ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 5, 2010
11:05 a.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Dennis Egan
Senator John Coghill

MEMBERS ABSENT

Senator Lesil McGuire

COMMITTEE CALENDAR

SENATE BILL NO. 222
"An Act relating to the crimes of harassment, possession of child pornography, and distribution of indecent material to a minor; relating to suspending imposition of sentence and conditions of probation or parole for certain sex offenses; relating to aggravating factors in sentencing; relating to registration as a sex offender or child kidnapper; amending Rule 16, Alaska Rules of Criminal Procedure; and providing for an effective date."

- HEARD AND HELD

SENATE BILL NO. 303
"An Act relating to a subcontractor's, contractor's, and project owner's liability for workers' compensation, to sole proprietors and partnerships without employees, and to managers or managing members of limited liability companies, and excluding certain persons from liability for securing the payment of workers' compensation benefits to employees; and providing for an effective date."

- HEARD AND HELD

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 386(FIN)
"An Act establishing a uniform format and procedure for citations for certain violations of state law; relating to the form, issuance, and disposition of citations for certain violations; relating to certain crimes and penalties for

noncompliance with citations; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

SENATE BILL NO. 292
"An Act relating to the registration and operation of pawnbrokers and to the exemption for pawnbrokers under the Alaska Small Loans Act; and providing for an effective date."

- MOVED CSSB 292(JUD) OUT OF COMMITTEE

SENATE BILL NO. 249
"An Act relating to official action by electronic transmission, to records, and to public records."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 292
SHORT TITLE: PAWNBROKERS
SPONSOR(s): SENATOR(s) HUGGINS

02/24/10	(S)	READ THE FIRST TIME - REFERRALS
02/24/10	(S)	L&C, JUD
03/18/10	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
03/18/10	(S)	Moved CSSB 292(L&C) Out of Committee
03/18/10	(S)	MINUTE(L&C)
03/22/10	(S)	L&C RPT CS 3DP NEW TITLE
03/22/10	(S)	DP: PASKVAN, DAVIS, BUNDE
03/22/10	(S)	FIN REFERRAL ADDED AFTER JUD
03/29/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/29/10	(S)	Heard & Held
03/29/10	(S)	MINUTE(JUD)
04/02/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/02/10	(S)	Heard & Held
04/02/10	(S)	MINUTE(JUD)

BILL: SB 249
SHORT TITLE: PUBLIC RECORDS/ELECTRONIC TRANSMISSIONS
SPONSOR(s): SENATOR(s) ELLIS

02/01/10	(S)	READ THE FIRST TIME - REFERRALS
02/01/10	(S)	STA, JUD
03/23/10	(S)	STA RPT 5DP

03/23/10	(S)	DP: MENARD, FRENCH, MEYER, PASKVAN, KOOKESH
03/23/10	(S)	STA AT 9:00 AM BELTZ 105 (TSBldg)
03/23/10	(S)	Moved SB 249 Out of Committee
03/23/10	(S)	MINUTE(STA)
03/31/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/31/10	(S)	Heard & Held
03/31/10	(S)	MINUTE(JUD)
04/02/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/02/10	(S)	Heard & Held
04/02/10	(S)	MINUTE(JUD)

BILL: SB 303
SHORT TITLE: WORKERS' COMPENSATION AND CONTRACTORS
SPONSOR(s): LABOR & COMMERCE

03/08/10	(S)	READ THE FIRST TIME - REFERRALS
03/08/10	(S)	L&C, JUD
03/25/10	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
03/25/10	(S)	Heard & Held
03/25/10	(S)	MINUTE(L&C)
04/01/10	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
04/01/10	(S)	Moved SB 303 Out of Committee
04/01/10	(S)	MINUTE(L&C)
04/02/10	(S)	L&C RPT 3DP 1NR
04/02/10	(S)	DP: PASKVAN, DAVIS, THOMAS
04/02/10	(S)	NR: MEYER
04/05/10	(S)	JUD AT 11:00 AM BUTROVICH 205

BILL: SB 222
SHORT TITLE: SEX OFFENSES; OFFENDER REGIS.; SENTENCING
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/19/10	(S)	READ THE FIRST TIME - REFERRALS
01/19/10	(S)	JUD, FIN
01/25/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
01/25/10	(S)	Heard & Held
01/25/10	(S)	MINUTE(JUD)
02/15/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/15/10	(S)	Heard & Held
02/15/10	(S)	MINUTE(JUD)
04/05/10	(S)	JUD AT 11:00 AM BUTROVICH 205

WITNESS REGISTER

JOSH TEMPEL, Staff
to Senator Charlie Huggins

Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Explained the new provisions in the committee substitute for SB 292 on behalf of the sponsor.

MIKE FORD, Attorney
Civil Division
Department of Law (DOL)
Juneau, AK
POSITION STATEMENT: Reported that DOL had concerns with SB 249 but was not yet prepared to offer suggested solutions.

MAX HENSLEY, Staff
to Senator Johnny Ellis, said
POSITION STATEMENT: Testified that the sponsor and his staff would be happy to work with DOL and the committee to resolve any concerns with SB 249.

SENATOR JOE PASKVAN
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Sponsor of SB 303.

KIP KNUDSON, External Affairs Manager
Tesoro Alaska
POSITION STATEMENT: asked the committee to set SB 303 aside.

