ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 24, 2014
1:20 p.m.

MEMBERS PRESENT

Representative Wes Keller, Chair
Representative Bob Lynn, Vice Chair
Representative Gabrielle LeDoux
Representative Lance Pruitt
Representative Max Gruenberg

MEMBERS ABSENT

Representative Neal Foster
Representative Charisse Millett

COMMITTEE CALENDAR

HOUSE BILL NO. 127
"An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

- MOVED CSHB 127(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 250
"An Act making an expression of apology, responsibility, liability, sympathy, commiseration, compassion, or benevolence by a health care provider inadmissible in a medical malpractice case; requiring a health care provider to advise a patient or

the patient's legal representative to seek legal advice before making an agreement with the patient to correct an unanticipated outcome of medical treatment or care; and amending Rules 402, 407, 408, 409, and 801, Alaska Rules of Evidence."

- HEARD & HELD

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 64(FIN)
"An Act relating to theft and property offenses; relating to the definition of 'prior convictions' for certain theft offenses; establishing the Alaska Criminal Justice Commission and providing an expiration date; relating to the crime of custodial interference; relating to the duties of the Alaska Judicial Council; relating to jail-time credit for offenders in court-ordered treatment programs; relating to conditions of release, probation, and parole; relating to duties of the commissioner of corrections and board of parole; establishing a fund for reducing recidivism in the Department of Health and Social Services; requiring the commissioner of health and social services to establish programs for persons on conditions of release or probation that require testing for controlled substances and alcoholic beverages; requiring the board of parole to establish programs for persons on parole that require testing for controlled substances and alcoholic beverages; relating to the duties of the Department of Health and Social Services; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 127
SHORT TITLE: OMBUDSMAN
SPONSOR(s): RULES BY REQUEST

02/18/13	(H)	READ THE FIRST TIME - REFERRALS
02/18/13	(H)	STA, JUD
03/12/13	(H)	STA AT 8:00 AM CAPITOL 106
03/12/13	(H)	Heard & Held
03/12/13	(H)	MINUTE(STA)
03/21/13	(H)	STA AT 8:00 AM CAPITOL 106
03/21/13	(H)	<Bill Hearing Rescheduled to 3/26/13>
03/26/13	(H)	STA AT 8:00 AM CAPITOL 106
03/26/13	(H)	Heard & Held; Assigned to Subcommittee
03/26/13	(H)	MINUTE(STA)
02/07/14	(H)	STA AT 3:00 PM CAPITOL 120

02/07/14	(H)	Work Session on above Bill
02/25/14	(H)	STA AT 8:00 AM CAPITOL 106
02/25/14	(H)	Heard & Held
02/25/14	(H)	MINUTE(STA)
02/27/14	(H)	STA AT 8:00 AM CAPITOL 106
02/27/14	(H)	Heard & Held
02/27/14	(H)	MINUTE(STA)
03/06/14	(H)	STA AT 8:00 AM CAPITOL 106
03/06/14	(H)	Moved CSHB 127(STA) Out of Committee
03/06/14	(H)	MINUTE(STA)
03/07/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/07/14	(H)	<Bill Hearing Canceled>
03/10/14	(H)	STA RPT CS(STA) NT 1DP 1NR 3AM
03/10/14	(H)	DP: LYNN
03/10/14	(H)	NR: GATTIS
03/10/14	(H)	AM: KELLER, KREISS-TOMKINS, HUGHES
03/12/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/12/14	(H)	-- MEETING CANCELED --
03/14/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/14/14	(H)	Heard & Held
03/14/14	(H)	MINUTE(JUD)
03/19/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/14	(H)	Heard & Held
03/19/14	(H)	MINUTE(JUD)
03/24/14	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 250
SHORT TITLE: MEDICAL MALPRACTICE ACTIONS
SPONSOR(s): OLSON

01/21/14	(H)	PREFILE RELEASED 1/17/14
01/21/14	(H)	READ THE FIRST TIME - REFERRALS
01/21/14	(H)	HSS, JUD
02/27/14	(H)	HSS AT 3:00 PM CAPITOL 106
02/27/14	(H)	Heard & Held
02/27/14	(H)	MINUTE(HSS)
03/13/14	(H)	HSS AT 3:00 PM CAPITOL 106
03/13/14	(H)	Scheduled But Not Heard
03/14/14	(H)	HSS AT 8:00 AM CAPITOL 106
03/14/14	(H)	Moved CSHB 250(HSS) Out of Committee
03/14/14	(H)	MINUTE(HSS)
03/17/14	(H)	HSS RPT CS(HSS) NT 6DP
03/17/14	(H)	DP: REINBOLD, PRUITT, KELLER, NAGEAK, TARR, HIGGINS
03/24/14	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SB 64

SHORT TITLE: OMNIBUS CRIME/CORRECTIONS/RECIDIVISM BILL
SPONSOR(s): JUDICIARY

02/27/13	(S)	READ THE FIRST TIME - REFERRALS
02/27/13	(S)	STA, JUD
04/04/13	(S)	STA AT 9:00 AM BUTROVICH 205
04/04/13	(S)	<Bill Hearing Postponed>
04/09/13	(S)	STA RPT CS 1DP 1NR 1AM NEW TITLE
04/09/13	(S)	DP: DYSON
04/09/13	(S)	NR: GIESSEL
04/09/13	(S)	AM: COGHILL
04/09/13	(S)	STA AT 9:00 AM BUTROVICH 205
04/09/13	(S)	Moved CSSB 64(STA) Out of Committee
04/09/13	(S)	MINUTE(STA)
07/25/13	(S)	JUD AT 10:00 AM WASILLA
07/25/13	(S)	Heard & Held
07/25/13	(S)	MINUTE(JUD)
01/29/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
01/29/14	(S)	Heard & Held
01/29/14	(S)	MINUTE(JUD)
01/31/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
01/31/14	(S)	Heard & Held
01/31/14	(S)	MINUTE(JUD)
02/03/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/03/14	(S)	Heard & Held
02/03/14	(S)	MINUTE(JUD)
02/05/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/05/14	(S)	Heard & Held
02/05/14	(S)	MINUTE(JUD)
02/07/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/07/14	(S)	-- MEETING CANCELED --
02/10/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/10/14	(S)	Heard & Held
02/10/14	(S)	MINUTE(JUD)
02/12/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/12/14	(S)	Moved CSSB 64(JUD) Out of Committee
02/12/14	(S)	MINUTE(JUD)
02/14/14	(S)	JUD RPT CS 4DP 1NR NEW TITLE
02/14/14	(S)	DP: COGHILL, MCGUIRE, WIELECHOWSKI, DYSON
02/14/14	(S)	NR: OLSON
02/14/14	(S)	FIN REFERRAL ADDED AFTER JUD
02/25/14	(S)	FIN AT 9:00 AM SENATE FINANCE 532
02/25/14	(S)	Heard & Held
02/25/14	(S)	MINUTE(FIN)
03/06/14	(S)	FIN AT 5:00 PM SENATE FINANCE 532
03/06/14	(S)	Heard & Held

