ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE
April 13, 2006
8:01 a.m.

MEMBERS PRESENT

Representative Paul Seaton, Chair
Representative Carl Gatto, Vice Chair
Representative Jim Elkins
Representative Bob Lynn
Representative Jay Ramras
Representative Berta Gardner
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 310
"An Act relating to the employment of prisoners; and providing for an effective date."

- HEARD AND HELD

CS FOR SENATE BILL NO. 86(CRA)(efd fld)
"An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals."

- HEARD AND HELD

HOUSE BILL NO. 461
"An Act relating to disclosure to the Alaska Public Offices Commission of information about certain income received as compensation for personal services by legislators, public members of the Select Committee on Legislative Ethics, and legislative directors subject to the provisions of law setting standards of conduct for legislative branch officers and employees; and providing for an effective date."

- MOVED CSHB 461(STA) OUT OF COMMITTEE

OVERVIEW: DIVISION OF ELECTIONS, ELECTRONIC VOTING

- AGENDA ITEM POSTPONED TO 04/20/06

PREVIOUS COMMITTEE ACTION

BILL: SB 310
SHORT TITLE: EMPLOYMENT OF PRISONERS
SPONSOR(s): FINANCE

03/20/06	(S)	READ THE FIRST TIME - REFERRALS
03/20/06	(S)	FIN
03/27/06	(S)	FIN RPT 4DP 1NR
03/27/06	(S)	DP: WILKEN, GREEN, DYSON, STEDMAN
03/27/06	(S)	NR: HOFFMAN
03/27/06	(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/27/06	(S)	Moved SB 310 Out of Committee
03/27/06	(S)	MINUTE(FIN)
03/31/06	(S)	TRANSMITTED TO (H)
03/31/06	(S)	VERSION: SB 310
04/03/06	(H)	READ THE FIRST TIME - REFERRALS
04/03/06	(H)	STA, L&C, FIN
04/11/06	(H)	STA AT 8:00 AM CAPITOL 106
04/11/06	(H)	Scheduled But Not Heard
04/13/06	(H)	STA AT 8:00 AM CAPITOL 106

BILL: SB 86
SHORT TITLE: STATE/MUNI LIABILITY FOR ATTORNEY FEES
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/31/05	(S)	READ THE FIRST TIME - REFERRALS
01/31/05	(S)	CRA, JUD
02/09/05	(S)	CRA AT 1:30 PM BELTZ 211
02/09/05	(S)	Heard & Held
02/09/05	(S)	MINUTE(CRA)
04/04/05	(S)	CRA AT 1:30 PM BELTZ 211
04/04/05	(S)	Moved CSSB 86(CRA) Out of Committee
04/04/05	(S)	MINUTE(CRA)
04/05/05	(S)	CRA RPT CS 1DP 2DNP 2NR SAME TITLE
04/05/05	(S)	NR: STEVENS G, STEDMAN
04/05/05	(S)	DP: WAGONER
04/05/05	(S)	DNP: ELLIS, KOOKESH
04/15/05	(S)	JUD AT 8:00 AM BUTROVICH 205
04/15/05	(S)	Heard & Held
04/15/05	(S)	MINUTE(JUD)
04/18/05	(S)	JUD RPT CS(CRA) 3DP 2DNP
04/18/05	(S)	DP: SEEKINS, THERRIAULT, HUGGINS
04/18/05	(S)	DNP: FRENCH, GUESS

04/18/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/18/05	(S)	Moved CSSB 86(CRA) Out of Committee
04/18/05	(S)	MINUTE(JUD)
05/06/05	(S)	TRANSMITTED TO (H)
05/06/05	(S)	VERSION: CSSB 86(CRA)(EFD FLD)
05/07/05	(H)	READ THE FIRST TIME - REFERRALS
05/07/05	(H)	STA, JUD
03/23/06	(H)	STA AT 8:00 AM CAPITOL 106
03/23/06	(H)	Heard & Held
03/23/06	(H)	MINUTE(STA)
04/13/06	(H)	STA AT 8:00 AM CAPITOL 106

BILL: HB 461
SHORT TITLE: LEGISLATIVE DISCLOSURES
SPONSOR(s): REPRESENTATIVE(s) GARDNER

02/13/06	(H)	READ THE FIRST TIME - REFERRALS
02/13/06	(H)	STA, JUD
03/30/06	(H)	STA AT 8:00 AM CAPITOL 106
03/30/06	(H)	Heard & Held
03/30/06	(H)	MINUTE(STA)
04/04/06	(H)	STA AT 8:00 AM CAPITOL 106
04/04/06	(H)	Heard & Held
04/04/06	(H)	MINUTE(STA)
04/13/06	(H)	STA AT 8:00 AM CAPITOL 106

WITNESS REGISTER

DARWIN PETERSON, Staff
to Senator Lyda Green
Senate Finance Committee
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented SB 310 on behalf of the Senate Finance Committee, sponsor.

SHARLEEN GRIFFIN, Director
Central Office
Division of Administrative Services
Department of Corrections (DOC)
Juneau, Alaska
POSITION STATEMENT: Answered questions on behalf of the department during the hearing on SB 310.

BRAD THOMPSON, Director
Division of Risk Management
Department of Administration

Juneau, Alaska
POSITION STATEMENT: Answered questions during the hearing on SB 310.

RANDY RUARO, Assistant Attorney General & Legislative Liaison
Legislation & Regulations Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska
POSITION STATEMENT: Testified on behalf of the department during the hearing on SB 86.

ROBERT SPARKS
Fairbanks, Alaska
POSITION STATEMENT: Testified on behalf of himself to describe SB 86 as shortsighted.

BARRY DONNELLAN
Fairbanks, Alaska
POSITION STATEMENT: Testified on behalf of himself during the hearing on SB 86 to warn against the state's raising the bar against a private citizen raising a grievance with the state.

MICHAEL W. MacLEOD-BALL, Executive Director
American Civil Liberties Union (ACLU) of Alaska
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to SB 86.

KARI ROBINSON, Legal Advocacy Project (LAP)/Project Attorney
Alaska Network on Violence & Sexual Assault (ANVSA)
Juneau, Alaska
POSITION STATEMENT: Testified in opposition to SB 86.

KAY ROLLISON
Anchorage, Alaska
POSITION STATEMENT: Testified on behalf of herself in opposition to SB 86.

BROOKE MILES, Executive Director
Alaska Public Offices Commission (APOC)
Anchorage, Alaska
POSITION STATEMENT: Offered APOC's opinion regarding language of a committee substitute to HB 461.

ACTION NARRATIVE

CHAIR PAUL SEATON called the House State Affairs Standing Committee meeting to order at 8:01:23 AM. Representatives Gatto, Elkins, Gardner, and Seaton were present at the call to order. Representatives Lynn, Ramras, and Gruenberg arrived as the meeting was in progress.

SB 310-EMPLOYMENT OF PRISONERS

8:03:18 AM

CHAIR SEATON announced that the first order of business was SENATE BILL NO. 310, "An Act relating to the employment of prisoners; and providing for an effective date."

8:03:33 AM

DARWIN PETERSON, Staff to Senator Lyda Green, Senate Finance Committee, Alaska State Legislature, presented SB 310 on behalf of the Senate Finance Committee, sponsor. He explained that the bill is being introduced at the request of the Department of Corrections.

