister and says, "I'd like to talk to you about this; this is something I need to get off my chest," ... that this is intended and is understood to be a confidential communication just as if the person had entered [a] confessional booth at the cathedral. To extend to one denomination a right of confidentiality, which is denied to another, begins to move toward very serious and substantial constitutional issues of establishment of religion, equal protection of the

> laws, and, frankly, I'm not sure if we have time to get into that. But we feel strongly that we are entitled to the same protection [of] confidentiality as extends to any other religious denomination.

MR. SMITH then turned to the issue of defining clergy. He noted that as currently stated in HB 92, "'clergy member' means a bishop, pastor, priest, minister, rabbi, religious healing practitioner, or person in a similar leadership position of a church, temple, religious denomination, or religious organization". He remarked Rule 506 is much more concise, relaying that it says, "A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual."

MR. SMITH said he assumes that the term "priest" includes a bishop; thus including the term "bishop" is not necessary. He also said he assumes that the term "pastor" includes a minister; but maybe it doesn't, he then acknowledged. He explained that the Alaska District Council of the Assemblies of God has many individuals who assume leadership positions, such as those who lead bible study groups and altar attendants. He asked whether all such people would become mandated reporters. If so, he remarked, his organization would have great difficulty with that stipulation.

Number 1889

MR. SMITH then turned to As 47.17.050, which says in part with regard to immunity, "a person who, in good faith, makes a report under this chapter ... is immune from civil or criminal liability". He said that upon reading that language, it occurred to him that "we do not have any presumption in that language, that it is presumed that this report is made in good faith." Bearing in mind that the law requires a person to report immediately, and in no case longer than 24 hours, he opined that "this" is an invitation to a lawsuit and is "a lurking problem." He mentioned that he is investigating whether this provision of current law has been utilized. He suggested that the committee do some research to determine whether "this immunity provision" is adequate. He said he would prefer a presumption, which can only be overcome by clear and convincing evidence.

REPRESENTATIVE GARA, after noting that there is no confidentiality provision for clergy with regard to elder abuse,

asked why there should be such a provision with regard to child abuse.

MR. SMITH suggested that the bill should be held over to the next session in order to allow more time for research on that issue.

REPRESENTATIVE LYNN, with regard to the definition of clergy member, said that the term "bishop" was included to accommodate concerns raised by the Church of Jesus Christ of Latter-day Saints, whose bishops perform functions similar to ministers and priests. He said that originally, the definition was written more narrowly in order that it not include everybody that works in some capacity for the church; the definition was intended to just encompass the "actual practicing leadership of the church." With regard to the term "penitential communication", he noted that that language is used without a problem in several other states.

REPRESENTATIVE GARA remarked that "penitential" is defined to mean the confession of somebody who has done something wrong, somebody who has done something that they feel guilty about. He said, "It's almost an irony that we are protecting people who go to clergy, who have done something wrong, and we are not protecting the victim." He opined that the current language in the bill would require clergy to report abuse if a victim discloses it, but in using the term "penitential communication", anything revealed by the aggressor would not have to be reported.

REPRESENTATIVE LYNN clarified that anybody who walks into a confessional is called a penitent, regardless of whether he/she is the victim or the aggressor.

Number 2266

WILLIAM MOFFATT, Staff to Representative Bob Lynn, Alaska State Legislature, sponsor, said that in his faith community, if somebody comes to confession, regardless of who it is, he, as a priest, cannot reveal what is said even if given permission by the penitent. He noted, however, that just because somebody comes to confession, it does not automatically mean that he/she will get absolution. In his church, he remarked, if he won't give someone absolution, no other priest can. He indicated that he would tell someone who confesses to a crime that he/she is not going to get absolution until he/she reports that crime to a civil authority. He opined that with regard to regular

conversations, clergy have a duty as citizens to report abuse of any kind. He remarked that repentance is not just feeling sorry for one's actions; rather, it includes being sorry for an action, being willing to do something about it - to make amends - and following through with [making amends]. He opined that the [confidentiality provision in] HB 92 is intended to recognize that some religions have a certain centuries-old tradition.

