

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 28, 2004

8:06 a.m.

TAPE(S) 04-54, 55

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

CS FOR HOUSE BILL NO. 15(FIN) am

"An Act relating to fair trade practices and consumer protection, to telephone solicitations, to charitable solicitations; and providing for an effective date."

HEARD AND HELD

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 29(JUD) am

"An Act relating to real estate licensees and real estate transactions; and providing for an effective date."

SCHEDULED BUT NOT HEARD

SENATE BILL NO. 246

"An Act relating to the commission of an offense or a juvenile delinquency act involving the victim's race, sex, color, creed, physical or mental disability, sexual orientation, ancestry, or national origin; relating to sentencing, informal adjustment, and adjudication for those offenses and acts; relating to a diversity tolerance program for certain juvenile delinquency acts; relating to a civil cause of action for certain acts involving discriminatory harassment; and providing for an effective date."

HEARD AND HELD

CONFIRMATION HEARINGS:

Violent Crimes Compensation Board - David Ingraham, Gerard Godfrey

Board of Governors of the Alaska Bar - Joe N. Faulhaber, Michael J. Hurley

Commission on Judicial Conduct - Peter J. Aschenbrenner, Thomas G. Nave

PREVIOUS COMMITTEE ACTION

BILL: HB 15

SHORT TITLE: SOLICITATIONS/CONSUMER PROTECTION

SPONSOR(s): REPRESENTATIVE(s) FATE

01/21/03	(H)	PREFILE RELEASED (1/10/03)
01/21/03	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	(H)	L&C, STA, FIN
01/29/03	(H)	L&C AT 3:15 PM CAPITOL 17
01/29/03	(H)	<Bill Postponed>
02/07/03	(H)	L&C AT 3:15 PM CAPITOL 17
02/07/03	(H)	Moved CSHB 15(L&C) Out of Committee
02/07/03	(H)	MINUTE(L&C)
02/10/03	(H)	L&C RPT CS(L&C) NT 3DP 4AM
02/10/03	(H)	DP: CRAWFORD, ROKEBERG, ANDERSON;
02/10/03	(H)	AM: LYNN, GATTO, GUTTENBERG, DAHLSTROM
02/18/03	(H)	STA AT 8:00 AM CAPITOL 102
02/18/03	(H)	Heard & Held
02/18/03	(H)	MINUTE(STA)
02/25/03	(H)	STA AT 8:00 AM CAPITOL 102
02/25/03	(H)	Scheduled But Not Heard
03/11/03	(H)	STA AT 8:00 AM CAPITOL 102
03/11/03	(H)	Heard & Held
03/11/03	(H)	MINUTE(STA)
03/13/03	(H)	STA AT 8:00 AM CAPITOL 102
03/13/03	(H)	Moved CSHB 15(STA) Out of Committee
03/13/03	(H)	MINUTE(STA)
03/26/03	(H)	STA RPT CS(STA) NT 3DP 4NR
03/26/03	(H)	DP: SEATON, GRUENBERG, WEYHRAUCH;
03/26/03	(H)	NR: HOLM, LYNN, DAHLSTROM, BERKOWITZ
02/19/04	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
02/19/04	(H)	Heard & Held
02/19/04	(H)	MINUTE(FIN)
02/23/04	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
02/23/04	(H)	Moved CSHB 15(FIN) Out of Committee
02/23/04	(H)	MINUTE(FIN)
02/24/04	(H)	FIN RPT CS(FIN) NT 7DP 3NR

02/24/04 (H) DP: HAWKER, CROFT, CHENAULT, FATE,
02/24/04 (H) MEYER, HARRIS, WILLIAMS; NR: STOLTZE,
02/24/04 (H) JOULE, MOSES
03/03/04 (H) TRANSMITTED TO (S)
03/03/04 (H) VERSION: CSHB 15(FIN) AM
03/04/04 (S) READ THE FIRST TIME - REFERRALS
03/04/04 (S) L&C, JUD
03/25/04 (S) L&C AT 1:30 PM BELTZ 211
03/25/04 (S) Heard & Held
03/25/04 (S) MINUTE(L&C)
04/06/04 (S) L&C AT 2:00 PM BELTZ 211
04/06/04 (S) Heard & Held
04/06/04 (S) MINUTE(L&C)
04/13/04 (S) L&C AT 1:30 PM BELTZ 211
04/13/04 (S) -- Meeting Canceled --
04/20/04 (S) L&C AT 2:00 PM BELTZ 211
04/20/04 (S) Moved SCS CSHB 15(L&C)am Out of
Committee
04/20/04 (S) MINUTE(L&C)
04/22/04 (S) L&C RPT SCS 1DP 4NR SAME TITLE
04/22/04 (S) NR: BUNDE, DAVIS, FRENCH, STEVENS G;
04/22/04 (S) DP: SEEKINS
04/28/04 (S) JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Dr. David Ingraham and Mr. Gerard Godfrey, nominees to the
Violent Crimes Compensation Board

Mr. Joe Faulhauber and Mr. Michael Hurley, nominees to the Board
of Governors of the Alaska Bar

Mr. Thomas Nave and Mr. Peter Ashenbrenner, nominees to the
Alaska Commission on Judicial Conduct

Representative Hugh Fate
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of HB 15

Mr. Jim Pound
Staff to Representative Fate
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Answered questions about HB 15

Ms. Cindy Drinkwater

Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Commented on the written notification requirement in HB 15

Ms. Virginia Tornes
Alaska Public Interest Research Group (AkPIRG)
Anchorage, AK

POSITION STATEMENT: Supports HB 15

Ms. Marie Darlin
Capital City Task Force - AARP Alaska
Juneau, AK

POSITION STATEMENT: Supports HB 15

Ms. Susan Burke
Gross and Burke
Juneau, AK

POSITION STATEMENT: Found sections of version W of HB 15 to be problematic

Mr. David Marcus
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Answered questions about HB 15

Senator Georgianna Lincoln
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of SB 246

Ms. Anne Carpeneti
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Took no position on SB 246 but answered questions

ACTION NARRATIVE

TAPE 04-54, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:06 a.m. Senators Therriault, Ellis, French and Chair Seekins were present. The committee first took up confirmation hearings.

