

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

February 20, 2012

1:02 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative Mike Chenault (alternate)

OTHER LEGISLATORS PRESENT

Representative Sharon Cissna

COMMITTEE CALENDAR

HOUSE BILL NO. 267

"An Act relating to the Real Estate Commission; and providing for an effective date."

- MOVED 2d CSHB 267(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 234

"An Act relating to picketing or protests at a funeral."

- MOVED HB 234 OUT OF COMMITTEE

HOUSE BILL NO. 293

"An Act relating to the rights of crime victims; relating to the duties of prosecuting attorneys; and amending Rule 45, Alaska Rules of Criminal Procedure."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 262

"An Act relating to the offense of interference with access to public buildings or transportation facilities, when a person conditions access to a public building or transportation

facility on consent to certain physical contact or to an electronic process that produces a picture of the private exposure of the person."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 267

SHORT TITLE: REAL ESTATE SALES LICENSEES/COM'N

SPONSOR(S): REPRESENTATIVE(S) MUNOZ, OLSON

01/17/12	(H)	PREFILE RELEASED 1/13/12
01/17/12	(H)	READ THE FIRST TIME - REFERRALS
01/17/12	(H)	L&C
02/06/12	(H)	L&C AT 3:15 PM BARNES 124
02/06/12	(H)	Moved CSHB 267(L&C) Out of Committee
02/06/12	(H)	MINUTE(L&C)
02/08/12	(H)	L&C RPT CS(L&C) 4DP
02/08/12	(H)	DP: CHENAULT, THOMPSON, HOLMES, OLSON
02/20/12	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 234

SHORT TITLE: PICKETING AND PROTESTS AT FUNERALS

SPONSOR(S): REPRESENTATIVE(S) THOMAS

04/09/11	(H)	READ THE FIRST TIME - REFERRALS
04/09/11	(H)	MLV, JUD
02/09/12	(H)	MLV AT 1:00 PM CAPITOL 120
02/09/12	(H)	Moved Out of Committee
02/09/12	(H)	MINUTE(MLV)
02/10/12	(H)	MLV RPT 4DP 1NR 2AM
02/10/12	(H)	DP: GATTO, LYNN, THOMPSON, SADDLER
02/10/12	(H)	NR: AUSTERMAN
02/10/12	(H)	AM: MILLER, CISSNA
02/20/12	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE CATHY MUNOZ

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: During discussion of HB 267, spoke as one of the bill's joint prime sponsors.

HILARY MARTIN, Attorney
Legislative Legal Counsel

Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska

POSITION STATEMENT: During hearing of HB 267, as the drafter, answered questions.

DON HABEGGER, Director
Division of Corporations, Business, and Professional Licensing
Department of Commerce, Community & Economic Development (DCCED)
Juneau, Alaska

POSITION STATEMENT: During hearing of HB 267, answered questions.

ERROL CHAMPION, President
Southeast Alaska Board of Realtors;
Member, Board of Directors
Alaska Association of Realtors
Juneau, Alaska

POSITION STATEMENT: Testified in support of HB 267.

NORMAN ROKEBERG
Alaska Real Estate Coalition
Anchorage, Alaska

POSITION STATEMENT: During hearing of HB 267, answered questions.

DAVID SOMERS, Industry Issues Chairman
Alaska Association of Realtors
Fairbanks, Alaska

POSITION STATEMENT: Testified in support of [CSHB 267(L&C), as amended].

AARON SCHROEDER, Staff
Representative Bill Thomas
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Spoke on behalf of Representative Thomas, sponsor of HB 234.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: During hearing of HB 234, answered questions.

DOUGLAS GARDNER, Director
Legal Services
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska

POSITION STATEMENT: During hearing of HB 234, answered questions.

ACTION NARRATIVE

[1:02:24 PM](#)

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 1:02 p.m. Representatives Gatto, Thompson, Lynn, and Keller were present at the call to order. Representatives Gruenberg, Holmes, and Pruitt arrived as the meeting was in progress. Representative Cissna was also in attendance.

HB 267 - REAL ESTATE SALES LICENSEES/COM'N

[1:03:03 PM](#)

CHAIR GATTO announced that the first order of business would be HOUSE BILL NO. 267, "An Act relating to the Real Estate Commission; and providing for an effective date." [Before the committee was CSHB 267(L&C).]

CHAIR GATTO directed the committee's attention to Amendment 1 labeled 27-LS1111\B.2, Martin, 2/17/12.

The committee took an at-ease from 1:04 p.m. to 1:06 p.m.

[1:07:02 PM](#)

REPRESENTATIVE THOMPSON made a motion to adopt Amendment 1, labeled 27-LS1111\B.2, Martin, 2/17/12, which read:

Page 4, following line 4:

Insert a new bill section to read:

"* **Sec. 2.** AS 08.88.305 is amended by adding a new subsection to read:

(b) A person licensed as an associate real estate broker or a real estate salesperson may not be employed to perform activities requiring licensure under this chapter for more than one licensed real estate broker."

Renumber the following bill sections accordingly.

REPRESENTATIVE HOLMES objected for discussion purposes.

