

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 25, 2004
8:00 a.m.

TAPE(S) 04-8&9

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 217

"An Act relating to genetic privacy; and amending Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure."

HEARD AND HELD

SENATE BILL NO. 333

"An Act relating to judicial relief before final administrative decisions of state agencies."

HEARD AND HELD

CS FOR HOUSE BILL NO. 260(JUD)

"An Act relating to immunity for free health care services provided by certain health care providers; and providing for an effective date."

HEARD AND HELD

CS FOR HOUSE BILL NO. 252(STA)

"An Act relating to the terms and duties of the members of the State Board of Registration for Architects, Engineers and Land Surveyors."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 217

SHORT TITLE: GENETIC PRIVACY
SPONSOR(s): SENATOR(s) OLSON

05/09/03 (S) READ THE FIRST TIME - REFERRALS
05/09/03 (S) HES, JUD
01/28/04 (S) HES AT 1:30 PM BUTROVICH 205
01/28/04 (S) Moved CSSB 217 (HES) Out of Committee
01/28/04 (S) MINUTE(HES)
01/30/04 (S) HES RPT CS 1DP 1NR 2AM NEW TITLE
01/30/04 (S) DP: DYSON; NR: GUESS;
01/30/04 (S) AM: GREEN, WILKEN
02/06/04 (S) JUD AT 8:00 AM BUTROVICH 205
02/06/04 (S) Heard & Held
02/06/04 (S) MINUTE(JUD)
02/18/04 (S) JUD AT 8:00 AM BUTROVICH 205
02/18/04 (S) Scheduled But Not Heard
02/25/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 333

SHORT TITLE: IF UNREAS. AGENCY DELAY, COURT DECIDES
SPONSOR(s): SENATOR(s) THERRIAULT

02/16/04 (S) READ THE FIRST TIME - REFERRALS
02/16/04 (S) JUD, FIN
02/25/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: HB 260

SHORT TITLE: IMMUNITY FOR PROVIDING FREE HEALTH CARE
SPONSOR(s): REPRESENTATIVE(s) SEATON

04/11/03 (H) READ THE FIRST TIME - REFERRALS
04/11/03 (H) L&C, JUD
04/28/03 (H) L&C AT 3:15 PM CAPITOL 17
04/28/03 (H) Moved CSHB 260(L&C) Out of Committee
04/28/03 (H) MINUTE(L&C)
04/30/03 (H) L&C RPT CS(L&C) 2NR 5AM
04/30/03 (H) NR: LYNN, ROKEBERG; AM: GATTO,
04/30/03 (H) CRAWFORD, GUTTENBERG, DAHLSTROM,
04/30/03 (H) ANDERSON
05/09/03 (H) JUD AT 1:00 PM CAPITOL 120
05/09/03 (H) Moved CSHB 260(JUD) Out of Committee
05/09/03 (H) MINUTE(JUD)
05/10/03 (H) JUD RPT CS(JUD) 6DP
05/10/03 (H) DP: HOLM, GARA, OGG, GRUENBERG,
05/10/03 (H) SAMUELS, MCGUIRE
05/19/03 (H) TRANSMITTED TO (S)
05/19/03 (H) VERSION: CSHB 260(JUD)

05/20/03 (S) READ THE FIRST TIME - REFERRALS
05/20/03 (S) HES, JUD
01/28/04 (S) HES AT 1:30 PM BUTROVICH 205
01/28/04 (S) Moved SCS CS HB260 (HES) Out of
Committee
01/28/04 (S) MINUTE(HES)
01/30/04 (S) HES RPT SCS 2DP 2AM SAME TITLE
01/30/04 (S) DP: DYSON, WILKEN; AM: GREEN, GUESS
02/25/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: HB 252

