ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
Anchorage, Alaska
September 12, 2011
11:09 a.m.

MEMBERS PRESENT

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Lance Pruitt
Representative Mike Chenault (alternate)

COMMITTEE CALENDAR

REVIEW OF SELECT 2010 COURT DECISIONS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

GERALD LUCKHAUPT, Assistant Revisor of Statutes
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska
POSITION STATEMENT: Testified during the review of select 2010 court decisions.

DENNIS BAILEY
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska
POSITION STATEMENT: Testified during the review of select 2010 court decisions.

JEAN MISCHEL Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska
POSITION STATEMENT: Testified during the review of select 2010 court decisions.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Testified during the review of select 2010 court decisions on recent legal challenges.

QUINLAN STEINER, Director
Central Office, Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Testified during the review of select 2010 court decisions.

ACTION NARRATIVE

11:09:15 AM

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 11:09 a.m. Representatives Gatto, Lynn, Keller, Thompson, Gruenberg, and Holmes were present at the call to order.

Prior to addressing the agenda items, the committee spoke briefly about a recent sexual assault case that occurred in Anchorage.

Review of Select 2010 Court Decisions

11:14:40 AM

CHAIR GATTO announced that the only order of business would be a review of select 2010 court decisions. He turned to the first case, Anderson v. Alyeska Pipeline Service Co., 234 P.3d 1282 (Alaska 2010).

CHAIR GATTO offered his understanding that if a company with workers' compensation insurance does something that causes a

worker to be injured, it is clear the company will be responsible to pay for expenses related to the injury and any time the worker is not able to work. The question is whether the worker can bring a lawsuit given the worker received workers' compensation. He described the specific incident in which Ms. Anderson was vacuuming, the cart moved, and a 70-pound table fell on her.

11:16:27 AM

DENNIS BAILEY, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), stated that the purpose of this report to the legislature is to identify problem areas, conflicts, or areas in which the law has been applied in an unusual way and to identify cases in which the legislature may have an interest. A number of issues in this case relate to issues of exclusive liability under the workers' compensation statutes. However, the issue he wished to draw the legislature's attention to is the question concerning the liability "up the chain of contractors" that provides if a subcontractor does not provide workers' compensation coverage, the contractor is liable. If the contractor does not provide coverage, the project owner is liable. In Anderson v. Alyeska Pipeline Service Company, the court reviewed the issue of what a project owner means, the definition in statute, and the question of how the application of the project owner would apply in this case. The reason Legislative Legal has identified this case for extra consideration is that the court identified possible unintended consequences or interpretations that may not have been intended in the statute. For example, an issue may arise when the project owner contracts with a contractor in a situation which does not fall under a construction contract. A circumstance may arise, such as one identified in the case, when a law firm hires and contracts with a company to provide delivery service. It is arguable in this case that the liability in this case, the liability of the project owner, would fall on the owners of the law firm. The court also identified the issue of a building owner hiring a plow company as a contractor to plow snow. Under the language, that would make the project owner liable for the workers' compensation coverage of a subcontractor or if the contractor doesn't provide coverage, the building owner may be potentially liable for the workers' compensation coverage of the snow plow company.

11:20:56 AM

MR. BAILEY summarized that is the issue the court identified and the reason this decision is before the committee. He highlighted several points, including that the court identified this issue, but limited its decision to the facts of the case recognizing some validity exists with the argument made by the opposing parties. Therefore, it is unclear if the court would arrive at the same decision in another case. In response to a hypothetical example he answered that the project owner, the building owner, or potentially the snow plow driver or contractor could be held liable depending on the circumstances. Those are questions of extraneous liability and exclusive liability under the statute. He provided liability questions such as in this case the injured party is a subcontractor so the contractor should have made workers' compensation available but did not. The next in line for liability is the renter followed by the homeowner. The homeowner hired someone so he/she did not need to deal with liability issues. The question then arises as to whether the homeowner is the top of the chain of command. Those issues have been debated and the legislature previously decided that the exclusive liability provisions of the workers' compensation statutes would apply to the project owner. That issue was addressed in this case but did not present a controversial issue in the process. Essentially, the court applied the law that the project owner enjoys the exclusive liability that a contractor would enjoy as an employer. The point being that the legislature made a decision that the exclusive liability would apply to project owners and that was applied in this case in a routine manner. However, that was not the reason this case has been identified for the legislature's consideration.

11:25:01 AM

REPRESENTATIVE HOLMES related she found this case the most interesting of the five cases in terms of whether the court decided this case correctly and whether the legislature likes the idea that the project owners are responsible for workers' compensation, have immunity and cannot be sued for negligence, and their liability is capped. Therefore, in a scenario in which a contractor hires a subcontractor without workers' compensation whose employee is injured, the contractor's workers' compensation would cover the injured worker. However, the contractor has some protections and cannot be sued for negligence. The legislature made that decision a few years ago. She said although it appears as though the statutes were correctly applied in this case, the ongoing policy debate in the legislature surrounds whether the policy was decided correctly

at the statutory level. She related her fascination with the definition of "project owner" and how far does this go. The court identified what constitutes a "project owner" on a construction site such that it moves up from the subcontractors to their subcontractors and on up the line. However, it's not as clear when the activity happens outside the realm of construction such as when a law firm hires a bookkeeper. Businesses and companies hire people to perform routine business, and therefore the question becomes whether the legislature wants that liability to go "all the way up the chain," which is one legitimate policy decision. If the aforementioned is not the case, the legislature needs to decide how it wants to protect workers when they are injured as well as how to handle negligence, when people will be covered by workers' compensation, when people should be able to sue, and what employers of subcontractors should be aware of with respect to liability. The courts have identified some gray areas in the law that the legislature should address.

CHAIR GATTO asked whether the ultimate "project owner" is the State of Alaska. He pointed out that Alyeska Pipeline Service Company operates on state lands and takes state resources, and therefore the question becomes whether the legislature went far enough.

11:28:11 AM

REPRESENTATIVE THOMPSON recalled the earlier scenario in which a snow plow company hired a subcontractor, but there was also a renter, a rental management company, an absentee owner, and a building owner. Therefore, he questioned how far this goes since it gets really spread out.