KEVIN CLARKSON, Attorney
Anchorage, AK
POSITION STATEMENT: Testified on behalf of Tesoro Alaska to oppose SB 303.

KEVIN DOUGHERTY, Attorney
Alaska Laborers
Anchorage, AK
POSITION STATEMENT: Testified in support of SB 303 as a means to get the workers' compensation law back on track.

JERRY LEE, representing himself
POSITION STATEMENT: Testified in support of SB 303.

BRAD THOMPSON, Director
Risk Management
Department of Administration
POSITION STATEMENT: Testified that the state would lose the protection of exclusive remedy under SB 303.

JERRY LUCKHAUPT, Attorney
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, AK
POSITION STATEMENT: Provided a sectional analysis of the CS for SB 222 as the drafter.

CINDY SMITH, Chief of Staff
to Senator Hollis French
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Provided information related to the CS for SB 222 as the Senate Judiciary Committee aide.

SUSAN MCLEAN, Director
Civil Division
Department of Law (DOL)
Anchorage, AK
POSITION STATEMENT: Described concerns that DOL has with CS for SB 222.

JEFFREY MITTMAN, Executive Director
ACLU of Alaska
Anchorage, AK
POSITION STATEMENT: Stated that he would like an opportunity to review the CS for SB 222 after which he would provide comments.

ACTION NARRATIVE

11:05:45 AM
CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 11:05 a.m. Present at the call to order were Senators Coghill, Wielechowski, and French.

SB 292-PAWNBROKERS

11:06:09 AM
CHAIR FRENCH announced the consideration of SB 292. He noted that the sponsor prepared a committee substitute (CS) to address concerns that were expressed about electronic records.

JOSH TEMPEL, staff to Senator Huggins, sponsor of SB 292, thanked the committee for its input and making a good bill better. He highlighted the changes made in the CS. On page 2, line 14, some language was removed because it addressed second hand and thrift stores. On page 4, line 8, the description of pledged property is now limited to serial numbers, model numbers

or other numbers on the item. Page 4, lines 15-27 addresses electronic records and it is language that this committee passed several years ago. It says:

> (b) A register may be contained in a book or in an electronic format, except that the register for pawn transactions must be in an electronic format if the pawnbroker is located in a municipality that has a population of more than 5,000.

CHAIR FRENCH commented that 5,000 is a good cutoff point. In a large city like Anchorage it's difficult to keep on top of what pawnbrokers have in their stores, whereas in smaller towns a police officer can readily identify new property in a pawnshop.

MR. TEMPEL said the final change addresses Senator Egan's concerns. On page 12, line 27, the language describing municipal regulation was clarified to reflect the sponsor's intent to set this statute as a minimum and to allow maximum local control.

CHAIR FRENCH asked for a motion to adopt the CS.

SENATOR WIELECHOWSKI moved to adopt the work draft committee substitute (CS) for SB 292, labeled 26-LS1487\T, as the working document. There being no objection, version T was before the committee.

CHAIR FRENCH found no questions or discussion and asked for a motion to move the bill from committee.

11:09:39 AM
SENATOR WIELECHOWSKI moved to report CS for SB 292, version T, from committee with individual recommendations and attached fiscal note(s). There being no objection, CSSB 292(JUD) moved from the Senate Judiciary Standing Committee.

At ease from 11:09 to 11:10 a.m.

SB 249-PUBLIC RECORDS/ELECTRONIC TRANSMISSIONS

CHAIR FRENCH announced the consideration of SB 249. It was heard previously. He noted that DOL had articulated concern about some perceived errors in the bill.

11:11:25 AM
MIKE FORD, Attorney, Civil Division, Department of Law, related that DOL has been working on language to correct their concerns,

but it's not in final form. He spoke to the sponsor and his staff and offered to continue to work on their concerns and that seemed to be acceptable. He said he appreciates that the committee wanted to advance the bill, but DOL believes that this is a complex bill with far-reaching implications and they are not prepared to go on record with a proposed solution at this time.

CHAIR FRENCH said he agrees that it's a complex bill, but it was complex when it was first introduced and he's struggling with the fact that it's taken DOL two months to get its views in writing. He asked if DOL could get its work done by Wednesday.

MR. FORD replied that depends in part on whether Senator Ellis's staff is available to meet, but they could certainly try to do that.

CHAIR FRENCH said he would prefer to have acquiescence from the sponsor, but an inability to meet with his staff should not hold up DOL's work. He reminded Mr. Ford that he could bring the material straight to this committee since this is where the decision will be made. "As soon as you can get concrete language addressing the concerns you raised you should send copies to my office, to my chief of staff, Cindy Smith," he admonished.

MR. FORD said he understood.

CHAIR FRENCH said the Governor and the public support this bill in concept and we should be able to work through the concerns before the end of session.

MAX HENSLEY, staff to Senator Ellis, said the sponsor and his staff are happy to work with the Department of Law and this committee to do what is necessary within the timeframe.

11:14:17 AM
CHAIR FRENCH stated that this committee will make time to work this out and get the bill moving by Wednesday. He held SB 249 in committee.

SB 303-WORKERS' COMPENSATION AND CONTRACTORS

CHAIR FRENCH announced the consideration of SB 303.

