HB

343

LAW OFFICES
STRACHAN, KELLY & PATTERSON

JOHN R. STRACHAN
PAUL D. KELLY
JOHN B. PATTERSON

880 H STREET
SUITE 201
ANCHORAGE, ALASKA 99501
(907) 279-2322
(907) 338-6777

March 30, 1984

Honorable John J. Cowdery
House Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: Report of the Task Force of the Business Law Section of the Alaska Bar Association regarding HB 343 and SB 246, Corporate Code Revision.

Dear Representative Cowdery:

Enclosed please find the report of the Task Group of the Business Law Section of the Alaska Bar Association. The report is the result of significant efforts by members of the task group who took time out of their busy practices to serve without compensation in providing their expertise on a subject of great importance to the Alaska business community. Each member on the task group has significant experience as a business law practioner.

Admittedly, the accompanying report is a brief review of a lengthy piece of legislation. The drafters have attempted to highlight certain areas of concern and hope that this report will aid the legislature. Listed below are the members who participated in the task group and their addresses and phone numbers. Please feel free to contact the group if we can be of any further assistance.

Very truly yours,

Paul D. Kelly

Paul D. Kelly
Chairman,
Business Law Section
of the Alaska Bar Association

PDK/pj
enclosure

Ray Gardner and John Norman	Hartig Rhodes Norman Mahoney & Edwards 717 K Street Anchorage, Alaska 99501 (907) 274-3576
Stan Reitman	Delaney Wiles Hayes Reitman & Brubaker 1007 W. Third Avenue Anchorage, Alaska 99501 (907) 279-3581
Richard Rosston	Ely, Guess & Rudd 510 L Street Anchorage, Alaska 99501 (907) 276-5121

Members of the Task Force

David Bendell	Bendell, Bendell, Simon & Platt 4796 Business Park Blvd. Suite 4 Anchorage, Alaska 99503 (907) 562-3343
Richard Block	Alaska National Insurance 7001 Jewel Lake Road Anchorage, Alaska 99502 (907) 248-2642
Julius Brecht	Holland, Trefry & Brecht 3003 Minnesota Drive Anchorage, Alaska 99503 (907) 272-4471
Brian Brundin	Hughes, Thorsness Gantz Powell & Brundin 509 W. Third Avenue Anchorage, Alaska 99501 (907) 274-7522
Mark Copeland	Copeland, Landye Bennett & Wolfe 420 L Street Anchorage, Alaska 99501 (907) 276-5152
Ken Eggers	Groh, Eggers & Price 550 W. 7th Avenue Anchorage, Alaska 99501 (907) 272-6474
Bruce Frenzel	ARCO Law Department 711 W. 8th Avenue Anchorage, Alaska 99501 (907) 265-6102

ALASKA BAR ASSOCIATION

P.O. BOX 279, ANCHORAGE, ALASKA 99510, (907) 272-7469

BUSINESS LAW SECTION

March 30, 1984

Honorable John J. Cowdery
House Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: Report of the Task Force of the Business Law Section of the Alaska Bar Association regarding HB 343 and SB 246, Corporate Code Revision.

Dear Sir:

Enclosed is a review by the Task Force of the Business Law Section of the Alaska Bar Association of Senate Bill 246 and House Bill 343, the Corporate Code Revision.

The Review represents a time-limited study of the bills and was performed for the limited purpose of bringing to your attention some of the possible legal and economic consequences to the business community and the Alaska public that could arise if the bill were adopted in its present form. We urge you, then to consider this only as such and not an exhaustive section by section analysis of proposed amendments or a scholarly attem, opposition or rebuttal to the work product of the Code Revisi Commission.

In our deliberations, we met, both in subcommittees and as a whole Task Force with John Abbott, Chairman of the Code Revision Commission. At some of those meetings, Jerry Kurtz, another member of the Commission, was also present. At these meetings there was candid exchanges of views on the bills. In addition, we were advised that Professor Dan Fessler was available to meet with us, although at a date too late to assist us with this report given the time constraints put on our work by your Committees.

Individual sections of the bills are commented upon in the attached review, but considering the bills as a whole, we would make the following observations:

1. Any major revision of a comprehensive body of law, such as the Corporate Code should include as one of its objectives, making the practice of law and business operations under the Code easier and more explicit.

We believe the proposed bill goes a long way to make the law more explicit than our current Code in many aspects, but not necessarily easier under which to practice or conduct business. For an Alaskan practioner, far more work needs to be done in carefully drafting Articles, By-laws and other documents than is currently the case. While it may be the intent to encourage the preventive practice of law and reduce remedial litigation, in the vast majority of cases, we think it will merely raise the cost of going into business in the corporate form.

For the out-of-state practioner, the problem is compounded, because as more states adopt the revised Model Act, Alaska's unique departures will require special time and study to assure compliance.

2. The Bills contain very material departures from current law in substantive rights and liabilities among corporate management, shareholders, creditors, secondary acquirers of shares and third parties doing business with Alaskan and even foreign corporations in Alaska.

We have two concerns about these departures. First, some substantive changes, such as the proposed limitations on distributions and the proposed direct liability of Officers and Directors to creditors are significant barriers to stimulation of commercial activity in the state and ought not to be adopted as this state's public policy. Second, we believe that passing a law this session with a July 1, 1984, effective date that contains such significant changes will prove to be an unwarranted shock on the practicing bar, the affected business community and the public.

3. Many provisions of the current Alaska Corporations Code merit attention and any thorough revision of the Code should analyze these special provisions to test their current value. Many of these provisions, such as registration of controlling out-of-state shareholders and disclosure of alien ownership, are ripe for elimination.

We found numerous occasions in the bills and the accompanying comments where these provisions were restated in the revision without explanations to their continuing value.

4. In March, 1983, a final exposure draft of the revised Model Business Corporation Act drafted after much careful study, under the auspices of the American Bar Association was released. The revised Model Act is the product of top legal and business professionals from across the nation.

We recognize that Professor Fessler has drawn liberally, in his proposals to the Code Revision Commission version, from the Model Business Corporation Act before its 1983 revision. Submitted herewith for your reference is a copy of the March 1983 Model Act draft. The final version is due to be published in the summer of 1984, with minor changes.

Some members of the Task Force have reviewed the revised Model Act and the accompanying commentary had the benefit of nationwide consideration by practioners and academicians and, to the extent adopted in other states, will enhance interstate corporate commerce. In our opinion if a comprehensive revision is deemed necessary, the revised Model Act is the appropriate vehicle for Alaska to utilize.

Furthermore, we urge consideration of the Model Act because its adoption in many states will provide a body of decisional law upon which Alaskans may draw for guidance in interpreting the Act, something a very unique Act would not have available. In addition, an extensive legal commentary accompanies the Model Act aiding the reader in a clear understanding of the provisions. Finally, as is the case with the old Model Act, the draftmen of the revised Model Act will provide model bylaws and official corporate forms to assist the public. This should significantly reduce legal costs.

We hope that this rather hurried review is useful to your committees in your own deliberations on the bills.

It is our view that there are numerous questions about specific provisions in the that the Committees should require more study.

Since the HB 343 carries such important consequences and there has been no showing of urgency to change the law, nothing is lost by deferring action on a new comprehensive code for Alaska until next session. By so doing, the legislature could accomplish the following:

a. give the Legislature, Code Revision Commission, and the public a meaningful opportunity to fully consider the revised Model Act;

b. give all sectors of the business community an opportunity to consider and propose specific amendments;

c. explain to the non-lawyer business community the Legislature's interest in revising the Code and seek an expression of support or concern from affected economic sectors.

The Task Force is willing to continue working with your Committees and with the Code Revision Commission towards a bill that is the best possible statute for Alaskans.

Yours cordially,

Richard Block
Task Group Chairman

RB/pj
enclosures

February 8, 1984

To: John

From: Ken

RE: HB 343--RELATING TO THE REVISION OF THE CORPORATIONS CODE

COMMENTS:

This bill of course has been in the works for several years and was first introduced in to the legislative process by the code revision commission in 1982. The bill would revise the states statutes regulating corporations; replacing statutes drafted in the 1950's.

Today in the committee meeting the plan, as we talked about it, is to go over the amendments made by the code revision commission and the Dept. of Commerce. These amendments are rather minor in the overall scope of the bill.

Dick Regan of the commission will be here to answer questions, Senator Rodey will also answer questions and

discuss the Senate's action on the bill. Prof. Fesler has class until 9am. We hope to hook up with him at about 9:15 via the telephone.

QUESTIONS:

CONCERNING THE LIABILITY OF DIRECTORS

1. Can review this section and shed some light to the committee on the liability of directors ?

2. How does the section covering the liability of directors differ from current statutes which covers this liability question ?