TAPE 03-29, SIDE B
Number 2345

JOANNE GIBBENS, Program Administrator, Central Office, Division of Family & Youth Services (DFYS), Department of Health & Social Services (DHSS), said that the DHSS supports the intent of HB 92 to include clergy members in the list of mandated reporters. However, she asked the committee to examine the provision that exempts the reporting of neglect. She elaborated:

> The department feels that, as mandated reporters, clergy should be required to report everything that ... all current mandated reporters are required to report. I know there's been some concern in previous hearings about that issue and, ... for clarification purposes, I just wanted to share with the committee the fact that, ... first of all, issues of neglect are the number one most reported type of child maltreatment nationally. Issues of neglect ... also result in long-term damages to children, even more so than some other types of abuse. And we could certainly share with the committee documentation of that through national studies and those types of things. Child deaths related to neglect are almost on an equal keel with child deaths related to physical abuse, looking at a number of national studies.
>
> There's been some concern that [including] neglect may mean having to ... file a report with the division or with law enforcement because a family is poor and does not have some of the financial abilities or other abilities to meet the needs of their children. And that's certainly not the case. And when we train mandatory reporters - which we would do for clergy as well - we would, of course, include that in our training. So when we're talking about making reports to the division regarding neglect, we're talking about instances where families may have the resources,

> themselves, to provide for the physical needs of their children [but] refuse to do so; [they] don't take adequate care of their kids. We may be talking about families where assistance has been offered [but] refused.

Number 2229

MS. GIBBENS went on to say:

> Quite often, reports of neglect allow us to intervene early with a family, to maybe prevent future and more severe abuse. And neglect calls often don't result in taking custody of a child, but often result in the division being able to facilitate services for a family. For instance, you might have a single mother, and maybe there's been a long-term pattern of ... not being able to adequately feed ... or clothe her child, and she's struggling because she doesn't know whether to stay home ... but needs to find a job, and doesn't have the resources.
>
> With our involvement, we can help her get daycare, and pay for that, for her child. So, in essence, ... we would like the committee to ... reconsider not including the neglect issue in terms of the mandatory reporting, because we really do feel ... [that] we have the same goals as clergy members do ... in terms of the health and safety of their parishioners and people that they care for, and see this as a way for us to potentially help families that may not be able to get the help they would otherwise.

CHAIR McGUIRE thanked Ms. Gibbens for her testimony, and mentioned that there might be an amendment that would address the issue of neglect.

Number 2157

TED BOATSMAN, Reverend, and Superintendent, Alaska District Council of the Assemblies of God, relayed that his organization has a zero tolerance policy regarding abuse of children, women, and the elderly. He noted that his organization has removed the credentials of those who have violated that policy. He relayed that he wanted HB 92 to be denominationally friendly, acknowledging, however, that that might be difficult, particularly with the use of the term "penitential

communication". He said that as a protestant, he sees himself having to defend which conversations were intended to be private and confidential, and which were not.

MR. BOATSMAN added, therefore, that he supports the language in Rule 506, as previously mentioned by Mr. Smith, regarding communications and clergy members. He then turned to the term "similar leadership position" on page 3, line 2, of HB 92. He said he is assuming that this term includes church elders, who, although not ordained in his organization, are held to very high spiritual standards, and who also find themselves in positions similar to actual clergy. He opined that HB 92 is a good idea that just needs to be adjusted a bit to ensure that it is denominationally friendly and doesn't create liability issues for certain religions but not others.

Number 2002

CHIP WAGONER, Lobbyist for the Alaska Catholic Conference ("Conference"), explained that the Alaska Catholic Conference is made up of the three Roman Catholic bishops of Alaska, and is the vehicle "they" use when speaking on public policy matters. He said that the Conference supports HB 92 and, after hearing Ms. Gibbens's testimony, would support putting the term "neglect" back in the bill. Turning to the issues raised by Mr. Smith, he said that the Alaska Rules of Evidence, Rule 506, "do not provide any sort of an exception unless there's a case action or proceeding currently in court." Therefore, in order to use [Rule 506], the statute itself must contain the language of that rule.