11:14:42 AM
SENATOR JOE PASKVAN, sponsor of SB 303, said this bill is designed to establish responsibility and accountability. It

advances conservative principles and fundamental capitalism by requiring owners, general contractors and others on a construction project to comply with the basic principle that is, "If you break it you pay for it." He added that it's important to understand that in Alaska under the concept of general law known as apportionment, an owner or general contractor who is 25 percent at fault is only liable for 25 percent of the injury. It's not the case that someone who is 1 percent at fault would be 100 percent responsible.

SENATOR PASKVAN reminded the committee that this nation was formed on the concept that the government and its citizens should be responsible and accountable for their wrongful conduct. This was a basic and fundamental principle to the founding of this country and likewise, the core concept in Alaska was that the government may be responsible for wrongdoing to individual citizens. However, that changed in 2004 with the creation of a privileged class that was immune from their wrongful conduct. SB 303 seeks to remove immunity.

11:17:37 AM
SENATOR PASKVAN noted that an argument that has been advanced says that SB 303 will promote double dipping, but that is patently not true. AS 23.30.015(g), which deals with the workers' compensation system when third parties are at fault, has since statehood said that if the employee recovers damages from the third party, that employee shall reimburse the employer for what they paid to the workers' compensation insurance carrier. Thus, there is no potential whatsoever for double dipping, he said.

SENATOR PASKVAN said there has been a question about whether the worker's compensation remedy is adequate, but he would point out that the workers' compensation system was never designed to be a full remedy system. Within the true definition of employer/employee, it has always been designed to be a partial remedy that would be applied irrespective of fault. The idea was to protect workers who were doing the work every day for their employers. For example, if an unmarried 25-year-old worker with no children were to be killed on a construction site through the fault of someone else and not necessarily the employer, the exclusive remedy now is reasonable funeral benefits. It's bad social policy, he said, if there is immunity from killing someone because of fault and the only responsibility is to the workers' compensation policy, which is paid by the employer and not necessarily the person at fault. The workers' compensation system provides for no future lost wages and no general damages

to the children or spouse of a worker who had a crippling injury or was killed. The workers' compensation system simply doesn't compensate for that loss.

11:21:00 AM
SENATOR PASKVAN recapped that SB 303 addresses the notion that responsibility and accountability attach when wrongful conduct exists and that the exclusive remedy provision falls within the true definition of the employer/employee relationship. SB 303 removes the immunity that currently protects a privileged class from the consequences of their wrongful conduct. This will promote the betterment of Alaska as a matter of social policy, he concluded.

SENATOR WIELECHOWSKI asked, "If an employer under current law is criminally negligent and…a subcontractor's employee is killed or injured, would they be covered under existing law?"

SENATOR PASKVAN replied the general contractor is immune even under the high moral standard of criminal negligence.

11:23:08 AM
SENATOR WIELECHOWSKI asked if there would be any recourse for that injured, maimed or killed employee.

SENATOR PASKVAN replied their sole remedy would be workers' compensation coverage. He continued to say:

> Under the current law the definition of employer and the exclusive remedy provisions of the law are very expansive, so they include the entire vertical chain within the definition of employer in order to be part of the exclusivity protections that are given to what one considers the direct employer. So the general contractor in your example would be immune because they come within the exclusive remedy provisions of the workers' comp statutes.

SENATOR WIELECHOWSKI asked if SB 303 would fix that.

SENATOR PASKVAN answered yes.

SENATOR WIELECHOWSKI asked if under this bill a worker who was injured or killed because of the criminal negligence of the general contractor could get their worker's compensation award and then sue the general contractor.

SENATOR PASKVAN replied that's correct.

SENATOR WIELECHOWSKI asked if there is an apportionment because that's where the double-dipping argument would come up.

SENATOR PASKVAN replied if you were to assume that the general contractor was 100 percent at fault, then the general contractor would pay the injured worker 100 percent of the damages. Workers' compensation would then be reimbursed so that there would be no double recovery. It is expressly set forth in the statute that irrespective of fault, medical expenses, potential retraining, and a partial compensation of past wages will be reimbursed to the workers' compensation insurer out of the recovery from the 100 percent fault of the general contractor. Irrespective of fault the employee recovers under workers' compensation, but the question that remains is whether those that are at fault would have a responsibility and accountability to the injured worker. SB 303 says that those at fault should have a responsibility to the injured worker.

11:26:15 AM
SENATOR COGHILL asked if there is still a tort liability to an employer contractor who is under the exclusive liability.

SENATOR PASKVAN replied not if it's within the definition of a true employee/employer relationship.

SENATOR COGHILL asked if the criminal liability would fall under the exclusive exemption.

SENATOR PASKVAN said that's correct.

SENATOR COGHILL observed that the concept "if you break it you fix it" doesn't apply. He asked what the recovery would be if the employer contractor is under the exclusive liability and somebody is damaged with a lifelong injury because workers' compensation would become the sole remedy.

SENATOR PASKVAN explained that before the workers' compensation system was developed about 100 years ago the injured employee could sue the employer if the employer's fault caused the injury. It wasn't until the Industrial Revolution that a concept started to develop in America that the employer's business product should bear the cost of the workers who were injured in the course and scope of their employment and that the employee should be compensated irrespective of fault. To balance the raw capitalism with responsibility and accountability and the idea

that workers should be protected irrespective of fault, a workers' compensation system was developed. That very good system has been maintained in the U.S. for about 100 years and in Alaska until 2004.