8:04:47 AM

MR. PETERSON, in response to a question from Chair Seaton, said the department knows which amendments the committee approves and has the authority to speak on behalf of the committee regarding those amendments. He stated his assumption that if the department were to come across any amendments it has never seen before, it would let the committee know about them at that point.

MR. PETERSON continued with his presentation of SB 310, by paraphrasing the sponsor statement, which read as follows [original punctuation provided]:

> The legislation that created the Alaska Correctional Industries program and commission was repealed on July 1, 2005. The primary purpose of SB 310 is to provide the necessary statutory authority so the Department of Corrections can continue providing inmate work and training programs without interruption.
>
> SB 310 is needed to provide for employment of prison inmates under AS 33/30. This employment program will be funded from Receipt Support Service funds. The bill

provides the necessary statutory authority to participate in critical federal Prison Industry Enhancement (PIE) programs. It also grants the authority to actively participate and partner with private enterprise. These partnerships will provide realistic work experience and vocational training for prisoners under conditions similar to those that prevail in the private sector. SB 310 will allow the department to make a deduction from the offenders' wages to apply to the cost of confinement. These receipts will support the prison employment program.

In addition, the prison employment program will allow inmates to work toward financial responsibility by taking deductions from wages to pay for child support, victim restitution, criminal fines, civil judgments, fees for utilities, as well as other obligations.

SB 310 is a vital piece of legislation if we are to continue inmate work and vocational training programs in our correctional facilities.

8:07:10 AM

REPRESENTATIVE ELKINS asked for confirmation that the bill in no way would alter or shut down the program.

MR. PETERSON assured Representative Elkins it would not. He explained that SB 310 is basically a redrafting of the previous program that was allowed to sunset. The only difference is that there would not be a commission; the department would oversee the program.

8:07:41 AM

REPRESENTATIVE GARDNER asked if the fact that the program was allowed to sunset was inadvertent, or if there was reason for it.

8:07:57 AM

MR. PETERSON relayed that the commission was intentionally allowed to sunset, but suggested that the department address the issue of the statutes that were inadvertently allowed to sunset "in addition to that." He concluded, "Those statutes that were

repealed when the commission 'sunsetted' is what this legislation would not put back into effect."

8:08:20 AM

CHAIR SEATON noted that there is a furniture making program in Seward and a laundry program in Juneau, both related to the corrections industry. He asked, "Is this also necessary for the internal cleaning and internal maintenance that is performed by prisoners at the prisons throughout the state?"

8:08:49 AM

MR. PETERSON said those programs that currently exist will have to be discontinued if the proposed legislation is enacted.

8:09:10 AM

CHAIR SEATON clarified that the second part of his previous question was whether the bill is also necessary to enable prisoners around the state to "do the work, and the maintenance, and the painting, and the cleaning."

8:09:22 AM

MR. PETERSON deferred to the department for an answer to that portion of Chair Seaton's question.

8:10:05 AM

SHARLEEN GRIFFIN, Director, Central Office, Division of Administrative Services, Department of Corrections (DOC), in response to Chair Seaton's unanswered question, confirmed that it would make a difference to the regular programs in the prison facilities if SB 310 were not enacted. She explained that there was a provision in the previous statute for exemption from workers' compensation, and without SB 310, the department would have to pay workers' compensation for inmate labor. She continued:

> The workers' compensation portion is not necessary; the department is [responsible] for inmate healthcare, and if a worker is injured doing anything that they do, the department picks up the cost of that inmate healthcare. If it exceeds what the department is capable of doing and becomes a risk management issue,

then we work with [the Division of] Risk Management on it.

8:11:15 AM

MS. GRIFFIN, regarding the sunset, explained that the sunset was inadvertent and everyone involved missed the fact that the legislation was going to sunset.

8:11:56 AM

CHAIR SEATON clarified that the intent had been to "sunset the commission," and when that happened, all the programmatic functions ended as well.

8:12:01 AM

MS. GRIFFIN confirmed Chair Seaton's remark.

8:12:08 AM

REPRESENTATIVE GARDNER asked if the workers' compensation requirement applies to internal labor for maintenance and routine jobs within the facility, or "this employment program."

8:12:32 AM

MS. GRIFFIN responded that the only exemption there was for not paying workers' compensation on inmate labor at all was in the correctional industry statute. She said there is not a related exemption in the workers' compensation statutes. Furthermore, AS 33.30.201 references the correctional industry statutes, AS 33.32, for the exemption of workers' compensation to apply to facility inmate labor. In response to follow-up questions from Representative Gardner, she stated that under SB 310, all offenders providing labor would once again be exempted from workers' compensation - for either type of labor.

8:13:46 AM

REPRESENTATIVE GATTO asked who would pick up the workers' compensation costs for an inmate who, for example, was injured, became a paraplegic, and could no longer work.

MS. GRIFFIN deferred the question to Brad Thompson.

8:14:01 AM

BRAD THOMPSON, Director, Division of Risk Management, Department of Administration, stated that an inmate who is severely injured may have a tort liability case presented on his/her behalf. He said, "There is not the exclusive remedy protection that an employee is precluded from suing their employer in our involvement with inmates. That's the policy call and the trade-off of not providing the workers' compensation."

8:15:48 AM

REPRESENTATIVE GARDNER proffered, "If workers' compensation were to be provided, it would be carried by the industry partner, but not the prison industries, if we're talking about the correctional industry's program."

8:16:03 AM

MR. THOMPSON responded as follows:

> If there was workers' compensation provided to the inmate participating in the correctional industry's program, and they're working for an outside entity, they could, in their purchase of workers' compensation - a statutory policy, also provide remedy to the inmate. But that's ... a policy call.

8:16:32 AM

CHAIR SEATON said:

> Just to clarify, that was for only those inmates that were working in conjunction with another industry; but all of the other exemptions for workers working within the walls of the prison doing maintenance, and painting, and cleaning ... wouldn't be covered by any outside -- I mean, that's not done in conjunction with any other outside entity, is it?

8:16:54 AM

MR. THOMPSON answered:

> If they were determined to be employees under the [Alaska Workers' Compensation] Act, then in this activity - performing service for corrections in the upkeep and maintenance of the facilities - ... Risk

> Management ... provide[s] the self-insurance protection for the State of Alaska as an employer. And so, if the State Department of Corrections was defined to be the employer of these individuals, it would be through our offices.

8:17:52 AM

MR. THOMPSON, in response to a request from Chair Seaton for further clarification, explained:

> The present system is, there is no workers' [compensation]. If there is injury, the medical is paid by [the Department of] Corrections, as is all medical [that] is being provided to inmates, whether it was [for] accidental [injury] or any other cause.
>
> In a prison industry's program, where they're working for an independent party - where they're performing work ... building furniture and they're working for ABC Industries - they today are not eligible for workers' compensation. And so, if that changed, if ... both ... programs - correctional industries as well as within the maintenance side ... - ... were defined to be employees, [then the Division of] Risk Management, on behalf of [the Department of] Corrections, would provide the workers' [compensation] for the maintenance activity, and then the independent employer - if they were working for ABC Industries in their statutory policy - would be required to provide workers' [compensation].

8:19:18 AM

MR. THOMPSON, in response to follow-up questions from Chair Seaton, related that the Division of Risk Management "provides the workers' compensation remedy owed to any state employee on behalf of the Department of Corrections, or any other agency." He reiterated that today workers' compensation is not being paid, but there are tort liability exposures or medical provisions being paid as part of the medical benefit program under [the Department of] Corrections. He concluded, "If there is workers' compensation, then the Division of Risk Management would be responsive."

