

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

April 12, 2019

1:32 p.m.

**MEMBERS PRESENT**

Senator Shelley Hughes, Chair  
Senator Mike Shower  
Senator Peter Micciche  
Senator Jesse Kiehl

**MEMBERS ABSENT**

Senator Lora Reinbold, Vice Chair

**COMMITTEE CALENDAR**

CONFIRMATION HEARING:

Commission on Judicial Conduct  
Jane Mores - Juneau

CONFIRMATION ADVANCED

SENATE JOINT RESOLUTION NO. 3

Proposing an amendment to the Constitution of the State of Alaska relating to the membership of the judicial council.

- HEARD and HELD

**PREVIOUS COMMITTEE ACTION**

BILL: SJR 3

SHORT TITLE: CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

SPONSOR(S): SENATOR(S) SHOWER

01/16/19	(S)	PREFILE RELEASED 1/7/19
01/16/19	(S)	READ THE FIRST TIME - REFERRALS
01/16/19	(S)	JUD, FIN
04/12/19	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

**WITNESS REGISTER**

SCOTT OGAN, Staff

SENATOR MIKE SHOWER  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Testified as sponsor of SJR 3, Senator Mike Shower.

NANCY MEADE, General Counsel  
Administrative Offices  
Alaska Court System  
Anchorage, Alaska

**POSITION STATEMENT:** Testified and answered questions during the discussion of SJR 3.

SUSANNE DIPIETRO, Executive Director  
Alaska Judicial Council  
Anchorage, Alaska

**POSITION STATEMENT:** Testified during the hearing on SJR 3.

JANE MORES, Appointee  
Commission on Judicial Conduct  
Juneau, Alaska

**POSITION STATEMENT:** Testified as appointee to the Commission on Judicial Conduct.

#### **ACTION NARRATIVE**

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**CHAIR SHELLEY HUGHES** called the Senate Judiciary Standing Committee meeting to order at 1:32 p.m. Present at the call to order were Senators Kiehl, Shower and Chair Hughes. Senator Micciche arrived as the meeting was in progress.

#### **SJR 3-CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL**

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CHAIR HUGHES announced that the first order of business would be SENATE JOINT RESOLUTION NO. 3, Proposing an amendment to the Constitution of the State of Alaska relating to the membership of the judicial council.

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SCOTT OGAN, Staff, Senator Mike Shower, Alaska State Legislature, Juneau, introduced himself.

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SENATOR SHOWER, paraphrased his sponsor statement, which read as follows:

SENATE JOINT RESOLUTION NO. 3, Proposing an amendment to the Constitution of the State of Alaska relating to the membership of the judicial council.

Proposing an amendment to the Constitution of the State of Alaska relating to the membership of the Judicial Council.

Alaska's Constitution Art 1 Sec 2 states, "All power is inherent with the people. All government originates with the people, is founded on their will only, and is instituted solely for the good of the people as a whole."

Passage of SJR 3 will help restore this aforementioned principle, as noted by the Constitutional Convention's professional consultants, "These sections in particular go a long way toward withdrawing the judicial branch from the control of the people of the state and placing it under that of the organized bar."

The constitutional convention professional consultants also said, "the convention has gone farther than is necessary, or safe, in putting them (Judicial Council) in the hands of a private professional group, however public spirited its members may be."

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SENATOR SHOWER continued.

Senate Joint Resolution 3 places a constitutional amendment on the next general election ballot that would allow the voters to decide whether the membership of the Alaska Judicial Council Bar members should require legislative confirmation of all members.

Currently, only public members are subject to legislative confirmation. Alaska is one of a handful of states that does not require legislative confirmation of member of the Bar to serve on Judicial Council.

SJR 3 would increase the public's voice on the Judicial Council through legislative confirmation of the members of the [Alaska] Bar. Currently, the attorney members are selected by the Board of Governors of the Bar Association and are not currently subject to legislative confirmation as they are in many other states. The lack of legislative confirmation is a stark glaring oversight when all members of every other Alaskan regulatory or quasi-judicial agency are subject to confirmation according to Article 3 Section 26 of the Alaska Constitution.

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SENATOR SHOWER continued.

The sponsor of this legislation believes that that [the Alaska] Bar has too much unilateral influence on who is ultimately submitted to the Governor for consideration of becoming a judge or justice. Alaska's current crime wave requires a wholistic approach in considering all aspects of the criminal justice system. In some states, judges run for popular election, with "hang em high" judges often winning by popular affirmation.

This measure will still protect the integrity of judicial temperament and impartiality with greater accountability by the people's representatives.

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SENATOR SHOWER continued.

SJR 3 will still put the Chief Justice in a perceived and sometimes actual conflict of interest. The Judicial Council must act by a concurrence of 4 members, as required by Article IV of the constitution.

According to the Judicial Council Bylaws (Article V, Section 1), the Chief Justice normally does not vote on any matter coming before the council - except in those instances, quoting the Bylaws, "when to do so could change the result." Because of this provision in the Council's bylaws, on those occasions when the six regular voting members split 3-3, the Chief Justice suddenly morphs from a non-voting member of the

Council into the crucial deciding vote on whether an applicant will be forwarded to the Governor or not.

Inevitably, this empowers the Chief Justice to use inclusion or exclusion of an applicant as a means of influencing who will be among his or her peers on the bench. It is even more alarming when this occurs during a Supreme Court nominating vote - and in fact, these tie-breaking votes actually occurred on each of the last two Supreme Court vacancies.

SJR 3 provides a cursory level of legislative oversight to members of the [Alaska] Bar that serve on the Council. The [Alaska] Bar having unilateral power to appoint who selects judges that the Governor can consider, is an inherent conflict of interest to the profession, and casts doubt on their objectivity with the judicial temperament and philosophy of the candidate.

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SENATOR SHOWER continued.

The tie votes on the Council are especially troubling when it involves a split of all three public (non-attorney) members voting one way, and all the attorney members voting the opposite way. Though rare over the course of the Council's history, these attorney/non-attorney vote splits have happened much more frequently in the past few years.

