ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 19, 2004
1:15 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

Representative Jim Holm
Representative Dan Ogg

COMMITTEE CALENDAR

HOUSE BILL NO. 428
"An Act relating to civil liability for acts related to obtaining alcohol for persons under 21 years of age or for persons under 21 years of age being on licensed premises."

- MOVED CSHB 428(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. 423
"An Act relating to accidents involving the vehicle of a person under the influence of an alcoholic beverage; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 351
"An Act relating to the devices, including carbon monoxide detection devices, required in dwellings; and providing for an effective date."

- MOVED CSHB 351(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 244
"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 428
SHORT TITLE: CIVIL PENALTY: UNDERAGE ALCOHOL PURCHASES
SPONSOR(S): REPRESENTATIVE(S) MEYER

02/04/04	(H)	READ THE FIRST TIME - REFERRALS
02/04/04	(H)	L&C, JUD
02/25/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/25/04	(H)	Moved Out of Committee
02/25/04	(H)	MINUTE(L&C)
02/26/04	(H)	L&C RPT 5DP
02/26/04	(H)	DP: CRAWFORD, LYNN, ROKEBERG,
02/26/04	(H)	GUTTENBERG, GATTO
03/18/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/18/04	(H)	Heard & Held
03/18/04	(H)	MINUTE(JUD)
03/19/04	(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
03/16/04	(H)	Heard & Held
03/16/04	(H)	MINUTE(JUD)
03/19/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 423
SHORT TITLE: TAXICAB DRIVER LIABILITY
SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/02/04	(H)	READ THE FIRST TIME - REFERRALS
02/02/04	(H)	JUD
02/02/04	(H)	STA REFERRAL ADDED AFTER JUD
02/09/04	(H)	REFERRAL ORDER CHANGED
02/09/04	(H)	STA, JUD
02/10/04	(H)	STA AT 8:00 AM CAPITOL 102
02/10/04	(H)	<Bill Hearing Postponed>
03/02/04	(H)	STA AT 8:00 AM CAPITOL 102
03/02/04	(H)	Heard & Held
03/02/04	(H)	MINUTE(STA)
03/05/04	(H)	STA AT 8:00 AM CAPITOL 102
03/05/04	(H)	Heard & Held
03/05/04	(H)	MINUTE(STA)
03/09/04	(H)	STA AT 8:00 AM CAPITOL 102
03/09/04	(H)	Moved CSHB 423(STA) Out of Committee
03/09/04	(H)	MINUTE(STA)
03/12/04	(H)	STA RPT CS(STA) NT 3DP 3NR 1AM
03/12/04	(H)	DP: SEATON, HOLM, LYNN; NR: COGHILL,
03/12/04	(H)	BERKOWITZ, WEYHRAUCH; AM: GRUENBERG
03/19/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 351
SHORT TITLE: CARBON MONOXIDE DETECTION DEVICES
SPONSOR(S): REPRESENTATIVE(S) GATTO, GRUENBERG

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	L&C, STA
01/21/04	(H)	L&C AT 3:15 PM CAPITOL 17
01/21/04	(H)	Heard & Held
01/21/04	(H)	MINUTE(L&C)
01/23/04	(H)	L&C AT 3:15 PM CAPITOL 17
01/23/04	(H)	Moved CSHB 351(L&C) Out of Committee
01/23/04	(H)	MINUTE(L&C)
01/26/04	(H)	L&C RPT CS(L&C) 5DP
01/26/04	(H)	DP: CRAWFORD, LYNN, GATTO, GUTTENBERG,
01/26/04	(H)	ANDERSON
02/19/04	(H)	STA AT 8:00 AM CAPITOL 102

02/19/04	(H)	Scheduled But Not Heard
02/26/04	(H)	STA AT 8:00 AM CAPITOL 102
02/26/04	(H)	Moved CSHB 351(STA) Out of Committee
02/26/04	(H)	MINUTE(STA)
03/01/04	(H)	STA RPT CS(STA) 3DP 1DNP 3NR
03/01/04	(H)	DP: GRUENBERG, SEATON, LYNN;
03/01/04	(H)	DNP: COGHILL; NR: HOLM, BERKOWITZ,
03/01/04	(H)	WEYHRAUCH
03/01/04	(H)	JUD REFERRAL ADDED AFTER STA
03/19/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 244
SHORT TITLE: CRIMINAL LAW/SENTENCING/PROBATION/PAROLE
SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

04/04/03	(H)	READ THE FIRST TIME - REFERRALS
04/04/03	(H)	JUD, FIN
04/14/03	(H)	JUD AT 1:00 PM CAPITOL 120
04/14/03	(H)	Heard & Held
04/14/03	(H)	MINUTE(JUD)
04/25/03	(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03	(H)	-- Meeting Postponed --
05/07/03	(H)	JUD AT 1:00 PM CAPITOL 120
05/07/03	(H)	Scheduled But Not Heard
05/08/03	(H)	JUD AT 3:30 PM CAPITOL 120
05/08/03	(H)	Heard & Held
05/08/03	(H)	MINUTE(JUD)
05/09/03	(H)	JUD AT 1:00 PM CAPITOL 120
05/09/03	(H)	Moved CSHB 244(JUD) Out of Committee
05/09/03	(H)	MINUTE(JUD)
05/12/03	(H)	JUD RPT CS(JUD) NT 1DP 1DNP 4NR
05/12/03	(H)	DP: SAMUELS; DNP: GARA; NR: HOLM,
05/12/03	(H)	OGG, GRUENBERG, MCGUIRE
05/13/03	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
05/13/03	(H)	-- Meeting Canceled --
05/14/03	(H)	FIN AT 8:30 AM HOUSE FINANCE 519
05/14/03	(H)	Heard & Held
05/14/03	(H)	MINUTE(FIN)
05/15/03	(H)	FIN AT 8:30 AM HOUSE FINANCE 519
05/15/03	(H)	Moved CSHB 244(JUD) Out of Committee
05/15/03	(H)	MINUTE(FIN)
05/15/03	(H)	FIN RPT CS(JUD) NT 2DNP 4NR 4AM
05/15/03	(H)	DNP: KERTTULA, FOSTER; NR: MOSES,
05/15/03	(H)	CHENAULT, HARRIS, WILLIAMS; AM: HAWKER,
05/15/03	(H)	STOLTZE, BERKOWITZ, WHITAKER
05/15/03	(H)	RETURNED TO JUD COMMITTEE
05/15/03	(H)	IN JUDICIARY

WITNESS REGISTER

REPRESENTATIVE KEVIN MEYER
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 428.

JERRY LUCKHAUPT, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: Spoke as the drafter of HB 428.

O.C. MADDEN III, Manager
Personnel and Loss Prevention
Brown Jug, Inc.
Anchorage, Alaska
POSITION STATEMENT: Answered questions with regard to Brown Jug's use of the Anchorage ordinance mirrored in HB 428.

DALE FOX
Cabaret Hotel Restaurant & Retailers Association (CHARR)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 428, answered questions.

ALLISON MENDEL, Attorney at Law
Alaska Academy of Trial Lawyers (AATL)
Anchorage, Alaska
POSITION STATEMENT: Testified on HB 472.

MICHAEL L. LESSMEIER, Attorney at Law
Lessmeier & Winters; Lobbyist
for State Farm Insurance Company ("State Farm")
Juneau, Alaska
POSITION STATEMENT: Testified in support of [CSHB 423, Version I].

JIM SHINE JR., Staff
to Representative Tom Anderson
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HB 423 on behalf of Representative Anderson, sponsor.

LINDA WILSON, Deputy Director
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 423.

REPRESENTATIVE CARL GATTO
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as one of the prime sponsors of HB 351.

KELLY NICOLELLO, Assistant State Fire Marshall
Central Office
Division of Fire Prevention
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Testified that the [division] is in favor of [Version V of HB 351].

SUSAN A. PARKES, Deputy Attorney General
Central Office
Criminal Division
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Presented the proposed committee substitute (CS) for HB 244 on behalf of the administration.

ACTION NARRATIVE

TAPE 04-41, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:15 p.m. Representatives McGuire, Anderson, Samuels, Gara, and Gruenberg were present at the call to order. She noted that Representative Ogg was excused.

HB 428 - CIVIL PENALTY: UNDERAGE ALCOHOL PURCHASES

Number 0102

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 428, "An Act relating to civil liability for acts related to obtaining alcohol for persons under 21 years of

age or for persons under 21 years of age being on licensed premises."

Number 0136

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, sponsor, reminded the committee that at the last hearing on HB 428, Conceptual Amendment 3 was left pending due to the need for legal assistance.

Number 0245

JERRY LUCKHAUPT, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, turned to the question of why he drafted HB 428 as he did, without having minors being sued directly [and] disallowing recovery against anyone violating Title 4 statutes. He explained that he drafted HB 428 after receiving a request to follow AS 09.68.110, which is a "civil liability for shoplifting" statute that already imposes a similar procedure for allowing storeowners to recover civil penalties against minors and others who shoplift. The aforementioned procedure is identical to the one used in HB 428. He explained that he took that approach due to the inherent problems in suing minors. Although a minor can be sued or can sue someone else, there are limitations. One of the limitations found under [Rule 4 of the Alaska Rules of Civil Procedure] specifies that both the minor and the parent or legal guardian has to be served as a condition precedent to maintaining the suit. Furthermore, if one attempts to sue a minor, the court has to ensure that the minor's legal guardian defends the suit on the minor's behalf because the interests of the minor and the parent [or legal guardian] may differ in some situations.

MR. LUCKHAUPT pointed out that just last year, the Alaska Supreme Court provided a decision specifying that a minor, through a next friend or legal guardian, can sue another individual. However, the minor can't defend through a next friend, and therefore a legal guardian has to maintain the defense on behalf of the minor. Mr. Luckhaupt further pointed out that the court's decision last year specified that the parent can't defend the minor pro se without an attorney. Therefore, at a minimum, an attorney would have to be hired in these cases. Moreover, a default judgment against a minor can't be obtained in a situation in which the minor doesn't answer the suit, because one can't assume that a minor is waiving his or

her rights to defend. Mr. Luckhaupt said he basically tried to avoid the aforementioned problems.

REPRESENTATIVE SAMUELS surmised that the best approach for the minor is to not be present.

