ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 16, 2004
1:10 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. 487
"An Act relating to the detention of delinquent minors in correctional facilities; relating to emergency detention of minors for evaluation for involuntary admission for mental health treatment; relating to detention of intoxicated minors and minors incapacitated by alcohol or drugs; and providing for an effective date."

- MOVED HB 487 OUT OF COMMITTEE

HOUSE BILL NO. 334
"An Act relating to unlawful exploitation of a minor."

- MOVED CSHB 334(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 472
"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 339
"An Act relating to negative option plans for sales, to charges for goods or services after a trial period, and to acts that are unlawful as unfair trade practices."

- HEARD AND HELD

HOUSE BILL NO. 468
"An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

- MOVED CSHB 468(JUD) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 487
SHORT TITLE: DETENTION OF MINORS
SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD, FIN
03/05/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/05/04	(H)	-- Meeting Postponed to 3/16/04 --
03/16/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 334
SHORT TITLE: UNLAWFUL EXPLOITATION OF MINOR
SPONSOR(S): REPRESENTATIVE(S) MEYER

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	JUD
01/30/04	(H)	JUD AT 1:00 PM CAPITOL 120
01/30/04	(H)	<Bill Hearing Postponed>
02/20/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/20/04	(H)	Scheduled But Not Heard
02/23/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/23/04	(H)	Heard & Held; Assigned to Subcommittee
02/23/04	(H)	MINUTE(JUD)
03/01/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/01/04	(H)	<Bill Hearing Postponed Wed. 3/3/04>
03/03/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/03/04	(H)	Scheduled But Not Heard
03/05/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/05/04	(H)	-- Meeting Postponed to 3/16/04 --
03/16/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 472
SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS
SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD
02/25/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/25/04	(H)	Heard & Held
02/25/04	(H)	MINUTE(JUD)
03/03/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/03/04	(H)	Heard & Held
03/03/04	(H)	MINUTE(JUD)
03/05/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/05/04	(H)	-- Meeting Postponed to 3/16/04 --
03/16/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 339
SHORT TITLE: TRADE PRACTICES
SPONSOR(S): REPRESENTATIVE(S) MEYER

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	L&C, JUD
02/02/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/02/04	(H)	Moved CSHB 339(L&C) Out of Committee
02/02/04	(H)	MINUTE(L&C)
02/05/04	(H)	L&C RPT CS(L&C) NT 4DP 2NR 1AM
02/05/04	(H)	DP: CRAWFORD, LYNN, DAHLSTROM,
02/05/04	(H)	ANDERSON; NR: GATTO, ROKEBERG;
02/05/04	(H)	AM: GUTTENBERG
03/05/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/05/04	(H)	-- Meeting Postponed to 3/16/04 --
03/16/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 468
SHORT TITLE: APPEAL BONDS: TOBACCO SETTLEMENT PARTIES
SPONSOR(S): LABOR & COMMERCE

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD
03/01/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/01/04	(H)	Heard & Held
03/01/04	(H)	MINUTE(JUD)
03/03/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/03/04	(H)	Heard & Held
03/03/04	(H)	MINUTE(JUD)
03/05/04	(H)	JUD AT 1:00 PM CAPITOL 120

03/05/04 (H) -- Meeting Postponed to 3/16/04 --
03/16/04 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

PATTY WARE, Director
Division of Juvenile Justice (DJJ)
Department of Health & Social Services (DHSS)
Juneau, Alaska
POSITION STATEMENT: Presented HB 487 on behalf of the administration; discussed Section 2, subsection(e)(2), of the proposed committee substitute (CS) for HB 334, Version H.

ALLEN STOREY, Lieutenant
Central Office
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 487.

REPRESENTATIVE KEVIN MEYER
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 334; sponsor of HB 339.

LINDA WILSON, Deputy Director
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Expressed concern with [the proposed committee substitute (CS) for HB 334, Version H].

SUZANNE CUNNINGHAM, Staff
to Representative Kevin Meyer
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 334, answered questions.

PATRICK LUBY, Advocacy Director
AARP Alaska
Anchorage, Alaska
POSITION STATEMENT: Provided comments and suggestions during discussion of HB 472, and spoke in opposition to the $250,000 limit proposed in the current version of the bill.

ROBERT B. FLINT, Attorney at Law

Hartig Rhodes Hoge & Lekisch
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 339 on behalf of the Direct Marketing Association and the Magazine Publishers of America.

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General
Commercial/Fair Business Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Assisted with the presentation of HB 339 and responded to questions.

ROBERT EVANS, Lobbyist
Phillip Morris USA, Inc.
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 468, answered questions.

EMILY NENON, Alaska Advocacy Director
American Cancer Society (ACS)
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 468.

JENNIFER APP, Alaska Advocacy Director
American Heart Association
Anchorage, Alaska
POSITION STATEMENT: Expressed concern with HB 468.

ACTION NARRATIVE

TAPE 04-35, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:10 p.m. Representatives McGuire, Holm, Samuels, Gara, and Gruenberg were present at the call to order. Representatives Anderson and Ogg arrived as the meeting was in progress.

HB 487 - DETENTION OF MINORS

Number 0163

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 487, "An Act relating to the detention of

delinquent minors in correctional facilities; relating to emergency detention of minors for evaluation for involuntary admission for mental health treatment; relating to detention of intoxicated minors and minors incapacitated by alcohol or drugs; and providing for an effective date."

Number 0179

PATTY WARE, Director, Division of Juvenile Justice (DJJ), Department of Health & Social Services (DHSS), explained that HB 487 modifies the statutes pertaining to delinquency, alcohol, and mental health so that state statute will be in compliance with the federal requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA), which prohibits the state from holding in a locked facility, whether an adult facility or a juvenile justice facility, kids who are only there by virtue of a mental illness, a disability, or severe intoxication. She went on to say:

> I do want to emphasis that this does not impact the state's ability to hold juvenile offenders accountable, or to hold accused juvenile delinquents in adult facilities in rural Alaska as necessary when they're charged with a crime. The issue is that right now, Alaska statutes allow us to hold, for certain lengths of time, both juveniles and adults when they're severely intoxicated or when they have a mental illness - for purposes of their own protection - but the federal rules require that we have state statutes that [are] consistent with the federal language. So we need to have this bill move forward so that we can retain our existing federal dollars that we receive from the Office of Juvenile Justice and Delinquency Prevention [OJJDP].
>
> We have prepared a one-page summary sheet for the committee ... that will let you all know that we are already ... grossly out of compliance with the federal requirements. We are working hard to address that issue, but in essence what you have before makes statutory changes for Alaska statutes so that we're in compliance with federal requirements. I guess I also want to say that the federal changes took effect on October 1 of 2003, and so we have already been, as a state system, making the necessary changes so that we're not holding "Title 47" juveniles in juvenile or adult facilities. We're working closely with the

Department of Public Safety [DPS] and the [Alaska State] Troopers so that as they identify high-need areas, we can develop alternative for these kids.

Number 0314

MS. WARE added:

I also want to say to the committee that we already have a wide array of alternatives across the state; we have non-secure shelters in a variety of urban and rural locations in Alaska. We are using these federal funds, as well as some [general fund (GF)] dollars, to expand those non-secure shelters so that ... we have more appropriate placements for kids who are not charged with a crime but who clearly have needs that need to be addressed. So one example I would share with you is that in Bethel, ... 25 percent of our detention admissions in fiscal year [FY] 03 were made up of "Title 47" holds, either alcohol or mental health. We work closely with the [Yukon-Kuskokwim Health Corporation (YKHC)] so that they would basically reserve a couple of hospital beds to accept those young people in, which is frankly more appropriate anyway because then they can refer them to appropriate behavioral health services as necessary. I'd be happy to answer any questions.

CHAIR McGUIRE noted that the aforementioned summary sheet in members' packets is dated 2/20/04.

REPRESENTATIVE HOLM asked what current costs are as compared to the cost of complying with federal standards.

MS. WARE replied:

These are not, technically, new standards. The Act has been around since 1974, [so] Alaska [has] been struggling with these requirements for many years. There will not be significant or, frankly, really, additional cost to come into compliance because, in practice, we've been working on this for many years. In terms of the loss of the federal revenue, what you would see is a reduction in alternatives for juveniles that we currently fund with these dollars, including ... the non-secure shelters that we already have in Fairbanks, Juneau, Kenai, Kodiak, Ketchikan, Valdez,

[and] Sitka, with about eight more due to come on line within the next, roughly, six months.

Number 0577

MS. WARE, in response to a further question, said that of the $700,000 in federal funds that the state is currently receiving and that would be jeopardized by failing to comply with federal standards, roughly $100,000 to $120,000 is spent on compliance-monitoring activities, which verify that the department's data is accurate and that it can do "site visits." The bulk of the remaining money goes toward funding services in Alaska. She added, "This is 'best practice'; it is important for ... Alaska not to be incarcerating juveniles, in either adult or juvenile facilities, when they haven't committed an offense."

REPRESENTATIVE HOLM asked what the state is proposing to do differently in order to come into compliance with federal requirements.

MS. WARE replied:

The changing of our ways has [consisted of] ... intensive partnering with a number of ... nonprofit ... [and local and] state government agencies including ... the [Alaska State] Troopers, [the] Office of Children's Services within [the DHSS], as well as [the] Division of Behavioral Health. The expansion ... in Bethel is a very good example of a very positive partnership, which has, in a very positive way, impacted what was severe overcrowding in the Bethel Youth Facility for almost a decade. Our admissions and our overcrowding are significantly reduced in addition to getting much improved services for those kids. ... In Fairbanks, ... as a result of both ... this federal change as well as a group effort at the local level, ... there has been the addition of some "detox beds" that will serve only juveniles; in fact, I think it began this week.

So essentially this has kind of forced us to push the dialog with existing providers in Anchorage that includes both Providence [Alaska Medical Center], the single point of entry, as well as [the Alaska Psychiatric Institute (API)]. And, as I may not have mentioned specifically enough, we are in the process of the procurement piece for adding non-secure

> shelters - we already signed the agreement in the [Matanuska-Susitna ("Mat-Su")] valley, we're adding a shelter in Anchorage, in Barrow, in Wrangell, in Dillingham, Kotzebue, Emmonak, and Hooper Bay - and we're making those decisions based on the high-need areas. I mean I recognize that we don't have, quote, "extra money" to fund services, but in essence we do have to take the data that we have and plug the dollars in where those high-need areas are, and we're using input from [the DPS] to help us do that.

Number 0773

MS. WARE, in response to further questions, said that Fairbanks has had a non-secure shelter for many years and that that shelter will continue to operate, and indicated that the aforementioned detox beds in Fairbanks are at the Ralph Purdue Center and are being managed by the Fairbanks Native Association's Behavioral Health Services. She then relayed that the primary "needs" areas are not in urban Alaska; in urban areas there are already alternatives to placing "Title 47" juveniles in locked facilities. Therefore, the goal of this legislation is to change Alaska statute to reflect the department's current practice. Ms. Ware noted that the federal requirements do allow states some level of violations per 100,000 population. In essence, the department recognizes that there will always be some situations in rural Alaska wherein the state does the best that it can but still has to use a locked facility because it is the only place, the safest place, to hold a "Title 47" juvenile, but the goal is to target funding towards high-need communities such as Emmonak and Hooper Bay.