From June 22, 2012 - Oct 10, 2013, there were five attorney/non-attorney split votes, in which all three public members voted to send an applicant's name to the Governor, but the Chief Justice sided with the attorney members and turned down the applicant.

I urge your support for SJR 3 and the additional legislative oversight it would provide to the members of the Bar on Judicial Council.

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SENATOR SHOWER offered to provide context by referring to the three branches of government, the executive branch, the legislative, and the judicial branch. He offered his belief that allowing a judge to be picked from within their own ranks without a voice from the people is like allowing the governor to

pick the next governor from a pool of governors or legislators picking who the next legislators will be from a pool of legislators. He did not think most people would think this a reasonable approach. In this case, the state is allowing attorneys to pick who the next judges are going to be.

SENATOR SHOWER asked to read from an article in the Federalist Papers No. 39, "The Conformity of the Plan to Republican Principles," by James Madison. He noted it is written in old English. He read an excerpt from paragraph 2.

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

He read an excerpt from paragraph 4:

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it;  
....

He read an excerpt from paragraph 5:

Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard, and to the model of State constitutions.

SENATOR SHOWER stated that the process outlined in the [Constitution of the State of Alaska] for selecting judges in Alaska, in his view, is not republican as defined by James Madison in The Federalist No. 39 and guaranteed in Constitution of the State of Alaska in Article IV Section 4. He said that Alaska's Judicial process is un-republican because it grants power [to one of three] branches of the state's government to judicial nominees who are not even the remote choice of the people. Instead, they are the choice of the Alaska Bar Association, a private organization consisting of a disproportionate portion of the population, about 4,500 people or 0.6 percentage of the state's population. This is the reason for SJR 3 to allow the public a voice in selecting judges by allowing them to select who serves on the Alaska Judicial Council.

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MR. OGAN said that SJR 3 would give the legislature the ability to confirm the members of the bar that are appointed to the Alaska Judicial Council. As the sponsor said, Article I, Section 2 states that "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole."

He said that Alaska's unified court system is very efficient. He said that there are advantages to have an independent judiciary with an independent body free from elections, and campaign donations. The framers were mindful when they made the decision to set up a merit system.

MR. OGAN said that the sponsor supports that philosophy. The disadvantage is that the branch of government that is supposed to provide the checks and balances has no corresponding checks from the citizens. In contrast, many states have county courts and other jurisdictions that challenge superior court's assumptions or rulings or present reasonable arguments why they should rule one way or the other. Further, many other states confirm members of the bar.

He said he fully expects the Alaska Supreme Court to recuse itself if a constitutional challenge occurs with SJR 3. He anticipated the Alaska Court System would oppose the measure. He offered his belief that the Alaska Supreme Court has shown its bias by opposing this. He said that the Alaska Bar Association (ABA) will not say that the founders ignored the wisdom of the professional consultants it hired. He said that the Judiciary

Committee in the Constitutional Convention consisted of five lawyers and two laymen. According to the record, the purportedly fair and balanced committee quickly agreed to follow principles suggested by the American Bar Association and the professional civic groups. The Judiciary Committee deliberately designed the Alaska Judicial Council with a weighted balance to easily prevail over the people's representatives in a close call. The Committee of the Day created a judicial oligarchy to empower the Alaska Bar Association as the sole source power of this branch of government. He said that the sponsor finds this very troubling. He characterized it as reminding him of the fable of democracy with a committee comprised of five wolves and two lambs deciding what is for lunch.

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MR. OGAN said that Vic Fisher, the last surviving constitutional founder wrote a book, in which he said, "the main features of the proposed judicial council system were unity, simplicity, efficiency, accessibility, independence for the executive and legislative branches and accountability to the people."

MR. OGAN said that regrettably the accountability to the people in the selection of judges got left on the table. Only a smidgen of accountability is left to the people, when the bar-controlled council evaluates judges and tells citizens how to vote on retention during election.

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CHAIR HUGHES asked whether he was quoting from Vic Fisher and when the quote started and ended.

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MR. OGAN re-read, "The main features of the proposed judicial council system were unity, simplicity, efficiency, accessibility, independence for the executive and legislative branches and accountability to the people."

MR. OGAN restated that regrettably accountability to the people in the selection of judges got left on the table. Only a smidgen of accountability is left to the people when the bar-controlled council evaluates judges and tells citizens how to vote on retention during election. That is really the only time the people have a say in this, he said.

MR. OGAN acknowledged that a minority of three members are confirmed by the legislature and the chief justice weighs in if there is a split vote. He reiterated the sponsor's statement as

noted by the Constitutional Convention's professional consultants, "These sections in particular go a long way toward withdrawing the judicial branch from the control of the people of the state and placing it under that of the organized bar."

He read, "No state constitution has ever gone this far by placing one of these three coordinate branches beyond the reach of democratic controls. We feel that in its desire to preserve the integrity of the courts, the convention has gone farther than necessary or safe in putting them in the hands of a private, professional group however public spirited its members may be."

SENATOR SHOWER agreed with the constitutional consultants that the convention went to far when it placed the entire judiciary branch under the control of the Alaska Bar Association.

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CHAIR HUGHES asked whether he knew what the response was from the constitutional convention to the consultants.

MR. OGAN responded that it apparently ignored them. He said you might say the five wolves had the lambs for lunch.

CHAIR HUGHES said the foundation of government is a separation of powers doctrine. She said it also relies on the check and balances between branches. She asked what other check and balances the legislature has on the judiciary branch other than the appropriation process or adjusting a court rule.

MR. OGAN said the legislature attempts to deal with constitutional questions from time to time. He offered his belief that the frustration is that some legislators believe that at times the Alaska Supreme Court legislates from the bench. He said that checks and balances are an important part of democracy and the sponsor is not attempting to undermine or politicize it. He said the Constitution of the State of Alaska bans political consideration [for appointees] to the Alaska Judicial Council. That ban would apply to the legislature during [the appointment and confirmation process.]

