ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 20, 2015
1:05 p.m.

MEMBERS PRESENT

Representative Gabrielle LeDoux, Chair
Representative Wes Keller, Vice Chair
Representative Charisse Millett
Representative Matt Claman
Representative Max Gruenberg
Representative Neal Foster

MEMBERS ABSENT

Representative Bob Lynn

COMMITTEE CALENDAR

HOUSE BILL NO. 83
"An Act relating to collecting information about civil litigation by the Alaska Judicial Council; repealing Rule 41(a)(3), Alaska Rules of Civil Procedure, and Rules 511(c) and (e), Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD & HELD

HOUSE BILL NO. 15
"An Act relating to credits toward a sentence of imprisonment and to good time deductions."

- HEARD & HELD

HOUSE BILL NO. 79
"An Act relating to controlled substances; relating to marijuana; relating to driving motor vehicles when there is an open marijuana container; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 83

SHORT TITLE: JUDICIAL COUNCIL: CIVIL LITIGATION INFO

SPONSOR(s): REPRESENTATIVE(s) LEDOUX

01/28/15	(H)	READ THE FIRST TIME - REFERRALS
01/28/15	(H)	JUD
02/06/15	(H)	JUD AT 1:00 PM CAPITOL 120
02/06/15	(H)	<Bill Hearing Canceled>
02/13/15	(H)	JUD AT 1:00 PM CAPITOL 120
02/13/15	(H)	<Bill Hearing Canceled>
02/20/15	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 15

SHORT TITLE: CREDITS FOR TIME SERVED/GOOD TIME
SPONSOR(s): REPRESENTATIVE(s) WILSON

01/21/15	(H)	PREFILE RELEASED 1/9/15
01/21/15	(H)	READ THE FIRST TIME - REFERRALS
01/21/15	(H)	STA, FIN
01/23/15	(H)	STA REFERRAL REMOVED
01/23/15	(H)	JUD REFERRAL ADDED BEFORE FIN
02/18/15	(H)	BILL REPRINTED 2/16/15
02/20/15	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

CLARK BICKFORD, Staff
Representative Gabrielle LeDoux
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HB 83 on behalf of Representative LeDoux, prime sponsor.

SUZANNE DIPIETRO, Executive Director
Alaska Judicial System
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 83, answered questions.

NANCY MEADE, General Counsel
Central Office
Office of the Administrative Director
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 83, answered questions.

BREWSTER JAMIESON, Attorney
Lane Powell LLC
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 83, testified in support.

KEN JACOBUS, Attorney
Law Offices of Kenneth P. Jacobus
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 83, testified in support.

SARAH BADTEN, Attorney
Groh, Eggers, LLC
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 83, testified in support.

BILLY HOUSER, Probation Officer
Division of Probation and Parole
Department of Corrections
Palmer, Alaska
POSITION STATEMENT: During the hearing on HB 15, testified regarding his concerns.

DOUGLAS MOODY, Deputy Public Defender
Criminal Division
Central Office
Public Defender Agency
Department of Administration
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 15, testified in support.

RICK SVOBODNY, Deputy Attorney General
Central Office
Criminal Division
Department of Law
Juneau, Alaska
POSITION STATEMENT: During the hearing on HB 15, testified regarding the concerns of the Department of Law.

ACTION NARRATIVE

1:05:00 PM

CHAIR GABRIELLE LEDOUX called the House Judiciary Standing Committee meeting to order at 1:05 p.m. Representatives Foster, Millett, Claman, Gruenberg, Keller, and LeDoux were present at the call to order.

HB 83-JUDICIAL COUNCIL: CIVIL LITIGATION INFO

1:06:10 PM

CHAIR LEDOUX announced that the first order of business would be HOUSE BILL NO. 83 "An Act relating to collecting information about civil litigation by the Alaska Judicial Council; repealing Rule 41(a)(3), Alaska Rules of Civil Procedure, and Rules 511(c) and (e), Alaska Rules of Appellate Procedure; and providing for an effective date."

1:06:28 PM

The committee took a brief at ease.

CHAIR LEDOUX passed the gavel to Vice Chair Keller for the hearing on HB 83.

1:06:50 PM

CLARK BICKFORD, Staff, Representative Gabrielle LeDoux, Alaska State Legislature, offered that the bill repeals a 1997 law relating to the collection of information regarding civil litigation by the Alaska Judicial Council, which is a widely forgotten and ignored practice amongst the legal community. For instance, he explained, from 2001-2010 only 13 percent of litigation reports have been filed. He offered that the majority of the legal community and the Alaska Judicial Council (AHC) is in favor of this repeal and urged support for the bill.

REPRESENTATIVE CLAMAN asked whether there was a time of greater compliance.

MR. BICKFORD, in response to Representative Claman, stated there was more compliance from the legal community at the time of passage, and gradually that compliance dropped dramatically. He pointed out that during the above-mentioned nine years only 20,000 of the 177,000 open civil cases were reported.

1:09:23 PM

VICE CHAIR KELLER assumed there was legislative intent for the original bill and asked for the legislative history.

1:09:50 PM

MR. BICKFORD said the difficulty of lawyers not was unforeseen, and the AJC does not have resources to [encourage attorneys] to report every 177,000 cases.

1:10:50 PM

VICE CHAIR KELLER questioned why years have passed without data, as it is a law.