11:28:44 AM

REPRESENTATIVE GRUENBERG suggested that a number of the cases being considered today did not fall in his area of expertise since some pertain to resource issues or other issues that other legislative committees address. He suggested that the committee refer cases with important and interesting policy issues to the committee of first referral and this committee would be a subsequent committee of referral. In doing so, the committee would receive input from the primary committee.

CHAIR GATTO indicated his interest in doing so.

11:30:50 AM

REPRESENTATIVE THOMPSON posed a situation in which a subcontractor with workers' compensation paid the employee's medical bills and lost wages, but the employee tried to sue the project owner. He recalled that in such a situation, in order to succeed in such a lawsuit, the first person who would be compensated would be the workers' compensation insurance. He asked if that is still the case.

MR. BAILEY, clarifying that he is not an expert on workers' compensation, said he thought the answer would be yes. He related his understanding that workers' compensation provides for a lien and if the injured party recovers damages through a third party, the workers' compensation carrier can serve a subrogation lien against the proceeds.

11:32:03 AM

REPRESENTATIVE GRUENBERG made a motion that the workers' compensation portion of the case be referred to the House Labor and Commerce Standing Committee. There being no objection, it was so ordered.

REPRESENTATIVE GRUENBERG then directed attention to the issue in the case which pertains to an offer of judgment. He referred to page 8 of the decision, under "B. It was Error to Award Alyeska Rule 68 Attorney's Fees." He said that it pertains to Civil Rule 68, an offer of judgment, which is a document that either party can serve on the other party; an offer to have judgment taken to a certain extent or for a certain amount. If the offer is accepted, a judgment is issued by stipulation.

REPRESENTATIVE HOLMES interjected it is basically a settlement.

REPRESENTATIVE GRUENBERG agreed, adding that it is a settlement approved by the court, which becomes a judgment. If the offer is rejected and the attorney does better at trial than he/she is offered, the attorney can receive the actual attorney fees, he said. He characterized it as "a real hammer." He pointed out another set of statutes also adjusts the interest rate in the same way. He referred to it as an informal way of doing it. The offer of judgment in this case was offered by the defense for a nominal sum of $10. This was not an appropriate subject because it was such a trivial amount. On the other hand, it was a real deterrent because rather than receiving a sum of money, the other party and the attorney would have had to discuss that the client may be liable not just for Rule 82, partial attorney

fees, but for the total attorney's fees. He highlighted that a nominal offer of judgment only works one way. Only the defendant can use a nominal offer of judgment for $10 since the plaintiff would have to have a sum of money. For instance, the plaintiff could ask for $1 million but say he/she will settle for $100,000, although that could not be done if a case is only worth $100,000. The use of a defense offer of judgment is useful when the real issue is liability, since a person is either liable or not. If, on the other hand, this decision were reversed by the legislature or a future court the change would benefit defendants at the cost of plaintiffs. Thus, some issues exist for this committee. The subject of offers of judgment usually only apply in money cases, but in the field of family law judgments can be helpful in instances in which custody issues are being worked out. Courts vary in whether offers of judgment are allowed and most do not. He suggested that the statutes would be inapplicable, whereas this pertains to attorney fees. He inquired as to whether the committee would like to consider this further. He offered to research this and report back to the committee.

CHAIR GATTO said he did not object to him considering the matter.

11:38:18 AM

CHAIR GATTO announced that the next case would be the Mat-Su Valley Medical Center v. Advanced Pain Centers of Alaska, 281 P.3d 698 (Alaska 2009). He offered his understanding that the issue revolves around the requirement of a certificate of need. In the event a second hospital would be built, the hospital would need to demonstrate the need for a second hospital. A Palmer Hospital became a private hospital and subsequently the Advanced Pain Center of Alaska sought to convert office space to a single suite ambulatory surgery center.

11:39:56 AM

JEAN MISCHEL, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), explained that the issue in the Mat-Su Valley Medical Center ("Mat-Su Medical") case is not a question of whether the Advanced Pain Center of Alaska developed a suite and violated a certificate of need since the Advanced Pain Center of Alaska ("Advanced Pain") did not have a certificate of need. The Department of Health and Social Service's commissioner determined that a certificate of need was not required, but the challenger delayed the

complaint beyond the administrative review period allowed to file a complaint. Thus, a threshold standing question ensued and became the primary concern of the court. In reviewing whether Mat-Su Medical had standing to challenge the failure of the Department of Health and Social Service's commissioner to issue a certificate of need, the court considered AS 18.07.031 and AS 18.07.091. The commissioner had decided that the dollar amount didn't meet the certificate of need threshold. Mat-Su Medical challenged that determination and charged that Advanced Pain had underestimated the value of the conversion. However, an ambiguity in the statute that set out the three categories of persons who could challenge a decision not to require a certificate of need for that type of conversion. The court went through some painstaking analysis of why the third category of people who could challenge a lack of issuance of a certificate of need included Mat-Su Medical. The decision turned on a grammatical construction of the statute, which resulted in the legislature being concerned the statute was in artfully drafted or confusing. The court corrected any ambiguity in favor of opening up challenges to the failure to issue a certificate of need in this case. Therefore, the question for the legislature, at least the Legislative Council, is whether that was a correct interpretation given the confusing nature of the language in the statute. She offered to elaborate on why that became an issue, but highlighted that the primary concern was the existence of an ambiguity that the court resolved broadly.

11:43:38 AM

MS. MISCHEL, in response to Chair Gatto, referred to AS 18.07.091. The problem the court identified was the use of the word "violation" in the last phrase of the statute. The statute, AS 18.07.091(a) provides the following: "Injunctive relief against violations of this chapter or regulations adopted under this chapter may be obtained from a court of competent jurisdiction ...." And the third category was that "any member of the public substantially and adversely affected by the violation." The question the court had to sort out was whether the phrase "by the violation" meant a violation of the chapter of regulations or a violation of a certificate of need, which was the second category of persons who could challenge the statute. The court determined that the lead in language controlled so the reference to violation was a violation of the chapter of regulations and not a violation of the certificate of need.