Number 0552

MR. LUCKHAUPT said that although a default judgment can be obtained, it means nothing. He informed the committee that in Alaska one can enter into a contract with a minor, but when that minor reaches the age of majority, he/she can void the contract if he/she so chooses. The aforementioned is why banks won't setup loans with minors unless the parent co-signs. Mr. Luckhaupt observed that it seems easier to avoid the questions surrounding minors, and just impose the penalties on 18-year-olds or emancipated minors or the [minor's] parents. The aforementioned is what the legislature choose to do with the shoplifting civil penalty statute.

REPRESENTATIVE GRUENBERG commented that this isn't a constitutional issue. Representative Gruenberg read from the Shields v. Cape Fox Corporation case as follows:

> Alaska Civil Rule 17(c) governs this issue.2 The second sentence of this rule makes clear that while a next friend may sue on behalf of a minor, she may not defend a suit against a minor. Further, a next friend cannot generally represent a minor, even as a plaintiff, without counsel.3
>
> As noted, [the mother], acting pro se, filed an answer for [the child] as [the child's] next friend. Thus [the child] was not properly represented and the trial court should have appointed a guardian ad litem or entered some other appropriate protective order on [the child's] behalf pursuant to Civil Rule 17(c). However, this error does not require reversal in this case because [the child] turned eighteen almost a year before trial. She became an adult after the case was filed but before any events had occurred in pretrial practice that might prejudice her interests. Once she became an adult she was, in the eyes of the law, competent to represent herself and was no longer entitled to protection under the rule.4 Absent a showing of prejudice resulting from her lack of

representation or protection before she turned eighteen, the error was harmless.5

Number 0871

REPRESENTATIVE GRUENBERG read Rule 17(c) of the Alaska Rules of Civil Procedure:

> (c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

REPRESENTATIVE GRUENBERG highlighted that the last sentence of Rule 17(c) was interpreted by the court to preclude the next friend from defending a suit against a minor, although the language of Rule 17(c) doesn't specify that explicitly. Representative Gruenberg offered his understanding of yesterday's testimony from Mr. Madden and others that these cases generally don't go to trial, and that the procedure followed by licensees such as Brown Jug, Inc. ("Brown Jug"), is well established and there hasn't really been a problem with it. Therefore, Representative Gruenberg surmised that the cure would be to simply say that if [a licensee] is proceeding against a minor, the [licensee], in its written notice to the minor, advise the minor of his or her rights under the Shields case [and] Rule 17(c). The aforementioned should be a fairly simple form to prepare and could be included in the notice [sent by the licensee] that is sent to the minor as well as the minor's parent or legal guardian, he opined.

MR. LUCKHAUPT expressed concern that what Representative Gruenberg is proposing requests that the waiver execute some sort of settlement agreement. However, the minor doesn't have the capacity to execute the settlement agreement and, thus, merely including the notice doesn't necessarily satisfy anything because the minor still doesn't have a right to execute the settlement or waive any rights the minor might have.

Furthermore, the minor doesn't necessarily know what those rights are.

REPRESENTATIVE GRUENBERG surmised, then, that the procedure being practiced in Anchorage for some time is technically illegal.

MR. LUCKHAUPT said it could be problematic.

REPRESENTATIVE GRUENBERG pointed out that it seems that no one has raised that as an issue. With regard to waiving any rights, the party who is really waiving his or her right to proceed is the [licensee]. The problem would only arise if the [licensee] brought a suit despite the minor going through the process. Representative Gruenberg said that [his proposal] would ratify something that has been in place for some time.

Number 1201

REPRESENTATIVE SAMUELS pointed out that there is a difference between a minor under the age of 18 and an individual who is considered a minor for the drinking age. Representative Samuels said he assumed that the "Hey Mister" group outside the liquor store are 18- to 20-year-olds rather than 14-year-olds. "Are we including most of them?" he asked. He also asked whether the Anchorage ordinance provides a remedy for those minors under age 18 as opposed to the "under 21 years of age" minors.

REPRESENTATIVE MEYER relayed his understanding that Mr. Luckhaupt basically mirrored what was in the Anchorage ordinance in HB 428. Representative Meyer said he didn't believe the Anchorage ordinance addresses what Representative Samuels is discussing. Representative Meyer commented that if he were Brown Jug and a state law became too complicated, he would just use the Anchorage ordinance. Representative Meyer posited that most of those being [arrested] by Brown Jug are over age 18.

REPRESENTATIVE GRUENBERG asked whether Brown Jug exclusively targets those who are over age 18.

Number 1265

O.C. MADDEN III, Manager, Personnel and Loss Prevention, Brown Jug, Inc. ("Brown Jug"), responded that the youngest person Brown Jug has dealt with was 15 years of age. He relayed that for all the reasons stated by [Mr. Luckhaupt], Brown Jug doesn't enter into any written agreements with a minor under the age of

18; rather, Brown Jug deals strictly with the parents. He explained that a letter is sent to the minor, who must have his/her parent's involvement.

REPRESENTATIVE GARA recalled reading an article that specified that Brown Jug has tried to use Anchorage's ordinance about 900 times since 1998, and inquired as to why the statute is necessary.

MR. MADDEN answered that after the article ran, he received calls from licensees in other areas of the state who would like to do the same thing, but they can't because there is no civil-penalty provision in place that would allow them to utilize the same program. Mr. Madden emphasized that this is an effective tool that [Brown Jug] would like to see replicated throughout the state.

Number 1383

REPRESENTATIVE GRUENBERG [withdrew Conceptual Amendment 3]. He then turned attention to page 1, line 14, and asked if this is already existing language or was developed by Mr. Luckhaupt.

MR. LUCKHAUPT specified that he used the language from AS 09.68.110 and then added the provisions from the Anchorage ordinance.

Number 1477

REPRESENTATIVE GRUENBERG pointed out that on page 2, line 1, the language "by first class mail" seems to be misplaced. Therefore, he moved that the committee adopt Amendment 4, as follows:

Page 2, line 1:
Delete "by first class mail"

Page 1, line 14, after "send":
Insert ", by first class mail,"

CHAIR McGUIRE asked whether there were any objections to Amendment 4. There being none, Amendment 4 was adopted.

REPRESENTATIVE GRUENBERG asked if the Department of Law is the most appropriate department to promulgate the regulations for this.

MR. LUCKHAUPT answered that this is similar to the procedure in AS 09.68.110 and the Department of Law is the department identified in that statute.

REPRESENTATIVE GRUENBERG offered his belief that the Department of Law doesn't generally promulgate regulations for the liquor.

REPRESENTATIVE MEYER remarked that since this legislation deals with civil law it would seem appropriate that the Department of Law promulgate the regulations.

MR. LUCKHAUPT explained that he specified the Department of Law because the procedure is basically the same [as the procedure used with shoplifting] and doesn't have anything to do with the intricacies of liquor licenses or alcohol and beverage management in Alaska. He said the regulations [for shoplifting] and [under age solicitation of an alcoholic beverage] should basically be identical.

REPRESENTATIVE GRUENBERG expressed the need to check with [the Department of Law] on that. He then turned attention to page 2, line 5, and suggested that "that" should be "a".

MR. LUCKHAUPT answered that "a" would be acceptable.

Number 1625

REPRESENTATIVE GRUENBERG moved that the committee adopt Amendment 5, as follows:

Page 2, line 5:
Delete "that"
Insert "a"

CHAIR McGUIRE asked whether there were any objections to Amendment 5. There being none, Amendment 5 was adopted.

REPRESENTATIVE GARA asked whether the existing statute regarding imposing a fine against shoplifters and sending that fine to the business that was shoplifted relates to all businesses.

MR. LUCKHAUPT answered that it applies to all businesses. He specified that it isn't a fine but rather a civil penalty.

REPRESENTATIVE GARA asked if he is correct that since the existence of the Anchorage ordinance, Brown Jug has attempted to impose these fines in about 900 cases.

MR. MADDEN replied, "Nine hundred of the fake ID cases, yes." In further response to Representative Gara, Mr. Madden specified that since Anchorage's ordinance has been in effect, Brown Jug has been able to [impose fines] in 20 cases. With regard to those cases, Mr. Madden said he didn't believe [that the fine] has been more than $300. Most everyone has signed up for the diversion program. Mr. Madden said he couldn't provide the committee with an estimate on the amount of fines collected from fake IDs because those are difficult to collect on due to the fact that fraudulent information is used. He said he didn't believe that the number of fake ID cases Brown Jug has collected on isn't a high number and, furthermore, many of the collections are negotiated down. In further response to Representative Gara, Mr. Madden reiterated that with such cases, virtually all attended the diversion program, but couldn't estimate how many of the fake ID cases resulted in the young person attending the diversion program.

Number 1707

REPRESENTATIVE GARA asked whether [Brown Jug] has collected more revenue, in the form of fines, than the expenses for enforcement and the diversion program.

MR. MADDEN relayed that on a $300 diversion program, the employee receives a $250 bonus, there are a couple of hours of administrative time, and there are postage and filing costs. And before one reaches that point, two to three hours, at minimum, are spent by security personnel involved in the situation. He remarked that this can be a fairly expensive proposition to do. Part of the reason the civil penalty was used was to help some of the smaller operators be able to afford security services that they wouldn't otherwise be able to utilize.

REPRESENTATIVE GARA said that he has no problem imposing a fine if the money is going to education, diversion, or treatment. However, he opined, it is problematic if the companies levying the fines were going to merely keep the money. Therefore, he had suggested obtaining a commitment from the members of the Cabaret Hotel Restaurant & Retailers Association (CHARR) that they would endeavor to use the money for the aforementioned purposes. However, he noted, the CHARR representative said that there are too many members to do so and it would be too difficult to obtain a commitment. Representative Gara recalled

that since a voluntary commitment couldn't be accomplished, his suggestion is to place it in statute.

Number 1927

DALE FOX, Cabaret Hotel Restaurant & Retailers Association (CHARR), pointed out that even if the CHARR Board took such a position, CHARR can't bind all of its members. Furthermore, CHARR can't bind its nonmembers who make up a significant number of licensees. Mr. Fox said that if the intent [of the committee] is for the money to be used for education, diversion, or treatment, then placing language to that effect in statute is probably appropriate.

CHAIR McGUIRE asked if it would be possible for Mr. Fox to generate a letter stating CHARR's position that it would encourage it members to put as much of the money toward alcohol treatment, education, and diversionary efforts as possible.

MR. FOX agreed that such could be provided. If this legislation passes, he opined, there will probably be more information provided with regard to how well the program has worked in Anchorage. Mr. Fox said that CHARR will definitely have an outreach program to encourage this program because there is the desire to have the same good results that Brown Jug and Chilkoot Charlie's are seeing.