SHORT TITLE: OCC LICENSING: TERMS OF BD & CONT. EDUC

SPONSOR(S): REPRESENTATIVE(S) MCGUIRE

04/08/03 (H) READ THE FIRST TIME - REFERRALS
04/08/03 (H) L&C, STA
05/02/03 (H) L&C AT 3:15 PM CAPITOL 17
05/02/03 (H) Moved CSHB 252(L&C) Out of Committee
05/02/03 (H) MINUTE(L&C)
05/05/03 (H) L&C RPT CS(L&C) NT 4DP
05/05/03 (H) DP: LYNN, DAHLSTROM, ROKEBERG, ANDERSON
05/07/03 (H) STA AT 8:00 AM CAPITOL 102
05/07/03 (H) Moved CSHB 252(STA) Out of Committee
05/07/03 (H) MINUTE(STA)
05/08/03 (H) STA RPT CS(STA) NT 4DP 1NR
05/08/03 (H) DP: DAHLSTROM, LYNN, SEATON, WEYHRAUCH;
05/08/03 (H) NR: BERKOWITZ
05/15/03 (H) TRANSMITTED TO (S)
05/15/03 (H) VERSION: CSHB 252(STA)
05/16/03 (S) READ THE FIRST TIME - REFERRALS
05/16/03 (S) L&C, JUD
05/19/03 (S) L&C RPT 2DP 1NR
05/19/03 (S) DP: SEEKINS, STEVENS G; NR: FRENCH
05/19/03 (S) L&C AT 8:00 AM BELTZ 211
05/19/03 (S) Moved SCS(L&C) Out of Committee
05/19/03 (S) MINUTE(L&C)
02/18/04 (S) JUD AT 8:00 AM BUTROVICH 205
02/18/04 (S) Heard & Held
02/18/04 (S) MINUTE(JUD)
02/25/04 (S) JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Representative Paul Seaton
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of HB 260

Mr. Mike Haugen
Alaska Physicians and Surgeons
4325 Laurel St.
Anchorage, AK
POSITION STATEMENT: Supports CSHB 260(JUD)

Ms. Marie Darlin
AARP - Capital City Task Force
Juneau, AK
POSITION STATEMENT: Supports CSHB 260(JUD)

Ms. Pat Senner
Alaska Nurses Association
Anchorage, AK
POSITION STATEMENT: Supports CSHB 260(JUD)

Mr. Dave Stancliff
Staff to the Administrative Regulation Review
Committee
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Presented SB 333

Mr. Doug Wooliver
Alaska Court System
303 K St.
Anchorage, AK 99501-2084
POSITION STATEMENT: Answered questions in regard to SB 333

Mr. Dan Houghton
Chief Financial Officer
Alaska Regional Hospital
POSITION STATEMENT: Supports SB 333

Senator Donny Olson
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 217

Ms. Robbie Meyer
American Council of Life Insurers
No address provided
POSITION STATEMENT: Expressed concerns about SB 217

Ms. Jennifer Rudinger
Alaska Civil Liberties Union

Anchorage, AK

POSITION STATEMENT: Expressed concerns about SB 217

ACTION NARRATIVE

TAPE 04-8, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:00 a.m. Senators Ogan, Ellis, French and Chair Seekins were present. The first order of business to come before the committee was CSHB 260(JUD).

^#HB 260

CSHB 260(JUD)-IMMUNITY FOR PROVIDING FREE HEALTH CARE

REPRESENTATIVE PAUL SEATON, sponsor of HB 260, explained the purpose of HB 260 is to encourage health care providers to provide services to Alaskans who would not otherwise be able to obtain proper health care. It does so by offering immunity to liability for civil damages resulting from an act of omission. HB 260 is consistent with the Volunteer Protection Act passed by Congress in 1997. The bill requires written notification to patients of the provider's immunity to civil prosecution.

[SENATOR THERRIAULT arrived.]

REPRESENTATIVE SEATON said the Senate HESS Committee made a change to Section 3; it clarifies that the health care must be provided in conjunction with a government entity or non-profit organization and the health care provider is acting within the scope of the provider's actively maintained license. Nothing in the legislation provides immunity for the agency or the non-profit agency; they must carry malpractice insurance. CSHB 260(JUD) will allow health care providers, especially those who have retired and no longer carry malpractice insurance, to provide services.

He noted the sideboards in the legislation are that immunity does not apply to the organization or to gross negligence or willful acts. He indicated members' packets contain a definition of gross negligence and willful act used throughout the statutes. He offered to answer questions.

SENATOR OGAN said he did not see any specific mention of retired health care providers in CSHB 260(JUD) and asked if the bill will apply to others.

REPRESENTATIVE SEATON said it provides immunity for anyone working within the scope of his or her license. It is especially critical for retired medical providers because many of them do not carry medical malpractice insurance. He pointed out it will not prevent compensation for expenses, so that a community could provide transportation and housing to a medical professional when traveling to the community to provide services but the term "compensation" is well defined in the legislation.