CHAIR SEEKINS asked Mr. Ingraham to address the committee.

DR. DAVID INGRAHAM, nominee to the Violent Crimes Compensation Board, told members he was asked if he wanted to serve on this board about six months ago, during which time he became familiar with it. As an emergency room physician, he sees the results of a lot of violence, so he sees this opportunity as a way to give something back to the victims.

CHAIR SEEKINS thanked Dr. Ingraham for his willingness to serve.

SENATOR THERRIAULT moved to advance Dr. Ingraham's name to the full body in joint session for consideration of appointment to the Violent Crimes Compensation Board.

CHAIR SEEKINS announced without objection, the motion carried.

MR. GERARD GODFREY told members he is currently serving as the public member on the Violent Crimes Compensation Board and is up for reappointment. He said his family experience with violent crime has provided him with some degree of empathy for the plaintiffs. He has studied in the fields of criminal justice and psychology.

SENATOR THERRIAULT moved to advance Mr. Godfrey's name to the full body in joint session for consideration of appointment to the Violent Crimes Compensation Board.

CHAIR SEEKINS announced without objection, the motion carried.

MR. JOE FAULHAUBER, appointee to the Board of Governors of the Alaska Bar, told members he is fascinated with the U.S. legal system and believes it to be the most beautiful and fair system in history, even though it can be cumbersome and frustrating. He was first appointed to serve on this board by Governor Hickel and has served for seven years. He serves with brilliant scholarly types who often deal with the process rather than the product, which is hard for those in business to grasp at times. However, over the years he has come to appreciate that approach and appreciates working with the board and staff. For those

reasons, and because he likes to think he has made some improvements over the years, he would like to continue to serve.

SENATOR THERRIAULT moved to advance Mr. Faulhaber's name to the full body in joint session for consideration of appointment to the Board of Governors of the Alaska Bar.

CHAIR SEEKINS announced without objection, the motion carried.

MR. MICHAEL HURLEY, a senior commercial analyst with Conoco Phillips in Anchorage, said he has been involved in many of the legal issues with the state for many years. He believes his experience as a senior commercial analyst, working in government affairs, and dealing with the legislature, puts him in a unique position to contribute as the public member of the Board of Governors of the Alaska Bar.

SENATOR ELLIS asked Mr. Hurley to provide his thoughts on the need for continuing education for Alaska Bar members.

MR. HURLEY said he believes the Alaska Bar Association has a fair requirement for continuing education, which he supports. He has been required to participate in continuing education for his own profession, which he also supports.

SENATOR ELLIS noted that former Senator Donley believed the continuing education requirements for the Alaska Bar members were onerous but he believes those requirements are a good idea. He then asked Mr. Faulhauber to address the same question.

MR. FAULHAUBER said that topic is dear to his heart. He noted there is no requirement for continuing education at this time. The Board of Governors mandated continuing education after quite a bit of effort and cooperation but the Supreme Court changed it to voluntary. Right now, members who attend continuing education classes sign an affidavit. He believes that concept recently sunsetted so the board is taking another look at the issue. He believes the public expects a certain level of competency of occupational licensees and he does not know of any other way to insure that, other than continuing education. He noted that brilliant people like Judge Kleinfeld spoke against it but he probably does not need it. Mr. Faulhauber said he personally experienced that requirement in the real estate industry and believes the competency of that industry is much higher than it was 25 years ago.

SENATOR THERRIAULT moved to advance Mr. Hurley's name to the full body in joint session for consideration of appointment to the Board of Governors of the Alaska Bar Association.

CHAIR SEEKINS announced that without objection, the motion carried.

MR. PETER ASHENBRENNER, nominee to the Alaska Commission on Judicial Conduct, told members that the Alaska Constitution provides for a body of members to, for one, give a fair shake to members of the public who have a complaint about a judge. The Commission investigates such complaints and makes recommendations as to conduct or reprimands or removes a judge. He appeared once before the Commission so has some familiarity with its proceedings. His interest is in judging the judges, a challenging job in a constitutional system. He sat as a part-time federal judge for 16 years.

CHAIR SEEKINS noted that he has known Mr. Ashenbrenner for a long time and believes he will be an excellent commission member.

SENATOR THERRIAULT moved to advance Mr. Ashenbrenner's name to the full body in joint session for consideration of appointment to the Alaska Commission on Judicial Conduct.

MR. THOMAS NAVE, nominee to the Alaska Commission on Judicial Conduct, told members he is a private practitioner and has been practicing in Juneau for 27 years.

SENATOR THERRIAULT asked what type of law he practices.

MR. NAVE said his practice has narrowed itself over the years. He was the deputy director of the public defender's agency until 1985, at which time he went into business with the district attorney; they concentrated on a civil practice - personal injury for both the defense and plaintiffs. They found themselves defending attorneys who were sued for malpractice. He still does some criminal defense work but the lion's share of his work is civil.