11:29:11 AM
SENATOR COGHILL said he's having a hard time understanding that workers' compensation becomes the universal remedy if the contractor has a subcontractor or an employee and there's a problem. He's wondering if this creates the employer/employee/subcontractor relationship that would be in this exclusive liability class under workers' compensation while the project owner is singled out as the "deep pockets" and has to bear a tort liability for the actions of those within the exclusive liability class regardless of the case. He asked for help understanding that relationship.

SENATOR PASKVAN explained that outside of the direct employee/employer relationship, everybody that is above the subcontractor would be responsible for only their percentage of the fault.

SENATOR COGHILL asked if that's within the workers' compensation apportionment or a tort apportionment.

SENATOR PASKVAN replied a liability/tort apportionment of fault above the employer/employee remains the exclusive remedy of workers' compensation. For example, if anyone had an employee within that direct employer/employee relationship, workers' compensation is the only remedy that the injured employee can have against the employer. Regardless of whether it's a general contractor, a project owner, or a project manager, all of those within the vertical chain above would be responsible and accountable only for their apportioned fault.

SENATOR COGHILL asked if under that scenario there is still a tort liability issue. He noted that the sponsor has appealed to his sense of fairness, but it seems as though the employer and the subcontractor live in the exclusive liability area and only have a responsibility to the workers' compensation system. Anybody outside of that including the manager, project manager, or the project owner can be apportioned a cost if there is a responsibility. He asked if that apportioned cost would be assigned as a result of a lawsuit. If that's the case, he said his understanding is that it would go into the workers' compensation payment - hence the double dipping discussion.

11:32:58 AM
SENATOR PASKVAN said SB 303 would impose responsibility on a project owner or general contractor under a tort system only if fault were proven. The project owner, for example, would have no responsibility for payment of the workers' compensation premium that is the responsibility of the subcontractor. The only risk that a project owner has is if they were at fault. Then if there was an allocation or percentage of fault, the project owner would only have risk for their allocated portion of 100 percent.

SENATOR COGHILL summarized that the exclusive liability of the workers' compensation system is not adequate for certain failures, but because of the employer/employee relationship, even if it's a subcontractor, they live under those rules. He added that it sounds like there's a desire to take the project owners outside of that because they may have a negligence that may be greater than what could be claimed under the exclusive liability.

CHAIR FRENCH asked Senator Paskvan if he had practiced in this area of law and if so, did he represent both sides.

SENATOR PASKVAN answered yes he's practiced for 30 years and for the first 10 years he did both plaintiff work and defense work. He said he has represented many general contractors doing corporate work and has represented contractors that have been involved in construction projects. It was those business owners that would ask him to recover for the family of an injured or deceased employee. In so doing the workers' compensation policy would get paid back so it wouldn't be a black mark on the subcontractor's workers' compensation policy and it wouldn't be the subcontractor that bore the price of injury or death that was caused by somebody else.

11:36:40 AM
CHAIR FRENCH commented that he was on the losing end of what was a vigorously fought battle when the 100 years of settled law was changed in 2004. He asked if SB 303 restores Alaska state law to the pre 2004 state of fairness.

SENATOR PASKVAN said yes; the intent of SB 303 is to return Alaska to the system that was created in statute in 1959.

CHAIR FRENCH asked the members to hold further questions for the sponsor until they'd heard from witnesses who may provide a contrasting point of view.

11:37:50 AM
KIP KNUDSON, External Affairs Manager, Tesoro Alaska, asked the committee to set SB 303 aside because they were having the wrong debate about the wrong issue. He said he specifically heard the sponsor claim that workers' compensation is not sufficient and that the majority of workers injured or killed are under the exclusive remedy provision of the workers' compensation arrangement. He continued to say that the discussion about making a project owner pay their fair share is "noise on the side." He said he believes that the 2004 reform created an appreciable safety benefit for the Alaska workplace and certainly for Tesoro Alaska.

MR. KNUDSON reminded the members that the last time the Senate Judiciary Committee discussed a bill similar to SB 303 there was a case before the Supreme Court that discussed whether the 2004 change violated equal protection. The decision in that case was that no violation occurs. Now the discussion centers on who pays when somebody is injured or hurt, he said.

MR. KNUDSON said his perspective of the 2004 change is that it created a safety benefit, specifically by tearing down high legal barriers that were erected pre 2004 between project owners and contractors. These barriers were anything but conducive to a safe workplace.

11:39:44 AM
MR. KNUDSON offered his belief that there is confusion about the allocation of fault and control of the workplace that existed prior to 2004 and he would like Mr. Clarkson to clarify those key concepts.

KEVIN CLARKSON, private attorney, Anchorage, said he has practiced in this area for quite some time and Tesoro asked him to testify on this bill. Mr. Knudson specifically asked him to address the underlying purpose of the workers' compensation law in the pre 2004 context, that being that the employee was to be relieved of the need to prove the employer's liability. He explained that employees were to be given a certain remedy if they were hurt while on the worksite. In exchange the employer was supposed to get exclusive liability in the workers' compensation system, but that's not what occurred.

MR. CLARKSON said he respectfully disagrees with the sponsor's assertion that the old system was a "you break it you pay for it" system. In reality what would happen is the project owner would contract with a contractor or subcontractor and require

indemnification for anything that might happen that resulted in injury to their employees while on the worksite. The result was that the contractor or subcontractor - who were supposed to have exclusive liability - would double pay. They would pay for the workers' compensation and they would also pay for the third-party tort liability because of the indemnity agreement they made with the project owner.