Number 2018

CHAIR McGUIRE announced that she is considering offering an amendment that would include the following language: "The $1,000 civil penalty may be reduced by a licensee if the defendant attends an alcohol treatment program approved by the licensee." Although it's not as strong as what she and Representative Gara have discussed, it would at least provide statutory intent.

MR. MADDEN advised against such an amendment because the $1,000 hammer seems to get offenders in the program. Mr. Madden stated his preference for the [punishment] to be either appearing in court and paying $1,000 or signing up for treatment. If these [offenders] believe the process can be drawn out and made difficult [for the business], that's what will occur. He reiterated that the reason he approached Representative Meyer regarding HB 428 is that other licensees have a strong desire to replicate what Brown Jug is doing, and remarked that Akeela,

Inc. ("Akeela"), is interested in partnering with Brown Jug on this.

CHAIR McGUIRE remarked that that seems fair, and commented that if a future legislature saw abuses in that perhaps treatment wasn't being sought, it could simply change the statute. Therefore, Chair McGuire announced that she [wouldn't pursue] that idea.

Number 2143

REPRESENTATIVE GARA announced that an amendment of his would essentially require that if liquor licensees are going to take advantage of the fine money, that they do essentially what Brown Jug is doing, and that taking advantage of the fine program merely to make money wouldn't be allowed. Representative Gara related his understanding from Mr. Madden that Brown Jug doesn't make money off the program. Therefore, he proposed [adding] language specifying that if [a licensee] recovers the fine, a form has to be submitted to the Alcoholic Beverage Control (ABC) Board confirming that at least 75 percent of the net proceeds, after deductions for enforcement expenses, go towards alcohol education, treatment, or diversion. He asked if the aforementioned would be problematic.

MR. FOX said he didn't know how Representative Gara's proposal would work. Although the proposal might work in aggregate, on an individual basis it would be a nightmare. He posed a situation in which the offender decides to take the [licensee] to court and ultimately [the licensee] loses $5,000 in the process; the [licensee] would already be in the hole. Although Mr. Fox said he agrees with the intent of Representative Gara's proposal, he offered that it seems problematic.

MR. MADDEN said he would be opposed to Representative Gara's proposal because he believes that it would cause licensees, who might otherwise participate, not to participate. He explained that the situation now is one in which people are parking in parking lots near a liquor store and sending an adult in to purchase alcohol for them. Under the current [law], there is really no incentive for a licensee to police those areas because it's not illegal to sell alcohol to a sober adult. This legislation would encourage people to pay more attention around their establishment. Additionally, this is an expensive process because it involves trained security personnel. Furthermore, many of the arrests made by [Brown Jug] are felony arrests involving possession of narcotics, violation of parole or

release, and in some cases [these individuals] are carrying guns. Mr. Madden stated that there is a certain amount of risk in doing this, specifically with regard to workers' compensation exposure. Mr. Madden remarked that Representative Gara's proposal would "kill the process," and reiterated his opposition.

REPRESENTATIVE GARA commented that there is no doubt that Mr. Madden is doing good things with the money being raised with the fine structure. However, he opined, there is also no doubt that this would be an easy way for some liquor establishments to merely make money from it, adding that he didn't want to help facilitate such. The problem with drafting statutes is if they aren't drafted narrowly, as is the case in this legislation, the behavior not wanted is encouraged in addition to the desired behavior.

MR. MADDEN highlighted that if a store is collecting this civil penalty every chance possible, then the store will gain a reputation such that people will know not to go there and attempt to purchase alcohol for minors. The aforementioned would be the case even if the store keeps the money from the fines collected.

TAPE 04-41, SIDE B
Number 2364

REPRESENTATIVE ANDERSON offered his belief that the bottom line is that this is about deterrence rather than making money.

REPRESENTATIVE GARA announced that he isn't going to introduce his proposal as an amendment. However, he pointed out, the entire deterrence [argument] doesn't work because [Brown Jug] has levied this fine 900 times and still people come to his business [and attempt to purchase alcohol for minors].

Number 2322

REPRESENTATIVE SAMUELS moved to report HB 428, as amended, out of committee with individual recommendations and the accompanying fiscal notes.

Number 2312

REPRESENTATIVE GARA objected and explained that he was doing so in order to encourage the sponsor to develop language that perfectly settles the problem.

Number 2304

A roll call vote was taken. Representatives Gruenberg, Samuels, Anderson, and McGuire voted in favor of reporting HB 428, as amended. Representative Gara voted against it. Therefore, CSHB 428(JUD) was reported out of the House Judiciary Standing Committee by a vote of 4-1.

HB 472 - CLAIMS AGAINST HEALTH CARE PROVIDERS

Number 2272

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 reminded the committee that Amendment 2, labeled 23-LS1743\A.3, Bullock, 3/10/04, was left pending at the March 16, 2004, hearing. Amendment 2 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"

REPRESENTATIVE ANDERSON, sponsor of HB 472, said he maintains his objection.

Number 2216

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

CHAIR McGUIRE turned attention to Amendment 3, labeled 23-LS1743\A.4, Bullock, 3/10/04, which read:

> Page 3, lines 19 - 30:

Delete all material.

Renumber the following bill sections accordingly.

Number 2155

REPRESENTATIVE GARA moved that the committee adopt an amendment to Amendment 3, which changed it to read as follows:

Page 3, lines 20 - 25:
Delete all material.

Renumber the following bill sections accordingly.

CHAIR McGUIRE announced that the amendment to Amendment 3 was adopted. [Therefore, Amendment 3, as amended, was before the committee.]

REPRESENTATIVE GARA recalled that some of the informed consent language is necessary to address the O'Malley case regarding telephonic advice given to patients. Those amendments to the informed consent statute are contained in Section 3 and Section 4, subsection (d), of HB 472. Representative Gara specified that he only objects to Section 4, subsection (c), and highlighted that there have been no objections to the current law. The [current law] specifies that the advice that should be given to a patient is that which would be given in a like circumstance regarding the risks and treatment options, which, he posited, is the reasonable patient standard. However, Section 4, subsection (c), changes that to the reasonable physician standard such that it would be the type of advice the physician in that community would normally provide. Representative Gara opined that the information should be given such that the average patient can understand treatment options and risks. Section 4, subsection (c), seems to be overkill, he remarked.

REPRESENTATIVE ANDERSON objected to Amendment 3, as amended. He said he prefers the reasonable health care provider standard. Part of the reason for the legislation is [to provide] predictability, whether in litigation or in insuring.

CHAIR McGUIRE recalled that there are states that use the reasonable physician in the community standard.

REPRESENTATIVE GRUENBERG turned to the first sentence in Section 4, subsection (c), and asked Representative Gara if that sentence could be retained.

REPRESENTATIVE GARA said he had no problem with retaining the first sentence in Section 4, subsection (c), although he relayed his belief that the first sentence merely repeats what the current statute already says.

Number 1987

REPRESENTATIVE ANDERSON specified that the first sentence of Section 4, subsection (c) is written in conjunction with the second sentence. He posed an example of an individual with a cut finger asking the physician whether he or she should go to the emergency room. If only the first sentence of Section 4, subsection (c), was kept, the physician would have to instruct the patient that in the worst case, the finger could get gangrene and would have to be cut off if the individual didn't go to the emergency room. The physician would have to specify that he or she couldn't provide the answer over the telephone. The second sentence is an imperative connection because it states that typically the healthcare community would inform the patient that although treatment seems necessary, the physician would say that he or she doesn't foresee other problems.

REPRESENTATIVE GRUENBERG posed a situation in which Amendment 3, as amended, is adopted and asked if the first sentence would continue to make sense.

REPRESENTATIVE ANDERSON said that he defers to the opinion of the health care providers who feel that this language [in Section 4, subsection (c)] would help.

CHAIR McGUIRE opined that as to Representative Gruenberg's question of whether the first sentence makes any difference, it doesn't.

REPRESENTATIVE GARA disagreed, saying there is a problem with the first sentence of Section 4, subsection (c). He explained that currently physicians are required to inform a patient of all risks he/she believes the patient would want to know about. However, the first sentence of Section 4, subsection (c), specifies that physicians only have to inform patients of risks that would cause serious bodily harm, which is drastically narrower. Representative Gara said he believes that a physician should inform a patient of the risks of moderate bodily harm as

well as minor bodily harm. He specified that he didn't like the fact that the physician now only has to discuss risks of death and serious bodily harm.

REPRESENTATIVE ANDERSON interjected that [Amendment 3, as amended] provides too much latitude and "opens up where lawsuit happy people can say, 'Wow, you didn't go to minor levels, or middle levels, or small levels,' and I think that's ridiculous and that's the whole point of the bill." He highlighted that the state is losing insurance companies because there is too much latitude for a patient to say that he or she wasn't completely informed. The aforementioned places an unfair onus on the physician, he concluded.

REPRESENTATIVE GARA pointed out that such a level of onus isn't in the current statute.

Number 1819

CHAIR McGUIRE recalled the O'Malley case from which arose a broad, philosophical debate regarding the amount of information a physician should be liable for giving to someone. She recalled that the discussion was that this is an area ripe for lawsuits. Chair McGuire turned to AS 09.55.556, which she characterized as fairly broad. She highlighted AS 09.55.556(a), which read:

> (a) A health care provider is liable for failure to obtain the informed consent of a patient if the claimant establishes by a preponderance of the evidence that the provider has failed to inform the patient of the common risks and reasonable alternatives to the proposed treatment or procedure, and that but for that failure the claimant would not have consented to the proposed treatment or procedure.

CHAIR McGUIRE explained that [Section 4, subsection (c)] narrows it, and emphasized that it refers to the "most common serious complications that may occur". She said she believes the aforementioned to be reasonable, and emphasized that this legislation attempts to reign in the exposure that physicians have, "that if something happens that is out of the ordinary, that was not disclosed, that ... [the physician is] not going to be liable for it." She offered her understanding that case law already recognizes the following: health care providers have a statutory duty to posses the knowledge and skill of [an] ordinary provider unless they're a specialist, in which case,

they have the duty to possess knowledge and skill of an ordinary specialist. She then turned to the second sentence of Section 4, subsection (c), and pointed out that the language "a skilled health care provider of the same or reasonably similar specialty" refers to both the expert and the generalist. The second sentence also refers to "under similar circumstances", which would be the community standard. Chair McGuire reiterated that this is being narrowed and made to be easily understood by physicians and medical malpractice providers so that there isn't a range of exposure.