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CHAIR HUGHES said she appreciated the premise that this resolution is based upon, that "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." Therefore, she will keep an open

mind, she said. She indicated that [the committee] has received substantial opposition to the resolution. She emphasized the importance of checks and balances. Part of the checks and balances are achieved by the confirmation of the three public members appointed to the Alaska Judicial Council. The committee will hear from an appointee to the Judicial Conduct Commission later today. Those appointees are all confirmed by the legislature, which provides some additional checks and balances. However, the judiciary's checks and balances on the legislature is quite high since it can overturn and determine laws the legislature has passed are unconstitutional.

She emphasized the need for checks and balances in the discussion. She offered that part of the opposition is because [Alaska] has a merit-based system. She acknowledged that the judicial process is politicized, and corruption occurs in many states in the Lower 48. For example, during her travels to the Lower 48, she has observed that signs are everywhere when judges are up for election. Although many states have an election process, she offered her belief Alaska's system is unique. She asked how Alaska's system compares to ones in other states.

MR. OGAN said he was unsure of the exact number of states that nominate their judges through a judicial council, but only a small handful do not have legislative confirmation of appointees.

CHAIR HUGHES stated that another point of those who are opposed [to SJR 3] is that the system is working fine.

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SENATOR SHOWER said he agrees with the phrase, "If it's not broke, don't fix it." However, he questioned if it does work. He said that historically when the vote is split, the public members of the Alaska Judicial Council (AJC) vote one way, and the attorneys vote another way. He said that the chief justice of the Alaska Supreme Court always sides with the attorneys. He acknowledged that it could be argued that this is because of the data and that the decisions are based on merit. However, he reiterated that it was troubling to him when the public members vote one way and the attorneys, and the Alaska Supreme Court chief justice vote the opposite. He pointed out that the Alaska Bar Association consists of a very small subset of the population. He characterized the attorneys as a group who have the same mindset due to their training and duties, which results in a more homogenous group. Of course, the same thing could be

said about the military or the legislature, but the legislature consists of Republicans and Democrats, he said.

He expressed further concern that the opposition is coming from the Alaska Supreme Court. It reminded him of military strategy, that the closer the military gets to a target that is really near and dear to the enemy's heart, the harder they will fight. He wondered if he was on to something with this resolution, that if [the opposition] is fighting hard, there may be something [to examine]. Perhaps he has identified something that could provide a better balance to the system, which should be considered. He clarified that when he speaks of balance, he means representation by the people, which is why he has introduced this resolution.

SENATOR SHOWER said he anticipates opposition, which to date has come mostly from lawyers and the Alaska Supreme Court. At the end of the day, Alaska is a representative republic and the people have a voice, he said. He emphasized that all power is derived from the will of the people. A full one-third of the government has complete power over the executive and legislative branches, he said. He found that to be troubling. He offered his belief that the people have little to no voice in the selection of the attorney members. He said a small group pick members from its own pool to serve on the AJC, who are subsequently selected by the governor, and serve on the bench. He said that [the Alaska Supreme Court] can strike down laws and make decisions about everything the legislature does. He did not think the court would be happy if a legislator brought legislation before them to argue. He characterized it as a "one-way street." He said what drives his decision-making process is the will of the people and the Constitution of the State of Alaska.

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CHAIR HUGHES agreed that standing up for the people is important. She said she can speak to this in public. However, until the ethics law is fixed, she cannot work privately on health care laws [due to a potential conflict of interest]. In fact, she had to withdraw a bill that "stood up" for the people and the health-care industry. The health insurance industry is not happy about the bill, she said. However, she must consider what is right for the people, she said.

She said that she has thought about democratic and representative government and the potential for corruption. She emphasized that she is not implying in any way that the Alaska Bar Association is corrupt. However, when the attorney members

are picked from the pool, it is a less democratic process. She reviewed the three branches of government, noting the legislative branch is a mix of parties, the executive branch is typically one party or another, and the judiciary branch is supposed to be nonpartisan. However, she said her research shows that the legal profession in Alaska in the 1950s and 1960s tended to be moderate and slightly left of center. She said that has changed, depending on the source of the research, such that 68-74 percent of attorneys now identify themselves to be on the left.

CHAIR HUGHES said that the legislature can create balance. She emphasized her belief that when she and her colleagues are voting on confirmation hearings, they consider candidates based on merit. She explained that they examine qualifications and merit. If SJR 3 were to pass, it would not mean that merit is being disregarded since the pool would still come from the Alaska Bar Association. Thus, if this resolution were to pass, every candidate would be considered acceptable based on their merits and qualifications. She said the opposition seems to think it would be politicized, and it might be for some. She said that members of the executive branch are all confirmed, including the attorney general. She offered her belief that merit would not be removed from the process.

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SENATOR MICCICHE joined the meeting.

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SENATOR SHOWER reiterated that the Constitution of the State of Alaska does not allow the process to be politicized, but we are humans. He said he does not believe that judges are absolutely unbiased since they are human, although he is sure they do their best. He offered his belief that SJR 3 gives a balance of who sits on the Alaska Judicial Council. The council selects and forwards the names of candidates for potential judges to the governor and the governor selects the judge.

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SENATOR KIEHL appreciated the discussion of principle. He acknowledged that the legislature has considered appointees who are not of the majority party in the legislature and have voted them down without a single word of debate. He questioned whether that is always apolitical. He asked for further clarification if the Alaska Supreme Court has ever elected a chief justice prior to the retention vote of the people.

MR. OGAN answered that he was unsure.

SENATOR SHOWER deferred to anyone who may know the answer.

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SENATOR KIEHL said it is important to him, since it is important to have a vital check of the people. He said Alaskan voters have a say in who serves on the bench. He characterized it as a critical check. He said he would be surprised if anyone was elected to a three-year term as chief justice to the Alaska Supreme Court without having gone before the voters for a retention vote. He said he was intrigued by the James Madison quote:

Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard, and to the model of State constitutions.