03/06/14	(S)	MINUTE(FIN)
03/11/14	(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/11/14	(S)	Heard & Held
03/11/14	(S)	MINUTE(FIN)
03/11/14	(S)	FIN AT 5:00 PM SENATE FINANCE 532
03/11/14	(S)	Heard & Held
03/11/14	(S)	MINUTE(FIN)
03/13/14	(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/13/14	(S)	Moved CSSB 64(FIN) Out of Committee
03/13/14	(S)	MINUTE(FIN)
03/14/14	(S)	FIN RPT CS 3DP 1NR 3AM NEW TITLE
03/14/14	(S)	DP: KELLY, MEYER, HOFFMAN
03/14/14	(S)	NR: OLSON
03/14/14	(S)	AM: FAIRCLOUGH, DUNLEAVY, BISHOP
03/14/14	(S)	TRANSMITTED TO (H)
03/14/14	(S)	VERSION: CSSB 64(FIN)
03/17/14	(H)	READ THE FIRST TIME - REFERRALS
03/17/14	(H)	JUD, FIN
03/24/14	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

ERIKA O'SULLIVAN, Staff
Representative Kurt Olson
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HB 250 on behalf of the prime sponsor, Representative Kurt Olson.

MEGAN WALLACE, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Services
Juneau, Alaska
POSITION STATEMENT: Spoke to the difference between an admission and a statement against interest within HB 250.

MIKE HAUGEN, Executive Director
Alaska State Medical Association
Anchorage, Alaska
POSITION STATEMENT: Testified regarding improved communication in the medical arena and in support of HB 250.

JORDAN SHILLING, Staff
Senator John Coghill
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented SB 64 as staff to the Senate Judiciary Committee, which Senator John Coghill chairs.

TRACEY WOLLENBERG, Deputy Director
Appellate Division
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Provided suggestions for SB 64.

ACTION NARRATIVE

1:20:20 PM

CHAIR WES KELLER called the House Judiciary Standing Committee meeting to order at 1:20 p.m. Representatives Gruenberg, LeDoux, Lynn, Pruitt, and Keller were present at the call to order.

HB 127-OMBUDSMAN

1:21:51 PM

CHAIR WES KELLER announced that the first order of business would be HB127, "An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence." [Before the committee was proposed committee substitute (CS) for HB 127, Version 28-LS0088\D, Gardner, 3/19/14.]

CHAIR KELLER spoke of his conviction that HB 127 is one of the most important bills in the legislature this session.

1:22:52 PM

CHAIR KELLER noted that more work needs to be done on the law defining the ombudsman. He noted a constituent call he received last night regarding the importance of the legislature having an investigative branch that can look into "the activities of where ever we spend our money." Chair Keller said that it is important to have a strong ombudsman with investigative jurisdiction. "It helps the legislature maintain in a state that ... has a strong executive/judicial element and a weaker legislature, and that is why I was determined to go slow with HB 127." Unfortunately, he said, he has been streamlining the process so the more essential elements of the bill can pass [this session], but there is a consensus on the committee that this issue will continue into the interim.

1:25:13 PM

CHAIR KELLER closed public testimony.

1:26:19 PM

REPRESENTATIVE MAX GRUENBERG thanked everybody who worked on the bill. He noted that good progress has been made in coming to where it is today. He said the committee is down to one amendment, and he moved to adopt Amendment 1, labeled 28-LS0088\D.1, Gardner, 3/20/14, which read:

Page 3, lines 9 - 10:

Delete "**construction, and office space**"

Insert "**and office space, and for construction limited to providing and maintaining office space for the office of the ombudsman**"

1:26:24 PM

CHAIR KELLER objected.

1:26:55 PM

The committee took an at-ease from 1:26 p.m. to 1:28 p.m.

1:28:17 PM

REPRESENTATIVE GRUENBERG withdrew Amendment 1 and moved to adopt proposed committee substitute (CS) for HB 127, labeled 28-LS0088\D, Gardner, 3/19/14, as the working document.

1:28:45 PM

CHAIR KELLER objected.

1:29:46 PM

CHAIR KELLER removed his objection. There being no further objections, Version D was before the committee.

1:29:58 PM

REPRESENTATIVE GRUENBERG moved to adopt Amendment 1, labeled 28-LS0088\D.1, Gardner, 3/20/14, [text provided previously].

CHAIR KELLER objected.

1:30:20 PM

REPRESENTATIVE GRUENBERG stated that [CSHB 127, Version] D, page 3, line 9-10, appears to provide the ombudsman with the opportunity to engage in any kind of construction or to acquire and renovate any kind of office space. It is the intent of the committee to limit the language to office space for the ombudsman's office, he opined. The amendment makes this clarification, he explained.

1:31:21 PM

CHAIR KELLER removed his objection. There being no further objections, Amendment 1 was adopted.

1:31:41 PM

REPRESENTATIVE BOB LYNN moved to report CSHB 127, labeled 28-LS0088\D, Gardner, 3/19/14, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objections, CSHB 127(JUD) was reported from the House Judiciary Standing Committee.

1:32:01 PM

The committee took an at-ease from 1:32 p.m. to 1:34 p.m.

1:34:24 PM

HB 250-MEDICAL MALPRACTICE ACTIONS

CHAIR KELLER announced that the next order of business would be HB 250, "An Act making an expression of apology, responsibility, liability, sympathy, commiseration, compassion, or benevolence by a health care provider inadmissible in a medical malpractice case; requiring a health care provider to advise a patient or the patient's legal representative to seek legal advice before making an agreement with the patient to correct an unanticipated outcome of medical treatment or care; and amending Rules 402, 407, 408, 409, and 801, Alaska Rules of Evidence."

REPRESENTATIVE GRUENBERG moved to adopt CSHB 250(HSS) 28LS0967\P as the working document. There being no objections, Version P was before the committee.