CHAIR McGUIRE pointed out that Section 4, subsection (d), resulted from the O'Malley case. As a result of the [O'Malley case], physicians are essentially being told that no matter the possibility, the patient should go to the emergency room. If the aforementioned happens, she remarked, it will cost Alaskans a lot of money.

REPRESENTATIVE GRUENBERG asked if the definition of health care provider would include pharmacists and health aides in villages.

Number 1559

CHAIR McGUIRE turned attention to the definition section under AS 09.55.560, which read:

> (1) "health care provider" means an acupuncturist licensed under AS 08.06; an audiologist or speech-language pathologist licensed under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45; an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist or occupational therapist licensed under AS 08.84; a physician or physician assistant licensed under AS 08.64; a podiatrist; a psychologist and a psychological associate licensed under AS 08.86; a hospital as defined in AS 18.20.130, including a governmentally owned or operated hospital; an employee of a health care provider acting within the course and scope of employment; an ambulatory surgical facility and other organizations whose primary purpose is the delivery of health care, including a health maintenance organization, individual practice association,

integrated delivery system, preferred provider organization or arrangement, and a physical hospital organization;

REPRESENTATIVE GRUENBERG opined that the standards set in one profession will eventually leech over to other professions. He explained that he wanted to be fair to both the injured person and those in the profession. He noted that although he generally is very supportive of the plaintiff's bar, he expressed concern with eliminating this provision.

Number 1460

ALLISON MENDEL, Attorney at Law, Alaska Academy of Trial Lawyers (AATL), testified that as an attorney and a consumer of health care, she is having difficulty understanding why it's important to meet the health care providers' expectations about [this]. This is about injured persons, and therefore one has to assume that there is an injured person to begin with. Ms. Mendel asked, "What difference does it make what information the doctor (indisc.) to be giving?" She highlighted that nothing in current law or this legislation specifies that the patient has to be informed of every possible, remote consequence of the treatment. The current law specifies that the patient has to be given enough information so that a reasonable patient can make a decision. "If the reasonable patient doesn't get enough information to make a decision, how could they be deciding," she asked. Ms. Mendel indicated her belief that the lawsuits that allegedly have been won by patients as a result of the physician providing obscure and "useless" information don't exist.

CHAIR McGUIRE stated that one of the things that physicians look at when determining a place to practice is the legal climate. Trying to envision what every single patient would consider to be reasonable or unreasonable [information] is outrageous, she remarked.

MS. MENDEL interjected, "That's ... not the reasonable person standard; ... it's an objective reasonable person, not every individual patient."

CHAIR McGUIRE opined that physicians become as trained as possible with regard to the most common side effects, risks, et cetera, and so [informing the patient of] the aforementioned is reasonable.

CHAIR McGUIRE reminded the committee that before it is the question of whether to adopt Amendment 3, as amended. [Text provided previously.]

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

Number 1257

REPRESENTATIVE GARA moved that the committee adopt Amendment 4, a handwritten amendment, which read [original punctuation provided]:

> Delete at p 3 line 22
> "serious bodily" and "most"
>
> Delete at line 23, "serious"
>
> and insert at line 22 the word "risks" after "common"

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE GARA opined that a physician has the duty to inform a patient of common risks, not just the most common risks. He said he believes that Amendment 4 doesn't request physicians to do anything other than what they already do. Furthermore, physicians [should] always inform the patient of possible risks of harm. He offered his belief that the physician's duty shouldn't be limited to risks of serious bodily harm. If the harm is common, then the patient should be informed. The lynchpin is the word "common".

REPRESENTATIVE GRUENBERG pointed out that the language being inserted on page 3, line 22, after "common" should be "risks and" rather than "risks". He offered the above as an amendment to Amendment 4. There being no objection, Amendment 4 was amended as specified.

REPRESENTATIVE SAMUELS asked whether there is a definition of "serious bodily harm". He opined that changing the language to refer to merely "harm" results in two lawyers arguing the case. Representative Samuels suggested bifurcating the motion to [adopt] Amendment 4, [as amended], because he is concerned with the deletion of "serious bodily".

REPRESENTATIVE GARA clarified that [Amendment 4, as amended] wouldn't require the physician to disclose all possible harms because the term "common" limits it. Therefore, the physicians have to advise the patients of a small world of common risks and harms. Representative Gara said that "serious bodily harm" isn't defined anywhere [in statute]. At some point, the matter goes before a jury and a physician is required to live up to the standard.

REPRESENTATIVE SAMUELS pointed out that with the adoption of Amendment 4, as amended, the language on page 3, lines 21-22, will, in part, read "shall disclose a known risk of death or harm". There's always a risk of harm, he remarked.

REPRESENTATIVE GARA said that there could be a compromise by leaving in the language "serious" and deleting "bodily" such that the language would read "shall disclose a known risk of death or serious harm".

CHAIR McGUIRE expressed concern that there are many serious harms and it seems that referring to the body is important if it's something that a physician is doing to a patient's body. She noted that she agrees with eliminating the language "most" from page 3, line 22.

Number 0967

REPRESENTATIVE GARA agreed to leave in the language "serious bodily" on page 3, line 22. Therefore, he moved to further amend Amendment 4, as amended, such that it would read as follows:

Delete at p 3 line 22
"most"

Delete at line 23, "serious"

and insert at line 22 the words "and risks" after "common"

CHAIR McGUIRE asked whether there were any objections to the second amendment to Amendment 4, as amended. There being none, the second amendment to Amendment 4, as amended, was adopted.

REPRESENTATIVE GRUENBERG requested that Amendment 4, as amended, be divided. [No objection was heard, and so Amendment 4, as amended, was treated as divided.]

Number 0913

REPRESENTATIVE GARA moved that the committee adopt Amendment 4A, which read:

Delete at p 3 line 22
"most"

CHAIR McGUIRE asked whether there were any objections to Amendment 4A. There being none, Amendment 4A was adopted.

Number 0891

REPRESENTATIVE GARA moved that the committee adopt Amendment 4B, which read:

Delete at line 23, "serious"

and insert at line 22 the words "and risks" after "common"

REPRESENTATIVE ANDERSON objected. He indicated that he could accept the deletion of "serious" from page 3, line 23, although he was uncomfortable with the term "risks".

Number 0778

REPRESENTATIVE GARA moved that the committee adopt an amended Amendment 4B, as follows:

Delete at [page 3], line 23, "serious"

CHAIR McGUIRE, after determining that there were no objections to such, announced that Amendment 4B [as amended] was adopted.

Number 0741

REPRESENTATIVE GRUENBERG moved that the committee adopt [handwritten] Amendment 5A and Amendment 5B, two handwritten amendments on one page, which read:

(A) page 3 line 22 after "and" insert "clearly"

(B) page 3 line 26 after "advice" insert "clearly"

REPRESENTATIVE GRUENBERG explained that Amendment 5A would mean that [the physician] would "clearly explain". He specified that he was referring to an oral explanation.

REPRESENTATIVE ANDERSON objected, and said the assumption is that it is clear when a physician [informs] a patient. He opined that the legislation is good as written, since the word "clearly" could be inserted in almost every provision of proposed legislation.

CHAIR McGUIRE opined that such would be part of the fact-finding mission of the jury. If it's alleged that [the physician] didn't disclose [possible risks and complications], part of the [patient's argument] would be [the patient] saying that he or she didn't understand the physician, or that the information was presented in a lengthy document, or that the patient didn't understand because he or she spoke Spanish. Chair McGuire offered her belief that [adding the proposed language] is unnecessary.

REPRESENTATIVE GRUENBERG asked whether, if the above-mentioned factual circumstances were presented, the jury should be able to make an award to the plaintiff.

REPRESENTATIVE ANDERSON said he didn't believe that someone would make the argument that the physician wasn't obligated to be clear because the statute doesn't include the "clearly" language. Although he agreed that this is a valid point, he said he didn't believe such language should be included in the statute.

Number 0500

REPRESENTATIVE GRUENBERG clarified that he didn't want someone to be able to say that an average physician or professional would have understood the information, because the patient is the one who must have understood the information. He expressed hope that the intent of the legislation is that a reasonable person in the plaintiff's position should have been able to understand the information. The aforementioned should be the standard, he opined.

REPRESENTATIVE ANDERSON disagreed and opined that [the language] is unnecessary. He offered his belief that it's already the case that physicians are already clear when giving instructions.

REPRESENTATIVE GRUENBERG asked if the intent of the legislation is that the explanation should be understandable to a reasonable person in the plaintiff's situation at the time the advice was given. He opined that the aforementioned should be the standard.

REPRESENTATIVE ANDERSON again opined that the proposed additional language is unnecessary.

REPRESENTATIVE GRUENBERG clarified that he's trying to determine what the standard should be, and whether the language referring to that standard is clear.

REPRESENTATIVE ANDERSON said that the standard being used is what a health care provider would determine as reasonable. The health care provider standard, he opined is clear without the additional language.

REPRESENTATIVE GRUENBERG offered his understanding that Representative Anderson is saying that the standard should be what a health care provider would understand.

Number 0222

REPRESENTATIVE ANDERSON pointed out that the legislation specifies that the health care provider "shall disclose a known risk of death or serious bodily harm and explain the common complications that may occur." Furthermore, the explanation would occur under the standard of another health care provider of that industry. The aforementioned is sufficient, he again opined.

CHAIR McGUIRE pointed out that other parts of the law factor into this. The problem with a yes answer to Representative Gruenberg's question, she opined, is that there could be the unintended consequence of adopting Representative Gara's amendment, which would shift [the law] to the reasonable patient standard.

REPRESENTATIVE SAMUELS remarked that [the committee] would want the patient to understand the risks. However, he agreed with Representative Anderson's wanting to avoid a situation in which someone would be sued because the person charged that the information wasn't clearly relayed.

REPRESENTATIVE GRUENBERG said he wanted it to be known that the intent [tape changes midspeech].

TAPE 04-42, SIDE A
Number 0001

REPRESENTATIVE GRUENBERG continued, "... is to be reasonably understandable."