8:20:04 AM

REPRESENTATIVE GARDNER asked first if prisoners are paid for doing the internal maintenance-type work, and second, if there is any reason that the legislature should waive workers' compensation for correctional industries, given that it exposes the state to risk.

8:20:36 AM

MS. GRIFFIN told Representative Gardner that the prisoners are paid between 30-60 cents an hour for work done within the prisons, such as janitorial, maintenance, and kitchen help, and are not presently covered by workers' compensation. In order for those workers to be covered by workers' compensation, a rate would have to be determined relating to how much needed to be provided to [the Division of] Risk Management. She stated her understanding that that rate would probably be high, based on the number of inmates that are working, even thought they don't make that much money. She emphasized the importance to the security of prisons in keeping inmates productively busy.

8:21:43 AM

MS. GRIFFIN offered an example of a case in which a former inmate who was in a halfway house was injured while performing community work for a nonprofit organization as a condition of his release. The workers' compensation board found that, under law, there was not an express contract between the man who was attempting to become an employee and the employer, because the former inmate was still under the control of the Department of Corrections. He noted that many states have preclusions for workers' compensation to clarify that "these individuals working within and outside the walls in these industry programs are not eligible for workers' [compensation]." He said these individuals are provided with medical [coverage], and he reiterated that if they are significantly injured and there is a tort liability, the state still has "an exposure for general liability for these individuals." He said those cases are rare, but when they happen they are resolved.

8:23:49 AM

REPRESENTATIVE GRUENBERG said one of the reasons that workers' compensation laws came into existence is because employers and potential defendants wanted them. He stated, "Prisoners love to litigate, and they can ... file a tort claim pro per." He indicated that the Division of Risk Management would have to

have its own lawyer. He asked, "Wouldn't it be just cheaper to cover them?"

8:24:32 AM

MR. THOMPSON reiterated that although some of the tort claims that have arisen are significant, their occurrence is a rarity. He indicated that [covering all prisoners with workers' compensation] would be very expensive.

8:25:35 AM

REPRESENTATIVE GATTO directed attention to page 7, [lines 3-4], which read:

> RETROACTIVITY: THE NONCOVERAGE OF AS 23.30. The provisions of sec. 12 of this Act apply retroactively to July 1, 2005.

REPRESENTATIVE GATTO asked:

> Since you had exceeded the fiscal note in previous legislation, I would assume, how did you manage to pay to keep the operation going between the time you had essentially no money, because it was never appropriated, and now?

8:26:18 AM

MS. GRIFFIN responded, "This is where the sunset of the Act was missed by everyone." She said DOC received an appropriation from the legislature, through the correctional industry's fund. She said that fund is an ongoing one from which DOC makes expenditures and deposits receipts. She stated, "We did not realize on July 1, that it didn't exist - we really didn't figure it out until ... [about October] - and we continued business as usual." Ms. Griffin said that explains why there is a retroactive date "to cover this year and to change it from the correctional industry's fund to receipt support services."

8:27:43 AM

MS. GRIFFIN, in response to follow-up questions from Representative Gatto, said the fund is that of the correctional industry, and she recollected the fund number is 22654. She revealed that the fund balance as of July 1, 2005, was approximately $300,000, and thus that money was available for

expenditures and selling services and products. She concluded, "So, there's no additional funding required to make up for the operations thus far this year."

8:30:13 AM

CHAIR SEATON closed public testimony.

8:30:22 AM

REPRESENTATIVE GRUENBERG stated his understanding that there is some behind-the-scenes negotiating that is taking place.

8:30:29 AM

REPRESENTATIVE ELKINS moved Conceptual Amendment 1, as follows:

On page 5, line 20:
Move paragraph (6) to line 16 and renumber it paragraph (4)
Move paragraph (4) to line 18 and renumber it paragraph (5)
Move paragraph (5) to line 20 and renumber it paragraph (6)

8:31:22 AM

CHAIR SEATON objected for discussion purposes. He reviewed the amendment.

8:33:13 AM

MS. GRIFFIN, in response to a request from Chair Seaton, indicated that the department would support [Conceptual Amendment 1], the result of which would be to change the order in which the department would apply deductions related to offender wages. She offered further details. In response to a follow-up question from Chair Seaton, she said [the money would be apportioned] proportionally. She noted, "Child support orders are first, and they generally have a percentage of the wages that [are] to be paid, and that's usually stated in the order."

8:35:44 AM

CHAIR SEATON asked, "Is there currently a percentage of their wages that do go to restitution anyway?"

8:35:58 AM

MS. GRIFFIN said she thinks that depends on how the court order reads. She stated her belief that there is a percentage applied "as it goes down the line." She offered to follow up on that issue for the committee.

8:36:12 AM

CHAIR SEATON said he is concerned, because he has not seen anything in statute that says that "you will only take out a percentage of it for this." He relayed that court orders for dependents, for example, are generally listed on percentages, and he said he is not sure if restitutions are done the same way. He stated, "I want to make sure that by making this change ... we don't get into the legal hole of making it so that the prisoner has zero incentive for participating in the program, and then you end up with very incorrigible people with no leverage over them."

8:37:06 AM

CHAIR SEATON removed his objection, but said he wants the department to get back to him about this issue. There being no further objection, Conceptual Amendment 1 was adopted.

8:38:00 AM

REPRESENTATIVE GRUENBERG stated his understanding that "the parties are working out some accommodations."

8:38:11 AM

REPRESENTATIVE GARDNER said she is troubled by the workers' compensation issue. She directed attention to page 6, [lines 29-31], which read:

> the provisions of AS 23.30 (Alaska Workers' Compensation Act) do not apply to inmates employed in a prison employment program operated by the Department of Corrections.

REPRESENTATIVE GARDNER asked whether the jobs in correctional industries fall under "prison employment program operated by the Department of Corrections", or whether that phrase refers to the "internal works."

8:39:05 AM

MS. GRIFFIN replied that Correctional Industries is a program operated by the Department of Corrections; however, not all correctional industry programs involve a vendor outside the department. For example, there is a sewing factory in Highland Mountain Correctional Center that currently makes all the clothing for inmates. She concluded, "So, not all correctional industry programs involve the public sector."

8:39:48 AM

REPRESENTATIVE GARDNER asked if it makes sense to draw a line between the employment which is funded through the Department of Corrections and employment which is paid by an outside organization.

8:40:00 AM

MS. GRIFFIN responded that that might work in some cases. She said federal regulations for the PIE programs allow either workers' compensation "or its equivalent." In more of a free venture program, the company pays to the department minimum wage for all hours worked by inmates; however, the inmates are only allowed to have 50 percent of minimum wage posted to their account for their pay. Currently, she noted, the state files 1099 forms for inmate labor, as opposed to wage statements that have all of the withholdings. She indicated that she had not really considered the effect of "whether, if the employer were paying workers' compensation, ... we would have some offenders receiving W2s from the private employer, and those working in the institution in industries receiving 1099s." In response to a question from Chair Seaton, Ms. Griffin confirmed that the 1099 form is for miscellaneous income.

8:42:07 AM

REPRESENTATIVE GARDNER said she would like to explore this issue further before offering an amendment. She explained:

> I do have concerns about the whole workers' [compensation] issue, and if they're paid externally on an hourly rate that's minimum wage or more ... they really are employees of some other agency, and I don't ... agree with saving the employer workers' [compensation] money and opening the state to

liability. But I don't think we have to do that here if there's another opportunity to ... have an amendment ready for next time.