[1:07:20 PM](#)

REPRESENTATIVE CATHY MUNOZ, Alaska State Legislature, speaking as one of the joint prime sponsors of HB 267, explained that Amendment 1 doesn't change any language in the legislation; rather, it provides clarification of the intention stated in the amendment.

CHAIR GATTO added that Amendment 1 ensures that an individual may only work for one broker. Without Amendment 1, he opined, the existing language in CSHB 267(L&C) allows a licensed real estate assistant to work for more than one broker because the language doesn't prohibit it. Amendment 1 clarifies the legislation to ensure that [a licensed real estate broker] can only work for one broker.

REPRESENTATIVE GRUENBERG surmised that Amendment 1 addresses ambiguity in Section 2 and inquired as to what the existing Section 2 does as opposed to what Section 2, as amended by Amendment 1, would do.

[1:10:17 PM](#)

HILARY MARTIN, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), as the drafter, explained that the existing statute in Section 2 could have been read in different ways. The language could have been read to allow a licensed assistant to work for someone other than the broker that employs that licensed assistant. Therefore, the licensed assistant could have worked in another broker's office. The existing language could have also been read to mean that a licensed assistant could work for someone other than the broker who employs that licensed assistant. The [proposed] language in Section 2 clarifies that "a licensed assistant ... can work as a licensed assistant to another licensed salesperson or associate real estate broker as long as they both work for the same broker".

CHAIR GATTO related his understanding that the original language allowed a [licensed assistant] to work for more than one licensed real estate broker because there was no prohibition. Therefore, he opined that the existing language wasn't unclear

to him and he questioned whether it was unclear to [Ms. Martin] and that the language restricted the [licensed assistant to work for] only one broker.

MS. MARTIN offered her belief, "The original language, it could have been read that you could work for another broker or it could have meant other than the broker who employs the salesperson, it could have been referring to the licensed person you're working for so that you could work for a different broker or you could work for a different licensee that's not the broker in your office." She opined that the language didn't clearly state that one could work for only one licensed real estate broker.

CHAIR GATTO asked whether Amendment 1 would allow [a licensed assistant] to work for a broker in another state or another country.

MS. MARTIN answered that she didn't know, but pointed out that it could be dependent upon how "licensed real estate broker" is defined.

The committee took an at-ease from 1:14 p.m. to 1:16 p.m.

REPRESENTATIVE GRUENBERG questioned whether Section 2 [in CSHB 267(L&C)] is necessary if the new Section 2 is clear.

CHAIR GATTO pointed out that Section 2 [in CSHB 267(L&C)] consists of five paragraphs. In further response to Representative Gruenberg, Chair Gatto agreed with Representative Gruenberg that in Section 2, paragraphs (1)-(5) [of CSHB 267(L&C)] are conjunctive rather than disjunctive.

REPRESENTATIVE HOLMES related that in the House Labor and Commerce Standing Committee it was clarified that in Section 2, paragraphs (1)-(5) are conjunctive and thus include all five paragraphs.

REPRESENTATIVE GRUENBERG said that if those paragraphs remain, he would then make a motion to insert "and" [between paragraphs (4) and (5)] in order to ensure there is no question that those are conjunctive.

[1:17:57 PM](#)

REPRESENTATIVE GRUENBERG inquired as to what the proposed Section 2 in Amendment 1 would do that Section 2 in CSHB 267(L&C) doesn't.

MS. MARTIN offered her belief that a licensed assistant is a separate arrangement and this clarifies that one can only work as a licensed assistant to a licensed salesperson or a licensed real estate broker and the licensed assistant has to work for someone who works for the same broker as the licensed assistant. In further response to Representative Gruenberg, Ms. Martin confirmed that she believes that [the language in Section 2 of CSHB 267(L&C) and the language in proposed Amendment 1] are appropriate.

CHAIR GATTO posed a scenario in which a [licensed assistant] working in Canada wanted to also work in Alaska.

MS. MARTIN pointed out that the individual would have to be licensed in Alaska in order to work for a broker in Alaska. She related her understanding that the individual would have to relinquish their broker's license [as is the case when a broker has a license] from another state.

CHAIR GATTO highlighted that that's true for brokers, but this is a discussion about a licensed real estate salesperson. The question he said is whether a licensed real estate salesperson in Whitehorse, Canada, could fly to Anchorage, Alaska, to request employment with a second broker. Therefore, he questioned whether Alaska's law would only apply to a second broker in the same state and exclude the rest of the planet.

MS. MARTIN said she believed so.

REPRESENTATIVE LYNN noted that licensees other than the real estate broker aren't really employees but rather independent contractors. Therefore, he questioned whether the term employee should be used under employment.

CHAIR GATTO directed attention to the language on page 4, lines 19-22, and asked if that refers to the broker.

REPRESENTATIVE LYNN reiterated that the licensed real estate salesperson is an independent contractor and it would be extremely rare not to be. However, a situation in which a licensed assistant who doesn't perform listings or sales but simply works for a broker may well be an employment situation. Those independent contractors working for the broker are paid a

share of the commission; the [independent contractor] isn't paid directly but rather is only paid by the broker. Therefore, the language needs to clarify that typically the employment situation only applies to a licensed assistant who is working for a wage rather than a commission.