SMITH, ROBINSON & GRUENING
ATTORNEYS AND COUNSELORS
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
N STREET PLAZA
821 N STREET, SUITE 201
ANCHORAGE, ALASKA 99501
(907) 277-7586

JOHN ANTHONY (TONY) SMITH
JAMES T. ROBINSON
CLARK S. GRUENING
DAVID A. DEVINE
CHARLES G. EVANS
ROBERT S. SPITZFADEN

DAVID W. CARNEY
KIMBERLEY A. UNDERWOOD
ROBERT I. SHOAF
SHAWN J. HOLLIDAY

OF COUNSEL:
ROGER G. CONNOR

DOWNTOWN OFFICE
605 WEST SECOND AVENUE
ANCHORAGE, ALASKA 99501
(907) 278-4691

JUNEAU OFFICE
NBA BUILDING
217 SECOND STREET, SUITE 204
JUNEAU, ALASKA 99801
(907) 586-8110

February 22, 1984

Hon. John J. Cowdery
Alaska House of Representatives
Pouch "V" - Mail Stop 3100
Juneau, AK 99811

Re: House Bill 343
An Act Revising the Alaska Corporations Code

Dear Representative Cowdery:

We are writing to provide you with a summary of our comments regarding H.B. 343, which is an Act revising the Alaska Corporations Code. We are impressed with the thoroughness and thoughtfulness of the proposed revisions. Although lengthy and complex, these revisions will add a great deal of certainty to the law of corporations in the State of Alaska. The present statute is not as detailed as the proposed revisions. Alaska courts have not resolved many of the legal issues which confront corporations.

The official comments accompanying this proposed revision and statements made at public hearings properly summarize the major features of these revisions. For the most part, we are in agreement with those comments. However, as noted herein, the provisions relating to liabilities of officers, directors, and shareholders; the provisions relating to derivative suits; and the provisions relating to dissolution deserve special attention. In addition to our comments on these portions of the proposed revision, we also suggest some technical changes which occurred to us during our review of the proposed bill.

I. Liability of Directors, Officers, and Shareholders to Creditors of a Corporations

In general terms, under existing law in the State of Alaska, officers, directors, and shareholders are not liable to creditors of a corporation. The creditor's claims against a corporation are limited to claims against the assets of the

corporation. Officers and directors are liable to corporations for their wrongful acts which harm the corporation. Shareholders are liable to the corporation to pay for their shares, and are liable to directors to contribute to a director's liability to the corporation in the event a dividend is paid improperly to shareholders.

H. B. 343 continues the liability of officers and directors to the corporation for their wrongful acts. Section 488 of the Bill expands directors' and officers' liability to include liability to creditors for materials, labor and services, up to an amount of Twenty-Five Thousand Dollars ($25,000.00) per creditor. Section 675 of the Bill makes directors liable to the corporation and its creditors for improper distribution of assets during dissolution and winding up.

Section 378 of the Bill creates shareholder liability to creditors in the name of the corporation for their knowing receipt of improper dividend payments. Directors are also liable to the corporation for the same transaction. See, § 480(a).

The expansions of liability contained in §675 and 378 are good. Liability of the directors and shareholders in these provisions is directly related to the wrongful or improper acts. Section 480(a)(1) of the Bill should be amended at page 64, line 15, to read:

> A director who votes for or assents to a distribution to the corporation's shareholders contrary to the provisions of A.S. 10.06.358, 10.06.360, 10.06.363, and 10.06.365, or contrary to a restriction in the articles of the corporation, is liable to the corporation and to creditors in the name of the corporation, jointly and severally with all other directors voting for or assenting to the distribution....

This addition will expand the liability of the directors in these to specifically include liability to creditors. Under the bill as written this liability exists pursuant to Section 488. However, the change to Section 480 is appropriate so that the liability continues even if Section 488 is deleted by the legislature or invalidated by an Alaska court.

Section 488 of H. B. 343 creates secondary liability of directors and officers to creditors of the corporation up to an amount of $25,000 per creditor in the event assets of the corporation prove insufficient. The liability exists only for materials, supplies, inventory or services furnished in Alaska during the period of an officer's or director's service. This provision of the Bill is new and is experimental. It is not based on the concept of wrongdoing by an officer or a director. The provision has the potential of creating conflicts of interest within a corporation and spawning complicated litigation. We believe that the section should be deleted or that alternatives should be considered by the legislature.

If you consider alternatives, these alternatives should be based on the simple principle that liability should not be created unless an officer or director does something wrong. For example, an officer or director should be liable for entering into or authorizing contracts for the provision of services or materials when the officer or director knew or should have known that the corporation would be unable to pay for those services or materials. As presently written, Section 488 creates liability even if a corporation is solvent while receiving material and services. An example illustrates the inequity which may result. Assume that a vice president authorizes a contractor to provide materials to a corporation. At the time the corporation is solvent and intends to pay for the materials. When the materials are delivered, the corporation is not satisfied, believing that the contractor has breached his obligation. A lawsuit results, taking 3 years to resolve, in favor of the contractor. During the interim time, the vice president leaves the corporation and the corporation, as a result of other problems, is unable to pay the contractor's judgment against it. The vice president,

without doing anything improper, would be personally liable to the contractor.

The following is a list of specific problems which you should consider in evaluating the propriety of Section 488.

Many small corporations in Alaska have titular officers and directors in order to meet the statutory requirements of three directors and that there be a separate president and secretary for the corporation. These individuals usually do not take a direct involvement in the activities of the corporation. Arguably, these individuals should not have liability to creditors for acts that they did not participate in.

Secondary liability under Section 488 arises "to the extent that the assets of the corporate entity prove insufficient...." It is not clear from this language whether a creditor is required to sue and obtain judgment against a corporation and unsuccessfully attempt to execute on that judgment against corporate property prior to asserting liability of officers and directors. As Section 488 is presently written, it is likely that if a plaintiff is suing a financially troubled corporation, that plaintiff will include all officers and directors of the corporation as defendants so that he will have judgment against them in the event the corporate assets are not available to satisfy the judgment. If this inclusion of defendants becomes standard practice, it has the potential of complicating lawsuits and increasing the burden on the courts of those lawsuits. Also this practice will harass officers and directors and may discourage their future participation in corporate matters.

A corporation may seek protection of the bankruptcy laws. When a corporation files for bankruptcy a court enters a stay prohibiting further action by creditors against corporate assets. Arguably, at that point in time, corporate assets would prove "insufficient" to satisfy creditors' debts. The question arises whether or not a creditor would then be permitted to proceed against officers and directors pursuant to Section 488.

Chapter 11 bankruptcy proceedings allow corporations to rearrange and delay payment of debts. Sometimes the bankruptcy court will order payment of part but not all of debts. If corporate finances deteriorate to the point where Chapter 11 reorganization is a potential solution for financial problems, officers and directors will be faced with a conflict of interest in that filing Chapter 11 bankruptcy will help the corporation but will potentially affect their own financial liabilities. While the corporation benefits by the rearrangement of its debts, the officers and directors will be required under Section 488 to assume obligation for those debts.

Foreign corporations will enjoy some advantage over domestic corporations in the application of Section 488. In all probability, most of the officers and directors of foreign corporations will not be subject to the jurisdiction of the Alaska courts. Thus, even though the section is intended to apply to foreign corporations, as a practical matter it will be very difficult to sue foreign directors and officers in Alaska.

If an officer of the corporation enters into a contract without corporate authority, the other directors and officers of the corporation should not be personally liable for that act.

Directors do not participate in day to day management of a corporation. They might not be aware of the types of contracts which would create personal liability for them. Section 488 would force directors to participate more directly in day to day management of the corporation.

Even if an officer or director dissents from a decision to enter into a contract, that officer or director would have liability under Section 488.

In addition to the type of conflict of interest previously noted, Section 488 could create conflict when an officer or director personally guaranteed an obligation of the corporation. For example, assume the president of the corporation personally guaranteed a loan from a bank and the corporation ran into finan-

cial trouble. The president would want the corporation to pay the loan he guaranteed. Other officers and the directors would want the corporation to pay creditors protected by Section 488, prior to paying the bank loan.

Subsection (b) permits modification of statutory provision in a written contract. This section would be better if it required this modification to be in bold face type set out from the body of the contract so that it would be clearly visible to anyone reviewing the contract.

Section 488 does not apply to directors appointed by the court pursuant to Section 640 of the Bill to break a deadlock in the board of directors. However, Section 488 does apply to other directors appointed during dissolution and winding up of the corporation pursuant to the court's authority granted in Section 650 of the Bill. If Section 488 remains in the legislation, it should not apply to those individuals appointed by the court pursuant to Section 650.