CHAIR McGUIRE asked how "grave disability" is defined.

MS. WARE indicated that there is a definition in AS 47.30, and that she would provide its exact wording to the committee later. In practice, however, if a law enforcement officer believes that someone, through some level of disability, poses a threat to himself/herself or others, is gravely disabled, and there is no local evaluation facility, then state statute allows that person to be put in an adult - or, in the DJJ's case, a juvenile - facility until he/she can be transported to the nearest appropriate evaluation facility.

CHAIR McGUIRE said she'd like to know the distinction between grave disability and mental illness.

REPRESENTATIVE GRUENBERG indicated that he may have a conflict because of his son, and asked to be excused from voting on this issue.

Number 1045

CHAIR McGUIRE objected, indicating that should a vote be required, Representative Gruenberg would be allowed to participate.

MS. WARE, in response to questions from Representative Gara, reiterated her earlier explanations regarding what current practice consists of, what the bill does, what will change because of the bill's passage, and how violations will be viewed by the federal government.

REPRESENTATIVE GARA expressed alarm that the state has been in the practice of locking up "Title 47" juveniles and is only changing that practice because of the threat of losing federal funding.

MS. WARE replied that the state has been working very hard to change that practice and the federal government has been very understanding of violations up to this point; now, however, the federal government is requiring a higher level of compliance.

CHAIR McGUIRE, after looking through current statute, relayed that the definition of "gravely disabled" can be found under AS 47.30.915, which says:

> (7) "gravely disabled" means a condition in which a person as a result of mental illness
>
> (A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or
>
> (B) will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person's previous ability to function independently;

CHAIR McGUIRE asked why, on page 2, line 26, the term "gravely disabled" is used instead of simply saying, "those who are in protective custody due to mental illness". She said that she is

trying to envision a circumstance wherein someone is gravely disabled but not also mentally ill.

REPRESENTATIVE GRUENBERG noted that when the definition of "gravely disabled" was initially adopted, it had been carefully crafted for the purpose of filling a specific gap in the law. He asked that this language not be changed in the bill.

MS. WARE offered to do some research on this issue and get back to the committee.

REPRESENTATIVE SAMUELS said why it isn't acceptable to hold juveniles in a locked facility for the crime of minor consuming.

MS. WARE said that because minor consuming is a "status offense," meaning that someone is only charged by virtue of his/her being a certain age, law enforcement is not allowed to hold such an individual in a locked facility. Protective custody pertains solely to the "Title 47" elements related to severe intoxication, and is a judgment call on the part of law enforcement.

Number 1476

ALLEN STOREY, Lieutenant, Central Office, Division of Alaska State Troopers, Department of Public Safety (DPS), said that the DPS supports HB 487 and is working with the DJJ in an effort to comply with the federal requirements. He noted that although some rural communities have had a bit of difficulty in complying with the federal requirements, they are working diligently to correct their situations. He opined that the provisions of the federal requirements are workable, and relayed that the DJJ has made a firm commitment to working with and training law enforcement personnel across the state to ensure that there are a minimum of violations.

CHAIR McGUIRE offered that the committee would like to see those efforts continued and appreciates all the work done thus far.

REPRESENTATIVE GRUENBERG noted a typo on page 2, line 30: the word "take" should be "taken".

CHAIR McGUIRE, after ascertaining that no one else wished to speak on the bill, closed public testimony on HB 487.

Number 1612

REPRESENTATIVE GRUENBERG moved to report HB 487 out of committee with individual recommendations [and the accompanying zero fiscal notes]. There being no objection, HB 487 was reported from the House Judiciary Standing Committee.

HB 334 - UNLAWFUL EXPLOITATION OF MINOR

Number 1615

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 334, "An Act relating to unlawful exploitation of a minor."

Number 1671

REPRESENTATIVE SAMUELS, as chair of the subcommittee on HB 334, informed the committee that the subcommittee attempted to craft a way to separate the age distinction so that there would be a three-year separation in age. However, that proved to be problematic. Therefore, the subcommittee decided to exempt this particular crime from the automatic waiver portion of the statute. There was also discussion of Representative Gruenberg's idea to make a second offense of distribution of child pornography a class A felony.

CHAIR McGUIRE noted that the committee packet should contain the subcommittee report from Representative Meyer dated March 4.

Number 1746

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, sponsor, thanked subcommittee members for their work, and relayed that [stopping] the making of child pornography is a top priority. He characterized [the product of the subcommittee] as a good solution - a stair-step approach - to juvenile sexual exploitation. He highlighted that sexual assault of a minor would be an unclassified felony, sexual exploitation of a minor would be a class A felony, a distribution offense would be a class B felony - unless it's a second offense, and then it would be a class A felony - and the actual possession [of child pornography] would be a class C felony. Representative Meyer mentioned discussions with Standing Together Against Rape (STAR) and others who work in this area of the law that have relayed that Alaska's laws are significantly less than those at the federal level. The thought is that by increasing the penalties, more federal funds could be obtained.

Number 1890

REPRESENTATIVE GRUENBERG moved to adopt the proposed committee substitute (CS) for HB 334, Version 23-LS1246\H, Luckhaupt, 3/3/04, as the work draft. There being no objection, Version H was before the committee.

REPRESENTATIVE GRUENBERG said that he didn't have a problem with Version H, save Section 1. He posed a situation in which an 18-year-old takes a photograph of a younger friend, and commented that he didn't want that 18-year-old to face a class A felony charge. He opined that such wouldn't be fair. He then turned attention to the text of AS 11.41.436(a)(4), and noted that the subcommittee report says that [an age distinction] is inconsistent with [AS 11.41.436(a)(4)]. Therefore, Representative Gruenberg suggested that if the intent is to make something a class A felony in Section 1 of the legislation, perhaps there should be a conforming amendment to [the provision] dealing with sexual abuse of a minor. He recommended saying "something similar to being 18 years of age or older and to say if you're three years older than that, then that would be a class A also so that they would be consistent." He reiterated his concern with making a class A felon of an 18 year old who takes a photograph of his or her girlfriend or boyfriend who is a month younger. He said that he couldn't support that.

REPRESENTATIVE SAMUELS pointed out, however, that the state would have to more forward in such a case; that is, someone from the Department of Law would have to make a conscious decision to move forward with the case and implement the statute. He said he didn't know if the desire is to cover every contingency covered for age discrepancies or if there is the desire to provide the district attorney's office [discretion in this area].

Number 2086

REPRESENTATIVE GARA said he couldn't believe that [the committee] would pass a criminal statute that includes the possible conviction of people that are not intended to be convicted, and do so merely on the belief that the prosecution might exercise the discretion not to convict those people appropriately. He emphasized the need to ensure that when criminal legislation is passed, it is as narrow as possible. He further emphasized that he isn't willing to give the government the ability to convict those [that the legislature] didn't

intend to be convicted. Therefore, he said he stood with Representative Gruenberg on this matter.

CHAIR McGUIRE remarked that the difficulty arises because there are all kinds of mediums, including photography, that can be used to produce child pornography. She pointed out that the statute is fairly clear with regard to the types of photographs being discussed. However, one can't clearly address statutorily the remote hypothetical that someone would be charged with a crime at age 18 for taking a naked photograph of his or her 17-year-old girlfriend or boyfriend because photography would then have to be excluded. Chair McGuire observed that photography may be one of the more obvious or common mediums since it's less expensive to produce. She said that she didn't believe that the [intent] is to create a huge net that would take in boyfriends and girlfriends who take naked photographs of each other. Rather, she posited, [intent] is that a heavy hand should be taken when one unlawfully exploits a minor and creates, produces, and sells child pornography.

REPRESENTATIVE GRUENBERG pointed out, however, that the language of the statute is broader. He relayed that the subcommittee had discussed [his concern] and he thought the subcommittee had conceptually agreed to a three-year [proposal].

REPRESENTATIVE MEYER noted that that was correct.

REPRESENTATIVE GRUENBERG suggested that this could be figured out in a day or so. He pointed out that this is the bill's [only committee of referral]. He said he believes this is good legislation that he would like to be able to support when it reaches the House floor.

CHAIR McGUIRE related her position that it is highly unusual for her to assign legislation to a subcommittee. However, she did so with the understanding that there would be majority and minority representation and that there would be ample time to work through any problems. However, the result seems to be a flawed committee report. She announced her inclination to move the legislation out today and any amendments can be presented on the House floor. However, she said she would take an at-ease for Representative Gruenberg and Representative Meyer to discuss whether the language should be narrowed.

The committee took an at-ease from 1:59 p.m. to 2:03 p.m.

Number 2313

CHAIR McGUIRE, referring to AS 11.41.455(a), opined that the intent of producing has to be present, which, she added, isn't a photograph of one's boyfriend or girlfriend.

REPRESENTATIVE GRUENBERG pointed out that AS 11.41.455(a) in part says: "A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a ... photograph ... the person knowingly induces or employs a child under 18 years of age". He noted that the language "knowingly induces" could simply be asking the person under the age of 18. He specified that the toughest possible case would be one in which there is someone barely over 18 who asks someone barely under 18 if he or she can take a [naked] photograph of the other individual. He said he didn't have a problem with the aforementioned being a class B felony as it is currently. However, making it a class A felony is problematic.

CHAIR McGUIRE remarked that she respects the philosophical differences on this matter, but offered her belief that the committee has gone as far as it can on this issue.

TAPE 04-35, SIDE B
Number 2393

CHAIR McGUIRE turned to the issue of creating the elements of the crime, and specified that one would want it be with the intent of producing and with all the different mediums. Furthermore, one would want it to be that it visually or orally depicts the conduct listed in AS 11.41.455(a)(1)-(7), which is very specific. She said that she sided with [Version H]. She also announced that she wouldn't hold the bill over any further.

REPRESENTATIVE GRUENBERG specified that AS 11.41.455(a)(6) refers to, "the lewd exhibition of the child's genitals", which he said could simply be a nude photograph. He mentioned that during the subcommittee meeting he wasn't aware that there was a memorandum from Legislative Legal and Research Services, and he said he still hasn't really seen it. The only thing the subcommittee wasn't aware of when the subcommittee members made a decision based upon age was the potential conflict with another statute. Although he indicated he wasn't opposed to creating a floor amendment, this would be a different type of floor amendment. He suggested that members will be very [skeptical] of doing anything to this legislation other than "pressing the button." Therefore, Representative Gruenberg said he didn't feel that he was being left with much of a remedy.

Furthermore, it's difficult politically to speak as he has on this legislation, although it may avoid significant injustice for some young person.