SENATOR THERRIAULT moved to advance Mr. Nave's name to the full body in joint session for consideration of appointment to the Alaska Commission on Judicial Conduct.

CHAIR SEEKINS announced that without objection, the motion carried. He then announced the committee would take up HB 15.

HB 15-SOLICITATIONS/CONSUMER PROTECTION

REPRESENTATIVE HUGH FATE, sponsor of HB 15, told members that he introduced this bill last year but held it since similar legislation was introduced in the U.S. House of Representatives at the same time. That bill passed Congress but the federal law was challenged in the 10th Circuit Court; it was determined to be constitutional. After that, the Alaska Department of Law felt it necessary to flesh out that federal legislation so that it fit and conformed to Alaska's situation and allowed the Alaska Department of Law to determine the penalties. The administration intended to introduce its own legislation until it became aware of HB 15.

CHAIR SEEKINS indicated that SCS CSHB 15(L&C), version W, was before the committee. He asked if any part of that version deviates from Representative Fate's intent for the bill.

REPRESENTATIVE FATE said there was a "pebble in the road" over changes requested by the Department of Law that affect magazine subscriptions but he believes that was taken care of.

MR. JIM POUND, staff to Representative Fate, told members one issue may still be a bit contentious between the Department of Law and the Direct Marketing Association. He told both groups during discussions that Representative Fate's objective was that the intent language of the bill remain the same.

CHAIR SEEKINS asked if this bill passes in its present form, an Alaskan would not be able to order a magazine or a book on the telephone using a credit card, even if the buyer initiated the call.

MR. POUND said he does not foresee anything in any of the versions of the legislation that addresses a buyer initiating a call to a telephone answering business. The intent of the bill is directly aimed at the "annoying dinner hour calls." Representative Fate did not intend to affect Alaskans generating a call.

CHAIR SEEKINS said he and Senator French heard this bill in the Senate Labor and Commerce Committee and he did not think that was the intent of that committee.

SENATOR FRENCH agreed and said he heard testimony that it was still okay for a customer to solicit a vendor and purchase by credit card.

CHAIR SEEKINS said the committee is more than willing to address any restrictive language in the bill that might bar that.

SENATOR OGAN asked if the amendments adopted by the Senate Labor & Commerce Committee addressed some of the concerns about ordering by credit card and requiring a written notice.

CHAIR SEEKINS said the intent of the substantive amendment was that a person has the opportunity to return a product within 30 days that was ordered via telemarketing activity.

SENATOR FRENCH added:

That sounds familiar to me. I was still thinking about the first point, which was whether or not you could actually call someone and order something and as I recall - we'll have to hear from the industry representative - but I recall that being a fairly strained interpretation of the bill. At least that's the way I remember it.

CHAIR SEEKINS said the language beginning on line 20 of page 8 received the most substantive discussion. It gives a person the right to review the magazine and cancel the subscription within 7 days of receipt or at the time the invoice is received, whichever is later. He noted that would prevent a publisher from sending an invoice on the 31st day, after the 30-day time period is over. The intent was to give people who felt they'd been strong-armed the ability to cancel in a timely manner.

SENATOR OGAN said a buyer who purchases with a credit card could call his or her credit card company and cancel that way.

CHAIR SEEKINS took public testimony and asked Ms. Drinkwater if Senator French's description of the intent of the Senate Labor and Commerce Committee substitute complies with her recollection.

MS. CINDY DRINKWATER, Assistant Attorney General, said it does, although she believed he referenced a 30-day cancellation period, which she thought was 7 days.

CHAIR SEEKINS agreed.

MS. VIRGINIA TORNES, Alaska Public Interest Research Group (AkPIRG), asked members to support HB 15 because it reinforces existing federal "Do Not Call" legislation. It more clearly defines a telemarketer, it gives consumers the ability to address any complaints at the local level and it ensures Alaskans consumer protection in the privacy of their own homes.

MS. MARIE DARLIN, representing the Capitol City Task Force of the AARP-Alaska office, urged members to support this legislation. She has worked with Representative Fate's staff on this bill since the prior year because of its consumer protection focus. AARP-Alaska has received many complaints from members about the number of phone calls they were receiving during the dinner hour. More than half of the people targeted by telemarketers are over age 50. A considerable amount of discussion has taken place on this bill. AARP-Alaska supports the bill as it has been amended. She noted that thousands of Alaskans have signed up on the federal "Do-Not-Call" list, which has been incorporated into this current version of the bill. She again urged members to support the bill.

MS. SUSAN BURKE, an attorney representing the Direct Marketing Association and the Magazine Publishers of America, informed members she is substituting today for Bob Flint. She stated that her clients have absolutely no objection to the no call provision in version W of HB 15. She asked to concentrate on two sections (on page 8) of version W (the Senate Labor and Commerce Committee bill). Those sections amend AS 45.63, which is essentially a telephonic anti-fraud statute. It says that unless a company is among the long list of exempt types of businesses, before it can engage in telemarketing, it must register with the Department of Law and provide all kinds of disclosures and, more importantly, it is prohibited from offering or making a sale without a written contract with the buyer. "Sale by telephonic means" in AS 43.63.105 includes not only a call initiated by the seller, but also a letter, postcard, a notice or other written communication advising, requesting, motivating or encouraging a person to contact the seller by telephonic means. She reminded members that definition only applies to businesses or people who are not on the exempt list.