During dissolution and winding up of a corporation, the corporation may obtain assistance from the courts. See §673. If a creditor fails to appear in a court-ordered dissolution proceeding, that creditor's claims against the corporation are waived. See §653. That section should also provide that the creditor's claims against officers and directors pursuant to Section 488 is waived.

The procedures established for judicial dissolution of a corporation insure that at the time of the distribution of assets all known claimants are bound by the terms of the dissolution. Those claimants are not bound by a non-judicial dissolution. They potentially have a claim against present and prior officers and directors pursuant to Section 488. If the situation arose where creditors made a claim after dissolution against prior officers and directors, those officers and directors could sue the dissolution officers and directors claiming they were negligent in failing to protect them from liability to those creditors. To avoid this potential liability, corporate officers should routinely use the court to supervise dissolution. This would unnecessarily crowd court dockets.

Section 960 exempts officers and directors of Native corporations from the provisions of Section 488. We believe that both corporations and individual officers and directors will be able to challenge this exclusion, arguing that it denies them equal protection of the law. The Fourteenth Amendment to the United State Constitution requires states to treat persons and corporations similarly situated in a similar fashion. A statutory classification which treats people differently based on race or alienage is suspect and will be upheld by a court only if there is a compelling state reason for the classification. If an officer or a director of a non-Native corporation were sued under Section 488, it is probable that individual would contest the constitutionality of Section 488 and Section 960 by arguing that the state has placed greater liability on him than on others who are similarly situated as directors and officers of Native corporations. The individual would argue that the distinction is based on alienage or race and that there is no compelling state reason for the different classification of liability. The official comment to Section 960 does not explain why officers and directors of Native corporations are excluded. We do not know whether there is sufficient justification for this exclusion. Even if the exclusion is justified at present times, its justification might terminate in 1991 when shares of the Native corporations become available to the public.

II. Derivative Actions:

Section 435 of H.B. 343 establishes the right of and procedure for shareholders to maintain a derivative action against the management of a corporation. Unless a majority of the directors of a corporation are implicated in the alleged injury to that corporation, a shareholder must demand corrective action from the board prior to initiating a derivative action. If after a demand is made on the board of directors, the board finds that in its business judgment litigation is not in the best interest of the corporation, the shareholder does not have the right to maintain a derivative suit. The shareholder is barred in this instance unless the shareholder is able to prove to the court that a majority of the directors is implicated in the injury or if the court rejects the board's decision as inconsistent with the directors' duties of care and loyalty to the corporation.

Once a derivative action is properly begun, a court may dismiss it if a disinterested board of directors petitions the court for dismissal and the court agrees that dismissal is in the best interests of the corporation and consistent with public interest.

This procedure makes it more difficult than present to maintain a derivative action in the State of Alaska. The procedure favors management of a corporation which has the authority, so long as it is not implicated in injury to the corporation, to decide whether or not a derivative action shall be maintained. Since the statute allows a disinterested board to petition the court for dismissal of a derivative action, plaintiffs in a derivative action will be forced to undertake two trials. The first trial would be to convince the court that the petition for dismissal should not be granted. Plaintiff in the action would be entitled to an evidentiary hearing to present its information to the court regarding the problem. If the plaintiff succeeded in that evidentiary hearing in avoiding dismissal, the plaintiff would then incur the additional expense of the second evidentiary hearing at trial on the merits.

Subsection (f) of Section 435 (H. B. 343, page 50, lines 17 and 18) allows the directors of the corporation to "petition" a court to dismiss a derivative action. To be consistent with Alaska Rules of Civil Procedure, the statute should require the directors to appear in the derivative action by a third party complaint against the plaintiff shareholders. The plaintiff shareholders would be third party defendants in the action. Subsection (f) could be amended as follows beginning at line 16:

> "Notwithstanding (c) or (e) of this section, disinterested, not involved directors acting as the board or a duly charged board committee may ~~petition~~ intervene in the derivative action as third party plaintiffs against the shareholders and request the court to dismiss the plaintiff's actior on grounds that in their independent, informed business judgment the action is not in the best interest of the corporation.

Section 435(h) (H.B. 343, page 51, line 6) provides that if the plaintiffs in a derivative action represent less than five percent (5%) of the outstanding shares of any class of the corporation, the court may require the plaintiffs to give security

for reasonable expense including attorney fees that may be incurred by the defendant corporation in the action. This section may be unenforceable. A.S. 09.60.060 requires non-resident plaintiffs or foreign corporations to post security as a prerequisite to appearing in Alaska courts. The Alaska Superior Court routinely refuses to apply this statutory prerequisite to a non-resident's or foreign corporation's right to appear as plaintiff in Alaska courts. The Alaska Supreme Court has refused to reverse this position by the Superior Court. The prerequisite to a lawsuit is not enforced because right to appear in court is a fundamental right and there is no sufficient rationale for the distinction which condititions that right against non-resident plaintiffs and foreign corporations.

The requirement in Section 435(h) that a derivative action on behalf of less than 5% of the shareholders of the corporation be conditioned upon those shareholders' ability and willingness to pay a bond for costs likewise interferes with the fundamental right of those individuals to have access to the courts. There is no correlation between the size of the group maintaining the derivative action and the merits of their claim. As a result it is unlikely that a court would enforce this condition for maintaining a lawsuit.

III. Dissolution:

Section 628 (H. B. 343, page 101) allows shareholders representing one-third of the total number of outstanding shares to petition for dissolution on the grounds that those in control of the corporation have been guilty of "persistent unfairness towards shareholders...." This language is new to Alaska statutes. We believe that it is too broad and too vague, allowing too much room for judicial interpretation of what consistutes persistent unfairness to shareholders.

Section 628(b)(5) appears to allow a petition for involuntary dissolution of a corporation having 35 or fewer shareholders of record by a single shareholder on the basis that "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders." (H.

B. 343, page 102, lines 10 and 11.) We believe this language may also be too broad, allowing too much room for judicial interpretation.

It is not clear from the comments whether or not the code revision committee considered requiring that suits for involuntary dissolution include all shareholders, or a representative of their interests, as defendants to the action. We believe this alternative should be considered so that the interest of other shareholders will be adequately represented in a suit for involuntary dissolution.

Section 630 specifies how a corporation may avoid involuntary dissolution by purchasing the shares of those plaintiffs seeking involuntary dissolution. The corporation is permitted to appear in the lawsuit for involuntary dissolution and offer to purchase the plaintiffs' shares at fair market value. Section 630 would be improved if it required the corporation to make this purchase offer within 90 days of the date the lawsuit was instituted.

Section 630 provides that if the corporation and the plaintiffs cannot agree on the fair value for the shares, the court may appoint three appraisers to determine that fair value. Subsection (c) of §630 would be improved if it specifies that the date of filing the complaint will be the date of valuation for the shares. In its present form, the date of valuation is not clearly stated.

In passing, we would note that in our copy of the official comments there is no official comment for Section 630. The official comment for Section 633 is erroneously printed as the official comment for Section 630. If the legislature intends to adopt the official comment by reference, this typographical error should be corrected.

Under H. B. 343, if a court is directing winding up of a corporation after its dissolution, creditors and claimants may be barred from participation of general assets of the corporation if they fail to make or present claims and proofs within the time ordered by the court. If Section 488 remains in H. B. 343, Section 653 should be amended to also bar creditors' claims against directors and officers if they fail to appear in the winding up proceedings. The amendment may be accomplished as follows:

> "In a court-directed winding up of a corporation (A.S. 10.06.618, 10.06.635(b) and 10.06.645) creditors and claimants may be barred from participation in a distribution of the general assets of the corporation, and shall be barred from asserting claims against officers and directors of the corporation pursuant to A.S. 10.06.488 if they fail to make or present claims and proofs within the time the court may order.

Section 655 (H. B. 343, page 114) describes the order the court may enter declaring that the affairs of the corporation are completely wound up. Subsection (c) of §655 states:

> "The directors or the persons appointed under A.S. 10.06.648 shall be discharged from their duties and liabilities, except as may be established under A.S. 10.06.488 or except as needed to complete the winding up."

Section 648 allows the court to appoint directors to resolve a deadlock in a board of directors. This provision excepting Section 488 liability for appointed directors should also apply to directors appointed by the court pursuant to its authority under Section 640 and Section 653 of the Bill. We do not believe that any individual appointed by the court to serve as a director or officer for a corporation during dissolution or winding up of the corporation should have personal financial liability for contracts entered into by the corporation during that period of time.

Whenever the Bill permits creditors in the name of the corporation to sue shareholders or directors for improper distribution of dividends (A.S. 10.06.378) or assets (A.S. 10.06.675), the statute should specifically provide that the shareholders and directors may assert any defense to the action available to the corporation.

