ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
May 2, 2003
4:10 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

CS FOR SENATE BILL NO. 49(STA)
"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

- MOVED CSSB 49(STA) OUT OF COMMITTEE

SENATE JOINT RESOLUTION NO. 8
Relating to the division of the Ninth Circuit Court of Appeals.

- MOVED HCS SJR 8(JUD) OUT OF COMMITTEE

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."

- MOVED CSHB 257(JUD) OUT OF COMMITTEE

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."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 87
"An Act relating to principal and income in the administration of trusts and decedents' estates and the mental health trust fund; adopting a version of the Uniform Principal and Income Act; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE JOINT RESOLUTION NO. 4
Proposing an amendment to the Constitution of the State of Alaska relating to the duration of a regular session.

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 145
"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

- BILL HEARING POSTPONED TO 5/5/03

HOUSE JOINT RESOLUTION NO. 20
Proposing amendments to the Constitution of the State of Alaska repealing the prohibition on dedicated funds.

- BILL HEARING POSTPONED TO 5/5/03

SENATE JOINT RESOLUTION NO. 10
Relating to the Pledge of Allegiance.

- BILL HEARING POSTPONED TO 5/5/03

PREVIOUS ACTION

BILL: SB 49
SHORT TITLE:2003 REVISOR'S BILL
SPONSOR(S): RLS BY REQUEST OF LEGISLATIVE COUNCIL

Jrn-Date	Jrn-Page		Action
01/31/03	0087	(S)	READ THE FIRST TIME - REFERRALS
01/31/03	0087	(S)	STA, JUD
02/20/03		(S)	STA AT 3:30 PM BELTZ 211

02/20/03		(S)	Moved CSSB 49(STA) Out of Committee
02/20/03		(S)	MINUTE(STA)
02/24/03	0256	(S)	STA RPT CS 5DP SAME TITLE
02/24/03	0256	(S)	DP: TAYLOR, HOFFMAN, COWDERY,
02/24/03	0256	(S)	DYSON, GUESS
02/24/03	0257	(S)	FN1: ZERO(S.STA)
03/17/03		(S)	JUD AT 1:30 PM BELTZ 211
03/17/03		(S)	Heard & Held MINUTE(JUD)
04/07/03		(S)	JUD AT 1:30 PM BELTZ 211
04/07/03		(S)	Moved CSSB 49(STA) Out of Committee MINUTE(JUD)
04/08/03	0745	(S)	JUD RPT CS(STA) 2DP 2NR
04/08/03	0745	(S)	DP: SEEKINS, THERRIAULT;
04/08/03	0745	(S)	NR: ELLIS, FRENCH
04/08/03	0745	(S)	FN1: ZERO(S.STA)
04/09/03	0783	(S)	RULES TO CALENDAR 4/10/2003
04/10/03	0783	(S)	READ THE SECOND TIME
04/10/03	0783	(S)	STA CS ADOPTED UNAN CONSENT
04/10/03	0783	(S)	ADVANCED TO THIRD READING UNAN CONSENT
04/10/03	0784	(S)	READ THE THIRD TIME CSSB 49(STA)
04/10/03	0784	(S)	PASSED Y19 N- E1
04/10/03	0784	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
04/10/03	0794	(S)	TRANSMITTED TO (H)
04/10/03	0794	(S)	VERSION: CSSB 49(STA)
04/11/03	0925	(H)	READ THE FIRST TIME - REFERRALS
04/11/03	0925	(H)	STA, JUD
04/22/03		(H)	STA AT 8:00 AM CAPITOL 102
04/22/03		(H)	Heard & Held MINUTE(STA)
04/24/03	1109	(H)	STA REFERRAL WAIVED
04/24/03		(H)	STA AT 8:00 AM CAPITOL 102
04/24/03		(H)	Waived out of Committee to JUD
04/24/03		(H)	MINUTE(STA)
04/30/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/30/03		(H)	Heard & Held Mtg. Postponed to after Maj. Caucus MINUTE(JUD)
05/02/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SJR 8
SHORT TITLE:DIVISION OF 9TH CIRCUIT CT OF APPEALS
SPONSOR(S): SENATOR(S) SEEKINS