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REPRESENTATIVE GRUENBERG indicated agreement with Representative Lynn's comments. However, he suggested that it would be easier to utilize the existing Section 2 of CSHB 267(L&C) and amend it as follows:

Page 4, line 10, preceding "if":
Insert "only"

Page 4, line 22, following ";":
Insert "and"

REPRESENTATIVE GRUENBERG also suggested inserting a new subsection to read: "The person licensed as an associate real estate broker or a real estate salesperson is not employed to perform activities [requiring licensure under this chapter for more than one licensed real estate broker.]" The aforementioned approach would result in everything being in one place in statute as the current drafting is a bit confusing, he opined. With regard to Representative Lynn's concern regarding the use of the term "employed", Representative Gruenberg suggested seeking the advice of the industry.

[1:26:01 PM](#)

DON HABEGER, Director, Division of Corporations, Business, and Professional Licensing, Department of Commerce, Community & Economic Development (DCCED), said he, too, would defer to industry in regard to the use of the terms "employed by" or "contracted with".

[1:26:56 PM](#)

ERROL CHAMPION, President, Southeast Alaska Board of Realtors; Member, Board of Directors, Alaska Association of Realtors, informed the committee that although he has a broker's license, the regulations are written in such a way that since he works for a broker as a licensed independent he is referred to as an associate broker. There can only be one broker per organization. Mr. Champion stated that he could work for

himself and be an independent broker. He then related support for HB 267.

CHAIR GATTO inquired as to whether Mr. Champion is an employee of the broker or a contractor of the broker.

MR. CHAMPION clarified that he is a licensed independent contractor.

CHAIR GATTO surmised then that Mr. Champion isn't an employee.

MR. CHAMPION related that in terms of normal employee relations, no benefits are provided and he has to function on his own. However, he cautioned the committee that may not be the case for every broker in Alaska because he knew that some brokers have employees, albeit these employees don't practice real estate.

CHAIR GATTO clarified that the legislation only addresses associate real estate brokers and real estate salespersons. He clarified that he wanted to ascertain, under the rules of a contractor, whether there are employees who do the same thing as the [licensed independent] contractor.

MR. CHAMPION explained that he could employ a licensed assistant to help him with his work.

CHAIR GATTO surmised, though, that such an assistant wouldn't be a real estate salesperson or licensed associate [real estate broker].

MR. CHAMPION informed the committee that the assistant is licensed by the Division of Corporations, Business, and Professional Licensing and has taken training and passed the test. In further response to Chair Gatto, he acknowledged that the assistant would be working for him.

CHAIR GATTO inquired as to whether the [licensed assistant] is employed by the broker.

MR. CHAMPION stated that the license of the [licensed assistant] must hang in the office of the broker. In response to Representative Lynn, Mr. Champion confirmed that the [licensed assistant] doesn't perform listings and sales.

REPRESENTATIVE LYNN likened licensed assistants to legislative staff as licensed assistants make phone calls, address escrow matters, coordinate with the lender, etcetera. Without a

license it's very easy to venture into licensed activities, he opined. Therefore, in order to prevent [an assistant] from venturing into licensed activities, there's a real estate license and the licensed assistant is paid a wage rather than a commission.

MR. CHAMPION stated his agreement.

[1:30:53 PM](#)

REPRESENTATIVE LYNN further clarified that a licensed salesperson receives a commission. The money from the real estate sale goes to the broker only and the broker gives the licensee a percentage of that sale, depending upon the commission split. He surmised, though, that the licensed assistant typically receives a wage not a commission. He reiterated his earlier comments that it's very easy for someone to unwittingly do something that only a real estate licensee is allowed to do.

CHAIR GATTO posed an example in which he decides to sell his house and calls a [real estate] agent rather than a broker. The agent secures a buyer for the house. The agent works for the broker and sometimes there are two brokers, one for the seller and one for the buyer.

REPRESENTATIVE LYNN explained that although a licensee may fill out the paperwork for the listing, the listing belongs to the broker. Oftentimes, when a licensee goes to a different broker, the listings of the licensee remain with the first broker as does any commission that results from that listing/sale.

MR. CHAMPION agreed with Representative Lynn's explanation and reiterated that all listings belong to the brokers not the agent. Furthermore, if an agent moves from one broker to another, it would be up to the broker under which the listing was obtained to determine whether the agent can take the listing. He doubted that the agent would be allowed to take the listing to his/her new broker.

[1:33:28 PM](#)

REPRESENTATIVE LYNN disclosed that he is a licensed Alaska real estate associate broker, and thus he has a conflict of interest.

REPRESENTATIVE GRUENBERG observed that the term "employs" is in current law. He suggested that any use of that term throughout

the legislation should be reviewed regarding whether it should be changed or a definition of it specified in the legislation.

CHAIR GATTO pointed out that the term "employed" can be found in AS 08.88.305 as follows:

Sec. 08.88.305. Multiple business operations. A person licensed as a real estate broker may own, operate, or be employed by multiple corporations, partnerships, or other business organizations engaging in activities for which a license is required under this chapter, provided that each business organization is registered with the commission, and that the principal offices of all of the business organizations share a single physical address.

REPRESENTATIVE HOLMES related that the term "to employ" is defined in a dictionary as "to either engage the services of or provide a job that pays wages". Therefore, she surmised that the term "employ" includes contract. If the desire is to change the language, she suggested that it should be changed to "employ and contract with" throughout the legislation.