1:11:11 PM

SUZANNE DIPIETRO, Executive Director, Alaska Judicial System, Alaska Court System, advised that the law was passed as part of tort reform legislation in 1997. The items in the legislation were recommended by the Governor's Advisory Task Force on Civil Justice Reform and, she noted, this task force was formed after Governor Tony Knowles vetoed tort reform legislation that had passed in 1995-1996. The task force made recommendations to improve the efficiency and fairness of civil litigation. She remarked that during the course of deliberation it became clear to the task force there was no data regarding the size and amount of an average jury verdict, average settlement, or the percentage of times a plaintiff won versus a defendant. When the legislation passed, the provision intended that the Alaska Judicial Council (AJC) would collect information and provide reports to the legislature so it could monitor the effects of what it had done in the tort reform legislation, she explained.

The AJC issued three reports, a preliminary report soon after the statute was passed with some information, and when information was rolling it issued the 2001 report which included the amount of the average settlement, and civil litigation data information. Unfortunately, she related, due to the difficulty in obtaining data, the AJC reviewed court case files and pulled the numbers of the cases it should have received reports.

1:13:39 PM

MS. DIPIETRO stated that AJC realized only a fraction of reports had been filed and sent letters to all of the parties that should have filed information. Through that laborious process the AJC was able to achieve approximately a 50 percent response

rate. She described it as the highest response rate it had received and, she opined, it was enough information to put out a report that was not misleading. In subsequent years, she noted, the reporting rate fell and for example, in FY13 court system data showed 6,113 cases that should have received a settlement report and received 1,086 reports, only 18 percent. She opined that it would not have been responsible to publish a report at 18 percent data.

1:16:10 PM

VICE CHAIR KELLER remarked that he just received the 2001 Alaska Judicial Council report and has not had an opportunity to evaluate the data. He questioned whether there is a valid reason to "get rid of" a law wherein compliance is difficult.

MS. DIPIETRO offered that the AJC has a constitutional responsibility to conduct studies to improve the administration of justice for the legislature. She advised she is ready to conduct any study the legislature would like conducted, such as the civil case data information.

1:17:51 PM

VICE CHAIR KELLER pointed to the implication that the data is not valuable as the AJC is bringing this bill forward and supporting it. He opined that his first impression is the information is very valuable and offered concern that the lack of information to the legislature is due to non-compliance.

MS. DIPIETRO responded in the affirmative, that the AJC has only received 18 percent with a lot of information outstanding. "As a representative of the AJC, I'm not really taking a position one way or the other," she said, and that she is testifying to advise of the difficulties, and for the committee to direct the AJC.

1:19:00 PM

CHAIR LEDOUX clarified that this bill was not put forth through the Alaska Judicial Council but was suggested to her by a number of individuals from the private bar. She questioned the amount of money would be necessary to put teeth into the law requiring parties to report.

1:19:48 PM

MS. DIPIETRO responded that she could work something up, and reiterated that the 2001 report required quite a bit of time and effort in collecting the data.

1:20:17 PM

CHAIR LEDOUX surmised that the AJC went through the records [in order to prepare the 2001 report] because attorneys were not submitting the data. She questioned what it would take in the way of law, or a budget, to enforce the attorneys to submit data. She also questioned who would be in charge of [enforcement].

1:20:42 PM

MS. DIPIETRO, in response to Chair LeDoux, stated an issue is that there is no enforcement mechanism in the law. She indicated she did not know what an enforcement mechanism could be, and reiterated that when the AJC sent letters and reminders it only achieved a 50 percent compliance rate.

1:21:11 PM

VICE CHAIR KELLER questioned whether the AJC would be able to devise some incentive ideas and actually make money instead of cost money and indicated there was no enforcement suggestion, but rather a suggestion to change the law.

1:21:44 PM

REPRESENTATIVE CLAMAN questioned what the data would show regarding the impact of the tort reform legislation.

MS. DIPIETRO responded that the AJC performed a study of tort jury verdicts (appendix to the [2001] report) and subsequent to realizing there were not many large tort jury verdicts, it shifted its focus to the idea of settlement. She explained that the hypothesis being that because there are large settlements paid out by insurance companies, this impacts the cost of insurance and causes the cost of insurance to go up and the availability of insurance to go down. The Department of Commerce, Community, and Economic Development, Division of Insurance, and the AJC attempted to answer what effect, if any, the settlement of civil cases is having on the availability and cost of insurance.

1:23:41 PM

REPRESENTATIVE CLAMAN asked what the studies revealed.

MS. DIPIETRO offered that the Division of Insurance issued a couple of reports in its effort to comply with that request and was unable to conclude one way or the other.

REPRESENTATIVE CLAMAN surmised that the theory of tort reform was that there were jury verdicts in the millions of dollars driving up insurance costs, but the studies of jury verdicts in Alaska actually showed there were not huge jury verdicts.

MS. DIPIETRO answered "that is correct, in the memo and the report, yes."

1:24:26 PM

REPRESENTATIVE CLAMAN further questioned what the research performed in the years following tort reform revealed regarding settlements.

MS. DIPIETRO explained that the 2001 report contains the most complete information on settlements which revealed "not all that many large settlements."

REPRESENTATIVE CLAMAN asked whether settlements were higher or lower than jury verdicts.