REPRESENTATIVE GRUENBERG commented that the statute is set out in the opinion on page 4 under "B".

REPRESENTATIVE HOLMES noted the specific statute is also included in the packet.

11:45:40 AM

CHAIR GATTO referred to page 13 of the Alaska Supreme Court's opinion in members' packets. He read part of the conclusion, as follows: "For these reasons, we REVERSE the grants of summary judgment in favor of Advanced Pain and the state ...." He asked whether that meant the summary judgment was in favor of Advanced Pain and now it is reversed.

MS. MISCHEL explained that the court, instead of finding that the Superior Court correctly decided this case of summary judgment motion, remanded the decision back to the trial court to determine whether Advanced Pain essentially got away without a certificate of need and whether the commissioner was correct as a factual matter since the summary judgment was overturned in favor of Advanced Pain.

CHAIR GATTO asked whether Advanced Pain is the prevailing party.

MS. MISCHEL answered no. She explained that it isn't known at this time which party will ultimately prevail, but instead the court decided the Mat-Su Medical had standing to bring the case to full trial rather than be decided on summary judgment, that they lack standing of failure to issue the certificate of need. In further response to Chair Gatto, she related that she would research what happened at the trial court on remand. They may have entered into settlement negotiations, she said. The commissioner ultimately determined that she believed the court correctly interpreted the standing question in favor of Mat-Su Medical. Therefore, she surmised that the commissioner went back administratively and reviewed the dollar amounts involved, if it went to trial at all.

REPRESENTATIVE HOLMES related her understanding that Ms. Mischel is stating the commissioner actually agreed with the Alaska Supreme Court's interpretation of the grammatical wording of the statute.

MS. MISCHEL answered yes, noting it was the former commissioner.

REPRESENTATIVE HOLMES offered her belief that this made sense. It seemed the court reached the correct answer, but acknowledged that the term "violation" is being used in more than one way in AS 18.07.091(a)], whether it was violating the whole chapter of law or violating a certificate of need. The first use clearly refers to violations of the statute and the second use refers to violations of the certificate of need, and the third instance of violation has no clarification of whether it means violation of statutes or certificate of need. So the question becomes whether the administration violated the statute by not issuing a certificate of need. She said she thought the court parsed the question out correctly. She asked whether the committee agrees and if the legislature should specify in statute "of this chapter" to clarify the matter or just let the court's ruling stand.

11:50:18 AM

REPRESENTATIVE GRUENBERG summarized the actions by the court. He referred to the final paragraph of the opinion, and offered that the trial court apparently dismissed the case. The Alaska Supreme Court reversed that ruling and remanded the case to the trial court and ordered the trial to go forward. The question of statutory authority seems to be in an area for the House Health and Social Services Standing Committee (HSS). He suggested that the case be referred to the HSS committee for consideration, noting he did not feel confident in making the decision.

CHAIR GATTO agreed. He expressed concern that having a second facility with expensive diagnostic equipment such as an MRI is direct competition with the current hospital and both facilities could suffer financially and go bankrupt. He questioned the need and suggested this is the reason for the issuance of certificates of need.

11:51:57 AM

MS. MISCHEL responded that particular issue was not addressed by the court in this case. Again, the statutory threshold exists for purchases and leases, but the issue for the committee to consider is whether the hospital has standing to challenge the underlying decision not on the certificate of need. Thus, the question was fairly technical and does not get into the basis of certificates of need.

REPRESENTATIVE LYNN asked whether anyone could explain if a certificate of need means certificate of monopoly instead.

REPRESENTATIVE THOMPSON concurred. He noted that he's seen abuses of this resulting in undue profits being made and unreasonable charges to the public.

REPRESENTATIVE LYNN disclosed that he has introduced legislation to eliminate certificates of need.

CHAIR GATTO pointed out that some monopolies are perfectly legal, such as a power company since it doesn't make sense for a second set of poles to be strung alongside the existing ones, so monopolies are regulated. He related his understanding that regulations accompany certificates of need, which do not provide just an ability to control the market.

REPRESENTATIVE LYNN agreed that the case doesn't determine whether the certificate of need is a good thing or a bad thing.

REPRESENTATIVE GRUENBERG asked whether Representative Keller disagreed with forwarding the case to the House Health and Social Services Standing Committee.

11:54:23 AM

REPRESENTATIVE KELLER offered his belief that the certificate of need is a volatile subject since it refers to millions of dollars. He pointed out that the question of whether a certificate of need is needed is a volatile subject. He said the question Ms. Mischel has brought up doesn't concern the certificate of need but rather whether the language with respect to violation is clear. He sought clarification on the three instances. He recalled injunctions could be made by the commissioner or the public, if harmed. He asked if Mat-Su Medical brought the case as a member of the public that was harmed.

11:55:53 AM

MS. MISCHEL concurred.

REPRESENTATIVE KELLER offered his belief that nothing in the case illustrated financial harm to Mat-Su Medical so in order for them to continue seemed to be a conflict. He thought Mat-Su Medical would need to demonstrate financial harm due to the

opening of Advanced Pain, which would be fairly intense. He expressed interest in the outcome of the case.

11:57:01 AM

MS. MISCHEL explained that the court looked specifically at whether Mat-Su Medical was substantially and adversely affected and found that it was a close question but it survived summary judgment. The court had to go back to the trial court to see if the challenge was factually valid. She referred to the last section of the Alaska Supreme Court's opinion, in which the court goes into some detail in terms of why Mat-Su Medical had a financial stake in the decision.

CHAIR GATTO posed a scenario in which Mat-Su Medical offers a service and an identical service is offered a tenth of a mile away. In such a situation, he asked whether it would automatically create an adverse profit situation for Mat-Su Medical.

MS. MISCHEL said that the court wasn't satisfied. The Alaska Supreme Court reviewed the number of cases handled by Mat-Su Medical that were the same types of cases Advanced Pain would also handle.

CHAIR GATTO asked whether Advanced Pain offered a new industry or services that Mat-Su Medical did not offer.