REPRESENTATIVE GARA said he agrees that the committee wants to ensure that the information the physician provides is reasonably understandable and, therefore, perhaps the language doesn't need to be changed. However, he surmised that Representative Gruenberg is being cautious because of the concern of a contrary ruling from a court, since "clearly" was already implied in existing law. The existing law specifies that "we want the information to be given so that a reasonable patient could understand it." However, that language has been [removed], and therefore there is the implication that "we" don't care whether a reasonable patient would understand it.

REPRESENTATIVE GARA noted that Representative Gruenberg proposes leaving in the aspect of ensuring that it's clear to a patient. Although he said he understood that to be the intent, he didn't believe it would be harmful to make it clearer in the statute. Representative Gara recalled that he and Representative Samuels go back and forth on the matter of whether to deny someone a right so that no one can file a frivolous claim or whether to give someone a right so that both people with valid claims and with invalid claims can pursue their rights. Representative Gara opined that it's bad policy to deny people rights on the possibility that someone might file a frivolous claim. Therefore, he announced his support of [Amendments 5A and 5B].

Number 0153

REPRESENTATIVE GRUENBERG withdrew Amendments 5A and 5B.

CHAIR McGUIRE explained that the standard is being changed to a health care provider standard so that a health care provider can be assured with regard to what he or she is expected to inform. The [information] isn't just from what the physicians learned in medical school, but also includes "what a skilled health care provider would know" language. She highlighted that the "informing" language contains some insight because it means that the intent is for the patient to be informed, not just be handed or given the information, about common complications.

REPRESENTATIVE GRUENBERG noted that he concurs with Chair McGuire's comments. He asked if the sponsor has the same understanding as [Chair McGuire].

REPRESENTATIVE ANDERSON replied yes.

Number 0297

REPRESENTATIVE GARA moved that the committee adopt Amendment 6, labeled 23-LS1743\A.5, Bullock, 3/16/04, which read:

> Page 2, following line 27:
> Insert a new subsection to read:
> "(g) The limitation on damages under (d) of this section shall be adjusted by the administrative director of the Alaska Court System on October 1 of each year, calculated to the nearest whole percentage point between the index for January of that year and January of the prior year according to the Consumer Price Index for all urban consumers for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor. The administrative director of the Alaska Court System shall provide notification of a change in the limitation of damages to the clerks of court in each judicial district of the state. The court shall adjust the award for noneconomic damages under this subsection and (e) of this section, if necessary, before the entry of judgment."

REPRESENTATIVE GARA said that the damage limits for this legislation seem to be acceptable. However, he didn't want what happened in California to happen in Alaska. He informed the committee that in 1975, [California decided that] the amount someone should recover for noneconomic damages should be $250,000, which hasn't changed in 30 years. Therefore, if California's $250,000 limit were inflation adjusted, it might sum upwards of $600,000 to $700,000 today. Every year people are given less and less damages. Representative Gara opined that the committee should do what is essentially going to be done during the common course of litigation. He explained that both sides will hire an economist, who will perform future inflationary projections. He suggested that the damage limit should be adjusted upwards for inflation so that the legislature wouldn't have to revisit this legislation each year. By lagging behind inflation, California's law specifies that the worth of someone's ability to walk, to hold his or her child, et cetera

is worth $13.69 a day in today's dollars. Representative Gara said that California should've inflation-proofed [noneconomic damages], and therefore that's what he wanted to do with HB 472.

REPRESENTATIVE ANDERSON stated that he didn't like the "$13.69 a day" as a matter of interpretation. Although he said he understands the argument, he didn't support the amendment increasing the cap because it would defeat the purpose for sponsoring the legislation. He opined that [Amendment 6] seems to lend itself to Representative Gara's first amendment expanding the caps and, thus, he disagrees with [Amendment 6].

Number 0559

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of the adoption of Amendment 6. Representatives Samuels, Anderson, and McGuire voted against it. Therefore, Amendment 6 failed by a vote of 2-3.

The committee took an at-ease from 3:00 p.m. to 3:40 p.m. Present at the call back to order were Representatives McGuire, Anderson, Samuels, and Gruenberg.

Number 0653

REPRESENTATIVE ANDERSON moved that the committee rescind its committee's action, on 3/16/04, in the adopting 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"

REPRESENTATIVE GRUENBERG predicted that he would be the only one opposing this motion. He posited that HB 472 won't be moved today and will be available at the first opportunity [when] all seven members of the committee will be present, with no one being excused from the vote. He requested the ability to be able to re-offer Amendment 1[A.1]. He asked if the sponsor is agreeable to that.

REPRESENTATIVE ANDERSON said that he couldn't guarantee all seven members would be present at that time.

Number 0788

A roll call vote was taken. Representatives Samuels, Anderson, McGuire voted in favor of the motion to rescind the committee's action, on 3/16/04, in adopting Amendment 1[A.1]. Representatives Gruenberg voted against it. Therefore, the motion to rescind the committee's action in adopting Amendment 1[A.1] passed by a vote of 3-1.

CHAIR McGUIRE announced that HB 472 would be held over.

HB 423 - TAXICAB DRIVER LIABILITY

Number 0823

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 423, "An Act relating to accidents involving the vehicle of a person under the influence of an alcoholic beverage; and providing for an effective date."

Number 0830

REPRESENTATIVE ANDERSON, sponsor, paraphrased from the following prepared statement [original punctuation provided]:

> House Bill 423 is a "Good Samaritan" bill for taxicab operators who transport intoxicated persons or who drive an intoxicated person's motor vehicle to their home or another residential location. This legislation would create a deterrent for those who might otherwise drive impaired if unable to find an alternative method of transportation. It grants taxicab companies and the person or organization that participates in making arrangements for the transportation of the intoxicated person and his/her vehicle legal immunity in the event that an accident occurs, except in the case of recklessness, gross negligence, or intentional misconduct.
>
> There are times when Alaskans find themselves in an "end of evening" dilemma – they are over the .08 blood alcohol limit and shouldn't drive, but are worried and reluctant to leave their car unattended overnight. HB

423 resolves this dilemma by allowing a taxicab operator to drive an intoxicated person home while a second operator follows them home in their vehicle.

While annual alcohol-related traffic fatalities have decreased by more than 33% over the past few decades, the latest statistics show a recent increase with more than 17,400 people killed and more than half a million others injured in alcohol-related crashes in 2002 in the United States. Alaska had 87 traffic deaths of which 35 were alcohol-related (40%) in 2002. The previous year there were 47 alcohol related deaths out of the 89 deaths (53%).

In order for this program to be successful cab companies and liquor establishments must work and communicate closely. These establishments will implement the following strategies and policies:

Place signs near pay phones, direct lines to cab companies and in other conspicuous areas of the establishment such as restrooms and near exits.
Train the establishment staff on the availability of this program and how to inform patrons, and how to implement the process.
Make public service announcements (PSA) at closing time to help influence patrons to use the program
Pay a portion of the cab fare cost agreed upon by establishments and program officials
Track program usage to assess effectiveness to promote and or improve the program

This bill passed from the House State Affairs Committee with the understanding we would address the insurance liability issue prior to a hearing in the Judiciary committee. The sponsor worked with Representative Gruenberg and his staff and with Mr. Lessmeier, who represents State Farm Insurance and is in the audience today. You should a letter of support in your bill packet from the Property Casualty Insurers Association of America, submitted by John George. The committee should have a copy of the CS, version I in your bill packet.

I'll be available to answer any questions you have, but I will defer any technical questions on the

insurance liability issue to Mr. Lessmeier, who crafted the new language in the CS.

Number 1059

REPRESENTATIVE GRUENBERG moved to adopt the proposed committee substitute (CS) for HB 423, Version 23-LS1600\I, Luckhaupt, 3/17/04, as the work draft. There being no objection, Version I was before the committee.

Number 1102

MICHAEL L. LESSMEIER, Attorney at Law, Lessmeier & Winters; Lobbyist for State Farm Insurance Company ("State Farm"), stated that he was present to support this legislation. He explained that [State Farm] wasn't involved in the initiation of this concept, but became involved when concerns were raised in the House State Affairs Standing Committee regarding a [hypothetical] situation in which the driver delivering the vehicle home runs a red a light and hurts an innocent individual. After working with Representative Gruenberg and the sponsor, Mr. Lessmeier said, it was determined that the insurance on the vehicle would follow the vehicle. Therefore, the language in Section 1, subsection (a), was changed to read as it does in Version I.

MR. LESSMEIER recalled that the second concern raised was in regard to the liability of an organization or a person who is participating in making arrangements for the transportation of the vehicle who might not hold a liquor license or might not be an agent or employee of "a person". For example, there was an issue raised with regard to what would happen to a municipality or an organization such as Mothers Against Drunk Driving (MADD) if it helped to arrange a program such as that proposed in HB 423. Therefore, the language in Section 1, subsection (b), was changed. He suggested that on page 2, line 12, after "A person", the language, "or entity" should be inserted. Therefore, it would be clear that anyone from any organization that makes arrangements for transportation of vehicle wouldn't be liable.

MR. LESSMEIER pointed out that in Section 1, subsection (c)(2) makes it clear that whatever is being done with this legislation doesn't impact a person's ability to recover damages under any applicable uninsured or underinsured motorist coverage, which didn't seem to be clear in the original legislation. Mr.

Lessmeier concluded by encouraging the committee to move the bill.

Number 1277

JIM SHINE JR., Staff to Representative Anderson, Alaska State Legislature, assisted Representative Anderson, sponsor, by offering that basically this legislation allows an intoxicated bar patron and his or her vehicle to be transported home. The Cabaret Hotel Restaurant & Retailers Association (CHARR) started organizing this concept and it was introduced as HB 68 in the Twenty-First Alaska State Legislature, but ultimately was stalled in the Senate Judiciary Standing Committee at the end of session. He explained that CHARR has been able to obtain financial support from bars, taxi companies, and corporate sponsors in Anchorage in order to pay the $40 one-time flat fee to transport the bar patron and his or her vehicle home. The bar patron will be transported in the taxicab while the bar patron's vehicle will be driven by a second taxicab operator. As already mentioned, the insurance liability will stay with the bar patron's vehicle in the case of an uninsured or underinsured motorist.

REPRESENTATIVE GARA asked what the liability is that people are concerned with under the current law.

MR. SHINE answered the [concern] involves a vehicle owner who doesn't have insurance.

Number 1362

REPRESENTATIVE GARA commented that he doesn't have a grasp of the circumstances which justify the need for this legislation.