Jrn-Date	Jrn-Page		Action
02/28/03	0298	(S)	READ THE FIRST TIME - REFERRALS
02/28/03	0298	(S)	JUD
03/12/03		(S)	JUD AT 1:30 PM BELTZ 211
03/12/03		(S)	Moved Out of Committee MINUTE(JUD)
03/13/03	0491	(S)	JUD RPT 5DP
03/13/03	0491	(S)	DP: SEEKINS, ELLIS, FRENCH,
03/13/03	0491	(S)	OGAN, THERRIAULT
03/13/03	0491	(S)	FN1: ZERO(S.JUD)
03/26/03	0592	(S)	RULES TO CALENDAR 3/26/2003
03/26/03	0592	(S)	READ THE SECOND TIME
03/26/03	0592	(S)	ADVANCED TO THIRD READING UNAN CONSENT
03/26/03	0592	(S)	READ THE THIRD TIME SJR 8
03/26/03	0593	(S)	PASSED Y18 N1 A1
03/26/03	0593	(S)	HOFFMAN NOTICE OF RECONSIDERATION
03/28/03	0615	(S)	RECON TAKEN UP - IN THIRD READING
03/28/03	0615	(S)	PASSED ON RECONSIDERATION Y16 N3 A1
03/28/03	0617	(S)	TRANSMITTED TO (H)
03/28/03	0617	(S)	VERSION: SJR 8
03/31/03	0702	(H)	READ THE FIRST TIME - REFERRALS
03/31/03	0702	(H)	JUD
03/31/03	0722	(H)	CROSS SPONSOR(S): LYNN, STOLTZE,
03/31/03	0722	(H)	SAMUELS
05/02/03		(H)	JUD AT 1:00 PM CAPITOL 120

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)
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/28/03		(H)	Heard & Held -- Meeting Postponed to 2:00 PM -- MINUTE(JUD)
05/02/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

PAM FINLEY, Revisor of Statutes
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: During discussion of SB 49, spoke as the revisor of statutes and responded to questions.

BRIAN HOVE, Staff
to Senator Ralph Seekins
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented SJR 8 on behalf of Senator Seekins, sponsor.

HEATHER M. NOBREGA, Staff
to Representative Norman Rokeberg
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 257, presented Version U on behalf of the sponsor, Representative Rokeberg, and responded to questions.

DAVE FEEKEN, Legislative Chair
Alaska Association of Realtors (AAR)
Kenai, Alaska
POSITION STATEMENT: During discussion of HB 257, suggested a change to Version U, recommended passage of the bill, and responded to questions.

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

Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 257, expressed her concerns about the bill.

DAVID A. GARRISON, Associate Broker
AAR #1 Buyer's Agency
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 257 and suggested changes.

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

ACTION NARRATIVE

TAPE 03-49, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at [4:10 p.m., stated as 5:10 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.

SB 49 - 2003 REVISOR'S BILL

Number 0079

CHAIR McGUIRE announced that the first order of business would be CS FOR SENATE BILL NO. 49(STA), "An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

Number 0118

PAM FINLEY, Revisor of Statutes, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, noted that she prepares a revisor's bill every year, and mentioned the sectional analysis in members' packets. She remarked that while most of the changes come from Legislative Legal and Research Services' periodic review of the statutes, sometimes corrections come from the executive branch or members of the public. When an error comes to her attention, she explained, she researches the issue to try to find out how and why the error was made, so that she feels confident about

correcting it. She noted that if she is not confident about correcting a particular error, she does not use the revisor's bill to fix it.

CHAIR McGUIRE, after ascertaining that no one else wished to testify on SB 46, closed public testimony.

Number 0235

REPRESENTATIVE HOLM moved to report CSSB 49(STA) out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSSB 49(STA) was reported from the House Judiciary Standing Committee.

SJR 8 - DIVISION OF 9TH CIRCUIT CT OF APPEALS

Number 0307

CHAIR McGUIRE announced that the next order of business would be SENATE JOINT RESOLUTION NO. 8, Relating to the division of the Ninth Circuit Court of Appeals.

Number 0334

BRIAN HOVE, Staff to Senator Ralph Seekins, Alaska State Legislature, said on behalf of Senator Seekins, sponsor, that SJR 8 respectfully calls upon Congress to divide the Ninth Circuit Court of Appeals. This action is necessitated for a variety of reasons, he opined, not the least of which includes the vast geographical and philosophical distance separating Alaska from the San Francisco-based court. The Ninth Circuit Court of Appeals adjudicates a caseload far beyond that which is reasonably manageable. In total, there are 11 circuit courts of appeal throughout the country, yet the Ninth Circuit Court of Appeals oversees nearly 20 percent of the U.S. population. In other words, he surmised, the Ninth Circuit Court of Appeals is twice the ideal size.

MR. HOVE offered that this size disparity is cited as the principal reason for the relatively high reversal record of the Ninth Circuit Court of Appeals in cases heard by the U.S. Supreme Court. Senate Joint Resolution 8 endorses legislation previously introduced in Congress by Senator Ted Stevens and then-Senator Frank Murkowski. This legislation would reconfigure the Ninth Circuit Court of Appeals to encompass Arizona, California, and Nevada. A new Twelfth Circuit Court of Appeals would take in Alaska, Hawaii, Idaho, Montana, Oregon,

and Washington. He noted that similar legislation was recently introduced in Congress by Senator Lisa Murkowski.

MR. HOVE said that SJR 8 simply seeks to accomplish two goals: one, correct a considerable imbalance in the caseload of the Ninth Circuit Court of Appeals; and, two, provide the disparate regions falling within the current purview of the Ninth Circuit Court of Appeals with a better-informed panel of judges. These objectives, he opined, are best accomplished by splitting the Ninth Circuit Court of Appeals.