11:42:42 AM
MR. CLARKSON said that from his perspective the benefit of the 2004 change is that it created an ability for the project owner and the contractors to cooperate more fully to promote safety on the worksite. Before 2004 if an owner like BP contracted with a drilling contractor like Rowan Drilling to bring their rig and employees onto the BP worksite to drill for oil and one of those employees got hurt, Rowan would pay the workers' compensation for its employee and the employee would sue PB for the third party liability claiming that BP controlled the worksite and thus had responsibility for making sure that the worksite was safe. This is in spite of the fact the worksite for the employee was Rowan Drilling's rig. But if BP had put even one employee on the drilling rig or if it had contractually maintained any safety oversight, BP would suddenly have a third-party liability for everything that took place on Rowan's drilling rig that resulted in the injury of the employee. The only way that BP could remove itself from that risk was to remove itself from any involvement in the safety aspects of the operation of the drilling rig.

MR. CLARKSON said that giving the project owner exclusive liability protection and the responsibility to see that workers' compensation is provided creates an environment in which the project owner and the contractor can cooperate and collaborate to increase safety on the worksite. Under the old system litigation became more complicated because of fault allocation. For example, a project owner like Tesoro who owns a refinery in Kenai could have somebody who is simply driving an asphalt truck for a company that is contracted to deliver asphalt to a Tesoro customer come on the worksite, climb onto their employer's asphalt truck, fall off and get injured, and Tesoro would be sued because the event occurred on their site. Tesoro would then have to look for anybody or everybody to allocate fault to and join those entities to the case. He related that he had been involved in a case where that scenario occurred. The worker died as a result of falling off his employer's tanker when it was on the Tesoro refinery. To avoid liability Tesoro had to join a

series of other companies and entities to allocate fault. This made the case more complicated and costly.

MR. CLARKSON recapped that the pre 2004 system was not one of "if you break it you pay for it." Employers actually paid for the workers' compensation and for the third-party liability, whereas the current law creates an environment where safety can be enhanced through cooperation.

11:45:23 AM
KEVIN DOUGHERTY, Attorney, Alaska Laborers, said he supports SB 303 as a means to get the workers' compensation law back on track. He said he has represented Alaska Laborers since 1981 and he served on Governor Hickel's workers' compensation committee in 1990. He said he would make three points. First, the workers' compensation law that was enacted in Alaska in 1915 was built on traditional values and it was fair to widows and injured workers. That changed in 2004 when the loophole was created. Fortunately, SB 303 would close that loophole and restore that long-standing law. Second, the bill would promote safety. He related that in the '80s and '90s major strides were made in the oil and construction industries with respect to safety, and injuries decreased. There really didn't need to be a loophole in the law to somehow promote safety, he said. Third, it's always good public policy to ensure that statutes are honest and straight forward. To that end, the definition of employer should only include employers and not some other legal fiction.

MR. DOUGHERTY recapped that he supports SB 303 because it would create an even playing field for everyone in the construction industry and it would make the statutes straight forward and honest. Alaskans would be well served by this, he concluded.

11:48:11 AM
JERRY LEE, representing himself, related that he was hurt in November 2005 while working for a subcontractor who was working for a general contractor. The job entailed building a scaffolding for the general contractor who was supposed to secure, tarp, and heat it before he and others used that scaffolding. Following a terrible accident, he found out that the general contractor hadn't properly secured the scaffolding. Mr. Lee explained that he was on the third level when the wind came up and blew the scaffolding over. Then the wall he and others were working on collapsed and he was crushed. He lost the use of a lower leg, has ongoing problems with his back, and is 30 percent disabled. He received worker's compensation and his medical expenses are being paid currently. At the time of the

accident he was paid $42/hour and now he works for $10/hour. "This needs to be changed," he said.

CHAIR FRENCH thanked him for taking the time to testify and said it's always good to hear from people who have had real experience under legal concepts that can sometimes seem abstract.

MR. LEE added that this was his first accident in a 25-year construction career and he'll never be able to work in field again.

11:51:08 AM
BRAD THOMPSON, Director, Risk Management, Department of Administration, said the 2004 amendment to the workers' compensation statutes extended the statutory definition of employer to both the contractor and the project owner. He noted he is speaking from the perspective that the project owner is generally the state. Pre 2004 the employee could have remedy from workers' compensation through the subcontractor. If the subcontractor was uninsured, the contractor had to pay but weren't shielded from tort liability even though they paid the worker's compensation benefit. Post 2004 both the general contractor and impliedly the subcontractor are responsible for workers' compensation. In fact, AS 23.30.045(d) obligates the state before it awards a contract to see a certificate of insurance from the general contractor showing that they have workers' compensation. It also obligates the state to pay in the event that the contractor or subcontractor is uninsured.

CHAIR FRENCH asked if there's anything in the law that requires that to happen on jobs where BP, Exxon, or anybody other than the state is the project owner.

MR. THOMPSON replied he doesn't believe that there is a requirement for private enterprise to protect itself that way, but it is common business practice to make sure that an independent contractor is insured. That's a qualifier of their capability of performance, he said.