MR. LESSMEIER reminded the committee that he wasn't involved in putting together the program. However, he recalled that testimony in the House State Affairs Standing Committee relayed that the transportation companies couldn't procure the insurance to cover this kind of risk, and if they couldn't cover the risk under their own insurance policies, then they wouldn't provide this service.

REPRESENTATIVE GARA asked if this legislation is requiring that the vehicle owner's policy be extended to the person who drives the vehicle in this circumstance.

MR. LESSMEIER answered in the affirmative. In further response to Representative Gara, Mr. Lessmeier specified that the provision [extending the vehicle owner's policy to the person who drives the vehicle] is essentially in Section 1, subsection (a). The intent of Section 1, subsection (a), and [Version I] is that the [vehicle] owner's policy would follow the vehicle.

REPRESENTATIVE GARA said he understood that to be the intent. However, the language [in Section 1, subsection (a)] merely says that the "taxicab driver isn't liable beyond the limits of the owner's car" rather than specifying that the owner's vehicle insurance would [follow the vehicle].

CHAIR McGUIRE opined that it says it by [inference]. She explained that [Section 1, subsection (a)] is specifying that one is liable, but not beyond the limits of the policyholder of the car.

REPRESENTATIVE GARA pointed out that it merely refers to "any applicable insurance policy" and doesn't require that the insurance policy of the owner of the vehicle applies. He offered his understanding that the desire is to say that the vehicle owner's insurance policy should cover the taxicab driver.

Number 1485

MR. LESSMEIER referred to Section 1, subsection (a)(4), and offered his belief that under most [automobile] insurance policies, as long as the driver is driving as a permissive user - driving with permission [from the owner] - then the coverage follows the vehicle. He opined that the language in [Section 1, subsection (a)(4)] accomplishes that for the taxicab driver.

REPRESENTATIVE GARA pointed out that [using such language] is banking on the insurance policy having language in it that matches subsection (a)(4) of Version I. He said he would be more comfortable with language that specifies that the insurance coverage shall apply in the circumstance desired. If the desire is to allow the vehicle owner's policy to protect the victim, then that should be specified, rather than saying that the victim would be protected in the event that the policy of the insurance company has language matching the language in this legislation.

MR. LESSMEIER commented that he isn't familiar with every policy sold. Mr. Lessmeier explained:

> The intent of what we were trying to do here is ... to put the person in no worse [a] situation than they would be in if the driver was actually driving. In other words, let's say this person that is having their car delivered got into that car and ... drove it home. We wanted, with this bill, to put ... the victim in the same position they would be in if that person were behind the wheel. No better. No worse. And ... through this bill, it was not the intent to put them in a better position.
>
> It was not the intent to put them in a worse position. It was the intent of these changes simply to address a situation in the original bill which made the taxicab driver immune from all liability. That's what we were trying to accomplish. We were not trying to create coverage where none exists, Representative Gara, and that would be the concern I would have about your proposal. We were simply trying to put them in the same position. And that's what we intended to accomplish and that's what, I think, we did accomplish.

Number 1640

CHAIR McGUIRE recalled that Representative Rokeberg's 2002 legislation, HB 68, passed the House unanimously and provided 100 percent immunity [for taxicab drivers], rather than the change worked on by Representative Gruenberg and Mr. Lessmeier.

MR. LESSMEIER indicated his agreement, and reiterated that the concern was brought up in the House State Affairs Standing Committee. This solution, he pointed out, was developed in conjunction with the sponsor and Representative Gruenberg's office. If the intent is to find a deeper a pocket than would've existed if the [intoxicated person] had actually gotten into the vehicle and driven home, then it's totally different legislation.

REPRESENTATIVE GARA relayed that he wanted, and he understood Mr. Lessmeier to want, the taxicab driver to have the same coverage as the vehicle owner would have if he or she had driven the vehicle home.

MR. LESSMEIER specified that the intent is to provide the same coverage on the person driving the vehicle home. There is no desire to create coverage where none otherwise existed.

CHAIR McGUIRE interjected that Representative Gara and Mr. Lessmeier are saying the same thing.

REPRESENTATIVE GARA agreed, but opined that the language of the legislation doesn't address it. Therefore, he surmised that [the intent] is that to the extent the owner of the vehicle had coverage, the taxicab driver should be protected by that coverage. If the owner of the vehicle didn't have coverage, then the taxicab driver wouldn't be given coverage that didn't exist.

MR. LESSMEIER argued, "It's a little different. ... It's to the extent that the coverage ... would be in place on the driver of that vehicle."

Number 1740

MR. LESSMEIER posed a situation in which the vehicle is a stolen vehicle. Under Representative Gara's notion, coverage would be created where it would not otherwise exist due to saying that the owner's coverage always follows the vehicle.

CHAIR McGUIRE interjected, "The driver, not the car."

REPRESENTATIVE GARA said, "The driver's coverage."

MR. LESSMEIER noted that the vehicle owner's coverage "may" [provide coverage to the driver of the vehicle] under the terms of the policy. Coverage certainly would be applied to the permissive user of the vehicle under many of the circumstances being discussed. However, [State Farm] had concerns with regard to a person who wasn't a permissive user and there could be other issues. He reiterated that there is no desire to create coverage where it didn't otherwise exist.

REPRESENTATIVE GARA surmised, then, that the intent is to ensure that the taxicab driver has the coverage that the person who would've driven the vehicle home would've had. However, he pointed out, the legislation doesn't make that policy held by the person who would've driven the vehicle home available to the taxicab driver. Representative Gara posed a situation in which an intoxicated individual drove home. In one circumstance the intoxicated individual has a policy that specifies that his

coverage extends to anyone he authorizes to drive him home. In the aforementioned circumstance, this legislation [works] because the policy specifies that the [policy holder] is covered and so is the individual he provides with the authority to drive the vehicle home.

REPRESENTATIVE GARA then posed a situation in which the intoxicated individual's policy says that the policy covers the [policy holder] but not those he gives the authority to drive his vehicle. In such a situation, this legislation doesn't require that the [policy holder's] insurance extend to the taxicab driver. Representative Gara stated that he wants to extend the [policy holder's] insurance to the taxicab driver as was stated by Representative Anderson and Mr. Lessmeier. It seems simple [that the legislation] would specify that the policy should follow the driver, he said.

Number 1978

MR. LESSMEIER said that although he would have to review the statutes, he believes that permissive users are covered. Furthermore, he said he didn't know of any policy that doesn't cover [permissive users]. He offered to check into that. Mr. Lessmeier reiterated [State Farm's] opposition to mandating coverage where it doesn't exist.

REPRESENTATIVE GARA remarked, "If we're only requiring coverage under coverage that exists but not under coverage that doesn't exist, we're not doing anything with this bill."

MR. LESSMEIER disagreed. He explained that this legislation began by giving complete immunity to the driver, which isn't the case now. Now the legislation only provides immunity [up to] the coverage that exists, and furthermore [this legislation ensures] that this doesn't impact a person's ability to recover under his or her [underinsured or uninsured motorist] policy.

REPRESENTATIVE GARA expressed the need not to inadvertently eliminate policy coverage that does exist. He posed a situation in which the person driving the vehicle home may have his or her own liability policy, an underinsured and uninsured motorist policy, and perhaps even a homeowner's policy.

MR. LESSMEIER interjected that the person driving the vehicle home isn't going to have underinsured and uninsured motorist coverage that provides coverage to the injured person. The injured person would be the one with the underinsured and

uninsured motorist coverage. He specified that he wasn't present to debate the philosophical reasons why this legislation was introduced. Mr. Lessmeier clarified that [State Farm] saw a problem [and is attempting to address] the possible situation in which an innocent person is left uncompensated.

REPRESENTATIVE GARA suggested that apart from the owner's policy, which should follow the driver, the legislation should also include language specifying "or any other applicable policy." He said he didn't know why the legislation limits the policies that someone could use to obtain coverage. He specified that the circumstance being addressed is one in which the taxicab driver who is driving the [intoxicated individual's] car home does so poorly and kills someone. Therefore, the desire is to point out to the victim's family from whom it can seek compensation. He expressed the need to allow other policies, beyond the [vehicle] owner's policy, to apply. However, the legislation seems to say that the only policies that apply are uninsured and underinsured policies, even though there may be some liability policies that could apply as well.

CHAIR McGUIRE announced that she would take public testimony today and then set HB 423 aside. She pointed out that [the legislation] has to create an incentive for a taxicab driver to drive an intoxicated person's home. She asked why the taxicab driver would risk having his/her insurance rates increasing due to something happening when the taxicab driver drives an intoxicated person's vehicle home.

Number 2180

MR. LESSMEIER recalled that the testimony in the House State Affairs Standing Committee suggested that adding the language, "or any other applicable policy", would kill this program. Mr. Lessmeier said that [State Farm] wants to recognize, as a matter of policy, that this is a good program and that there is a narrow situation in which an innocent victim could be hurt. Therefore, [State Farm] wants to be sure that in the aforementioned situation, there would be coverage for that person.

REPRESENTATIVE SAMUELS asked if Mr. Lessmeier would have problems with the following language: "The auto insurance that covers the driver [shall also] cover the taxicab driver that drives the car from the licensed premises to the home or directed location of the original driver."

MR. LESSMEIER said he would want to think about that, reiterating that he doesn't want to create coverage where no coverage exists.

REPRESENTATIVE SAMUELS asked, "Of the auto insurance that covers the driver?"

MR. LESSMEIER replied in the affirmative and said that [State Farm] doesn't have any problem with the suggested language.

Number 2266

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration (DOA), testified in support of HB 423. She expressed pleasure with legislation that is trying to do something positive to prevent people from driving while intoxicated. Giving the taxicab driver the opportunity to drive an intoxicated individual's car is a positive step. She commented that it's nice to see legislation that isn't punitive and that addresses a problem.

CHAIR McGUIRE, upon determining no one else wished to testify, closed public testimony.

REPRESENTATIVE GARA asked if the intention is that the taxicab company's liability policy doesn't go into effect [in these situations].

MR. SHINE explained that this is a pilot program for the Anchorage area. Taxicab operators in Anchorage are independent contractors that have to take out their own insurance policies on a vehicle and it only stays with the vehicle. He recalled testimony in the House State Affairs Standing Committee from the transportation inspector, who specified that the insurance [held by the operators] would only be applicable to licensed taxicabs.

REPRESENTATIVE GARA surmised that if the [taxicab driver] also had insurance that followed them, the [taxicab driver] wouldn't mind having that apply.