1:35:24 PM

ERIKA O'SULLIVAN, Staff, Representative Kurt Olson, Alaska State Legislature, offered the following statement:

> My named is Erika O'Sullivan, Staff to Representative Kurt Olson. Before you today is HB 250, "An Act making an expression of apology, responsibility, liability, sympathy, commiseration, compassion, or benevolence by a health care provider inadmissible in a medical malpractice case; requiring a health care provider to advise a patient or the patient's legal representative to seek legal advice before making an agreement with the patient to correct an unanticipated outcome of medical treatment or care; and amending Rules 402, 407, 408, 409, and 801, Alaska Rules of Evidence." Before I get into the presentation of the bill, I would like to acknowledge that Mr. Mike Haugen, the Executive Director of the Alaska State Medical Association is online, as is Ms. Megan Wallace from [Legislative Legal Services], and hopefully Mr. Doug Wojcieszak, the author of Sorry Works, will be attempting to call in, but he is on the East Coast and has some prior commitments so we'll see if we can get him online as well. So they will be available to testify or answer questions. We'll start by

addressing the intent of the bill and then go into an explanation of changes. House Bill 250, also known as the "I'm sorry" bill, would render expressions of apology or sympathy by a health care provider to a patient related to an unanticipated outcome of treatment inadmissible as evidence in a malpractice case. This is similar to legislation that has passed in over 30 states. As you saw in your bill packets, there is a state-by-state breakdown of the legislation in a document assembled by the American Medical Association. As addressed in the sponsor statement, the bill is intended to clear up the gray area which now exists between apologies and admissions of neglect, and to improve doctor/patient relationships, especially in cases ending in a less than favorable outcome. Unfortunately, health care providers often cut off communication after adverse events, which can lead to anger and the perception that there is a lack of caring, or that a mistake was made even if in reality no error occurred. It is not negligence but rather a failure in communication between the provider and patient that often results in malpractice lawsuits. This bill will by no means prohibit malpractice lawsuits, but to quote Bioethicist Arthur Caplan, whose full interview you saw in your bill packets, "You can talk about your feelings without having that held against you or being the trigger to a lawsuit." This legislation will enable health care providers to better fulfill their moral and ethical responsibilities to patients and their families for expressions of compassion and sympathy without fear of retribution in the form of a lawsuit. And, I can now go into an explanation of the changes in Version A to Version P, if that is what the committee is interested in. Okay.

1:38:09 PM

So, the changes from the original bill version to the version you see in front of you, Version P, are as follows: on page 1, line 1, of the bill title the word liability was deleted. It was also deleted under Section 1(a) on page 1, line 12, and under Section 2(1) on page 3, line 6. The sponsor felt that including the word liability undermined the intent of the bill and that an expression of liability was in fact closer to an admission of negligence and should

not necessarily be excluded in the civil case or arbitration. Under Section 1(a) on page 2, line 14, subsection (5) was added. And, this subsection was added with the intent of closing a potential loophole should an indirect offer to compromise, write off, or furnish payment occur. Under Section 1(a) page 2, line 18, subsection (b) was added. And, this subsection, basically, the sponsor felt this was necessary to clarify that if a statement prefaced by or made in conjunction with an admission of negligence or liability be subject to additional scrutiny and not necessarily be deemed inadmissible. On page 3, line 7, of the Section 09.55.545, the word "to" was deleted and "in writing that the patient or patient's legal representative may" was added. This addition of "in writing" remedies a potential proof problem; it was something that was brought forth by co-sponsor Representative Gruenberg, so this way everyone has their bases covered, everyone is informed of their rights, and changing the word "to" to the word "may" again insured that patients or their representatives were made aware of their rights but this was not a directive to seek legal counsel. So again, making aware versus a directive.

1:40:11 PM

And finally, under Section 4, page 4, line 4, the CONDITIONAL EFFECT was amended to include Section AS 09.55.545. This was basically a language cleanup because in the original bill only AS 09.55.544 would require a 2/3 majority to take effect, and this left open the possibility that should the bill pass with a simple majority that one section would be added and the other section would not. So, this was to ensure that those sections were added.

1:41:19 PM

REPRESENTATIVE GRUENBERG questioned if there is a technical difference between an "admission" and a "statement against interest," and he requested the citation for the two issues in the Rules of Evidence.

1:42:14 PM

MEGAN WALLACE, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Services, explained that an admission is considered not hearsay under Alaska Rules of Evidence 801, and a statement against interest is an exception to the Hearsay Rules under Alaska Rules of Evidence 804.

1:43:12 PM

REPRESENTATIVE GRUENBERG surmised that located on page 2, lines [20-22], are expressions of sympathy that are inadmissible, but if it is legally an admission [of liability] that is admissible. He suggested the language be changed to "an admission or a statement against interest," since they are legally two different [issues].

1:44:24 PM

MS. WALLACE said that HB 250 does not define admission as only an admission under Alaska Rules of Evidence 801, and she thought it might clarify whether the statement is construed as an admission or a statement against interest. She opined that the legislature can't determine every statement that this rule will apply to as to whether a court would construe it to be an admission or just a statement against interest. She said that admission of liability or negligence is just a general term, and it was not intentionally meant to be constrained to the definition of admission by party opponent under Alaska Rules of Evidence 801.

REPRESENTATIVE GRUENBERG, as co-sponsor, said they would take a few days to look at this issue, as a sharp lawyer might say he or she is not offering this as an admission, but a statement against interest, and that is not the intention of HB 250. He expressed that he thinks it is a very good bill.

CHAIR KELLER agreed, and he said that the fact that it is law in over 30 tells us that most of these questions have probably been vetted many times. "So we shouldn't have a whole lot of trouble getting the bugs out of it," he added.

1:47:19 PM

REPRESENTATIVE LYNN noted his understanding about a doctor telling a relative of someone who passed away that they are sorry for their loss and they have his or her sincerest sympathy, but how would HB 250 address a doctor saying "I'm

really sorry I left the sponge in your lungs?" He asked if that would be admissible evidence.

MS. O'SULLIVAN advised that the addition of subsection (b) [page 2, lines 18-22] was attempted to address that concern exactly. There is precedence in 20 other states where similar subsections exist to clarify that if an admission of negligence is made in conjunction with an apology, without expression of benevolence, that that statement is subject to additional scrutiny.