REPRESENTATIVE GRUENBERG, noting that language in SJR 8 purports that four justices of the U.S. Supreme Court have endorsed splitting the Ninth Circuit Court of Appeals, asked who those four justices are.

MR. HOVE said he could not recall who they were.

REPRESENTATIVE OGG remarked that he applauded "this" effort.

Number 0487

REPRESENTATIVE GARA said that while he does not have a problem with the resolution, he does not want to say anything [via the resolution] that could be construed as insulting, at all, to the people on the Ninth Circuit Court of Appeals, whom he doesn't know. He said he didn't think anything in the resolution was intended to do that. But, turning attention to page 2, lines 12-14, he indicated that he would like the committee to consider taking out the language that says the Ninth Circuit Court of Appeals produces so many opinions that it is virtually impossible for each judge to thoroughly review each opinion. He pointed out that in no federal circuit court does any judge read all the other judges' opinions. "They just don't, unless the issue comes up," he added; therefore, the resolution is accusing the judges in Ninth Circuit Court of Appeals of [failing to do] something that judges in the other circuit [courts] don't do.

MR. HOVE, in response, offered that the situation is exacerbated in the Ninth Circuit Court of Appeals by the caseload.

REPRESENTATIVE GARA said he agrees with most of the other points in the resolution and with the point that the Ninth Circuit Court of Appeals has too big a caseload. He added, however, that he didn't feel it is appropriate for him to be criticizing Ninth Circuit Court of Appeals' judges for behavior that is consistent with judges' behavior in the other circuit courts.

He reiterated, "They just don't read all of each other's opinions, in any circuit, unless the issue comes up before them." "I don't know why I would slap at them for doing that," he added.

REPRESENTATIVE SAMUELS said he didn't view that language as a "slap," but added that perhaps all circuit courts should be looked at regarding that issue.

REPRESENTATIVE HOLM offered his belief that had each judge in the Ninth Circuit Court of Appeals read all of the other judges' opinions, perhaps that court would not have such a high rate of reversals in the U.S. Supreme Court.

CHAIR McGUIRE said she thinks SJR 8 is good resolution, but added that she is not sure just how many justices will actually be reading it.

Number 0671

REPRESENTATIVE GARA noted that although the issue before them is just a resolution and therefore not binding, he did not want to have a resolution say things that he does not want to say. He acknowledged that SJR 8 is intended to send a message that needs to be sent. However, regardless of whether the Ninth Circuit Court of Appeals is doing a good job or a bad job, he said his point in disagreeing with the clause that says it is impossible for each judge in the Ninth Circuit Court of Appeals to read every other judges' opinion is that no judge in any circuit court reads every opinion from that circuit court. Therefore, he remarked, he did not know what the point is of including that language, although he does agree that the Ninth Circuit Court of Appeals has too much work.

REPRESENTATIVE GARA then turned attention to page 3, lines 19-21, and asked the committee to consider taking out that language. He said:

> I don't know that I know for a fact that the [Ninth Circuit Court of Appeals] was so unfamiliar with this <u>Village of Venetie</u> case that that's what caused them to issue the decision they issued. I assumed they issued the decision they issued because they believed that they were right, and that they analyzed the case law pretty thoroughly. But if you have information that they really didn't do any work on that case or

> they didn't do enough work on that case, I guess I'd like to hear it, but otherwise I see that as a slap.

MR. HOVE said he did not have any information on that issue. He opined, however, that it is not a stretch to suggest that a three-judge panel that might see an Alaskan case only once every three years probably wouldn't be up to speed on everything it needs to know. He remarked that Alaska law is very complex with regard to Native claims issues, and concluded that the language on page 3, lines 19-21, is not out of the realm of possibility.

REPRESENTATIVE GARA replied: In reality, in no circuit [court] does any judge see a particular issue from a particular state so often that he/she becomes an expert in that state's issue.

CHAIR McGUIRE asked whether the language on page 3, lines 19-21, is in Senator Lisa Murkowski's legislation.

MR. HOVE said he could not recall. He mentioned, however, that Senator Lisa Murkowski's legislation proposes to divide the court in a slightly different manner than is suggested in SJR 8.

Number 0867

REPRESENTATIVE GARA made a motion to adopt Amendment 1, to delete lines 12-14 from page 2, and delete lines 19-21 from page 3.

Number 0895

CHAIR McGUIRE objected for discussion purposes. She suggested that the motion be bifurcated.

Number 0937

REPRESENTATIVE GARA withdrew Amendment 1 as previously stated. He then made a motion to adopt a new Amendment 1, to delete lines 19-21 from page 3.

CHAIR McGUIRE objected. After noting that she did not necessarily like the language on page 2, line 14, she said that she'd written her "comment" on the Village of Venetie case - referred to on page 3, lines 19-21; had dissected both courts' opinions; and was surprised to see how much larger the Ninth Circuit Court of Appeals' opinion was.