MS. MISCHEL answered no, the court found that of the 127 pain related procedures that Mat-Su Medical had performed in the prior year, Advanced Pain would be equally qualified to perform them after the conversion.

REPRESENTATIVE GRUENBERG recalled in the 1980s the House Judiciary Standing Committee reviewed cases rather quickly. He did not recall dealing with the technical aspects. He pointed out that this is the first hearing in 10 years to hold this type of review on the report. He hoped the House Judiciary Standing Committee will be setting a precedent for how the legislative judiciary committees will look at the reports. He further recalled the process the Council of State Government committee uses to review hundreds of laws. In many instances the laws are referred from another committee, but are often sent back to the original committee to work on technical issues not within the area of expertise of the review committee. He affirmed his belief that the House Judiciary Standing Committee should defer to the committee of primary jurisdiction any questions that do

not pertain to the judiciary. He felt the questions in this case deal with the subject of health and should be considered by the House Health and Social Services Standing Committee.

CHAIR GATTO offered his belief that the committee of primary jurisdiction determines that the issue is a legal issue and defers to the judiciary committees.

REPRESENTATIVE KELLER said he wholeheartedly appreciated his perspective. However, in this instance, the court, rightly or wrongly determined legislative intent on the issue of how the word "violations" was used. He thought the court probably ruled correctly on the issue of the language. He agreed that matter should go back to the HSS committee for discussion. He thought that using that as justification was weak and the whole issue of certificates of need should be considered by the legislature, noting that Representative Lynn has such a bill. He characterized it as huge issue since the cases end up in court and the associated legal costs adversely affect the party seeking a certificate of need. He did not think the question addressed by the court provided justification for opening up the whole certificate of need issue.

12:03:24 PM

REPRESENTATIVE GRUENBERG made a motion that the case Mat-Su Valley Medical Center v. Advanced Pain Centers of Alaska, 281 P.3d 698 (Alaska 2010) and the notes be referred to the House Health and Social Services Standing Committee. There being no objection, it was so ordered.

12:03:42 PM

CHAIR GATTO announced that the next case for consideration as the Planned Parenthood v. Campbell, 232 P.3d 725 (Alaska 2010).

12:04:40 PM

MS. MISCHEL explained that this case does not substantively involve the issue of abortion, but instead addresses the issue of the legislative initiative petition for the parental notification law. Essentially, the court considered whether the petition circulated for signature purposes prior to the matter being place on the ballot was accurate enough to move forward for a vote. The court distinguished between a petition summary and a ballot summary and found while both are held to a high level of accuracy it was okay that the petition summary was

deficient as a matter of law because it was corrected on the ballot summary. The three areas the court identified as deficient in the ballot summary prepared by the lieutenant governor's office did not show an intent to mislead the signatories of the petition. The lieutenant governor's summary left out a few key details, one of which involved an omission of the significant felony penalties that a physician would be subjected to if the physician violated the notice procedures. That was of primary concern for both the trial court and the Alaska Supreme Court.

MS. MISCHEL said the other two issues involved that the Alaska Parental Consent Act was being revised without providing clarification of such to the voters and that parts of the act had been invalidated as being unconstitutional. The third omission was the fact that the lieutenant governor omitted from the summary that the act would restrict current law since current law did not require parental consent or notice. Thus, there was already an opportunity for an abortion to be performed on a minor without either consent or notice. On these three issues, the Alaska Supreme Court agreed with the trial court that the petition summary was deficient. However, the Alaska Supreme Court corrected the summary for the purpose of the ballot and when that initiative went to a statewide vote, language in the summary and attached to the initiative included the felony provisions and the existing law that would be revised by the petition. She characterized it as fairly cumbersome, but the Alaska Supreme Court reviewed case law and distinguished this deficiency from other deficiencies it had found. The Alaska Supreme Court determined this was not so deficient that it couldn't correct it. She said the Alaska Supreme Court's decision was a fairly discretionary and fact-based decision.

MS. MISCHEL emphasized that the court recognized the importance of holding the petition summaries to a high level of accuracy and impartiality, but found that there were differences in the functions of the two summaries. Essentially, it "bent over backwards" to allow the petition to go to a vote of the people without having to go back and obtain new signatures. The Alaska Supreme Court also reviewed whether the summary omissions substantially misrepresented the essential nature of the initiative, but found that it did not even though the felony provisions were lacking. The court further found that the petition proponents had spent a significant amount of time and resources to gather the required signatures so the hardship was great. However, the court discerned little hardship to the initiative's proponents by allowing it to be corrected on the

ballot. This particular initiative is under review on a different issue at the Superior Court level. She offered her belief that this Alaska Supreme Court decision is significant in terms of voter rights and has very little to do with the constitutional issues on abortion rights.

12:12:02 PM

REPRESENTATIVE GRUENBERG suggested that the Alaska Supreme Court's opinion seemed reasonable. He pointed out that the primary issue of elections falls squarely with the House State Affairs Standing Committee. He respectfully suggested that the matter be referred to that committee.

REPRESENTATIVE KELLER objected for purposes of discussion. He said that this is an issue of voters' rights and the Alaska Supreme Court decided more or less that the people had a right to vote on the matter. He suggested that bringing the matter back to the House State Affairs Committee "as a handle" to get to voters' rights question is weak. And to use this case to start over on the parental consent issue, which is still pending, would also be inappropriate.

REPRESENTATIVE HOLMES offered her belief that this issue is not about abortion and she agreed with the analysis. She offered her belief that this opinion is about what happens with deficiencies in summaries and if the petition summary will be thrown out or not. She did not think Representative Gruenberg was suggesting sending the opinion to the House State Affairs Standing Committee to take up a bill or action, but rather to ensure this committee does not overstep its jurisdiction. She acknowledged that the legislature has made it more difficult to put ballot initiatives on the ballot and is sympathetic with people who put a lot of time and effort into that process. However, it was the lieutenant governor and not the initiative sponsor who drafted the materials. She concluded that it would be a serious burden to ask the initiative sponsors to start over. Of the three issues raised, she agreed with the Alaska Supreme Court that the most concerning oversight was that there was no mention of criminal sanctions in it. She said the court clearly indicated that sanctions were needed in going forward. She suggested that the legislature should consider the issue, when criminal penalties will be imposed, as to whether those sanctions should be included in the summary. She opined that those types of issues are the House State Affairs Standing Committee could mull over.