IV. Miscellaneous Comments:

Section 460 of the Bill permits removal of directors without cause by vote of shareholders. H. B. 343, page 57, line 4. Subsection (a)(2) describes the number of shares which must vote in favor of removal of the director if the corporation has cumulative voting. Subsection 3 describes the number of shares

within a class which must vote in favor of removal if a director is elected by a class. Subsection 460 should be amended to describe the minimum percentage of shares which must vote in favor of removal of a director without cause if the director was not elected by class and the corporation does not have cumulative voting. This may be accomplished by an amendment to H. B. 343, page 57, line 6 and 7 as follows:

> "At a regular or special meeting for which notice is given under A.S. 10.06.410 and this section, any or all of the directors may be removed without reason if the removal is approved by a vote of the majority of the outstanding shares and...."

The Alaska Federation of Natives has proposed an amendment to H. B. 343, page 149 at line 12, as follows:

> "Notwithstanding the provisions of A.S. 10.06.574-586, a plan of merger, consolidation or exchange qualified under this section prior to December 19, 1991 shall not include the right of shareholders to dissent."

This amendment should be improved by the addition of the phrase:

> ".... plan of merger, consolidation or exchange qualified under this section and approved by the proper corporations prior to December 19, 1991 shall not include the right of shareholders to dissent."

This amendement will specify that the merger plan must be approved prior to the specified date; otherwise shareholders will have a right to dissent.

Section 546 provides that a plan of merger, consolidation or exchange for an Alaska corporation must receive approval by a vote of two-thirds of the outstanding shares of each corporation affected. A lower voting requirement applies to corporations established under the Alaska Native Claims Settlement Act. Section 960(c) provides that a plan of merger, consolidation or exchange of ANCSA corporations may be approved by an affirmative vote of holders of a majority of the outstanding shares of each corporation. The official comments do not explain the different

requirements for these corporations. The different requirements are probably permissible. It would be well to explain the different requirements to avoid confusion in future.

We appreciate this opportunity to comment on H. B. 343.

Sincerely yours,

SMITH, ROBINSON & GRUENING

for James T. Robinson

RIS:ljd

cc: Mr. Ken Johnson
Mr. Merrill Sikorsky

Opinion

1996

"The Olympics is a huge investment over a 12- or 14-year period. But for Anchorage it wouldn't be so much a big financial investment as a human investment. It would take a lot of time and energy." Reyn Bowman, executive director, Anchorage Convention & Visitors Bureau.

Anchorage and the Winter Olympics are a perfect fit.

On the one hand, Anchorage is the right size — not too big, not too small. It has the financial resources, both public and private, to make the venture a success. It's becoming adept at hosting world-class competitions with alpine skiing events at Alyeska Resort, Nordic skiing at Kincaid Park and even the Great Alaska Shootout at Sullivan Arena.

Its lodging accommodations are adequate today and are growing by leaps and bounds. The climate is ideal for winter sports competition. Anchorage is ideally situated for air access both from North America and from Europe and Russia, which provide the vast majority of the athletes participating in Winter Games.

Anchorage would add a new dimension to the cultural aspects of the Olympic Games, and in a state where the number of visitors and tourists annually doubles and triples the population, playing host has become an art more than a chore.

Those are just a few of the things Anchorage has to offer the Winter Olympics. The other side of the question — what does the Olympics have to offer Anchorage, and the entire state of Alaska, for that matter — is equally compelling. And the facts are equally one-sided.

The Winter Games would give Anchorage worldwide exposure and a massive economic boost at the time of year when it needs it most. Tourism, one of the mainstays of the Alaskan economy, always has sagged during the winter; nothing could turn that situation around faster than the Olympics. Officials from the Lake Placid area in New York say that area still is on a high from the 1980 Winter Games, and in the words of one economist, "We don't know how long it will take for that to wear off or if it ever will."

Most important is what would be left behind after the Olympics are gone: world-class winter sports facilities that would establish Anchorage as a winter sports mecca and benefit everyone in Southcentral Alaska who would have easy access to those facilities for years to come.

Unquestionably, construction of some of those facilities would be an expensive proposition. Most notably, those

From Courtroom to Board Room

By TONY SMITH

Senior partner, Smith, Robinson & Gruening

House Bill 343, pending before the Alaska House of Representatives, is "An act revising the corporation code." This bill was prepared by the Alaska code Revision Commission, and it proposes sweeping changes in Alaska's corporate law.

Rep. John Cowdery has been taking a hard look at the proposed bill. The Alaska Code Revision Commission held extensive hearings and spent a great deal of time and money preparing the revisions.

My review of the proposed revisions indicates they did a good job. Cowdery, however, has quite correctly realized that the revisions are very expansive and may have long-range side effects.

The bill is lengthy and complex. While the proposed revisions may add a degree of certainty to Alaska's Corporation Law, there are some areas of real concern.

For example, the proposed revisions extend personal liability of directors and officers to certain creditors of the corporation up to the amount of $25,000 per officer or director.

Thus if the corporation lacks the assets to pay bills the officers and directors are liable.

The exposure of the directors and officers is irrespective of any wrongdoing, irrespective of the degree of involvement in the affairs of the corporation and irrespective of whether the individual dissented from incurring the debt.

In addition, not all creditors have the same right as the commission decided to only protect the "little guys."

There also is a serious question as to whether the effect of the revisions will be to prefer foreign corporations.

While the code attempts to impose liability on foreign corporations, as a practical matter the corporate codes of the other states will apply to the internal affairs of corporations incorporated in their jurisdictions.

Thus some of the more novel concepts may very well disadvantage Alaska corporations in the long run.

There are other aspects of the proposed bill which have wide-range effects. The Alaska Code Revision Commission has stated it attempted to find a middle ground between pro management and pro shareholder states. In so doing it has developed some rather esoteric concepts.

For example, the bill allows minority shareholders to petition a court to dissolve a corporation on the grounds that those in control have been guilty of "persistent unfairness towards shareholders."

That language may become one of the principal sources of litigation in the State of Alaska.

It is evident that a great deal of thought has been devoted to the proposed revisions. However, Cowdery and others have focused on the danger of attempting to legislate in a broad sweeping manner problems which may or may not exist.

There are some advantages to trying out ideal solutions but I question whether this is the right time or place.

A critical review of House Bill 343 is a real service. The effort to solve all Alaska's potential corporate problems in one piece of legislation appears to open up a Pandora's box.

It would be well if those involved in the business community took the time to familiarize themselves with this important piece of legislation.

Perhaps no other legislation effects the rules of the game as much as Alaska's Corporation Code.

STATE OF ALASKA Committee Secy.

POUCH V
JUNEAU, ALASKA 99811
(907) 465-3873

HOUSE LABOR AND COMMERCE COMMITTEE

M E M O

TO: HOUSE LABOR & COMMERCE COMMITTEE MEMBERS
HOUSE JUDICIARY COMMITTEE MEMBERS

FROM: HOUSE LABOR & COMMERCE STAFF

RE: JOINT HOUSE LABOR & COMMERCE AND JUDICIARY COMMITTEE HEARING ON HB 343-REVISE THE CORPORATION CODE VERBATIM TESTIMONY

DATE: MARCH 7, 1984

ATTACHED FOR YOUR INFORMATION AND REVIEW YOU WILL FIND THE VERBATIM TESTIMONY ON HB 343. THIS WAS THE LAST HEARING HELD IN ANCHORAGE, FEBRUARY 24, 1984.

THIS TRANSCRIPT IS PROVIDED FOR US COMPLIMENTS OF THE CODE REVISION COMMISSION AND WAS TYPED BY CATHERINE WALSH OF THE COMMISSION.

JOINT HOUSE LABOR AND COMMERCE AND JUDICIARY
COMMITTEE HEARING ON HB 343/SB 246--FOR PROFIT CORPORATIONS
FEBRUARY 24, 1984 - LEGISLATIVE INFORMATION OFFICE, ANCHORAGE
10:00 a.m.

COWDERY: Will the meeting please come to order. It's 10:07 a.m., February 24th. We are in Anchorage, the Labor and Commerce Committee joining with the House Judiciary Committee. I'd like to make note of those present here in Anchorage is Representative Wendte, Representative Pestinger, Representative Furnace, Representative Uehling and also Representative Koponen is in Fairbanks on the teleconference network and Representative Ringstad is in Juneau. I'd like to check in and make sure that Representative Koponen and Ringstad, first in Fairbanks and then to Juneau. Representative Koponen.

KOPONEN: This is Representative Koponen right here. We have two people in the audience at this time.

COWDERY: Representative Ringstad.

MODERATOR: This is the moderator in Juneau and Representative Ringstad has stepped out for a moment. Can you come back to us?

COWDERY: Yes. O.K. We have a quorum and I would like to maybe turn it over to Representative of the Judiciary Committee to establish his quorum. Representative Bussell.

