

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 28, 2003

2:10 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. 257

"An Act relating to the disclosure requirements for real estate licensees, to disciplinary action against real estate licensees, to private actions against real estate licensees, and to real estate licensee agency relationships, fiduciary duties, and other duties; and providing for an effective date."

- HEARD AND HELD

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86

"An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

- MOVED CSSSHB 86(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 24

"An Act relating to intergovernmental agreements regarding management of fish or game."

- HEARD AND HELD

HOUSE BILL NO. 245

"An Act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire

management and firefighting activities; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 145

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

- HEARD AND HELD

HOUSE BILL NO. 13

"An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in *Savage Arms, Inc. v. Western Auto Supply*, 18 P.3d 49 (Alaska 2001), as it relates to products liability; providing that a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor only if the acquisition is accompanied by an agreement for the successor to assume the liability, results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor, constitutes a consolidation or merger with the predecessor, or results in the successor's becoming a continuation of the predecessor; defining 'business entity' that acquires assets to include a sole proprietorship; and applying this Act to the sale, lease, exchange, or other disposition of assets by a corporation, a limited liability company, a partnership, a limited liability partnership, a limited partnership, a sole proprietorship, or other business entity that occurs on or after the effective date of this Act."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HB 257

SHORT TITLE: DISCLOSURES BY REAL ESTATE LICENSEES

SPONSOR(S): REPRESENTATIVE(S) ROKEBERG

Jrn-Date	Jrn-Page		Action
04/10/03	0912	(H)	READ THE FIRST TIME - REFERRALS
04/10/03	0912	(H)	L&C, JUD
04/14/03		(H)	L&C AT 3:15 PM CAPITOL 17

04/14/03		(H)	Moved Out of Committee MINUTE(L&C)
04/15/03	0984	(H)	L&C RPT 1DP 5NR
04/15/03	0984	(H)	DP: ROKEBERG; NR: LYNN, CRAWFORD,
04/15/03	0984	(H)	GUTTENBERG, DAHLSTROM, ANDERSON
04/15/03	0984	(H)	FN1: ZERO(CED)
04/15/03	0984	(H)	REFERRED TO JUDICIARY
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 86

SHORT TITLE: INJUNCTIONS AGAINST PERMITTED PROJECTS

SPONSOR(S): REPRESENTATIVE(S) FATE

Jrn-Date	Jrn-Page		Action
02/10/03	0169	(H)	READ THE FIRST TIME - REFERRALS
02/10/03	0169	(H)	RES, JUD
02/21/03		(H)	RES AT 1:00 PM CAPITOL 124
02/21/03		(H)	Failed To Move Out Of Committee
02/21/03		(H)	MINUTE(RES)
02/24/03		(H)	RES AT 1:00 PM CAPITOL 124
02/24/03		(H)	<Bill Hearing Postponed>
03/07/03		(H)	RES AT 1:00 PM CAPITOL 124
03/07/03		(H)	Heard & Held
03/07/03		(H)	MINUTE(RES)
04/02/03	0738	(H)	SPONSOR SUBSTITUTE INTRODUCED
04/02/03	0738	(H)	READ THE FIRST TIME - REFERRALS
04/02/03	0738	(H)	RES, JUD
04/02/03		(H)	RES AT 1:00 PM CAPITOL 124
04/02/03		(H)	Heard & Held
04/02/03		(H)	MINUTE(RES)
04/04/03	0798	(H)	COSPONSOR(S): FOSTER, ROKEBERG, HOLM,
04/04/03	0798	(H)	KOTT, LYNN, CHENAULT, DAHLSTROM, WILSON
04/04/03		(H)	RES AT 1:00 PM CAPITOL 124
04/04/03		(H)	Moved Out of Committee
04/04/03		(H)	MINUTE(RES)
04/08/03	0837	(H)	RES RPT 6DP 1DNP
04/08/03	0837	(H)	DP: WOLF, MASEK, MORGAN, GATTO, LYNN,
04/08/03	0837	(H)	FATE; DNP: KERTTULA
04/08/03	0837	(H)	FN1: ZERO(LAW)

04/09/03	0901	(H)	COSPONSOR(S): HEINZE
04/23/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/23/03		(H)	Heard & Held MINUTE(JUD)
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	-- Meeting Postponed to Mon. April 28 --
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 24

SHORT TITLE: AGREEMENTS ON MANAGEMENT OF FISH AND GAME

SPONSOR(S): REPRESENTATIVE(S) WEYHRAUCH, WHITAKER

Jrn-Date	Jrn-Page		Action
01/21/03	0037	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0037	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0037	(H)	RES, JUD
03/05/03		(H)	RES AT 1:00 PM CAPITOL 124
03/05/03		(H)	Heard & Held -- Meeting Postponed to After Session --
03/05/03		(H)	MINUTE(RES)
03/07/03		(H)	RES AT 1:00 PM CAPITOL 124
03/07/03		(H)	Moved CSHB 24(RES) Out of Committee
03/07/03		(H)	MINUTE(RES)
03/10/03	0487	(H)	RES RPT CS(RES) NT 4DP 3NR
03/10/03	0487	(H)	DP: HEINZE, GATTO, LYNN, FATE;
03/10/03	0487	(H)	NR: KERTTULA, GUTTENBERG, MASEK
03/10/03	0488	(H)	FN1: ZERO (H.RES)
03/10/03	0488	(H)	REFERRED TO JUDICIARY
04/09/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/09/03		(H)	Scheduled But Not Heard
04/11/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/11/03		(H)	Heard & Held MINUTE(JUD)
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	-- Meeting Postponed to Mon. April 28 --
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 245

SHORT TITLE: SUITS & CLAIMS: MILITARY/FIRE/DEFENSE

SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
04/04/03	0777	(H)	READ THE FIRST TIME - REFERRALS
04/04/03	0777	(H)	MLV, JUD, FIN
04/04/03	0778	(H)	FN1: ZERO(LAW)
04/04/03	0778	(H)	FN2: ZERO(DNR)
04/04/03	0778	(H)	FN3: INDETERMINATE(ADM) FORTHCOMING
04/04/03	0778	(H)	GOVERNOR'S TRANSMITTAL LETTER
04/08/03	0859	(H)	FN3: INDETERMINATE(ADM) RECEIVED
04/11/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/11/03		(H)	<Bill Hearing Postponed>
04/15/03		(H)	MLV AT 3:00 PM CAPITOL 124
04/15/03		(H)	Moved CSHB 245(MLV) Out of Committee MINUTE(MLV)
04/16/03	1007	(H)	MLV RPT CS(MLV) NT 1DP 2DNP 1NR 2AM
04/16/03	1007	(H)	DP: LYNN; DNP: GRUENBERG, CISSNA;
04/16/03	1007	(H)	NR: MASEK; AM: WEYHRAUCH, FATE
04/16/03	1008	(H)	FN1: ZERO(LAW)
04/16/03	1008	(H)	FN2: ZERO(DNR)
04/16/03	1008	(H)	FN3: INDETERMINATE(ADM)
04/16/03	1008	(H)	REFERRED TO JUDICIARY
04/16/03		(H)	JUD AT 8:00 AM CAPITOL 120
04/16/03		(H)	<Bill Hearing Postponed>
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 145

SHORT TITLE:ATTY FEES: PUBLIC INTEREST LITIGANTS
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
03/03/03	0359	(H)	READ THE FIRST TIME - REFERRALS
03/03/03	0359	(H)	JUD, FIN
03/03/03	0359	(H)	FN1: ZERO(LAW)
03/03/03	0359	(H)	FN2: INDETERMINATE(ADM)
03/03/03	0359	(H)	GOVERNOR'S TRANSMITTAL LETTER
03/03/03	0359	(H)	REFERRED TO JUDICIARY
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	-- Meeting Postponed to Mon. April 28 --
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE NORMAN ROKEBERG
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 257.

CHRIS STEPHENS, Associate Broker
Bond, Stephens & Johnson, Inc.
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 257, urged the bill's passage and responded to questions.

JOE LOMONACO, Associate Broker
Bond, Stephens & Johnson, Inc.
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 257 and urged its passage.

CLAYTON HALVERSON, Associate Broker
Bond, Stephens & Johnson, Inc.
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 257.

ROBERT ARMS, Associate Broker
Bond, Stephens & Johnson, Inc.
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 257.

DAVE FEEKEN, Legislative Chair
Alaska Association of Realtors (AAR)
Kenai, Alaska
POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 257.

HOWARD S. TRICKEY, Attorney at Law
Jermain, Dunnagan & Owens, PC
Anchorage, Alaska
POSITION STATEMENT: On behalf of Prudential Vista Real Estate and Prudential Jack White Real Estate, provided comments and responded to questions during discussion of HB 257.

LINDA S. GARRISON, Broker
AAR #1 Buyer's Agency

Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to HB 257.

DAVID A. GARRISON, Associate Broker

AAR #1 Buyer's Agency

Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 257.

JIM POUND, Staff

to Representative Hugh Fate

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented SSHB 86 on behalf of the sponsor, Representative Fate.

REPRESENTATIVE BRUCE WEYHRAUCH

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 24.

TED POPELY, Majority Legal Counsel

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Answered questions about suggested wording for HB 24.

RON SOMERVILLE, Member

Board of Game

Juneau, Alaska

POSITION STATEMENT: Testified on HB 24, noting that he has been assigned to the House and Senate majority on resource issues.

GAIL VOIGTLANDER, Assistant Attorney General

Special Litigation Section

Civil Division (Anchorage)

Department of Law (DOL)

Anchorage, Alaska

POSITION STATEMENT: Presented HB 245 on behalf of the administration.

CRAIG TILLERY, Assistant Attorney General

Environmental Section

Civil Division (Anchorage)

Department of Law (DOL)

Anchorage, Alaska

POSITION STATEMENT: Presented HB 145 on behalf of the administration.

ACTION NARRATIVE

TAPE 03-44, SIDE A

Number 0001

CHAIR LESIL MCGUIRE called the House Judiciary Standing Committee meeting to order at 2:10 p.m. Representatives McGuire, Holm, Ogg, Samuels, Gara, and Gruenberg were present at the call to order. Representative Anderson arrived as the meeting was in progress.