12:16:28 PM

REPRESENTATIVE GRUENBERG indicated that he is merely concerned with the jurisdictional matters and ensuring that this committee does not overstep its jurisdiction. Furthermore, he said he did not want to slight the chair of the House State Affairs Standing Committee.

REPRESENTATIVE LYNN responded that he did not feel slighted, but questioned the point of the committee hearing the matter if it is not going to consider legislation.

REPRESENTATIVE GRUENBERG concluded that the committee could pass on the referral.

12:18:01 PM

CHAIR GATTO moved on to the next case to come before the committee, Weimer v. Continental Care and Truck LLC, 237 P.3d 610 (Alaska 2010).

REPRESENTATIVE GRUENBERG offered his understanding that important statute of limitations issues surround the case. He suggested that the administration should have time to consider the matter. He further suggested that the committee table the opinion and set this case aside until more information is available.

CHAIR GATTO offered his understanding that the attorney general believed it was too difficult to make a decision and it is up to the legislature to decide whether the document fees were allowable.

REPRESENTATIVE GRUENBERG clarified that the review was done by the Legislative Legal Services not the attorney general. He clarified that although the attorney general was not a party to this litigation, he is in the process of reviewing the case. He reiterated his suggestion that staff monitor the progress. He related his understanding that the issue of when the period for the statute of limitation begins for this particular statute, which has significant ramifications for Unfair Trade Practices Act, matters.

CHAIR GATTO offered his belief that the document fees were on the form next to taxes and other fees, which was misleading to consumers since it appeared to be government fees.

REPRESENTATIVE GRUENBERG offered his understanding, after discussing the issue, that the question in the case is limited to the statute of limitations and when it begins.

CHAIR GATTO asked for his view on when the statute of limitations should begin.

REPRESENTATIVE GRUENBERG said he spoke to Ed Sniffen, Senior Assistant Attorney General, Commercial/Fair Business Practices, from whom he obtained the impression that this statute was different than other statues, which typically rely on when the person becomes aware that the fees were illegal. Subsequent conversations left him feeling confused so Mr. Sniffen offered to do some additional research.

CHAIR GATTO reiterated that the document fees were comingled so they represent nothing but extra profits for dealers.

REPRESENTATIVE GRUENBERG suggested it could be tabled.

12:23:56 PM

REPRESENTATIVE LYNN offered his belief that the issue to consider is when the statute of limitations starts, which is separate from the question of fairness in terms of the fees. However, when an individual discovers something wouldn't be a time certain.

REPRESENTATIVE GRUENBERG concurred.

12:25:17 PM

MS. MISCHEL concurred with Representative Lynn's summary. She said the Unfair Trade Practices' statute of limitations differs from the common law discovery rule as Representative Gruenberg pointed out.

CHAIR GATTO related that this has a two-year statute of limitations and others may be longer. He pointed to a hypothetical situation in which a consumer may discover medicine caused harm 10 years later.

REPRESENTATIVE GRUENBERG offered his belief something of that nature would be covered since the two-year limitation begins when the plaintiff discovered or reasonably should have discovered that the conduct broke the law. He pointed out that

it wouldn't be unreasonable to discover the health ramifications of a drug some time later.

MS. MISCHEL concurred. In response to comments, she pointed out that the Alaska Supreme Court was not reviewing when the harm actually occurred. The discovery that something was illegal was not the point at which the court was willing to start the statute of limitations, although the court looks very clearly at the dates of harm and in this case, the loss of the $200. The court was unwilling to accept the proposition that because the plaintiff didn't know it was illegal that the statute of limitations was tolled, even though the loss occurred two and one-half years earlier.

CHAIR GATTO asked whether consumers needed to go to small claims court over illegal document fees.

MS. MISCHEL answered that the Alaska Supreme Court is not making that judgment since the statute provides for other options, such as complaints. The problem in this case is that the plaintiff waited beyond the two-year period.

CHAIR GATTO summarized that the House State Affairs Standing Committee has held discussions on whether fees should appear as though they are taxes.

12:30:35 PM

CHAIR GATTO directed the committee's attention to the next case: West v.State, 248 P.3d 689 (Alaska 2010).

12:31:23 PM

MS. MISCHEL reviewed the case for purposes of the oversight report. She said her recommendation is for the legislature to review the case to determine if the court correctly applied the intensive game management statute. She explained that the court primarily addressed the question of whether the sustained yield requirement in Article VIII of the Alaska Constitution applies to predators and the court determined that it did. She offered her belief that Alaska is the only state in the U.S. with a sustained yield constitutional provision. The statute merely implements the sustained yield requirement. In addition to the statutes, the Board of Game has administrative regulations and predator control plans under scrutiny. The Alaska Supreme Court determined that the plans, regulations, and the statutes all correctly implemented the constitutional sustained yield

principle as it applies to control of wolves and bears in specific game management units. The court analyzed the intensive game management statutes in AS 16.05.255 in the same way it analyzed the constitutional provisions. She concluded that if the legislature is dissatisfied with the outcome or finds it is contrary to legislative intent, the appropriate fix would involve a constitutional amendment.

MS. MISCHEL said essentially, the court upheld both the predator control plans that allow for aerial wolf hunting and high number of bear yields in certain game management units to allow moose and caribou populations to recover. The regulations provided the same level of detail. The Alaska Supreme Court decided that the sustained yield applied to predator populations but also that the Board of Game implemented the sustained yield principles even though the regulations adopted subsequent to the 2006 decision invalidating those regulations took out the sustained yield language with respect to predator control. The court found as a factual matter that the Board of Game adhered to sustained yield principles without actually saying it.

12:35:20 PM

CHAIR GATTO asked whether the question of the Endangered Species Act entered into any of the testimony. He related a scenario in which there was a threatened moose population due to too many bears or wolves. Since the aforementioned endangers the prey population, he asked whether someone could apply the Endangered Species Act if the state needs to reduce bears and wolves.