[1:35:30 PM](#)

REPRESENTATIVE PRUITT expressed the need to be cautious because the Internal Revenue Service (IRS) separates the two and there are 20 different distinct criteria. Therefore, he suggested seeking council from Legislative Legal and Research Services.

CHAIR GATTO agreed. He then directed attention to AS 08.88.910, as follows:

Sec. 08.88.910. Application to independent contractors. The provisions of this chapter that apply to employment relationships and employees also apply to contracting relationships and independent contractors.

REPRESENTATIVE GRUENBERG recalled that provision was enacted in 1998. Prior to 1998, either a court/agency adjudicated whether a person was truly an employee when they have many of the indices of being an employee. The broker just said that [the employee] is an independent contractor so that the broker wouldn't have to withhold wages, taxes, and etcetera. He opined that it has been a big deal in the real estate industry.

CHAIR GATTO surmised then that withholding is another hitch.

REPRESENTATIVE LYNN mentioned that independent contractors are also responsible for their own working hours. Independent contractors are in business for themselves.

REPRESENTATIVE HOLMES ventured her belief that AS 08.88.910 does clarify that within this entire chapter, references to employment relationships and employees also refers to contracting relationships and independent contractors. Therefore, she opined that the terms "employ" and "employment" can be used.

REPRESENTATIVE PRUITT agreed that it seems that state law has done due diligence to provide clarity in this particular section, but it doesn't mean that the clarity exists for the IRS.

REPRESENTATIVE THOMPSON withdrew Amendment 1.

[1:44:27 PM](#)

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment 2, as follows:

Page 4, line 10, preceding "if":
Insert "only"

Insert a new subsection to read:

"The person licensed as an associate real estate broker or a real estate salesperson is not employed to perform activities requiring licensure under this chapter for more than one licensed real estate broker;"

Re-number accordingly.

Page 4, line 22, following ";;":

Insert "and"

REPRESENTATIVE HOLMES objected for discussion purposes.

The committee took an at-ease from 1:48 p.m. to 1:52 p.m.

MS. MARTIN said that if the intent is to clarify for whom a licensed assistant can perform those activities, then Conceptual Amendment 2 accomplishes that.

REPRESENTATIVE HOLMES expressed the need to ensure no ambiguities are created in terms of what people can and can't do by placing the language in the subsection rather than the statute as a whole.

MS. MARTIN offered that Conceptual Amendment 2 would clarify licensed assistants but not change anything else currently in statute. She explained that she originally proposed a separate subsection in Amendment 1 because she understood the goal was to have it be a rule for every licensed real estate salesperson or associate real estate broker. However, if the intent is to merely refer to licensed assistants, then it's fine as a [paragraph]. In response to Chair Gatto, Ms. Martin explained that a licensed assistant has to be licensed and thus would have to be a real estate salesperson or an associate real estate broker. In further response to Chair Gatto, she related her understanding that a licensed assistant is a special relationship that is entered into separate from other relationships, which is why there is a separate subsection addressing licensed assistants.

[1:55:58 PM](#)

REPRESENTATIVE HOLMES noted her understanding that the sponsor of HB 267 is amenable to Conceptual Amendment 2.

MS. MARTIN directed the committee's attention to existing AS 08.88.398, which in part says:

A licensed real estate salesperson or licensed associate real estate broker may act as a licensed assistant to a real estate licensee other than the broker who employs the salesperson or associate broker if

MS. MARTIN said that language is referring to a licensed individual who acts as an assistant to another licensee. In response to questions, Ms. Martin opined that the use of the language "may act" is fine since the relationship [between the licensed assistant and another licensed salesperson or associate real estate broker] is clarified by paragraphs (1)-(5).

REPRESENTATIVE HOLMES removed her objection to Conceptual Amendment 2. There being no further objection, Conceptual Amendment 2 was adopted.

[2:00:54 PM](#)

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 3, labeled 27-LS1111\B.1, Martin, 2/14/12, which read:

Page 1, line 1, following "Commission;":

Insert "relating to temporary permits issued by the Real Estate Commission; relating to licensed assistants who are employed by other real estate licensees; relating to contributions by a real estate licensee to a charitable organization;"

REPRESENTATIVE HOLMES objected for discussion purposes.

REPRESENTATIVE GRUENBERG asked if, in light of the prior changes, Amendment 3 "will do the trick."

MS. MARTIN replied yes.

REPRESENTATIVE HOLMES withdrew her objection to Amendment 3. There being no further objection, Amendment 3 was adopted.

CHAIR GATTO asked whether the passage of CSHB 267(L&C), as amended, would prevent an individual from working for a broker in Los Angeles in the winter and then working for a broker in Anchorage in the summer. He said he isn't in favor of preventing an individual from working two jobs, which it seems to do because the legislation says [the licensed assistant] can work for only one broker.

REPRESENTATIVE LYNN explained that he was a licensed broker in California and after moving to Alaska obtained an Alaska license. The California license was inactive once he was in Alaska, but had he returned to California he could've worked in California. Although he could have actively practiced in both states, he couldn't practice in California because he wasn't with a broker in California. In further response to Chair Gatto, Representative Lynn recalled that a [licensee] moving to another state to work does have to take action. He informed the committee that he is a licensee now, but since being in the legislature he has been in referral status only.