She pointed out that violating a criminal fraud statute is a felony. That statute was designed to deal with fraud and theft, not the ordinary run-of-the-mill consumer protection problems. She pointed out that fraud and theft would include people who sell an item on behalf of a non-existent business and pocket the

money, not a situation where a seller misrepresented an item. She said it is probably appropriate that thievery be a felony.

MS. BURKE said most other kinds of "unfair trade practices" are dealt with in an entirely different section of AS 45. The remedies under those sections are injunctive relief, damages, or refunds, which seem more appropriate for the types of things dealt with in subsections (10) and (11) - sales of magazines, periodicals, sound recordings, books, or memberships in book clubs. She said subsection (10) of version W would remove, from the list of exempted businesses, sales of sound recordings and books. That means a book distributor who mails a buyer a mail order catalog would be exempt. However, a bookseller who mails a postcard advertising a single book to a buyer that includes an 800 number to call to purchase, cannot purchase that book with a credit card because, even though the sale is buyer initiated, that would constitute a prohibited telephonic sale unless a written contract accompanied the transaction. Magazines are a little different because they have a qualified exemption under version W. The qualified exemption is from the registration and written contract requirement only if the seller gives the buyer the right to review the magazine and cancel the subscription and the buyer is provided a written notice of that right.

MS. BURKE said in looking at the rest of the bill, that is already required for all those exempt under existing law, such as funeral directors, insurance agents, etcetera, not just for magazine solicitation. She referred to page 7 of version W and pointed out that although her clients have no problem with this section, its import is that only certain sections of AS 43.63 are entitled to exemption, section .010. Therefore, under this version, if a seller falls under the listed exemptions, the seller does not have to register, pay the registration fee, have a contract with the buyer, or make certain disclosures in the written contract. However, what is now applicable to everyone are the cancellation and refund rights that are in current law under section .030(a) and (b). The opt-out is only for .030(c) and (d). Under the cancellation and refund provision of .030(a) and (b), they are exactly the same as what is being required under subsection (11)(A) just for magazines. Ms. Burke emphasized, "So I don't think you need this at all - subsection A, totally unnecessary."

MS. BURKE then turned attention to subsection (B) and described why the written disclosure is problematic. She stated:

We have no problem with making disclosures in any kind of telephone situation if it's verbal - no problem at all. The difficulty is if it's required to be in writing, and that's true of whether it's a seller initiated call or if it's a buyer initiated call in response to a mail out of a postcard, or what have you and here's why.

If it's a seller initiated call, you can't make a written disclosure and do the credit card thing because you're on the telephone so that's a problem with that.

SENATOR FRENCH noted the bill says a written disclosure notice must be given to the buyer before or at the time the initial invoice is received. He said an invoice strikes him as being the receipt one gets in the mail after a purchase or a credit card statement.

MS. BURKE said she does not interpret the word "invoice" to mean a credit card statement. She understands it as a request for payment.

SENATOR FRENCH asked whether the entire dispute is about when that invoice is received. He questioned how an invoice could accompany a telephonic credit card transaction.

MS. BURKE agreed and said that perhaps is the policy debate but she is suggesting that if the legislature wants to outlaw all credit card sales for magazines, that language will do it. If the legislature does not want to do that, section (11)(B) creates serious problems.

TAPE 04-54, SIDE B

CHAIR SEEKINS said an invoice would indicate request for payment and usually for goods received before the payment is due. He noted that he believes the committee is trying to say if the customer is to receive an invoice for future payment, that invoice should include a written notification.

SENATOR FRENCH agreed that is the intent the committee is trying to convey.

CHAIR SEEKINS said the customer needs to be made aware of the option to cancel two times: upon receipt of the first issue or within 7 days after receipt of the invoice, whichever is later.

He said he believes that if the practice is that a person receives unsolicited magazines and is later sent an invoice, the invoice should include written notification.

MS. BURKE said no one has a problem with that, however the qualifier is if the transaction is structured so that payment is not due until later, requiring a disclosure is fine. However, the problem comes with the buyer who initiated the call and does not want to receive an invoice and write a check but would prefer to pay by credit card on the phone. She repeated that under the language of this bill, that sale would not be exempt.

CHAIR SEEKINS said the committee would be willing to look at language to accomplish its intent. It wants to make sure the person receives the notification along with the first issue and has the right to cancel; it does not want to bar a person's ability to purchase with a credit card.

MS. BURKE said there is no question that under this bill as drafted, the right to cancel exists whether or not that is disclosed to the buyer, for magazines and everything else. The form in which disclosure of that right is required is of issue: whether it should be provided by the seller as opposed to an informational or educational campaign by the consumer protection division, and whether disclosure can be made in a format other than in writing.

CHAIR SEEKINS asked Representative Fate if the previous discussion aligns with his intent.

REPRESENTATIVE FATE replied that he sees nothing in this legislation that prohibits the use of a credit card by a person initiating the sale and that was not his intent. He said regarding the invoice issue, he sees an invoice as more of a record because sometimes an invoice arrives before the bill, sometimes after. He emphasized that he had no intent to prohibit the use of a credit card.

MS. BURKE said she is concerned that the language in the bill does not comport with the committee's intent. She offered to work with committee staff to find appropriate language.

SENATOR FRENCH suggested changing the word "invoice" to reflect the intent that when people first receive notice that they purchased a magazine, they also receive a disclosure. He thought the sponsor's intent was that the buyer who purchases on the telephone is told upfront during the transaction of a right to

cancel. He said the problem is that people forget that they ordered something.