He said that if a judge has been retained by the people, the public has weighed in and made the decision. He offered his belief that the vote reflects the will of the people. He asked who the consultants to the Alaska Constitutional Convention were and if they were Alaskans or consultants from the Lower 48.

SENATOR SHOWER said that the "remote voice of the people" would refer to a voice in the selection process. He said that this happens in some states and in others, such as Alaska, it does not. He said the distinction is whether the judges are directly elected. He said that there is not any direct line from the voters to the three people who serve on the Alaska Judicial Council. He reiterated that historically, when the chief justice sides with the three attorney appointees, these four individuals have made the decision of which names to forward to the governor. He maintained that means the people would have no voice in the process. Instead, the decisions are made by a small subset of the population. He acknowledged that the three public members are confirmed by the legislature, but the other four are not confirmed, which he found most concerning.

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SENATOR KIEHL offered that when the chief justice is retained by a vote of the people, it means that at least 60 percent of the Alaska Judicial Council voting members are confirmed by the

legislature. He asked for further clarification on consultants for the constitutional convention.

MR. OGAN responded that he referenced Vic Fischer's book [,"To Russia with Love, An Alaskan's Journey."] He read, "The consultants suggested the number of revisions that would in their view democratize the proposed system by providing for legislative confirmation the attorney members of the judicial council, adding a superior court judge and another lay member to the membership of the council and other changes. However, the suggestions were not accepted by the meeting of the committee chairman and never reached the convention floor."

MR. OGAN surmised that if they were advising the Alaska Constitutional Convention Judiciary Committee that someone considered them qualified.

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CHAIR HUGHES asked for further clarification on how many attorneys drafted the Constitution of the State of Alaska.

SENATOR SHOWER offered to research it and report back to the committee.

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SENATOR KIEHL recalled the sponsor referenced a series of split votes by the Alaska Judicial Council. He asked how many total votes were made during the 18-month period that resulted in five split votes. He further asked for the number of split votes going back over a longer period and whether this is a system that has a consistent problem or if there are a few outlier votes.

SENATOR SHOWER offered to research it and report back to the committee.

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CHAIR HUGHES said judges are sworn to uphold the Constitution of the State of Alaska, yet people weigh in against this.

SENATOR SHOWER observed that SJR 3 seems to be a sensitive area since it is upsetting people. He offered his belief that most of the opposition is from the Alaska Bar Association and lawyers. He offered his belief that the people would want a voice in the process of selecting judges. He reiterated that the Alaska Bar Association really gets to make the choice.

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CHAIR HUGHES pointed out that this is not giving people a direct choice over who sits on the bench, but it relates to confirmation of members appointed to serve on the Alaska Judicial Council and that group selects names of judicial candidates to forward to the governor. She offered her belief that the names selected would be of high merit.

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SENATOR MICCICHE said he does not have any personal vendetta against the court. He pointed out that the court and the legislature are supposed to be isolated bodies. The courts judge the legislature's work and define if what is done is constitutional, which is often not reciprocal. However, the voters can choose not to retain a judge. He asked whether judges should be selected by the people. He offered his belief that the tendency is to send everything to the people to decide. He said that the reason [the Alaska Bar Association has selected members of the Alaska Judicial Council] is because they are the experts in this field. The reason legislators generally make good decisions is because they are forced to become experts. He said he is not taking an adverse position on this bill, but he wondered how much should be sent to the people. He concluded that Alaska does not have that kind of government.

SENATOR SHOWER said this issue arose when a young man provided him with his research on this topic, that it was not something he had considered. He related his personal experience in front of a court was when he was a major still in the Air Force. He was ticketed for having a load of wood extending over the sidewalk. He appeared in uniform and the case was dismissed. His experience with judges has been very positive.

He was not sure if it would be better to use this process or to hold elections to determine judges. He acknowledged that voters vote on whether to retain judges [in Alaska], which is based on merit and performance. He said that legislators are elected representatives of the people. However, he maintained that the people do not have a voice in who selects the judicial branch of government members. He said he would not propose that Alaska elect its judge or for the legislature to pick judicial nominees. However, he said he thinks that it is very reasonable that the members of the Alaska Judicial Council [be confirmed].

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SENATOR MICCICHE said there are reasons for the court to be independent or it would be a mob rule on every decision. He said

that mob rule is not always the right one. He said the five split votes does not mean anything to him, but he would like to understand the problem. He acknowledged that he has been very frustrated with the courts because they do not always agree with him.

SENATOR SHOWER asked the record to reflect that he does not have a vendetta. This issue was brought to him. He has tried to be clear that the court generally works fine. He reviewed the Alaska Constitutional Convention related to selection of the judiciary. He recapped that the Alaska Bar Association essentially makes the choices of [who serves on the Alaska Judicial Council and the AJC forwards names of judicial candidates to the governor]. He characterized it as a small gap that he is trying to address.

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MR. OGAN said that judges and courts have a lot of power over Alaskans. They have the power to imprison and impoverish people. The courts can overturn laws the legislature passes. He said he served in the building for 10 years. He said the litmus test he would have for the Alaska Judicial Council appointees is if they would select people who are fair and impartial and will not legislate from the bench. The Constitution of the State of Alaska says the bar cannot consider the politics of an appointee to the Alaska Judicial Council and the legislature would be constitutionally prohibited from doing the same.

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SENATOR KIEHL expressed an interest in hearing from the Alaska Court System. He offered his belief that the Constitutional Convention did not miss anything. He said that they required two branches of government to make a decision. With a regulatory board, the governor appoints member and the legislature confirms the appointee. The board can set regulations and fees. The governor appoints members to the Board of Regents and the legislature confirms. He said that this seems to be the only situation that has two and a half members. The governor appoints and the legislature confirms half of the members of the Alaska Judicial Council. The AJC screens applicants, and the governor appoints judges. He offered his belief that more checks in the process occur with the Alaska Judicial Council, rather than fewer.