REPRESENTATIVE OGG said he has read both [opinions], since American Indian law is a part of his legal background, and is of the belief that "there's a difference of opinion, and how you tip that scale, one way or the other, is such a slight thing, and it's really reasonable for a court [regardless of its makeup] to go one way or the other." He opined that the courts' decisions were well written in both instances, and it is simply that the U.S. Supreme Court went a different way. He surmised that any case dealing with "Alaska Native law" is going to create great turmoil. So, although the statement on page 3, lines 19-21, may be a fair statement, he remarked, it may cast unfair aspersions on the Ninth Circuit Court of Appeals that it does not deserve regarding that particular instance. He said he would support the removal of that language.

CHAIR McGUIRE agreed.

REPRESENTATIVE SAMUELS offered that the language on page 3, lines 19-21, ties into the language in the two preceding paragraphs; all three paragraphs together make a point regarding familiarity.

REPRESENTATIVE HOLM suggested that removing "great" from line 20 on page 3 might allay members concerns about casting aspersions.

Number 1160

REPRESENTATIVE OGG [made a motion to amend] Amendment 1, to remove the specific example used on page 3, lines 19-21. He opined that the Ninth Circuit Court of Appeals was not at all unfamiliar with the issues in the Village of Venetie case.

REPRESENTATIVE GARA said he considered that to be a friendly amendment to Amendment 1, and would accept it.

Number 1259

CHAIR McGUIRE stated that the amendment to Amendment 1 would result in lines 19-21, page 3, reading: "Whereas this unfamiliarity has resulted in decisions which have caused great political turmoil in Alaska;". There being no objection, Amendment 1 was amended.

Number 1292

CHAIR McGUIRE asked whether there were any objections to Amendment 1, as amended. There being none, Amendment 1, as amended, was adopted.

Number 1294

REPRESENTATIVE SAMUELS moved to report SJR 8, as amended, out of committee with individual recommendations and the accompanying zero fiscal note.

Number 1303

REPRESENTATIVE GRUENBERG objected and then withdrew his objection.

Number 1329

CHAIR McGUIRE asked whether there were any further objections. There being none, HCS SJR 8(JUD) was reported from the House Judiciary Standing Committee.

HB 257 - DISCLOSURES BY REAL ESTATE LICENSEES

Number 1347

CHAIR McGUIRE announced that the final 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." [Before the committee was the proposed committee substitute (CS) for HB 257, Version 23-LS0893\Q, Bannister, 4/28/03, which was adopted as a work draft on 4/28/03.]

Number 1376

HEATHER M. NOBREGA, Staff to Representative Norman Rokeberg, Alaska State Legislature, on behalf of Representative Rokeberg, sponsor, noted that there was a new proposed CS for consideration.

Number 1392

REPRESENTATIVE SAMUELS moved to adopt the proposed CS for HB 257, Version 23-LS0893\U, Bannister, 5/1/03, as the work draft. There being no objection, Version U was before the committee.

MS. NOBREGA explained that Version U no longer has the commercial [real estate] exemptions, which some realtors objected to. She relayed that the Alaska Association of Realtors (AAR) has reviewed Version U and, aside from one suggestion for change, now fully supports the bill. The AAR's suggestion is to change, on page 4, line 17, "blanket" to "written preauthorized", and she said she thought that this was a good suggestion. This change would occur to proposed AS 08.88.396(d), which is a new provision specific to Version U and which is intended to reflect current real estate practices. She elaborated:

> The way [subsection (d) is currently] written, basically, from house to house to house, you have to have a change in paperwork because there is a change in your circumstance, and (d) requires, anytime there's a change [in] circumstance, [that] you get it in writing. Well, the reality is, a realtor doesn't go and change their paperwork [for] every house they go to depending on who is listing the house and who is ... selling the house and what office it is. So this allows the daily practice of a realtor to show multiple houses, and not until they decide what a buyer wants to buy - which house, and what the relationship is between the buyer and the seller, and who is the selling agent and who is the listing agent - once you figure that out, the end, and you're ready to write an offer, then you know exactly what kind of relationship you're dealing with, and that's when you get the final - finalized in writing - "this is our relationship" [disclosure].

MS. NOBREGA said that although, technically, this practice is not allowed under current statute, as a practical matter it is what occurs on a daily basis; therefore, [proposed subsection (d)] is intended to merely reflect current practice.

CHAIR McGUIRE reopened public testimony on HB 257.

REPRESENTATIVE GARA asked for a comparison between Version U and Version Q, which has already been reviewed by the committee at the bill's last hearing.

MS. NOBREGA relayed that in addition to amending AS 08.88.396(d) - found on page 4, lines 14-17 - for the previously stated purpose, the "legislative findings and intent" language has been removed, as have the provisions, including their sunset, pertaining to the exemption of commercial real estate transactions.

Number 1702

DAVE FEEKEN, Legislative Chair, Alaska Association of Realtors (AAR), noted that he is a real estate broker in Kenai. He confirmed that the AAR almost unanimously supports Version U, recommends the previously mentioned change, and urges passage of HB 257.