1:49:10 PM

REPRESENTATIVE GABRIELLE LEDOUX asked for the purpose of HB 250, because a statement of apology, sympathy, commiseration, or compassion has nothing to do with a statement of liability. She questioned why it would be introduced as the plaintiff would not introduce it to make the doctor look good, "if all you're talking about is if the doctor said, 'I'm really sorry this happened.'"

1:51:12 PM

MS. O'SULLIVAN responded that there is a strong precedence for these bills in other states as members of the medical community have expressed it feels like there is a gag order on them in that they cannot communicate effectively with their patients; they feel hindered by the fear of lawsuits. She opined that HB 250 attempts to get the conversation going and stop lawsuits before they happen. She then referred to the Journal of Health & Life Sciences Law contained within each member's packet on page 133-134, wherein a survey was performed and 37 percent of respondents said that if there had been an apology or explanation of what had happened that they would not have sued. These laws are an important component in the bigger picture of malpractice reform, and she explained that she has spoken with doctors and their representatives and they feel HB 250 is necessary. Ms. O'Sullivan deferred to the Executive Director of the Alaska State Medical Association [Mike Haugen] to speak in more detail.

1:52:20 PM

REPRESENTATIVE LEDOUX speculated that [physicians] may be hamstrung by the actual statute, or they may be hamstrung because their insurance company gives them strict orders to keep their mouths shut.

1:55:23 PM

MIKE HAUGEN, Executive Director, Alaska State Medical Association, stated that the Alaska State Medical Association supports HB 250. Physicians feel it should lead to improved communications between patients and physicians, and it should lessen the chance for miscommunication which results in fear of litigation, he opined.

1:56:09 PM

CHAIR KELLER announced HB 250 was set aside.

SB 64-OMNIBUS CRIME/CORRECTIONS/RECIDIVISM BILL

1:56:20 PM

CHAIR KELLER announced that the final order of business would be SB 64, "An Act establishing the Alaska Sentencing Commission; relating to jail-time credit for offenders in court-ordered treatment programs; allowing a reduction of penalties for offenders successfully completing court-ordered treatment programs for persons convicted of driving while under the influence or refusing to submit to a chemical test; relating to court termination of a revocation of a person's driver's license; relating to limitation of drivers' licenses; relating to conditions of probation and parole; and providing for an effective date." [Before the committee was committee substitute (CS) for SB 64(FIN).]

1:57:32 PM

JORDAN SHILLING, Staff, Senator John Coghill, Alaska State Legislature, stated that SB 64 was introduced last session and was heard in the Senate State Affairs, Judiciary, and Finance Standing Committees and also during the interim. The Department of Law (DOL), Public Defender Agency, Department of Corrections (DOC), Department of Public Safety (DPS) and the Alaska Court System have worked consistently throughout the process to produce CSSB 64.

1:58:45 PM

REPRESENTATIVE LANCE PRUITT moved to adopt CSSB 64, labeled 28-LS0116\L as the working document. Hearing no objections, Version L was adopted.

1:59:09 PM

MR. SHILLING continued with a slide presentation, and [page 2 of the slide show] showed the state-of-the-art, medium security facility, Goose Creek Correctional Center, which opened in 2011 for $250 million to build and $50 million to operate. The cost to house an inmate is approximately $160 per day and $5,400 per year, which is roughly twice as much as it costs to house a prisoner in the lower 48. He noted that Alaska is at a crossroads in that if the prison population continues to grow at its current rate (an average of 3 percent a year with the budget growing approximately 7 percent per year), the state's prisons will be full again in two years. [Page 4] depicts Alaska's Institutional Inmate Population from fiscal years (FY) 2003 to 2020. He related that the state must either plan to build a new prison now, send the state's prisoners outside, or look at programs that have proven to work. He noted there are programs other states have implemented to reduce recidivism, reduce the budget, and put off the huge capital and operating expenses of building another prison. He stated that approximately 2/3 of the state's prisoners have returned to prison within approximately three years of release, and most return in the first six months. Alaska has one of the highest recidivism rates in the country. With state revenues falling, "is this how Alaska wants to spend its money?" he asked.

MR. SHILLING said many states have been in the same position of needing new prisons, so they identified issues that were driving their prison growth and passed laws to fix the problems. Over the past couple of years, 15 states that worked on justice reform have actually closed prisons. Texas was faced with building four new prisons and instead the state funded evidenced-based programs and actually closed a few prisons a couple of years later. Kentucky is projected to save approximately $400 million over the next decade, and Arkansas expects to save about a billion dollars. "Alaska hasn't done much in the way of corrections reform," he noted. A majority of Alaska's criminal statutes were rewritten in 1982, and since that time, effective ways to address prison problems have been found. He explained that the three goals of SB 64 is to improve public safety, reduce recidivism, and reduce cost. The DOC has similar goals; its mission statement includes secure confinement, reformative programs, and community re-integration. Those goals are pulled from the Alaska Constitution, so "it's not that their goals or missions are wrong, it's how they're allocating their resources to reach those goals," he opined. He presented a graph of DOC resource allocation, and the highest

allocation for full-time positions is in secure confinement, and only about 4 percent of its staff work on reformative programs. Additionally, only 6 percent of money spent is on reformative programs, and "it's actually those very areas where we can affect recidivism—it's the reformative programs and the supervised release," he explained. If Alaska keeps doing the same things, it will keep getting the same results.

MR. SHILLING said [page 9] depicts Alaska's drop of approximately 1.5 percent in recidivism over four years; it is not happening quickly enough. He reiterated that at that rate, Alaska's prison system will be full by 2016. Senate Bill 64 has eight main pieces will help the recidivism problem. It establishes a 24/7 [24 hours a day and 7 days a week] sobriety program, which includes twice-a-day alcohol testing and swift punishment for violations. The bill creates the Alaska Criminal Justice Commission to evaluate Alaska's system and make recommendations, including sentencing recommendations. The bill expands a program called Probation Accountability with Certain Enforcement (P.A.C.E.), which is an intensive type of probation that decreases drug use and new crimes, and ultimately decreases days spent in jail. Senate Bill 64 also requires the DOC to conduct more assessments of its prisoners, and it establishes a recidivism reduction fund intended to grant money to transitional or re-entry programs. The bill increases the 1970 felony theft threshold from $500 to $1,200, it incentivizes residential treatment, and it expands the ability to receive credit for time in treatment.