11:54:46 AM
MR. THOMPSON continued to explain that when the state sees the certificate of insurance, the state is noticed as a certificate holder should that coverage lapse or not be paid. If the premium isn't paid the coverage lapses, but the employees don't necessarily know that. When the state is the project owner it would receive a notice of cancellation and would have the

ability to take project funds to continue coverage. Clearly the state is a good project owner with respect to maintaining certainty that there is workers' compensation for the general contractor and their employees, he said. Should there somehow be a lapse, the state is the statutory employer and would retain the obligation to pay the benefit should there be an unpaid remedy under the Workers' Compensation Act to the contractor's employee or impliedly the subcontractor's employee. That wouldn't change under SB 303.

MR. THOMPSON continued:

> When '04 was enacted, we didn't put a fiscal note in. It did provide…a second way of us to be obligated to pay the remedy of workers' comp. The first time was if they were uninsured. And this is now undoing that protection so we're back to where we were before. Our practice will be the same - we make certain there is coverage for the general. There's often concern about a sub. Is he a sub? Is he an employee? … That's a separate matter to address…. But the State of Alaska and other municipalities are…careful before awarding a contract and in maintaining the contract coverage to make certain that the people working on those jobs are receiving the benefit of workers' comp. We would lose the protection of exclusive remedy if [SB] 303 is enacted.

SENATOR WIELECHOWSKI asked, "If the state were criminally negligent, under current law then the state's not liable, correct?"

MR. THOMPSON replied AS 45.45.900 precludes you from having an indemnity that protects you from your own sole negligence. Depending on the facts, criminal negligence likely is sole negligence. He explained that when the state lets contracts, the terms and conditions include hold harmless and indemnity provisions and the additional requirement of additional insured status. The state pays for that extra protection on all its projects and that extra cost is added to the project budget to protect that comparative allocation, he said.

11:57:09 AM
CHAIR FRENCH closed public testimony and announced he would hold SB 303 until the next hearing.

SB 222-SEX OFFENSES; OFFENDER REGIS.; SENTENCING

CHAIR FRENCH announced the consideration of SB 222.

11:58:23 AM
JERRY LUCKHAUPT, Attorney, Legislative Legal and Research Services, Legislative Affairs Agency, related that he was directed to prepare a CS for SB 222 based on the House judiciary CS for HB 298. Basically, 90 percent of this CS comes from that House bill, he said.

Sections 1 and 2 are the same as the House bill and Section 3 is slightly different.

CHAIR FRENCH noted that the change in Section 3 occurs on line 20. Since the crime is committed through clothing, the word "anus" was changed to "buttocks."

MR. LUCKHAUPT agreed and said DOL suggested the change.

CHAIR FRENCH asked if it's too simplistic to say it's a misdemeanor to touch somebody through clothing and it's a felony to touch the skin, depending on the location.

MR. LUCKHAUPT explained that DOL said this statute was needed because people were acting spontaneously. For example, someone in a bar might spontaneously grab a woman's breast and she would have no opportunity to say "No." to the contact before it occurred. That would apply whether it was through clothing or not. He said if DOL's interpretation is correct, then there's still a slight loophole. If the lack of consent cannot be communicated directly, then it would still apply to situations where the breast is touched directly, and not through clothing.

CINDY SMITH, Chief of Staff to Senator French, put herself on the record.

12:01:10 PM
MR. LUCKHAUPT said Sections 4 and 6 are the same as the House version. Section 5 is slightly different because it does not contain any of the language dealing with anime pornography that the House Judiciary Committee adopted.

CHAIR FRENCH read the language on lines 6-8 in Section 5 and asked what that is if it's not anime.

MR. LUCKHAUPT hypothetically described it as someone taking Miley Cyrus's face and projecting it on someone's nude body. He

continued to explain that federal law and most state laws consider it child pornography to superimpose the face of a real child on someone else's body for the purpose of achieving sexual gratification.

CHAIR FRENCH asked if superimposing an adult's face on a 12-year-old child's body would be a crime under this bill.

MR. LUCKHAUPT replied "That would also count there too."

CHAIR FRENCH asked if it would be a crime if an adult body had an 8-year-old's face superimposed.

MR. LUCKHAUPT answered yes.

12:04:24 PM
SENATOR WIELECHOWSKI asked if it would be a crime under this bill to take Miley Cyrus's foot and superimpose it on a 35-year-old woman's body.

MR. LUCKHAUPT replied, "Theoretically it could be - if you could identify that foot as Miley Cyrus's as an actual child's foot."

CHAIR FRENCH asked if there wouldn't have to be conduct that is described in AS 11.41.455.

MR. LUCKHAUPT said he was assuming that the foot would be attached to a nude body or a pornographic image.

SENATOR WIELECHOWSKI asked whose state of mind it is - the person superimposing the foot on the body or the person that's viewing the foot.

MR. LUCKHAUPT replied there are provisions that provide that you don't have to prove the actual identity of any particular child, but in some cases you know the child is somewhat famous. In some situations identification may be easy, but in others the state may not be able to prove that it's a specific child and that it constitutes child pornography.

SENATOR COGHILL mentioned the cybercrime's unit and noted that it's clear that many people are engaging in illegal behavior, but it's the most egregious that need to be caught first.

CHAIR FRENCH said that was his concern about anime. While it's wrong and something people shouldn't be watching, it's not time

to bring a new offensive when so much evidence is not addressed now.

MR. LUCKHAUPT said the U.S. Supreme Court ruled that you can criminalize the cartoon depictions, but a finding that it's obscene has to be included. Because of that secondary requirement, there have been very few prosecutions of anime type pornography in the federal system.