HB 257 - DISCLOSURES BY REAL ESTATE LICENSEES

Number 0058

CHAIR MCGUIRE announced that the first order of business would be HOUSE BILL NO. 257, "An Act relating to the disclosure requirements for real estate licensees, to disciplinary action against real estate licensees, to private actions against real estate licensees, and to real estate licensee agency relationships, fiduciary duties, and other duties; and providing for an effective date."

Number 0063

REPRESENTATIVE SAMUELS moved to adopt the proposed committee substitute (CS) for [HB 257], Version 23-LS0893\Q, Bannister, 4/28/03, as the work draft. There being no objection, Version Q was before the committee.

Number 0093

REPRESENTATIVE NORMAN ROKEBERG, Alaska State Legislature, sponsor, said that HB 257 was engendered by what he termed "the disquieting nature of the commerce in the real estate business in this state," two lawsuits, and a statute which he said he considered to be broken. He said he calls HB 257 an interim bill intended to clarify the current situation so that the commerce of the state can continue. He mentioned that 25 percent of the "state domestic product" is made up of the "chain of real estate transactions and all activity revolving around the real estate industry." Thus, he added, "it exceeds everything but petroleum." The real estate component of Alaska's economy is paramount in importance, he remarked.

REPRESENTATIVE ROKEBERG said:

I rewrote the entire real estate title ... a few years back, and I left one section open - this issue that's about dual agency. I asked at that time that a task force undertake that; there was a task force working on it then, but I've been waiting seven years. I worked this last year with [an] Alaska state board of realtors' task force on rewriting a bill, and we're still working on that. But we reached a deadline and ... told folks that unless we could get something - a comprehensive bill - passed this year, I'd introduce a stopgap measure to try to make sure that business and commerce (indisc.) continue. And that's what this measure is; ... this is a stopgap measure.

It speaks to two issues. One is the exemption of commercial real estate activity from the problems revolving around disclosure under dual agency in the statute, which is [AS] 08.88.396, and the definition [of] what a commercial real estate transaction is. Then it goes on to indicate ... in Section 7 of the bill ... - page 5, ... [subsections] (f) and (g) - ... what ... needs to be done.

Number 0300

REPRESENTATIVE ROKEBERG turned attention to subsection (g), which read:

(g) The failure of the licensee to make a written disclosure as required by this section or to obtain a written acknowledgment or consent as required by this section does not give a person a cause of action against the licensee for the failure. However, this subsection does not limit a person's ability to take any other action or pursue any other remedy to which the person may be entitled under other law.

REPRESENTATIVE ROKEBERG said that basically, if the legislature adopts this language, it means that the "paperwork ... revolving around the current statutory requirements of acknowledgement of disclosure" - whether by seller's agent, buyer's agent, or dual agent - doesn't, in and of itself, give rise to a cause of action. Instead, it gives rise to a "license action." So, if there is an error, there are sanctions that can be applied by

the Real Estate Commission. He relayed that "this" is consistent with the current [statute pertaining to] conflict of interest in that if there is an apparent conflict between a licensee and his/her client and a failure to disclose, any sanctions or remedies are limited to a license action. In addition, specific language in subsection (g) permits a person to take any other action or pursue any other remedy allowed by law.

REPRESENTATIVE ROKEBERG assured the committee that HB 257 does not diminish consumers' rights because it only addresses clerical errors and timing errors regarding [dual-agency] disclosures pertaining to [commercial] real estate transactions. He opined that current statute is so unclear about when disclosure is supposed to occur, that it creates a stultifying atmosphere. He reiterated that HB 257 is merely an interim step, and its goal is to ensure that what he termed an administrative problem does not rise to a major cause of action. He noted that Section 9 does apply to one of the aforementioned lawsuits, which is still "at bar" and which speaks to "the very issue contained in this bill."

Number 0510

REPRESENTATIVE ROKEBERG turned attention to page 4, lines 26-31. He said:

What we had to do, if we're going to exempt commercial real estate transactions, we had to define it, because, formerly, under the title now, a commercial real estate transaction is defined as a fourplex and above. So it's not inclusive as to leasing activities. Let me just say, for the record, on [lines 24-25], page 4, the [term] "commercial real estate transaction" is there. So, as relates to [paragraph] (3), about leasing, it's my intention - I think the language is clear - that this does not include residential leasing transactions.

REPRESENTATIVE ROKEBERG then touched on the details of proposed AS 08.88.396(e), which read:

(e) The provisions of (a) - (c) of this section do not apply to a commercial real estate transaction that involves

(1) the sale or lease of real estate that contains a building having eight or more separate living units;

(2) the sale of real estate that has a purchase price of \$250,000 or more in value for nonresidential use; or

(3) the sale or lease of real estate having a gross lease revenue that exceeds \$12,000 a year.

REPRESENTATIVE ROKEBERG, with regard to a potential conflict of interest, noted that he is a licensed real estate broker and has had his license for 30 years, though currently he is not active and has not received a real estate commission for eight years. He offered that he can speak from experience on the activities of a commercial broker, and detailed some of his accomplishments during the time he was active in the industry, which included dual-agency situations.

REPRESENTATIVE ROKEBERG then turned to the issue of dual agency and said:

Number 0753

We'll talk ... about the application of the "principles of agency" to this subject. ... There's been a court interpretation that those licensees and brokers that act under their client relationships are acting under the "common law of agency," whereas the principal and agent does directly link between the client and that particular licensee. I submit that that's a wrongheaded and legally faulty provision. ... And even the current common language of a real estate agent related to the agency principal relationship between the broker, as the principal, and the agent as the agent of the principal are (indisc). So there's been a corruption; there's been a corruption in the case law and everything else.

REPRESENTATIVE ROKEBERG went on to say:

And one of the worst things, [which is] what I think the committee should take notice of, is that if the continuation of "common law agency" is to relate to the licensee and client relationship, then that gives rise to enormous vicarious liability on the part of that client. So the average citizen is going to be exposed. If we continue down this path, legally, and

the fiction of [an] agency principal relationship that arises between the client and the agent, then the significant vicarious liability ... could arise and be directed towards the average citizen. And I think that's not a good public policy.

REPRESENTATIVE ROKEBERG offered that HB 257 is designed to clarify this issue. He then mentioned a couple of his past clients and a leasing situation in which he'd served as dual agent, to illustrate the problems facing those who serve in that capacity. He said, "When you're in an agency principal relationship, fiduciary duties arise, and that's the crux of this matter: How much can you speak?" Once a dual-agency situation is established and [a broker] has two masters, under "agency law" he/she cannot discuss price terms or certain conditions that would divulge or disadvantage one side of the transaction or the other. He submitted that it is impossible to perform one's duties as a dual agent "without being able to do that," and offered a further personal example pertaining to leasing to illustrate the difficulties that could arise if one is prohibited from discussing certain things with one's clients simply because one is a dual agent.

Number 1210

CHRIS STEPHENS, Associate Broker; Bond, Stephens & Johnson, Inc., noted that his company is a commercial real estate firm in Anchorage, that there are others at the location from which he is testifying that share his sentiments, and that he has submitted a letter to the committee. He said that there is no way on earth a commercial broker can do his/her job under dual agency as defined under current Alaska law. He elaborated:

We absolutely have to have the ability to put these transactions together and to work with both parties effectively, and [we] can't do that under the law because the law says we have to be silent when there's dual agency. And it's an absolutely ... impossible position. We have dual agency in roughly half the transactions that we do. So, it's not for the benefit of the public or the state or the commerce to have this restriction, which is an essential part of us being able to do our job.

The second point is, is on the form of the disclosure. ... The reality is that the disclosure forms that are required end up being so darned burdensome. In many

cases we're dealing with companies from outside this state ..., having to run these forms back and forth, some of the corporations won't even look at them because they've got to send them to their real estate law department; it just becomes a nightmare almost. We're not selling houses, we're not selling people homes, we're not in business. We're doing business transactions with people involved in commerce. So it's a totally different situation.

MR. STEPHENS concluded by saying that he and others at his location are concerned about [the current situation] and urge the bill's passage.

Number 1351

JOE LoMONACO, Associate Broker; Bond, Stephens & Johnson, Inc., noted that he has been in the real estate industry in Anchorage for 27 years. He opined that confusion pertaining to the current statute and its various interpretations has increased. He said that his fears and concerns surround the risk of being held civilly or criminally liable because of this confusion. He noted that some of the more sophisticated clients refuse to sign the required disclosure forms. He urged passage of HB 257.

Number 1412

CLAYTON HALVERSON, Associate Broker; Bond, Stephens & Johnson, Inc., remarked that there is a distinct difference between residential [transactions] and commercial [transactions]. Those involved in commercial transactions are generally businesspeople who are very knowledgeable about the pending transaction, sometimes more so than the transaction brokers. He opined that under the current law, such transaction brokers are not able to provide the kind of service that they are obligated to provide their clients.

Number 1471

ROBERT ARMS, Associate Broker; Bond, Stephens & Johnson, Inc., said that the difference between residential and commercial transactions is dramatic. In many cases, a commercial agent will represent a customer and find a user for a property, and the whole transaction will happen without it reaching the multiple listing service (MLS) system. It's all done privately, it's all done confidentially, and it's a completely different

situation than what occurs for a residential transaction. He said that he supported everyone else's comments.

MR. STEPHENS again urged passage of HB 257. In response to a question, he said that [his firm] has spent over \$12,000 having disclosure forms developed that would meet current law. He relayed that he's had clients who've simply handed the forms, without first reading them, to their attorneys, and has had some clients who've refused to accept or review the forms altogether. He opined that [the current disclosure requirements] do not serve any purpose and make an already difficult process more so. In response to further questions, he acknowledged that some clients could simply go find brokers that are willing to participate in a transaction without abiding by the current disclosure requirements. He also relayed that his firm has provided the committee with copies of the various disclosure forms required by current law.

REPRESENTATIVE GARA noted that there is a provision in HB 257 which says that "the law of agency" won't apply, anymore, to real estate agents "in this context." He asked for examples of how "the law of agency" has proven to be unfair to real estate agents. He also noted that there is a retroactive provision in HB 257 which would allow it to reverse a jury verdict. He asked for comments on that provision.