CHAIR McGUIRE said she respected what Representative Gruenberg has to say, noting that she has allowed much latitude in order to allow [the discussion] to be part of the record. She indicated that [the record] factors into the interpretation. She pointed out that the fax of the statutes from the Public Defender Agency includes the statute relating to the unlawful exploitation of a minor, which amounts to almost one page of text. Furthermore, this statute goes into great detail with regard to the legislature's intent, specifically under the commentary section. She noted that [any member] has the ability to prepare written commentary to be adopted with the legislation. Moreover, she opined, the record has been established. Chair McGuire stated that in increasing the penalty to a class A felony relating to the unlawful exploitation of a minor, it's not the committee's intent to prosecute people in a boyfriend-girlfriend relationship for taking [naked] photographs of each other as discussed earlier. She reiterated that the record is clear that [this legislation addresses a situation in which [the exploitation of the minor] is intended for production and monetary gain. She again highlighted the conduct specified in [AS 11.41.455], which makes such actions deserving of a class A felony.

Number 2169

REPRESENTATIVE GRUENBERG asked if there would be any great harm in holding this legislation over so that he could craft an amendment to say what has been discussed with regard to the intent of the legislation.

REPRESENTATIVE MEYER agreed that the intent isn't to [prosecute] the individuals in the situation being discussed. Therefore, attaching a letter of intent, whether it be in this committee or on the House floor, would be fine, he said. However, Representative Meyer expressed concern with an amendment as he believes a letter of intent would be more appropriate. He highlighted that [AS 11.41.455 includes language] specifying "the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises ...". He recalled Anna Fairclough, Director of STAR, relaying the difficulty of proving any of these sexual crimes. Therefore, he surmised, [STAR] supports increasing the penalty to a class A felony because once a conviction can finally be

obtained, the desire is to "put that person away" because [the crime] is so blatant. Representative Meyer said that this is why he isn't concerned about the aforementioned situation regarding 18- and 17-year-olds.

REPRESENTATIVE GRUENBERG said that normally he would agree that a letter of intent would be fine. However, this type of criminal law [involves] superior court judges, prosecutors, and defense attorneys across the state. As a practicing attorney in trial, letters of intent are never used, and therefore it has to be placed in statute, he said. Representative Gruenberg stated that he wouldn't offer [any language] unless [the sponsor and the chair] agree to it. He expressed the need to have a narrow exception [in statute] so that those practicing in this area of law would be apprised of it.

CHAIR McGUIRE remarked that she believes this matter is at an impasse and back to the place where the committee was before the subcommittee met. Chair McGuire announced, "We don't have the ability to do the type of thing that you [Representative Gruenberg] want to do."

Number 1959

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration (DOA), began by thanking Representative Meyer for working with the subcommittee regarding the concerns about the automatic waiver. Ms. Wilson said, "The amended version, with the automatic waiver part, excluding those kids from being automatically waived, is very helpful." However, Ms. Wilson expressed serious concern with regard to a situation in which an individual who is 18 years and one day old taking a consensual [naked] photograph. The aforementioned is producing a photograph; she emphasized that according to current statute, producing the photograph doesn't have to be for a commercial purpose or for sale. She added: "Just taking a photo is producing a photograph; so there doesn't have to be any intent to sell or to ... pass it around. So an 18-year-old ... takes a picture of their 17-year-old ... [sexual partner] and that's a class A felony, and that is very, very troubling." The notion of just trusting the district attorneys and the prosecutors to not prosecute such a situation is even more disturbing, she said. Ms. Wilson recalled that the testimony from the Division of Juvenile Justice was that most of the cases under this title [AS 11.41.455] were kids taking photographs of each other consensually. She said, "I don't think that you have a huge problem of the unlawful exploitation of a minor are acts

under this particular statute [AS 11.41.455]." Ms. Wilson opined that it's worth pursuing only the true pedophiles.

MS. WILSON turned to the commentary provided for [AS 11.41.455]. She informed the committee that when the statute was changed back in [1983], the [legislature] deleted the language "for any commercial purpose" and the age was changed from "under 16 years of age" to "under 18 years of age". Therefore, Ms. Wilson suggested that the [penalty] be a class A felony if the [unlawful exploitation of a minor] is for a commercial purpose; this would address Representative Gruenberg's concern with regard to similarly aged kids [taking naked photographs of a boyfriend or girlfriend] and not doing it for a commercial purpose. Therefore, those [unlawfully exploiting a minor] for a commercial purpose would be targeted while not including those unintended to be included. She said a letter of intent offers no protection against a prosecution. She offered to work with the sponsor.

Number 1798

CHAIR McGUIRE remarked that [this legislation] merely increases the penalty for the already existing law. Chair McGuire pointed out that the legal memorandum mentioned that there is an equal protection problem with a bifurcated age stipulation, and so the choice was made not to revamp all of [existing law].

REPRESENTATIVE ANDERSON informed the committee that he had just spoken with Legislative Legal and Research Services, and learned that letters of intent can be adopted [in the committee] or on the House floor, where the letter would be "somewhat ratified." In statute, codification occurs whereby there is a notation that specifies the existence and location of the letter of intent. Therefore, he suggested that if he were an attorney representing an individual who took photographs of his girlfriend and the young man is being charged with a class A felony, he would turn to the letter of intent, which he believes would rectify the situation.

REPRESENTATIVE GRUENBERG suggested that an intent section could be included in the legislation. He asked if the sponsor would accept holding HB 334 [for that purpose].

REPRESENTATIVE MEYER said he would leave whether or not to hold the legislation over up to the chair. However, he characterized Representative Anderson's suggestion of adopting a letter of intent on the House floor as a good idea.

REPRESENTATIVE GRUENBERG specified that he hasn't seen letters of intent referenced in the notes [of the statute]. However, an intent section in the legislation will appear in the notes [of the statute] and would satisfy him. He maintained his belief about the need to do this [in committee].

Number 1648

SUZANNE CUNNINGHAM, Staff to Representative Kevin Meyer, Alaska State Legislature, related her belief that a letter of intent from the committee would satisfy "the request of the sponsor."

REPRESENTATIVE GARA commented that this has been the most frustrating meeting of the House Judiciary Standing Committee he has attended. He said that speaking as an attorney who has practiced law for over a decade, he believed that a letter of intent isn't going to impact a case. The courts disregard letters of intent because the rule of statutory construction that the court has to follow is that if the law is clear, then legislative history can't be looked at. Therefore, it's very important that criminal statutes be crafted as narrow as possible and so that it only applies to those intended. He went on to say:

> The moment we start drafting criminal statutes that take in people who we don't want to prosecute, but say, "Well, let's just trust the government and trust that the government won't prosecute the people we didn't want to prosecute even though we told them they could prosecute them in the ... statute." The moment we start doing that, we've crossed a line ... that I don't ever want to cross.

REPRESENTATIVE GARA opined that this issue should be addressed within the language of the legislation. When a criminal statute is crafted, one can err two different ways. First, the statute could be made too broad so that it applies to people to whom it wasn't intended to apply. Second, the statute could be made too narrow so that it applies to most of those intended, but not everyone. Given those choices, Representative Gara offered his belief that it's safer to write the legislation to address essentially almost everyone desired. He said he didn't have a problem making conduct being done for a commercial purpose a class A felony, which would exclude the possibility of prosecuting two kids [in the situation discussed earlier]. [Unlawful exploitation of a minor] for commercial purposes is

the worst, and any other [lesser] conduct would remain a class B felony and the judge would retain the discretion to place an individual in jail for up to 10 years.

REPRESENTATIVE MEYER interjected that the first offense for a class B felony carries a penalty of one to four years. Representative Meyer said he viewed an individual who entices a child to the basement to disrobe, but not for commercial purposes, as a class A felon.

REPRESENTATIVE GARA disagreed and offered his belief that it's a class B felony. Although the normal sentence range is zero to four years, aggravated offenses can result in one going to jail for ten years for a class B felony.

REPRESENTATIVE GRUENBERG pointed out that the committee packet includes [a spreadsheet] specifying class A and B felonies. He informed the committee that a class B felony carries a penalty of one to four years while a class A felony carries a five-year penalty.

Number 1398

MS. WILSON specified that the sentencing range for a first-time offense of class B felony is one to four years. The penalty for a second-time offense of a class B felony starts at four years and can reach up to ten years. However, she noted that there could be aggravators in a nonpresumptive situation, which could reach up to four years for a first-time offense and would require some extensive factors to go beyond a four-year penalty for a first-time offender. In further response to Representative Gara, Ms. Wilson clarified that the sentencing range is zero to ten years, but it would have to be a rare situation for a first-time offender to be sentenced to ten years.

Number 1363

PATTY WARE, Director, Division of Juvenile Justice (DJJ), Department of Health & Social Services (DHSS), thanked the sponsor and the subcommittee for making changes with regard to the department's concerns pertaining to exempting this crime from the automatic waiver provision within the delinquency statutes. Ms. Ware turned to Section 2, subsection (e)(2), in Version H of HB 334. She informed the committee that she reviewed [DJJ's] database, which revealed that since 1991, 12 juveniles have been charged with distribution of child

pornography. She noted that none of those juveniles were charged more than once. Therefore, there is no data to support that [Section 2, subsection (e)(2)] would impact any juveniles.

CHAIR McGUIRE clarified that the presumptive sentencing only takes place on a second offense.

REPRESENTATIVE GRUENBERG asked Ms. Wilson whether a letter of intent or an intent section in the legislation would make an impact in the [courtroom].

MS. WILSON said she agrees with Representative Gara that the statute is controlling, and furthermore the letter of intent won't be considered if it contradicts the language of statute. With regard to Representative Gara's earlier suggestion to insert "for a commercial purpose", she surmised that this would get at the target group by adding another offense, "for a commercial purpose", which would be raised to a class A felony.

REPRESENTATIVE GRUENBERG asked whether adding an intent section to the legislation that would go in the uncodified language and appear in the notes would have an impact in the [courtroom].

MS. WILSON said that she didn't know of anyone who ever looks [at the uncodified language in the notes]. The attorneys tend to look at what is in statute. Even if there is a reference, if the language in the statute says one thing and [the intent] in the legislation says another, the attorneys tend to follow the statute.

Number 1130

REPRESENTATIVE SAMUELS remarked that a situation in which an individual is making child pornography in his or her basement just because he or she likes it seems worse than when the purpose is to sell it. Although both are bad, adding the "commercial" language doesn't really help, he opined.

MS. WILSON confirmed that the situation proposed by Representative Samuels is a class B felony. However, [making child pornography] for commercial purposes is even worse, she opined, and thus she didn't believe elevating that to a class A felony was inconsistent.

REPRESENTATIVE SAMUELS acknowledged that both situations are equally bad.

CHAIR McGUIRE asked whether [unlawful exploitation of a minor] was ever lower than a class B felony.