MS. BURKE said people who forget that they've been told of the 7-day cancellation policy will also lose their invoices so she does not know why a verbal declaration of the cancellation and refund right is inadequate.

SENATOR FRENCH disagreed.

CHAIR SEEKINS said the committee's intent is to fully protect the Alaskan citizen who is involved in the transaction within reason. He believes it is reasonable to expect both.

MS. BURKE said in terms of having the disclosure come with the magazine that may be problematic only because this pertains to national magazine distributors. Every state has different disclosure requirements so that would require a publisher to have an Alaska-specific disclosure requirement, which would be burdensome and costly. The result could be that Alaskans might not be able to take advantage of perfectly legitimate offers in the mail from which a buyer would call and subscribe to a magazine because the buyer could not purchase with a credit card.

CHAIR SEEKINS asked Ms. Drinkwater to comment.

MS. DRINKWATER said she agrees from a consumer protection standpoint that written notification is very important. She pointed out that people often do not receive a magazine within a week; often the magazine arrives 60 to 90 days later so it is not realistic to think that consumers will remember the information they were given when they placed the order. She said that while the industry has suggested that it has wonderful cancellation policies, consumers have no way to exercise their rights without written notification of those policies.

9:06 a.m.

CHAIR SEEKINS suggested, in the interest of time, Ms. Burke, Ms. Drinkwater and the sponsor work to draft adequate language that will not restrict Alaskans' ability to exercise their purchasing prerogative but provide for consumer protection. [No member objected.]

MS. DRINKWATER deferred to Mr. Marcus.

MR. DAVE MARCUS, Assistant Attorney General, Department of Law, clarified that his understanding of the charge is to allow instantaneous credit card purchases that do not involve invoices and provide subsequent written notice of cancellation, either with the first subscription delivery or otherwise so that there is a written notice of cancellation.

CHAIR SEEKINS agreed and said it may not have to be simultaneous with the first delivery but could come at a different point.

SENATOR FRENCH questioned why a consumer couldn't get a written notice of the sale and right to cancel within 14 days of the telephone transaction.

CHAIR SEEKINS noted that would come from the solicitor rather than the publisher.

MS. BURKE interrupted to say she would be happy to explore those issues. She asked for clarification about mail or telephone solicitations for books or sound recordings. She said according to this bill, those companies are not exempt and would be guilty of fraud.

SENATOR FRENCH admitted that he had difficulty following Ms. Burke's explanation of that problem and asked her to send him a written explanation.

CHAIR SEEKINS said he does not believe it was the sponsor's intent to unduly single out CDs and books.

REPRESENTATIVE FATE affirmed that.

CHAIR SEEKINS asked that those items be considered in the proposed amendment. He asked that the group provide such an amendment soon otherwise the committee would have to move forward without it. He then announced he would hold the bill in committee. The committee took a 5-minute recess.

9:15 a.m.

SB 246-HATE CRIMES/DISCRIMINATION/TOLERANCE PROG

SENATOR GEORGIANNA LINCOLN, sponsor of SB 246, informed members that she distributed to members the previous evening the answers to 17 questions posed by the Chair. In addition, she submitted letters from the Juneau, Anchorage and Fairbanks police departments and the Alaska Association of the Chiefs of Police,

all of which endorse SB 246. She noted that various groups nationwide endorsed the federal legislation, entitled the Local Law Enforcement Enhancement Act. She noted that Ms. Carpeneti from the Department of Law was available to answer technical legal questions.

SENATOR LINCOLN then asked members to consider an amendment to page 3, line 8: after the word "hatred" insert "AS 11.76.200". She explained, "The purpose of that is when referring to a new category of crime that is motivated by hate that this crime would be charged under that section of our statutes and so it's just a clarifying amendment."

CHAIR SEEKINS said he asked for an independent sectional analysis.

SENATOR LINCOLN replied:

Mr. Chairman - and I didn't misread when you said independent because when I received that two days ago, I was trying to get as much of that information as I could. We did call over to - as independent - I did call over to [Legislative Legal] and [they] said that they were going to try to get that to us before this meeting. We have not received that so I apologize for that.

CHAIR SEEKINS suggested "walking" through the bill with Senator Lincoln to understand her intent.

[At that point the committee realized that, inadvertently, members never received a sectional analysis that Senator Lincoln's staff thought was distributed. She offered to get copies.]

CHAIR SEEKINS asked Senator Lincoln her intent in Section 1.

SENATOR LINCOLN explained that Section 1 adds a new section to AS 09.55 that authorizes a civil lawsuit for compensatory and punitive damages against a person who causes physical injury or property damage with the intent to intimidate or harass and authorizes a lawsuit against the parent or legal guardian of a minor for the same if the suit is based on reckless conduct by the parent or legal guardian. It also prohibits lawsuits under this section against the state or its political subdivisions.

CHAIR SEEKINS asked if Section 1 will allow a complainant to bring a civil lawsuit.

SENATOR LINCOLN affirmed that is correct.

CHAIR SEEKINS asked how "harassment" is defined in that regard.

SENATOR LINCOLN explained the definitions of "prejudice", "bias", and "hatred" are on page 3 and those are FBI terms from the Department of Justice.

MS. ANNE CARPENETI, representing the Criminal Division of the Department of Law, noted the Administration has not taken a position on SB 246. She noted that she would be surprised if the word "harassment" is defined in criminal law and she is not aware of such a definition in civil law. She pointed out that does not mean every term used in civil or criminal law needs to be defined because often the common understanding of terms is used.