BUSSELL: Thank you, Mr. Chairman. The Judiciary Committee does have a quorum. Representative Wendte is present with us, Representative Hayes, Representative Liska, Represenative Malone, and Representative Barnes is someplace on her way here.

WENDTE: Mr. Chairman.

COWDERY/BUSSELL: Representative Wendte.

WENDTE: I just want to know as a matter of deference to my dear friend the Chairman of the Judiciary Committee, I've been placed on this side of the table. It's not that I don't care to join the Judiciary Committee today. But since I am the only member of both committees, maybe I should run back and forth.

BUSSELL: You are sitting in the witness chair.

COWDERY: The House Labor Committee meets in the morning and so at noon you can move to the other side. The Judiciary meets . . .

WENDTE: It's probably a good way to do it, Mr. Chairman. Thank you.

COWDERY: We are here this morning to hear HB 343 to revise the corporate code. And we have had a joint hearing on this with the Senate Labor and Commerce in Juneau and we've got quite lengthy testimony, had quite lengthy testimony to review, and it is the intent of this committee to not be critical of the code or the bill, but to bring some areas that are not clear, perhaps help clarify some of the areas and to discuss some of the areas that seem appropriate now that we clear up rather than later if it ever comes to a court decision that perhaps we can by clarifying some of the areas of concern we can maybe keep that later court date to a minimum. I was wondering, I know that Mr. Dick Black of the Alaska Bar Association, or Block. Would you care to comment or have comments. Or I could go on an overview of some of the areas of concern . . .

BLOCK: Mr. Chairman, it's your pleasure. I am prepared to testify if you like or any order you that you would like. Good morning to the Chairmans of both committees. My name is Richard Block. I actually come before you I suppose more officially as a representative of one of the sections of the Alaska Bar Association. And I will refer back to that in a moment. I would also like to say, however, I am an attorney admitted to practice in the State of Alaska and have to only a small or modest degree done corporate work for clients. I also am an owner and investor in a business enterprise in the State of Alaska which is in corporate form, and we have in our corporation five separate corporations. So I believe that from the standpoint of its practical application as well as its legal concerns, I do have some familiarity with what the impact of the bills before us might have in this Alaska community. And I also said from a more official standpoint, I am representing one of the sections of the Alaska Bar Association. About a week and a half ago, I was asked by the chairman of the business law section of the Alaska Bar Association, the chairman of the executive committee, to chair a task force which has just recently been appointed to study and undertake a review of these bills and the work that has been done by the code revision commission and by Professor Fessler. It is the charge of our task force not to engage in an extensive, shall we say academic type review or even a legal analysis of the bill, since we believe that has been extensively done and well done by Professor Fessler and by the code revision commission and by the staffs of the legislature. But we do believe that in the interest of better understanding, the impact that such a bill would have on the business community and on the practice of business and corporate law, that you might say kind of a business impact report is deserving. Exactly what will be, or not exactly but at least to the extent that we can

foresee it, what are some of the economic interests and factors in the state that could be affected by what this bill contains that may not have been brought before your committees. And when I am through here in a few moments, I am going to ask or suggest that the committee in its deliberations at least not move so quickly that our task force would not be given the time to present to you what we regard as our you might say economic legal impact report of this bill. We do not believe it will take a lot of time, we'd like, say, about 30 days to finish our work and present it to you. As I indicated, I think we can do that because we are not going to reinvent the fine work done by those that have gone before us. A very brief review of the bills and the commentary that accompanies the bills would indicate that one of the things you typically find in a significant revision of a law of this type, that is to say that it is a technical revision, it is a language revision, that it is a modernization of tone or tenor is certainly a part of this bill. But this bill really has substantial substantive changes in it, and I think that one of the things that is unfortunate, and I have to say that for myself I take upon myself the responsibility for making some of the same assumptions I am going to charge to a larger class of people and that is I think a lot of people thought that the revision of the law was going to be a revision of the words and not a lot of substantive change. And as you get into it, there are some signficant changes in this bill, and I don't think the business community broadly based is widely aware of it. And I think they need to be and you need to be aware of what that means to them. I think, for example, that my brief reading of the analysis and the bill would seem to change the character of the articles of incorporation from a simple organic document that kind of brings the corporation into existence, which is now and would in the future if this bill were adopted, be its function. But the articles become in addition more or less a disclosure statement, a rather complete disclosure statement to anyone who becomes involved in the corporation. And I gather that notion from the fact that an awful lot of things which today are kind of put into articles by a one line reference or by absence of any reference and then incorporating statutory provisions to the requirement that if certain things are going to be ever done in a corporation, it needs to be specifically allowed for disclosed in the articles of incorporation. Now I am not here nor do I think our section takes a view that that's good or bad, but only that it becomes a fact that's contained in this law and if a lawyer is going to do an adequate job of protecting a corporate client, they are going to have to do a more careful analysis and a more careful job of drafting to make sure the corporation is permitted by its articles of incorporation, or in this disclosure document if you will, to do those things which it now intends to do or might in the future wish to do. And I suggest that one of the things that we would like to measure in our impact report is how much additional legal work is going to be required by lawyers

asked by their clients to form a corporation and what's going to have to be done in order to make sure that they never get into a situation which under this bill would become an ultra vires or an act outside the ambit of their agreed authority. Another significant aspect of this bill is that it clearly seeks to change the relative protections among classes of people involved in a business relationship. I think it's fair to say that the code revision commission and Professor Fessler recognizes that current Alaska law is, if you want to assign an appellation to it, is a vested, corporate ownership protection approach. And I think it is clear that the approach taken in this bill is to move away from that and to provide some protections for creditors and for outside stockholders. Now again, I don't think this is the responsibility of the bar association, or do we wish to take a view that that's good or bad, but only that it is in fact a significant change in our law. It is a substantive change, and the way in which that's done, and the fact that it is being done, I think needs to be recognized by a broader base of the business community and the effect of that, if any, presented to your committee. There are a number of impacts that we see this potentially having. One I've alluded to and that's simply the cost effectiveness. We think there is going to be some significant changes in just legal costs informing the corporation, because I think lawyers are going to have to be a lot more careful and a lot more explicit in what they do. That may not be that, that may be public policy desire that the cost of that needs to be thought out. I suppose there are going to be some changes in trade costs. By trade costs, I mean that if you are going to change the respective protections of creditors and the protections of superiorly postured investors, then there may be changes in interest rates or rates of return to stockholders and to officers and directors and creditors in view of the changing positions. And I would imagine that one of the things that's going to have to be considered by any officer or director of a corporation, that because of one of the provisions in the law subject it to potential personal liability in the event of the failure of the corporation is the possibility of additional indemnification costs in order to attract people to be officers and directors of complex business operations. I think we also want to suggest to the committee the need to evaluate the impact, what I would call the business impacts. For example, would the potential exposure of many, potentially millions of dollars to an individual officer or director, and as I read this there is a right to go against certain officers and directors for up to $25,000 per creditor. So the $25,000 is mulitiplied by as many of these trade creditors as there may be in a corporation. What is it going to take to attract a person to become an officer or director of a corporation when he's got that potential exposure. Now I don't think anyone can quarrel with the proposition advanced by the advocates of this bill that you are trying to encourage responsible action by corporate officers, and the

threat that they may by dissipation in corporate assets or inappropriate business actions leave creditors unprotected and they should be aware of that. That may be a valid public policy. But I do think we need to think out if that is going to chill business entrepreneurship in the State of Alaska or freeze out or preclude access to the most qualified executives to come in and operate corporations because of this concern. And I would be even more particularly concerned if it were necessary to attract a highly qualified person to come in and run a troubled corporation. And if you have a corporation that is salvageable but in financial difficulty and you want to attract someone to come in and involve himself with that enterprise, is he doing so at such a great peril that you cannot attract that kind of individual to your company. Finally, I think I would want to suggest to the committee that one needs to consider the broad based economic impacts. I don't think it, I realize we may be focusing an unwarranted amount of attention on one section of a bill that contains several hundred sections, but nonetheless, when you start getting in to where the dollars go and whose pocketbook is exposed, it becomes important. And the question I would raise with respect to economic impact is we are trying in this state, and I believe it's the professed posture of the legislature, that we are trying to encourage investment in economic activities in the state which so far have proven to be less certain than other types of investments. We don't need to encourage people to get involved in the oil industry. It's a rather certain profitable return on that investment. But what about business enterprises around the fishing industry, around the timber industry, around the agricultural industry, and other industries where we are trying to encourage investment, but where the opportunites for absolute certainty of return are less known to us. Are we going to chill business entrepreneurship because the person is unwilling to commit $100,000 and put that into a corporation and see if I can may a go of it in one of these marginal industries. But if I have to further expose my resources beyond that investment because through circumstances that I may control or may be beyond my control, I expose myself to liability beyond what I am prepared to commit, I am not willing to do it and thus, preclude the type of access, the type of business enterprise that you're trying to encourage in these marginal industries. Those are the kinds of things we need to think about. Again, I know that there is a great amount of good in this bill. Not only do I know it because of the caliber of people who have worked on it, I've gone through it and I know having worked in the existing corporation code, that there is room for improvement and the desirability, just the general advisability of getting into the corporations code and cleaning it up I think is meritorious. But I would urge the committees to move with great caution when you start making substantive changes that aren't well understood by the business community but could have a tremendous economic impact on them, on the economy

generally and on businesses specifically. It is the request of our task force which is just created that you would give us time to more particularly analyze the bill from those kinds of aspects and submit, you might call it our impact report to you for your consideration. Thank you.