REPRESENTATIVE GRUENBERG referred to AS 08.88.161, which says:

"Sec. 08.88.161. License required. Unless licensed as a real estate broker, associate real estate broker, or real estate salesperson in this state, a person may not, except as otherwise provided in this chapter,"

[2:07:10 PM](#)

CHAIR GATTO clarified that he is trying to ascertain whether an individual can hold multiple licenses [from various states].

MR. CHAMPION specified that in Alaska one must have an Alaska license to practice real estate.

CHAIR GATTO pointed out that the language specifies that an individual may only work for one real estate broker. He posed a scenario in which a licensed individual works for a broker in Los Angeles and doesn't deactivate his California license while living in Alaska. In such a situation, could the licensed individual work for a broker in Alaska. He likened this situation to a driver's license in that an individual who obtains a driver's license in one state, but moves to another state has to forfeit their driver's license from the state from which they move before being allowed to obtain a driver's license from the state to which they moved.

MR. CHAMPION explained that in Alaska a real estate license is a two-year license. He further explained that he could request his license to be inactive and continue to pay a fee and his Alaska real estate license would continue to be with the broker for which he works. During that time in which his Alaska real estate license is inactive, in another state he could acquire a license to the point of being a broker. If he were to return to Alaska and wanted to practice real estate, he would have to reactivate his Alaska license.

CHAIR GATTO asked if in the aforementioned situation, Mr. Champion would have to deactivate his real estate license from another state.

MR. CHAMPION said he couldn't speak to the rules of other states.

[2:09:32 PM](#)

NORMAN ROKEBERG, Alaska Real Estate Coalition, explained that it's allowable for an individual to work with referrals or an out-of-state broker to work with an Alaskan licensee. He then related his belief that one can have licenses from various states and practice real estate in those states. With regard to HB 267, Section 2 specifically relates only to licensed assistants. As a point of clarification, Mr. Rokeberg stated that there could be assistants in employment relationships that aren't licensed. Regarding Amendment 2, Mr. Rokeberg said that if it relates only to AS 08.88.398, then it's agreeable to him. He opined that there shouldn't be any problems or questions regarding cooperation or interstate commerce as it relates to real estate transactions.

REPRESENTATIVE GRUENBERG disclosed that his late father was an industrial real estate broker in California and worked in various states. He surmised that the aforementioned would continue to be permissible upon passage of HB 267.

MR. ROKEBERG concurred, adding that the only question revolves around the real estate licensed assistant. He told the committee he is currently representing the Alaska Real Estate Coalition, which consists of (indisc.) and real estate licensees that aren't necessarily members of the Realtors Association; these are individuals who are interested in enhancing the public policy and education of Alaskans regarding issues of real property and other real estate issues. Mr. Rokeberg related support for HB 267.

[2:15:27 PM](#)

DAVID SOMERS, Industry Issues Chairman, Alaska Association of Realtors, related that he has been a broker in Fairbanks for 47 years. He then related his support for [CSHB 267(L&C), as amended].

CHAIR GATTO, after having ascertained that no one else wished to testify, closed public testimony on HB 267.

REPRESENTATIVE PRUITT inquired as to what the licensed assistant does.

MR. CHAMPION offered his understanding that a "licensed assistant" is a contracted individual that is different than a full licensee that represents buyers and sellers, an associate broker who has taken advanced training and acquired the broker's license, and the broker. A licensed assistant is simply an

individual that likely works guaranteed hours with guaranteed earnings. A licensed assistant enjoys the rights a license provides, such that the licensed assistant can show property, discuss terms and conditions, and go out on appraisals and inspections. A regular employee can't do the aforementioned, he said. In fact, statute prohibits a regular employee from discussing many details of a real estate sale, including the price.

REPRESENTATIVE LYNN concurred, adding that basically licensed assistants perform those duties that a salesperson is too busy to do, such as coordination with loan companies, advertising, escrow issues, and showing property. He echoed his earlier comment that licensed assistants don't receive a commission. He then reminded the committee that if any of the aforementioned duties are performed by an unlicensed individual, it would be problematic. In response to Chair Gatto, Representative Lynn confirmed that a homeowner can put his own home for sale without having a license.

[2:20:02 PM](#)

REPRESENTATIVE PRUITT surmised then that a broker and an assistant broker will be able to go to California and sell real estate. He questioned whether a licensed assistant [in Alaska] would be able to go to California and work at a real estate agency in California.

MR. CHAMPION replied yes, but clarified that the individual must have a license from the state in which he is practicing real estate.

MR. ROKEBERG added that it's important to understand that under the contractual employment relationship between a broker or an associate broker and another sales agency as an assistant, the assistant remains under the umbrella of the broker. The broker has to supervisor the licensee, which is a standard practice. Mr. Rokeberg opined that a [licensed assistant] couldn't practice in various states.

REPRESENTATIVE PRUITT recalled that the discussion has been that [a licensed assistant] isn't an employee. He opined that if [a licensed assistant] holds a license [in one state and then moves to another state for work], there is no reason he/she should have to forfeit his/her license in the state from which he/she originally was licensed. He clarified that his concern is regarding whether this legislation prohibits a licensed

assistant from practicing in another state in which he/she is licensed and then from working as a licensed assistant in the state in which he originally holds a license and to which he returns.