REPRESENTATIVE GRUENBERG turned attention to page 4, lines 8 and 9, and sought confirmation that the addition of "representation" and the removal of "agency" merely conforms this language to that of other statutes in Title 8.

MS. NOBREGA confirmed that.

REPRESENTATIVE GARA, noting that the prior version intended to exempt commercial real estate transactions from the common law principles of agency, referred to Section 3, page 3, of Version U and mentioned that he is still uncomfortable with the possibility that deleting "agency" might also exempt a real estate licensee from the fiduciary duties that arise from the common law principles of agency. He asked Mr. Feeken whether the AAR believes that under the law of agency, fiduciary duties between real estate agents and the public should be maintained.

MR. FEEKEN opined that because the abrogation of the common law principles of agency is not included in Version U, a licensee would still have common law fiduciary duties. Removing "agency", he posited, will merely standardize the language throughout the real estate statutes, wherein the licensee is referred to as a real estate licensee, rather than an agent.

REPRESENTATIVE GARA argued:

> I guess I worry; it seems to me ... that if ... throughout the statutes we take out the words "agency", and throughout the statutes we indicate that we as a legislature intend that there's not an agency relationship, and if it doesn't state anymore anywhere in the statutes that there is an agency relationship,

> I'm worried that what we do could be interpreted as trying to abrogate the agency relationship. Is there some other place in the statutes that says there is an agency relationship if we take ... the word "agency" out of this section?

Number 1891

MR. FEEKEN said he is not sure on that point. Instead, he offered that in the practices of real estate agents, fiduciary duties are governed by the common law of agency, which is not very simple to abrogate. He noted that although a number of states have attempted to abrogate portions of common law, none have them have done so successfully. No matter what the statutes say, the court system uses the common law of agency as its "guidance" in a dispute.

REPRESENTATIVE GARA said, "So, if we did something in this bill just to make sure that ... the common law of agency would continue, I take it you wouldn't have an objection."

MR. FEEKEN said no, because that's what's in place now.

REPRESENTATIVE GRUENBERG offered that use of the word "representation" on page 4, lines 8 and 9, has the same effect as using the word "agency", and suggested that perhaps language could be added to clarify that point.

CHAIR McGUIRE agreed to return to that issue after others have had a chance to testify.

REPRESENTATIVE GARA mentioned that there are four points that still cause him concern. He turned attention to page 4, lines 14-17, and asked Mr. Feeken what the term "written preauthorized consent" entails and when it would come into play.

MR. FEEKEN explained:

> What is common practice in the industry is, when you take a listing, or someone puts a property on the market, there's a discussion of agency at that time. And it's fairly common for the listing agent to obtain written, preauthorized consent to basically show the property themselves and enter into the potential dual-agency, dual-representation situation at that time. That was not clear in the [current subsection (d)] as to what happened when ... a particular buyer was

> found. The interpretation of the [current subsection (d)] was that that had to be reestablished in writing at that point. This [proposed new language] is just to clarify what's really the practice in the industry.

Number 2028

REPRESENTATIVE GARA replied:

> I guess what I'm worried is happening here is -- I mean, I think we're both on board that we want customers to know if there's a dual agency at some point, so we want some sort of disclosure if that happens. I'm wondering whether this new language, by allowing a written preauthorized consent, gives the agent the right to, just at the outset of the relationship, state to the client, "Look, I'm not representing anybody else, I'm just representing you, but would you mind signing this form document that says you're giving me preauthorization to represent both sides if that ever occurs in the future." Is that the kind of document we're talking about?

MR. FEEKEN explained that the document says that the seller acknowledges - or doesn't acknowledge, if he/she doesn't want it to happen - that there is a potential for that agent to move into a neutral position in which he/she will withhold certain confidential information, for example, what the seller is willing to take for the property and what the buyer is willing to pay for the property. These are the most common issues of confidentiality that the agent would retain. Condition of the property and "all of that" is still passed freely back and forth, he assured the committee. The seller, at the time of the listing, has the ability to reject that option if he/she prefers the agent to fully represent him/her through the entire process. He remarked that as a practical matter, such does not happen very often. He mentioned that this document would be presented to the client at the outset of the relationship, and he offered to fax members a copy so they could see the wording.

REPRESENTATIVE GARA said that would be helpful.

Number 2172

LINDA S. GARRISON, Broker, AAR #1 Buyer's Agency, first relayed that HB 257 would neither hurt nor help her company. She remarked that although testimony has indicated that the purpose

of HB 257 is to bring statute in line with industry practice, there has been no mention that the bill would offer any additional public or consumer protection. She opined that current statute and common law work well as is. She suggested that the assertion that new disclosure documentation must provided to the seller every time a different prospective buyer looks at a piece of property is inaccurate. The agent has the option of simply telling prospective buyers that he/she represents the seller. In conclusion, she said that her concern centers around the fact that certain members of the industry are attempting to change the law to conform to how they conduct business, rather than conforming how they conduct business with current law, which, she reiterated, works well as is.