MS. WILSON said that she wasn't sure of the code or the sentencing before the early 1980s, but she offered to research that matter.

CHAIR McGUIRE announced that HB 334 would be set aside, to be brought up later in the meeting.

The committee took an at-ease from 2:40 p.m. to 2:42 p.m.

HB 472 - CLAIMS AGAINST HEALTH CARE PROVIDERS

Number 0977

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 472, "An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

CHAIR McGUIRE announced that she would hold the vote on HB 472 until 3:00 p.m. when other members should be present. She then turned to public testimony.

Number 0901

PATRICK LUBY, Advocacy Director, AARP Alaska, began by saying that medical mistakes happen. Therefore, AARP Alaska believes that this legislation should focus on error reduction rather than damages. Furthermore, the tort system encourages providers to cover up mistakes in order to avoid lawsuits rather than reporting errors and learning how to prevent them. Mr. Luby opined that someone who is hurt by a medical error is entitled to fair compensation, but emphasized that it's more important to ensure that errors are reported in order prevent future errors.

MR. LUBY, noting that older people with limited income potential will receive less in economic damages than younger victims, informed the committee that AARP believes $250,000 is too low for noneconomic damages. He also informed the committee that the Institute of Medicine (IOM) has proposed testing nonjudicial no-fault alternatives to the tort system for medical errors. If Alaska adopted one of the IOM's recommended alternatives, it would foster fair compensation and error reduction, which should be the real goal of consumer-oriented reform, he opined. Under the IOM approach, compensation would be based on "avoidability"

of error rather than negligence, and there would be preset schedules for compensation with reasonable limits that may help stabilize malpractice premiums. Mr. Luby relayed that the IOM believes that mandating the reporting of errors would help experts find systemwide [solutions] and improve patient safety. Mr. Luby encouraged the committee to review adopting some of the IOM's recommendations.

Number 0743

REPRESENTATIVE ANDERSON noted that Mr. Luby has experience with California's model, and asked Mr. Luby his opinion of it.

MR. LUBY commented that what works well is dependent upon the perspective. He relayed that the AARP takes the consumer's perspective, although reducing the number of errors would be in the best interest of all concerned.

REPRESENTATIVE ANDERSON mentioned that he expected the legislation to move from committee today, but said he wanted to talk further with Mr. Luby.

REPRESENTATIVE GARA relayed his sense that this legislation is going to move before anyone has time to consider IOM's proposal. Therefore, he inquired as to AARP's position if the legislation is left with the $250,000 noneconomic damages cap.

MR. LUBY reiterated that the $250,000 noneconomic damages cap is too low, as is the current $400,000. Therefore, AARP would oppose the legislation. He reiterated the need for legislators to review the IOM recommendations and whether any can be incorporated into statute.

The committee took an at-ease from 2:45 p.m. to 3:20 p.m.

[Tape ends early; no testimony is missing.]

TAPE 04-36, SIDE A
Number 0001

CHAIR McGUIRE announced that HB 472 would be set aside briefly and be brought up later in the meeting.

HB 334 - UNLAWFUL EXPLOITATION OF MINOR

Number 0066

CHAIR McGUIRE announced that the committee would return attention to HOUSE BILL NO. 334, "An Act relating to unlawful exploitation of a minor."

Number 0077

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, sponsor of HB 334, announced that the differences between Representative Gruenberg and himself are close to being resolved. Therefore, he said he believes it will be a matter of intent language or a simple amendment to illustrate that the legislation doesn't intend to increase the penalty to a class A felony in cases of young people having consensual sex and taking pictures of each other. Representative Meyer requested that the committee report the legislation from committee and allow he and Representative Gruenberg to continue to work on this before it reaches the House floor.

Number 0140

REPRESENTATIVE GRUENBERG moved to report the proposed CS for HB 334, Version 23-LS1246\H, Luckhaupt, 3/3/04, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 334(JUD) was reported from the House Judiciary Standing Committee.

HB 472 - CLAIMS AGAINST HEALTH CARE PROVIDERS

Number 0191

CHAIR McGUIRE announced that the committee would return attention to HOUSE BILL NO. 472, "An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

REPRESENTATIVE ANDERSON, speaking as the sponsor of HB 472, recalled that at the last meeting there were two amendments that he was considering [one of which was offered as Amendment 1 and then withdrawn on 3/3/04]. He announced that at this time he wouldn't offer either amendment because he supports HB 472 as it is.

CHAIR McGUIRE, in response to Representative Gruenberg, reminded the committee that the original version of HB 472 was before the committee.

REPRESENTATIVE GARA recalled testimony from insurance company [representatives] regarding whether malpractice settlements have increased or decreased over the years. He noted that he'd provided the committee with the [Alaska State Medical Board's] record of all malpractice settlements and verdicts, which, he opined, illustrates that the settlements and verdicts radically change from year to year because these are statistically irrelevant samplings. Of the claims in 2003, the average settlement was about $341,000 while in 1991 it was $380,000. Representative Gara said that he didn't believe that there is any evidence which establishes that verdicts have increased in recent years. He also noted that he'd provided the committee with [the Alaska State Medical Board's] case by case [analysis] of each settlement and verdict over the last 15 years, and with information from Legislative Legal and Research Services regarding the number of physicians in Alaska. He pointed out that although there has been growth, the number of physicians in Alaska remains inadequate.

Number 0488

REPRESENTATIVE GARA recalled debate over California's $250,000 cap and mentioned that he provided the committee with a document from the Foundation for Taxpayer & Consumer Rights [entitled, "Five Dangerous Myths About California's Medical Malpractice Restrictions"]. Representative Gara related that in 1975 Medical Injury Compensation Reform Act (MICRA) was enacted in California and was subsequently litigated until 1986 when the California Supreme Court upheld the $250,000 cap. He highlighted that in 1986, [medical] malpractice premiums didn't decrease but, in fact, increased. In 1988 California voters passed a proposition specifying that there shall be a reduction in premiums paid and it gave the insurance commissioner the right to reject rate increase applications and the right to lower insurance rates. From 1988 on, California experienced [medical malpractice insurance] rate reductions. Representative Gara opined that the proposition reduced the rates in California.

REPRESENTATIVE GARA turned attention to the Legislative Legal and Research Services memorandum [dated March 16, 2004] regarding the daily recovery for noneconomic losses under a $250,000 cap even for the most serious injuries. He highlighted that the calculation specifies that under a $250,000 cap someone with a 50-year life expectancy is paid for the pain, suffering, and loss of enjoyment of life at the value of $13.69 per day. The aforementioned value is too low, he opined.

Number 0713

REPRESENTATIVE GARA moved that the committee adopt [new] Amendment 1, labeled 23-LS1743\A.1, Bullock, 3/10/04, which read:

> Page 2, line 19, following "$250,000":
> Insert ", except that, in the case of severe permanent physical impairment or severe disfigurement, the damages may not exceed $1,000,000. The limit on damages applies"
>
> Page 2, line 25:
> Delete "$250,000"
> Insert "the maximum amount allowed under (d) of this section"

CHAIR McGUIRE recognized that there was an objection.

REPRESENTATIVE GARA explained that Amendment 1 would essentially reinstate the current two-tier damage cap that already exists. The current two-tier damage cap is $400,000 with the possibility of more for those with a long life expectancy. However, in cases of severe permanent physical impairment or severe disfigurement [the noneconomic damage cap] is $1 million or in some rare cases it could go up to $2 million, depending upon the life expectancy of the individual. Amendment 1 provides the insurance industry certainty with a hard cap [on noneconomic damages] of $250,000, except in cases in which there is severe permanent physical impairment or severe disfigurement which allows for a noneconomic damages cap of up to $1 million. Therefore, Amendment 1 addresses his concern with regard to valuing the damages of an individual at $13.69 a day.

REPRESENTATIVE ANDERSON said that although he wasn't adamantly opposed to [Amendment 1] in the context of those severe cases, the other side is that such [noneconomic damage caps] would [work against] attracting new physicians and solidifying the insurance market. With regard to the argument about the $13.69 per day [damage award], Representative Anderson said he didn't believe the $400,000 cap would provide that much more per day. Furthermore, he posited, a $250,000 award could be quadrupled by the individual if he/she makes the proper investments.

REPRESENTATIVE ANDERSON relayed his fear that the insurance companies wouldn't know whether the cap is $250,000 or $1

million until the jury [rules]. Therefore, he suggested that in order to protect itself the insurance company will assume every case is a $1 million worth of exposure and so perhaps the insurance rates would increase. Representative Anderson said that it's a balance between individuals who [should receive $1 million in compensation] for pain and suffering, and physicians leaving and the inability to recruit new physicians. Representative Anderson requested that the committee vote against Amendment 1 and allow [the legislation] to try to recruit more physicians. "Again, the cases where this occurs is so miniscule, I think the needs of the many outweigh the needs of the few," he said.

Number 1015

REPRESENTATIVE HOLM said he agrees with Representative Gara on this issue, noting that he has received some compelling e-mails regarding the $250,000 cap, especially considering that that cap minus attorney's fees may result in nothing for a damaged individual. The compensation for malfeasance should be greater than $250,000, he opined, though he said he also agrees with Representative Anderson with regard to the need to attract more physicians to Alaska. Representative Holm said that he didn't believe that the case has been made that physicians will come because of a specific [noneconomic] damage cap nor has it been made that there will be any [rate] reduction or increased availability [due to this legislation]. Representative Holm announced his support of Amendment 1.

REPRESENTATIVE SAMUELS expressed concern with insurance companies leaving the state as well as with the lack of physicians in the state. He inquired as to how one measures the person who has to catch a Medivac flight because there was no physician to perform a certain procedure and the individual dies en route. Representative Samuels asked if there are definitions for "severe disfigurement" or if it is based on what the attorney claims. Representative Samuels said that although he has no illusions with regard to insurance rates decreasing, he is fearful of it not being available.

REPRESENTATIVE GARA explained that he thought it would be best to use the standard that has been on the books since the late 1980s, during the first round of Tort Reform. He noted that there is one supreme court case and several superior court cases that address it. The [current] standard seems to be a reasonable standard. In a case in which the individual isn't terribly injured, but the higher standard is satisfied, the

question regarding what should be awarded in noneconomic damages would be submitted to the jury. Representative Gara highlighted that Alaska is a conservative state and that jury verdicts in the state tend to be so as well, especially in medical malpractice cases. Therefore, he opined, there shouldn't be a fear that there will be an automatic award of $1 million in a case that isn't serious. Representative Gara pointed out that the language is tailored narrowly.

Number 1360

REPRESENTATIVE OGG turned attention to the [case by case analysis provided by ASMA], and highlighted those cases that were over the cap. He indicated that it seems the claim amounts are increasing, although he noted that the chart merely shows the total claim. The increase is concerning, he said, adding that he likes the $250,000 cap, although he noted that he is a bit uncomfortable with it having known individuals who have had something happen to them. The key, he said, is that the negligence or malpractice has to be proven. Although $1 million is a bit high, at least it's certain.