2:05:54 PM

MR. SHILLING responded to Chair Keller that the first three sections of SB 64 deal with custodial interference. He advised that these sections were the result of an amendment in the Senate Judiciary Standing Committee and, he opined, it doesn't necessarily fit the overall theme of the bill, but it is a worthy effort. The sections close a potential loophole in the Alaska Statutes. He explained that if an abductor goes into a school or day care, essentially impersonating a parent, and attempts to take that child, he or she can only be charged with criminal mischief in the fourth degree, even though it is clearly an attempted abduction. Section 2, page 2, creates a crime of custodial interference in the second degree if an individual attempts to abduct a child in that manner, he stated.

2:07:14 PM

REPRESENTATIVE GRUENBERG related that there is custodial interference in the first and second degree. First degree custodial interference involves taking a child out of the state and is a felony, and second degree custodial interference is a misdemeanor as the child is not removed from the state. He said there is a U.S. Supreme Court decision wherein "that difference is constitutional" and there may be an Alaska Supreme Court case on the issue also. He then posed a question that he withdrew.

2:08:22 PM

REPRESENTATIVE LEDOUX asked, if the child's [abductor] is not a relative, why is it custodial interference and not kidnapping?

2:08:40 PM

MR. SHILLING deferred to the Department of Law.

2:08:53 PM

REPRESENTATIVE GRUENBERG advised there is a general attempt statute that applies to anything; "if you attempt murder you marry the statutes up," he said. It could be considered a conspiracy, as well, or attempted kidnapping.

2:09:25 PM

REPRESENTATIVE LEDOUX asked why it is not kidnapping for a stranger to walk into a day care and claim to be the parent—whether the stranger is caught there or actually takes the child. She again questioned why the discussion was custodial interference, why the sections are needed, and why it would not be covered by the kidnapping statute.

2:09:58 PM

MR. SHILLING responded that the current custodial interference statutes only apply to relatives, so the attempt is to bring non-relatives under that umbrella. He agreed that it may be appropriate and said he will research the issue.

2:10:13 PM

REPRESENTATIVE GRUENBERG, in reference to page 2, lines 19-20, said it must be shown that the defendant is not a relative, does not have the right to keep the child, and is aware he or she has no right to keep the child. He noted that, should an individual

make a statement that he or she has a legal right to take the child, that statement would not be considered an attempt [as the individual has not gone far enough into the crime]. It would not be a conspiracy because [the action] does not require two or more individuals; a conspiracy is a criminal contract. He described this scenario as probably falling within a loophole as the crime is not completed, and there is no kidnapping, but simply a representation.

2:11:41 PM

MR. SHILLING continued that Sections 4-19 of SB 64 [pages 13-23 of the slide show] addresses the felony theft threshold put in place by the 1978 legislature, in which the dividing line between a misdemeanor theft and a felony theft is $500. The threshold does not take inflation into account wherein $500 is equal to approximately $1,800 today, and, he noted, what amounted to a misdemeanor twenty years ago, now effectively constitutes a felony. He stated that SB 64 goes into 15 different statutes where this monetary threshold has been placed, and it includes theft and property crimes. "We raised the level between a class C felony and a class A misdemeanor, and, similarly, we moved the class B level up a little bit as well," he stated [page 22 of the slide show].

2:13:03 PM

REPRESENTATIVE LEDOUX asked if the felony had mandatory jail time.

MR. SHILLING responded that he was not sure if there is a mandatory minimum on any of these property claims, and many are pled down. He imagined there are some people who have committed thefts who do not serve jail time—but some certainly do.

REPRESENTATIVE LEDOUX asked if they are pled down to misdemeanors.

2:13:33 PM

MR. SHILLING responded that in some areas of Alaska the answer is yes. He said he has heard that in the Matanuska-Susitna Valley, for example, "they treat any theft, even if it is $501, they don't plead down, they just go for the felony, but I've heard in other areas in Alaska they do plead deals regularly." One of the aspects of raising the felony theft threshold is the cost it incurs on the state. The public defender's agency

demonstrates that defending a misdemeanor is approximately 1/3 of the cost of defending a class B or C felony [page 15 of the slide show]. He added that most of these crimes are committed by young people; those ages 18-30 commit the bulk of property crimes. A felony conviction carries life-long consequences and greatly diminishes an individual's ability to be productive. He related that this problem disproportionally affects those in rural Alaska and used the example that if a window is broken in Juneau or Anchorage it could be under the $500 level, and yet that same window could easily invoke a felony in rural Alaska where everything is 30-40 percent more expensive. As inflation continues, the problem continues, he stated, and year after year it will become easier to be convicted of a felony and it will cost the state more and more money.

2:15:11 PM

REPRESENTATIVE PRUITT offered a suggestion of language that allows for the 30-40 increase of costs in rural areas. As Alaska will always have a disparity in the price scenario, he suggested coming up with a mechanism allowing local municipalities the ability to determine the level. He said he struggles with increasing [the threshold] on the basis that it is more expensive in rural areas and prefers giving rural areas the option to make that determination.

2:16:21 PM

MR. SHILLING responded that ultimately what the legislature does with the sections will be a policy call with the House Judiciary Standing Committee, and he found Representative Pruitt's suggestion interesting as he had not heard it before. There will always be a price disparity between rural and urban Alaska, and he deferred to DOL as to how it could be implemented in SB 64. He noted there have been suggestions to actually peg the felony theft threshold to inflation which would negate the necessity to continually pass bills to track inflation.

2:17:48 PM

MR. SHILLING continued that Alaska is one of the last states to adjust for inflation and noted the average threshold for 34 states is approximately $1,230. A concern from the small business community is if the change will lead to more theft, and, intuitively, it seems it might. However, Arkansas doubled its threshold and has seen a steady rate of theft with no increase; Ohio did the same and has a decrease in theft; South

Carolina is steady on theft; Maryland raised its threshold to $1,000 and it slightly lowered the rate of thefts; and Delaware and Utah have stayed steady.