MR. STEPHENS offered the following as example of the problem encountered with dual agency:

If you're an agent, and let's say you have a listing and you're out soliciting buyers, and let's assume that you get three offers - one from an agent within your company, which that (indisc.) now a dual agent, and two other offers from agents, let's say, [of] other companies - and you're in your conference room reviewing these offers to decide which one you're going to move forward with or perhaps counter and why, and (indisc.) a very detailed process. So you go through the offers from one other company; you go through it in detail. You go through the next offer, from another company, in detail. Now, you get to the offer brought in from an agent in your own company. Currently, you have to tell that seller, "I'm sorry, I cannot comment on this offer." Now that doesn't do that seller any good at all, or anyone any good at all. That's a perfect example of the kinds of things that we run into all the time.

Number 1750

REPRESENTATIVE GARA said, however, that there is "a law of agency" that defines the duties between people who are agents and the people who they represent. And HB 257 seems to exempt real estate agents from "the law of agency," he remarked. He said that he understands that sometimes there might be requirements of "the law of agency" that don't seem to help people in a particular circumstance, but he is wondering whether "the law of agency is a burden to Mr. Stephens in some way and, if so, what that burden is.

MR. STEPHENS acknowledged that he is not that familiar with "the law of agency." He added, however, that "in trying to do our job, when we are dealing with people wanting to buy and sell and lease commercial real estate, we have to be able to talk to them, and in dual agency, we can't - but we've been hired for our expertise." That's where the problem is. The types of transactions at issue require someone with a lot of expertise in the field of commercial real estate to make them go together. That's why such brokers are hired; yet current law inhibits them from providing that expertise, he opined. With regard to the retroactivity provision of HB 257, he suggested that others could better testify to that issue.

REPRESENTATIVE ROKEBERG noted that Section 8, found on page 5, line 15, repeals Section 7 on June 30, 2005. He said that the reason this sunset provision is included is because Section 7, the exemption for commercial real estate transactions, is intended to be a stopgap measure until more comprehensive legislation can be put in place.

REPRESENTATIVE GARA remarked that of the two changes HB 257 purports to make, he understands one very well, that of exempting commercial realtors from some rules governing dual agency in revealing details to the various parties involved in a transaction. The change he said he seeks clarification on pertains to the current law that some people have said prohibits a realtor from representing both a buyer and a seller. He remarked, however, that the current law does not prohibit this, as long as the realtor discloses that he/she is representing both buyer and seller. "So what am I missing there?" he asked.

Number 1952

REPRESENTATIVE ROKEBERG agreed that under current law, an agent can represent the buyer; the seller; or both, as a dual agent. The difficulties arise because of interpretations which say that when two licensees from the same brokerage company represent the buyer and the seller, it becomes a dual-agency situation and, therefore, both parties must agree to having both licensees continue with the transaction. That can work, he remarked, but the problem then becomes one of what can a licensee do to advise his/her client. He said that the problem is particularly acute in the commercial arena, and he called it the "duct tape rule," likening it to slapping duct tape over the mouths of the licensees whose goal is to merely put a deal together.

REPRESENTATIVE GARA said he still doesn't understand why a realtor, right now, can't give advice to a client, as long as he/she discloses that there might be a potential conflict. "Am I right that if they do disclose, then they can say whatever they want," he asked, adding, "That's the issue I'd like addressed."

CHAIR MCGUIRE surmised that the problem revolves around the fact that once an agent has signed a person on as his/her client, under the principles of "agency law," he/she then has fiduciary responsibilities to that client as the principal. She suggested that even disclosing to both clients that he/she is acting on behalf of both of them does not discharge the agent's fiduciary duties to both clients or make it easier for communication to occur in a commercial setting.

REPRESENTATIVE ROKEBERG said that the issue becomes how to determine whether one is breaching one's fiduciary duties with regard to what information is being discussed. He said that these same dual-agency problems are true for residential transactions as well, but HB 257 does not address residential transactions at all. He indicated that the comprehensive legislation still to be developed will address all the problems currently faced by clients and agents.

Number 2092

DAVE FEEKEN, Legislative Chair, Alaska Association of Realtors (AAR), turned attention to page 5, lines 10-14, subsection (g) of Version Q, and said that this language clarifies that it pertains only to the written disclosure required by AS 08.88.396, rather than to the whole concept of disclosure. He said that the AAR is very much in support of this clarifying language. He mentioned that the board of directors [of the AAR]

has had lengthy debate regarding the definition of "sophisticated and knowledgeable commercial real estate transactions," and has provided the sponsor with suggested language to redefine "the limit." He also mentioned that the AAR now has a "no opposition as amended" position on HB 257. He noted that there are a number of states that exempt "commercial, single agency only, transactions from disclosure." He added, "The dual-agency situation ... still requires a disclosure in all states in this country, right along with conflict of interest."

REPRESENTATIVE GRUENBERG opined that subsection (g) immunizes a licensee even from a deliberate concealment of a disclosure. Why is that good public policy? he asked.

MR. FEEKEN said that the AAR does not interpret subsection (g) as immunizing an agent for concealment. "We're saying that the rest of the statute still stands," he added; under AS 08.88.396, the agent still has the duty to disclose. However, if either a buyer or seller doesn't sign "at the time of specific assistance," then that is considered a clerical or technical violation; it does not remove the licensee's obligation to disclose.

REPRESENTATIVE GRUENBERG said that a right without a remedy is pretty specious. The only way something can be enforced is to provide a remedy in the law; one remedy, traditionally, is a civil remedy, which is often the most effective because it provides an immediate private remedy without having to go through a governmental bureaucracy. According to his interpretation of subsection (g), he said, it's an immunization of licensee for the failure to make a written disclosure. So again, why is that good public policy?

Number 2281

MR. FEEKEN pointed out that the second sentence of subsection (g) says:

However, this subsection does not limit a person's ability to take any other action or pursue any other remedy to which the person may be entitled under other law.

MR. FEEKEN said that proposed AS 08.88.396 says that an agent shall disclose at the point of specific assistance, which most people interpret to mean when the agent first starts helping to

locate a property or when he/she first becomes aware of confidential information. The obligation to disclose has not been removed, he opined. Instead, he also opined, the language in subsection (g) means that if one doesn't get that written disclosure within a particular timeframe, it is just considered a clerical mistake.

CHAIR McGUIRE remarked that one of the things that has come out of the aforementioned litigation and some of the resulting discussions is that people have become aware that there are alternatives to dual agency. She referenced her own neighborhood in which the sole real estate agent represented both the homebuilder and potential buyers, many of whom were first-time homebuyers and didn't realize that dual agency is only one alternative. What has begun to happen, she remarked, is that now a form is being offered, first thing, to potential buyers regarding dual agency.

TAPE 03-44, SIDE B

Number 2385

CHAIR McGUIRE indicated that she is unsure whether mere sanctions on an agent's license are going to be enough to encourage an agent to do all he/she can to inform consumers of their rights.

MR. FEEKEN said he understood Chair McGuire's concern. He offered, however, that "the specific assistance issue is something that's debated in an open-house environment and in [a] new-construction environment as to when that happens." He posited that most agents comply with AS 08.88.396, but acknowledged that perhaps such is not the practice in a hot market. He remarked that there have been a lot of changes made in the industry in the last 15 months due to the aforementioned lawsuit.

CHAIR McGUIRE opined that those changes have been positive for consumers, particularly that of forcing agents to give consumers a form explaining their relationship right at the outset. Subsection (g) is taking away consumers' remedy, she remarked, and so agents would no longer have the force of law behind them ensuring that they did the right thing for consumers.

MR. FEEKEN argued that the consumer would still have the right to bring a cause of action if the agent failed to disclose verbally. Subsection (g) only pertains to circumstances in which the agent does not make the disclosure in writing or

obtain written verification of disclosure. He opined that it would be in the agent's best interest to obtain written verification of disclosure. He remarked that undisclosed dual agency constitutes a fraudulent act and as such would still entitle the consumer to bring a cause of action, adding that subsection (g) only pertains to the "written technicality of the disclosure."

REPRESENTATIVE GRUENBERG pointed out, however, that for many years, the "statute of frauds" has required real estate transactions - contracts - to be in writing because they are so important to the people involved in those transactions. In fact, having things in writing is important to the legal system, as well, in reducing problems of proof, he said, because if a consumer bringing a suit claims that he/she never received verbal disclosure, the defendant - the agent - can then show the court the written acknowledgement of disclosure. Once the forms are created, it is easy to provide them to consumers, and they make it easy to prove in court that proper disclosure did occur.

Number 2146

REPRESENTATIVE ROKEBERG pointed out, however, that one of the problems revolves around when to make such a disclosure. The timing of the disclosure has become an issue: Should disclosure happen when a person attends an open house? After a person asks an agent a couple of questions? When a person responds to an add in the paper? He opined that a potential buyer should not have to sign a form at those points in time, and remarked that agents in small communities have no choice but to act as dual agents. He suggested that the aforementioned lawsuit and current statute have created artificial barriers that are ludicrous to abide by. He again reiterated that HB 257 is merely a "Band-Aid bill" that will be replaced by a later, more comprehensive bill. Current law is badly drafted, he remarked, in that it doesn't give clear direction regarding when disclosure should occur.

CHAIR McGUIRE argued, however, that in order for something - a contract, a transaction, a warranty - to really be meaningful for a consumer, it should be in writing. Relying on a claim that disclosure occurred orally is not sufficient, and is likely to engender more litigation.

REPRESENTATIVE ROKEBERG offered that disclosure would still have to occur in writing; subsection (g) merely addresses instances

when such does not occur at the exact moment the relationship started.

REPRESENTATIVE GARA said he agrees that the disclosure forms should be in writing, but does not agree that proof of verbal disclosure should be sufficient to preclude a cause of action. Regardless, he observed, subsection (g) is really poorly written in that it makes it very vague as to whether someone has a cause of action for a failure to disclose. He stated that if all the sponsor wants to do is exempt technical violations, then subsection (g) needs to be rewritten because, as currently written, it appears to exempt much more than just technical violations.