Number 2266

DAVID A. GARRISON, Associate Broker, AAR #1 Buyer's Agency, said that although he could agree with the provision in the bill pertaining to written preauthorization and with the addition of "lessee" and "lessor", and would like to see those items move forward, he thinks that the rest of the bill could be gotten rid of. He then turned attention to page 3, line 3, and said that removing "agency" from that provision, which pertains to what real estate examinations may include, does not make any sense whatsoever because agency, not "real estate licensee relationships", is what needs to be taught. He mentioned, however, that if "real estate licensee relationships" were followed by ", agency", it might resolve his concern. He offered his belief that the reason [proponents of HB 257] want to eliminate "agency" is because "they don't even want to teach it."

MR. GARRISON mentioned that he was one of the members of the AAR who voted not to support [the legislation]. He suggested that the committee keep the word "agency" in this proposed statute: Why call something, something else if it's still a duck?" He also mentioned that he would like to see the Real Estate Commission be responsible for creating the agency [disclosure] form that's to be presented to buyers and sellers, receipt of which is to be acknowledged at "first substance contact," just as it is responsible for creating the disclosure form that's to be presented to the buyer. On the issue of disclosing one's representation, that is something that can be added to one's e-mail messages so that every recipient is informed. In conclusion, he offered that the bill should be narrowed down to just fix the perceived problem of the agent having to get

written authorization for each buyer in order to act in a dual-agency capacity.

TAPE 03-49, SIDE B
Number 2393

REPRESENTATIVE GARA said he still has concerns about the language contained in what is now proposed AS 08.88.396(e), which says:

> (e) 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 to recover for damages or losses suffered.

REPRESENTATIVE GARA asked Mr. Garrison if it would trouble him, as an agent, to be held liable for not making written disclosure of dual representation.

MR. GARRISON, in response, mentioned that the courts have held that although dual agency is not a good idea in the first place, it should definitely be disclosed if it is going to be done. He said he thought there definitely should be some strong punishment for failure to disclose, and suggested deleting all of [subsection] (e).

MS. GARRISON added that any time the public's legal recourse is taken away, it negates the purpose of having checks and balances.

CHAIR McGUIRE, after determining that no one else wished to testify on HB 257, closed public testimony.

Number 2295

REPRESENTATIVE SAMUELS made a motion to adopt Amendment 1: page 4, line 17, delete "blanket" and insert "written preauthorized". There being no objection, Amendment 1 was adopted.

Number 2259

REPRESENTATIVE OGG made a motion to adopt Amendment 2: page 3, line 3, after "real estate licensee relationships," insert "law of agency,".

Number 2236

CHAIR McGUIRE objected for the purpose of discussion. She noted that testimony has indicated that the common law of agency will apply regardless of whether there is reference to it in statute. She then invited Ms. Nobrega to comment.

MS. NOBREGA remarked that all last year, an agency task force has been discussing this issue. "We know that agency exists as far as real estate goes; whether or not we want it to exist and have a different type of relationship is something we've been discussing," she added. House Bill 257 does not abrogate the common law of agency, she stated. In response to a question, she said that neither she nor the sponsor object to Amendment 2.

REPRESENTATIVE OGG said that Amendment 2 would merely clarify that the law of agency is something that a real estate licensee should know in order to pass a real estate examination.

Number 2164

CHAIR McGUIRE withdrew her objection to Amendment 2, and asked whether there were any further objections. There being none, Amendment 2 was adopted.

Number 2155

REPRESENTATIVE GARA made a motion to adopt Amendment 3, to reinsert "agency" on page 3, lines 13, 17, 19, [and 28]. He offered that doing so would clarify that the relationship remains an agency relationship.

Number 2132

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE GRUENBERG asked whether the same should be done on line 22.

CHAIR McGUIRE pointed out that line 22 says "an agent" rather than "agency".

REPRESENTATIVE GARA said he did not think altering line 22 would be necessary.

CHAIR McGUIRE surmised that by reinserting "agency" on lines 13, 17, 19, and 28, Representative Gara is simply seeking to amend the areas of statute that refer to the agency relationship itself, which is not what the language on line 22 refers to.

MS. NOBREGA indicated that Amendment 3 is acceptable.

Number 2064

CHAIR McGUIRE withdrew her objection to Amendment 3, and asked whether there were any further objections. There being none, Amendment 3 was adopted.

Number 2055

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 4, on page 4, lines 8 and 9, to [insert] "agency" in front of "representation".

Number 2020

CHAIR McGUIRE objected for the purpose of discussion.

MS. NOBREGA indicated that Amendment 4 is acceptable.

Number 2011

CHAIR McGUIRE withdrew her objection to Amendment 4, and asked whether there were any further objections. There being none, Amendment 4 was adopted.

REPRESENTATIVE GRUENBERG turned attention back to Section 4, which adds new subsection (e) to AS 08.88.396. He suggested that if the intent of that language is to excuse an agent from providing written disclosure at a particular point in time such as when a buyer first views the property, it might be helpful to have a conceptual amendment that specifies exactly that.