COWDERY: Thank you, Mr. Block. It is our intention to hear testimony on this and maybe ask questions and then possibly development some amendments for a substitute bill for review by another committee I think or maybe two more committees to be referred to before final action. I would like to ask one question. In your capacity as knowledge, it is my understanding that many small corporations, particularly small ones, have honorary directors or maybe family members appointed for one reason or another, if I understand some of the language in this bill, that it could possibly maybe even attorneys I understand are noted in some corporations, but I think the attorneys probably have insurance to cover any liability, but some of the other areas I've mentioned may not be aware of this insurance. But it's my understanding the bill reads that even these people could be liable at a later date for some of the liabilities of a corporation that went bad.

BLOCK: Representative Cowdery, I think that's one of the points I am trying to make is that I think there is a lot of people who are maybe sleeping in bliss with respect to this and will some day wake up to the fact that they have exposures they didn't know they had. But that may not be bad. I am not saying that the proposition that officers and directors shouldn't stand behind their actions. That maybe a valid public policy. I am not saying it is or is not. What I am saying is I don't think too many people are aware that that's what you're talking about. Number one. And number two I think we need to go beyond just the consideration of do we need more protection for creditors and less protection for the corporate entrepreneurs and consider what could be the impact once everybody understands this and getting people to go into business and involve themselves in business enterprise. Let me add one further point, since you I think, perhaps, somewhat accidentally touched me in a soft spot when you mentioned insurance. I do not believe at the present time, certainly under most officers and directors policies, and once this bill were changed I am certain there would be amendments to the policies to talk about the exposure of this particular type of exposure. That's not to say that I can tell you we can make anything insurable. Some of the more, I am looking around I think Joe you were the only one who was here in those days, we made a lot of uninsurable things insurable. And this might be one of them. But as a general proposition, I don't think it's contemplated in the risk that for E & O protection for officers and directors.

UEHLING: Thank you, Mr. Chairman. In going back to the liability question on the directors of the corporation and you mentioned another party, the directors and . . .

BLOCK: And certain named officers.

UEHLING: And certain named officers. What about in the case where you have a situation where a corporation is purposely bankrupt and goes down the tubes, and then where is the liability in present law right now? Who holds the liability on that? Then they set up another corporation and then go on and do this as a chain reaction.

BLOCK: Rep. Ueling, you made a comment and I'm not quite sure what you meant by it. I'll try to interpret it when you said deliberately bankrupt, purposely bankrupt. If you are talking about people who with intent to defraud creditors forms a corporation and either fails to properly capitalize it, or capitalizes it incurs the obligations and strips the capital or the assets out of it. There are already remedies, the deliberate fraud of a creditor is already actionable. An improperly capitalized corporation subjects the stockholders of that corporation to the doctrine of piercing the corporate veil to reach behind a corporate shell and get at the individuals. So, if you're really talking about a malicious act to try and fraud the creditors, you have already got existing case and statutory law to protect you. I think the concern here is that this goes beyond that, and we are talking about what happens if you have a properly capitalized, legitimately run operation and either at some point down the road there are some stripping out of assets or maybe not but simply the corporation is just unsuccessful because of economic conditions or for whatever other reason. That's the new impact of this bill.

UEHLING: And then, also, a follow up question. The $25,000 liability question, what about in that case, how does that relate to what we presently have in law right now. There is not a $25,000 per creditor liability right now, is that correct?

BLOCK: Well, as I indicated I think current law does provide that if there is a deliberate or fraudulent, you know, fraud against the creditors, there is a protection, but, of course, then it is unlimited as to amount. You go after them for the full amount of your obligation. For the circumstances that I am concerned about, I don't believe there is anything in the statute. This would be the new provision. It says that these particularly specified officers and directors are exposed for up to $25,000 per creditor in the event the corporation. You have got to, according to the statute that's proposed here, exhaust the assets of the corporation. So it is not relevant if you have a successful corporation. But if the thing, the liabilities

exceed the assets and you paid out all of the assets proratably or whatever other way to creditors and there are moneys left due and owing, then each creditor would be entitled to go against these individuals up to $25,000 as I read the statute.

COWDERY: Rep. Furnace.

FURNACE: Thank you, Mr. Chairman. I have three questions. The first has to do with the secondary liability. In your opinion, should that be an average of $25,0000 rather than a per creditor, is that an alternative?

BLOCK: Well, Rep. Furnace, I think the point I'm making is that I am not sure the concept is valid, and I think that's what we want to look at is whether there should be any statutory exposure for officers and directors beyond obviously in the case that Rep. Uehling talked about, fraud, or the investment that the entrepreneurs put into the corporation. Once you get over that, once you say it is to be the public policy and whatever it may cost in business impact that we are going to make officers and directors responsible, then you are only talking about how much. I haven't really thought out the right way to do that, this may be as good as any.

FURNACE: The second question, often times we say if it's not broke, don't fix it. In your opinion, is the present code broke?

BLOCK: I've got two answers to that. Guess that's why I am a lawyer. One answer is no, it's not broke in the sense that if you look outside you can see the State of Alaska is filled with business enterprises that are operating successfully. Corporations are being formed and business going on all in the context of our existing code. So in that sense I don't see a burning need to jump in and change the law. I do have to acknowledge, however, that our law is like so many of our codes, we just kind of lifted out of another state and plunked it in here without a whole lot of thought as to what it means in the State of Alaska. There are a lot of things in our code that, you know, having worked with it, I find are difficult to interpret and work with. And I would say that it is appropriate that our code be reviewed, modernized, made relevant to the economic conditions in our state, so I certainly don't oppose the effort going forward. My concern isn't that we not review our code, only that we consider what the substantive changes mean to the business community.

FURNACE: The last question, Mr. Chairman, and asking an opinion. I agree that this code revision has a significant impact, philosophically, on commerce in the State of Alaska. In that light, in your opinion, how to we better involve the

business community in understanding the various implications of this bill?

BLOCK: Well, that's perhaps the most fair question and most difficult to answer. I do know there has been a very affirmative effort by the code revision commission and particularly Professor Fessler to reach out and explain the bill. I know that he has given a number of seminars and continuing legal education presentations to the bar, so that most lawyers ought to be aware of it, and hopefully lawyers representing business clients will be passing that information back to their clients. I do not know that there has been an equal effort in the non-bar business community. Now, I am aware, for example, I saw a bulletin issued by the Alaska State Chamber of Commerce very recently bringing the attention of its membership to the existence of this bill. But as far as a lot of education, I am really not sure what's going on. I have to say, Rep. Furnace, the responsibility of the chambers of commerce and the business groups, and the, you might say, the special trade associations to dig in and learn these things. I don't know how much more the legislature can do. I know you've run ads and one thing and another letting people know of this going on, but nonetheless, I still think you may have to reach out a little more and make sure you are getting a true study of what the impact is on the business community. Beyond that I'm not sure I can give you a definitive answer.

FURNACE: Good. Thank you, Mr. Block. Mr. Chairman, I think Mr. Block has made a very valid point. Perhaps what we should do is hold a teleconference specifically with chambers of commerce throughout the State of Alaska. That's probably one of the most direct ways that we can involve the business persons. I am concerned about this here today.

COWDERY: I have one question to touch on and then I'll, Rep. Russell has some questions too. You touched on an area there it seems to me that directors, present day directors or past directors, could obligate a company and then to a point where maybe it proved to be a financial, real difficult for the company, and then the directors could leave and new directors come in. It is my understanding that this bill would, the new directors would assume liabilities, is that your interepretation?

BLOCK: I'm not sure that that's the correct interpretation. I am not sure I could tell you what the correct interpretation is as I read the statute. It says is liable for materials, goods and services provided to the corporation at the time they were in office. I think, it's not the exact wording, but essentially the thrust. How that would be interpreted in practical fact when generally cash flow goes to pay the oldest

debts. I'm not too sure. But, again, that's one of the things that needs to be thought out.