REPRESENTATIVE GARA noted that contrary to Mr. Feeken's statement that the AAR now has no position regarding HB 257, Carole Winton, president of the AAR, sent a letter via e-mail that says the AAR does not support HB 257. In particular, the letter states about the applicability and retrospectivity provision: "This is a real slap in the face to the law abiding majority of real estate practitioners in Alaska." He asked Mr. Feeken to explain why the AAR no longer has a problem with that provision.

Number 1898

MR. FEEKEN offered his understanding that the applicability and retrospectivity provision - Section 9 - only applies to subsection (g), which, he opined, only deals with technical or clerical disclosure, rather than the actual process of disclosure. He added:

One of the issues that's came up out of the "Mehner lawsuit" was, the common practice in the industry was, in a dual-agency residential transaction, that the seller of the property, during the process of listing a property, would allow for dual agency, in other words, that that agent or someone within that company to sell that property; "preauthorizing" it was the terms used. Within that lawsuit, the definition that came back out said, "No, that practice can't happen because the principals have to know who each other is," which was never the intent of the original [AS 08.88.396].

So, it would put the burden upon the agent who has the listing; if a buyer comes along and says, "I want to

see that property," if you're to go by what the judge and the attorneys were saying out of that lawsuit, that agent has to run back out and get that seller to sign a form saying it's okay for him to show his house. That is the written technical difficulty we're trying to put the Band-Aid on ... until this larger bill can be introduced, which totally revamps this process of agency disclosure.

REPRESENTATIVE GARA referred again to Ms. Winton's letter, and read from the third paragraph from the bottom which says in part: "Fiduciary Duty - This provision is simply embarrassing to professionals that endorse the National Association of Realtors code of ethics." He asked: What about the removal of the "law of agency's" fiduciary duty? Is that no longer the position of [the AAR]?

MR. FEEKEN replied that the AAR is not dealing with those issues. He relayed that he'd been involved in the creation of AS 08.88.396, which had been enacted at a time when "subagency" was common within the industry. The current language was intended to let the seller know that the agent working with the buyer was the buyer's agent, and to disclose the possibility of dual agency on an in-house [situation] or the same agent working with both the buyer and seller. The industry has changed a lot, he added, and subagency is not even available in most states in the country. "The concept of abrogating the common law by simply putting a line in like that has been attempted in 13 states and it's failed in 13 states; [you've] got to replace it with something," he stated. With regard to Ms. Winton's statement, he said that he did not understand how one could be honest, be fair, act in good faith, and still not have fiduciary duty. It's just not practical, he added.

Number 1762

REPRESENTATIVE GARA remarked that Ms. Winton's letter seems to state that AAR has a problem with abrogating "the common law of agency," in that it says in part: "The National Association of Realtors does not recommend abrogation of the common law." Representative Gara asked: "What is it about this new version of the bill that resolves that concern?"

MR. FEEKEN replied: "It doesn't address that, and I guess my point is ... that that line is not enforceable (indisc. - someone else talking] it hasn't been replaced with anything. If you abrogate the common law, what law are you going to use?" He

remarked that when Colorado attempted to abrogate common law with regard to disclosure, "it took 65 pages to replace it, of the duties of the agent." He surmised that if an issue came before a judge, even though the proposed legislation might state that the common law of agency does not apply, without anything in its place, the judge will "go right back to common law."

REPRESENTATIVE ROKEBERG pointed out that HB 257 only repeals the "common law principles of agency," not all common law.

REPRESENTATIVE GARA said that's the problem: "we're abrogating the law that provides the duties." That's not just a little technical thing that's being abrogated; if the "common law of agency" imposes the fiduciary duties, and it is abrogated, then so too are the duties. Why is that a good thing? he asked. Why are not Ms. Winton's comment right on point?

REPRESENTATIVE ROKEBERG argued that it would only affect commercial transactions, and then only for two years until more comprehensive legislation can be introduced and enacted.

REPRESENTATIVE GARA said he understood those points.

REPRESENTATIVE ROKEBERG opined that doing as HB 257 proposes is acceptable because the parties involved in commercial transactions are sophisticated and understand the rules of engagement.

Number 1647

REPRESENTATIVE GARA asked Representative Rokeberg whether he is claiming that everyone who purchases a commercial piece of property is so sophisticated that he/she does not need to made aware of his/her agent's potential conflict of interest.

REPRESENTATIVE ROKEBERG replied that although nothing is absolute, by and large, people who engage in commercial transactions should have their own agents, advisors, and accountants, and should be and are protected under commercial law.

REPRESENTATIVE GARA said that the concept that one cannot rely on the agent and should instead arm one's self with a battery of other agents and an attorney is shocking to him.

REPRESENTATIVE ROKEBERG said that as a matter of course, he'd advised all of his clients to have their own attorneys and

accountants. He indicated that current law is an insult to him and his own personal ethics because it implies that an agent can't act in an ethical manner when serving as a dual agent. He remarked that every other state in the country is also struggling with this issue. He said that for a number of years, he and his staff have been working with people in the industry to try to find a solution.

REPRESENTATIVE OGG asked why the burden to inform - to disclose dual agency - in writing is considered onerous.

MR. FEEKEN said that problems arise in instances where the person to whom the disclosure must be made is not standing right there where the agent can hand him/her the disclosure notice. Sometimes portions of the transaction, with regard to information that must be disclosed, occur over the telephone; however, according to the specific requirements currently in AS 08.88.396, information must be disclosed in writing. Therefore, it's not that written disclosure doesn't happen, it's just that it doesn't happen at the exact same time as the verbal disclosure; this is the technical issue that subsection (g) is intended to address. He confirmed that subsection (g) is also intended to address the issue of the seller approving, via written acknowledgement, of a dual-agency situation.

REPRESENTATIVE OGG asked whether delivering written disclosure or acknowledgement could be done via fax, e-mail, or courier.

Number 1390

MR. FEEKEN pointed out that current law says the written disclosure or acknowledgement must occur at the same time as the verbal disclosure or acknowledgement. Such is not always possible, he remarked, adding that sometimes the person to whom the written disclosure is presented or from whom the written acknowledgement is asked either does not have the authority or must get the documents reviewed first.

REPRESENTATIVE OGG remarked that subsection (g) does not mention the technical violation that the sponsor has indicated he wants to address. He suggested that perhaps a reference to and a definition of what constitutes the technical violation should be included in the bill.

MR. FEEKEN said that is a good suggestion.

REPRESENTATIVE GRUENBERG, on that point, referred to page 4, line 6, and suggested that the language "at the time of the initial contact" should be amended by adding something along the lines of, "or as close as possible thereto". He opined that currently, subsection (g) is overbroad. He said he agreed with Representative Gara with regard to the issue of throwing out the "common law principles of agency." That's a complete body of law, and it will have a lot of unintended consequences if this legislation exempts even commercial real estate transactions from the entire "restatement of agency"; "I couldn't support that," he added. He then asked Mr. Feeken whether he'd yet read Judge Christen's decision on the Mehner case.

MR. FEEKEN said he had not.

REPRESENTATIVE GRUENBERG mentioned that one of the decisions arrived at from the issues surrounding that case was that not all intentional torts give rise to damages, because even when the tort is intentional, the conduct must still satisfy either the "outrageous" or "reckless indifference" requirements of AS 09.17.020(b). Thus, he surmised, one could get punitive damages only if one is able to prove by clear and convincing evidence that the action was either outrageous, including acts done with malice or bad motives, or recklessly indifferent to the interest of another person. He opined that the judge's finding that she could not give punitive damages to a particular defendant in that case - McAlpine - is either a serious misreading of the statute or there is a problem with the statute.

Number 0958

REPRESENTATIVE GRUENBERG asked Mr. Feeken if he sees a problem with that interpretation of the punitive damages statute, "where it's one broker suing another for stealing a commission."

MR. FEEKEN said no.

REPRESENTATIVE HOLM said that giving up the "common law principles of agency" bothers him because his understanding is that once he hires someone to do something for him, then that person will act as his principal agent in his best interest. He noted that he has never read a law that says someone must treat another honestly, fairly, and in good faith. Although such is good sentiment, it doesn't really mean anything because it's all based on "some level of association" that is not in law. He questioned whether an agent could really represent both the buyer and seller and still be "evenhanded."

REPRESENTATIVE HOLM surmised that the only way an agent could really do so would be if that agent was really just looking out for his/her own best interest. He asked: "Is that what we're saying here, [that] this is done for the purpose of the real estate agent? ... Where do the purchasers and the renters, the lessors and the lessee, where do they fit into [it]? ... Do they give up their rights to having ... some kind of agency law at all?" Because if they do that, then no one acts in their best interest, necessarily.

REPRESENTATIVE HOLM said:

If you hire someone, usually you're paying them to do business in your best interest. But the way this is written, to me, business will be done in the real estate broker's best interest, regardless of whether or not it's [in] my best interest ..., whether I'm the lessor or lessee. ... If I hire a real estate agent, I would want them to be working for me.

Number 0665

REPRESENTATIVE HOLM said that although he may not understand all of the principles of agency, he knows how they affect him as a businessman. If he purchases property, he explained, he wants to truly feel comfortable that the agent he hires, that he pays, is working in his best interest. Notwithstanding the claim that this bill is a "Band-Aid" approach, to write law which stipulates that the "common law principles of agency" will no longer apply leaves him wondering what will happen in the meantime, he remarked.

REPRESENTATIVE ROKEBERG opined that strict interpretation of the current law hinders commerce, in that transactions cannot be concluded properly. He remarked that HB 257 has narrow application, affecting commercial real estate transactions; with regard to residential transactions, the bill only pertains to the timeframe in which written documentation is received. He again reiterated that HB 257 is merely an interim bill, and that a more permanent solution is being drafted. "All we're trying to do here is reduce the liability ... for unnecessary litigation, and to move forward so we can make progress here," he added.

CHAIR McGUIRE suggested that they simply wait for that permanent solution, rather than taking this interim step.

REPRESENTATIVE ROKEBERG pointed out, however, that the firm of Bond, Stephens & Johnson, Inc., alone does between \$300 million and \$400 million in business a year, approximately half of which is under dual agency. Waiting for the more comprehensive legislation, he opined, will shut down such firms and have a negative impact on business. Agents are fearful of the potential liability resulting from the aforementioned case and are in need of legislation that will keep the balance until a more permanent solution is in place, he added.