12:08:34 PM
MR. LUCKHAUPT continued. Sections 6, 7, 8 and 9 are the same as the House bill except that a definition related to anime pornography was removed. Sections 9, 10, and 11 are the same as the House bill.

CHAIR FRENCH asked if Section 11 is the Miller test.

MR. LUCKHAUPT replied it's actually the Ginsberg v. New York test related to supplying adults with things that they could lawfully possess, but that minors might be restricted from possessing. Most states seem to be using this test for regulating the distribution of materials that could be considered "adult" and restricting their distribution to children.

Sections 12, 13, and 14 are the same as the House bill.

SENATOR COGHILL asked if alcohol or drugs had for any reason been included before Section 13.

MR. LUCKHAUPT replied they are presumably included when there's language about a victim who is particularly vulnerable or incapable of resistance. There's also the catch-all phrase, "for any other reason the person was substantially incapable of exercising normal physical or mental powers of resistance." Apparently that's come into question a time or two for DOL, but that's been the understanding, he said.

Section 15 is the same as the House bill and Section 16 has a change. He deferred to Ms. Smith for an explanation.

12:11:45 PM
SENATOR EGAN joined the meeting.

MS. SMITH explained that Senator French requested this change to address a concern that there was no registerable offense for the

misdemeanor harassment charge. Section 16 makes it a registerable offense on the second offense.

MR. LUCKHAUPT added that this was the spontaneous touching through clothing section that was mentioned earlier. It also removed the provision dealing with registration of sex offenders and the fact that some people have been convicted of crimes in other states.

SENATOR COGHILL asked what the conviction criteria were for touching through clothes that will now be a registerable offense.

CHAIR FRENCH said the elements of the crime are on page 2, lines 17-20. It would be a misdemeanor for the first conviction so the person would go to jail for a year, but wouldn't have to register as a sex offender thereafter. On the second offense the person would have to register as a sex offender.

SENATOR COGHILL surmised that it wouldn't happen very often.

CHAIR FRENCH related that when he was a prosecutor C felonies were referred from Chilkoot Charlie's about once a month. The cases are difficult to prove, but with the right witness they could go forward. Most of those cases would resolve this way, but now it's the charge is matched to the crime, he said.

12:14:21 PM
MR. LUCKHAUPT continued. Section 17 is the same as the House bill. It relates to the subpoena power of the attorney general for identifying material in an Internet service account in cases involving exploitation of children.

CHAIR FRENCH admitted that he's a little queasy with this significant expansion of the subpoena power, but he believes that it's narrow and focused and it would be difficult to claim that the information that is gleaned is the type that is private between the account holder and the service provider. He asked Mr. Luckhaupt to list the types of information that could be obtained by serving the subpoena.

MR. LUCKHAUPT said it includes the name of the person holding the account, the address associated with the account, telephone numbers connected to the account, the length of service, the network address, and the means and source of payment for the account. He noted that those are all included in the federal law that deals with this issue. This law was taken from Kentucky.

The subpoena does not allow access to any information in the account like email records. It's just identifying information. There is case law in Alaska that says that the identifying characteristics for a utility account, for example, are not protected under the right to privacy in the Alaska Constitution. The problem is that utilities or ISPs are reluctant to release the information without a subpoena even though the information is probably not protected.

12:17:06 PM
MR. LUCKHAUPT said Section 18 is new.

MS. SMITH explained that this section is a result of the hearings the committee had last summer. One thing that was identified was the dire need to collect accurate statistics regarding the actual level of felony sex crimes committed in the state. Currently the state collects only Uniform Crime Report (UCR) data, which includes only forcible sexual penetration of an adult woman against her will. This provision would be a mandate for The Department of Public Safety (DPS) to begin to require reporting from law enforcement agencies on all types of felony sexual assaults as they are proscribed in the state in order to begin to get accurate data.

CHAIR FRENCH recalled hearing that a lot of police departments simply aren't reporting. This is the kind of arm twist we had in mind to encourage reporting, he said.

MR. LUCKHAUPT said Section 19 is a court rule amendment dealing with the distribution of materials in cases of child pornography. This provision is basically the same as the relevant portion of a law that Congress passed several years ago. That federal statute has been interpreted in Alaska and applied. The operative provision is whether or not the property is deemed reasonably available to the defendant to use in their defense. To the extent that a hard drive, for example, was made reasonably available and the defense could perform their examination on site then it would be acceptable. He noted that there had been a U.S. district court case in Alaska where the hard drive was in Spokane Washington. The FBI office had possession of the hard drive and would only let the defense examine it during certain hours and with supervision. This could conceivably give the prosecution an idea of what the defense was trying to do at what could be considered an improper time, he said. In that particular case the U.S. district court magistrate found that the materials were not reasonably available to the defendant.

12:20:53 PM
CHAIR FRENCH said he read the case and believes that Magistrate Burgess made a thoughtful decision. He was struggling with the need to keep a lid on the material while at the same time providing the defense with a real opportunity to do its work. It takes time to do a forensic examination of a hard drive and if it's located in a place that's difficult for the expert to get to that adds time, expense, and delay to the process. It was interesting that the magistrate pointed out that in the cases that were brought to his attention in the motion practice, the only time that any information had been lost it was by the government, not by the defense.

MR. LUCKHAUPT added that the defense would need to show why they wouldn't be able to their examination in the prosecution's or the law enforcement's office. This leaves it up to the judge to make those decisions.