MS. DIPIETRO responded that she could not recall, and reiterated that the data was only 50 percent of the cases.

1:25:33 PM

VICE CHAIR KELLER noted that the description of the settlement or judgment is only one aspect of the information to be reported. He related that the other things erased, should the law be repealed, is information regarding the court civil justice processes, case processing information, and characteristics of the litigation and parties. For example, he said he would be interested in how many civil cases were frivolous, how much court time is taken up in civil litigation, what percentage, and what the information is based upon without the [other 50 percent] data.

1:26:31 PM

REPRESENTATIVE GRUENBERG moved to adopt proposed committee substitute (CS) for HB 83, Version 29-LS0414\H, Wallace, 2/5/15, as the working document. There being no objection, Version H was before the committee for discussion.

REPRESENTATIVE GRUENBERG surmised that the enforcement mechanism could be grounds for discipline such as an individual violating a civil rule in statute.

MS. DIPIETRO clarified that it would be discipline for the attorneys through the Alaska Bar Association, but this law also applies to unrepresented litigants.

1:28:14 PM

REPRESENTATIVE GRUENBERG, in reference to the Mr. Jacobus supporting letter in each member's packet, said it reads that this law costs attorney time and that most plaintiff lawyers work on a contingency basis. The defense bar is generally on an hourly basis, so the clock would run for the clients in preparation of these reports, he remarked.

MS. DIPIETRO replied "correct."

1:28:43 PM

REPRESENTATIVE GRUENBERG requested an estimate of the amount of time spent filling out a report with the hourly rate.

MS. DIPIETRO replied that the form was streamlined to make it as easy as possible in order to evaluate the minimum amount of information in the best manner possible. She offered that she had received an email from a law firm suggesting it was a burden.

REPRESENTATIVE GRUENBERG pointed out that the bill repeals certain rules of court. He opined the protocol in matters of comity ... when dealing with a change of a court rule would be to request the court system to repeal its rule.

MS. DIPIETRO advised she could not respond to the protocol, but the rules require an attorney to certify they submitted the information to the AJC, or promulgated as a way to implement the statute. She deferred the response to Ms. Nancy Meade.

1:31:08 PM

CHAIR LEDOUX asked whether the law requiring reporting was enacted after tort reform legislation.

MS. DIPIETRO responded "that is correct."

CHAIR LEDOUX questioned how a study would be performed when the information is available after [the law was enacted].

1:31:50 PM

MS. DIPIETRO articulated that the AJC does not have base line data so it could not determine whether prior to tort reform settlements were a certain amount or after tort reform settlements were a certain amount. She said the thought was that the AJC could report that immediately after tort reform things were a certain way, and five years later had changed, and ten years later had changed again. She remarked it would not be the type of analysis to prove a causation as it would just be a correlation.

1:32:30 PM

VICE CHAIR KELLER said that part of the AJC's responsibility is offering recommendations to judges, and he asked whether any of the non-compliant attorneys became judges and asked Ms. DiPietro to report back.

MS. DIPIETRO replied "I actually do not know the answer to that question."

1:33:03 PM

REPRESENTATIVE CLAMAN noted that part of the rule was amending either the court rules or attorney rules relating to attorney client privilege and whether or not disclosing this information violated the attorney client privilege, particularly relating to settlements. He asked whether anyone tested that question in court, whether lawyers were unwilling to report because they believe it is an attorney-client violation.

MS. DIPIETRO responded that her knowledge no one has ever challenged that issue in court. She said she has heard that some attorneys object to the idea of disclosing the information on that ground, but described her statement as hearsay.

1:34:25 PM

REPRESENTATIVE CLAMAN referred to Representative Keller's question of sitting judges who, when in practice, had complied every time, sometimes, or never.

MS. DIPIETRO advised the AJC would have to go back to the court and obtain the list of cases that had been dismissed or settled and determine who the attorneys were and whether a report was submitted. "That would be quite the tricky research project."

VICE CHAIR KELLER advised Representative Claman that he could work it out whether he wanted the information, but his question was "rhetorical" because he believes it was ignored.

REPRESENTATIVE GRUENBERG called the committee's attention to AS 09.68.130(b), which is the statute that will be repealed under the bill, which read:

> (b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties.

REPRESENTATIVE GRUENBERG offered that many settled civil cases are confidential, but are not confidential as to statistics.

1:36:50 PM

NANCY MEADE, General Counsel, Central Office, Office of the Administrative Director, Alaska Court System, responded to Representative Gruenberg that the legislature does have the right to change court rules of practice and procedure constitutionally, and that it takes place several times per session. She opined it is an appropriate exercise of the legislature's authority, and in this instance, those rules are in the Alaska Rules of Court solely due to the passage of the statute. In the event the statute and court rules are repealed it would not be problematic from the court's point of view to also repeal the court rules, she explained.

REPRESENTATIVE GRUENBERG opined that if the legislature changed it to a request of court, it would not be a rule change and would not require two-thirds vote.

MS. MEADE responded that Legislative Legal and Research Services, who deals with statutory changes, always checks to determine whether there would at least be an indirect rule

amendment, if not a direct one. She stated it is their call as to whether statutory changes do impact rules.

VICE CHAIR KELLER opened public testimony.