8:42:48 AM

MS. GRIFFIN said she believes there has been discussion among attorneys related to "having those contracts with private vendors read in such a manner that they are also liable."

8:43:36 AM

MR. THOMPSON added that in its contract agreements with independent vendors, DOC would require the vendors to hold the state harmless "for claims arising from these activities and operations," and it would make the vendors carry a liability policy, "such that they would have the means to effect a commitment to hold us harmless." He concluded, "And so, those injuries typically would occur while they're not on our premises, or if in fact they're on our premises, they have the directional management and control of the inmate at that time. So, they have the responsibility to resolve the claim."

8:44:25 AM

REPRESENTATIVE GARDNER asked, "Has there ever been occasion to actually rely on those policies?"

8:44:37 AM

MR. THOMPSON answered that there has been claim history when injury occurred to inmates off premise involving "a contractual tender of defenses."

8:44:44 AM

REPRESENTATIVE LYNN recalled that Chair Seaton had previously commented regarding "the nature of what's being worked out." He asked if that nature has anything to do with provisions that would protect law-abiding workers from competition from criminal workers.

8:45:31 AM

MS. GRIFFIN confirmed that that is indeed the nature of what is being worked out. She noted that there are provisions in the PIE program that require, before beginning a program: meeting

with organized labor, involving the Department of Labor to determine prevailing wages, and not creating competition for organized bargaining units or displacing workers. She stated her understanding that "what we are working towards is having something very similar, if not the same, applied to any industry that ... would be free venture with a private organization."

8:46:14 AM

MS. GRIFFIN, in response to a follow-up question from Representative Lynn, offered her belief that there would be an upcoming amendment to address this issue.

CHAIR SEATON said it is not the intent of the committee to hold up the bill; however, he said he wants to ensure that any necessary amendments are incorporated.

8:46:54 AM

MS. GRIFFIN related that there is an amendment being worked on presently.

8:47:11 AM

CHAIR SEATON asked Representative Gardner to work with DOC to ensure that any amendments to be offered are received by the committee in writing before the next meeting.

8:47:34 AM

REPRESENTATIVE GARDNER [nodded].

8:47:43 AM

MS. GRIFFIN concluded that the passage of SB 310 is critical in order to keep inmates productively employed. She reiterated that having inmates working and busy is vital to the security of the institution. In response to a request from Chair Seaton, she said she would have a response for the committee, regarding the reprioritization of the deductions, by the next meeting.

8:49:06 AM

[The committee held discussion regarding its upcoming calendar.]

8:50:38 AM

CHAIR SEATON announced that SB 310 was heard and held.

SB 86-STATE/MUNI LIABILITY FOR ATTORNEY FEES

8:51:06 AM

CHAIR SEATON announced that the next order of business was CS FOR SENATE BILL NO. 86(CRA)(efd fld), "An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals."

8:51:16 AM

RANDY RUARO, Assistant Attorney General & Legislative Liaison, Legislation & Regulations Section, Civil Division (Juneau), Department of Law, said he was standing in for Mr. Tillery, who had testified during the 3/23/06 hearing on SB 86. He said he would address a question asked at the last bill hearing, regarding a concern that the bill would mandate a payment by the state in an appeal of 20-30 percent of the prevailing party's reasonable fees. Mr. Ruaro explained that that amount is a cap, not a mandated amount, which he noted is shown in language on page 2, [Section 2, subsection (a)].

The committee took an at-ease from 8:53:25 AM to 8:54:37 AM.

8:55:13 AM

REPRESENTATIVE GRUENBERG said if the intent is to limit the courts in what they can procedurally award, then he doesn't think "this Act is effective to do that because it doesn't have a title that says it amends the appellate rules or it doesn't amend the civil rule, and it doesn't have the required two-thirds vote, obviously." He asked Mr. Ruaro if he is aware of that deficiency in the bill.

8:55:58 AM

MR. RUARO said Representative Gruenberg's concern mirrors that which the committee had asked Mr. Tillery and Mr. Ruaro to research during the last hearing of the bill. He clarified that Representative Gruenberg's point is that the bill effects a court rule change, thus mandating the title requirement and the two-thirds vote.

REPRESENTATIVE GRUENBERG inserted, "It effects at least two: Rule 82 and the appellate rule as well."

8:56:43 AM

MR. RUARO, on that point, stated that he disagrees that it effects a court rule. He offered his belief that the public interest litigant doctrine isn't spelled out in either Rule 82 or Rule 508; those rules speak generally to awards of attorney fees. He stated, "The public interest litigant doctrine, I believe, is case law, starting with the McCabe case and then proceeding through a number of other cases. And I believe that the two-thirds vote requirement applies to rules of procedure that are expressly promulgated by the court, and that the public interest litigant doctrine is not contained in either of those rules."

8:57:23 AM

REPRESENTATIVE GRUENBERG responded that Mr. Ruaro's statement seems to be novel legal theory, and he asked Mr. Ruaro if he has any precedent to support his position.

8:57:41 AM

MR. RUARO replied that the cases themselves speak about the doctrine and the right to receive attorney fees, but the term public interest litigant, or the amount to be awarded, or the rule that fees will not be apportioned among issues if one is a public interest litigant doesn't appear in the language of the rules. He said, "It's all case law as far as I could tell."

8:58:14 AM

REPRESENTATIVE GRUENBERG offered his understanding that Mr. Ruaro is making the argument that because the rule itself is established in the case, therefore the constitutional provision does not apply. He asked, "I'm not aware of any case holding to that effect, are you?"

8:58:42 AM

MR. RUARO said there is a case which references the test that courts apply: Nolan B.C. Air Motive 627 P.2d 1035. In that case, he said, the court notes that there has to be an initial finding that the statute that the legislature passed actually conflicts with a rule promulgated by the court. Mr. Ruaro said he interprets that language to mean that "it has to be an express rule that the court has adopted." He continued:

> I think the distinction is a bright-line test, and that's whether or not the court has expressly adopted it as a rule. If it were not, the legislature would be left to guess every time the court issued a decision, whether or not [this is] a two-thirds requirement .... So, I guess I read Nolan to require a bright-line test of whether it actually appears in a rule.

8:59:59 AM

REPRESENTATIVE GRUENBERG recollected that in the past there was a similar bill limiting attorney fees which passed without a two-thirds vote and "at least the superior court struck it down on that basis."

9:00:36 AM

MR. RUARO said he thinks Representative Gruenberg is referring to House Bill 145, and he said an [Alaska] Superior Court judge did hold that there was a two-thirds vote requirement. He said the state's position on appeal was that the judge was incorrect.

9:00:44 AM

REPRESENTATIVE GRUENBERG responded that that may be that state's position, but the case, as it stands, is directly opposite to the position of SB 86. He concluded, "So why don't you be certain and put that in?"

9:01:05 AM

MR. RUARO said there are additional reasons that SB 86 does not require a two-thirds vote "beyond that distinction that the judge made in that case." He noted that Article 2, Section 21 of the [Alaska State] Constitution specifically grants the legislature the authority to provide the rules for sovereign immunity of the state and municipalities. He continued:

> That was not present in [House Bill] 145. So, ... there's a distinction to make between [House Bill] 145 and the basis or the authority for SB 86, which is: SB 86 is a function or a result of the legislature using its ... very specific constitutional grant of authority to exercise a core function, which is to protect the state in the means it deems fit. And I

> would argue that that specific grant of authority - even if public interest litigant doctrine was embodied in a court rule - ... must give way to ... the legislature's authority under Article 2, Section 21. And the language there ... specifically grants the legislature the authority to determine the procedures for suits against the state.