REPRESENTATIVE HOLM asked if the [information provided by ASMA refers to] jury awards, and therefore are "agreed-to" settlements.

REPRESENTATIVE GARA answered that these are mostly agreed-to settlements. He clarified that [the settlements] are all the payments, some of which are after a verdict while others are after a settlement.

REPRESENTATIVE OGG announced that he would go along with Amendment 1.

CHAIR McGUIRE clarified that the record shouldn't be construed to have emphasis on any one [issue] that has been discussed, since the record is comprehensive and includes testimony from various groups. She highlighted that [since the implementation of MICRA] in California, California's costs have only increased 100 percent while nationwide the costs have increased by over 563 percent. Although there is no proof or knowledge that this legislation will keep the two medical malpractice insurance providers in the state or will attract more physicians, the [committee] has looked to other jurisdictions to review what was done. California was the model for the $250,000 cap that appear to work, at least in part.

CHAIR McGUIRE declared a conflict because her father is a physician [and requested that she be excused from voting].

REPRESENTATIVES GRUENBERG and OGG objected [and thus Chair McGuire was required to vote].

CHAIR McGUIRE specified that her father doesn't really fall into any of the categories listed. She further specified that she is reviewing this legislation in terms of the overall health of the medical industry in this state. Alaska is close to a crisis, and therefore it's incumbent upon the legislature to address it. Furthermore, it's important to remember that this cap is dealing with noneconomic damages.

Number 1655

CHAIR McGUIRE remarked that [medical malpractice] suits are similar to aviation lawsuits because the liability has to be projected in terms of the possible amount that could be recovered. Therefore, it doesn't matter that there is information that says Alaska juries are more conservative. Insurance companies, she reiterated, have to factor in the entire amount that is possible to recover. The aforementioned is the problem with Amendment 1, she opined. Furthermore, the terms "serious physical impairment and disfigurement" aren't defined. She said she understood the reluctance to define those terms in this [statute] because they already appear in common law, but relayed that discussions with health care professionals have revealed that these terms have been interpreted more loosely than committee members probably envision. Furthermore, most cases are borne out through settlements, for which there are no statistics. The statistics are related to the trials. However, the real costs come into play with the settlements for which everyone pays the cost.

CHAIR McGUIRE reminded the committee that during testimony she asked every medical malpractice attorney questions regarding contingency fees and costs. She relayed her understanding that it's illegal to include the cost of hiring experts as part of the [contingency] percentage. She reminded the committee that the federal government has said that the maximum contingency fee is 20 percent, unless it's 30 days prior to the trial in which case the maximum contingency fee is 25 percent. The aforementioned has to be addressed, she emphasized. After [the injured party] pays [25] percent in contingency fees and $50,000 in costs, she questioned what would be left for the injured party. Chair McGuire encouraged the trial bar to contemplate

the aforementioned and she suggested that perhaps the trial bar would want to lower its contingency fees because 20 percent of $250,000 is a lot of money.

CHAIR McGUIRE relayed her belief that Amendment 1 would gut the goal of HB 472, which is to reduce the amount of exposure and the amount of settlements.

REPRESENTATIVE ANDERSON offered that it's a matter of balance. He reminded the committee that many of the hospitals and physicians, and the Alaska State Medical Association (ASMA) seem to believe this legislation will work.

REPRESENTATIVE GARA informed the committee that the other important reason for Amendment 1 is that often [the injured party] doesn't receive anything outside of the noneconomic damages. Although the medical expenses are covered, those are paid to the entity for the services provided. Furthermore, many don't receive lost wages, such as seniors because they have stopped working. He questioned whether those following a subsistence lifestyle would receive lost wages. Therefore, there is little left once the $250,000 cap is reduced by one third because it's taxable and by another third because of attorney fees. Therefore, the two-tiered approach in Amendment 1 provides a compromise in which the insurance companies have a hard cap.

REPRESENTATIVE ANDERSON maintained his objection.

Number 2017

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

Number 2037

REPRESENTATIVE OGG moved that the committee adopt Amendment 2, labeled 23-LS1743\A.3, Bullock, 3/10/04, which read:

> Page 2, line 22, following "death.":
> Insert "The limits on damages in this subsection do not apply if the personal injury or wrongful death was the result of gross negligence or reckless or intentional misconduct."

Page 2, line 25, following "judgment":
Insert "unless the personal injury or wrongful death was the result of gross negligence or reckless or intentional misconduct"

Number 2040

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE OGG explained that many insurance companies don't cover people for [personal injury or wrongful death] resulting from gross negligence or reckless disregard. Representative Ogg opined that [this legislation] would allow those who [commit conduct that is grossly negligent or reckless or intentional] to "walk." He said he wants to be sure that those who commit such conduct are accountable for the damage they do, which is why he offered Amendment 2.

REPRESENTATIVE ANDERSON relayed that the associations believe Amendment 2 is irrelevant because punitive damages apply in these cases of gross negligence or reckless or intentional [misconduct]. He recalled that someone told him that 50 percent of punitive damages go to the state, and therefore it's believed that [Amendment 2] is an attempt to get around that arrangement. Representative Anderson specified that those supporting this legislation feel that this doesn't need any correction because there are adequate remedies in the statute. Therefore, he announced that he didn't concur with Amendment 2.

REPRESENTATIVE GRUENBERG pointed out that punitive damages are extraordinary and not often awarded, and almost require a separate phase of the trial. Furthermore, punitive damages have to be proven by clear and convincing evidence, which is a much higher standard of proof. Therefore, [punitive damages] aren't a substitution for [Amendment 2].

REPRESENTATIVE GARA explained that [Amendment 2] would say that in the actual damages phase, the caps wouldn't apply for those who are [injured due to] gross negligence or worse. The punitive damages question would be separate. Therefore, by adding the [language] specified in [Amendment 2], the punitive damages wouldn't be reduced nor would the state's take be reduced. Representative Gara acknowledged that sometimes there is a bifurcated trial in which liability [issues] are addressed and then punitive damages are addressed; however, that's not required.

Number 2184

CHAIR McGUIRE informed the committee that the section covering punitive damages under civil damages and apportionment of fault is AS 09.17.020 from which she highlighted the following:

> (b) The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct
>
> (1) was outrageous, including acts done with malice or bad motives; or
>
> (2) evidenced reckless indifference to the interest of another person.
>
> (c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider
>
> (1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;
>
> (2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;
>
> (3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;
>
> (4) the duration of the conduct and any intentional concealment of the conduct;
>
> (5) the attitude and conduct of the defendant upon discovery of the conduct;
>
> (6) the financial condition of the defendant; and
>
> (7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

REPRESENTATIVE GRUENBERG indicated that the [financial condition of the defendant] isn't normally admissible.

REPRESENTATIVE ANDERSON expressed concern with the "ceiling" aspect, which he said he didn't believe was fair.

REPRESENTATIVE OGG remarked that he has offered Amendment 2 because when the conduct reaches the level specified in the amendment, there shouldn't be a protection for the individual

committing [the misconduct]. Such an individual should be subject to the present law.

CHAIR McGUIRE expressed interest in knowing the percentage of claims that are brought on the basis of the mental intent of simple negligence. She pointed out that now that Amendment 1 has been adopted, the [noneconomic damages] cap is essentially at $1 million. Furthermore, the common law interpretation of serious physical injury is broad enough to assume that the $1 million will be factored in and settlements will be adjusted accordingly based upon people's unwillingness to go through trials and pay the costs.

REPRESENTATIVE OGG said that the claims brought on the basis of simple negligence weren't identified.

REPRESENTATIVE GARA remarked that punitive damages and informed consent aside, all medical malpractice cases are brought on a simple negligence theory.

TAPE 04-36, SIDE B
Number 2393

REPRESENTATIVE GARA said that one would never find out which cases involved gross negligence because only negligence has to be proven in order to be entitled to basic damages.

CHAIR McGUIRE surmised that [with the adoption of Amendment 2], there would be an incentive to argue the higher levels [of negligence] knowing that the caps would not apply.

REPRESENTATIVE GARA interjected to say that such would be a separate claim.

CHAIR McGUIRE opined that Amendment 2 should be rejected given the fact that the caps have been increased. She suggested that Amendment 2 "opens it up too far," highlighting that it's not what's proved but rather what's alleged. A clever attorney could easily argue gross negligence. Chair McGuire pointed out that this legislation doesn't impact punitive damages, which attempts to deter bad conduct. Compensatory damages aren't going to change due to one's mental intent, she noted. She also noted that there have been statements that noneconomic damages are being used to address loss of consortium, loss of enjoyment of life, and possibly to grant recovery to groups such as the elderly who don't have the ability to recover under an economic-damages basis. However, Chair McGuire opined, that's mixing

apples and oranges because she believes that when the discussion is regarding someone's mental intent [at the level specified in Amendment 2], the discussion should be about punitive damages as a separate consideration. Therefore, Chair McGuire announced that she opposes Amendment 2.

Number 2228

REPRESENTATIVE SAMUELS relayed his understanding that under the present law, the cap [for gross negligence or reckless or intentional misconduct] is $2 million. Therefore, Amendment 2 would [eliminate] the present cap. He expressed interest with regard to where the suits normally fall. Although he didn't believe there would be any argument regarding intentional misconduct, he doubted that there are many suits brought based on it. Representative Samuels asked if "this" is covered under the punitive damages portion. He expressed concern with proving negligence versus gross negligence to jurors who don't know anything about the law or medicine. Such a situation would seem to result in a contest of attorneys.

REPRESENTATIVE OGG said he has a problem with those whose actions rise to the level [of gross negligence or reckless or intentional misconduct], and therefore he believes that such behavior should be reigned in somewhat. He echoed earlier comments that punitive [damages] are a separate category. He reiterated his understanding that the insurance companies don't cover claims of gross negligence, and therefore he didn't believe the notion that [injured parties] go for the deep pocket would fit in this case.

REPRESENTATIVE GARA informed the committee that the only medical malpractice case he ever took involved intentional misconduct, for which others in the medical community congratulated him. He relayed that in most [medical] malpractice cases [there are charges of] negligence. However, in American society the thought is that if someone is hurt by exercising unreasonable care, the victim should be compensated. At some point, he remarked, the conduct becomes so egregious that there is no reason for society to offer any protections. Representative Gara relayed his experience with the medical malpractice case and highlighted the [usual] practice of offering a low settlement until the eve of trial. The aforementioned seems to be a strategy to deter people from filing for claims by "running them through the ringer if they file them." Furthermore, just because [a case] qualifies for a higher cap, it isn't the case that the money is just given out, because [the attorneys] take

into account what a jury is likely to do with the evidence, the client, and the extent of the injuries. Representative Gara concluded that ultimately, there are some classes of conduct that the legislature shouldn't protect, and therefore he agreed with Representative Ogg.