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SENATOR SHOWER said he does think [the gap] was overlooked. He referred to the Alaska Constitutional Convention minutes. He

read, "As noted by the professional consultants, these sections in particular go a long way toward withdrawing the judicial branch from the control of the people of the state and placing it under the organized bar. The convention has gone farther than necessary or safe in putting them, the judicial council, in the hands of a private, professional group, however public-spirited its members may be." He surmised that these people would disagree that there is more control since the very people involved in the process say that there is less. He maintained that the people's voice is being removed from the selection of who ends up being on the bench and wielding immense power.

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CHAIR HUGHES said that the Alaska Bar Association is not part of the legislature or the executive branch, so she arrives at one and one-half. She said the governor makes the appointment, but the legislature only confirms half of the board members.

SENATOR KIEHL said the governor appoints and legislature confirms some members of the Alaska Judicial Council. The people vote on retention of the chief justice. It is in the judicial branch and the Alaska Judicial Council screens applicants for the governor. He maintained that all three branches are involved in this process. He said he would like to hear more about the consultants because the Alaska Constitutional Convention delegates were elected by the people. The delegates disagreed with the consultants.

CHAIR HUGHES said that this relates to the appointment process and not how the judiciary branch and legislative branch work together.

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MR. OGAN offered his belief that only a few judges have been turned down by an election. He recalled that perhaps only one other judge was voted down in 40 years. He said he votes no unless he knows the judge. He said he thinks it is good to get a little "fresh blood" in there once in a while. He said the non-retention is a pretty limited check and it is rarely used. He acknowledged that judges can be removed through the impeachment process. He offered his belief that this resolution would make a very small correction in the process.

SENATOR SHOWER offered to research and provide information on the consultants to the Alaska Constitutional Convention.

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SENATOR MICCICHE said he would like to put more emphasized on understanding the reason the three positions are independent. He said he appreciated Mr. Ogan's statement that the legislature is not overly political with respect to the people who are confirmed. He said, "But that just simply isn't the case." The legislature "digs stuff up from elementary school and we parade it out there as though the rest of us should be casting the first stone." He acknowledged that no one is perfect. He reiterated that the confirmation process is not apolitical. He said that a prime example is the Board of Fish. He said that this sounds like a change that he would support. However, he maintained he would like to put more time in to determine why the three positions are independently selected by the technical experts as opposed to those who will be weighing in politically.

CHAIR HUGHES suggested that doing a background check on appointees is not something she considers to be political. She considers it to be part of the qualification and merit check.

SENATOR SHOWER focused his concern that a small subset selects who serves on the Alaska Judicial Council. He would prefer to have representatives of the people making those decisions. His concern is that the ultimate decisions made by the Alaska Judicial Council could be swayed. Again, less than 5,000 people are part of the Alaska Bar Association, he said.

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SENATOR MICCICHE said this is the second or third time he has seen this approach since he has served in the legislature. He said he will be very careful about this measure. He will also keep an open mind, he said.

CHAIR HUGHES offered her belief that the last iteration would have added three public members. She said that SJR 3 seems to be a much smaller tweak and a more reasonable approach.

[2:35:33 PM](#)

NANCY MEADE, General Counsel, Administrative Offices, Alaska Court System, Anchorage, stated that this is a resolution the Alaska Supreme Court has asked her to oppose. She said that the reason the Alaska Court System opposes SJR 3 is because it believes that it is not a harmless change to the Constitution of the State of Alaska to add confirmation. In fact, it has the potential to be quite harmful to the judicial independence and it goes to the administration of justice.

She offered to provide the reasons why the court does not believe it is a harmless change. She said she has no intent to disparage anyone's intentions in the legislature. However, confirmation of appointees often does become something other than 100 percent merit based. Currently, the appointees by the Alaska Bar Association to the Alaska Judicial Council are appointed based on merit. She said that not a lot of people apply to serve on the Alaska Judicial Council. These are not considered to be plum positions that are highly competitive with twelve or fifteen people being voted on, she said. She said that Ms. DiPietro can provide more information; however, it is often one, two, or three attorneys who apply. Those attorneys would run the risk of having "red flags" raised that might be things said in a legal brief, when they were representing someone in court or previously made donations to politicians. She said that these are not things that the Alaska Bar Association members would be considering when voting on appointees to serve on the council. She pointed out that Attorney General Clarkson had to defend himself against things he said in litigation and explain how those comments may not necessarily mirror his beliefs. She said she did not agree with the implication that this change is harmless.

MS. MEADE said that the sponsor and sponsor's staff acknowledged that the very goal of this is to change the nature of who sits on the bench. She pointed out the comments in the sponsor statement about criminal justice and "hang 'em high judges." The implication is that perhaps some judges are perceived as being not tough enough when sentencing criminal defendants. She reiterated that the goal is to get behind who serves on the bench. She said that the thinking appears to be that if there is a little bit more check on who chooses the nominees that go to the governor that it might change the nature of the judges. She said that is why it goes beyond a harmless legislative confirmation just like every other board and commission process.

[2:39:16 PM](#)

MS. MEADE cautioned that the Alaska Judicial Council is not just like every other board and commission. The Alaska Judicial Council is an independent entity created in the Constitution of the State of Alaska. The Board of Fish and the Board of Barbers and Hairdressers is not in the Constitution of the State of Alaska, she said. The council is established specifically as an independent group. It is in the judiciary article on purpose. She said the constitutional drafters discussed this provision. She provided an excerpt from the minutes [in members' packets]. This is not a "stark glaring oversight" that the sponsor

statement indication. This was an absolutely purposeful, well-thought out and debated provision. There was an amendment during the Alaska Constitutional Convention to provide for legislative confirmation of the three attorney members.

MS. MEADE referred to the document she provided to the committee titled, "Excerpted Minutes of Constitutional Convention." She said that this describes the whole theory of the Missouri Plan. She read from the language titled "Page 695", "The theory on the lay members on the confirmation, they represent the public and they represent the predominate political thought." She pointed out that this is 50 percent of the members on the council.