9:02:47 AM

REPRESENTATIVE GRUENBERG asked Mr. Ruaro if there is any precedent for that opinion.

9:02:54 AM

MR. RUARO answered yes: Alaska v. O/S Lynn Kendall. He said, "It's not exactly on point, but it does say the Constitution of the State of Alaska grants to the legislature the sole and exclusive power to enact laws establishing the terms and conditions upon which the state may be sued." He continued:

> And I would just note that the position I'm arguing is also consistent with the U.S. Supreme Court decision in Alyeska Pipeline Service Company v. Wilderness Society and other federal decision where the courts have noted that it would be inappropriate for the judiciary to create a general rule independent of statute to allow attorney fee awards in the courts, and that those matters are subject to Congress' determinations. So, I guess I would argue my position as also consistent with U.S. Supreme Court law.

9:03:57 AM

REPRESENTATIVE GRUENBERG said he would like copies of those cases as soon as possible.

9:04:08 AM

MR. RUARO said he would provide those copies.

9:04:15 AM

CHAIR SEATON said he does not think that's the core of the issue. He opined that the core of the issue is whether the committee is proceeding on the basis of ensuring that the public has reasonable access to redress bad laws that are possibly

unconstitutional or ordinances that violate state law. He said people who challenge their government for the aforementioned reasons - not for personal gain - will have huge out-of- pocket expenses even if they win, if the legislature only allows 20 percent reimbursement of actual expenses. He said the House State Affairs Standing Committee has a policy decision to make as to whether to raise the bar for those people, which would result in their being less able to sue. He indicated that looking at the court rule issue is more in line with the perspective of the House Judiciary Standing Committee.

9:05:58 AM

MR. RUARO said he understands Chair Seaton's concern. He said, "I think the answer is that all of the things you mentioned can still be in place; it's simply that the legislature will be the entity that's exercising the authority to determine that, as opposed to the court system.

9:07:10 AM

CHAIR SEATON asked how the legislature would exercise that authority, should the bill pass.

9:07:30 AM

MR. RUARO explained that if SB 86 passed and a particular group or entity wanted to receive the right to recover enhanced fees, it would lobby the legislature, and the legislature could pass a statute - similar to what the legislature has done related to consumer protection, imminent domain, or other exceptions that the legislature currently has on the books - and receive that exception. He said, "In the first instance, I guess, the entity making that policy decision would be the legislature, as opposed to the court system."

MR. RUARO, in response to a question from Chair Seaton, clarified that he is talking about a situation where - rather than going back and making an appropriation after the case is over - a group or interested party would have a ... legislator introduce a bill that said, "This class or this group of litigants is entitled to receive enhanced attorney fees, and here's why." The legislature would act on that legislation, and then in subsequent cases that fell within that category, those entities would be entitled to receive the enhanced fees.

9:08:24 AM

CHAIR SEATON responded:

> I think ... that might be good for something like ... the last ... challenged reapportionment .... In fact, it's the second largest year in suit cases under public interest litigants. I think that there might be the clout there. But what we're talking about here is looking at the small guy on the municipal level or the individuals who are challenging state laws, and the ability of individuals that ... we are trying to protect under ... public policy. I don't think the chance of getting ... any kind of legislation like that through for them is very large.

9:09:22 AM

ROBERT SPARKS, testifying on behalf of himself, told the committee that he is an attorney practicing in Fairbanks. He shared his background with the committee. He relayed that he had a client a few years ago who had a driver's licensing issue with the City of Fairbanks. The client was trying to obtain a taxicab license and the city was demanding that the person comply with requirements way beyond the requirements for obtaining a driver's license. He said his client did not have a lot of money. Eventually the city agreed to issue the man his taxicab license. Mr. Sparks indicated that if [SB 86] had been in place at the time and his client had filed a lawsuit in order to get the city to comply with state law, there is no way he would have been able to pay for it. Furthermore, Mr. Sparks said, "If I was only going to look at getting 20 or 30 percent of my actual attorney fees and costs back for doing that lawsuit, there's no way that that person would have been able to get his ... taxi permit so that he could ... continue earning a living."

MR. SPARKS opined that SB 86 is shortsighted and has vast, unforeseen ramifications that would substantially change "the public justice outcomes in Alaska." He said the proposed legislation would limit the ability of citizens to make the state comply with its own law by making those citizens pay 70-80 percent of the actual attorney fees. Mr. Sparks exclaimed that he thinks that is outrageous. In response to a question from Chair Seaton regarding pro bono work, said there are many instances where lawyers do pro bono work for people who don't have any money. He cited family law cases as one example, and said he is on the list for Alaska Legal Services to help people

with eviction cases. He indicated that there are already a lot of pro bono cases taken on. He said:

> In this circumstance ... you're talking about trying to get the state or a municipality to comply with either ... state [law] or the municipality's own charter ..., and it doesn't seem to me when you win in a case like that that it's necessarily punishment for the municipality or the state to have to pay the attorney fees that they caused the person to run up to make the municipality or the state comply with their own law.

9:13:02 AM

REPRESENTATIVE GRUENBERG asked Mr. Sparks how the legislature can ensure that the legal system isn't being abused by private litigants that are just litigating unmeritorious claims against the government.

9:13:36 AM

MR. SPARKS replied that the legislature is in charge of appointing the superior court judges and must have faith that the system is going to work the way it is supposed to work. He said the system was developed over time and has been in place for "hundreds of years."

REPRESENTATIVE GRUENBERG, regarding the award of attorney fees under case law, asked if the courts consider whether the lawsuits are frivolous or over litigated and if the court and appellate rules currently provide that kind of protection.

MR. SPARKS answered yes. He said the court rules provide the judge with great discretion to be able determine what the attorney fees are, and he said there are some really competent judges with integrity who follow the law. He noted that Rule 82 has many exceptions regarding the percentage awarded in attorney fees. Mr. Sparks stated, "If you take away ... having to pay attorney fees, it reduces the overall incentive for the state and municipality to exercise reasonable care and take reasonable action." He offered examples. He said making people pay consequences for unreasonable actions is a disincentive toward them taking those actions. He stated, "If you commit a crime, you're going to have to pay attorney fees for the public defender, you have to pay court costs, you have to pay fines,

you have to go to jail. I mean, it's the same thing; it should be the same thing for the state."

9:16:43 AM

CHAIR SEATON talked about recent committee discussion regarding paperwork in the committee packet showing that litigants are considered the prevailing party if they succeed on the main issue. He said the handout cites [Hillman v. Nationwide Mutual Fire Insurance Company, 855 P.2d 1321, 1324 (Alaska 1993)]. He asked Mr. Sparks if he is aware if there is a different standard, so that a public interest litigant could win on a minor technicality and receive full attorney fees, or if "they have to do the same thing and prevail on the main issue."

9:17:25 AM

MR. SPARKS offered his understanding that the public interest litigant would be compensated only for the issues that he/she wins. He said the public interest litigant has to justify his/her fee position by filing a motion for attorney fees and a detailed statement about time spent, work done, and costs, after which the judge decides if the motion is reasonable. He said he thinks the judges can be relied upon to do their job.