SENATOR THERRIault asked how it might apply to a health care provider who offered free services on a cruise ship and whether that person would get a free cruise and be covered.

REPRESENTATIVE SEATON noted "compensation" means receiving something of value, which is defined in the federal law as well.

CHAIR SEEKINS asked if non-profit organizations are required to carry medical malpractice insurance.

REPRESENTATIVE SEATON deferred to Mr. Haugen for an answer.

CHAIR SEEKINS said he wondered if anyone would be liable if these services are provided at the facilities of non-profit organizations.

REPRESENTATIVE SEATON said the bill specifically requires written recognition by the patient that the provider is not liable. In addition, the provider must be working under the authority of a non-profit organization or another agency. He said it does not apply to an individual who provides a service independently; there must be some contractual relationship.

SENATOR FRENCH asked how many health care providers are currently offering free services at their own economic detriment and how many might participate if CSHB 260(JUD) is enacted.

REPRESENTATIVE SEATON said he could not provide a number. He said numerous medical professional associations have contacted him and they all support this bill.

SENATOR FRENCH complimented Representative Seaton and staff on the excellent back-up material they provided.

CHAIR SEEKINS announced that the committee would take public testimony.

MR. MIKE HAUGEN, Director of Alaska Physicians and Surgeons, said his association represents about 170 physicians in Anchorage and 2 in Fairbanks. He noted statistics cite the average age of an Alaskan physician at 51. In addition, the state is not recruiting enough new doctors to replace them. Many of his members are in their late 50s and 60s; he believes many of them would take advantage of a bill like this. They are not ready to "hang up their shingles" and walk away after accumulating a lifetime of knowledge. He believes CSHB 260(JUD) will give physicians an incentive to retire in Alaska and help the communities that are not well served. A Providence Hospital study reported that Anchorage alone has a shortage of 160 to 200 doctors.

SENATOR FRENCH asked how much medical malpractice currently costs for a general practitioner, or non-specialist.

MR. HAUGEN said he believes a general internist pays about \$15,000 per year and that the premiums have been increasing rapidly. He said most physicians do not carry malpractice insurance once they retire.

CHAIR SEEKINS asked if a retired physician without malpractice insurance could have hospital privileges throughout the state.

MR. HAUGEN could not answer that question.

CHAIR SEEKINS said he was wondering if the Fairbanks Memorial Hospital, for example, could allow a retired physician to perform surgery at no charge with the patient's signed understanding that the physician did not carry malpractice insurance.

MR. HAUGEN thought each hospital would make that determination on an individual basis.

CHAIR SEEKINS asked Mr. Haugen, as an attorney, if he would recommend that a hospital allow that.

MR. HAUGEN said probably not.

SENATOR OGAN asked if a paid staff person follows a direct order of a physician who is immune from liability would also be immune from liability.

MR. HAUGEN said he believes the facility would be liable if the paid staffer is employed by the facility, however he hesitated to give a definitive answer.

SENATOR OGAN asked if other states have similar legislation.

MR. HAUGEN said Alaska would be one of the last states to pass such legislation. Over 40 states currently have similar laws.

SENATOR OGAN asked if any case law has been established.

MR. HAUGEN said he has been told that very few lawsuits have been brought against physicians who are immunized by this type of legislation.

SENATOR FRENCH asked what standard a paid staffer would be held to - negligence or gross negligence.

MR. HAUGEN said the bill would not immunize paid staff so the standard would remain the same.

CHAIR SEEKINS asked where the paid staffer would fall in the matter of responding to that superior.

MR. HAUGEN said he could not answer that question.

REPRESENTATIVE SEATON pointed out that Version V contains a slight drafting error.

SENATOR THERRIAULT moved to adopt Version V as the working document before the committee.

CHAIR SEEKINS announced that without objection, Version V was before the committee.

REPRESENTATIVE SEATON noted on page 2, line 22, the words "medical clinic," should be inserted between "in the" and "governmental entity."

SENATOR THERRIAULT moved to make the aforementioned addition to page 2, line 22.

CHAIR SEEKINS announced that without objection, the motion carried. He then took public testimony.

8:23 a.m.

MS. MARIE DARLIN, Coordinator of the Capital City Task Force for AARP, informed members that AARP submitted a written letter of support. AARP believes this legislation will help alleviate the overall need for physicians in Alaska. At least 43 other states have enacted similar legislation, so it has been tried before, found to work, and created a win-win situation for everyone.