MR. SHINE agreed. However, he said he found that taxicab operators have a difficult time obtaining insurance because [they] can charge a fee for the driving and there is an incentive to drive faster to obtain better tips and make more trips. He relayed that no insurance company in Alaska will insure taxicab operators. In fact, he said, the only insurance

company that he could find that will insure taxicab operators is "Scottsdale."

TAPE 04-42, SIDE B
Number 2393

REPRESENTATIVE GARA clarified that he isn't saying that all other policies should apply; rather, he is merely asking if there is any reason why language specifying, "any other insurance policy that applies shall apply" wouldn't be acceptable.

MR. SHINE highlighted that HB 423 aims to get drunk drivers off the road. He echoed the sponsor's earlier testimony that almost 40 percent of the traffic deaths in 2002 were alcohol related. In reviewing the issue of insurance, Mr. Shine informed the committee that taxicab drivers are supposed to be professional drivers because they have to go through licensing and drug testing, and thus the probability of a death or an accident while transporting a vehicle would be slim. He relayed that the House State Affairs Standing Committee discussed the slim chance of an accident occurring in comparison to taking drunk drivers off the road and saving lives.

REPRESENTATIVE GARA offered his understanding that the point is not to hold the taxicab driver liable above the available insurance limits. However, the reality is that among professional drivers there is the pressure to drive fast and get more fares. He posed a scenario in which a taxicab driver runs a red light and kills a child or permanently injures someone. He noted that the reality is that most people carry inadequate insurance. The current legislation says that perhaps the policy of the person who would've driven the vehicle home would be in effect, and the legislation also covers uninsured and underinsured coverage. However, he maintained that there may be other insurance policies that also apply. Therefore, he reiterated his suggestion to include the following language: "or any other applicable insurance policy". Representative Gara specified that he didn't want to mandate that other insurance policies apply, but if they do already apply, then they do so in this situation as well. Representative Gara said that he had no problem immunizing the taxicab driver, which he viewed as the purpose of the legislation.

Number 2260

REPRESENTATIVE SAMUELS pointed out that the sponsor statement and the memorandum requesting a hearing for HB 423 seem to suggest that this legislation immunizes the individual who drives the intoxicated individual home as well as the driver of the intoxicated individual's vehicle. He surmised that if this is true and the intoxicated individual is immunized, then every taxicab driver with an intoxicated rider is being immunized. He said he didn't see [such language] in the legislation.

REPRESENTATIVE GRUENBERG clarified that HB 423 has nothing to do with the taxicab driver who transports an intoxicated individual home; this legislation only deals with the individual driving the [intoxicated] individual's vehicle.

Number 2209

CHAIR McGUIRE announced that HB 423 would be set aside.

HB 351 - CARBON MONOXIDE DETECTION DEVICES

Number 2184

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 351, "An Act relating to the devices, including carbon monoxide detection devices, required in dwellings; and providing for an effective date."

Number 2150

REPRESENTATIVE GRUENBERG moved to adopt the proposed committee substitute (CS) for HB 351, Version 23-LS1325\V, Bannister, 3/18/04, as the working document. There being no objection, Version V was before the committee.

Number 2136

REPRESENTATIVE CARL GATTO, Alaska State Legislature, one of the prime sponsors of HB 351, explained that the main reason for this legislation is that there is the possibility of negligence, which could kill people. Furthermore, low levels of carbon monoxide are fairly damaging to newborns, toddlers, and the very young. Moreover, it's possible to have a hazardous situation in the home by accident. In this latter possibility, Representative Gatto pointed out that someone could fall asleep with the auto start to the car in his or her pocket and accidentally activate the auto start. Starting an automobile in

a garage produces enough carbon monoxide to get someone very sick, if not dead.

REPRESENTATIVE GRUENBERG, speaking as one of the prime sponsors of HB 351, informed the committee that HB 351 received a referral to the House Judiciary Standing Committee because the legislation specifies that not having a carbon monoxide detector would be a class B misdemeanor with a 30-day jail sentence. Some have felt that the aforementioned penalty is too high. Therefore, Sections 5 and 6 were added to Version V. Section 5 is a conforming amendment while Section 6 provides that not having a carbon monoxide detector is a violation as defined in AS 11.81.900, which carries a maximum fine of $500.

REPRESENTATIVE GRUENBERG explained that the legislation provides that in all qualified dwelling units, the [carbon monoxide] detection devices must be installed and have an alarm, which can be a visual or auditory alarm. The devices must be in working order, he noted. Representative Gruenberg highlighted that on page 2, line 4, the language "**of any deficiencies**" and "**the landlord**" was added by Representative Gatto. The aforementioned change necessitated broadening the title to include carbon monoxide detection devices as well as smoke detection devices. Basically, this legislation adds carbon monoxide detection devices to the existing law pertaining to smoke detection devices. Representative Gruenberg informed the committee that just this week the Municipality of Anchorage passed a very broad carbon monoxide detection ordinance.

Number 1957

KELLY NICOLELLO, Assistant State Fire Marshall, Central Office, Division of Fire Prevention, Department of Public Safety (DPS), announced that the [division] is in favor of [Version V] because it makes good sense. He noted that very large spaces, such as hotels and large residential locations, aren't impacted. This legislation is geared toward homes.

REPRESENTATIVE GRUENBERG noted that in the past, John Bitney, a lobbyist for Alaska State Home Builders Association, has testified that this is a top priority of that organization. He offered his understanding that it's also a top priority of the firefighters association as well. Representative Gruenberg then drew attention to the [definition] of "qualifying dwelling unit".

CHAIR McGUIRE noted that James Baisden, Fire Marshal, Kenai Fire Department, had been on-line but decided to forward his testimony in written form. Upon determining no one else wished to testify, Chair McGuire closed public testimony on HB 351.

Number 1864

REPRESENTATIVE GRUENBERG moved to report the proposed CS for HB 351, Version 23-LS1325\V, Bannister, 3/18/04, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 351(JUD) was reported from the House Judiciary Standing Committee.

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 1850

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 244, "An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Number 1780

REPRESENTATIVE GRUENBERG moved to adopt the proposed committee substitute (CS) for HB 244, labeled 04-0033, 1/16/2004, as the work draft. There being no objection, this proposed CS was before the committee.

Number 1748

SUSAN A. PARKES, Deputy Attorney General, Central Office, Criminal Division, Department of Law (DOL), reminded the committee that last year it heard a version of HB 244 about which many concerns were raised by committee members and the public. She relayed that the proposed CS should address many of those issues and concerns while maintaining a balance regarding the public's safety, victim's rights, and defendant's rights. Ms. Parkes informed the committee that the consecutive sentencing provisions found in Sections 18-19 and 25-26 are

identical the provisions the committee debated last year which mandate that judges give some consecutive time of imprisonment for serious offenses.

MS. PARKES turned to the issues of immunity and self-defense, which the department views as high priority matters. Both of these issues were in last year's version of HB 244, although in a very different form. She directed the committee's attention to Sections 15-17 and Section 20. Ms. Parkes informed the committee that the desire is for the statute to conform to State v. Gonzalez, which specifies that in Alaska, transactional immunity, rather than use immunity, must be provided. The proposed CS establishes a procedure by which to accomplish this goal. Under the proposed CS, the witness can have a private hearing with the judge and his/her attorney in order to offer proof with regard to why the witness believes he/she has a valid Fifth Amendment privilege. The significant difference between last year's legislation and the proposed CS is that the prosecutor wouldn't be present at that hearing. If the judge found that there was a valid Fifth Amendment privilege, the proposed CS would allow the judge to inform the prosecution of that fact and that it would apply to a higher-level felony, a lower level felony, or a misdemeanor. Therefore, the aforementioned is the only information that would be given to the prosecution and thus when a prosecutor is asked to give a witness immunity, there is enough information to ensure a responsible exercise of immunity. The department believes that this balances privacy and protection of the witness while providing the state enough information to responsibly exercise the tool of immunity.

Number 1514

REPRESENTATIVE GARA asked what the current procedure involves.

MS. PARKES answered that often these things are worked out informally, but there isn't a uniform way in which this is handled. She relayed that her experience is that the judge has a private meeting with the witness or just the witness's attorney and the judge determines whether the witness has a valid Fifth Amendment privilege and then announces that to the prosecution. Then, if the prosecution wants the witness to testify, the witness would have to be given immunity.

REPRESENTATIVE GARA surmised, then, that there could be a situation in which there is a murder and a witness says he or she has immunity, which leads the judge to hold a hearing in

camera and subsequently inform [the prosecution] that the witness will be provided immunity if he/she testifies, but [the prosecution] has no idea what the crime is for which the witness is receiving immunity.

MS. PARKES clarified that only the state can provide immunity. The judge would simply inform [the prosecution] that the witness has a Fifth Amendment privilege and if the witness is required to testify, the witness may incriminate himself or herself. Therefore, if the [prosecution] wants the witness to testify, then [the prosecution] would have to give the witness immunity. In response to Representative Gara, Ms. Parkes confirmed that [the prosecution] receives no indication of what [crime] the immunity might be for. Because the state can only offer transactional immunity, the witness would receive immunity with regard to whatever crime he or she testifies about on the stand.

REPRESENTATIVE GARA inquired as to the witness's interest in not letting the prosecution know the subject of the immunity.

Number 1414

MS. PARKES said that there is concern that [information regarding the level of crime] could somehow be used as an investigative tool; the state could refuse the witness immunity and then focus on that witness in an investigation. However, she opined that the more realistic reason the witness doesn't want the [information] to be known by the prosecution is because people often use the Fifth Amendment as a way to escape having to testify against friends.

REPRESENTATIVE GARA surmised, then, that the court, under this legislation, would only be able to provide the level of the crime but not the specific crime.

MS. PARKES agreed.

MS. PARKES turned to the issue of self-defense and Sections 13 and 14, and explained that Section 13 makes the level of evidence to obtain a self-defense instruction consistent with federal law. Therefore, the legislation proposes the need for some plausible evidence that could warrant a jury to find self-defense before the instruction is given. She opined that under Alaska case law, a judge will give a self-defense instruction for any evidence, even implausible evidence, of self-defense.

CHAIR McGUIRE recalled the Wallner case in which a woman was stabbed forty-some times. She further recalled that the defendant, because the confession was excluded, took the stand and offered a self-defense theory. In the aforementioned situation, would that be considered plausible, she asked.

MS. PARKES answered that a judge would have to make that decision, and such a decision would be based on whether the judge found the defendant's testimony credible or plausible. If it is found to be plausible, the self-defense instruction might be given.