9:18:30 AM

REPRESENTATIVE GRUENBERG asked if the government can appeal if the trial court awards attorney fees against the government and the government feels those fees are too high.

9:18:56 AM

MR. SPARKS answered that in his experience, the government usually appeals those issues if it believes that the judge has been unreasonable, and the supreme court is amenable to reviewing such cases and is critical in its review of the awards of attorney fees if it believes they are excessive or unreasonable in any manner.

9:19:16 AM

BARRY DONNELLAN, testifying on behalf of himself, said he is a lawyer in Fairbanks. He said he has dealt over the years with private parties dealing with the state, and he said the big problem lies with the state's law firm, not with the private litigant. He related having experienced a case in which the

state's law firm spent tens of thousands of dollars defending a point, only to ultimately contradict the point it had spent so much money defending. He said his client didn't have any money and thus couldn't carry the case any further. He stated, "If we want to save money, what we need to do is instill a little bit of fiscal responsibility with the state's law firm and not with the private law firm." He opined that the state's law firm has no concept whatsoever with fiscal responsibility. He shared that his experience is that the state's law firm defends the state even when the state is obviously wrong.

MR. DONNELLAN recommended that the attorney fees to a prevailing party be increased to 100 percent, not cut back to 20 percent. He concluded, "I think it is very serious when the state considers raising the bar against a private citizen raising a grievance with the state."

9:21:40 AM

MICHAEL W. MacLEOD-BALL, Executive Director, American Civil Liberties Union (ACLU) of Alaska, testified in opposition to SB 86. In response to Representative Gruenberg's previous question about frivolous lawsuits, he said the short answer is that nothing needs to be done. He explained that under the existing rules, if the attorney is not successful in the case, he/she does not get an award of attorney fee, and certainly frivolous lawsuits are not going to be successful.

MR. MacLEOD-BALL stated:

> ACLU of Alaska opposes SB 86 on the grounds that it will have a chilling effect on the ability of parties acting in the public interest to challenge the inappropriate exercise of governmental authority. The bill will tend to widen the legal advantage currently held by governmental litigants over private individuals. The ACLU of Alaska, I will say parenthetically, will be affected, but not as much as other individuals and nonprofit organizations that will benefit from the existing rule. The reason for that is that most of our cases are brought on constitutional grounds, and most constitutional claims have separate award of fee provisions in the statute.
>
> But the bottom line here is that if this legislation is enacted, citizen oversight of government will be thwarted, and I think that is a bad thing for Alaska

as a whole. The typical plaintiff in a public interest lawsuit is an individual or a nonprofit advocacy organization. An atypical defendant in such a suit is a governmental entity - often the federal or state government, due to the nature of the issues commonly litigated. However, your reports clearly show that the public interest cases are brought just as regularly against quasi-public or even private entities. There can be no dispute that the typical suit hits a party with limited financial resources that needs to hire outside council against a governmental or other private entity with access to substantially greater financial and legal resources. As often as not, the dispute is over principle, and very rarely over any substantial amount of money.

Compare this to any other type of litigation. First, private suits almost involve a fight over money or property interest. Typically, general civil litigation pits business against business or individual against individual. Certainly there are disparities in each party's ability to cope with the cost of litigation, but that's a matter of happenstance. The public interest litigant is financially disadvantaged and typically does not have the prospective benefit of a money-damages award. As a result, attorneys are not readily available to take on such cases without sizeable retainers; it's simply not profitable for those attorneys to do so. Therefore the public interest litigant is legally disadvantaged, as well, because the governmental adversary will always have council on board from the start.

In his letter of transmittal, the governor complains that the public interest litigant is being subsidized by the current system of attorney fee reimbursement, but bear in mind that the public interest litigant only receives reimbursement if "A," he or she is acting in the public interest, and "B," he or she is successful in showing that the government acted wrongly, unlawfully. On the other hand, the government gets its subsidy from the taxpayer whether it wins or not. It's not as if the individual within the government who caused the government to violate that victim's rights is made to reimburse the tax

payers for the internal cost of running the government in a manner violative of the public interest.

9:25:24 AM

MR. MacLEOD-BALL continued his testimony as follows:

The key is to set up a system that does not reward improper behavior, and there will be no incentive for the government to stop unlawful action if there is no one willing to speak out against such action through public interest legal action. Who will this bill affect? It will affect those in our society least able to afford it - the poor, the uneducated, the minorities, the disabled, the elderly - all of whom have benefited from public interest litigation at one time or another, many of whom would not have been able to bring such actions in their own right. It won't make a difference to the wealthy individual who funds the public interest lawsuit. For such individuals, attorney fee reimbursement is not a significant consideration. Rather this law will discourage normal, everyday people and small nonprofit organizations from trying to make a difference when they see the government failing to do its job. If this bill becomes law, the state government will be able to rest easier that it can act against the public interest, because it will be less likely to be held to account for its wrongful actions.

MR. MacLEOD-BALL said he believes that the committee has examined the two-thirds vote for the court rule change; however, he suggested that it might be appropriate to wait for the supreme court to rule on the pending case before taking further legislative action "that would further muddy the waters." He noted that there appears to be an exception in SB 86 for eminent domain cases; fees can be awarded in such cases. He questioned why eminent domain cases are made an exception, while other unlawful acts by the government are not. He listed other unlawful acts, and asked, "Who's to say that a property taking is somehow worthy of fee reimbursement and is somehow superior to all these other very legitimate claims?"

MR. MacLEOD-BALL noted that a gentleman named Ken Jacobus had wished to testify, but had to leave. He reported that Mr. Jacobus had asked him to relay his opposition to the bill for the reason that "this will affect not just ... organizations on

the left, but also organizations on the right and in the middle." Mr. MacLeod-Ball told the committee Mr. Jacobus has represented conservative organizations on a fairly regular basis in public interest litigation actions.

9:28:05 AM

MR. MacLEOD-BALL summarized that SB 86 is presented as if the government is unfairly required to pay for a vengeful individual's lawsuit against the state, and he opined that nothing could be further from the truth. This bill will simply make it harder for someone who's acting in the public interest to force the government to comply with its legal obligations.

9:28:57 AM

REPRESENTATIVE GATTO mentioned the article entitled, "Governor aims at legal fees," copied from an unknown source on a handout in the committee packet. In the article, Representative Gatto said, ["Chris Kennedy, state assistant attorney general"] is quoted as having noted that "Alaska is the only state that awards repayment of all legal fees to winning litigants." He asked if that is accurate and, if so, how it transpired that Alaska stands alone among 50 states.

9:29:31 AM

MR. MacLEOD-BALL [began to answer, but due to technical difficulty the teleconference connection was cut off abruptly and he could no longer be heard].

The committee took an at-ease from 9:30:29 AM to 9:32:27 AM.

9:32:28 AM

CHAIR SEATON asked Mr. MacLeod-Ball to repeat his answer for the record.

9:32:57 AM

MR. MacLEOD-BALL said the answer is complicated because each state has slightly different rules. For example, some states have a greater number of statutes that award attorney fees. He said in almost all states the courts have discretion to award attorney fees, but some courts will interpret their discretion somewhat more broadly than others. Mr. MacLeod-Ball stated his belief that Alaska is the only state that follows the rule that

says as a matter of course the losing party pays a portion of the winning party's fee. He stated the reason for that is to discourage frivolous lawsuits. He added, "Beyond that there can be sanctions ... awarded, as well."