12:35:51 PM

MS. MISCHEL responded that the issue did not arise in this case.

CHAIR GATTO recalled that predator pressures threatened moose in certain game management units. Although as a whole moose are not endangered species, he recalled the situation in the Arctic in which the total number of polar bears was increasing but specific populations were not. The Endangered Species Act allowed the removal of a portion of the land the size of California as the normal range to protect them from hunting. He recalled Yenlo Hills moose [counts] used to be 100 but are now 1, so ultimately the moose will disappear in the area. He opined that it would make sense to protect the population in specific areas as well as the overall population.

MS. MISCHEL explained that the Alaska Supreme Court generally agrees with the principle, that certain game management units and range of the animals were significant in determining sustained yield. While the sustained yield principle is being interpreted as a constitutional matter in terms of predator population, the primary reason the court found that the aerial killing of wolves and bears in specified units was consistent with that principle is the court also found that the constitution and the statutory framework for sustained yield allowed for preferences for prey populations over predator populations. She acknowledged part of that had to do with beneficial use and the Board of Game found that human consumption was the highest and best use of wildlife, in general. In response to a question from Chair Gatto, she said the term, "hunting" can apply to both predator and prey populations. The intensive game management decisions and statutes allowed for a higher number of predators to be taken in some units than some biologists have deemed as sustainable. However, the court found that the environmental value of wildlife viewing over human consumption did not come up at the Alaska Supreme Court level although it may have been raised at the trial court level.

12:40:24 PM

REPRESENTATIVE KELLER asked for the reason for legislative review.

MS. MISCHEL said that one of the four reasons for oversight of cases for legislative consideration include whether the court has modified or revised common law of the state, which happened in this case.

CHAIR GATTO noted that the opinion states in conclusion, "We AFFIRM the superior court's ruling regarding the applicability of Alaska's sustained yield clause to predator populations ...." The court went on to reverse a ruling that does not apply to predator populations.

REPRESENTATIVE GRUENBERG inquired as to whether the case needed to be referred to the House Resources Standing Committee.

CHAIR GATTO offered his belief that the case has been decided.

12:42:34 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), brought up a recent challenge to the bail schedule revisions enacted in 2010. She reported that a lawsuit was filed the day before the effective date of the legislation by a group of defense attorneys, the Alaska Association of Criminal Defense Lawyers, and three named defense lawyers versus the State of Alaska and Dan Sullivan, in his capacity as attorney general. The complaint was for both declaratory and injunctive relief and sought a temporary restraining order to stop enforcement of several provisions of the bail revision. The suit claimed 10 areas of the bail revision law were defective. The first was a claim that the presumption of dangerousness and flight risks had the effect of denying the right to bail as guaranteed by the constitution. Another claim asserted that the requirement of $250,000 bail for a second offense of methamphetamine manufacturing charges violated the person's right to bail. Another claim asserted that the cooling off period in domestic violence, which prohibited a judge from allowing a person charged with a crime involving domestic violence from returning to the home of the victim for 20 days, violated the equal protection clause of the constitution.

MS. CARPENETI explained the Department of Law's response, in the case, was that the plaintiff's had not established irreparable harms since the plaintiffs, the lawyers, argued that they were not representing any particular defendants. The lawyers were bringing this action on their own without having a person denied bail or having a personal interest in the outcome of the case. The superior court denied the temporary restraining order for all except for the 20-day cooling off period for domestic violence defendants. When the legislature passed the Domestic Violence Prevention Act in 1998, it stipulated that the court may not allow a person charged with the crime of domestic violence to return to the home at all while the person is released on bail. That provision was challenged in a lawsuit decided in 2006, the Williams case, in which the Court of Appeals decided the provision violated the constitutional right to equal protection of the law. Thus, when the legislature rewrote the bail statutes, it changed it to a 20-day cooling off period. The trial court found that the provision was too similar to one found invalid in the Williams case so it issued a temporary restraining order from applying that provision of the law, not only for that court but for all trial courts in Alaska. She reported that the trial court ruled in favor of the state in all other aspects in terms of the temporary restraining order.

MS. CARPENETI related that both parties petitioned to the Alaska Supreme Court from the trial court's decision. The Alaska Supreme Court vacated the superior court's decision as it applied to other judicial officers of the state. She offered the theory that the trial court can decide for its court but may not impose that decision on other courts. Thus, the court vacated the decision and denied the petitions in other respects. The case returned to the trial court for the issue of declaratory relief where the superior court granted the state's motion to dismiss based on lack of standing by the plaintiffs. The order was dated April 12, 2011, and the lawyers made a motion for reconsideration, which was denied May 23, 2011, and a final judgment was entered July 18, 2011, vacating the temporary restraining order and granting final judgment in favor of the state. She said at this point the decision has not yet been appealed and the timeline has run out, although there are provisions for the court to relax the deadline up to 60 days. She said there is not any legislative action needed but offered to answer any questions.

12:49:19 PM

REPRESENTATIVE GRUENBERG related his understanding that the ultimate result was that the provision by the superior court on the 20-day cooling off period was subsequently set aside because the plaintiffs didn't have standing.

MS. CARPENETI clarified that it was vacated as it applied to other superior court judges and officers. Later, the entire case was dismissed for lack of standing by the defense lawyers. In response to a question, she agreed the provision was denied.

REPRESENTATIVE GRUENBERG concluded then that the only order that would potentially be out there was the 20 day cooling off period.

MS. CARPENETI agreed. She added that other superior courts have made decisions based on challenges made to the bail revision law and have upheld that law, although they may be appealed to the Court of Appeals. However, at this point other judges have decided to uphold the bail revision challenges made to them individually.

REPRESENTATIVE GRUENBERG remarked that it would likely be premature for the committee to take any action.

MS. CARPENETI concurred, but related the department's desire to inform the legislature since it was a substantial challenge.