Number 0392

HOWARD S. TRICKEY, Attorney at Law; Jermain, Dunnagan & Owens, PC, indicated that he would be speaking to proposed AS 08.88.396(g) and its retrospective application [on behalf of Prudential Vista Real Estate and Prudential Jack White Real Estate]. He said that the purpose of the legislation, as drafted, is to address the following problem. Currently, there is a perception that every dual-agency transaction done in Alaska in recent years was not properly documented. This contention is based upon the requirement that there be a signed acknowledgement, from both buyer and seller, every time a prospective buyer wants to see a house listed with the same broker. For example, if the broker has a house and a "house showing," which is common in many areas, each time a new buyer even walks into that house, the current statutory requirement is that the broker obtain a written consent from both seller and buyer in order to show the house.

MR. TRICKEY offered that current law is ambiguous in that it requires the disclosure when there's a specific assistance. He opined that subsection (g) is intended to merely and solely protect agents and brokers from liability for a technical statutory violation involving the timing of when they document the written disclosure. It really is to protect them from a recordkeeping requirement, he added. Subsection (g) does not abrogate the responsibility to make a written disclosure; it does not abrogate agents' liability in the event that there is actual harm or loss because someone was engaged in fraud, intentional misconduct, negligence, or negligent misrepresentation. He said that the second sentence of subsection (g) was drafted to preserve any cause of action or claim that a buyer, who has suffered injury or harm or damage, may have under the common law of either tort principles or contract principles.

MR. TRICKEY attempted to assure members that subsection (g) is not intended to protect agents or brokers when someone has actually suffered harm or loss. Under the second [sentence of subsection (g)], any buyer would still have the right to bring a claim based on a tort or contract theory. The intent of the legislation is very narrow and limited, he opined, in that it is intended to protect from liability a failure to timely document the written disclosure still required of a residential agent when acting in a dual-agency capacity.

MR. TRICKEY said of the retroactivity provision that it is not intended to set aside a jury verdict. He said he is unaware of any jury verdict involving any action that has resulted in a trial and a verdict that's been rendered. He attempted to assure members that HB 257 will not change and would not have changed the result of the Mehner case, wherein, he offered, the judge found that the defendant committed intentional misconduct and made misrepresentations in a transaction. He opined that the retroactivity provision is necessary to protect those in the industry when there is a technical violation of the statute involving the documenting of the written-disclosure requirement, which, he also opined, causes no harm to a buyer and seeks only the forfeiture of the commission that the agent earned in the transaction.

TAPE 03-45, SIDE A

Number 0001

MR. TRICKEY, in response to a question, mentioned that he is speaking on behalf of Prudential Vista Real Estate and Prudential Jack White Real Estate, and is involved with co-counsel in defending those firms in a class-action lawsuit, which, he proffered, seeks to disgorge all commissions earned by those firms over the past six years.

REPRESENTATIVE GARA surmised that what is intended via subsection (g) is that if agents fail to disclose, to a client, dual agency or a conflict, then they would be liable, but if the agents do disclose but just don't do a written disclosure in time, that fact doesn't make the agents liable. He asked if that was a fair summary, if he had 90 percent of it right.

MR. TRICKEY told Representative Gara that he did have 90 percent of it right, because statute requires disclosure of dual agency and defines conflict of interest. Therefore, if there is a conflict as defined by that statute, there is a different remedy

for an undisclosed conflict. In other words, "conflict" is a technical term under the statute.

REPRESENTATIVE GARA opined that if the aforementioned is the intent of subsection (g), then it needs to be rewritten because, currently, it seems to imply, though unintentionally, that if an agent fails to disclose, then there is no [cause of] action.

MR. TRICKEY noted that failure to make a written disclosure, at all, would result in a licensure action. He reiterated that the purpose of subsection (g) is to prevent someone from being liable for the technical failure to document the disclosure.

REPRESENTATIVE GARA said that the language, as written, does not make him feel comfortable that that is all they are doing.

[Following was some discussion about Mr. Trickey's aforementioned class-action lawsuit and whether the court will hold that actual harm must occur before damages are awarded.]

Number 0401

CHAIR McGUIRE opined that subsection (g) is written so vaguely that it gives the impression that failure to make any disclosure at all does not give a person a cause of action. At a minimum, she suggested, it should be rewritten to clarify that the duty itself still exists and it is only the [timing of] the written disclosure that is addressed in subsection (g). She also pondered whether the committee should consider the issue of actual harm. For example, perhaps the language should stipulate that the failure to provide written disclosure within a certain timeframe must cause actual harm.

MR. TRICKEY confirmed that he'd assisted in the drafting of the current language in subsection (g), and said he thought that the language is clear in its intent when read in the context of the entire statute, because proposed AS 08.88.396(a) and (b) require the disclosure to be in writing. "Subsection (g) does not abrogate that requirement; it simply, we thought, made it clear that it just does not give rise to a cause of action against the licensee for failure to do that," he added, mentioning that the second sentence in subsection (g) was written as it was because they did not want it to interfere with any legal claim by a person who suffers actual harm.

REPRESENTATIVE ROKEBERG, making reference to the aforementioned class-action lawsuit, said, "The focus of the legislation is to

cut off a fishing expedition by counsel, and the scope of the commissions he's asking for disgorgement and the discovery alone could run into hundreds of thousands of dollars." That's why the issue warrants interim legislation, he opined, because the scope of the aforementioned class-action lawsuit is quite substantial.

CHAIR McGUIRE indicated that regardless of whether HB 257 is warranted, the language in subsection (g) does not seem to address the specific problem, as purported.

REPRESENTATIVE GRUENBERG turned attention to Section 9, subsection (b), and asked whether its effect will be to dismiss the aforementioned class-action lawsuit.

MR. TRICKEY replied, "That's correct ...; it would be correct as to the claim in the suit for the violation of the statute."

[Following was some discussion on the issue of legislation specifically designed to influence pending court cases, and on the issue of prior legislatures' intentions.]

Number 1029

LINDA S. GARRISON, Broker, AAR #1 Buyer's Agency, said that [HB 257] is a bad law, adding that its creation was very rushed. Why the hurry, she asked, why the sunset? She noted that Mr. Trickey has said that HB 257 is necessary to protect the industry so that commissions are not disgorged. She spoke against abrogating common law, and remarked that she has heard no one explain how these proposed changes will help the public - the consumer. She noted that her firm has chosen to be a single-agency office: it exclusively represents buyers.

MS. GARRISON opined that state law is not difficult to understand. It's very simple: an agent can represent the seller, or the buyer, or, in certain case, can [undertake] dual agency. She explained that the term "specific assistance" is defined by some people in the industry as the writing of the contract, but countered that that is way too late. Instead, an agent should explain to the consumer right up front what his/her agency relationship is and what types of situations could arise because of that relationship.

MS. GARRISON said that HB 257 could be called a "real estate protection Act." It is the flexibility to comply with statutory requirements without driving away the client; in other words,

she opined, it is like saying, "We don't want to tell buyers ... [and] sellers the whole story because, if we do, they won't let us be a dual agent." [House Bill 257] is designed to preserve dual agency, it is designed to take liability away from the professional in the field, and it is an attempt to weaken Alaskan statutes. She suggested that it is as if proponents of HB 257 are saying, "Rather than comply with the law, we're going to work to dilute the law until it serves our purpose."

MS. GARRISON stated that written disclosure should be immediately upon first contact, and listed ways in which a record of that disclosure could be made and kept, that that disclosure was indeed made on first contact. On the issue of what constitutes a commercial real estate transaction, she said that the definition in the bill is not accurate: \$250,000 is about the average price of a home, and an annual gross lease revenue of \$12,000 is [easily achieved in many residential leases]. She remarked that any time she hears that something is going to block the public - block the consumer - from legal recourse, it gives her concern. She opined that the reason HB 257 is before the committee is because the industry got caught doing something it wasn't supposed to do and is now seeking legislative relief. Current statute works just fine - it's not broken - she said in conclusion, adding that she does not support HB 257 at all and strongly urges the committee to table it.

Number 1265

DAVID A. GARRISON, Associate Broker, AAR #1 Buyer's Agency, referred to page 3, line 16, in which "agency" is changed to "real estate licensee relationships". He said, "We need to discuss agency, not the relationship of a real estate licensee. Referring then to page 3, line 23, in which "an agent" is being changed to "a real estate licensee", he opined that the purpose of that change is to allow agents to say that their relationship is with brokers rather than buyers or sellers, and thus they could be governed more by regulation rather than statute. He remarked that this should be stopped, and that an agent should stay an agent - for either the buyer or the seller.

MR. GARRISON stated that the judge was very clear in the Mehner case regarding dual agency. It is very difficult to be a dual agent and, thus, there should be a higher standard of awareness for the person entering into such deal, that both the buyer and the seller - or the lessee and lessor - have a really strong understanding of what it means to be entering into that type of

a relationship. Turning to the bill's definition of what would constitute a commercial real estate transaction, he noted that a duplex would fall outside of that definition but probably couldn't rent for under \$12,000 a year.

MR. GARRISON said that nothing in current law prevents an agent from representing the seller, and opined that there are very few people who broker commercial transactions for the very wealthy - who some consider to be "sophisticated" in the matter of such transactions - and are perhaps encumbered by the current law regarding dual-agency disclosure. There are many people, he noted, that for one reason or another are entering into commercial real estate transactions for the first time, and these folks are not knowledgeable about the real estate market and everything there is to know about such transactions. Such people aren't sophisticated buyers or sellers; they need to be protected, and the agents need to disclose whom they're working for.

MR. GARRISON stated that HB 257 goes totally against the general public. He relayed that recently he'd taken a client of his - a buyer - to an open house, and the agent holding the open house insisted that she was there to represent the buyer. Members of the general public just walking into such a situation without any prior knowledge would have relied upon her to assist them and deal with them fairly, and might never realize that she was actually representing the seller. Mr. Garrison remarked that the current law needs to be enforced and that agents need to be educated on that law; if it takes lawsuits to get agents to realize that they need to abide by the law, then that remedy should remain intact.

Number 1532

REPRESENTATIVE ROKEBERG explained that the changes from "agent" to "real estate licensee" and from "agency" to "real estate licensee relationships" are simply conforming amendments, ones that he'd anticipated would have been done some time ago, but since those changes had yet to occur, he'd included them in HB 257.