MR. SHILLING noted that Alaska has been struggling with alcohol for decades [pages 24-30 of the slide show] and the societal cost is huge. He mentioned its role in Fetal Alcohol Spectrum Disorders (FASD), suicide, domestic violence, and sexual assault. He related that alcohol is a factor in most crimes. It is involved in 75 percent of domestic violence offenses, and public defenders will say that for 99 percent of their clients, alcohol is a factor in their crimes. He stated that addressing the issue of alcohol abuse will cause a reduction of recidivism in Alaska. Mr. Shilling pointed out that Sections 20-22 establish the 24/7 Sobriety Program in the pre-trial phase. The program was developed in South Dakota in 2005, and it curbs alcohol use, makes the public safer, reduces recidivism, and costs the state "next to nothing." The 24/7 program is a growing trend in the United States; South Dakota, North Dakota, and Montana have implemented the program. Eleven states, including Alaska, have pending legislation, and five more states are operating pilot programs. The program simply requires the participant to refrain from using alcohol for 24 hours a day and 7 days a week, and it requires the participant to show up twice a day for a breath alcohol test. In the event someone lives in an area where it is not convenient to go to a testing site twice a day, which is much of Alaska, the court can order that the person use electronic monitoring, he explained.

2:20:45 PM

CHAIR KELLER asked, "How does the swift response—that makes it so effective—work when it's an electronic monitor?"

2:20:52 PM

MR. SHILLING responded that the swiftness is much more important than the severity of the sentence, which is a huge part of the program. It is more difficult to implement with ankle monitors and the response is slower; however, it does still reduce recidivism. South Dakota has roughly 15 percent of their participants on electronic monitoring because they live so far away from the testing sites, and Mr. Shilling has effectiveness data for the committee. This program is a new tool for Alaska, and it helps to keep the public safe. The program is court ordered and can be done as a condition of probation or parole, or during pre-trial. If an offender commits a crime that falls

under unclassified felonies, class A felonies, sexual felonies, misdemeanor or felony domestic violence, DUI refusal, or misconduct involving a controlled substance, and alcohol is a factor, the court can order that person on 24/7 sobriety. The program is particularly effective for repeat DUI offenders and is self-funded by the $4.00-$5.00 per day testing fees, which is paid for by the offender.

MR. SHILLING said that the program can work anywhere that has landlines and local law enforcement, which excludes communities that do not have a Village Public Safety Officer (VPSO), for example. An individual can test in person or with an ankle bracelet, home-based device, or portable breathalyzer [page 27 of the slide show]. While in the program, participants remain in society, conduct their daily lives, go to work, pay their fees, and fulfill their responsibilities as long as they remain sober. Persons can be on the program anywhere from a week to a couple of years, he said. [Page 28 of the slide show] shows a graph depicting an average participation of approximately three months; the far right graph depicts individuals in the program for about two years. He noted the program is based on personal responsibility and is backed by swift and certain sanctions in that if the offender "blows hot" he/she is arrested immediately and receives a quick hearing and a short jail sentence, usually one to three days. He said that judges in South Dakota schedule these jail sentences over the weekend to not interrupt a person's work week. "The program works; most people on the program quit drinking completely," he said. Another 30 percent of participants quit drinking after their first or second violation, and the remaining 17 percent who have three or more fails on the program are probably candidates for treatment. He noted that South Dakota has been collecting data on the program for 10 years, and they have a 74 percent reduction in recidivism for folks between their second and third DUI [driving under the influence], and between the third and fourth DUI, the reduction is 44 percent. A study published in the [American Journal of Public Health] showed a 9 percent decrease in domestic violence and a 12 percent decrease in drunk driving. "The program is reducing recidivism, it's making the public safer, and ultimately it saves the state money." The bottom line is that a majority of the people in the program quit drinking, and when they are not drinking they are not committing new crimes, he opined.

MR. SHILLING turned to Section 23, AS 12.55.027, which incentivizes treatment and lays out the requirements to receive credit for time served while in a treatment facility. By

relaxing requirements on treatment programs, the programs can offer better treatment, and participants can more readily earn credit for time served. Offenders have very little incentive to enter a treatment program if they might not receive credit for their time there, he stated. For 25 years the court made determinations on what counted as credit for time served in a treatment program based on years of case law, beginning with Billie T. Ward Nygren, Appellant, v. State of Alaska, Appellee, 616 P.2d 20 (1980). In 2007, the legislature put this section in statute, and it is much more restrictive than it was before 2007. It leaves little room for an offender to participate in activities that these treatment programs would like to provide, such as going to a job center or a vocational technical class, attending church, or attending Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. The programs would like to provide the abovementioned activities; however, if the participants engage in those activities they are likely to jeopardize getting credit for their time served. He suggested relaxing the requirements in this statute as it will encourage rehabilitation and will allow treatment programs to do more. It also brings the statute more in line as to how things were done prior to 2007. The changes in SB 64 are written so that the state is still preventing credit for time served for going to a dinner and a movie, for example. The program must remain very restrictive such that the setting must be equivalent to incarceration. The individual has to remain on the grounds of the facility at all times and can only get a day pass for the above-mentioned activities or any purpose directly related to the individual's treatment. This section encourages treatment and is by far less expensive to the state than a prison bed.

2:27:58 PM

REPRESENTATIVE GRUENBERG noted that the committee passed a bill in response to a case on this point a couple of years ago. It was proposed by the Legislative Affairs Agency, and he thought the statutes no longer have the "approved in advance by the court" provision.

2:28:34 PM

MR. SHILLING responded that he was aware of the statutes and had performed research regarding the bill passed in 2007, which had significant debate. The DOL represented this statute as something that would largely be conforming to what the courts were already doing. He surmised that, inadvertently, the statute was much more restrictive than how credit for time

served had been treated before 2007. He opined that this is an attempt to re-examine the actions in 2007.

REPRESENTATIVE GRUENBERG said that he thought "something" was done after that.

2:29:46 PM

MR. SHILLING referred to Sections 26-28, the Public Advocates in Community Re-Entry (PACE) program. When offenders are put on probation they are basically given a list of things they cannot do, like use drugs or drink alcohol.

2:30:05 PM

REPRESENTATIVE LEDOUX advised that she did not see ignition interlock devices listed in Section 26.

MR. SHILLING said that is just the title of that Section and on the committee's copy, Section 26 begins with subsection AS 33.05.020, subsection (f); however, he does believe ignition interlock devices are discussed in other parts of the statute. "You just can't see it here in SB 64."

2:31:03 PM

MR. SHILLING responded to Representative LeDoux that it is not somewhere else in subsection (f), but somewhere else in AS 33.05.020, and SB 64 does not currently deal with interlock devices at all.

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REPRESENTATIVE PRUITT stated that there is a reference in the bill that the offender can either use the interlock device or the 24/7 program. He thinks it may be a policy call, and there is actually one point where if the offender screws up he or she will be sent back to the interlock, and that doesn't make sense, he opined.