MS. MEADE continued. "The theory on the lawyer members of the council, they represent the profession, they represent the best interests of the profession. They represent a desire to have the best judges on the benches." She emphasized that this was not accidental.

She turned to a statement by Mr. McLaughlin found above "Page 695," and read: "The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualifications of their brothers." She explained that this does not give lawyers any elitist or special population a say that seems unfounded. She characterized it as being the same as acknowledging that if you need heart surgery you might ask other doctors who is the best heart surgeon. It does not mean that it is put to a popular vote but rather to contact the people who know their "brethren" as it was stated at the time of the constitutional convention. They are best able to determine which lawyers are the ones at the top of their field.

She continued and read a portion of the following:

The intent of the Missouri Plan was in substance to give a predominance of the vote to professional men who know the foibles, the defects and the qualifications of their brothers. It is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation.

She emphasized that it was not an accident and it is not "willy nilly" that lawyers get to choose the three lawyers on the commission. It is very purposeful, she said. She continued to read excerpts of the minutes:

If you require confirmation of your attorney members you can promptly see what will happen. The selection is not then made by the organized bar on the basis of a man's professional qualifications alone. The determination of the selection of those people who are on the judicial council will be qualified by the condition, are they acceptable to a house and a senate or a senate alone, which is essentially Democratic or essentially Republican. No longer is the question based solely on the qualification \*\*\*Page 695\*\*\* of the candidate for the bench.

MS. MEADE remarked that requiring confirmation of the attorney members was not a generalized discussion of the judiciary article, which is what the consultants were talking about.

She emphasized the excerpt, "The determination of those people who are on the council will be qualified by the condition, are they acceptable to a house and a senate or a senate alone, which is essentially Democratic or essentially Republican." She remarked that the Alaska Court System absolutely agrees with this.

MS. MEADE said that these thoughts from 1959 are exactly the thoughts that [the Alaska Court System] currently has. This system has worked well for the last 50 or 60 years. There is not any need to think that this language that swayed the day in 1959 is any different now. The excerpt goes on to read, "The question is, will those people whom we set up here on the judicial council, that we send from the bar, will they be acceptable in terms of political correctness?"

She said that [the Alaska Court System] does not want that question coming into play until the very end of the judicial selection process.

MS. MEADE asked members to flip to the last page of the constitutional convention excerpted minutes. She said the amendment overwhelmingly failed by a vote of 4-49. The delegates overwhelmingly voted not to have legislative confirmation of the attorney members. It was not an oversight, but was very purposeful, she said. She offered her belief that those concerns hold sway just as well today and [the Alaska Court System] does not want the qualifications removed or the merit base to be de-emphasized at all and add politics at that level.

[2:44:28 PM](#)

MS. MEADE touched on the votes [of the Alaska Judicial Council] to emphasize the reason it is not necessary to make any change [to the process for selecting council members]. The Alaska constitutional drafters had the benefit of [48] other state constitutions and the benefit to see what worked well and what did not work well. She said at least 12 other states do not require legislative confirmation of their attorney members. Alaska is not a "lone wolf" in this area and other states were studied. The Constitution of the State of Alaska is known as the "gold standard" nationwide in the selection of judges.

There is a balance. Three people are appointed by the governor and confirmed by the legislature. That is the peoples' voice, she said. Three lawyers, who are also constituents and regular Alaskans and citizens. All six people serving on the Alaska Judicial Council are constituents. The chief justice votes rarely, only when a tie occurs.

MS. MEADE referred to a handout in members' packets titled, "Alaska Judicial Council Vote Summaries, 1984-present." This shows that this is a council that works very well. Since 1984, which is as far back as the data goes, 1,389 votes have been taken. She said that 82.5 percent of the votes were unanimous or 5-1. She characterized that as a well-functioning organization. She offered her belief that this could be said of many other organizations in this state. During this 35-year period, the chief justice has voted 75 of 1,389 times. Of the 75 votes, the chief justice voted 57 times to forward the name to the governor. She said that most ties were a mix of attorney members and public members. In one percent of the time, 19 times between 1984 to the present were the attorneys and non-attorneys split. She emphasized that this does not demonstrate a dysfunctional organization or an organization in which the attorneys are bullying the public members. This group gets along and cooperates well, she said. She said that in 8 of 19 times, the chief justice voted with the non-attorneys and the remaining 11 times with the attorneys. She characterized it as an inconsequential difference. She said that there cannot be any conclusion that the chief justice votes with the attorneys every time. It is not borne out by the data; however, it does not show an organization with problems or needs to be adjusted.

[2:47:41 PM](#)

MS. MEADE said she wanted to address something that is a little difficult to broach. She said she thinks that it is fair to say that there is a thought that changes to the Alaska Judicial

Council is needed because there is a sense that Alaska's judges are not conservative enough. There's a sense that the judges are over-empowered or exercising judicial activism from the bench. She said that the Constitution of the State of Alaska is like every other constitution in every other state and the U.S. Constitution does have checks and balances. One of the main checks and balances for the legislature is that the legislature can in every session overrule an opinion of the court. The legislature does this by changing the statute. The legislature will state in its legislative intent the whole purpose of this bill is to change the decision of the Alaska Supreme Court or the Court of Appeals. The legislature can do so up to the point of a constitutional determination. In our system of government, someone must have the last say as to what is constitutional and it is the Alaska Supreme Court. She acknowledged that it sometimes frustrates the legislature because it passes a bill or resolution it believes passes constitutional muster, and the Alaska Supreme Court decides otherwise. She said that if the Alaska Supreme Court or the Court of Appeals says that its interpretation is "X," the next session the legislature can pass a statute to change the law to "Y," based on policy. She said it frequently occurs and it represents a big "check" on the opinions from the Alaska Court System.