9:34:01 AM

REPRESENTATIVE GARDNER said she would like a copy of Mr. MacLeod-Ball's testimony in writing, if available.

9:34:16 AM

CHAIR SEATON made the same request of all the testifiers.

9:34:25 AM

REPRESENTATIVE GRUENBERG offered his understanding that Rule 82(b)(3) "puts some sidebars on, among other things, frivolous suits." He said he is not certain whether that subsection applies in the public interest arena, but asked Mr. MacLeod-Ball, "Would you have any problems with making sure that that does apply so that the rule would explicitly say that ... the court can take into consideration if the lawsuit is frivolous?"

9:35:20 AM

MR. MacLEOD-BALL answered that he would have no problem with that. He stated, "Our practice is not to file a lawsuit unless we are very confident we're going to win."

9:35:56 AM

KARI ROBINSON, Legal Advocacy Project (LAP) Director/Project Attorney, Alaska Network on Violence & Sexual Assault (ANVSA), testified in opposition to SB 86. She relayed:

> We were a successful public interest litigant back in 1997, and we were forced to sue the Alaska court system to ... properly implement the 1996 Domestic Violence Act. So, here we were challenging to actually have the legislative mandate in statute properly enforced. So, I want to echo that a small nonprofit does not take on litigation like that without serious consideration. We would never file a frivolous lawsuit; it's a huge investment of staff

time, and we really consider ... what the public impact of the litigation is.

I also want to echo that this bill would affect people in our society who are least likely to protect their rights. We're talking about victims of domestic violence and sexual assault, ... the poor, minority groups, the disabled, and the elderly. If this bill passed, it would severely limit our ability as a nonprofit to take action for victims' rights in similar types of litigation ... as we did back in 1997.

9:38:15 AM

REPRESENTATIVE LYNN asked Ms. Robinson for an example of the type of case in which ANVSA might get involved in suing the state as a public interest litigant.

9:38:41 AM

MS. ROBINSON offered more details regarding the aforementioned case from 1997. She explained that the court system refused to put all three types of protective orders on the state court form, which meant that a victim could not request all forms of relief that the legislature had mandated by statute. After trying for over a year to negotiate with the court system, ANDVSA finally had to file suit. Ms. Robinson said ANDVSA kept costs down by doing much of the work in house and was lucky to have an attorney work for the nonprofit organization for reduced fees. She said the case was won, and she stated her belief that had ANDVSA not filed that suit, victims today would not have all three types of protective orders available to them on the court forms.

9:39:55 AM

CHAIR SEATON asked Ms. Robinson if ANDVSA "put in" for the attorney fees as they had been incurred at the reduced levels or if they were requested at a higher level.

9:40:18 AM

MS. ROBINSON said ANDVSA requested those fees at the level at which they were incurred, which was at a reduced rate. She said the fees for that litigation, which lasted at least a year, were $19,000. In response to a question from Chair Seaton, she

confirmed that the court decided to award the actual attorney fees. She said it was a hardship for ANDVSA to come up with the reduced fees, because the nonprofit organization has limited and restricted funding. She concluded, "So, litigation such as this would really limit our ability."

9:41:02 AM

REPRESENTATIVE LYNN asked Ms. Robinson if ANDVSA's public interest litigant prevailed on all elements of the litigation or just some.

9:41:08 AM

MS. ROBINSON replied that there were three elements in the case, all three of which were won. Two of them became mute, she said, when the court system agreed to make changes, but the third and primary issue, which was to list all three types of protective orders on the court form, was won through litigation.

9:42:18 AM

MS. ROBINSON, in response to a question from Representative Gruenberg, explained that there are a number of factors that the court looks at in determining "whether or not you're a public interest litigant." She said, "It's not ... simply by the issue that you're bringing to the court." She listed the four factors that the court considers, which are to decide whether or not: the case is designed to affect strong public policies; numerous people will receive benefits from the suit if the plaintiff succeeds; only a private party can have been expected to bring the suit; and the purported public interest litigant has sufficient economic incentive to file suit - even if the action involved only narrow issues lacking general importance.

9:43:18 AM

CHAIR SEATON mentioned the Dansereau v. Ulmer case and said the committee had heard testimony that a court may also determine that apportionment is appropriate because a litigant raised certain issues that were frivolous. He asked Ms. Robinson if she is familiar with that case or was made aware that some frivolous suits can reduce the award.

9:43:37 AM

MS. ROBINSON responded that she is not familiar with that case.

9:44:28 AM

CHAIR SEATON closed public testimony.

9:44:36 AM

MR. RUARO recollected that Representative Gatto had made a comment that the public interest litigant doctrine is an aberration among the 50 states. He concurred with that estimation. He said, "Any other states that do provide recovery of enhanced attorney fees do handle that by statute, and ... we're suggesting that this legislature can do that very same thing." Regarding the apportionment issue, he noted that public interest litigants under Dansereau can prevail on one issue - one item - and recover full attorney fees. He offered an example of when that has happened. In response to a request from Chair Seaton, he said he would provide to the committee information pertaining to the court cases.

9:46:32 AM

MR. RUARO referred to Mr. MacLeod-Ball's testimony that something needs to be in place that imposes a penalty on parties for bringing a frivolous or losing suit, and he said under the public interest litigant doctrine the loser doesn't pay anything. He recalled testimony that characterized the types of plaintiffs that bring these cases as being ordinary, everyday people and individuals with a lack of funds. He stated, "While that may be the case in some instances, I think if you look at Ms. Taylor's February 17 Legislative Report, I think to your office, most of the entities listed in there are organizations, environmental groups, ACLU, and I would suggest to you that ... some of those organizations at least have more than ample funds and don't ... fit the image that was painted for the public interest litigants. In response to Mr. MacLeod-Ball's mention of eminent domain as an exception, he stated, "That's in current statute, and that's why it would still stand." Mr. Ruaro disagreed with a former testifier's characterization of the Department of Law as not being competent, revealing that he had worked eight years in private practice and sees the attorneys in the department as highly specialized.

9:48:37 AM

CHAIR SEATON reminded Mr. Ruaro that the opinions expressed by those testifying are not necessarily the opinion of the

committee, even if they are not challenged by the committee. He said there had been testimony imparting that full attorney fees would be paid in relation to "challenging on constitutional grounds." He said he does not see that in SB 86.

9:49:01 AM

MR. RUARO said that exception is in House Bill 145, which is "up on appeal right now."

CHAIR SEATON asked if that exception is for the recovery or the payment of the fee.

MR. RUARO said he believes it is for the recovery.

9:49:23 AM

CHAIR SEATON said, "But we're passing a piece of subsequent legislation now, without the exception for enhanced recovery fees for constitutional grounds. So, as I see it, this subsequent legislation will be precedent over previous legislation." He asked if that is correct.

9:49:52 AM

MR. RUARO said he believes that is incorrect. He directed attention to page 2, lines 4-6, which read:

> (c) This Act does not preclude the enactment of, nor create an implied repeal of, specific statutes authorizing awards of attorney fees in particular situations, such as in AS 45.50.537.

MR. RUARO indicated that the language includes enhanced attorney fee awards, "so that it dovetails in that regard."

9:50:08 AM

REPRESENTATIVE GARDNER said Mr. Ruaro had given an example of a case in which the plaintiff lost on several points, won on one point, but received full attorney fees. She asked if that is standard, and if there could be other cases in which someone could lose on several points, win on one point, and get partial fees.