COWDERY: A question that possibly a director could order something that wouldn't be delivered for a year or two or later, and I was wondering that at the time of the delivery if the liability was, the commitment was made earlier, but the time of delivery would the liability incur at that time, and I was just wondering if that would be a grey area in your opinion?

BLOCK: Well, the most I could say to that, Rep. Cowdery, is it would be a grey area. Probably it's more grey in my mind than it may be in Professor Fessler's or in the code commission's mind. They may be able to specifically address that. I'm not sure I know the answer.

COWDERY: Thank you. Rep. Bussell.

BUSSELL: Thank you, Mr. Chairman. Are there members of the Judiciary Committee that wish to ask Mr. Block a question? Rep. Wendte.

WENDTE: Thank you, Mr. Chairman. I gather from your testimony you seem to emphasize two main points in terms of what you call significant or substantive changes in legislation. One being that there will be substantial additional legal work in terms of impact on any corporation and secondly, you particularly focused on the liability between classes of people, particularly the impact on directors. Those are the only two significant changes in this document?

BLOCK: Oh, no, sir. They are not. What I tried to do was sort of classify the changes, but not to delineate them, give some examples. There are other changes. Another very significant area of change is the authority to pay dividends, to distribute corporate assets to the stockholders. There is a significant change in that. There is also a significant change which, incidentally, may be an appropriate and beneficial change, I don't know, but it needs to be thought out. In bringing the corporation code provisions for classification of equity accounts more up to the way that the generally accepted accounting procedures would choose to have those equity accounts relected. And as I say there may be a beneficial change in the code to do that, but it is a significant and substantive change and in so doing, it changes to some degree the permissible opportunities in which to distribute assets or profits to stockholders. So there is a substantive change there. I'd have to tell you that I have not completely analyzed this to exactly see what the true impact is, because I think in order to understand it I need to sit down with an accountant and understand how they interpret it, which I haven't done and one of the things I think would be part of our

study in understanding the economic impact of this. But I think that's a substantive area I didn't mention before.

WENDTE: In the area of director and officer liability, are there major problems in litigation in the state right now that has either not been accommodated by the court or indicate there is need to correct statutes? Are there major changes or volumes of those types of cases within the court system in Alaska right now? I guess what I am trying to get at is it broken . . .

BLOCK: Are you asking me are there a plethora of E & O cases against officers and directors in the State of Alaska? I guess I'd have to say I don't know whether there are or are not. I am not aware of them, but there could well be some that I am unfamiliar with.

WENDTE: The bar through your task force indicates that they need more time to . . . when do you expect to complete that.

BLOCK: It is my expectation we have scheduled our work activities so we could have our impact report back to you in about 30 days.

WENDTE: You are aware, of course, this bill was introduced ten months ago in April of last year. Given the responsibility of the bar to their clients and I guess the relationship between the bar and the state, that has not provided enough time for review?

BLOCK: I am not, I don't wish to try to either explain or try to apologize for the responsiveness of the bar. I would have hoped that the bar association would have taken a more early look at this, and indeed tried to get a better understanding of it by inviting Professor Fessler to conduct continuing legal education program for the business law section I guess it's about a year ago. So we have been studying it, but certainly not directing it toward legislative action, and perhaps we should have been. As far as our task force is concerned, our task force only came into existence as I say about a week, week and a half ago, in response to recognition that the legislature was just now becoming concerned with the bill.

WENDTE: You seem to endorse the concept of the code revision process in terms of reviewing the statutes to bring them into conformity with the reality of the state. One other action to this bill may be to just dump this whole thing and then try and crack individual problems, piecemeal . . . Would you suggest that?

BLOCK: Well, I neither endorse nor oppose or unendorse the code revision concept. That is a way to make a comprehensive revision of a major statute such as the corporation code. I am of the view that it is probably an appropriate time for the corporations code as well as other codes in our statutes to receive a wholesale review, and I am not suggesting that we ought to just scrap this bill. There is a tremendous amount of work involved in putting this together. A lot of very careful thought and ball corporationof ideas from numerous other states which have studied a lot of these other issues and I don't think that should be wasted. And I am not arguing that we ought to scrap the bill, nor am I suggesting let's take out the important points and piecemeal changes throughout the existing corporations code. It may be appropriate to start over. My only suggestion to this committee is that this goes beyond just language and organizational changes and modernization, it makes some significant substantive changes, and we need to be careful that we know what those are and what the impact of that is before we adopt them. That's my only point.

WENDTE: In regard to process and need for additional review, Should we suppose that I pick up my chamber of commerce bulletin Ind it mentions a page, a bill of this magnitude, 150, 160 pages, is it likely that that businessman is going to call his attorney to review? Is it the normal businessman corporate businessman to sit down and then rely on his attorney to address this issue?

BLOCK: My suspicion is, Rep. Wendte, he would probably do neither. He would be overawed by the number of pages and say somebody else must be taking care of this. I think that's unfortunate, but I think it's the fact. I don't think you can expect nor do you really, would it be appropriate for the people engaged in business enterprises say to sit down and do a careful analysis of this bill. I do think it's important that they understand what the significant, substantive impact is on their business, and perhaps address that in a general way. Beyond that, I think you are going to have to look to the technicians for guidance.

WENDTE: With your background, for the most part are small corporations in this state able to get errors and omissions insurance?

BLOCK: I would venture to say that the small the corporation the less necessity there is for it. 1 would imagine few corporations few corporations even try to get it, a few

small corporations try to get it. It is very expensive and really its predominant functions is to protect officers, primarily directors, officers and directors from actions brought by dissident stockholders, and generally where you have a family held or modest size corporation, or a corporation with people who know one another, you generally just assume that risk.

WENDTE: In your judgment, would most of the corporations in the state other than the major corporations be able to obtain coverage to cover the type of liability you have addressed to this legislature?

BLOCK: Would most of them be able to? Well, I am trying to find an analogy to another coverage that may be useful here. I would suppose what you are talking about here is the kind of exposure, probably the most analogous exposure would be surety and performance bonding of contractors. Really what you are talking about is a management and credit risk. And you are indemnifying whoever provides the insurance is indemnifying the insured that all of the bills are going to get paid. And I guess the most analogous existing insurance would be performance and payment bonding. And you should be pretty familiar with who has that, its availability and its costs and complications. And it's not readily available and only certain people can get it and only after a very lengthy qualification process.

WENDTE: I have a number of other questions and I think we are probably going to find, Mr. Chairman, that with all these witnesses we are going to cover them today . . .

BUSSELL: Thank you, Rep. Wendte. Particularly in light of Mr. Block's statement that he's heading the task force that's going to give a report here in a few days, I think it's unfair to grill him too much on what the task force may or may not decide to talk to us about the bill. Rep. Liska.

LISKA: Mr. Block, a lot of the questions I had were partially answered by the other committee. As you know, normally when a piece of legislation has started.

VOICE: We can't hear Rep. Liska here in Fairbanks.

BUSSELL: Turn your mike on.

LISKA: Now, Mr. Block, normally when a piece of legislation is submitted for study, a lot of different people have input into it. Now the way I read into this here, this apparently is directed to the small business. You know there is a $25,000 liability on the insurance and so forth . . . My basic question to you is, you made a statement that we'd have to change the articles of incorporation, and I am not going to ask you what's wrong with it because any attorney can change the law of a corporation if it has to be. Disclosure statement is another

subject atogether, but usually a public or businessman plays a major part in introducing or changing any new piece of legislation.

In your opinion, what does this piece of legislation actually do? I mean is it changing that much to the radical side where it's going to make it inoperative, or are we so far off, for example, from other states. A lot of laws are based on Oregon law. A lot of them have been put on us up here, and we more or less have copied them. Are these other states working under concepts this bill addresses, any ways near it?

BLOCK: Rep. Liska, I really think that I would urge you to put that question to Professor Fessler who is here this morning, because that is his profession is analyzing what's going on in all the states, and he can better answer the degree to which this is a departure from the norm in the other states, the degree to which other states are working on making modifications. And he studies it and I don't. So he's the better expert on that. My brief reading of his commentary, however, is that this is a substantive departure from the current state of law in most other states. There may be two other states, New York and California, which he suggests are rethinking and changing. But, yes, this is a substantive departure from where we are in Alaska and a substantive departure from where the law seems to be currently in most other states, as near as I can tell.

BUSSELL: Are there questions from other Judiciary Committee members of Mr. Block? If not, all right . . . Rep. Koponen.

KOPONEN: Thank you, Mr. Chairman. One question or suggestion. If the task force were to examine the problem with current statutes to see what sort of economic chilling effect it has on investments by passive investors or people who are going to be minority stockholders, I know there is a tendency for people to invest capital that has been created in Alaska and invest them in what are considered more stable . . .[TAPE CHANGE] into that and that's the protection of the minority stockholder, the dispersion of their assets in this city where stockholders up to 49 have been wiped out by the majority under procedures which are legal under the current code and which they felt don't give them sufficient protection.