CHAIR GATTO inquired as to the situation in which a licensed assistant wants to move within Alaska, say between Fairbanks and Anchorage.

REPRESENTATIVE LYNN explained that a licensee working for a licensed broker can go anywhere in Alaska to list and sell property. Although typically there would be a referral from a broker or a salesperson in the area, there's nothing stopping the licensee from taking a listing anywhere in the state. Representative Lynn clarified that a licensee can't work for two brokers within the state, either simultaneously or independently.

[2:26:50 PM](#)

REPRESENTATIVE THOMPSON moved to report CSHB 267(L&C), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, 2d CSHB 267(JUD) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 2:27 p.m. to 2:32 p.m.

HB 234 - PICKETING AND PROTESTS AT FUNERALS

[2:32:16 PM](#)

CHAIR GATTO announced that the final order of business would be HOUSE BILL NO. 234, "An Act relating to picketing or protests at a funeral."

CHAIR GATTO offered his understanding that many of the court decisions are from the Southeast portion of the U.S. because that's where the church that was doing the protesting was located. He informed the committee that the Snyder v. Phelps, 2011 WL 709517 (U.S.), case in which Snyder's son, a Lance Corporal in the U.S. Marine Corp, died due to injuries sustained in the line of duty in Iraq. One of the slogans used [by Westboro Church] at the Snyder funeral service was "Thank God for Dead Soldiers". Mr. Snyder sued the Westboro Church for \$10 million and although he prevailed, the case was set aside by the court because the court ruled that the church had First

Amendment rights. He informed the committee that several states have legislation requiring that there be no picketing within 150 feet [of a funeral service or procession]. There are also [laws] regarding the prevention of picketing/protesting at someone's home. Chair Gatto related his strong belief that funerals should be protected. He noted that there doesn't seem to be much resistance to the 150-foot barrier.

[2:34:41 PM](#)

AARON SCHROEDER, Staff, Representative Bill Thomas, Alaska State Legislature, speaking on behalf of the sponsor, Representative Thomas, explained that HB 234 would bring Alaska in line with 46 other states that have passed similar legislation. The legislation proposes guidelines for a 150-foot fixed buffer from the boundary of a church, cemetery, or funeral home one hour before, during, and after the service. The sponsor believes, he related, that the families and relatives that attend the funeral warrant state protection and are members of a captive audience. Under HB 234, there are five acts that must be committed at the same time in order to commit the crime. Those five acts are acts against the time and the distance, fall under the definition of picketing, show reckless disregard, and disrupt the funeral. Therefore, it's very difficult to commit the crime [of disorderly conduct] and it doesn't regulate all speech from occurring during the funeral. This legislation falls under disorderly conduct as a class B misdemeanor and would carry a penalty of no more than 10 days and a fine of no more than \$2,000. He then pointed out that the committee should have a letter of support for HB 234 from the Alaska Peace Officers Association.

REPRESENTATIVE KELLER, referring to the language on page 1, lines 11-12, related his confusion with regard to the use of the term "facility". He inquired as to whether the point of demarcation is 150 feet from the property line that a facility is on or is it 150 feet from a facility, which he would believe to be a building. He expressed the need to be clear with the language in order to avoid any ambiguity that could result in litigation.

CHAIR GATTO surmised that a facility could be an air force base, and thus the boundary would be the property line. Therefore, if the air force base was 1,000 acres that would be the property line.

MR. SCHROEDER concurred that the intent of the term "boundary" is the property line, but deferred to Mr. Gardner, Legislative Legal Services, for further clarification.

[2:38:15 PM](#)

REPRESENTATIVE LYNN questioned whether other cemeteries that are private property would be able to control who enters the cemetery.

MR. SCHROEDER replied yes.

REPRESENTATIVE LYNN surmised then that for a privately owned cemetery the boundary would be 150 feet from the [property line] of the private cemetery. However, there seems to be some ambiguity with regard to public cemeteries, such as national or state cemeteries.

CHAIR GATTO pointed out that the legislation doesn't make a distinction between private and public cemeteries rather it just refers to "boundary". He opined that everyone agrees that [the term "boundary"] refers to the property line. However, he questioned whether on an air force base the boundary would be the cemetery or the perimeter of the air force base.

REPRESENTATIVE LYNN related his assumption that it would be the boundary of the air force base.

REPRESENTATIVE PRUITT opined that the state wouldn't have jurisdiction within an air force base.

MR. SCHROEDER concurred, and added that the federal guidelines would be in force on federal property [such as an air force base].

[2:40:34 PM](#)

REPRESENTATIVE GRUENBERG asked whether or how HB 234 would apply in a situation in which a family gathers to scatter the ashes of the deceased on a mountain top or at sea where there are no boundaries.

MR. SCHROEDER answered that although ultimately a law enforcement official would make the decision on that, the boundary would be the service itself. If [picketers/protesters] disrupt the service, the law would be applicable.

REPRESENTATIVE GRUENBERG surmised, then, that the language on page 3, lines 1-2, may warrant review. He opined that the legislation seems to address smaller boundaries, although in today's world one can be terrifically disruptive auditorily.