CHAIR SEEKINS said he was trying to determine what harassment is if a person could be sued for it.

SENATOR FRENCH pointed out that with any new provision, there will be some "finding out" as people bring lawsuits with good and bad arguments. He noted that burning a cross in someone's front yard would be a good claim under the statute but hurling a racial epithet at another might not because the defendant must have physically injured the plaintiff or damaged property. He noted the jury would make that determination.

CHAIR SEEKINS argued that he would prefer that the 60 legislators define that term.

MS. CARPENETI said the statute describes the civil action as discriminatory harassment and then goes on to describe the basis of that action. It does not necessarily use that term in establishing what must be proved.

CHAIR SEEKINS asked Ms. Carpeneti to review AS 11.61.120.

MS. CARPENETI explained:

It establishes the crime of harassment to do these various things like taunt another person or insult them, telephone them repeatedly at inconvenient times, or make an obscene or anonymous telephone call.

CHAIR SEEKINS asked, "Under this definition, which we have the crime of harassment, since this definition exists in another part of statute, would that be the likely standard that the court would use?"

MS. CARPENETI acknowledged that she is not well versed in civil law, but replied:

They might look at that statute and say, well for a crime that's what a person has to prove but I think this is different and the reason I think that is this civil action tells you what discriminatory harassment is against another, and then it says what you have to do - cause physical injury to the individual or damage the property with the intent to intimidate or harass the individual and they would probably look at that. ...Generally, civil lawsuits - judges look to the case law rather than defined terms, like we do in criminal law because in criminal law it's more important that we have a definite term. In civil cases generally, judges and juries make those decisions and they appeal them and courts of appeals look at the basis for the case and then that case is decided and everybody gets to learn from that case and we go on and use the direction from the juries and the judges. So civil lawsuits generally are more - terms tend to be defined more by case law rather than legislative decision.

CHAIR SEEKINS asked if a person caused physical injury to an individual or damage to the property of an individual, that would constitute criminal behavior.

MS. CARPENETI said it would depend on the circumstances surrounding how that damage was inflicted. If the person had a culpable mental state of intent knowing recklessness or with criminal negligence, there might be a crime involved.

CHAIR SEEKINS asked if a person could be guilty of that crime without culpability under the crime of harassment.

MS. CARPENETI did not believe so because a person must intend to harass or annoy another person so that would be the culpable mental state the state would have to prove beyond a reasonable doubt.

CHAIR SEEKINS asked if they would have to have intent for the civil action.

MS. CARPENETI said yes.

CHAIR SEEKINS surmised, "So, we already have in statute criminal law that would also allow them to bring civil actions to recover for those damages, if not part of the judgment if they were convicted for restitution, which is normal, is it not now for judges and courts to order restitution for someone who does property damages or individual damages?"

MS. CARPENETI noted the Constitution requires that a person be compensated.

CHAIR SEEKINS continued, "And we already have a crime of harassment, which would fit into this. If someone did the things that they could sue for under this section, they have, in effect, committed this crime of harassment, have they not?"

MS. CARPENETI said she did not know because the crime of harassment is limited to those various acts. She explained, "This civil action is a whole lot broader in terms of how a person could recover."

CHAIR SEEKINS said he is trying to find out what this section gives to people that they do not already have under the law. He noted under current law a person could be charged for a crime of harassment and the victim could maintain a civil action against that person if damage occurred.

SENATOR LINCOLN replied:

I think that Ms. Carpeneti already stated that, Mr. Chairman, that as she read from the laws that are on the books that it is not specific and that when we talk about the discriminatory harassment that has caused physical injury to an individual or damaged property because of the intent to intimidate. This expands what is on the books. It makes it very clear.

CHAIR SEEKINS asked how SB 246 will expand that. He then added the crime of harassment is an action with the intent to harass or annoy another person: that person insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response, etcetera. He questioned whether that is a low standard.

MS. CARPENETI said crimes must be proved by proof beyond a reasonable doubt while civil actions must be proved by a preponderance of the evidence, very different standards. She suggested, "Maybe I'm just used to what we do for harassment. It's often in a domestic violence context, making phone calls and hanging up, doing various things. Under these circumstances, not necessarily racially related, it's not necessarily related to a particular person and it's a class B misdemeanor, which is a lower [indisc.]."

CHAIR SEEKINS responded, "And I guess - I'm saying there on the crime side it happens to anybody regardless of what their status is. I mean it's universal, is that not correct?"

SENATOR OGAN said the legislature should probably amend the harassment laws to exclude those of us that sit on this side of the table from the citizens sometimes.

SENATOR FRENCH offered, as an example to differentiate between the bill and criminal law, the crime of cross burning. If a black family was preparing to move into a predominantly white neighborhood and found that some neighbors had burned a cross on their lawn the night before, that would not fit the crime of harassment because that action is not likely to provoke an immediate response. However, the property was damaged with the intent to harass because of race.

CHAIR SEEKINS asked what the damages would be.

SENATOR FRENCH said that would be for the jury to decide. The jury would have to take into consideration whether, for example, there was a chanting crowd outside. He suggested it is hard to analyze those scenarios outside of the factual context.

CHAIR SEEKINS questioned why state employees would be exempted, and whether they would be exempted regardless of whether they were working at the time.

SENATOR LINCOLN said that was question number 11 and the drafter from Legislative Legal and Research Services responded that a person's remedy would be limited to actions under AS 09.50 and .65 and 42 U.S.C or normal actions under common law or other principles.