CHAIR McGUIRE surmised, then, that those changes simply reflect current terms of art, and indicated that the substantive changes in the bill pertain to dual agency and disclosure.

CHAIR McGUIRE, after determining that there was no one further to testify, closed public testimony and indicated that HB 257 would be held over.

The committee took an at-ease from 4:18 p.m. to 4:29 p.m.

HB 86 - INJUNCTIONS AGAINST PERMITTED PROJECTS

Number 1655

CHAIR McGUIRE announced that the next order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86, "An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

Number 1685

REPRESENTATIVE SAMUELS moved to adopt the proposed committee substitute (CS) for SSHB 86, Version 23-LS0349\V, Kurtz, 4/25/03, as the work draft. There being no objection, Version V was before the committee.

REPRESENTATIVE GARA asked for a brief at-ease for the purpose of working with the sponsor's representative on a possible amendment to Version V.

The committee took an at-ease from 4:31 p.m. to 4:35 p.m.

Number 1731

JIM POUND, Staff to Representative Hugh Fate, Alaska State Legislature, remarked on behalf of Representative Fate, sponsor, that Version V maintains the sponsor's intent to "provide a private remedy to the permittee or owner of a state-permitted project who is the victim of frivolous, obstructionist litigation." The private remedy is in addition to any other penalty or sanction otherwise provided by law. Under Version V, a person who initiates or maintains a malicious claim against a state-permitted project will be liable for damages caused by such a lawsuit should he/she lose the case. Version V specifies the elements that would have to be established in order for the person to be held liable, and it specifies the type of damages the aggrieved person would be able to seek. The elements for such a cause of action are based on concepts established in law for stating a claim for unlawful civil proceedings and abuse of process.

MR. POUND remarked that [Version V] has two key benefits. One, it avoids use of the unfamiliar, potentially ambiguous terms currently found in SSHB 86. Two, the courts would be able to draw on existing case law from Alaska to assist them in interpreting and applying the proposed law. He assured the committee that the civil remedy provided for in Version V is narrow and focused, adding that "it would apply only to egregious cases of abusive civil litigation." If adopted, he remarked, Version V would not have a chilling or deterrent effect on litigants who would bring legitimate, meritorious cases to court.

Number 1834

REPRESENTATIVE GARA made a motion to adopt Conceptual Amendment 1: on page 2, lines 16-17, delete "(A) without probable cause; or (B)", and insert "in bad faith"; on page 2, delete subsection (d) located on lines 23-25. There being no objection, Conceptual Amendment 1 was adopted.

REPRESENTATIVE SAMUELS suggested that page 1, line 10, should have the phrase, ", but not limited to" inserted after "including".

REPRESENTATIVE GRUENBERG explained that language in Title 1 defines "including" to mean "including, but not limited to".

REPRESENTATIVE SAMUELS withdrew his suggestion, which Chair McGuire referred to as Amendment 2.

Number 1940

REPRESENTATIVE SAMUELS moved to report the proposed committee substitute (CS) for SSHB 86, Version 23-LS0349\V, Kurtz, 4/25/03, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSSHB 86(JUD) was reported from the House Judiciary Standing Committee.

HB 24 - AGREEMENTS ON MANAGEMENT OF FISH AND GAME

Number 2013

CHAIR MCGUIRE announced that the next order of business would be HOUSE BILL NO. 24, "An Act relating to intergovernmental agreements regarding management of fish or game." [Before the committee was CSHB 24(RES).]

Number 2018

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, joint sponsor of HB 24, summarized his understanding from the previous hearing. He drew attention to language proposed by [Stephen White of the Department of Law] to address some concerns he had; it read [original punctuation provided but some formatting changed]:

SUGGESTED LANGUAGE FOR CS FOR HOUSE BILL NO. 24(RES)

(This will remove the separation of powers issue and will strengthen the bill against attack under the impairment of contracts clauses.)

Section 1. AS 16.20.010 is amended by adding a new subsection to read:

(c) The department or a board may not enter into an agreement with the National Park Service that cedes to the federal government the state's traditional authority to manage fish or game in the navigable waters within or adjoining Glacier Bay National Park and Preserve. In this subsection, "authority to manage" means authority to regulate the method, manner, means, time, or place of taking of fish or game or to regulate the amount of fish or game that may be taken.

Section 2. The uncodified law of the State of Alaska is amended by adding a new section to read:

STATUS OF EXISTING AGREEMENTS REGARDING MANAGEMENT OF FISH AND GAME IN THE NAVIGABLE WATERS WITHIN OR ADJOINING GLACIER BAY NATIONAL PARK AND PRESERVE. An agreement, or a severable portion of an agreement, between the Department of Fish and Game, the Board of Fisheries, or the Board of Game and the National Park Service that was entered into before the effective date of this Act and that cedes to the federal government the state's traditional authority to manage fish or game in the navigable waters within or adjoining Glacier Bay National Park and Preserve is void on and after July 1, 2004.

REPRESENTATIVE WEYHRAUCH informed members that he'd asked George Utermohle, legislative drafter, and Ted Popely to talk to the committee.

The committee took an at-ease from 4:44 p.m. to 4:45 p.m.

Number 2090

REPRESENTATIVE WEYHRAUCH told members that one concern he's had is that the state's authority, referenced in Section 1, subsection (c), of Mr. White's proposed language, is a constitutionally recognized one, not [just] a traditional one. He said that the central premise of the bill is to ensure that the state doesn't cede, by contract, the management rights it holds by authority under the constitution. He suggested that if the word "traditional" is stricken, the language will basically mirror the bill.

CHAIR McGUIRE agreed.

Number 2149

REPRESENTATIVE OGG noted that although what's before the committee focuses on Glacier Bay National Park and Preserve, the same issues apply in his district, which has a national park "across the way from us." He suggested perhaps extending the legislation to apply to national monuments and other federal lands as well, so that it could correct potential problems in his district.

REPRESENTATIVE WEYHRAUCH explained that S. 501 was introduced in Congress by then-U.S. Senator Frank Murkowski to require that agreements be entered into by the State of Alaska and the Department of the Interior for co-management of fisheries in the outside waters of Glacier Bay. While there may be concerns over a potential co-management agreement between the National Park Service and the State of Alaska in the Kodiak area, there is no specific requirement as now exists for Glacier Bay National Park and Preserve. He suggested, however, that it is in the state's best interest to prevent, statewide, the kind of co-management agreements wherein the state cedes, by contract, its authority. He said he wouldn't object to putting [language that applies statewide] in the bill.

CHAIR McGUIRE offered her understanding that the intent behind the original version of HB 24 was to include all navigable waters.

Number 2229

REPRESENTATIVE WEYHRAUCH specified that the original intent was to include all co-management agreements over "all waters and, basically, resources in the entire state of Alaska." He'd supported [CSHB 24(RES)], however, because sometimes the state and a sovereign entity have an agreement over a fish weir to count fish, for example, or have an agreement to hire a tribal entity or federal [agency] with regard to some resource. In those instances, the state and the resource users benefit, and there is no ceding of jurisdiction. He suggested that that isn't the kind of agreement the legislature wants to review on a case-by-case basis. It's only the central, critical kinds of issues where there potentially is a ceding of jurisdiction, with respect to the right and ability to manage resources, that the legislature should be concerned about, he concluded.

CHAIR MCGUIRE posited that the committee supports the sponsor's goal, and that the only debate she's heard from members is the question, "Why not make it broader?" She suggested speaking clearly and concisely [in the statute]. She asked how a court will interpret the existence of a House bill that originally spoke on a broader level about navigable waters and the state's rights, followed by committee discussion and a subsequent narrowing of that.

REPRESENTATIVE WEYHRAUCH acknowledged the difficulty of predicting how a court would interpret something, but suggested that a reasonable interpretation would be that the legislature considered it and decided to make it more restrictive. Therefore, he opined, a court wouldn't read [the proposed statute] expansively to include any other area outside the Glacier Bay National Park and Preserve, because the legislature specifically knew about a broad intent and then amended the bill to make it narrower.

Number 2332

REPRESENTATIVE SAMUELS asked about replacing "Glacier Bay" with the word "any" so that it would read "any national park or preserve". He also suggested the word "a".

REPRESENTATIVE WEYHRAUCH said it had begun broad and that he'd had no problem with it. He emphasized his concern: that Alaska not cede to the federal government its jurisdiction over management of fish and game.

CHAIR McGUIRE asked Mr. Popely whether he had any suggested language, and whether saying "any national park and preserve" would accomplish the intent.

Number 2371

TED POPELY, Majority Legal Counsel, Alaska State Legislature, answered that either that or similar language would be effective, to his belief. With regard to broadening the language, he said it may actually be required, since there is a constitutional mandate that [legislative Acts] conform to the local and special Acts provision; this could raise an issue about whether this is a special or local provision, as opposed to one that's generally applicable to all federal preserves.

TAPE 03-45, SIDE B

Number 2380

MR. POPELY added that he believes broadening it probably should have been done originally, in fact.

REPRESENTATIVE WEYHRAUCH emphasized that it is fundamental management issues and disputes that are at issue here, rather than examples like the one he'd given of a fish weir.

CHAIR McGUIRE suggested it could be made clear through testimony both in this committee and on the House floor that it isn't the intent to be unnecessarily burdensome for small, technical agreements worked out over things like fish wheels.

Number 2355

REPRESENTATIVE WEYHRAUCH noted that Mr. Popely had suggestions about the word "traditional" in the proposed language.

MR. POPELY suggested that removing the phrase "the state's traditional" [in subsection (c)] would cause the language proposed by Mr. White to more accurately reflect the sponsors' intention. He explained that the state's traditional authority to manage fish or game seems to be a fluid concept in Alaska, one that is continually litigated and that probably shouldn't be in the statute as written; it would be open to a wide spectrum of interpretations as to whether the department was conforming to the statute with regard to when it is ceding the state's traditional authority to manage fish and game.

MR. POPELY offered his understanding that Representative Weyhrauch's point in proposing this bill is specifically to preclude the state's ceding any of its constitutional authority, "as opposed to some interpreted or manufactured authority that's always subject to some legal interpretation"; he said removing those three words - "the state's traditional" - would reflect that intention well in both Sections 1 and 2 [of Mr. White's proposed language].