REPRESENTATIVE GRUENBERG turned attention to the [case by case] list of [malpractice cases], and commented that there are a number of things that are clearly negligence while there are others that seem to fall under Amendment 2. He pointed out that even for serious [misconduct], such as performing arthroscopy on the wrong knee, it doesn't necessarily result in a large settlement. He expressed the need to be fair.

CHAIR McGUIRE, upon being informed that someone had flown in to testify on other legislation, announced that HB 472 would be set aside with Amendment 2 pending.

HB 339 - TRADE PRACTICES

Number 1947

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 339, "An Act relating to negative option plans for sales, to charges for goods or services after a trial period, and to acts that are unlawful as unfair trade practices." [Before the committee was CSHB 339(L&C).]

Number 1928

REPRESENTATIVE GRUENBERG moved to adopt the proposed committee substitute for HB 339, Version 23-LS1265\S, Bannister, 3/5/04, as the work draft. There being no objection, Version S was before the committee.

Number 1893

ROBERT B. FLINT, Attorney at Law, Hartig Rhodes Hoge & Lekisch, relayed he has been retained by a firm in Virginia, DeHart & Darr, to represent Direct Marketing Association and Magazine Publishers of America, which combined constitute a large group of people who conduct business via mail, Internet, and telephone selling products. He said:

> The industry here is regulated in significant respects by the Federal Trade Commission [FTC], both on telemarketing and aspects of mail, and also at the

state level in various ways. Particularly in Alaska, for example, there's an unsolicited merchandise Act governing things you might receive in the mail without soliciting them or without agreeing to them and it's considered a free gift. The industry is large and diverse and old; it's been around a long time, [and] I'm sure you're all familiar with it. Its basic advantage, obviously, ... to the business, is they have that way to sell to the public, to boost up their subscription rates, and for the consumer it's a discounted value because [they're] usually accompanied by promotions including the free-trial type, which is what I'm going to talk about right now.

House Bill 339 ... arises, as I understand it, out of certain circumstances from last year and also complaints [received by] ... the attorney general's office ... through the [Commercial/Fair Business Section]. We've been working with ... Representative Meyer's office and the attorney general's office ... diligently ... to try to come to a draft bill which will work to protect [consumers from] ... the problems [that are] perceived and allow the vast majority of the honest and legitimate business folks to go about doing this type of promotion. ... In fact, legitimate [business] people always want to go after the problems, after all, because they're the ones that get splashed with the mud even though they're maybe doing the correct thing.

Number 1767

MR. FLINT continued:

Let me just go to ... one of the sections we're hung up with now .... What I'm speaking to ... [are] some suggested amendments [that] have come from my clients, in large part, and have been changed a little bit by the attorney general's office which creates a problem. ... We're dealing largely with ... the question of free trial offers via the telephone. The sections in the bill regulate both inbound and outbound calls. Outbound calls are the ones that we all love to hate; those are the telemarketers that call you up at dinnertime and offer to sell you something. These calls are regulated by [FTC] rules and also ... by the

"do not call" list at the federal level which now has 57 million names on it.

MR. FLINT said:

I suspect that "cold called" sales - telephonic marketing - is probably going to decline rapidly because that list is now upgradeable every 90 days and at Congress's insistence is going to upgraded every 30 days, and I assume that 57 million will ... rise dramatically. ... But we're also dealing [with] the inbound calls; [this] is where ... the customer ... originates the call in response to an ad, or [they are] calls to existing customers - people who are already on the business's list and have purchased products or dealt with them before.

Number 1592

[The amendment Mr. Flint then discusses, with original punctuation provided but containing some formatting changes, is as follows:]

Page 2, line 3
Delete: "(3) a description of the seller's refund, cancellation, exchange, and repurchase policies; and"
Insert: "(3) the right to cancel; and"

Page 2, line 8:
After: "express"
Delete: "written"
Insert: "verifiable"

Page 2, line 9-12
Delete: "The seller shall obtain the written consent on a form prepared by the seller. The form prepared by the seller must include the information required by (b) of this section and the consumer's acknowledgement that the consumer has received and understands the information in the consent."
Insert: A seller who provides goods or services to a consumer for a free trial period has the burden of proving that the seller provided the information required by (b) of this section and that the consumer gave express verifiable consent to the free trial period.

Page 2, line 16
Insert new subsection (e)

(e) If the consumer agrees to a free trial period by telephone, the seller shall comply with the following:

(1) the seller shall send the consumer an invoice which the consumer may pay or write "cancel" on the invoice and return to the seller;

(2) the seller shall disclose by telephone the consumer's right to cancel and how to cancel;

(3) the seller shall record the disclosures required in subsection (b) of this section as well as the consumer's express verifiable consent required by subsection (c) of this section; and

(4) the seller shall send the consumer written confirmation at least 10 days before charging the consumer's account which will include a telephone number the consumer may use to cancel. The telephone number provided to the consumer to use to cancel must be operative during the consumer's normal business hours.

Page 2
Insert new subsection (f)

(f) In a free trial period, when a consumer cancels goods or services to be provided after the end of a free trial period, the seller must cancel the billing or credit the consumer's account within 30 days for unused goods or services.

Page 2
Re-letter the remaining subsections accordingly

MR. FLINT went on to say:

We have in the amendment a [new] subsection (e) .... There are two stages involved in the telemarketing for free trial offers. Stage 1 I believe ... we have come to acceptable language on, and that is the call and the promotion itself. And in that the requirements there are that the seller disclose certain items including the charges, cancellation policy, and so forth; that the customer agrees - express consent - to

the promotion; and that in all cases, both on the disclosure and in the agreement, the burden of proof is on the seller to show that those ... disclosures have been complied with and that the agreement is there. That does not appear to be a problem.

But then in stage 2, what ... follows on ... in the mail, the clients proposed the list of four items you see here as alternatives, [but] the attorney general would prefer that you do all of them. The problem is that the business doesn't do all of them. For example, if you look on this list of four items, if the customer chooses to be billed by credit card ... they would obviously not receive an invoice because they have already paid. So the fact of the matter is ... that flexibility [via] the alternatives is what the business needs at this stage 2, where we feel we've complied the disclosures, certainly, and also that the customer always has the right to ... cancel it.

And ... the great majority of free trial promotions are canceled. It is not an unusual situations; most of them end up being canceled after the free trial period or during the free trial period. So that's just a regular cost of doing business. So it's trying to fit the legitimate concerns, which we totally agree with, into business practices that occur nationwide. It's a complicated problem, it's a diverse industry, there are various methods used to use it, there are regulations at the [FTC] level, so I'm not saying this is easy to do. We are working diligently; we'll continue to work diligently to help get this bill through ... and I think we can, but we're still trying to fit a few things together.

Number 1508

REPRESENTATIVE GARA remarked that with a lot of free offers there are two problems: one is that consumers forget the rules for cancellation, and the other is that sometimes cancellation involves dialing a phone number that only works during the same hours that consumers are at work. He opined that to be perfectly fair, it would be best if consumers receive a paper billing, before the billing is actually due, that contains a box that clearly tells consumers how to cancel and that could then be used to cancel before actually owing money. He mentioned

that he has a proposed [handwritten] amendment to this effect, which read [original punctuation provided]:

> Insert at P.2 line 24
>
> (g) within 30 days of the first billing, the consumer must be provided a form that clearly states how the consumer can discontinue service without payment. The form shall provide a box or other space allowing the consumer to indicate they wish to discontinue service, and must be accompanied by a return envelope.

MR. FLINT said, however, that it does not appear, from the volume of people who cancel "these things," that there's a persistent problem out there. He remarked that the attorney general's office has statistical information regarding the complaints received, and suggested that such information could help quantify the perceived problem. The problem with putting on extra obligations is that although such may be alright for the bigger companies, it is not going to be alright for the smaller companies and will ultimately result in increase costs to consumers, he remarked, and noted that one of the advantages of "this type of system" is that products are discounted.

Number 1283

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, sponsor, characterized HB 339 as a consumer protection bill that pertains to two business practices: one practice pertains to the free trial period, and the other practice pertains to the opt-out marketing plan. The bill requires businesses to fully disclose to consumers what is involved in their offers, for example, what the consumer's obligations are and what any forthcoming charges will be. He relayed that the concept of HB 339 was brought forth by a constituent, and stemmed from the fact that last year one of the telephone companies offered a new feature on cell phones that was automatically provided unless people opted out of receiving it, and so folks wound up getting billed for something they didn't ask for.

REPRESENTATIVE MEYER offered a personal example of a company that was billing his credit card for a service that he had not asked for but that was part of a free-trial program with an opt-out provision that he'd not been aware of. He noted that it was very hard to cancel this unsolicited service and that he was unable to get reimbursed for the months he was charged for a service he didn't know he had and that he'd unknowingly paid

for. He said that HB 339 will prohibit opt-out marketing plans unless all of its provisions are fully disclosed to the consumer, and will place more responsibility on businesses to disclose such provisions before engaging in opt-out marketing plans. He suggested that the Department of Law has received numerous complaints about "these type of business practices," and relayed that he is willing to be flexible in working with the industry to come up with compromise legislation as long as it fully protects consumers.

REPRESENTATIVE HOLM said that a simple fix could be for companies to just include on the billing a box that could be checked if the consumer wants to opt out.

REPRESENTATIVE MEYER surmised that Representative Gara's suggested amendment followed a similar line of thought, but remarked that there could be certain limitations on such a concept because of federal law dealing with interstate commerce.

Number 0895

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General, Commercial/Fair Business Section, Civil Division (Anchorage), Department of Law (DOL), said that the DOL supports Representative Meyer's efforts to deal with the issues related to free trial periods and opt-out marketing situations. He went on to say:

> There are a number of reasons why this kind of legislation ... would help consumers understand obligations that they undertake when they respond to these kinds of offers. And these are the kinds of offers that are the most enticing to consumers, and you'll note the legislation is really only directed at the free trial offer or the opt-out plan. ... Direct sales aren't a problem ...: I call you up, I have this product, do you want to buy it, yes or no - no, okay, see you later. ... This legislation is directed at ... the kind of offer that people just simply don't refuse or don't want to refuse. This creates fertile ground for all [kinds] of potential deception because it easy to say, on the phone, to someone, "Oh sure, I'm going to get it for free and no obligation for me; yeah, I'll take this thing, and then ... if I don't want it later I can cancel," and everyone thinks it's easy to cancel.

MR. SNIFFEN continued:

Well, as Representative Gara pointed out, a lot of telemarketers have phone lines that really only go one way; they make outgoing calls but ... they can't take incoming calls, so the ability to cancel these services in the same manner in which they are sold is unavailable in a lot of circumstances. So the singular intent of the bill, I believe, from our perspective, was to require some kind of a written confirmation from the consumer that they in fact agree to this deal, whatever the deal is. And ... we had suggested that that written confirmation be obtained from the consumer before the product or service was provided or at least billed for. And the response we got from the Direct Marketing Association essentially was that [that] would create an economic burden that would really be unfair and that there might be other ways to address this problem [for example] by requiring some disclosures over the phone or [sending] out a written confirmation of the sale that the consumer can review and then send back in the event it didn't comport with their understanding ....