12:51:06 PM

CHAIR GATTO, with respect to vehicle and document fees, stated that the amount of paperwork is a quarter of an inch thick, so a person may not notice the document fee. He asked whether the committee should determine that the statute of limitations begins when a person discovers the illegal fee.

MS. CARPENETI declined to respond. She then referred to a second lawsuit recently decided, the American Booksellers Foundation et al v. Daniel Sullivan, in his capacity as attorney general.

12:53:30 PM

MS. CARPENETI noted that this involves statute changes prohibiting the distribution of indecent materials to minors under AS 11.61.128. She explained that although the changes were adopted in Senate Bill 222, a substantial amount of work was done in its companion bill, House Bill 298 in the House Judiciary Standing Committee. She related there are several ironies since Senate Bill 222 narrowed the scope of the statute prohibiting the distribution of indecent materials to a minor. She explained that the bill prohibited a person over the age of 18 years of age from distributing material that depicts certain prescribed conduct, such as sexual penetration, to a person under 16 or to a person the defendant believes is under 16 years of age, and the material must be harmful to minors. The House Judiciary Standing Committee added the element that the state is required to prove beyond a reasonable doubt to AS 11.61.128, which is why the work done in the committee actually narrowed the effect of the law. The standard for proving whether the material is harmful is a three-part definition, which first requires the state to prove that the average individual applying contemporary community standards would find the material taken as a whole, appeals to the prurient interest in sex in persons under 16 years of age. Second, the state would have to prove that a reasonable person would find that the material taken as a whole lacks serious, artistic, literary, educational, political, or scientific value for persons under 16 years of age. Third, the state would have to prove the material depicts actual or simulated conduct in a way that is patently offensive to the prevailing standards in the adult community with respect to what is suitable for a person under 16 years of age. She highlighted

that [the aforementioned] element was added in the House Judiciary Standing Committee to what the state is required to prove when prosecuting a person under this statute.

MS. CARPENETI pointed out several things that were disappointing in the process. She recalled a representative from the Alaska Civil Liberties Union (ACLU) gave an opinion that he thought with the additions made in the House Judiciary Standing Committee that the statute would probably withstand constitutional muster. Another disappointment was that this statute was litigated in federal court and the state had asked the federal district judge to certify the question to the Alaska Supreme Court asking them to interpret the statute according to Alaska law. Unfortunately, the court declined to take that question, she said.

12:57:12 PM

REPRESENTATIVE GRUENBERG asked if the federal judge refused to certify it or did the Alaska Supreme Court refuse to accept the certification.

MS. CARPENETI responded that the federal judge certified the question and the Alaska Supreme Court refused to address the matter without opinion, which she opined wasn't that unusual. She said that no rationale was given. The main claim of the lawsuit was that the statute was overbroad, which occurs when it prohibits constitutionally protected conduct as well as conduct that can be legitimately regulated by the state. The claim was that contemporary community standards of the definition of "harmful to minors" was overbroad and vague, that there was no distinction between what might be harmful to an older minor still under the age of 16 as compared to a younger minor, that it was not the least restrictive alternative to regulate this behavior and that the culpable mental states were unclear and it was not absolutely clear the defendant must know the contents of the material that he/she is distributing. And it wasn't clear that the defendant knew or was reckless regarding the age of the recipient of the materials. There was also a claim that the statute inhibited interstate commerce, which she thought was unusual.

MS. CARPENETI related that the state's response was that Senate Bill 222 narrows the focus of AS 11.61.128, the state has a compelling interest in the safety of its children, and that the statute was narrowly tailored and the least restrictive alternative under the circumstances since it only restricts

certain specified images to be distributed. The department felt the "harmful to minors" definition that was adopted by the legislature met the U.S. Supreme Court decisions of Miller and Ginsburg in upholding the definition. The state also argued that the claim the statutes didn't differentiate between an older group of minors versus a younger group of minors was irrelevant since if it isn't harmful to a certain group of minors it would not be found harmful to minors. In terms of the Commerce Clause, the state's argument was that the state has jurisdiction to protect its citizens and even if the defendant's conduct is carried out outside the state, the state still has jurisdiction if the victim is in Alaska. She pointed out that is statutory and decisional law.

MS. CARPENETI related the Alaska Supreme Court decided that the court has a compelling interest in the safety of its children, and it upheld the "harmful to minors" definition finding indicating the definition does meet the U.S. Supreme Court decision in Miller and Ginsburg. However, it ultimately held that the statute was overbroad and prohibited constitutionally-protected conduct in addition to conduct not protected. She said it invalidated the statute not only as the language had been changed in Senate Bill 222, but as it had been before the amendments to the bill. The department will consider its options, but will likely suggest changes to the statutes to address this issue since currently the state cannot enforce the law, she said.

MS. CARPENETI, in response to Chair Gatto, answered that the statute prevented distribution of materials to persons under 16. One concern raised was that minors ages 13-14 may have different interests than minors ages 7-8. She reiterated that the state's argument was that if the materials were not harmful to any group of minors it would not be deemed harmful to any minors. She clarified that the Alaska Supreme Court upheld the definition she believed was added in the House Judiciary Standing Committee requiring that in order for materials to be illegal they had to be considered harmful to minors.

REPRESENTATIVE GRUENBERG inquired as to whether the state is considering an appeal.

MS. CARPENETI responded that the Department of Law is not planning to appeal the decision since it does not think its chances are good to prevail in the Court of Appeals.

1:03:19 PM

REPRESENTATIVE GRUENBERG said he had not considered the court rule that allows a federal court to refer a question of law to the Alaska Supreme Court. Currently, the Alaska Supreme Court has discretion on whether to accept the referral. He acknowledged that he has not personally been involved in a case where that issue arose. However, he questioned whether the legislature or perhaps the court's Appellate Rules Advisory Committee ought to address establishing standards. In instances in which the federal court has considered it an important enough question to refer to the Alaska Supreme Court, he further questioned whether the court should have complete discretion on the referral.

MS. CARPENETI acknowledged that she is not that familiar with this area of the law. She indicated a willingness to research the issue further.