Number 2250

CHAIR McGUIRE moved to adopt as a work draft the document titled "Suggested Language for CS for House Bill No. 24(RES)" [text provided previously], with the following amendments: In Section 1 after "federal government", delete "the state's traditional"; delete "Glacier Bay"; insert after the word "Park" the letter "s"; and insert after the word "Preserve" the letter "s". In Section 2, delete "Glacier Bay"; insert after the word "Park" the letter "s"; and insert after the word "Preserve" the letter "s".

CHAIR McGUIRE continued with the motion, specifying that the title, though not part of the written document, would be [included in the work draft after being] amended as follows: delete "Glacier Bay"; insert after the word "Park" the letter "s"; and insert after the word "Preserve" the letter "s".

REPRESENTATIVE HOLM suggested inserting "any" after "within or adjoining".

CHAIR McGUIRE accepted that as a friendly amendment, specifying that it would read "any national parks or preserves".

REPRESENTATIVE WEYHRAUCH stated his preference for "and" instead of "or" so that it is broader.

CHAIR McGUIRE concurred, specifying that the title portion would read "or adjoining any national parks and preserves".

Number 2198

REPRESENTATIVE GRUENBERG proposed a friendly amendment, to retain the word "the" so that [both Sections 1 and 2] would read "cedes to the federal government the authority". He acknowledged that this was in contrast to Mr. Popely's suggestion to delete "the state's traditional".

CHAIR McGUIRE, calling it a good, friendly amendment, specified that deleted would be "state's traditional" [in both sections].

CHAIR McGUIRE asked whether there was any objection [to the proposed work draft, as amended, including the title change].

Number 2165

REPRESENTATIVE OGG [objected for discussion purposes], suggesting that there were additional amendments to discuss. For example, national wildlife refuges sometimes receive wilderness status for some sections on shores or bays. There are also national monuments and national forests. He inquired about the [ability of the Alaska Department of Fish and Game] to make agreements with "those folks."

REPRESENTATIVE WEYHRAUCH said that that is the problem - where to cut it off - and that it potentially is a significant problem which the legislature should deal with.

REPRESENTATIVE OGG suggested adding those entities he'd mentioned.

REPRESENTATIVE WEYHRAUCH said he wasn't sure how to amend the bill to do that. He said he'd thought about it a long time, and just needed "something small I could chew." He suggested perhaps Representative Ogg could provide an amendment to insert later after discussion. He added that it is a huge problem that he doesn't know how to deal with.

Number 2094

REPRESENTATIVE HOLM indicated his staff had just suggested defining "preserve" to include all the entities that the committee wants to include.

REPRESENTATIVE WEYHRAUCH proposed just saying "with the federal government"; that would include parks, preserves, forests, and everything else. He also suggested it could say "any federal lands or waters".

Number 2065

CHAIR McGUIRE said she liked it. She announced that a friendly amendment to the conceptual amendment was before the committee, and reworded it slightly to be "any federal lands and waters".

Number 2049

REPRESENTATIVE GARA objected for discussion purposes, expressing concern about broadening it to where the legislature will have to confirm a large number of agreements about which it knows very little at this point. When the bill was limited to Glacier Bay National Park and Preserve, he said, "I think we all sort of had our arms wrapped around the problem." Remarking that the sponsor had solved one problem, he recalled an earlier hearing and noted that the bill would have prevented [the state] from contracting with and accepting authority from the federal government at times. He explained:

The sponsor has now said no, we just want to keep the state from giving away authority. We'll accept authority, but we don't want to give away any authority; so that's the "ceding" language in here. So that solves a good bit of the problem, and I appreciate that.

But now let's focus on some areas where the state accepts authority from the federal government. ... Let's think through how many agreements there might be out there that we're going to have to confirm if we broaden the language. And ... there are places on federal land, I suppose, [where] we conduct fish and game law enforcement activities, and I'm wondering whether, if we wrote the bill as broadly as this, we might now need legislative approval to do that. ... I'm just worried that now that we're going to affect ... all sorts of federal lands within Alaska ..., with this provision, that there might be a whole bunch of agreements out there that the legislature's going to have to confirm that we really didn't mean to confirm.

Number 1966

REPRESENTATIVE WEYHRAUCH asked Ron Somerville to talk about this issue.

MR. POPELY first offered his belief that the definition provided by Mr. White's language specifically defines the authority to manage to include regulating methods, manner, means, time, or place of taking. Those are the traditional aspects of management activities for which he thinks the sponsor is trying to preclude contracting with the federal government, Mr. Popely indicated, as opposed to law enforcement, counting activities,

or other ministerial activities for which the state continues to want to contract with various federal or other organizations.

Number 1935

REPRESENTATIVE WEYHRAUCH pointed out that there are co-management agreements on waterfowl and bowhead whale hunting, for example, between the state and the federal government. He said he'd hate to think management of fish and game couldn't be facilitated for citizens' interests through legislative review of all those smaller kinds of agreements.

Number 1904

RON SOMERVILLE, Member, Board of Game, noting that he has been assigned to work with the House and Senate majority on resource issues, said most of the agreements with federal agencies involve cooperative programs, but don't involve authority. These are agreements for enforcement work or cooperative counting programs, for instance, but rarely include anything related to the basic authority of various agencies, he indicated. With regard to authority being ceded to one agency or another, he said he doesn't see that very often - only where there may be disagreement with the Office of the Attorney General over what traditional authorities there might be. He added his belief that the legislature already would be required to deal with any authority that was going to be given to other agencies.

MR. SOMERVILLE suggested the purpose here, when Congress has mandated that a cooperative program be established, for example, is to make it clear to the [administration], as a matter of policy, that it cannot cede any management authority or authority to regulate. He said the key point he'd seen [in the proposed language] is defining "authority to manage", which is regulating "the following activities". He said he doesn't think it will be often that the legislature will be called upon to do that.

Number 1841

CHAIR McGUIRE interpreted the foregoing to mean that Mr. Somerville doesn't see a problem with using the broader term "federal lands and waters".

MR. SOMERVILLE affirmed that he doesn't see that as a problem, although he said it might broaden the debate to say any federal

withdrawals, because there are a lot of federal withdrawals. He mentioned the BLM [Bureau of Land Management] and said the U.S. Fish and Wildlife Service "is just as difficult to deal with, in many cases, as is the National Park Service."

Number 1801

CHAIR McGUIRE asked whether there was further debate on the "second-degree amendment" to broaden the language beyond national parks and preserves to include "federal lands and waters".

REPRESENTATIVE OGG noted that the second line [of the proposed work draft] references an agreement with the National Park Service; he suggested it should say "with the federal government" for consistency.

CHAIR McGUIRE indicated agreement, noting that it would be required in the title as well.

Number 1779

REPRESENTATIVE SAMUELS asked about saying "federal lands and waters" in the title, as opposed to just "federal lands".

AN UNIDENTIFIED SPEAKER said, "Just federal lands."

CHAIR McGUIRE concurred. She said within the title it would read "navigable waters within or adjoining federal lands".

REPRESENTATIVE WEYHRAUCH disagreed with saying "lands" to the exclusion of waters, because there are areas of dispute between the federal government and the State of Alaska regarding which has management jurisdiction over waters, not just lands. He referred to a U.S. Supreme Court case he'd mentioned in the first bill hearing that relates to Glacier Bay waters, "donut hole" waters in the Alexander Archipelago, and "the national forest waters." He said the state recently won that point because the federal government, in its brief, acknowledged that the state has jurisdiction over those waters adjacent to the Tongass National Forest.

Number 1706

CHAIR McGUIRE agreed. She announced her intention of withdrawing her amendment and reoffering it incorporating "all of the discussion that we've had here on the record."

Number 1693

REPRESENTATIVE GRUENBERG said it sounds as though the committee's intent is to make it broad. He said he was wondering, if the intention is to assert sovereignty, whether sovereignty perhaps should be asserted "in things that would not be within the, quote, 'authority to manage'." He offered deep-sea mining as a possible example and mentioned authority over other types of natural resources. He suggested keeping it as broad as possible to comply with Representative Weyhrauch's desire not to cede any state authority. Then if it needs to be narrowed, that can be done. "If we want to make a statement, let's make a statement," he concluded.

Number 1594

REPRESENTATIVE WEYHRAUCH said he thinks that is a great idea as a [policy] statement. He offered to have the drafters create a clean committee substitute (CS), which he'd bring back to the committee.

CHAIR MCGUIRE agreed, noting that the committee's intent is to broaden it, but no further than the sponsor is comfortable with.

REPRESENTATIVE WEYHRAUCH reiterated that the bill had begun broad, and told members that both he and the other prime sponsor [Representative Whitaker] want it broad.

CHAIR MCGUIRE announced that HB 24 would be held over.

HB 245 - SUITS & CLAIMS: MILITARY/FIRE/DEFENSE

Number 1424

CHAIR MCGUIRE announced that the next order of business would be HOUSE BILL NO. 245, "An Act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities; and providing for an effective date." [Before the committee was CSHB 245(MLV).]

Number 1401

GAIL VOIGTLANDER, Assistant Attorney General, Special Litigation Section, Civil Division (Anchorage), Department of Law (DOL), relayed that HB 245 provides tort liability protection for emergency workers in a variety of areas. She referred to a handout in members' packets, a "bullet sheet" that reviews HB 245.

MS. VOIGTLANDER turned attention to [Section 2 of the bill], and said that the first area in which HB 245 provides immunity from tort lawsuits is that of search and rescue; this immunity would be for state and local government and their employees. Annually, there are approximately 400 "search and rescues" conducted in Alaska in a variety of circumstances, many of which are severe and life threatening, both to the people who are being searched for and for those doing the searching. The Division of Alaska State Troopers (AST) calls for those searches and then relies upon a number of state and local resources to help conduct the "search and rescues." The immunity granted in Section 2 would allow state and local agencies to make decisions based upon both the information at the time and the safety-related circumstances that searchers might be subject to.