CHAIR SEEKINS asked if a police officer who burned a cross on a neighbor's yard could not be sued for discriminatory harassment.

SENATOR LINCOLN said that was question 15 about the Alaska State Troopers. She read the response, "Alaska's law currently has several provisions that serve to protect law enforcement officers...." She then noted, "And then it talks about which statutes those are under 12.55 and talks about the parallel between the statutes, the hate crime, the police officers, with the protection that is already on the books for them."

CHAIR SEEKINS asked if a police officer in uniform could be charged with criminal harassment.

MS. CARPENETI believed so. She explained, "What this does is it says that this new statutory cause of action, if it is adopted by the legislature, does not create a statutory cause of action against a law enforcement officer under these circumstances. To the extent that there are other remedies on a civil basis that a person could bring against a person who's a police officer, these provisions would not affect that."

CHAIR SEEKINS said if other remedies exist for a police officer, other remedies exist for everyone.

SENATOR LINCOLN replied:

Mr. Chairman, I don't know how to say this in a different way for you but when you ask about harassment, there is nothing on the books right now that speaks to harassment of this category of folks or damage to property under hate crimes. There is nothing on the books for that and what we are attempting to do, just as with the paintball incident, is that that crime gets elevated to a misdemeanor. You know, the harassment is a class B misdemeanor and it gets elevated to a higher offense so that we send a message out. That's the whole intent of this bill. We send a message out that hate crimes are not going to be tolerated in the state. ...If you read the letters from the police departments who go out and investigate these types of crimes that are supportive of having different penalties for people who go out and knowingly, and I have to say knowingly because it's not just done very lightly...

CHAIR SEEKINS interjected to say he is not only talking about hate crimes but also about the civil action that could be brought. Nothing in the bill says the person must have been

convicted of a hate crime in order for a civil action to be brought.

SENATOR LINCOLN replied, "Well, Mr. Chairman, it says who has caused physical injury to the individual or damage with the intent because of the individual's actual or perceived race, sex, color, creed, physical or mental disability, sexual orientation, ancestry or national origin."

CHAIR SEEKINS expressed concern that this would allow someone who has gone to court and is found innocent to also have a civil action brought against him or her, regardless of whether or not that person was charged with the crime.

SENATOR FRENCH commented that happens all of the time, possibly because of the difference in the burden of proof. He mentioned the O.J. Simpson case as an example.

CHAIR SEEKINS asked why a person who was not convicted of a hate crime should be subject to a discriminatory harassment action for recovery under this process.

SENATOR FRENCH expressed confusion about the question but stated that strikes him as the difference between the nature of criminal and civil law.

CHAIR SEEKINS commented that during the last election, people destroyed his property by tearing down his campaign signs and that might have constituted a hate crime, but not under that section. He then directed members to section 2.

SENATOR LINCOLN said that is the provision of the bill that elevates the crime to the next level of offense by establishing the crime as motivated by prejudice, bias or hatred and was knowingly committed. She pointed out that a class B felony, such as an assault in the second degree, would be a class A felony if motivated by prejudice, bias, or hatred.

CHAIR SEEKINS asked Senator Lincoln if she did the sectional analysis herself.

SENATOR LINCOLN said she did with help from many people.

TAPE 04-55, SIDE A

CHAIR SEEKINS asked how the crime is elevated to the next level.

SENATOR LINCOLN explained that according to the bill, a crime that is a class A misdemeanor would become a class B misdemeanor.

CHAIR SEEKINS expressed confusion and said it appears that there would be two crimes because a person convicted of one crime would be guilty of another.

SENATOR FRENCH said there is no way a person would get convicted of one crime and punished for another. The person would be charged with a B felony, which might be a C felony assault motivated by prejudice, bias or hatred. The grand jury would have to return a true bill on that indictment, where the person would be charged with a B felony.

CHAIR SEEKINS asked if a person is charged with a B felony and the prosecution believes there was a motivator involved, the person would be charged with one crime, that being the crime of motivation by prejudice.

SENATOR FRENCH thought that was correct.

MS. CARPENETI explained the difference between the underlying crime and this crime is that the state would have to prove between a reasonable doubt the motivation.

CHAIR SEEKINS asked if the person would be considered innocent of the crime if the state could not prove the motivation beyond a reasonable doubt.

MS. CARPENETI said that would depend on the circumstances, but the underlying crime would be a necessary part of it so if the jury found that the state did not meet the burden of proof of beyond a reasonable doubt on the motivation, it could return a verdict on the underlying crime alone.

SENATOR FRENCH noted, as an example:

Frequently, one single death, one single murder death will result in - you know, you'll offer a jury three murder theories in a grand jury and a murder jury and they'll consider all three of those theories and they may find you guilty of all three of those murder theories and then it all collapses into one sentence. And so in this case, I can see you offering a jury on a C felony assault - you're going to offer them a B felony motivated by prejudice and hatred and a C

felony on straight assault and the jury will decide whether you've proved beyond a reasonable doubt that it was motivated by prejudice, bias or hatred, and if you didn't, they'll just say - and then they'll decide whether you proved beyond a reasonable doubt that you actually committed the assault.

CHAIR SEEKINS asked Mr. Luckhaupt to address the construction of the bill regarding getting to a crime of motivation by prejudice, bias or hatred.

MR. JERRY LUCKHAUPT, legislative counsel, Legislative Legal and Research Services, told members as Senator French stated, the person would be charged with the underlying crime but basically, both offenses would have to be charged and merged into one offense, similar to the procedure for crimes like conspiracy or solicitation. The grand jury would also return an indictment for the underlying crime with that specific motivation. The jury would have to find the person guilty of both the underlying crime and of doing it in a particular manner.