MS. PAT SENNER, Alaska Nurses Association (ANA), said ANA's interest in this bill stems from its efforts to have nurses ready to volunteer in a time of need, whether that be a natural disaster, act of terrorism or disease outbreak. She said the current statutes have been patched together over time and contain holes. It would be helpful to review those statutes and draft a more comprehensive set. However, in the meantime, the current statutes do not cover health care providers who volunteer to care for individuals with non-life threatening illnesses in times of protracted emergency events. For example, after September 11, the Red Cross sheltered air travelers who were stranded in Anchorage. Those travelers' lives were not in immediate danger, but they had a need for health care services.

MS. SENNER thanked Representative Seaton for amending the bill to include "temporary emergency site," as its inclusion will help health care providers who volunteer in emergency situations. She said the important factors are under whose auspices individuals volunteer and whether they are qualified to provide health care services - not where they provide services. The amended language addresses those factors. Another group of health care providers covered by this bill would be employees of the federal government who are covered by the federal government legal system in terms of malpractice insurance. Those employees do not carry their own malpractice insurance.

CHAIR SEEKINS asked if nurses normally carry malpractice insurance.

MS. SENNER said the ANA encourages them to do so but they often rely on their employers' insurance.

CHAIR SEEKINS asked where a nurse would purchase malpractice insurance.

MS. SENNER said the ANA offers malpractice insurance except for the delivery of babies.

CHAIR SEEKINS noted that with no further participants, public testimony was closed. He then said he would hold the bill in

committee so that the committee could get answers to the question of liability of staff taking direct orders and the question of liability for nurses providing emergency care.

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^#SB 333

SB 333-IF UNREAS. AGENCY DELAY, COURT DECIDES

CHAIR SEEKINS announced that Version A of SB 333 was before the committee.

SENATOR GENE THERRIAULT, sponsor of SB 333, told members this legislation is the third piece of a package of bills he introduced that makes changes to the regulatory and administrative hearings process. SB 203 reforms the internal administrative process with a central panel concept; SB 287 provides for legislative input into the regulatory process; and SB 333 allows a person to take an administrative hearing case to the superior court if he or she feels caught in an endless loop.

SENATOR THERRIAULT explained that SB 333 provides a safety valve in the administrative process. Under current law, a person has no access to the court system until he or she has exhausted the administrative process. However, it is possible that a final decision may never be reached in that process. People caught in that process often feel that delays are an attempt to wear them down. SB 333 establishes an extraction option by allowing the court to intervene. It will provide an incentive to finalize administrative hearings and leave the integrity of the administrative process intact; however, it changes the dynamics by putting hearing officers on notice.

MR. DAVE STANCLIFF, staff to the Administrative Regulation Review Committee (ARRC), informed members that this reform is based in part on testimony heard on SB 203. People said they have been stuck in the administrative hearing process for growing periods of time while costs accrue to both state government and the private sector. The principle behind SB 333 is similar to the 120-day legislative session limit so applying a time limit on the executive branch does not chart new ground. In addition, the judicial review process under AS 44.62.300 allows a petitioner to find that a regulation is invalid. SB 333 gives the court wide discretion to determine whether or not the petitioner is making a valid argument that he or she no longer has the financial resources and will be damaged without quick finality to a decision.

MR. STANCLIFF said he worked with one of Senator Ogan's constituents who came to Senator Ogan saying he needed to get his case into court. He said people often feel they are being denied due process because of the expense and time the administrative hearing process takes. SB 333 will provide some assurance for people with fewer resources. He noted that the cost to the private sector is 3 times the cost to state government so SB 333 will provide a stable, predictable business climate.

8:40 a.m.

SENATOR OGAN asked if SB 333 could act as a "stand alone" bill even though it is part of a package.

MR. STANCLIFF said SB 333 could have been incorporated into SB 203 but the sponsor and those involved with the negotiations felt this matter should stand independently.

SENATOR THERRIAULT clarified that the language on page 2, lines 5-12, contains the conditions that must be satisfied before a person can ask for court intervention. SB 333 does not allow a shortcut; the petitioner must have satisfied all procedural requirements and show that further delay will cause financial harm. The court must then determine that the agency has unreasonably delayed the process.