MR. SCHROEDER responded that such would fall outside the context of HB 234. However, depending upon the volume and activity of such a protest, the disruptive individuals could be disrupting the peace, which is a class B misdemeanor.

REPRESENTATIVE GRUENBERG suggested then that the committee should perhaps address either or both of those issues.

REPRESENTATIVE LYNN offered then that the language "if the sound is audible within 150 feet" could be inserted.

CHAIR GATTO suggested that perhaps it would be appropriate to refer to the decibel level at the perimeter.

[2:44:19 PM](#)

REPRESENTATIVE HOLMES, expressing support for the legislation, pointed out that there are other types of protests beyond those that intend to disrupt a funeral. For instance, one of the letters in the committee packet highlighted situations in which there are downtown cemeteries that are surrounded by buildings and traffic or situations in which there are many churches and synagogues in fairly dense urban areas and individuals protest but don't intend to picket. Therefore, she expressed concern that the legislation doesn't include those individuals who don't intend to disrupt a funeral service but are targeting other establishments in the area.

REPRESENTATIVE THOMPSON, regarding Representative Gruenberg's concerns with funeral services at sea, opined that the language "**other facility**" on page 3, line 2, would address such situations.

REPRESENTATIVE GRUENBERG acknowledged that point, but maintained his question regarding spreading someone's ashes on a mountain top.

CHAIR GATTO related his belief that what one does with the ashes is probably not covered.

REPRESENTATIVE GRUENBERG stated that in many cases the service is the scattering of the ashes. Since HB 234 addresses a

criminal law, the committee should consider how it would apply in a situation such as the funeral service being the spreading of the ashes.

[2:47:13 PM](#)

REPRESENTATIVE KELLER offered his belief that picketing/protesting a private ceremony on a mountain top wouldn't happen as a practical matter. He opined that HB 234 proposes to protect a ceremony and although there may be cases in which it's difficult to protect, it shouldn't stand in the way of the legislation.

REPRESENTATIVE PRUITT questioned how to address situations in which the ceremony of scattering one's ashes occurs in a river that's accessible or a location that's off the road.

REPRESENTATIVE THOMPSON remarked that it's not farfetched to think that folks on snow machines couldn't gather at the top of a mountain top to protest where others were gathered to scatter someone's ashes.

REPRESENTATIVE GRUENBERG assured the committee that there will be some situations that the committee will miss.

REPRESENTATIVE KELLER clarified that his point is that even though the legislation can't provide protection for every ceremony, the legislation shouldn't be held up.

REPRESENTATIVE LYNN concurred. He indicated favor with the 150-foot boundary, but pointed out that protests could be staged using an airplane flying a banner. Again, the legislation can't address every possible situation and shouldn't be held because of that.

REPRESENTATIVE PRUITT questioned whether changing the language to refer to "within 100 feet of a funeral ceremony" would be helpful.

REPRESENTATIVE THOMPSON stated that a funeral ceremony isn't usually spreading the ashes.

CHAIR GATTO related his preference for a facility and boundaries as they would be clear, although he did note that the boundaries for services held in downtown Anchorage would likely be the curb, which would provide the opportunity [to protest at a closer proximity to the service].

[2:53:48 PM](#)

REPRESENTATIVE HOLMES referred to the proposed definition of "**picketing**" and expressed concern that with the use of the language "**that disrupt**" as it is a bit broad. She posed a situation in which an individual is picketing across the street from a funeral service and that individual is targeting another building for something else not the funeral service. However, if someone from the funeral service charges that the picketer disrupted the funeral service, the individual could face a class B misdemeanor.

CHAIR GATTO disagreed, and directed attention to the language "**to disturb a funeral**".

REPRESENTATIVE HOLMES asked whether those who lawfully picket something else across the street from a funeral should be criminals because that's what this would do. Representative Holmes clarified that folks may be picketing a building all day and not know that a funeral is being held [across the street] later in the day. Therefore, Representative Holmes recommended deleting the language "**disrupt or are**".

MR. SCHROEDER acknowledged Representative Holmes' point, but noted that the disruption must also include "**reckless disregard**", which is defined as "a gross negligence without concern to danger for others". He offered his understanding that the sponsor would want HB 234 to apply if the protest is with reckless disregard, even if it isn't directed at the funeral.

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REPRESENTATIVE GRUENBERG ventured that there would be two separate standards: a reckless standard on page 2, lines 30-31; intentional mens rea, mental state, on page 3, lines 18-19. Given that the U.S. Supreme Court has issued one opinion that upholds the right of free speech and that the conservative majority on the court is more protective of free expression than many have been in the past, the chance of this surviving a constitutional challenge are greater within the intentional standard on page 3, lines 18-19 than a reckless standard. He then asked if any courts of last resort upheld a reckless standard in this case.

MR. SCHROEDER replied yes, and informed the committee that the language and definition was from an Ohio case in the 6th Circuit Court. He further informed the committee that it has also withstood a challenge in trial court in the 8th circuit.

REPRESENTATIVE GRUENBERG referred to the rule of lenity, which says a criminal statute with an ambiguity is construed most leniently in favor of the accused. Therefore, he opined that a court would find it difficult, when there are two standards as is the case in HB 234, to allow a reckless conviction to stand and would resolve it under the rule of lenity to require intent.