Number 1971

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment [5]: [on page 5, lines 19-20] replace "as required by this section" with something like "at the time the person viewed the property".

Number 1959

CHAIR McGUIRE objected. She posited that the goal of Section 4 is to clear up some misunderstandings that have occurred due to perceptions of what's required at what time. She opined that [Conceptual Amendment 5] would muddle the issue more.

REPRESENTATIVE GRUENBERG replied that he merely wants to make Section 4 more specific than what is done by use of the term "as required by this section", which, he suggested, refers back to page 3, lines 14-15, which says: "at the time that the licensee begins to provide specific assistance to locate or acquire real estate for the buyer [or lessee]".

Number 1901

REPRESENTATIVE GRUENBERG, after indicating a desire to change [Conceptual Amendment 5], made a motion to word it such that it would replace "as required by this section" with "at the time that the licensee begins to provide specific assistance to locate or acquire real estate for the buyer [or lessee]".

Number 1881

CHAIR McGUIRE objected for the purpose of discussion.

Number 1874

REPRESENTATIVE NORMAN ROKEBERG, Alaska State Legislature, sponsor, noted that there are other points in time to be considered; aside from that which is specified on page 3, lines 14-15, another point in time, for example, is referenced on page 3, lines 25-26. He offered that by using the term "as required by this section", the drafter is simply economizing on language, and thus [Conceptual Amendment 5] is redundant. He assured the committee that Section 4 will not abrogate the duties required by Section 3.

Number 1802

REPRESENTATIVE GRUENBERG withdrew [Conceptual Amendment 5].

REPRESENTATIVE OGG suggested, however, that perhaps some standard language from the Uniform Commercial Code could be used to clarify the issue. For example, in dealings between

individuals and/or business entities, the term "within a reasonable time" is used.

Number 1759

REPRESENTATIVE OGG [made a motion to adopt Conceptual Amendment 6], to alter page 4, lines 19-20, so that it would read: "The failure of a licensee to make a written disclosure within a reasonable time as otherwise required by this section". He suggested that [Conceptual Amendment 6] would provide some clarity as to when written disclosure must occur, while still ensuring that someone making his/her best effort to comply will not be penalized.

REPRESENTATIVE ROKEBERG argued, however, that Section 4 merely provides for a "licensing action," rather than a cause of action for damages. He said that although he appreciates Representative Ogg's concern, timeliness per se should not be grounds for a cause of action for damages; by inserting a specific time, the issue would then be raised to a level where it would have to be decided by the courts.

CHAIR McGUIRE opined that the "reasonable time" standard would not engender a cause of action because it does not describe a specific time. She indicated that such language wouldn't be either confusing or burdensome. From the consumer's perspective, she added, timing is a part of meaningful disclosure; for example, if disclosure of agency representation occurs three months into the relationship, that disclosure is meaningless.

REPRESENTATIVE ROKEBERG offered, however, that the language on page 3, lines 14-15, which says, "at the time the licensee begins to provide specific assistance", raises questions of what that is and when it occurs. Therefore, adding the phrase "within a reasonable time", would make the issue convoluted, he remarked.

MS. NOBREGA added the comment that because the timing issue has become a subject of debate, staff in the attorney general's office is working on changes to the regulations in an effort to define what timeliness means. She suggested that at this point, nothing more should be added [to the language in Section 4]; instead, it would be better to allow the issue to be addressed via regulation.

REPRESENTATIVE ROKEBERG said he would be happy to provide members with a draft copy of those [proposed forthcoming] regulations.

CHAIR McGUIRE said she agrees that statute should not be written so specifically that it results in the micromanaging of activities over the long term. She said that upon further consideration, it is clear that Section 4 does refer back to and is triggered by the language on page 3, lines 14-15, which says, "at the time that the licensee begins to provide specific assistance to locate or acquire real estate for the buyer [or lessee]". She remarked that making changes to regulations sounds like a better way to address this issue.

Number 1530

CHAIR McGUIRE said she would maintain an objection to [Conceptual Amendment 6].

REPRESENTATIVE GARA offered that there are two different problems being discussed. He elaborated:

> You're supposed to give written disclosure, and we want real estate agents to give written disclosure of a conflict. The question is, when do you give the written disclosure. And, generally, I don't think people really have a hard time with that: it's when you contract to do the work for the party. But if at some point somebody wants to better define that time period by regulation, that's fine - or even by statute, that's fine. So that's a separate problem.
>
> The problem raised by Representative Ogg is, should we let real estate agents off the hook when they don't give written disclosure of a conflict. And I ... recall the testimony the same way as related by [Representative Ogg], it was that ... we, as real estate agents, don't want to be held liable for failing to give somebody written disclosure on Monday, when we started the relationship, when in fact we gave it to them Tuesday or Wednesday or Thursday. And I understand that.
>
> So, I think that ... the suggestion by Representative Ogg - to insert somewhere in Section 4 that ... the written disclosure is provided within a reasonable time - is a good one, [although] we'd have to sit down

and scratch out the language. But the moment you remove liability for not revealing a conflict is the moment you make the duty meaningless to a consumer. So, I think we can achieve the intentions of those who've requested this protection, but also do it carefully so that we're not throwing the baby out with the bathwater.