[2:49:25 PM](#)

MS. MEADE addressed the concern and sense that conservatives cannot become judges. She said that of the 73 judges, approximately 42 percent were prosecutors, 33 percent were public defenders at some point in their careers. These applicants have been business attorneys and public interest attorneys; and she did not think that it is a fair assessment to say that it has been hard for certain people to get through the Alaska Judicial Council because of their politics. Some judges have attended military schools, Christian schools, public universities, and private universities. They fish, they fly, they are in Boy Scouts, and they are involved in athletics. She offered her belief that a unified liberal bench is a myth. She said if anyone thinks it is otherwise, to point to something and she is willing to hold a discussion and would need hard evidence. She said that Alaska's judges are ranked during the retention cycle by all the jurors who appear in front of them. They receive a score based on performance, impartiality, temperament, fairness, integrity, diligence and overall. The performance score for Alaska's judges is 4.9 out of 5. She pointed out that constituents are the ones who sit in front of the judges for hours and days. She said that the peace officers and probation officers overall ranking of is 4.5 of 5. In

closing, she stated that Alaska does not have a broken system. She noted that the performance rating is statewide.

2:51:47 PM

CHAIR HUGHES asked for the dates of the 21 instances when the chief justice acted as a tiebreaker, in terms of years in which those occurred so the committee can see the trend and if it is evenly spread.

MS. MEADE said that there have not been any in the last four years. She offered to research and provide it to the committee.

2:52:18 PM

SUSANNE DIPIETRO, Executive Director, Alaska Judicial Council, Anchorage, reviewed the Alaska Judicial Council's procedures, purposes, and goals. She said she has some information on how Alaska's judicial merit system fits in with the national system. She directed attention to the Alaska Judicial Council's bylaws. She said the Alaska Judicial Council evaluates people who want to be judges by considering their professional competence, including written and oral communication skills, integrity, fairness, temperament, judgment, including common sense, legal experience, life experience, and demonstrated commitment to public and community service. These are the qualities that the council members are evaluating in the applicants.

She said that the council has published very detailed selection procedures, which are found on its website and published in its annual report. The Alaska Judicial Council provides the legislature with its biennial report. She emphasized that the council is prohibited from considering applicants' political or religious beliefs.

MS. DIPIETRO said that the council is very proud of its transparent judicial selection process. Its bylaws are available in written form and are posted on its website. She said the council has approximately 15 pages of detailed procedures about how the council evaluates people who want to be judges, which includes an important public component of the process. At any point in a judicial selection process, a citizen can provide a written letter to the Alaska Judicial Council about any applicant, or with any opinion or suggestion on how the council should be doing its job. She said that all of these communications go to the council members for consideration. She said that in a formal sense, the council holds a public hearing for every vacancy in the community where the judge will be seated. The council has been very gratified, in particular, in

rural areas to have standing room only attendance. She said that people identify who they believe are the good applicants, and even more importantly, identify challenges in the community for the council to assist them in the selection process.

[2:55:40 PM](#)

MS. DIPIETRO discussed how the council fits into the national perspective. She said she welcomed the opportunity to have a dialogue with the sponsor's office. She said that the Alaska Judicial Council's staff tracks what is happening in the national scene in terms of judicial selection. She said that her data does not support the statement that only a handful of states do not require legislative confirmation of attorney members. In fact, her tally shows that 35 states use a judicial nominating commission in some way to select state judges. The states all use very different processes. She said that in 18 of the 35, the bar association appoints the attorney members of the commission with no further involvement by the governor or the legislature. In several jurisdictions, several seats are reserved for legislative appointment. She said that she found only two states in which the legislature actually must confirm an attorney member of a judicial nominating commission. She said that her research indicates it is an extreme minority. She said that the most common template for the judicial nominating commissions is very similar to the one used by the Alaska Judicial Council. She said that a roughly equal number of the non-attorney and attorney members are appointed. She said that usually the attorney members are appointed by the bar with no further involvement of confirmation by the governor or the legislature. The non-attorney members are selected by a variety of methods, sometimes by gubernatorial appointment or other ways.

[2:58:38 PM](#)

CHAIR HUGHES asked her to provide her chart to the committee. She further asked if she would provide the composition of attorney and non-attorney members for the other states.

[SJR 3 was held in committee.]

**CONFIRMATION HEARING**  
**Alaska Commission on Judicial Conduct**

[2:59:12 PM](#)

CHAIR HUGHES announced that the next order of business would be the confirmation hearing for Jane Mores, Alaska Commission on Judicial Conduct

[2:59:24 PM](#)

CHAIR HUGHES informed members that Jane Mores is her sister. She turned the gavel over to Senator Micciche.

[3:00:02 PM](#)

At-ease.

[3:00:31 PM](#)

ACTING CHAIR MICCICHE reconvened the meeting and turned to the confirmation hearing. He said that the Alaska Commission on Judicial Conduct was created by an amendment to the Constitution of the State of Alaska in 1968. The commission is comprised of three state court judges, three attorneys who have practiced law in the state for at least 10 years, and three members of the public. This group of nine members from differing backgrounds and geographical areas address problems of judicial conduct and disability. Complaints alleging judicial misconduct can be filed by any person.

[3:01:25 PM](#)

JANE MORES, Appointee, Commission on Judicial Conduct, Juneau, said that she is the governor's appointee to an attorneys' seat on the Commission on Judicial Conduct.

[3:01:55 PM](#)

MS. MORES provided her personal and professional history. She said she and her husband, Peter, are semi-empty nesters, with five adult sons/stepsons. Their last two are in college, one in his first year at the University of Alaska Southeast and one is finishing his second year at a community college in Oregon.

She moved to Alaska from Ohio with her family as a young teenager in 1976. Her family joined a Christian community about 10 miles outside of Hoonah, known as Mount Bether Bible Center at Game Creek, Inc. where she lived for the next seven and a half years. Navigating those years in a close-knit community taught her a lot about hard work and human nature. She learned life lessons that she will always hold very close to her heart. She does not milk cows, bridle horses, chop wood, can cauliflower, dry greens, dig clams, cheek halibut, pitch hay, hand-crank a tractor, or hand weed endless rows of carrots anymore. She said she likes to think that she gained from her years at Game Creek a work ethic, critical thinking skills, and a personal and professional code of conduct that helped define who she is today.