[3:01:30 PM](#)

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), returning to the question regarding the language "**disrupt**" on page 3, line 19, pointed out that there are several culpable mental states including knowingly to act, with reckless disregard that the conduct occurs within the time and place of a service or funeral, and the definition with culpable mental states. She said that it's unusual to have a definition with culpable mental states. She further said that she would interpret "**undertaken to disturb a funeral**" to be an intentional culpable mental state. However, the disruption is unclear. Usually when a culpable mental state is read in from our general statutes, one would read in reckless. She mentioned that she would assume that this isn't a conduct but rather a circumstance and thus "you read in 'reckless'." Therefore, Ms. Carpeneti didn't know that there is a problem with those two in this definition because one or the other would have to be proven. To "recklessly disrupt" is the fact that one has disrupted the funeral as opposed to undertaking intentional conduct to disturb it.

REPRESENTATIVE HOLMES inquired as to what would constitute recklessly disrupting a funeral for purposes of the legislation's prohibition.

MS. CARPENETI explained that "reckless" means that a person is aware of the circumstances and consciously disregards the risk that the circumstance is occurring. For example, one who protests hotel wages across the street from a church must know that the funeral is happening and then determine he/she doesn't care that the funeral is occurring and protests anyway.

[3:04:55 PM](#)

REPRESENTATIVE HOLMES pondered whether there's a difference between holding signs versus shouting. In the situation Ms. Carpeneti proposed, she asked whether only holding a sign [in protest to hotel wages] would be construed as a disruption.

MS. CARPENETI cautioned that it depends on the circumstances, but surmised that under such circumstances, if the person didn't understand the risk and didn't understand that [holding signs] was disrupting the funeral, then it wouldn't be something that the Department of Law could prosecute.

REPRESENTATIVE GRUENBERG offered a hypothetical situation in which there is picketing outside a funeral home in regard to a labor dispute and has nothing to do with the content of the funeral. He asked if that would violate HB 234.

REPRESENTATIVE THOMPSON interjected that it would be disrupting the funeral.

MS. CARPENETI said that she didn't know whether it could be proven to be picketing under the definition in HB 234, although it's possible.

[3:07:28 PM](#)

DOUGLAS GARDNER, Director, Legal Services, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), explained that in Phelps-Roper v. Strickland, 539 F.3d 356, the court, in upholding restrictions similar to those proposed in HB 234 to address the issue of over breadth, said the following:

Thus, properly read, the Funeral Protest Provision restricts only the time and place of speech directed at a funeral or burial service. If a protestor's communication is not directed at a funeral or burial service, the mere fact that one holds a picket sign within 300 feet of a funeral or burial service during the relevant time period, without more, will not support a conviction under § 3767.30.

MR. GARDNER surmised that if a labor group is protesting wages in front of the capitol and there is a church within 150 feet and a funeral procession is occurring, the statute wouldn't reach to criminalize those protesting in front of the capitol. The more difficult question is regarding silent protestors holding signs that someone at a funeral finds offensive, because

there has to be knowing conduct and reckless conduct with respect to disrupting or undertaking to disturb a funeral. He highlighted the portion of the definition of "recklessly" that the risk must be of the nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in that situation. Therefore, he opined that the statute doesn't attempt to reach coincidental acts or negligent acts but rather acts that a reasonable person would consider to be a gross deviation from the standard of conduct that a person would be expected to understand would be disrupting a funeral in the circumstances.

MR. GARDNER told the committee that per the sponsor's direction, the statute was drafted to draw from the case law and the definitions primarily from the 6th circuit cases that have approved of this type of language as an appropriate time, place, and [manner] restriction on speech. In response to Representative Holmes, Mr. Gardner confirmed that the language in HB 234 is similar to that of Phelps-Roper v. Strickland. The 6th Circuit case definition of "other protest activities" is equivalent to the definition of "picketing" in HB 234. Although the 8th Circuit found language similar to this unconstitutional, but the three-judge panel wanted the case referred back to the en banc court because it was concerned that the court had reached the wrong conclusion on the captive audience analysis as it relates to people attending a funeral at a funeral home.

[3:13:16 PM](#)

REPRESENTATIVE HOLMES asked whether the language in HB 234 would be considered content neutral.

MR. GARDNER offered his belief that the courts which have reviewed this language have considered it to be content neutral. The language doesn't focus on a particular type of speech; rather it focuses on disruptive activities while recognizing that there are limitations as the U.S. Supreme Court recently held in the Snyder case. There are limitations on speech so long as they're content neutral in their time, place, and manner. He acknowledged, though, that he didn't know what an Alaska court would do with it. There are risks inherent in legislating in an area involving speech and balancing the rights of peaceful association and freedom of religion. The latter are involved in this particular case in terms of the rights of others who aren't the speaking parties in the speech analysis such that they can conduct their activities free from unwanted speech.

REPRESENTATIVE HOLMES said that she likes the intent of HB 234.

3:15:29 PM

REPRESENTATIVE THOMPSON moved to report HB 234 out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HB 234 was reported from the House Judiciary Standing Committee.

3:15:47 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:15 p.m.