Number 1447

REPRESENTATIVE OGG said that regardless of whether language such as is found page 3, lines 14-15, is placed in regulation, also altering Section 4 of HB 257 is not going to complicate the provision on page 3. All [Conceptual Amendment 6] will do, he opined, is to say that if and when regulations are changed to stipulate when that trigger is, then a licensee must make written disclosure within a reasonable time from that point in time stipulated by regulation. He posited that if [Conceptual Amendment 6] is not adopted, it exempts a licensee from ever providing written disclosure, regardless of what point in time is later stipulated by regulation.

REPRESENTATIVE GRUENBERG remarked that his concern centers on the fact that "as" - which is used on page 4, line 20 - can be read in two ways. It can be read to mean either "at the time" or "in the manner." Thus line 20 could be read to mean "obtain a written acknowledgement or consent 'at the time' required by this section" or "obtain a written acknowledgement or consent 'in the manner' required in this section." He offered his belief that the intent was to have "as" mean "at the time," and suggested changing the language to that effect.

REPRESENTATIVE ROKEBERG argued that the phrase, "at the time" is the crux of the problem "in the field, out there in the real world." When is that time?

REPRESENTATIVE GRUENBERG, in response, pointed out that the remainder of HB 257 makes certain requirements. "And what we're doing here," he remarked, "is creating additional confusion by the way ... we're (indisc. - voice faded away) because of the word 'as'."

REPRESENTATIVE ROKEBERG said he respectfully disagrees with Representative Gruenberg. "What we're talking about here is, what's the remedy; if there is a failure on the part of this type of a disclosure, and it's in the main a technical problem, then ... the bill provides for a lesser remedy than another type

of cause of action," he added, "unless there was actual damages that occurred."

CHAIR McGUIRE noted that the issue before the committee is whether to adopt [Conceptual Amendment 6]. She indicated that she is still maintaining her objection.

Number 1187

REPRESENTATIVE GRUENBERG offered a conforming amendment to Conceptual Amendment 6 such that line 20 would read: "obtain a written acknowledgement within a reasonable time as required by this section".

REPRESENTATIVE OGG indicated that he would accept that amendment to Conceptual Amendment 6. [No objection was stated, and the amendment to Conceptual Amendment 6 was treated as adopted.]

REPRESENTATIVE GARA sought confirmation that Conceptual Amendment 6 [as amended] would mean that liability should attach if no written consent is provided within a reasonable time.

REPRESENTATIVE OGG agreed.

Number 1139

REPRESENTATIVE GARA made what he called a friendly restatement of Conceptual Amendment 6 [as amended]: "There should still be a cause of action unless the real estate agent fails to provide written disclosure within a reasonable time."

CHAIR McGUIRE asked Representative Ogg if he accepts Representative Gara's [restatement] that "there should be a cause of action".

REPRESENTATIVE OGG said he accepts.

Number 1070

A roll call vote was taken. Representatives Ogg, Holm, Gara, and Gruenberg voted in favor of Conceptual Amendment 6, as amended. Representatives Samuels, Anderson, and McGuire voted against it. Therefore, Conceptual Amendment 6, as amended, was adopted by a vote of 4-3.

The committee took an at-ease from 5:20 p.m. to 5:22 p.m. [during which Representative Holm indicated a desire to change his vote].

Number 1022

REPRESENTATIVE HOLM [moved that the committee rescind its action in adopting Conceptual Amendment 6, as amended].

Number 0977

A roll call vote was taken. Representatives Holm, Samuels, Gara, Anderson, Ogg, and McGuire voted in favor of the committee's rescinding its action in adopting Conceptual Amendment 6, as amended. Representative Gruenberg voted against it. Therefore, the committee rescinded its action by a vote of 6-1.

Number 0952

A roll call vote was taken. Representatives Gara, Gruenberg, and Ogg voted in favor of adopting Conceptual Amendment 6, as amended. Representatives Samuels, Anderson, Holm, and McGuire voted against it. Therefore, Conceptual Amendment 6, as amended, failed by a vote of 3-4.

Number 0939

REPRESENTATIVE GARA made a motion to adopt Amendment 7, to delete Section 5. He said he didn't think that [HB 257] should be applied retroactively.

Number 0928

CHAIR McGUIRE objected.

Number 0832

A roll call vote was taken. Representatives Gara, Gruenberg, and Ogg voted in favor of Amendment 7. Representatives Anderson Holm, Samuels, and McGuire voted against it. Therefore, Amendment 7 failed by a vote of 3-4.

Number 0822

REPRESENTATIVE HOLM moved to report the CS for HB 257, Version 23-LS0893\U, Bannister, 5/1/03, as amended, out of committee

with individual recommendations and the accompanying [zero] fiscal note. There being no objection, CSHB 257(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 0815

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:33 p.m.