2:32:06 PM

MR. SHILLING responded that there are no references to it in Version L, although he has heard that a member of the committee is working on an amendment. There are earlier versions of SB 64 in the Senate Judiciary Standing Committee where members had attempted to work on a limited license concept, and an ignition

interlock was one of the requirements for getting a limited license, he stated, but the current version of the bill does not refer to the ignition interlock.

2:33:08 PM

MR. SHILLING continued his presentation and noted that Public Advocates in Community Re-Entry (PACE) is a new way of doing probation. Within the PACE program, should an individual violate the conditions of his or her probation, it can trigger an individual going back to jail. The revolving door of individuals coming in and out of Alaska's prisons is one of the biggest cost drivers to the Department of Corrections. "There's a way to stop this revolving door," he stated. He read from the 2012 DOC Offender Profile that 14 percent of those serving time were there due to parole or probation violations. He noted that the PACE program was first developed in Hawaii and is now being used in 17 other states. People on the program are re-arrested less, use drugs less, miss fewer appointments with probation officers, and ultimately spend fewer days in jail, he remarked. The program involves frequent random drug tests, and it responds to any violation with swift and certain circumstance, much like 24/7. Probation today, without PACE, comes with high rates of violations, and often times affords offenders the opportunity to continue using drugs, which in most cases means continuing to commit crimes, he highlighted. Current drug testing tends to be too infrequent and sanctions too rare and delayed, but yet when sanctions are imposed, they tend to be too severe with months or years in prison rather than a two to three-day jail term. Probation officers have a lot of discretion, and PACE takes away that discretion. Currently, a probation officer could have someone on his or her caseload who violates multiple times, "and finally when they rack up, say, seven violations, that probation officer might finally revoke their probation and send them back to jail." At that point, he explained, the person will have several costly court hearings and may not be back in jail for six months, "and so the sanction doesn't quickly follow the violation." The PACE program and 24/7 are successful because sanctions quickly follow the violation, and current probation is anything except swift and certain. He noted that PACE is intensive but can be low cost. In Hawaii, the program grew from 35 participants to more than 1,400 without adding courtrooms, judges, court clerks, police officers, or jail cells. He submitted that under SB 64, PACE will be established statewide immediately, and the DOC estimates needing additional personnel for the program. The PACE probationers are 55 percent less likely to be arrested for a new crime, 72 percent less likely to

use drugs, 61 percent less likely to skip appointments, and ultimately 53 percent less likely to have their probation revoked and as a result serve 48 percent less days in jail. He noted that 48 percent is a large amount when talking about prison costs of $160 per day, per offender.

2:37:10 PM

CHAIR KELLER questioned if Hawaii's Opportunity Probation with Enforcement (HOPE) is the same as PACE.

MR. SHILLING responded that it is exactly the same approach.

2:37:30 PM

MR. SHILLING continued his presentation with Section 29, which deals with assessments the Department of Corrections (DOC) conducts when an inmate enters prison, such as an interview and evaluation in order to understand the inmate's risks and needs. This type of assessment offers DOC an idea of the underlying reasons the person committed the crime in the first place and potential needs. Based upon that assessment, DOL gets a good idea if the offender needs to be in PACE or in substance abuse or mental health treatment. The Department of Corrections uses a 54-item assessment, which looks into family and marital issues, attitudes, and substance abuse and/or alcohol issues. However, when an individual is sentenced to serve time in Alaska, more often than not, they are not assessed or evaluated and, therefore, DOC does not know the needs of most offenders in prison. If they are not assessed, they cannot be linked to FASD treatment or understand the underlying root causes of their crimes. He related that the DOC assesses less than half of the felons and hardly any misdemeanants even though misdemeanants truly are Alaska's future felons. A risk-needs assessment takes about 45 minutes, and Section 29 requires one for offenders who have been sentenced to 30 days or more in prison. Therefore, there will be a significant increase in the number of assessments DOC will conduct, and the department estimates needing additional probation officers to do them.

2:39:23 PM

CHAIR KELLER asked why risk assessments are not being performed now.

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MR. SHILLING responded that it is partly not putting enough emphasis on understanding the prison population, but more often it is an issue regarding resources. He believes there is not the necessary personnel to assess all of the inmates.

2:40:01 PM

CHAIR KELLER asked if an assessment requires special training or if it is easily performed.

2:40:11 PM

MR. SHILLING noted that probation officers conduct the assessments in the facilities and do receive training, but he deferred to DOC.

2:40:26 PM

CHAIR KELLER asked if risk assessments are relatively new.

2:40:38 PM

MR. SHILLING responded that inmates have been screened and assessed for quite some time. The model of assessment currently used by DOC is an industry standard and he believes DOC adopted it recently, but he deferred to DOC. He pointed out that Section 29 has a delayed effective date for 2016 in order for DOC to provide the necessary policies. He continued his presentation and noted that the Senate Finance Committee CS urges DOC to place more emphasis on FASD screening and assessments. Mr. Shilling noted that SB 64 establishes a commission to review, analyze, and evaluate the effects of laws and practices within the state's criminal justice system. Originally this commission had 17 members without a sunset clause or an executive director. In an effort to reduce the cost of the commission, certain positions were consolidated, which left the group with 12 members. The Senate Finance Committee eliminated two more positions, leaving the commission with 10 members, and it provided for a 4-year sunset provision and an audit provision.

2:42:43 PM

REPRESENTATIVE LEDOUX asked why only one ethnic group, the Alaska Native Community, is represented on the commission.

MR. SHILLING said Native Alaskans are disproportionally represented in the Alaska prison system. She made a good point, and it is a policy call of the House Judiciary Standing Committee, he added. The sponsor is open to that discussion.

2:43:30 PM

CHAIR KELLER stated it is appropriate for the House Judiciary Standing Committee to make sure there are no gaps.

2:43:57 PM

MR. SHILLING added that the Senate Finance Committee made some adjustments on the fiscal note. The Alaska Judicial Council (AJC) reduced the number of staff it required, shaving approximately $100,000 off the cost of the commission. He further noted that the sponsor resisted adding an executive director, which would have added quite a bit to the fiscal note. He conveyed that the powers and duties of the commission were pulled directly from the Alaska State Constitution. The commission will be staffed by the AJC, he explained, and the members of the commission will receive no compensation, meet at least quarterly, and produce an annual report. Mr. Shilling advised that the commission is an attempt to [reestablish] the Alaska Sentencing Commission, which existed in the early 1990s and produced some good work, and it will mainly review presumptive sentencing.