SENATOR OGAN expressed concern that "unreasonably delayed" is a subjective term.

SENATOR FRENCH asked how long a typical administrative hearing takes.

MR. STANCLIFF said the length of time varies a great deal, depending on the complexity of the matter, the agency and which rules apply under the Administrative Procedures Act (APA). He thought that a sufficient track record has been established from which the court can make a determination. He also thought that the timelines that will come into play with SB 203 will help the court decide whether an agency has been timely. He noted the court could establish a time certain for resolution by the agency or decide to take it up. He said a number of people have been stuck in the administrative hearing process for over 10 years, and a fair number over 5 years, according to statistics gathered by the ARRC. Nothing requires an agency to resolve a matter in finality within a certain timeframe. The number of times an agency can ask for information is unlimited, and an

agency can continually remand decisions within areas of expertise. He said if a person has expert legal advice, he or she will not approach the court without a solid history and track record of the case.

SENATOR FRENCH said he heard two answers: that the court can look at a track record and that there is no way to tell. He said if a track record exists, he would like to see a copy. He pointed out that a court does not do research on its own; it asks for evidence and whoever brings the best evidence wins. The petitioner will have to convince the court that an agency delay is unreasonable so it will fall on the petitioner to determine the average length of cases. He sees that as onerous for the petitioner and asked Mr. Stancliff if he has done any research in that area that would give the court some guidelines.

MR. STANCLIFF said he asked the senior law judge of Colorado the longest amount of time a person should be held in the administrative hearing process. He said 180 days.

CHAIR SEEKINS maintained that the courts interpret words like "egregious" or "frivolous" regularly so he does not believe a judge would have difficulty determining an unreasonable timeframe. He said he believes SB 333 will provide an incentive to agencies to make sure their practices are defensible in front of a judge.

SENATOR OGAN said the Regulatory Commission of Alaska (RCA) is one of the more controversial agencies with administrative hearing powers, especially in regard to the telephone industry. That industry is one of the fastest changing, regarding technology and services.

TAPE 04-8, SIDE B

He said by the time the telephone companies get a ruling, the industry has morphed to a whole new dynamic and the ruling may be a moot point. He asked if SB 333 affects the RCA and will motivate it to issue decisions in a timelier manner.

MR. STANCLIFF indicated SB 333 touches the RCA and every other regulatory body in the state. He said SB 333 can save the state and private sector an incalculable amount of money but its main purpose is to provide a better way for the government to do business and to balance the power of the executive branch with the legislative and judicial branches.

SENATOR FRENCH asked if the administrative hearing process would continue while the court makes its determination or whether the proceeding would be automatically stayed upon an action being filed in court.

MR. STANCLIFF said SB 333 is silent on that issue. He said he believes the agency would be able to continue and that it might entice the agency to wrap a case up rapidly to avoid court action.

SENATOR THERRIAULT said he would want the administrative process to continue. He stated:

...The fact that you are availing yourself of the ability to go to court may [indisc.] the agency to wrap things up. They may realize that their actions have been egregious and rather than suffer the embarrassment of going to court and being told so, they'll wrap things up. What we're trying to get to here is the final decision so I wouldn't want this process to prevent you from getting to a final decision. It's not like a court case, I don't think, where you feel something has been determined incorrectly and you want to stay the whole process while you get that question answered necessarily on appeal. So, unless Senator French has some reason to do otherwise, I think letting the process forward is probably the correct thing to do.

SENATOR FRENCH referred to the language on page 2, lines 24-28, and said it implies that the administrative proceeding is stayed because it says if the court decides that a person is not eligible for judicial relief, the agency shall continue the proceeding. He argued that direction would be unnecessary if the proceeding was allowed to continue simultaneously.

SENATOR THERRIAULT thought that language needs further clarification and said he does not want a court filing to automatically stop the administrative proceeding.

SENATOR OGAN asked if the court could remand the case to the agency.

MR. STANCLIFF explained that the language on page 2, lines 15-22, gives the court wide discretionary authority. The court could enjoin the administrative proceeding, which suggests to

him that until it does so, the proceeding continues. He suggested getting an interpretation from the legal drafter.

CHAIR SEEKINS agreed.

SENATOR FRENCH asked if the bill contains a limit on the number of times a person can go to court and claim that the administrative proceeding is taking too long.

MR. STANCLIFF said it does not.