1:39:24 PM

BREWSTER JAMIESON, Attorney, Lane Powell LLC, said he has been practicing civil litigation for 31 years in Alaska and noted that the law does not accomplish much in the way of useful information, but it does place a burden on practitioners. In terms of settlement information, the data is of cases in the court system, not cases that are settled before they go to court. He opined that tort reform accomplished much of what it set out to accomplish and has had a significant impact on his practice in terms of the certainty it brought in areas that were uncertain before passage. He said that tort reform made it easier to resolve and settle cases and predict outcomes. He highlighted that there are factors determining the dollar amount cases settle for, and what juries award in the way of verdicts. It is expensive and difficult to collect data that doesn't tell much about the cases, or whether tort reform was or was not good, should or should not continue, or is fair or unfair, he explained. He remarked he fully supports the repeal of this provision and the bill.

1:45:20 PM

KEN JACOBUS, Attorney, Law Offices of Kenneth P. Jacobus, paraphrased the following statement [original punctuation provided]:

> As Chairman of the Judiciary Committee, you should be able to do something about this abomination that continues to exist in the Alaska Statutes. I have enclosed the most recent Resolution of the Anchorage Bar Association directed at this matter. Every year since 2003 through 2010, similar resolutions were adopted by the Anchorage Bar Association and the Alaska Bar Association. The Legislature has continued to ignore this request, so we finally gave up.
>
> The enclosed resolution lists a lot of the reasons that the statute is bad. At the present time, these reports must be made. Many of the attorneys do not follow this law. I think that a lot of them don’t even know about it. Those that do bill their clients or

> absorb the cost as an administrative cost. Nothing is done with the reports by the State because it has no need of the information.
>
> I have enclosed some additional information. In 2001, the Judicial Council itself recommended the elimination of the automatic reporting requirement. It desired to retain the right to collect information if it needed to do so in the future. It prepared a draft of a bill that would accomplish this result. Copies of the relevant information is enclosed.
>
> My personal preference would be to repeal AS 09.68.130 completely. However, if the Judicial Council wants to retain the right to collect information, I have no real problem. While it has collected information for 15 years since it published its only report, I do not assume that it will collect information in the future unless there is a real purpose in doing so.
>
> Repealing this statute would lessen a useless and major burden on Alaskan attorneys and clients If the State wants to collect information in the future, it is free to do so.

MR. JACOBUS advised that prior to tort reform there was an assumption that verdicts were too high, and attorneys were paid too much. The AJC study showed there are not a number of large jury verdicts in Alaska, or large settlements, and attorneys are not being paid huge amounts of money. He referred to page 1, lines 6-9, AS 09.68.130(a), which read:

> (a) Except as provided in (c) of this section, the Alaska Judicial Council shall periodically collect and evaluate information relating to the resolution of civil litigation ...

MR. JACOBUS suggested the word "shall" mandatory, should be changed to "may" discretionary.

VICE CHAIR KELLER referred to Version H, and explained that it deletes that entire section as the language now reads "AS 09.68.130 is repealed."

1:50:12 PM

REPRESENTATIVE CLAMAN noted the committee substitute (CS) does away with the authority to collect any information at all and asked whether Mr. Jacobus was in favor of the CS.

MR. JACOBUS advised he is in support of the CS and does not believe the Alaska Bar Association would be very happy being the enforcement mechanism. "It can't deal with thousands of disciplinary complaints because attorneys do not file their required reports," he expressed.

1:51:26 PM

SARAH BADTEN, Attorney, Groh, Eggers, LLC, stated she wholeheartedly supports repealing the statute as her practice is in contract law and contract principle where she sues over a lien foreclosure or payment of money. She emphasized that individuals pay the money that is owed and the case is dismissed so it is not reflective of any useful information to the AJC or the legislature. She remarked that she deals with costs that are transferred back to the borrower or owner. She attempts to keep costs down, but it is part of her time and she charges her clients who then pass that cost through to the owner. She said she would like to see the statute repealed as it is archaic and costs unnecessary time and money.

VICE CHAIR KELLER closed public testimony after ascertaining no one further wished to testify.

1:54:28 PM

The committee took a brief at ease.

VICE CHAIR KELLER passed the gavel to Chair LeDoux and the bill was held in committee.

HB 15-CREDITS FOR TIME SERVED/GOOD TIME

1:54:51 PM

CHAIR LEDOUX announced that the next order of business would be HOUSE BILL NO. 15, "An Act relating to credits toward a sentence of imprisonment and to good time deductions."

1:56:12 PM

REPRESENTATIVE KELLER moved to adopt committee substitute (CS) for HB 15, Version 29-LS0102\N, Gardner/Martin, 2/19/15 as the

working document. There being no objection, Version N was before the committee.