MR. SHILLING said that one of the last main components of SB 64 is the Recidivism Reduction Fund [page 47-51 of the slide show]. When prisoners have served their entire sentence they are released, and every state releases prisoners differently. Some states transition them into halfway houses or some other type of phased re-entry. In Alaska, more often than not, when prisoners are released they are released into the parking lot. They do not have first month's rent; they do not have money for a deposit; they are very unemployable; and they do not have a solid safety net, he explained. Many of these individuals go directly to a homeless shelter, and many of them return to prison within the first six months, and this is one of the root causes of Alaska's high recidivism rate. Moreover, individuals from rural Alaska are probably being released into a city unfamiliar to them, and many do not have the same family network that members of the community might have, he noted. As a result, many individuals go back to jail "in no time." On the other hand, he opined, if individuals could be put into a transitional re-entry program, a place with a structured

environment, sober living, available treatment and case management, and assistance in getting a job, the state could greatly improve their chances of not re-offending. The graph [on page 48] shows the recidivism curve, and a majority is happening in the first year and not the first six months [he corrected himself from prior testimony]. It is known that treatment works, in that when DOC provides treatment in a facility there is roughly a 20 percent drop in recidivism. He opined that should the state [offer] treatment, assistance getting a job, and housing during this critical and fragile period after release, the state could see lower recidivism rates. The recidivism fund can only distribute money to programs that meet the following criteria [listed on page 51]: there must be a case management program; it must require sober living, treatment or a referral for treatment for substance abuse or mental health must be available; there has to be a work placement program, including vocational education or volunteering; and there must be a one-year cap on the time a resident can stay in the program. The Senate Finance Standing Committee moved the fund from the DOC, which did not have the infrastructure in place to run a grant fund, to the Department of Health and Social Services (DHSS), which has the necessary granting infrastructure to do so—much more inexpensively.

2:48:05 PM

CHAIR KELLER asked if DHSS would just manage the fund and grants.

MR. SHILLING agreed. However, the DOC Commissioner must cooperate with the Commissioner of DHSS on deciding where the money goes, but the clerical administration of the fund would be done by DHSS. Continuing, he said the rest of the legislature refers to applicability, transitional provisions, and effective dates. He noted that all of the changes made in the House Judiciary Standing Committee on SB 64 apply to offenses occurring on or after the effective date of the Act. The first meeting of the Alaska Sentencing Commission will be held no later than September 30, 2014. Sections 36 and 38 allow the relevant departments to begin drafting regulations immediately upon passage of SB 64, rather than wait until its effective date. He reiterated that Section 37 creates a delayed effective date for the assessment portion of SB 64, which allows DOC to wait until 2016 to begin assessing individuals incarcerated 30 days or longer. Section 39 establishes an overall effective date for SB 64, which is July 1, 2014.

2:51:12 PM

TRACEY WOLLENBERG, Deputy Director, Appellate Division, Central Office, Public Defender Agency, Department of Administration, referred to Section 2, the custodial interference provision, and said her concern is the way it is currently written. She expressed that it would criminalize a representation to a lawful custodian that the person has a legal right to take or keep a child without simultaneously requiring that the person has the intent to actually act upon that representation. She suggested language requiring not only that the state prove that the person represented but that he or she had a right to [take the child]. That can entail a person making a simple statement to another about a belief that he or she has a legal right, but also that there is intent to actually act upon that representation. She then stated her concern with Section 23, which is to conform to pre-2007 law in allowing jail credit for time spent in residential treatment. She noted that substantial time was spent on this provision while SB 64 was in Senate Judiciary Standing Committee. The Public Defender's Office spoke with the Department of Law and the sponsor's office about this provision. The provision was modified to accurately reflect that the credit should hinge on whether the particular person is under conditions approximating incarceration, rather than hinging on whether the program allowed other residents to go out with recreational passes. Her concern relates to subsection (c)(2)(D), page 12, lines 29-31, as the wording is ambiguous and may unintentionally cause credit to hinge on whether the residents are generally eligible for a certain type of pass, rather than credit hinging on whether the person is constrained under conditions of confinement or conditions approximating incarceration. She offered that the language could read "periods during which the resident is permitted to leave the facility for rehabilitative purposes directly related to the person's treatment, so long as the periods during which the resident is permitted to leave ...." In that manner, the credit really ties into whether the person is under the conditions the legislature envisions in order to qualify for credit, she opined.

2:55:11 PM

REPRESENTATIVE GRUENBERG verified that conceptually the language should say "during which the resident is" or "the defendant is."

MS. WOLLENBERG answered in the affirmative.

2:55:39 PM

REPRESENTATIVE GRUENBERG, referring to Ms. Wollenberg's custodial interference language, asked if the language on [page 2], line 19, should be "the person intentionally represents ...." He added that the language currently says a person now must know that he or she has no legal right "to do so," which he thinks would carry the general mental intent to do the act and reckless as to the effect. He asked if she felt it should be that the person actually intends to misrepresent.... "You want it so that it's not just a reckless intent, but an actual specific intent to misrepresent. Am I right?"

MS. WOLLENBERG remarked that as written it criminalizes a representation. In light of the default provision regarding mens rea, the mental state for that would be "knowingly represents to a lawful custodian that the person has a legal right to take or keep the child or an incompetent person." Conceivably, she said, that would criminalize someone from saying to another person, "I have a right to take this child," if he or she knowingly makes that statement without necessarily requiring proof of any corresponding intent to actually act on that statement. The concept is building in an additional mens rea that would require the state to prove that the person who knowingly made the statement also had the intent to act on that statement or intent to take the child.

CHAIR KELLER asked Ms. Wollenberg to work on the issue with the sponsor.

2:58:34 PM

REPRESENTATIVE LEDOUX reiterated that if the intent is to take the child, why it would not be attempted kidnapping instead of custodial interference.

2:59:03 PM

CHAIR KELLER closed public testimony.

2:59:12 PM

REPRESENTATIVE GRUENBERG noted the [the act] would be an attempt to interfere with the lawful custodian because the person entitled to the child is the custodian so it is interference with the parental right.

CHAIR KELLER said deliberation will continue on Wednesday.

3:01:26 PM

REPRESENTATIVE GRUENBERG noted that Representative LeDoux brought up an issue that he has never fully thought about, and that is the difference between custodial interference and kidnapping.

3:02:12 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:02 P.M.