9:50:24 AM

MR. RUARO responded that the standard for nonpublic interest litigants is that they have to be the prevailing party on the main issue in the case, whereas public interest litigants merely need to prevail on a single issue in the case to receive payment of full attorney fees for all issues.

9:52:25 AM

REPRESENTATIVE GRUENBERG, regarding Mr. Ruaro's defense of the department's attorneys, suggested that [the attorneys working for] the State of Alaska have far more resources than any litigant that they are up against.

MR. RUARO, although agreeing that the state as an entity has a significant amount of resources, said he wouldn't label those resources as unlimited.

CHAIR SEATON reopened public testimony to allow someone to testify whose name previously had not been noticed on the sign up sheet.

9:52:57 AM

KAY ROLLISON, testifying on behalf of herself, told the committee about a case that she had to "take on" a couple years ago that was against organized labor. Luckily, she said, there were a couple of attorneys that were willing to work on contingency fees. If it had not been for the "loser pays" requirement, she said, she would never have had the ability to take that case on. She related that just knowing she has a right to bring a case against any person or entity not fulfilling the obligations specified by law keeps her "in the process." Ms. Rollison suggested that if the proposed legislation passes, there would be nothing "to keep it from sliding over into the private sector also, so that those same contingency fees would be limited to a certain amount, and then ... I'd have no way to defend myself in that arena either." She concluded:

> When it comes to principle, when it comes to integrity, and it comes to my staying connected to how we run this state, if you pass this bill, you've just cut my legs right out from under me. I personally ... have concerns with things that are going on in our legislature, things that are going on in our government, and I may well be one of those public litigants.

And with respect to your nonprofits and how they play into it: Okay, I'm single, I'm by myself, ... I have some small savings, but if I had a case - if I had something that I just was willing to risk everything for - I would probably have to ... look for some nonprofit that might be interested in taking ... my case [and be] willing to help me, because at least they have ... some way of helping me present that case.

... My plea to you is to please keep this process as it is. It's scary even as it is, but ... I think it's incredibly untimely that this particular piece of legislation is brought up. You might be thinking that you're defending yourself or looking out for some big money-bag, nonprofit group from outside ... or inside the state, but I'm not one of those, and I've used this process, at least ... on the private side, and I may well use it on the public side.

9:57:44 AM

CHAIR SEATON closed public testimony.

CHAIR SEATON announced that SB 86 was heard and held.

HB 461-LEGISLATIVE DISCLOSURES

9:58:23 AM

CHAIR SEATON announced that the last order of business was HOUSE BILL NO. 461, "An Act relating to disclosure to the Alaska Public Offices Commission of information about certain income received as compensation for personal services by legislators, public members of the Select Committee on Legislative Ethics, and legislative directors subject to the provisions of law setting standards of conduct for legislative branch officers and employees; and providing for an effective date."

9:58:24 AM

REPRESENTATIVE ELKINS moved to adopt the proposed committee substitute (CS) for HB 461, Version 24-LS1656\Y, Wayne, 4/7/06, as a work draft. There being no objection, Version Y was before the committee.

9:58:47 AM

REPRESENTATIVE GARDNER, as sponsor of HB 461, addressed the changes made in Version Y, which were in response to the committee's concerns stated during the last hearing. She said one concern had been in regard to the meaning of personal services. She stated that the phrase, "personal services" is defined not only as consulting or contract work, but also as employment. Thus, if a legislator is employed by someone and, as a result of that employment, receives a W2 form, then that employment would also have to be described under Version Y. She added, "It previously had to be disclosed, but now we have to say what it is."

9:59:58 AM

CHAIR SEATON said he thinks that was one of the main issues that was discussed at a prior hearing on HB 461. He said, "I don't think that was the intent of your bill." He asked, "Have you been able to work out that issue yet?"

10:00:04 AM

REPRESENTATIVE GARDNER answered yes. She clarified, "The existing language using 'personal services' meets my desire as well as [the Alaska Public Offices Commission's (APOC's)] understanding of what the intent is, which is that all income should be disclosed with some description, not just consulting or contracting ...." Representative Gardner said if the income is earned as a result of a job for which a person is licensed, for example a pilot or hairdresser, than that could be enough description in and of itself.

REPRESENTATIVE GARDNER said another question that had been addressed was whether a person would have to state how many hours he/she intends to work. She offered her understanding that APOC had a problem with that, because of its concern about reporting what has happened. She said her own concern is that "you can have income for work you're going to do over a course of time - some of which you've already done and some of which maybe you haven't." She said she thinks APOC is now comfortable with retaining the language, shown on page 2, [beginning on] line 11, which read:

> **(B) the approximate total number of hours that have been spent or will be spent performing the services; and**

REPRESENTATIVE GARDNER noted that Chair Seaton had questioned the issue of dividend income and wanted that to be included. She said that language is on page 2, [beginning on] line 4, and read as follows:

as to a dividend received from a limited liability company as compensation for personal services,

REPRESENTATIVE GARDNER noted that the language on page 2, lines 14-16, "IF THE SOURCE OF INCOME IS KNOWN OR REASONABLY SHOULD BE KNOWN TO HAVE A SUBSTANTIAL INTEREST IN LEGISLATIVE, ADMINISTRATIVE, OR POLITICAL ACTION", was not fully understandable and not meaningful to APOC, thus, it would be deleted. She explained, "When you accept money, as a legislator, you don't always know whether the source of that money may, during the time of your service, come before the legislature in any way."

10:03:07 AM

CHAIR SEATON asked if the issue regarding employment being included within the definition of personal services had been resolved.

10:03:18 AM

REPRESENTATIVE GARDNER answered yes. She said that is in current definition and is both recognized and understood.

10:03:32 AM

BROOKE MILES, Executive Director, Alaska Public Offices Commission (APOC), confirmed that personal services would include regular employees of a company, as well as people who receive compensation on a contractual basis. She said that in discussions with Representative Gardner's staff, APOC was "set at ease with respect to that." She said, if a person's job title was not descriptive enough, a person who is a regular employee would have the option of attaching his/her job description. She reminded the committee that APOC's primary concern with the original version of HB 461 was that it may not have a "bright enough line about who would be required to provide some additional description outside of" [his/her job title alone]; however, she said APOC is feeling much more comfortable about the language in Version Y.

MS. MILES expressed particular appreciation for the deletion of the aforementioned language [on page 2, lines 14-16]. She said, "If a person indicated that they had more than $5,000 of employment, but didn't show the amount, our only really clear guideline to request an audit was if we knew the company retained a lobbyist, because of course the lobbying law is within our purview as well." She said that subjective language was confusing both to the filer and to the public. She concluded, "If the intent is that legislators are held to this higher level of disclosure - in that [if] their personal services ... are more than $5,000 they also disclose the amount - how much simpler to just have that stated plainly in law?"

10:07:09 AM

MS. MILES, in response to a question from Chair Seaton, said APOC does not see any further problems in the bill. Furthermore, she stated for the committee's knowledge, "Once a CS of this nature is read across the floor, we would be revising our fiscal note to a zero fiscal note."

10:07:43 AM

REPRESENTATIVE GRUENBERG moved to report CSHB 461, Version 24-LS1656\Y, Wayne, 4/7/06, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 461(STA) was reported out of the House State Affairs Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:08:00 AM.