1:56:23 PM

REPRESENTATIVE TAMMIE WILSON paraphrased the following sponsor statement [original punctuation provided]:

> The state of Alaska faces rising incarceration costs, growing correctional populations, and declining financial resources. To face this challenge, Alaska must seek out alternatives which maximizes state financial resources while providing rehabilitative services for incarcerated individuals. It is the purpose of HB 15 to grant credit against a sentence of imprisonment and award good time deductions for time spent in a treatment program, in a private residence, or under electronic monitoring.
>
> It is the mission of Alaska Department of Corrections (DOC) to provide secure confinement, reformative programs, and provide a process of supervised community reintegration to enhance the safety of our communities. Under current statutes, a convicted prisoner is entitled to a deduction of one-third of the term of imprisonment under good time deductions if the prisoner follows the rules of the correctional facility in which the prisoner is confined. However, if a prisoner spends any time in a treatment program or while under electronic monitoring they are ineligible. The penalization for seeking treatment, maintaining employment, or starting the process of reintegration into the community stands in stark contrast to the goals outlined by DOC.
>
> A diverse range of programs are available to prisoners to facilitate an individual's reintegration. Electronic Monitoring (EM) is a tool utilized by DOC that provides cost effective supervision of offenders while reducing recidivism. The EM program allows qualified incarcerated individuals to serve time at home while adhering to the program conditions. Qualified individuals can gain access to community-based treatment, maintain employment, access diverse medical treatment, perform community service work, and begin the process of reintegration. The ability to grant credit against a sentence of imprisonment for

time spent under supervision of electronic monitoring or within a treatment program can potentially save the state of Alaska over twelve million dollars a year. The State of Alaska has an opportunity to substantially save money while increasing Alaskans access to community-based treatments, ability to maintain employment, and reduce recidivism. HB 15 promotes the mission of DOC by encouraging the use of reformative programs while fostering community based reintegration.

Thank you for your support of HB 15.

1:58:56 PM

REPRESENTATIVE WILSON offered an Electronic Monitoring (EM) power point presentation and advised that the bill does not change eligibility. Requirements of eligibility are based upon the Department of Corrections (DOC) recommendations and the court in determining the type of monitoring an individual should have, she expressed. Currently, the seven requirements by DOC are as follows: 1. Release date is less than three years. 2. No current or prior sex offense related convictions. 3. No current domestic violence related convictions. 4. Reside in and work in the Anchorage, Fairbanks, Girdwood, Kenai, Ketchikan, Mat-Su, or Sitka areas. 5. Land-line phone with basic service and long distance carrier. 6. Must be able to provide a "clean" urine sample (no prescription narcotics or street drugs.) 7. No weapons, alcohol, or controlled substances in the home. She stated she is hopeful the program will grow to cover more areas than the above mentioned areas.

1:59:51 PM

REPRESENTATIVE WILSON explained that within the EM 24/7 program, should an individual take a drink of alcohol, the monitor picks it up and data is downloaded at the end of the week. The approximate monitor cost is $105 for seven days versus over $150 per day. DOC has an EM program and there are private companies with monitors, she remarked. In FY14 a total of 2,034 individuals participated in DOC's EM program and the participants served a total of 134,585 days, which averages about 66 days per year. Although, if good time deductions were provided with the 2014 participants, it would have reduced the days by 44,862. She described good time as not only a mechanism to show behavior change when incarceration, but actually "a step down." She related that parole is to help individuals find a

job or a place to live but is currently not [effective] because there are many prisoners per parole officer. This program puts an individual in their own setting, receiving treatment, and an opportunity to abide by the rules. She pointed out that should the offender not obey the rules they will serve the remainder of their time in jail. She suggested encouraging those with "these kinds of issues" to undergo treatment rather than penalize them.

2:02:30 PM

REPRESENTATIVE WILSON pointed to the chart on page 9 which she described as a potential cost savings per individual. The intent is to incentivize a program currently in existence which, she noted, is that an individual in pre-trial receives credit for sitting there. "I go and say I'm going to get treatment while I'm waiting to go to trial, I don't. That just to me seems very backwards to be able to do that," she related. She noted that pages 9-10 indicate more savings, and page 11 depicts a reduction of 31 percent, with significant reduction across all age groups and offenses. She opined that the reduction is due to individuals living in their own community versus taking them completely out of it. She pointed to page 12, "general recidivism", "EM recidivism" and "general recidivism less EM recidivism" from FY2007-FY2011. Page 13, is the BI TAD device which has proven effective in Alaska and, she said, that 90 percent of Alaska's offenders/inmates have alcohol or illegal drugs involved in their crimes. She noted there is an 18 percent recidivism rate for offenders who serve their entire sentence on the EM program, and were released for time served. She pointed out that the state can save $12 million if the program is utilized by individuals already enrolled in electronic monitoring during FY2014. However, if an individual is currently on the EM program, this bill does not affect them. She reiterated that EM has been successfully tested in Anchorage, Kotzebue, Bethel, Palmer/Wasilla, Fairbanks, and Nome.

2:04:53 PM

REPRESENTATIVE WILSON advised it was never her intent that the program would be solely private residence, and if the offender commits another crime while on EM they will not receive time served or good time. Representative Wilson commented that HB 15 is not ready to be passed out of committee today as she has questions on the statute. She asked "should we just offer it to those going into a treatment program, actually a residential treatment program, or the 24/7 program that we are hearing would

not be eligible under the current way this bill is written because it is not a residential treatment." However, she noted, the individual being monitored 24/7, is holding a job, performing according to DOC's requirements, and is outside of a treatment program. There is a question that once an individual is sentenced, can they stay on the same monitor versus a different monitor where they will have to check in with someone randomly. She described that scenario as being difficult when the individual has a job and yet with the EM device, the individual is monitored 24/7 and does not have to leave work to be tested. She stated that as far as the incentivize treatment portion of the bill that is as far as she plans to go. She opined that currently under HB 15 an individual in jail and not currently on EM would not be eligible. She further opined that the more time an individual stays in jail without the right kind of treatment, or able to get back into society, "having that step down," the more likely the individual is to stay within the system. She described the goal as getting Alaskans out of jail, able to live in society, and have a family.