MS. VOIGTLANDER indicated that the next area in which HB 245 provides immunity relates to intra-military tort claims. Those provisions of the bill would bar tort action for damages against the state and its employees by service members. She said that there was a recent Alaska Supreme Court decision that basically went a different direction from all but two of the "reported states and the federal government," which do provide such intra-military tort immunity. She predicted that [these provisions of the bill] would not affect any service member's entitlement to, or rights to, benefits under either state worker's compensation, if they are on state-duty orders, or federal compensation, if they are on federal-duty orders.

MS. VOIGTLANDER said that these provisions would make Alaska consistent with the majority of states that follow both the Feres doctrine and the "federal doctrine." The policy behind the federal doctrine, she explained, is to avoid civilian courts going in and "Monday-morning quarterbacking" the decisions that were made in military operations. In Alaska, a variety of military operations occur; most involve federal orders and the Alaska National Guard responding to federal orders, but occasionally there are also times when the governor calls them out in active state service under Title 26.

Number 1195

MS. VOIGTLANDER offered that [these provisions] of HB 245 would also immunize the state from lawsuits that arise out of such military maneuvers unless there was, in fact, a "state call out" by the governor. [These provisions] of HB 245 recognize that the federal government, and not the State of Alaska, is responsible for injuries and claims while service members are under federal command and control. She reiterated that a person's entitlement to worker's compensation benefits are not affected.

MS. VOIGTLANDER said that the next area of immunity addressed by HB 245 relates to civil defense and homeland security. Since [the terrorist attacks of September 11, 2001 ("9/11")], the need for homeland security and civil defense have shifted somewhat. The existing statutes in Title 26 reflect the concept of civil defense which existed prior to 9/11. [Sections 7-11] of HB 245 would bar tort claims against the government, employees, and authorized volunteers for damages that are sustained by a homeland security worker. However, a homeland security worker's or an authorized volunteer's rights to worker's compensation benefits remain. These sections simply create a bar to tort claims. She noted that those receiving worker's compensation are already barred from filing a tort lawsuit arising out of the same injury.

MS. VOIGTLANDER pointed out that Sections 7-11 also bar third-party tort claims against the government, employees, and authorized volunteers for damages sustained within the scope of civil defense or homeland security, unless the person who was injured can demonstrate, by clear and convincing evidence, that the actions were taken with reckless indifference or were malicious in nature. She added: "The ... limited exemption that is available in the civil defense and homeland security [provisions] attempt to track an exemption in existing law under that same title; that does provide some liability exposure, but under very limited circumstances."

MS. VOIGTLANDER said that the final area of immunity addressed by HB 245 involves fire management and firefighting activities. Section 12 and 13 would bar tort claims by third parties against the state, local governments, or other firefighting groups and their employees. Every year, the Division of Forestry [Department of Natural Resources] is called upon to respond to 600-700 fires throughout Alaska. In the past, she remarked, lawsuits were not brought against the Division of Forestry in terms of how fires were fought. However, in two rulings by the

Alaska Supreme Court, it has been held that the state may be sued for firefighting activity. This departs from many jurisdictions in the West, as well as from federal jurisdictions which find that firefighting activities are immune activities for which the government should not be sued for damages in tort.

Number 0967

MS. VOIGTLANDER said that the litigation the Division of Forestry anticipates as a result of the Alaska Supreme Court decision will disrupt its activities, and cause it to call firefighters in off the line in order that they be available for civil litigation, hearings, testimony, and trials. In addition to being a disruption, [being available for such activities] will be quite expensive for the agency, she predicted.

MS. VOIGTLANDER noted that these provisions of HB 245 are consistent with both federal [law] and common law in many other jurisdictions that immunize [firefighting] activities, either through case law or through statute. She offered that Sections 12 and 13 would not affect a person's existing entitlement to worker's compensation benefits, or to federal or state disaster-relief benefits. She noted that because the Division of Forestry's firefighting and fire management activities are addressed in two chapters in statute, both Section 12 and Section 13 are necessary to effect the desired change.

MS. VOIGTLANDER said in conclusion that although HB 245 deals with four different topics, what they have in common are "methods in order to allow the state, it's employees, and those other governmental employees and volunteers who conduct various types of emergency relief to be immune from tort claims." She indicated that she would be available for questions whenever HB 245 is next heard.

CHAIR McGUIRE announced that HB 245 would be held over.

HB 145 - ATTY FEES: PUBLIC INTEREST LITIGANTS

[Contains mention that a proposed clarifying amendment to HB 145 resulted from Senate committee hearings on SB 97, companion bill to HB 145.]

Number 0776

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 145, "An Act relating to public interest

litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0732

CRAIG TILLERY, Assistant Attorney General, Environmental Section, Civil Division (Anchorage), Department of Law (DOL), said that HB 145 is a bill related to public interest litigant [attorney] fees. He offered that currently, public interest litigants are entitled to full attorney fees if they win a case; are entitled to "no fees against them" if they lose a case; receive full fees if they win one issue out of many that they may allege; and may be entitled to fees in some cases, even if they don't win at all but it is viewed that the government later changed its actions partially in response to the lawsuit. This law is not in a rule of the court, he noted, but rather was developed by the Alaska Supreme Court through case law. It applies to civil actions and to administrative appeals.

MR. TILLERY relayed that during the last legislative session, SB 183 was proposed, and it applied to [Civil Rule 82 of the Alaska Rules of Civil Procedure], and would have eliminated the public interest litigant rule in all cases; SB 183 passed the Senate but not the House. HB 145 is different in that it is far more limited. It applies only to decisions by the Department of Environmental Conservation (DEC), the Department of Natural Resources (DNR), and the Alaska Department of Fish and Game (ADF&G) that are coastal consistency determinations, that adopt regulation, or that have had an opportunity for public comment and administrative review.

MR. TILLERY said that under HB 145, in the aforementioned circumstances, public interest litigants would be treated the same as any other litigant. He reasoned that each of the aforementioned situations represents "something where public participation has already been paid for and where there's already been extensive public participation on the decision." He mentioned that members should have a proposed amendment before them that reflects some clarifications that came out of hearings in the Senate on the companion bill to HB 145 - SB 97; this proposed amendment read [original punctuation provided]:

Page 1, line 1, following "**fees**", through line 2:

Delete "**; and amending Rule 82, Alaska Rules of Civil Procedure**"

Page 1, line 11, following "**action**":

Insert "or an appeal from an administrative agency,"

Page 1, line 13, following "Resources", through line 14:

Delete "making a coastal consistency determination, adopting"

Insert "through which one or more of those agencies makes a coastal consistency determination or adopts"

Page 2, line 3, following "litigant" through line 5:

Delete "as provided in Rule 82(g), Alaska Rules of Civil Procedure, on the effective date of this Act"

Insert "in the same manner as attorney's fees may be awarded to or against a non-public interest litigant"

Page 2, line 6, through page 3, line 2:

Delete all material and insert new bill section to read:

*** Sec. 2.** AS 09.60.010 is amended by adding a new subsection to read:

(b) In this section, "public interest litigant" means a party bringing a civil action or appeal that

(1) is designed to effectuate strong public policies;

(2) will benefit numerous people;

(3) could only be expected to be brought by a private party; and

(4) the party bringing the civil action or appeal would lack sufficient economic incentive to bring if it did not involve issues of general importance.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to all civil actions and appeals filed on or after the effective date of this Act."

MR. TILLERY explained that this proposed amendment is intended to do three things. First, it clarifies that the bill applies to both civil actions and to administrative appeals. The reason for this is because many instances in which public interest litigant [attorney] fees are awarded are administrative appeals. Second, it clarifies that HB 145 only applies to the three

aforementioned types of decisions by the DEC, the DNR, and the ADF&G. Third, the proposed amendment would delete a proposed change to Civil Rule 82(b), thus allowing the legislation to proceed simply as a change in statute rather as a court rule change.

Number 0512

MR. TILLERY offered that the purpose of HB 145 is to balance the incentives in litigation between those who attack a state resource agency decision and those who would defend it. Changing the law would force all potential public interest litigants to make the essential cost/benefit analysis that all other potential litigants do prior to filing a lawsuit, that is, does the benefit gained by going to court outweigh the risk of loss and the transaction costs of going to court. Since most public interest litigants and public interest organizations involved in natural resource issues are fairly well financed, he opined, they can engage effectively in this "calculus" without any disadvantage.

MR. TILLERY noted that there are firms, both in Alaska and in other states, that deal with public interest issues, and that most public interest lawsuits end up being against the state and are costly to defend. The state's fiscal situation, he remarked, could lead the specter of potential fees playing a role in decisions made by the state. "Public interest fees are also available against private individuals, which may or may not be affected by the potential for such fees, depending upon the size of the project and the size of the entity that wishes to engage in a project," he stated.

MR. TILLERY also offered that HB 145 is intended to reduce the incentive to assert excessive, unjustified claims, that is, to reduce the potential incentive for parties to file claims with multiple - even a hundred - various causes of action in the hopes that some of them will later be proven justified and then, under the "doctrine of non-apportionment," the parties can recover attorney fees. "It also should make it easier to compromise cases, as frequently these public interest litigant cases will become 'mooted out,' will somehow become no longer relevant, but we still end up in fights in the supreme court ... [relating to attorney] fees only," he added.

Number 0368

MR. TILLERY said that philosophically, the approach of the administration is that HB 145 is very narrowly drawn. In the last 11 years, only 23 of the 43 fee orders that the state has had to pay were from natural resource cases, representing about \$760,000 in awards. The bill and [the proposed amendment] would not penalize litigation or restrict lawsuits, he assured the committee; instead, all it does is reduce the positive incentive that the [Alaska] Supreme Court has introduced into [the issue of] attorney fees.

MR. TILLERY opined that the bill provides a level playing field for all parties, and only includes situations where there is already extensive state-funded public involvement, those being coastal consistency determinations; regulations, where there is public notice, public comment, and - often but not always - hearings; and decisions which have had an opportunity for public comment and administrative review. He assured the committee that the courts would remain free, under the rules, to vary fee awards for reasons such as the complexity of the litigation, but not simply for the reason that the party is a public interest litigant.

CHAIR McGUIRE announced that HB 145 would be held over.

TAPE 03-46, SIDE A

Number 0001

CHAIR McGUIRE discussed the committee's schedule for the upcoming week.

ADJOURNMENT

Number 0191

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:45 p.m.