MR. WAGONER went on to say:

> [The] position of our church is, number one, our priests and our bishops and what we call our fulltime ministers ... - all pastoral ministers - of the diocese of Juneau are to assume that they are mandatory reporters. So if we have our director of religious education or anyone else that hears a report of sexual abuse or neglect, they are to assume that they are mandatory reporters and should report it. And whether you pass the law or not, that is the position of our diocese, and it's the position of the Anchorage archdiocese. And the Fairbanks diocese, which has a brand new bishop, is currently reviewing their policies, but I'm sure that would probably apply there too.

> The one time that our church would not report allegations of suspected sexual abuse or neglect is in the very narrow sacrament of penance and reconciliation. So if a person came to one of our priests and wanted to talk about their marriage problems, and sexual abuse came up, we would be reporting it, whether you pass the law or not. If one of them came and said something about a neighbor to the priest, it would be reported. It is only in the very narrow exception, per our church's policy, of the sacrament of penance and reconciliation where we would not report it. And the sacrament of penance and reconciliation, depending on which book you want to read, actually started in the second century. The form we know today started in the fifth century.

Number 1883

MR. WAGONER read from an unspecified document:

> What happens in the sacrament of penance and reconciliation is almost more than one can imagine. If we could meet Jesus today, we would expect to be received with love and compassion because he is perfect and knows what it is to forgive. Instead, we confess to an ordinary human being who represents Jesus Christ sacramentally.

MR. WAGONER added that his church has seven sacraments, of which "this is one, and they all flow directly from Jesus Christ." Noting that he was quoting from Pope John Paul II, he said:

> In faithfully observing the centuries old practice of the sacrament of penance, the practice of individual confession, with a personal act of sorrow and the intention to amend and make satisfaction, the church is therefore defending the human soul's individual right - man's right to a more personal encounter with the crucified forgiving Christ, with Christ saying, through the minister of the sacrament of reconciliation, "Your sins are forgiven; go, and do not sin again."

MR. WAGONER said his church would like, at the very least, to see the narrow exception pertaining to information revealed during the sacrament stay in the bill, although he acknowledged

that other churches may not have the sacrament. He assured the committee that [aside from that exception] anytime those other churches would be required to report something, so, too, would his church. In response to questions, he said he would find out for the committee who can receive the sacrament.

REPRESENTATIVE GARA opined that it is that very narrow definition of the sacrament that causes the problem. He elaborated:

> Most other religions have an equivalent thing, but that is not as narrowly defined. ... Many other religions have a confidential communication that you can have with a religious leader, which, in your church, would be reportable, but they don't have a sacramental confession. And, so, I don't think we can write the bill that would just allow an exception for the sacramental confession without having an equal protection problem for the other religions. But, then, if we extend the definition to be broad enough that it also covers confidential communications between a clergy and a member, which would be reportable by the Catholic church if it were outside of the sacrament and confessional context - if [we] extend the definition to cover those things - now we're covering things that would be reportable by your church, but [only] to be fair to the other churches. And I don't know that that's the proper way to go about it, either.

Number 1644

MR. WAGONER, in response, asked that his church not be penalized simply because other churches have chosen not to have the sacrament of confession, which he characterized as being at the heart of his church for centuries.

REPRESENTATIVE LYNN, in response to a request by Chair McGuire, said he would provide the committee with information regarding the reporting requirements in other states.

CHAIR McGUIRE remarked that it is important to ensure that one religion's right to confidential communication is not being protected more than the rights of other religions.

MR. WAGONER noted that information regarding other states can be found in a document produced by the National Clearinghouse on

Child Abuse and Neglect Information, which is a service of the Children's Bureau; Administration on Children, Youth and Families; Administration on Children and Families; U.S. Department of Health and Human Services.

CHAIR McGUIRE relayed that Ms. Gibbens has indicated that she will provide that document to the committee.