2:09:00 PM

REPRESENTATIVE KELLER asked the amount of time being spent between arrest and sentencing. He said he had heard the pre-trial time was large, and the Alaska State Constitution guarantees a speedy trial.

REPRESENTATIVE WILSON offered that if an individual is sitting jail waiting for trial, and found innocent, "you've got time banked, because you served and you didn't have to serve."

2:09:57 PM

REPRESENTATIVE KELLER asked that Representative Wilson bring the information to the committee of the amount of time and the number of people that are in this position, and the number of individuals and the amount of banked time. He expressed that he would like to know why she backed away from house arrest as he understood that conditions of bail sometimes include third party custodians with the individual locked in house arrest.

REPRESENTATIVE WILSON stated "that was never our intent, Representative Keller, it was kind of an accident." The intent was always for electronic monitoring, she said she took the part of the statute that looked "like they took just that part out." She noted that a court case decided if an individual is in their residence [with a 3rd party custodian] and not allowed to go

where they would like, it is not the same type of monitoring as electronic monitors. She added that most of the people in jail are due to drugs and alcohol, and courts have been concerned that the third party custodian is not monitoring as well as they should.

REPRESENTATIVE KELLER said there are individuals that take being released into custody very serious, as it changes the life of the person that takes it seriously and in house arrest. He suggested that the appropriate response may be to do something to ensure that the terms of bail are met rather than just ignoring that arena and allowing it to get weaker. He likes the idea of including this into the bill and would like to hear reasons why not.

REPRESENTATIVE WILSON deferred to "bright people behind me," and noted she is not an attorney.

2:12:51 PM

CHAIR LEDOUX referred to Representative Wilson's statement regarding "banked time" and asked for clarification that in the event an individual is acquitted and has served time, that time can be used the next time the individual is arrested.

REPRESENTATIVE WILSON said "it is my understanding that is true." Literally, she remarked, an individual has served time but has been acquitted so later on the individual can use it if arrested again.

2:13:50 PM

REPRESENTATIVE CLAMAN commented that he was not aware of "banking." He opined that it is common that a pre-trial release is not as restrictive as a house arrest post sentencing, and it is fairly common for an individual to negotiate receiving jail credit before sentencing so it is part of the pre-trial release, he said. In terms of speedy trial, he suspects that speedy trial has been waived more than once.

CHAIR LEDOUX opened public testimony.

2:16:06 PM

BILLY HOUSER, Probation Officer, Division of Probation and Parole, Department of Corrections, said he is the program manager for the Department of Corrections Electronic Monitoring

and is not clear as to the changes made in the drafts. However, good time is the key issue and part of Sec. 4 [Version 29-LS0102\E] deals with good behavior while a prisoner is confined at a correctional facility and noted it is problematic for the electronic monitoring program. He said the draft he reviewed would have been fine and would have resolved those issues if the last portion, " ... ordered by the court and the defendant has not committed a crime while in the residential treatment program or under electronic monitoring." He indicated that removal of the last sentence could achieve the goals of this legislation, which is both rehabilitation and reducing the amount of individuals in custody. He pointed out that the first three sections regarding sentencing and pretrial credit have a lot of problems.

CHAIR LEDOUX noted that Mr. Houser may not be looking at the correct draft.

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REPRESENTATIVE WILSON offered that Mr. Houser is looking at the committee substitute that was "out" last night. She remarked the section is problematic which is why it is no longer part of the bill.

MR. HOUSER said he now understands that everything was removed except for the prior section 4, which addresses AS 33.20.010(c).

REPRESENTATIVE WILSON responded that Sec. 1, AS 12.55.027(d) was in the original bill. She explained that "in a private residence" is removed so it reads "for time spent under electronic monitoring" and added the following: "if the defendant has not committed a crime while under electronic monitoring." She further responded that AS 33.20.010(c) was amended to read "a prisoner shall be awarded a good time deduction under (a) of this section for any period spent in a residential treatment program, or while under electronic monitoring if the defendant has not committed a crime while under electronic monitoring."

MR. HOUSER stated that from an electronic monitoring standpoint and a restorative justice philosophy standpoint, allowing the courts to give sentence credit to an individual in a pretrial status is very problematic. Currently, he stated, the bail companies are non-regulated and are in a for-profit position in that when an individual does not have the money to pay for bail and electronic monitoring, the individual will not receive those