MS. MORES said in her early 20s she went from Southeast Alaska to the Southeastern U.S. where she obtained her bachelor's degree from Auburn University in secondary education. Having a classmate named Bo Jackson is one of her Auburn stories. Bo was the 1985 Heisman trophy winner and she did attend a class with him. After a brief teaching stint in rural Alabama, she received her law degree from Ohio State and was admitted to the Alaska Bar in 1990

She provided her work history, relating that since that time, she has represented individuals and business clients, large and small, first for a private firm in Anchorage. She then worked as a sole practitioner in private practice, followed by working for the City and Borough of Juneau (CBJ). She said that she provided an array of services to the CBJ, the CBJ Assembly, Bartlett Hospital Board, the Bid Review Board, and Board of Equalization. Through her municipal work she also conducted specialized board trainings on conflicts of interest and worked in the quasi-judicial role of certain boards. She explained the quasi-judicial role is that of being a fair and impartial tribunal vested with authority to make decisions under applicable rules of law, much like a judge. Prior to that time, she served for six years on the Alaska Bar Association Ethics Committee. This committee is responsible for researching and writing ethics opinion at the request of bar counsel and/or the Board of Governors. She expressed her interest in serving on the commission.

[3:05:19 PM](#)

MS. MORES quoted from the preamble of the Alaska Code of Judicial Conduct

The role of the judiciary is central to American concepts of justice and the rule of law. [Intrinsic to all Sections of this Code are the precepts that] judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is [an arbiter of facts and law for the resolution of disputes and] a highly visible symbol of government under the rule of law.

She said that public trust and confidence in Alaska's judicial system is essential to the effectiveness of the system. Public trust is not built on blind trust, but it must be earned and maintained through public accountability. We all know that judges have significant authority and make decisions every day

that change lives and have far-reaching impacts. Those entrusted with such positions must not only be competent in the law but must conduct themselves in and out of the courtroom in a manner that upholds the integrity of the office. As you know, the Judicial Conduct Commission is tasked with the oversight of judicial conduct through a fair and impartial deliberative review process that investigates and appropriately addresses complaints of judicial misconduct and disability. This oversight protects the public and maintains public trust. As a member of the legal community, both of these things are especially important to her. She also respects the constitutional makeup of the commission, who consist of public citizen members, judge members, and attorney members. She said that in carrying out her commission responsibilities, every voice and perspective on the commission will be of equal import to her. She said that she thinks anyone who knows her would vouch for that fact. She offered her commitment on that aspect. She acknowledged that she is very honored at this appointment and committed to undertake her duties to the best of her ability. She gave a shout out to her colleague, Lael Harrison, for her integrity and professionalism as having been appointed to serve on this commission by the prior administration. She thanked the committee for their attention and for their hard work on behalf of Alaskans.

[3:08:14 PM](#)

SENATOR KIEHL said that he has worked with Ms. Mores professionally for several years when she served in the capacity as Deputy City Attorney and he served on the City and Borough of Juneau Assembly. He worked with her on a number of issues and once gave him informal ethics advice. She has given advice on a significant number of legal questions, including advice that took him in a direction he did not want to go. He said that she was right. He is very glad she has been appointed to the commission. He offered his endorsement for her appointment to the Commission on Judicial Conduct.

[3:08:55 PM](#)

SENATOR HUGHES said that she is very proud of her.

[3:09:17 PM](#)

ACTING CHAIR MICCICHE reviewed her resume. He related his understanding that she received her juris doctor from Ohio State and took a job at Faulkner, Banfield, Doogan, and Holmes, P.C.

MS. MORES agreed that is correct.

ACTING CHAIR MICCICHE asked whether she worked in the Lower 48 as a contract attorney for Bogle & Gates, P.L.L.C.

MS. MORES stated that that her ex-husband liked to travel, and she took a part-time project job with Bogle & Gates in Houston, Texas. She said it was a temporary position on complex tax litigation.

ACTING CHAIR MICCICHE asked for further clarification that since 1990 she has worked in Alaska in the legal community. He related his understanding that she has well over the ten years of legal practice in Alaska required for the position.

MS. MORES answered that she has practiced law for 29 years.

ACTING CHAIR MICCICHE asked the record to reflect that he knows Ms. Mores and her husband.

[3:10:52 PM](#)

ACTING CHAIR MICCICHE stated that in accordance with AS 39.05.080, the Senate Judiciary Standing Committee has reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Commission on Judicial Conduct  
Jane S. Mores - Juneau

Signing the reports regarding appointments to boards and commissions in no way reflects individual members' approval or disapproval of the appointees; the nominations are merely forwarded to the full legislature for confirmation or rejection.

[3:11:15 PM](#)

At-ease.

[3:11:41 PM](#)

ACTING CHAIR MICCICHE reconvened the meeting. He opened public testimony, and after first determining no one wished to testify, closed public testimony on the confirmation hearing for Jane S. Mores.

[3:12:01 PM](#)

ACTING CHAIR MICCICHE reconvened the meeting. He restated the motion, that in accordance with AS 39.05.080, the Senate Judiciary Standing Committee has reviewed the following and recommends the appointments be forwarded to a joint session for consideration:

Commission on Judicial Conduct

Jane S. Mores - Juneau

Signing the reports regarding appointments to boards and commissions in no way reflects individual members' approval or disapproval of the appointees; the nominations are merely forwarded to the full legislature for confirmation or rejection.

[3:12:32 PM](#)

At-ease.

[3:13:21 PM](#)

ACTING CHAIR MICCICHE reconvened the meeting. There being no further business to come before the committee, Acting Chair Micciche adjourned the Senate Judiciary Standing Committee meeting at 3:13 p.m.