CHAIR SEEKINS announced the committee would take public testimony.

MR. DOUG WOOLIVER, Administrative Attorney, Alaska Court System, said as is the court's typical practice, it takes no position on SB 333. He said the Alaska Court System submitted an indeterminate fiscal note because it does not have a good sense of how many cases will be filed. He explained that in order to move out of the administrative setting into the superior court, the petitioner must allege the agency is unreasonably delaying the process and the delay is causing significant and irreparable harm. The petitioner would file a petition but the court is unlikely to rule without considering the agency's rebuttal and holding a hearing to decide whether the delay is unreasonable. He said it is entirely likely that the court system will only see a handful of cases, particularly in light of the other proposed reforms. He added that if the administrative hearings were not stayed when a motion is filed, SB 333 would spur quick agency action. He noted, however, that a significant number of people within the administrative process will feel the process is unreasonably delayed. He said many hundreds of cases may be pending before the regulatory agencies and only a small number of those could have a big impact on the court system. The court system does not have a clear idea of whether this option will be used judiciously. He said he is putting the court's uncertainty on the record in case it is necessary to request relief from the legislature next year.

CHAIR SEEKINS asked how the court would determine an "unreasonable" delay.

MR. WOOLIVER said that determination would be fact-specific and made on a case-by-case basis. It may depend on how many times the agency asks for information, whether the issue is seasonal and could vary by industry.

CHAIR SEEKINS asked how long it might take for the court to create guidelines for future cases.

MR. WOOLIVER said that is possible to some extent but superior court cases are not precedent setting. He said attorneys who do a lot of work in this area would start to get a sense of timeliness but attorneys will not necessarily present the petitioners.

SENATOR THERRIAULT believed the expense of taking a case to court would keep a lot of cases without merit from being filed. He then said the purpose behind the central hearing officer panel is to create a more efficient system.

SENATOR FRENCH asked Mr. Wooliver if he sees any right of appeal from a superior court's determination to the supreme court.

MR. WOOLIVER said a person always has one right of appeal to the supreme court, except criminal cases or an appellate case.

CHAIR SEEKINS asked if the regulatory agency is more likely to appeal a decision.

MR. WOOLIVER said he believes so.

SENATOR THERRIAULT asked Mr. Wooliver to comment on Senator French's question about the number of times a person could file a petition and whether he believes the bill should contain a cap.

MR. WOOLIVER said that is the legislature's call. He imagined a first appeal might not be meritorious but a second one could be. He noted the court has rules to deal with frequent litigants. The court can require a person to jump through specific hoops before filing another claim. He said the court tends to have a high tolerance at first but then shuts the door.

The committee took a 5-minute recess.

MR. DAN HOUGHTON, Alaska Regional Hospital, recounted an administrative hearing procedure the hospital was involved in. The hospital appealed its 1991 [Medicaid] rate setting. A hearing officer heard the appeal in March of 1997 and issued a favorable decision on May 26, 2000. The decision was submitted to Commissioner Livey, who issued his final decision in April of 2001, which reversed the hearing officer's decision. The Alaska Regional Hospital then appealed to superior court, which ruled

favorably. However, that decision was then sent to the commissioner's office, and the hospital awaits an oral argument with a hearing officer. He stated support for SB 333 and said had the Alaska Regional Hospital had the ability to take its case to superior court earlier, the agency would have been motivated to move the case forward and both parties would have saved time and effort.

CHAIR SEEKINS announced that with no further testimony, he would hold SB 333 in committee.

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^#SB 217

SB 217-GENETIC PRIVACY

SENATOR GENE THERRIAULT moved to adopt Version I of SB 217 as the working document before the committee.

CHAIR SEEKINS announced that without objection the motion carried.

SENATOR OGAN asked for an explanation of the changes made in Version I.

SENATOR DONNY OLSON, sponsor of SB 217, informed members that three changes were made in Version I:

- A letter of intent replaces the legislative findings section in the bill
- Language that required researchers to get informed consent to use DNA information for research purposes was deleted, because researchers already have such requirements
- The definition of "DNA analysis" was refined to eliminate other tests outside of the parameters of genetic studies, for example a family history.

SENATOR OLSON added, "We also have protection for the DNA analysis under Section 3 to make sure that the intent is still there under the genetic characteristics."

CHAIR SEEKINS asked if this bill protects the privacy of one's DNA analysis, not of one's family history.