services. The program rules are "all over the map" and in essence defendants seek continuance after continuance and waive their right to a speedy trial. He described a scenario of reviewing an electronic monitoring application for an individual who had served three and one-half years to a private bail company on electronic monitoring. The individual planned to take a plea agreement where he would serve a three years flat time sentence. This would be the individual's third felony conviction, presumptive under sentencing guidelines, and in essence, he expressed, if the court were to allow the individual credit for the time he was out on bail he would not have served a single day in jail for a conviction that requires three years. Mr. Houser reiterated there is "so much" disparative treatment involved that it is very problematic. He related that judges are not familiar enough with correctional interstate compact rules and regulations for actual correctional facilities and probation and parole and were giving credit to individuals living out of state with a private bail company to "serve their sentence." The individual then receives jail credit for it, when in fact, the individual should have been processed through the interstate compact for corrections, he expressed. He noted that if that process is not met, or regulated, the state is subject to civil penalties. In essence, he remarked, AS 33.20.010(c) would be served in helping to reduce the number of individuals incarcerated. Realistically, he commented, DOC has the ability right now to place pretrial prisoners on electronic monitoring house arrest as a designation process. The only thing that keeps DOC from currently doing that is the good time credit statute. He explained that if an individual is placed on pretrial, the individual does not get the good time but, if DOC designated them to pretrial, they would. The goal could be achieved just by amending AS 33.20.010(c).

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DOUGLAS MOODY, Deputy Public Defender, Criminal Division, Central Office, Public Defender Agency, Department of Administration, stated that electronic monitoring is sufficient both to protect the public and to provide the necessary structure to reintegrate the individuals. The whole idea with offenders in jail is because the state was mad at them about their behavior, and not so much afraid of them. The goal is that they change their behavior and get them plugged back into being productive members of society and, he said, HB 15 will do that. Anything that helps DOC expand its electronic monitoring program both post-trial and pre-trial, the public defender's office supports. He opined it would benefit the public

defender's particular client base in that they have sliding scales for their electronic monitoring so that indigent defendants can participate. Whereas Mr. Houser is correct, he noted, that if it is totally left to the free market a lot of public defender clients can't get out because they can't pay the fee. He then addressed the question about banking time and said the time an individual spends in jail could only be credited to the case the individual is in jail upon. For example, he explained, an individual does six months on one case and is acquitted, that time is dead time and never counts again. He further explained that the banking situation arises when there are probation hearings and an individual may sit in jail waiting for a probation revocation hearing for 60 days. The offender finally appears in front of the judge and the judge revokes 30 days, so the individual has 30 days in the bank for the next violation but on that case only, he expressed.

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RICK SVOBODNY, Deputy Attorney General, Central Office, Criminal Division, Department of Law, stated he would not be focusing so much on electronic monitoring or credit for jail time for an individual staying in their private residence. But rather offered two concepts that sound a lot alike but are not the same at all. There is credit for time served in pre-trial, which is before an individual has been sentenced they can get credit for time in jail, or credit for time in treatment programs. He noted that what has been added with this bill is credit for time on electronic monitoring. He explained that the other concept is good time credit where an individual has been sentenced to a term in jail and to control the individual in jail, they receive a reduction of one day for every three days served. Currently, he said, an individual receives credit for time in pre-trial when the individual actually is in jail. For example, if the judge said bail is $100,000, and the individual cannot post $100,000 the individual may stay in jail unless there are other conditions for their release. Every day an individual is in jail they get credit for that time. He paraphrased a 1980 Alaska Supreme Court decision that said, "if a court orders you do something that is the functional equivalent of jail - that it is like jail in many respects in pretrial. The individual should get credit for that too." He noted two cases Lock v. State of Alaska, 609 P.2d 539 (1980) and Nygren v. State of Alaska, 658 P.2d 141 (Alaska App. 1983) that set out that proposition. He opined that when a court orders an individual pre-trial, as a condition of bail to a treatment program the individual should receive credit as though sitting in jail.

Although, he said there were examples of a treatment program being run outside of Anchorage for alcohol treatment in a bar, "Sgt. Preston's Lodge." The courts have granted credit for showing up at the Department of Health & Social Services or an entity designated by the Department of Health & Social Services to take medication that wasn't related to alcohol. Some judges believe that was the functional equivalent of jail and were giving people credit.

2:36:35 PM

REPRESENTATIVE GRUENBERG asked if Mr. Svobodny was talking about good time, or credit for time served.

2:36:48 PM

MR. SVOBODNY responded that he was referring to conditions of bail that are set by the court prior to trial, prior to conviction, and credit for time actually served. The Court of Appeals and the Alaska Supreme Court were good about telling judges that it doesn't count when the individual is out fishing. He offered another example where an individual was released to the custody of his mother. The individual came to court and said "that's like jail," and the court gave him credit of which the Court of Appeals overturned, he noted. In 2007, the legislature put standards into the law which became AS 12.55.027 credit for time served. The legislature decided if an individual is in a treatment program and it has restrictions which the Court of Appeals and Supreme Court said are the functional equivalent of jail, the individual receives one day credit for every day in the program. "You don't even need to complete the program, but just for every day you've been in it, you get credit," he said, and that is where AS 12.25.027 comes in. He offered that he is not arguing that electronic monitoring is not a good thing or a helpful tool, but suggested it is not the functional equivalent of jail. He described it as being back to the old days, before standards for treatment programs as no standards for EM have been imposed. He explained that the legislature imposes standards for treatment programs in that it had to be a legitimate treatment program and a representative of the program had to go to court and testify that the individual was in their program. He described the core principle of Sec. 2, AS 12.55.027 as when an individual has served time in jail, or the functional equivalent of jail time, the individual should receive credit and the question that requires answering "is wearing an electronic bracelet the functional equivalent of incarceration."