CHAIR SEEKINS asked about the standard.

MR. LUCKHAUPT said the standard of proof would be beyond a reasonable doubt on each and every element. He thought that the mental state is knowingly, rather than intentional. He pointed out that the use of knowingly, which is one step below intentionally, will be fairly problematic because the courts will consider it as an intentional mental state because of the recognition of motivation.

MS. CARPENETI said in this context, a culpable mental state of knowingly means the offender knew the person he or she was harming was in one of the protected categories and committed the offense for that reason. She, too, agreed it is very similar to intentional under these circumstances. She assumed the drafters used the word "knowingly" because sometimes "intentionally" applies to the result.

MR. LUCKHAUPT said SB 246 was part of a governor's bill two years ago so it was originally drafted by the Department of Law. He was not sure why "knowingly" was chosen but combined with the motivation aspect in the bill, he did not know how the court could apply it other than as an intentional mental state.

SENATOR LINCOLN confirmed that SB 246 is the result of a bill that was not enacted by a previous legislature. She noted that

she submitted that bill but the Governor and the Department of Law worked on it.

CHAIR SEEKINS asked if other methods in existing statute could address Senator Lincoln's intent to elevate the penalty for these crimes.

MR. LUCKHAUPT replied:

Well, there are. States, as they've gone through dealing with bias crime legislation and they've had to take this approach of either trying to create a new crime or trying to deal with it as a sentencing aspect and so you've had different approaches used...My personal feeling as a drafter is that under the model penal code, our culpable mental states are all things that don't imply values in and of themselves, or they are not - intentional conduct, knowing conduct, reckless conduct or criminally negligent conduct in and of itself isn't morally reprehensible. We don't think that people that act with a particular intention are just bad people. We look to the other elements of that crime to decide whether or not that is reprehensible or not or whether that's accountable or not.

Under the model penal code, which Alaska adopted when we redid our penal code back in 1979, it follows that approach that the culpability of someone, their accountability, is determined by their particular mental state when they are committing the crime in terms of were they acting intentionally or were they acting knowing this result could occur or were they disregarding a particular likelihood that some result would occur, even if they hoped that it wouldn't occur. And, equating those to intentional, knowing or reckless, we then provide gradations of penalties based upon that person's culpability, they're accountability for the offense. So someone that intentionally wants to make sure someone ends up dead and they then shoot that person, that person is more culpable, more accountable for the conduct than someone who is shooting over towards that house and knows that someone could get hit by this or I could kill somebody but they aren't really intending to kill someone and so, you know, those are the ways we have traditionally dealt with people's motivation, people's

conduct and we haven't brought the value aspect into it.

I'm just discussing that to bring up the idea of how our penal code is designed and when we do look at people's particular motivations or things that might be - where we impose our values then upon issues, we've usually done those in the sentencing aspect where we've distinguished between victims or distinguished between certain conduct and we then impose a greater punishment based upon that.

For example, if I select a victim because they have certain characteristics and someone else selects a victim because they were paid to hurt this person, both of us that were acting intentionally in regards to that victim or at least knowingly in regards to our conduct and respect to that victim, the crime is the same. There's nothing to distinguish one victim from another except some value specific thing that we put on. There's nothing that makes that victim more morally subject to protection than another victim usually. Now, saying that, we can then distinguish down the road after we've decided this is a particular crime, that this person has a particular mental state. You then decide well, if someone acted with this particular motivation, for example if there's a murder for hire or something like that, a lot of states will penalize murders for hire at a higher level than other murders. We will penalize hate crimes as we do in Alaska law as we do with our aggravating factor for felonies. We allow for increases in punishment based upon that.

That doesn't deal with the specific issue Senator Lincoln has in regards to the misdemeanor offenses because we don't have aggravating factors for misdemeanor offenses and that has been a problem with the two instances up in Anchorage in the last three years or four years where the offenses were classified as misdemeanors and, in some cases, the juveniles were dealt with in the juvenile system in a way that most folks found unacceptable.

But there are other ways to deal with that. Some of those issues involve things like requiring, if certain aggravating factors are found, you can require a

certain increase in sentence. You can require what we've done in the misdemeanor context - we've required minimum jail terms. And also, to deal with the juvenile situation, is you can require that that juvenile not be dealt with in a juvenile system. The legislature has done that in a number of cases where the legislature has found the response of the juvenile to different crimes as unacceptable.

SENATOR FRENCH said SB 246 has had two hearings in the Senate Judiciary Committee and the police chiefs of Anchorage, Fairbanks and Juneau are in favor of it so it strikes him that the bill is ready to move on.

CHAIR SEEKINS said he has not come to the same conclusion yet.

SENATOR FRENCH moved SB 246 to the next committee of referral to allow the next committee to deal with it. He stated that SB 246 has been well presented, documented and backed up by Senator Lincoln.

CHAIR SEEKINS said, "I will tell you that the motion isn't ready but I'll let you make the motion because I don't believe so." He asked for a roll call vote.

SENATORS FRENCH and ELLIS voted in favor of the motion; CHAIR SEEKINS was opposed.

CHAIR SEEKINS announced that the motion failed and that he would carry the bill over to another hearing. He explained that the bill needed three votes in favor to pass out of committee.

SENATOR ELLIS disagreed.

CHAIR SEEKINS upheld his decision. There being no further discussion, the meeting ended at 10:11 a.m.