Number 1173

REPRESENTATIVE GRUENBERG clarified that the content of the instruction is a question of law, while the giving of instruction, based on the view of the evidence, makes it almost review-proof in many cases. The trial court in Alaska has very broad discretion on the admission and exclusion of evidence and whether to give it to a jury.

MS. PARKES agreed that there is broad discretion with regard to what evidence goes to a jury. She then explained that the problems in self-defense cases have mainly arisen in situations in which a drug deal "went bad" or there has been gang activity in which [the prosecution] can't show who fired the first shot, and so no one is prosecuted. Therefore, the legislation specifies that one wouldn't be entitled to self-defense if the individual is involved in a drug transaction or gang activity.

CHAIR McGUIRE commented that such was what the committee requested last year.

REPRESENTATIVE GRUENBERG noted that the language being discussed is on page 8, lines 7-13. Representative Gruenberg said he is very concerned because [the language] doesn't specifically say what Ms. Parkes is saying. Furthermore, there aren't one set of evidentiary or defense rules for gang-related cases and drug cases.

CHAIR McGUIRE remarked that at least [the language] is getting closer to what was being discussed [at the last hearing].

Number 0933

REPRESENTATIVE GARA commented that he still isn't convinced that there isn't a way to better limit the language to apply to gang

activity. Representative Gara acknowledged that it's difficult to come up with fair rules for people who are doing terrible things. In this case, Representative Gara said that he is more sympathetic to making it harder for the person who is in the business of selling drugs. He said he didn't consider the person who purchases drugs because of his or her drug habit as engaging in the same class of crime [as a person who is in the business of selling drugs]. He posed a situation in which a person who purchases drugs from someone he or she knows is dangerous decides to carry a weapon for protection. In such a situation, if the drug dealer starts violent activity and the purchaser defends himself or herself, the purchaser would lose his/her right to claim self-defense under this provision.

REPRESENTATIVE GARA specified that he would be more comfortable dealing with such a situation in a way that affects the drug dealer [because] a drug dealer who brings a weapon to a drug deal is doing something much worse than someone with a drug habit who might bring a gun along at a drug deal. He asked if such a distinction could be made in this provision.

MS. PARKES recalled that in the Senate there were suggestions to limit it to felonious activities or to limit it to people who bring a dangerous weapon. The language is being reviewed for possible changes in order to make it apply in the situations desired.

REPRESENTATIVE GARA said he would probably be agreeable if it is limited to the [drug] dealer, not the purchaser.

Number 0729

REPRESENTATIVE SAMUELS posed a situation in which a [drug user] goes to a drug dealer's apartment and shoots the drug dealer, takes the drugs, and claims self-defense.

REPRESENTATIVE GARA responded that the [drug user] would go to jail.

REPRESENTATIVE SAMUELS clarified that in that hypothetical situation, the [drug user] came by to purchase only a small amount of drugs.

MS. PARKES interjected that when everyone has a gun, proving who drew first is the problem. Therefore, the [intent] is to address those situations in which one engages in inherently dangerous activity that one comes to armed because of the

knowledge that it's inherently dangerous. In such a situation, the individual assumes the risk that he or she might have to use his or her weapon. "This is meant to deter people from doing that," she said.

REPRESENTATIVE GRUENBERG said he doubted that an individual who is going to purchase or sell a large quantity of drugs is going to review the criminal code to determine whether he or she will be prosecuted for self-defense. Representative Gruenberg opined that this isn't a circumstance in which [the law] would deter anyone.

MS. PARKES continued her presentation, noting that the remaining provisions are new ones. She pointed out that Section 8 provides for a small modification to the felony murder statute, and explained that [the department] is proposing the deletion of the "other than a participant" language. Therefore, [those participants who didn't point a gun] could be charged with murder in the second degree in a situation in which four people attempt to rob a convenience store and one of the four points the gun at the clerk, but the clerk shoots the individual who pulled the gun.

MS. PARKES offered that right now, there doesn't seem to be a logical reason to treat participants in a serious felony differently when the foreseeable consequence is that someone could die, whether it's an innocent person or one of [the perpetrators]; "it's the same serious conduct, so we're proposing to take away that distinction."

MS. PARKES highlighted that Sections 21 and 23 address felony driving while under the influence (DUI). Because of the 10-year look-back, there are situations in which someone will have a felony DUI and later receive a misdemeanor DUI. Therefore, the [department] is proposing that once one receives a felony DUI, every DUI received after that is a felony.

Number 0467

MS. PARKES, in response to a question, returned to Section 8 and explained that the language "other than a participant" was deleted. Therefore, if one of the "bad guys" die rather than the victim, the other "bad guys" can be charged with murder in the second degree. Under current law, if, during the course of a serious felony, someone other than a participant is killed, it's considered murder in the second degree.

REPRESENTATIVE GARA surmised, then, that in a situation in which one of the participants in the felony is killed, under the proposed CS, it would also be murder in the second degree.

MS. PARKES answered in the affirmative.

REPRESENTATIVE GARA posed a situation in which two people commit a burglary or robbery with no intention to hurt anyone, but the store clerk shoots one of the burglars. Under the proposed CS, the remaining burglar would be charged with murder in the second degree.

MS. PARKES replied yes, and added that under current law if robbers went into a store with no intention to kill anyone, but one of them shoots the store clerk, the remaining participants would be charged with murder in the second degree.

Number 0229

REPRESENTATIVE GRUENBERG, returning attention to Sections 21 and 23, mentioned that Representative Rokeberg has introduced legislation dealing with the look-back provision.

MS. PARKES offered her understanding that Representative Rokeberg's legislation addresses the misdemeanor look-back, while the proposed CS only addresses felony DUI, which currently has a 10-year look-back. She explained that currently, one would have to have two prior DUIs within a 10-year period and then the third DUI would be a felony. Therefore, the individual would do some jail time and, after being released, if the individual was charged with another DUI two years later, that DUI would only be a misdemeanor because it would be beyond the 10 years.

MS. PARKES turned attention to Sections 22 and 24, which addresses Conrad v. State wherein the new "big gulp" defense was put forward. She explained the "big gulp" defense as follows: an individual at a bar who isn't intoxicated pounds back five shots and hops in his or her car to drive home. The police immediately stop this individual before the alcohol can enter the individual's blood stream, but [the alcohol has entered the blood stream] an hour later at the police station when he/she is tested.

TAPE 04-43, SIDE A
Number 0001

REPRESENTATIVE GRUENBERG asked if there is a constitutional problem with this [defense].

MS. PARKES said she didn't believe so, and explained that [the department] believes it's a perversion of the current law.

REPRESENTATIVE GRUENBERG posed a situation in which one individual drinks just immediately before the accident, but so immediately that it hasn't had a chance to affect the individual. He also posed a situation in which an individual drinks immediately after an accident and [the alcohol] didn't affect the individual in this case either. If this [legislation] precludes the [big gulp] defense, he opined, there would be due process and equal protection problems because in both hypothetical scenarios, the alcohol didn't affect the driving.

MS. PARKES disagreed and opined that what's being prohibited is people having that level of alcohol in their bodies getting into a car and driving. She said she didn't believe the intent is to get into the "blood-alcohol expert-witness" debate on the blood alcohol level. In the case wherein someone drinks after driving, the alcohol isn't in the person's system when he/she was behind the wheel. The aforementioned situation wouldn't be illegal. However, she opined that it's very different if someone has alcohol in his/her system at the time of an accident. She pointed out that the statute says that if within four hours of the driving, a person's blood alcohol concentration (BAC) is 0.08 or over, he/she is DUI. Therefore, she said, she believes that the legislature can legislate the aforementioned. Ms. Parkes said she didn't believe [the committee] wants people drinking in bars to try to calculate their body weight, how much they have eaten, and how far away they live in order to determine whether they can make it home before [the alcohol] reaches their system.

REPRESENTATIVE GARA surmised that this legislation doesn't limit the "big gulp" [defense] in the traditional case.

MS. PARKES replied no, and specified that the defense is being prohibited because the individual would have the alcohol in his or her system when behind the wheel of the car. She clarified that what isn't being prohibiting is the [defense] for a situation in which an individual pulls into his or her driveway and, after entering the house, drinks.

Number 0329

REPRESENTATIVE GARA posed a situation in which a chemical test indicates that an individual is drunk, although the individual only had two drinks and believes the chemical test to be wrong. In such a situation, the individual would want to introduce evidence of having consumed alcohol in order to explain the results of the chemical test. However, it seems that Section 22 doesn't allow for the introduction of evidence showing that the individual didn't have very much to drink.

MS. PARKES clarified that there is no intention to prohibit an attack on an inaccurate chemical test. The intent is simply to not allow the argument that at the time the individual was driving the blood alcohol was lower than specified at the later chemical test.

REPRESENTATIVE GARA remarked that the intent is fine, although the language is of concern.

MS. PARKES offered to review that.

REPRESENTATIVE GARA suggested that the language should say, "If you're defense is that you've had an amount of alcohol that would render you intoxicated, ... you can't use the defense that you weren't intoxicated in time ... for the [chemical test]." He related his belief that the "big gulp" theory could be described in the section and then specified that it can't be used.

MS. PARKES turned attention to Section 9. She explained that the assault statutes include assault in the fourth degree, which refers to criminal negligence causing "physical injury by means of a dangerous instrument." However, there is no assault statute that covers cases in which an individual in a vehicular collision may not have had a blood alcohol level at 0.08 but may have alcohol or drugs in his/her system, or some other condition that makes the individual's driving criminally negligent. Therefore, to cover such serious-physical-injury situations, the proposed CS includes a new assault in the third degree provision that would make such a situation a class C felony.

REPRESENTATIVE GRUENBERG highlighted that the lowest crime in [Alaska statute] is a class B misdemeanor and the next level is a violation. Representative Gruenberg opined that there are some [crimes] that should have a 30-day jail sentence, and therefore he stated his desire to have a class C misdemeanor. He commented that a number of things would fall into his

proposed class C misdemeanor. He inquired as to the department's thoughts on such.

MS. PARKES said she would research that issue, but pointed out that the disorderly conduct statute has a maximum of 10 days in jail. Therefore, there is already at least one statute in which the penalty is different than that of a class A or B misdemeanor.

CHAIR McGUIRE announced that HB 244 would be held over.

ADJOURNMENT

Number 0743

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:20 p.m.