2:42:34 PM

REPRESENTATIVE KELLER asked Mr. Svobodny to make his last point again.

MR. SVOBODNY responded that he will be losing a lot of prosecutors due to the budget and he would rather have individuals do less time in jail, rather than have people who do a good service lose their jobs. He is not opposed, in general, to reducing the amount of time some individuals go to jail but, he stated, "why don't we just call it that - let's commute everyone by one-third of their time instead of creating a legal fiction."

2:43:43 PM

REPRESENTATIVE GRUENBERG referred to Sec. 1, and stated it is confusing due to the way it is currently drafted "may not," and proposed the language "shall grant credit."

MR. SVOBODNY answered there is no need to change anything in AS 12.55.027 as it says "shall not grant credit" is for the previous examples. That is why in 2007, the legislature said "they shall not grant credit."

2:45:36 PM

REPRESENTATIVE GRUENBERG noted that the current language is that "the court may not grant credit [against a sentence of imprisonment] for time spent in a private residence ..." He asked whether there were any circumstances wherein an individual should be able to do that.

MR. SVOBODNY replied in the event an individual is in the functional equivalent of jail, then yes. If the court releases an individual on his own recognizance, and orders that he live at his residence and not leave the room, that would be the functional equivalent of incarceration.

2:47:18 PM

REPRESENTATIVE GRUENBERG surmised that Mr. Svobodny would support allowing credit for time in a private residence if it is the functional equivalent of incarceration.

MR. SVOBODNY responded "yes."

REPRESENTATIVE GRUENBERG questioned whether there were any circumstance under which credit should be granted for electronic monitoring.

MR. SVOBODNY replied that it is hard for him to think of a circumstance wherein all the court is requiring is that an individual wear an ankle bracelet. He said he can't conceive anyone thinking that is the same as being in jail.

2:49:03 PM

REPRESENTATIVE CLAMAN said Mr. Svobodny prefaced his comments that up until 2007 when AS 12.25.027 was passed the courts did a good job of developing a common law of what constituted the functional equivalent of jail for purposes of what is known as a legal matter is Nygren credit.

MR. SVOBODNY answered "yes," if you mean the appellate courts.

REPRESENTATIVE CLAMAN noted that since 2007, there has been considerable additional litigation about Nygren credit. He further noted that the old common law of Nygren credit versus the statutory law turned out to not perfectly match Nygren credit. He offered that the philosophical question is whether the state is better off trying to define this as a legislature by statute, or might the state be better off by saying that the courts are doing a good job developing this as common law and adapting to modern technology as it comes up. He asked whether the state would be better off getting out of the business of defining this and let the courts continue to deal with it rather than writing it as statute.

MR. SVOBODNY responded that it depends upon what the legislature would do. He said he knows what the courts have said, and would the state give people credit for staying in their own homes and wearing an ankle bracelet. He remarked that the discussion is credit for time served and he has no problem with the appellate court decisions if it starts with Nygren credit for the functionally equivalent of incarceration. He agreed with Representative Claman that there is an existing statute that is a little more restrictive than where the courts were at the time AS 12.25.027 was passed. He described it as a nuance issue as opposed to public policy issue.

2:52:35 PM

CHAIR LEDOUX asked whether the legislature is in this legislative predicament right now with this statute because there are a few "off the wall" cases by the Superior Courts that possibly the Department of Law and legislature reacted to. She suggested the legislature consider going back to the system especially now that common law is more developed. With the guidance of the appellate courts, trial courts have a little more discretion to determine what the functional equivalent of jail is, she said.

MR. SVOBODNY responded "Yes, we might be better off." He opined that the reason there were less than appropriate decisions by the trial courts is that it is hard to predict without standards whether something is going to work or not. He referred to a Juneau case wherein a defendant was found at a movie theater with his girlfriend rather than being home or at work. The trial court determined that dinner and a date was not the same as being in jail. "If we put the resources into fighting about it, both from the defense point of view and the state's point of view, we're just fine with the appellate court decisions."

2:55:04 PM

CHAIR LEDOUX surmised that rather than a statute currently reading "the courts may not grant," that perhaps the best situation would be a statute with a number of guidelines the courts should consider when making decisions.

MR. SVOBODNY responded in the affirmative and advised that was done in 2007 in (a), (b), (c), the major place that people were getting credit was treatment programs.

2:55:55 PM

REPRESENTATIVE GRUENBERG said subsection (c) uses the concept of functional equivalent and provides guidelines.

MR. SVOBODNY responded that Sec. 3 is credit for good time and is an entirely different concept. That is a tool as to how the Department of Corrections causes people to behave following sentencing where an individual is given one-third off of the sentence then, he explained, should the prisoner cause problems DOC potentially takes that time away. After fulfilling the sentence and the individual is out on probation or parole and is using electronic monitoring, the individual receives credit for good time if their probation or parole is being revoked. He opined that if the individual is not in custody, it is a "bigger

legal fiction" to say an individual should be given one day for each three days served so the individual will behave. He reminded the committee that electronic monitoring is a device to help in public protection and it has the ancillary effect of keeping people from breaking the law. He expressed that electronic monitoring does not stop people from committing crimes as it is not a panacea, it is a tool.

3:00:04 PM

CHAIR LEDOUX announced HB 15 is held over and public testimony remains open.

3:00:52 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:00 p.m.