Number 0761

I couldn't agree more ... [that] people tend to forget what they say on the phone, and these phone transactions are very interesting to say the least, but they're targeted at elderly folks who a lot of times don't remember what they said, or even not so elderly folks, like myself, who don't remember sometimes what we say. And to get something in writing to at least confirm what you've agreed to, and if it's not what you've agreed to, give you the ability to say, "No, I don't want this deal anymore," is ... what we'd like to see in this legislation. ...

The way the bill was originally drafted, which I played a significant role in drafting ..., contained some fairly strict requirements for obtaining that kind of consent up front. And we have worked with Mr. Flint and his clients ... to come up with some compromise language that would still achieve the goal of making sure that the telemarketers or direct marketers -- and it's not just limited to telephone sales, it's ads on late-night TV and mail that you

get, and it's ... a barrage of consumer media that you might respond to.

MR. SNIFFEN relayed:

We had a consumer file a complaint this year who responded to a Focus Factor (ph) ad on TV ... for these vitamins - and it was free for 30 days, just pay $4.95 shipping [and] handling - and she called ... this number up ... and they said, "Oh, sure, give us your credit card for the $4.95," and she does and they say, "Okay, we're going to put you on auto-shipment for this product." And she didn't know what that meant, and they said, "You're under no obligation and [if] you don't want anything we send you, you can just send it back or you don't have to pay for it." Well, cut to the chase, ... they kept sending her this product month after month after month at $60 a bottle and she didn't want it. She tried to call the number to cancel and she couldn't cancel, and she tried ... sending them letters and ... they wouldn't get them or she got no response.

Number 0623

And finally she reached someone and they said, "Well, we're not going to charge you for future shipments, but ... since you've already gotten this past product and you've used it, we can't give you the refund; we're going to bill you $120 and then we're going to cancel the rest of your order." So the consumer is out $120, not something she's going to fight about, she just kind of soaks it up and goes on.

But it's that kind of thing that happens, and we were involved in a multistate case involving a try-and-discount (ph) buying club out of Florida that up-sold a lot of products to consumers, and ... that's a national case that received some attention that all the states participated in where telemarketers [were] doing very similar things. So ... we do see these abuses and we're hoping this legislation will target that at a minimum - at least require these marketers ... to make consumers aware of what they're obligations are in some fashion that we can easily verify. And if it's not written consent from the consumer, at least have it be in some form of

verifiable consent, either over the telephone or through a confirmation mailing or something of that sort. And we're certainly happy to work with [the sponsor] and Mr. Flint and his clients to come up with language that works for everyone.

Number 0549

MR. SNIFFEN concluded:

And I would like to respond just briefly to a [suggestion] earlier about why you couldn't send an invoice [and] have box on there that you just check that says, "No, I don't want this, thank you very much," and send it back. Those kinds of things actually look deceptively like bills; sometimes you don't know that it's not an invoice ... that you have to pay, and some consumers will get those things, not see that little box, not see the fine print, [and think], "Now I've got an invoice; I've got to pay it." Heck, there's a huge scam going on now involving yellow pages ... - you've probably all received these things - they come in the mail, they look like invoices ..., [but] it's really an advertisement and they're asking you if you want that service but it looks like an invoice, and a lot of businesses don't rally read it - they send a check (indisc. - coughing). And we're concerned that just ... putting a box on an invoice that lets the consumer out of this transaction ... might not alert consumers sufficiently that that's the way that you need to cancel these things. So, I hope that answers that question.

REPRESENTATIVE GARA said Mr. Sniffen's examples were useful, and relayed that he would like to keep the protections currently proposed in the bill as they are and on top of those also add language to the effect that a form will be required to remind consumers, 30 days before being billed, of how to cancel the transaction. This proposed form would be one that the consumer could fill out and send back. He referred to his aforementioned amendment, and asked Mr. Sniffen to comment.

MR. SNIFFEN responded:

I think that's a terrific idea and I didn't mean to suggest in my testimony that wouldn't work. ... I think if it's a separate confirmation that is separate

from an invoice, that works very well because then consumers [are] getting a form [that] doesn't look like an invoice, it doesn't tell them to pay any money, [it] just says, "You've agreed to this, ... and we're going to send you an invoice for this product and this is how much it's going to cost you, and if you don't want this, or if you don't remember doing this deal, you need to call this number or you need to check this box and send it back to us."

Something that doesn't confuse the consumer with the fact that this may be an invoice they have to pay, I think would be preferable; ... 30 days is good, 15 days would be good. I know in the amendment proposed by Mr. Flint's client, the Direct Marketing Association, they had an alternative requiring the seller to send the consumer a written confirmation at least 10 days before charging the consumer that included a telephone number that the consumer could use to cancel. I think it is also a way that you could do it in writing for the reasons you suggest Representative Gara, and that would be good as well.

Number 0288

REPRESENTATIVE GARA remarked that he didn't want to put the companies through an undue burden of cost. He surmised that the two options are to have a separate form and either having that as part of an invoice or not part of an invoice. He said that he didn't mind [the separate form] being part of the invoice so long as it clearly states how the consumer can opt out.

MR. SNIFFEN agreed that would be okay, but noted that it would need to be carefully reviewed. He indicated the need for the [cancellation language] to be done clearly and conspicuously.

REPRESENTATIVE GARA said he might go that route.

REPRESENTATIVE GRUENBERG turned attention to page 3, lines 24-25, where "seller" is defined. He pointed out that under the Uniform Commercial Code (UCC), AS 45.02.103, it says: "(4) 'seller' means a person who sells or contracts to sell goods." The UCC defines "goods" in AS 45.02.105, and the term "contracts" is also defined in the UCC in AS 45.02.106. Representative Gruenberg explained that the UCC generally governs the laws of the sale of goods. The Act is well drafted because things are defined somewhere in the Act, and therefore

one doesn't have to look so much to common law. Representative Gruenberg noted that he liked the definition of "seller" in AS 45.02.103(4) because one could enter into a contract before the sale is actually made and the individual would still be covered. However, he acknowledged that the definition of "seller" in AS 45.02.103(4) only covers goods while this legislation covers goods and services.

CHAIR McGUIRE informed the committee that the legislation will be set aside shortly. She suggested that Representatives Gara and Gruenberg work with the sponsor between now and the end of the week in order to come to an agreement on the aforementioned issues.

TAPE 04-37, SIDE A
Number 0001

REPRESENTATIVE GRUENBERG inquired as to why this legislation pertains to AS 45.45 rather than the UCC. He asked if the reason was that the legislation covers services [as well as the sale of goods].

MR. SNIFFEN replied yes, pointing out that the legislation begins with the following language: "Notwithstanding a provision in AS 45.02 to the contrary ...." He explained that the desire was to use these definitions to ensure that not only the sale of goods was included but also services. However, Mr. Sniffen noted that he liked the idea of including "selling or contracting" as well.

REPRESENTATIVE GRUENBERG mentioned that Mr. Sniffen may want to review the definition of "contracting" and "goods" in the UCC. He indicated the need to define the term "services." Representative Gruenberg questioned whether there would be any benefit to placing these statutes in the UCC while indicating that the two statutes [specified in the legislation] apply to the sale of services. He asked if Mr. Sniffen could comment.

MR. SNIFFEN noted his willingness to review that, but he wasn't sure about complicating the legislation any more than necessary. Mr. Sniffen said: "I think the intent defining "seller" in this bill was ... just to include the types of direct marketers who would be engaging in the kind of conduct that we're trying to regulate and we didn't mean any more ... than that, but we'll certainly take a look at that."

REPRESENTATIVE GRUENBERG pointed out that under the UCC, there are provisions that might provide the consumer with some protections. At the very least, he suggested reviewing the definitions [found in the UCC].

CHAIR McGUIRE announced that HB 339 would set aside.

HB 468 - APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

Number 0240

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 468, "An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

Number 0331

CHAIR McGUIRE moved to adopt Amendment 1, which read [original punctuation provided]:

Page 2, Line 2:
Delete "25,000,000"
Insert "100,000,000"

REPRESENTATIVE HOLM objected.

CHAIR McGUIRE explained that Amendment 1 would increase the bond amount, which is reflective of what was done in the Senate. She opined that such an increase in the bond amount is commiserate with what other states have done and more representative of the type of capital that could be put forward.

REPRESENTATIVE GARA agreed that $100 million is appropriate. He recalled that there was concern with regard to punitive damages. However, he expressed the need to be sure that there is enough of a bond to cover compensatory [damages]. He suggested that the best avenue would be to have a $100 million bond, but specify that such a limitation should only apply to punitive damages. Therefore, for compensatory damages, the bond would have to be provided under the current rules. Representative Gara noted that the committee should have an amendment from him

that also increases the bond amount to $100 million, but only limits the punitive damages verdict to $100 million.

CHAIR McGUIRE suggested that the committee should dispense with Amendment 1 first and then, when Representative Gara offers his amendment, the portion addressing the amount [as specified in Amendment 1] could be deleted.

REPRESENTATIVE HOLM removed his objection.

Number 0558

CHAIR McGUIRE, noting that there were no further objections to Amendment 1, announced that Amendment 1 was adopted.

Number 0593

REPRESENTATIVE GARA moved to adopt Amendment 2, labeled 23-LS1719\A.1, bullock, 3/2/04, which read:

Page 2, line 1:
Delete "total"
Insert "portion of the"

Page 2, line 2, following "collectively":
Insert "that is attributable to the amount of the judgment for punitive damages"

Page 2, lines 2 - 3:
Delete "$25,000,000, regardless of the value of the judgment"
Insert "$100,000,000"

CHAIR McGUIRE objected.

REPRESENTATIVE GARA recalled that at the last hearing on this bill, the testimony from the tobacco industry's attorney relayed concern with regard to large punitive damages amounts. This [legislation] creates a special exception to the bond rules, with which he is uncomfortable. He said that he could perhaps [understand such an exception] if the bonds are being limited only in the area of punitive damages. However, he reiterated that he didn't want to limit the bond amount for compensatory damages.

REPRESENTATIVE ANDERSON opined that [Amendment 2] doesn't follow the intent of the legislation, and could cause the reverse

effect. Representative Anderson announced that he opposed Amendment 2, save the last portion that is encompassed in Amendment 1.

CHAIR McGUIRE pointed out that most of the states that apply similar legislation to punitive [damages] use [a bond amount of] $25 million.

REPRESENTATIVE GARA remarked that a minority of states, one of which is Kentucky, do [what is proposed in Amendment 2].

Number 0777

REPRESENTATIVE ANDERSON opined that this is a financial issue not a public health issue. Furthermore, when the [limit] is changed with regard to punitive damages, it changes the intent of the law. Therefore, the change made by Amendment 1 is sufficient.