MR. WAGONER said that according to his understanding, in only New Hampshire and West Virginia is the confessional not privileged, and some states simply require "all persons" to be mandatory reporters. In response to a question, he said he would research whether people who go to confession are encouraged to turn themselves in to law enforcement for acts that may warrant it.

CHAIR McGUIRE noted that with the attorney-client privilege, there is a distinction between past acts and future acts in that attorneys are required to report possible future acts. She asked whether there is something similar for information revealed in the confessional.

[Although inaudible on the tape, Mr. Wagoner indicated that there is not.]

Number 1398

REPRESENTATIVE GARA thanked Mr. Wagoner for being willing to have the reporting of neglect added back in the bill. He then again raised the point that clergy are, by statute, required to report instances of elder abuse, regardless of where or when it is learned of. He opined that this is also the right approach to take on the issue of child abuse, noting that the competing concerns of protecting somebody from harm and protecting someone's confidentiality are common to both types of abuse. He said it seems to him that protection from harm is more important. He asked Mr. Wagoner for the church's position regarding the distinction between the reporting requirements for elder abuse and the reporting requirements for child abuse.

MR. WAGONER relayed that in the eyes of the church, there is no distinction between elder abuse and child abuse: the sacrament is inviolate for both. He said he would be very surprised to learn that there have been any reports of elder abuse that came from information learned in the confessional.

REPRESENTATIVE GARA said:

> I think we recognize that if we ... decided not to grant a privilege, ... as a matter of conscience, some members of the clergy would not obey it. And that would probably be the reality. And that's probably the reality in any other states. So, I understand that.

REPRESENTATIVE SAMUELS remarked that lacking an exception for information revealed in the confessional, the legislation would be criminalizing priests.

REPRESENTATIVE GARA pointed out, however, that such is already the case regarding elder abuse.

REPRESENTATIVE GRUENBERG opined that both sets of laws should be congruent: either there should be reporting without exception for both types of abuse, or there should be an exception pertaining to information revealed in the confessional for both types of abuse.

CHAIR McGUIRE asked whether there are any reporting requirements in statute for spousal abuse.

Number 1236

MS. GIBBENS said that domestic violence is addressed in a couple of ways. She relayed that AS 47.17.035 speaks to the duties of the department with regard to domestic violence cases, and that AS 47.17.020(h) says:

> This section does not require a person required to report child abuse or neglect under (a)(6) of this section to report mental injury to a child as a result of exposure to domestic violence so long as the person has reasonable cause to believe that the child is in safe and appropriate care and not presently in danger of mental injury as a result of exposure to domestic violence.

MS. GIBBENS noted that AS 47.17.035 stipulates that the department must develop protocols with the Council on Domestic Violence and Sexual Assault (CDVSA). She said that if the issue of domestic violence arises during an investigation of child abuse, "it needs to be something that has to be screened for, and then ... a decision needs to be made about the appropriate protection of the child." She added that the department is

required to make reasonable efforts to protect the child and prevent the removal of the child from the custody of the parent who is not the domestic violence offender.

REPRESENTATIVE GARA surmised, then, that currently there are no specific reporting requirements regarding domestic violence.

CHAIR McGUIRE announced that HB 92 would be held over.

REPRESENTATIVE LYNN asked for the committee's assistance regarding specific changes.

REPRESENTATIVE SAMUELS asked Representative Lynn whether he had any objection to replacing the language pertaining to neglect.

REPRESENTATIVE LYNN said he did not, noting that it was part of the original bill.

REPRESENTATIVE GRUENBERG mentioned that at the next meeting, he would be offering an amendment that would incorporate Mr. Smith's suggestion regarding Rule 506.

REPRESENTATIVE GARA mentioned that perhaps instead of bringing in the entirety of Rule 506, the same goal could be accomplished simply by changing "penitential communication" to "confidential communication".

CHAIR McGUIRE, after some committee discussion, noted that at the next hearing, one of the issues that would be addressed would be the differences between the reporting requirements in HB 92 and the elder-abuse statute.

[HB 92 was held over.]

ADJOURNMENT

Number 0910

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:17 p.m.