SENATOR FRENCH summarized that it keeps the material within the domain of the district attorney's office, but it has to be in a place where the defense has freedom to work.

MS. SMITH clarified that the provision regarding the mental state of a person who fails to register that was in the original version of SB 222 is not in the current CS. Thus, the existing law would apply where a mental state would have to be proven. That's the section that deals with the registration of out-of-state offenders, which was in the original version and is not in the CS.

12:23:20 PM
SUSAN MCLEAN, Director, Civil Division, Department of Law (DOL), said she would provide introductory comments today, but DOL will want to talk about the deletion of former Section 3 [The repeal and reenactment of AS 11.56.840.]

CHAIR FRENCH said that's the provision that eliminated the mental requirement for failure to appear and failure to register.

MS. MCLEAN replied it actually reads the same as the current statute. What it does is add an affirmative defense and then the enabling language explains the circumstance of failing to register. This crime has always had a mental state and that is that the person has to know that they have to register.

Last year the court of appeals decided a case called Moffitt v. State saying that the state has to prove some mental state - knowingly, recklessly or negligently. Then a week ago that same court of appeals decided a case of a DUI involving Nyquil. The defense was on the grounds that the driver didn't know that Nyquil would make him drunk. The court said that in that circumstance the mental state of not knowing that it would make you drunk is negligently. This puts DOL in the difficult position of having to disprove a negative, she said.

MS. MCLEAN, noting that Moffitt applies to the crime of failure to appear, said the state has never had a decision in failure to register as a sex offender that says that the state has to prove why the person didn't register. That's the burden Moffitt places and it's unattainable. It's not possible to disprove why someone didn't do something particularly in a state that doesn't have reciprocal discovery. She pointed out that Moffitt relies on Hutchinson and in each of those cases the defense asked for an instruction saying it should be able to defend on the ground that "I knew I was supposed to be here, but for whatever reason I couldn't be here."

MS. MCLEAN said that with failure to register as sex offender, DOL has never had anyone raise the issue of not being able to register, but that's partly because of the way those statutes are written. For example, if someone who has to register is going to be out of town the law requires the person to notify the Department of Public Safety (DPS) before they leave so the defense that they couldn't get back to town and register by the deadline is sort of questionable.

12:26:59 PM
MS. MCLEAN said the issue for DOL is that it cannot as part of its burden of proof prove why someone didn't register and that it wasn't reasonable. They are required to prove beyond a reasonable doubt that a person knew he or she had to register. But, she said, as far as why that didn't occur, it's DOL's position that it should be an affirmative defense.

She related that just this morning she read that an ombudsman attorney made a suggestion that perhaps a compromise would be to place a negligent mental state on the failure to register. DOL could live with that, she said.

CHAIR FRENCH agreed the committee could explore that.

MS. MCLEAN said the other part of Section 3 in the original bill related to the duty to register if one had to register in another state. A legitimate issue is what should happen if a registerable offense in another state has not been criminalized in Alaska. For example, consensual adultery and consensual fellatio are not crimes here, but they are in other jurisdictions. Rather than disposing of the entire section, DOL would suggest an amendment to accept consensual acts between adults. The people doing the sex offender registration often get questions from other states about whether or not this is a registerable offense here. She noted that when DOL asked DPS for a list of crimes that are registerable in other states and not here, they were surprised to see mutilation of female genitals on the list. In this state that would be an assault, not a registerable offense. We're asking for this because people do call before they move here to determine whether or not they have to register and if they get an advisory opinion that they don't, they move here. We'd like that decision to be reconsidered, she said.

12:30:31 PM
MS. MCLEAN noted that DOL submitted language to reword the new Section 17. One suggestion was to exclude credit card or bank account numbers because of the legitimate privacy concerns. She pointed out that the subpoenaed person that is mentioned in subsection (c) probably won't petition the court to modify or set aside the subpoena because the subpoenaed person is the bank and they just want their potential liability covered. They probably won't assert the privacy interest that someone may have in their bank account number or credit card number if they have a subpoena in hand.

CHAIR FRENCH asked if the committee should substitute that phrase with "the target of the subpoena."

MS. MCLEAN suggested he look at the language DOL provided, which synthesizes all of it and addresses any possible constitutional challenges.

CHAIR FRENCH asked how closely DOL's language tracks the language in the federal administrative subpoena because the language in the CS was lifted from that federal law.

MS. MCLEAN replied it tracks it closely, but not identically. DOL believes that the exact federal language would present problems with the state's constitutional right to privacy.

CHAIR FRENCH thanked her for providing an overview of the issues and asked her to feel free to meet with Ms. Smith to articulate other suggestions and concerns.

12:33:33 PM
SENATOR WIELECHOWSKI moved to adopt the work draft committee substitute for SB 222, labeled 26-GS2859\E, as the working document. There being no objection, version E was before the committee.

He asked Mr. Mittman if he had seen the new CS.

JEFFREY MITTMAN, Executive Director, ACLU of Alaska, said he sent a request for a copy and he'd like an opportunity to review it before submitting written and verbal comments.

SENATOR FRENCH said that sounds eminently fair and he set SB 222 aside for final work on Wednesday.

12:35:16 PM
The Senate Judiciary Standing Committee meeting was recessed until 8:30 a.m. Wednesday, April 7, 2010.