REPRESENTATIVE GARA remarked that a class action lawsuit is the only circumstance for which he could envision a verdict this large. He surmised that if it is a class action lawsuit, then the bond amount would apply to the entire suit. If there ever is such a case, the cigarette company should have to post a bond to cover those it has harmed under the current laws and rules. Representative Gara said he is willing to [give the cigarette company] something on the punitive damages portion, but not on the compensatory damages portion.

Number 0887

CHAIR McGUIRE moved an amendment to Amendment 2, which would delete the last portion of Amendment 2, which read:

Page 2, lines 2 - 3:
Delete "$25,000,000, regardless of the value of the judgment"
Insert "$100,000,000"

CHAIR McGUIRE asked whether there were any objections to the amendment to Amendment 2. There being none, the amendment to Amendment 2 was adopted.

CHAIR McGUIRE clarified that before the committee is Amendment 2 as amended, which now read:

Page 2, line 1:

Delete "total"
Insert "portion of the"

Page 2, line 2, following "collectively":
Insert "that is attributable to the amount of the judgment for punitive damages"

REPRESENTATIVE OGG offered his understanding that [subsection] (a) of the bill only applies to the tobacco settlement.

Number 0919

A roll call vote was taken. Representatives Samuels, Gara, and Gruenberg voted in favor of Amendment 2, as amended. Representatives Holm, Anderson, Ogg, and McGuire voted against it. Therefore, Amendment 2, as amended, failed by a vote of 3-4.

REPRESENTATIVE GARA, speaking with regard to Amendment 3, explained that he wanted this limited bond to only apply in tobacco cases. Many of the signatories of the Master Settlement Agreement ("MSA") are conglomerates that might harm people in areas outside of the tobacco area. Therefore, he said he didn't want these conglomerates to benefit from this reduced bond in cases that aren't tobacco related litigation.

Number 1000

REPRESENTATIVE GARA moved that the committee adopt Amendment 3, which read [original punctuation provided]:

Page 1, line 10, after "civil"
Insert: "tobacco-related"

REPRESENTATIVE ANDERSON objected.

CHAIR McGUIRE recalled that Keith A. Teel, Attorney, Co-Chair, Legislative Practice Group, and Chair, Tobacco Practice Group, Covington & Burling, indicated that there might be a practical problem with this. She recalled that the problem was in regard to how the assets would be separated when [a signatory of the MSA] was involved in other industries besides tobacco.

REPRESENTATIVE GARA answered that the assets wouldn't be separated out. If a tobacco-related case is against a [signatory] of the MSA, then the bond limit applies. However,

if the case isn't tobacco related, then the bond limit doesn't apply.

REPRESENTATIVE SAMUELS remarked that it seems like that's already accomplished through the language on page 1, lines 9-10.

REPRESENTATIVE GRUENBERG directed attention to AS 45.53.010, which reads:

> Sec. 45.53.010. Tobacco product Master Settlement Agreement recognized.
> The Master Settlement Agreement entered into by certain United States tobacco product manufacturers and the state, and related documents, for settlement of claims raised in State of Alaska v. Philip Morris, Incorporated, and approved by the Alaska Superior Court on February 9, 1999, are recognized.

REPRESENTATIVE GRUENBERG pointed out that the entire chapter only relates to the State of Alaska v. Philip Morris, Incorporated litigation, which is tobacco related. He said he didn't believe Amendment 3 did any harm, but indicated that it's already clear.

Number 1125

REPRESENTATIVE GARA said he disagrees. He explained that the MSA is a tobacco-related case between the state and tobacco companies. However, Section 1 of HB 468 refers to other cases that have nothing to do with the MSA; HB 468 refers to private litigation involving people who sign onto the MSA. Therefore, since "Phillip Morris" [Phillip Morris USA, Inc.] signed onto the MSA five years ago, this [proposed] bond rule will apply to any future case brought against Phillip Morris, even those unrelated to the MSA. The future litigation to which this bond rule would apply doesn't have to be tobacco-related litigation but could be related to anything [a signatory of the MSA] does to a member of the Alaska public. Although he acknowledged that the circumstances happening at this damage amount are remote, he said that he saw no reason to go out of his way to adopt a special rule for these companies. Representative Gara said, "To the extent these companies might injure people outside of the tobacco context, because they're conglomerates, the bond rule will apply in those cases."

REPRESENTATIVE GRUENBERG remarked that he would be surprised if having the proposed bond rule apply to non-tobacco related cases

is the intent of the legislation, but added that if that is the intent, then Amendment 3 is necessary.

REPRESENTATIVE GARA stated that he didn't like adopting special legislation for special industries.

REPRESENTATIVE ANDERSON maintained his objection.

Number 1299

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

Number 1321

REPRESENTATIVE GRUENBERG moved that the committee adopt Amendment 4, as follows:

Page 2, line 5,
Delete "outside the ordinary course of business"

CHAIR McGUIRE objected, and subsequently removed her objection. There being no further objection, Amendment 4 was adopted.

Number 1409

ROBERT EVANS, Lobbyist, Phillip Morris USA, Inc., in response to questions from Representative Gara, confirmed that Phillip Morris and virtually all of the 40 signatories to the MSA are supporting this [legislation]. He mentioned that the National Association of Attorneys General is comfortable with this as well.

REPRESENTATIVE GARA highlighted the discussion regarding whether the bond rule proposed in the legislation only applies to tobacco-related litigation. He asked if Mr. Evans's intent is for [this proposed bond rule] to only apply to tobacco-related litigation.

MR. EVANS replied yes, noting that Mr. Teel testified to that effect in the Senate Judiciary Standing Committee meeting.

REPRESENTATIVE GARA remarked that he was comforted that it's the intent of the legislation to only apply to tobacco-related litigation.

Number 1475

EMILY NENON, Alaska Advocacy Director, American Cancer Society (ACS), recalled a question from the last hearing, and explained that although the American Cancer Society doesn't have a position on appeal bond caps, the American Cancer Society is staunchly opposed to HB 468, which is special consideration being given to the world's largest tobacco companies. Ms. Nenon said that she understands that the idea is to ensure that the state receives its MSA payments. Ms. Nenon disputed the statement at a previous hearing that the state receives, into the general fund, $22-$27 million from the MSA. She informed the committee that the state receives $4-$5 million from the MSA while the other 80 percent of the income stream has already been pulled out as bonds. Therefore, the state wouldn't lose anything from that [80 percent that is set aside] if the tobacco industry went bankrupt. If the major tobacco companies went bankrupt, the state would lose $4-$5 million in MSA payments, and she said she presumes there would be an impact on the over $200 million the state spends for direct health care costs and lost productivity from tobacco-related illness.

MS. NENON recalled that at the bill's last hearing, Mr. Teel stated that the only reason similar legislation didn't pass in New Mexico was because the session ended before its passage. However, her American Cancer Society counterpart in New Mexico related to her the following:

> We fought this tooth and nail and we got two consecutive votes in our favor and the first vote was a tabling motion and the second vote a couple of days later on the last evening of the session was to keep the bill tabled in our House Judiciary Committee after Phillip Morris had to reside the bill there during the last week of our session. On the last day of our session, the Speaker of the House pulled the bill out of that committee ... and they couldn't get it through legitimately. But, [when] he was explicitly threatened with a filibuster on the floor in the final hours of the session, the Speaker backed off.

MS. NENON reiterated that the American Cancer Society believes tobacco companies should be held to the same standard as other industries and shouldn't receive special protection from state legislatures.

Number 1647

JENNIFER APP, Alaska Advocacy Director, American Heart Association, began by recalling Mr. Teel's statements with regard to the [potential] broad impact of this legislation. She recalled that a hypothetical situation in which a Nabisco truck hit a school bus was posed as an example. In response, Mr. Teel said that the aforementioned wouldn't be a problem because there aren't Nabisco employees in Alaska, and did not say that the legislation is so narrowly drafted that it would prohibit any non-tobacco litigation from falling under this cap. Ms. App said the legislation is clear as it specifies: "in civil litigation under any legal theory involving a signatory, a successor of a signatory, or an affiliate of a signatory to the Master Settlement Agreement". The language "or an affiliate of a signatory to the Master Settlement Agreement" would include any Altria company, which is an affiliate of a signatory of the MSA, in any civil litigation. Therefore, she opined that this [legislation] goes beyond just tobacco.

MS. APP noted that she reviewed the rules [Alaska Rules of Appellate Procedure] that this legislation would amend. She pointed out that Rule 204(d) specifies:

> When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, and interest, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond.

MS. APP opined that currently, Rule 204 already provides protections against bankruptcy. Furthermore, she relayed that she hasn't been able to find any record of any company going bankrupt in Alaska because of needing to pay an appeal bond. She attributed the aforementioned to the safeguard in Rule 204(d). In conclusion, Ms. App announced that the American Heart Association continues to be concerned about HB 468, especially since it believes current rules protect all companies. She commented that tobacco-related companies certainly aren't deserving of additional protection.

Number 1786

REPRESENTATIVE GRUENBERG, noting that the intention for this legislation is to apply only to tobacco-related litigation and that there is the potential for it to be read otherwise, moved that the committee [rescind] its [action] in failing to adopt Amendment 3.

REPRESENTATIVE ANDERSON objected, saying that the title specifies the [intent] of HB 468.

REPRESENTATIVE GRUENBERG pointed out that there is an existing statute that specifies that the title [of legislation] isn't legally part of the act. Therefore, if the intent is to conform to the title, then [the adoption of Amendment 3] is necessary, he opined.

REPRESENTATIVE ANDERSON withdrew his objection.

CHAIR McGUIRE clarified that Amendment 3 [text previously provided] is now before the committee. Upon determining there were now no objections to the adoption of Amendment 3, she announced that Amendment 3 was adopted.

Number 1891

REPRESENTATIVE ANDERSON moved to report HB 468, as amended, out of committee with individual recommendations and the accompanying zero fiscal notes.

REPRESENTATIVE GARA objected and indicated that the legislation is unnecessary. This seems like special legislation, he said. Furthermore, this state already has punitive damage caps and economic damage caps that will probably prevent the types of verdicts [that these companies] fear, except in a class action lawsuit. In a class action lawsuit, [these companies] should be subject to the same rules as would anyone else. Therefore, Representative Gara stated that he opposes HB 468.

REPRESENTATIVE ANDERSON highlighted that half the states in the nation disagree with Representative Gara and have passed this type of legislation.

REPRESENTATIVE GARA maintained his objection.

Number 1846

A roll call vote was taken. Representatives Anderson, Ogg, Holm, Samuels, and McGuire voted in favor of reporting HB 468,

as amended, from committee. Representatives Gruenberg and Gara voted against it. Therefore, CSHB 468(JUD) was reported out of the House Judiciary Standing Committee by a vote of 5-2.

ADJOURNMENT

Number 1976

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:35 p.m.