SENATOR OLSON replied:

The DNA specific is what we're trying to go ahead and protect. The integrity of that is the main reason for this legislation.

What comes out as far as predisposition for other diseases and other problems that you can get through other means, such as taking a family history and going and taking some of the other blood tests, CBC for sickle cell anemia and things like that, is not part of what's in here.

SENATOR OLSON said there are two polarized opinions: one from those who support protection rights and the other from the insurance industry. Version I is his best effort to accommodate those views and tackle the main issues. He pointed out this legislation is a starting point so problems that surface in the future can be dealt with then.

CHAIR SEEKINS asked if anything in this bill would preclude someone from using a DNA analysis to contradict family history.

SENATOR OLSON said that is correct; SB 217 only gives an individual full control of his DNA information to prevent exploitation. Although the DNA analysis is the property of the individual, the bill contains three exceptions: for criminal identification, paternity disputes and for a medical necessity.

With no further questions for Senator Olson, CHAIR SEEKINS took public testimony.

MS. ROBBIE MEYER, an attorney for the American Council of Life Insurers (ACLI), a national trade association that represents about 70 percent of the life insurance businesses nationwide, said the ACLI is committed to the principle of genetic privacy but it has concerns with the legislation. Life insurance companies are obligated to keep medical information confidential. However, life insurers need to obtain, retain, use and cautiously share consumers' personal information to perform the very insurance functions that consumers purchase. The ACLI is opposed to SB 217 in its current form and urges that it be amended to exclude life, disability, and long-term care insurers. The ACLI is concerned that this bill could unintentionally interfere or jeopardize its ability to perform critical business functions, such as underwriting and paying claims.

MS. MEYER said insurance companies are unique in that they are already subject to a host of federal and state privacy laws and regulations that govern an insurer's ability to obtain, maintain and disclose genetic information. In addition, Alaska's Division of Insurance is in the process of adopting a privacy regulation that will govern all insurers' ability to disclose medical information. It will require insurers to develop extensive security programs to protect the integrity of customer information. Meanwhile, insurers are already subject to a federal privacy bill and, most importantly, all insurers' ability to get any

medical information is subject to the Health Insurance Portability and Accountability Act (HIPAA). She cautioned that the exceptions are not as clear as they need to be with respect to retaining DNA samples. SB 217 does not distinguish between the requirements applicable to DNA samples versus the results of DNA analyses. That gives rise to a number of ambiguities with respect to insurers' obligations. The ACLI is concerned about the requirement of specific consent because if anyone has the right to revoke an insurers' ability to retain medical information, insurers' will not be able to continue to underwrite or pay an individual's claims. The ACLI feels the consumer's privacy with respect to life insurance or long-term care insurance is addressed by existing federal law and the new Division of Insurance regulations. She again asked that life, disability and long-term care insurers be exempted from the legislation.

CHAIR SEEKINS asked if insurers sell medical information.

MS. MEYER said they do not.

CHAIR SEEKINS asked if all ACLI members can access each others files.

MS. MEYER said ACLI has 400 members so she could not say, but if they do, it is contrary to ACLI policy and federal law.

CHAIR SEEKINS asked how those companies can share information if doing so is against the law.

MS. MEYER said the HIPAA privacy rule and another federal law require an individual's consent unless the information is being shared to perform business operations, for law enforcement purposes or other specific purposes.

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MS. MEYER added the new regulations of the Division of Insurance track the federal laws. 3AAC 26.680 contains specific provisions with respect to disclosure of medical information.

CHAIR SEEKINS asked if ACLI believes this bill is not just a redundancy of other laws but breaks new ground.

MS. MEYER said she believes it breaks new ground unintentionally by virtue of the fact that it requires specific consent to get a DNA sample or perform a DNA test. What ACLI finds troublesome is the revocable consent to retain and disclose the information without any business exceptions. She repeated that privacy protections are already in place because insurers are subject to other laws.

9:55 a.m.

MS. JENNIFER RUDINGER, Executive Director of the Alaska Civil Liberties Union (AkCLU), told members the AkCLU is opposed to Version I for the following reasons. First, in order to protect an individual's privacy, the bill must contain a comprehensive definition of "genetic characteristic" or "genetic information." The AkLCU presented a written recommendation for that definition in a letter to the committee dated February 24. The definition in the bill is so narrow, just about everything would be covered in the exceptions. Routine diagnostic tests should require informed consent from the subject before the DNA is collected, used, distributed or disclosed. The exemption means that informed consent for genetic testing or retaining information is unnecessary if the genetic information is discovered in the course of a common diagnostic procedure.