1:05:45 PM

MS. CARPENETI then referred to a case that involved a person, Mr. Bridge, who was charged and convicted of escape in the second degree in violation of AS 11.56.310, which prohibits a person from removing him/herself from a correctional facility while under official detention. Mr. Bridge had been charged with driving with a license suspended, which is a misdemeanor. He was unable to make the bail set by the court and since the Fairbanks jail was full he was placed in the Northstar Center, which is a halfway house or is used to house people in similar circumstances. Mr. Bridge eventually walked away from the Northstar Center and was charged and convicted of escape in the second degree. The conviction was appealed to the court of appeals, which reversed the conviction, finding that the definition of "correctional center" in law is defined as "a correctional facility or premises used for confinement of persons under official detention." She related that although the term "official detention" is defined in statute very broadly, the term "confinement" is not. Although the Mr. Bridge was told he was not to leave, the Northstar Center was not gated, or guarded, and did not have any constraint mechanisms in place. Additionally, the staff had been trained to not intervene except to call the police, so his housing at Northstar Center was not considered constituting confinement. Thus, the conviction was reversed. Ms. Carpeneti reported that the Department of Law has appointed a committee of prosecutors to review the case and make recommendations, but hasn't yet formulated any recommendations yet.

1:09:09 PM

REPRESENTATIVE GRUENBERG, referring to the opinion that was a 2:1 decision, related his understanding the DOL is not appealing the decision.

MS. CARPENETI answered that the state does not have a right to appeal. Although the state could petition for review in the Alaska Supreme Court, it will not do so.

1:09:50 PM

REPRESENTATIVE GRUENBERG suggested that the committee ask the attorney general to provide results of its review.

REPRESENTATIVE HOLMES concurred.

REPRESENTATIVE GRUENBERG then referred to the case Hertz v. Carothers, 225 P.3d 471 (Alaska 2010) located on page 7 of the December 2010 Report to the Twenty-Seventh Legislature that's included in members' packets to. He read:

> The state was awarded attorneys' fees after Hertz lost a lawsuit against the state. The state attempted to execute on Hertz's prisoner trust account and directed the Alaska State Troopers to serve the writ of execution on the superintendent of Spring Creek Correctional Center and the notices of execution on Hertz. The trooper served all of the paperwork on the superintendent and did not serve Hertz with any paperwork. Sometime later the state faxed copies of the paperwork to the institution and a guard served the faxed paperwork on Hertz. Although Hertz eventually received actual notice of the execution, the Alaska Supreme Court found that Hertz had not been properly served as required by statute or court rule and the execution could not proceed.
>
> Hertz v. Carothers, 225 P.3d 571 (Alaska 2010)
>
> Legislative review is recommended to determine if the legislature should provide specific guidance and procedures for service of process on prisoners in state correctional facilities, or should include prison guards in the definition of "peace officer" for

purpose of process under Rule 4, Alaska Rules of Civil Procedure.

1:12:35 PM

GERALD LUCKHAUPT, Assistant Revisor of Statutes, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), explained that he wrote the review since he thought the legislature should consider the matter. The court rules that pertain to service of process don't envision service of process on a prisoner. The legislature might wish to address that in order to preclude similar situations from arising.

REPRESENTATIVE GRUENBERG concurred. He suggested that the committee request Mr. Luckhaupt make recommendations and to send the commissioner of the Department of Corrections a similar letter asking for recommendations. He further suggested that the House Judiciary Standing Committee may wish to introduce a bill addressing the matter.

1:14:08 PM

REPRESENTATIVE LYNN asked what ramifications broadening the definition of "peace officer" may have.

CHAIR GATTO responded that the suggestion is to add prison guards to the definition of "peace officer."

REPRESENTATIVE LYNN expressed concern that to add prison guards to the definition of "peace officer" may have ramifications in other circumstances in state law.

1:14:55 PM

REPRESENTATIVE GRUENBERG suggested that instead of changing the definition of "peace officer" one way to address the issue would simply be to clarify that the service of process could be done by a peace officer or a correctional officer.

CHAIR GATTO acknowledged that if the definition of "peace officer" was broadened it could affect contract negotiations.

REPRESENTATIVE GRUENBERG reiterated that the change would only be made to Rule 4, Alaska Rules of Civil Procedure.

MR. LUCKHAUPT clarified that he was not suggesting a broad change in definition of "peace officer" but instead would be referring directly to service of process. He clarified that the definition of "peace officer" for purposes of the serving process on a prisoner could include correctional officers or could refer to them separately.

1:16:29 PM

MR. LUCKHAUPT referred back to Ms. Carpeneti's remarks and noted that the case on official detention will be in the oversight report for the coming year. He recommended review of the case, noting the discussion in the dissent provides relevant information on how the case should have been resolved. He hoped the committee could address the case during the upcoming regular legislative session.

1:17:59 PM

QUINLAN STEINER, Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), stated, with respect to the issue of Mr. Bridge's case, that some inconsistencies in the level of crime for escapes exists. He related that Mr. Bridge was originally convicted of a "B" felony for walking away from what was essentially a halfway house. However, if the behavior had occurred in a courtroom with public safety officers present, the offense would have been a "C" felony. He stated that Mr. Bridge was ultimately convicted of a misdemeanor. He suggested that the consistency be addressed when the legislature reviews the case. He characterized the discrepancy as a quirk in the current language. In response to a question, he answered that electronic monitoring is typically used for misdemeanor cases. He elaborated that the level of the escape would depend on the circumstances and whether the crime included use of a weapon to escape. Again, in this case Mr. Bridge had been initially charged with a misdemeanor, which was advanced to a "B" felony due to the escape, but if he had been in court or incarcerated the escape would have been advanced to a "C" felony.

1:21:00 PM

REPRESENTATIVE GRUENBERG suggested that the committee obtain more information on the escape statutes for consistency.

MR. LUCKHAUPT agreed to do so.

REPRESENTATIVE HOLMES recalled Ms. Carpeneti had a group of prosecutors reviewing the Bridge case and she hoped that the public defender would also be included in the discussion.

MS. CARPENETI, in response to a comment, agreed to include the public defender in the discussions.

1:23:20 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 1:23 p.m.