MS. RUDINGER said the AkCLU believes the bill must include some "teeth" to prevent employers and insurers from collecting genetic information and discriminating against individuals, with certain exceptions. The AkCLU maintains that DNA information is a constitutional privacy right rather than a property right. A privacy right is supreme over a property right. She believes calling human material property creates a slippery slope. She noted the definition of "person" includes a corporate entity but does not speak to a government agency, which the AkCLU believes should also be liable for improper disclosure of genetic information. The AkCLU also believes the law enforcement exemption should allow collection of genetic information only for those activities allowable under Alaska state law.

SENATOR OGAN asked Ms. Rudinger:

Some of your comments concern me. These ethical questions oppose themselves repeatedly in various contexts, such as whether people should be able to buy and sell human organs, fetuses, babies, etcetera. Of course babies are a person so - but I guess it's a little bit undefined whether or not they're a person in the womb and I guess there's a little bit of an oxymoron there with some of your positions on those issues but are you talking about babies inside or outside the womb? I mean obviously you can't sell a baby - that's slavery but....

MS. RUDINGER replied:

...Senator Ogan, we're talking about human material. We're talking about people, human beings, we're talking about

fetuses, we're talking about DNA in the context of this bill. We're talking about human genetic material.

MS. RUDINGER said the question involves a philosophical discussion that may be outside the scope of the bill. She noted the bill refers to genetic information as a property right. She said Roe v. Wade was not decided on the basis of property rights, it was based on a constitutional privacy right. She said a constitutional right would give this matter the highest level of protection.

CHAIR SEEKINS asked about blood.

MS. RUDINGER said people sell blood, eggs and sperm and the AkCLU sees that as a slippery slope that presents a difficult policy question for the legislature. She said the AkCLU is concerned about human material being considered as property that can be bought and sold because of the fear that poor people could be induced or coerced into selling their genetic material.

SENATOR FRENCH said he believes the definition of DNA analysis is clear in the bill. He asked if a cholesterol test could be considered as a DNA analysis.

SENATOR OLSON replied:

To a certain degree, we need to be careful here because a cholesterol test obviously is one thing that gives you certain information. Even though cholesterol itself, if you think of it biochemically, is just an alcohol that's got some sterols related to it, but there is the lipoproteins that are actual carriers of the body fats and so when you start thinking about high density lipoproteins, low density lipoproteins, the LDL [indisc.] low density of proteins, you start getting into a complicated detail there that's certainly not the intent of this bill. But you are correct that in the purest, simplest form, a cholesterol test is not included.

SENATOR FRENCH asked if his doctor runs a cholesterol test and gives him the results, the doctor would only be in trouble under this bill if he used that blood to test for genetic characteristics.

SENATOR OLSON said that is correct.

CHAIR SEEKINS said that chromosomal tests are routine for certain birth defects. He asked if those tests would be prohibited under SB 217.

SENATOR OLSON said not at all. He said the intent of the bill is to require informed consent to do any genetic testing.

CHAIR SEEKINS asked Senator Olson if he intended to include government agencies in the definition of "person."

SENATOR OLSON answered:

I wrote the bill, Mr. Chairman, and obviously there is a fair amount of tension between the previous testimony as well as the testimony we just heard. The bill is intended to be exactly the way it is right now because of what's going on - the tension that's there, there has to be a fair amount of give and take. There are details on one side that one wants to go into, details that the other side really wants to get into, but this is the best-crafted bill we have so far.

CHAIR SEEKINS said he was trying to determine whether Senator Olson was looking at "the entire universe and not trying to split it, of people or entities that could collect this information and possibly disseminate it." He asked if Senator Olson does not intend to include government agencies into that net.

SENATOR OLSON said that is correct.

SENATOR THERRIAULT asked if the bill applies to any DNA test required under the criminal statutes.

SENATOR OLSON said that is correct. The three exceptions in the bill on page 2 pertain to law enforcement, medical necessity, and paternity determination.

CHAIR SEEKINS announced that he would hold SB 217 in committee so that further questions could be answered. He then adjourned the meeting at 10:06 a.m.

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