BUSSELL: Is that a question or statement?

BLOCK: Well, Mr. Chairman, I think Rep. Koponen's points are well taken, and it's not the position of the task force that we want to show you all the negative impacts. We want to show you what the economic impacts are both ways, and I think the points raised by him are very valid.

BUSSELL: Are there other questions of Judiciary Committee members of Mr. Block? If not, Mr. Block, I'd like to ask you just one or two questions in a complete and other vein if I could, although they pertain to this. Are you aware of the membership of the Alaska Code Review Commission?

BLOCK: I can't recite it now. I reviewed it at one time. I know that one of its esteemed members is here, but beyond that I am not sure I know the total composition of it.

BUSSELL: My reasoning for asking you is that you are an active member of the Alaska Bar Association, and this commission does do a variety of things. Are you aware of other work that they have in hand right now that they are doing?

BLOCK: I was led to believe that there was another project that they were considering getting into, but I am not sure they are actually working on it. Beyond this I really don't have a specific knowledge of the activities they are engage in.

BUSSELL: Well, again because of your unique position associated with the bar association, I would think that it would be one of the responsibilities of the code review commission, and since I am a member of that group and we haven't done a very good job of reaching out and telling you and others what they are doing. They do have a . . . in fact, almost everything they do seriously affects the bar association. And I'm somewhat ashamed, at least on my part, of not telling you about it. What connection, or how does the Alaska Bar Association connect with other states' bar associations? Obviously, this present review, or this present portion of the review, affects attorneys that practice in other states. Does the Alaska Bar Association or the Anchorage Bar Association have any connection with bar associations in other states who would be intimately involved in enforcement or work with the code?

BLOCK: I know of no official connection that the Alaska Bar Association would have with the bar associations in other states. Perhaps the most effective interstate communication would be that you would expect most of the lawyers that are in the business law section, for example, which is perhaps the section most affected by this. The business law section of the Alaska Bar are undoubtedly also members of the business or corporate law section of the American Bar Association. And in that way could communicate back and forth with their counterparts in other states.

Now I actually would ask that you address that to Mr. Kelly who is chairman of the business law section this year. He may know of more connections with other states than I am familiar with.

BUSSELL: Thank you. I didn't mean to put you on the

spot there, I just wanted to know because as you were speaking it came to my mind. And that's what happens, of course, when you get sections of state government like the code review commission that are off on a tangent of their own, largely removed not only from you folks, but removed from the legislature too. And I personally am opposed to that kind of thing and think this should have been a matter done by you folks with legislators instead of the way is was handled. And I will immediately as the Judiciary chairman embark on a program of letting other bar associations across the country know what's happened here so we can get their very valuable input.

COWDERY: Rep. Ringstad.

RINGSTAD: I've got a question for Mr. Block if I could, please.

COWDERY: Yes, John, we have about ten witnesses so if you could keep that in mind.

RINGSTAD: Mr. Block, if I understand you correctly in your saying that you feel that most of this isn't a real imminent problem and we should proceed slowly to make sure we get it right rather than having parts of this that need to be done immediately?

BLOCK: Well, I would, I think Rep. Bussell said correctly, I hate to prejudge the outcome of the task force. I would say at least for the next 30 days, I'd adopt that view, yes, sir.

RINGSTAD: Thank you.

COWDERY: Thank you, Mr. Block. Rep. Wendte.

WENDTE: Another question for the witness, but I would have a question for you, Mr. Chairman. We have been requested by the code revision commission and since the topic of other works of the commission has come up, is it your intent to not pursue the nonprofit code revision?

COWDERY: That is true. We have been asked to give our attention to this and that's our primary goal.

VOICE: For information of those present, we do have another document similar to this on nonprofit corporations. We've had hearings throughout the state and they subsequently recommended that we drop that consideration. But I assume we can serve notice that it comes back, we have made the decision apparently to not pursue that, that's it's likely to raise its head again at some point in time. I assume that document would be a working document again, and it might behoove everyone here that deal in that area to begin to look at that as well.

COWDERY: I don't believe it's been referred to at least my committee yet. Thank you. I'd like to ask Mr. Paul Kelly to come forward.

VOICE: We have Commissioner Brown here.

COWDERY: Commissioner Brown.

BROWN: Yes, Mr. Chairman.

COWDERY: Does he want to testify, or observe or what?

BROWN: Yes, Mr. Chairman, this is Fred Brown. I'm here just as an observer as a member of the Alaska Code Revision Commission. If anyone wishes to address any questions to me, may I assume Professor Fessler is also available?

COWDERY: Yes, they are in the audience. Craig Stowers and John Abbott and Dan Fessler in the audience here.

BROWN: They are physically in Juneau?

COWDERY: We're in Anchorage.

BROWN: Well, I'll figure out all these different places in Alaska.

COWDERY: Mr. Paul Kelly.

KELLY: I was considering the number of witnesses, could we go ahead and take two witnesses at this time?

COWDERY: Yes, sure, please come.

KELLY: This is Bruce Frenzel from ARCO.

BUSSELL: Since we are recording electronically, this thing is being done by teleconference, could you state you name for the record and for the committees information prior to proceeding with remarks on the subject.

KELLY: My name is Paul Kelly, speaking this morning on behalf of the, I'm chairman of the business law section of the Alaska Bar Association, and the views I'm expressing are on behalf of that section.

FRENZEL: My name is Bruce Frenzel, and I am an attorney with ARCO Alaska, Inc., here in Anchorage, representing ARCO Alaska, Inc.

KELLY: The first point, just with regard to the history of the bill right here, I do recognize the fact that we are

addressing the issue in February of 1984, ten months after the bill was introduced, and acknowledge that maybe we should have been involved earlier. But the point is that we are trying to provide this body here with the input from the clients we represent, the small corporations mainly the mom and pop corporations are a lot of the ones I represent who are going to be significantly affected who don't have an in-house attorney or attorney on staff as a consultant on a regular basis. And I am trying to work with them right now and explain to them what's going on. But these are the people who do not have that daily input from an attorney to explain to them what's happening, what this code is going to do to them. And there are many more out there who will have that problem, I think.

Secondly, the bill as it's proposed is an excellent, very well thought out obviously bill, and it represents many important changes I think to the code. And many of them are beneficial, and we don't want to represent to the committee today that we are opposed to the bill. The primary purpose of the business law section anyway in appearing here today is to request that we be given a period of time to complete a quick review and an impact report so that you could have that in your file and you can refer to that when decisions are being made at a later time. We are not here this morning to debate the merits and demerits of the proposed code. We are not in a position at this point until we have completed our study. But I think we should address just a couple of points to explain why we have this concern, and why we need this extra time.

With regard to this section 488, section which I think was proposed primarily to deal with the collapsible corporation problem for people who are setting up corporations, conducting a business and then absconding leaving the laborers, materialmen, suppliers without any funds. That is an important aspect which I think needs to be addressed, but I don't think it necessarily needs to be addressed when we are dealing with the broad spectrum of corporations. We're dealing not only with ARCO but Continental Airlines that they're doing business in Alaska, and the corner grocery store and the Native corporations or at least their subsidiary corporations, which are not Native corporations. They are business making corporations and so all of the Native corporations have certain provisions applicable to them, their profit making ventures are going to come under this code. And they are still going to have the officers and directors being liable for activities of their subsidiaries.

Another point that needs to be made is the commentary is the case law on this code right here, and comprises the amalgamation of California case law, Model Business Corporation Act, New York case law and the New York Act. The one point I'd like to make as we've developed it, under the present code that we've got, we've got very few cases since statehood that have explained what a lot of the problems in that law mean. There has

been a very slight development of the case law under the present Business Corporation Act. I doubt if there is going to be any significant expansion of case law development of this new proposed act when it's finally enacted.

So the point is we are developing under this new proposed code a new body of law that's not going to have any concurrently developing case law in other jurisdictions, which you do have, at least we are able to refer to Oregon or Washington as having some similar case law development. And if we were to adopt the Model Business Corporation Act revisions, which are being done at this time, if we were to adopt those we would then have a concurrently developing case law in other jurisdictions. What we are doing here is we are going to have unique case law development in Alaska which is, there has been very little development in Alaska under the present Act anyway.

And finally, one issue that was addressed on sec. 488 as I recall, this was sold as an idea that would protect fishermen and other people dealing say with fish purchasers. And I do a lot of work out in the Bay and I understand that problem. The problem is that I also know there is a contract provision that allows your corporation to contract out of liability by having an exculpation clause that says we are not liable. You are not going to hold us liable, the officers and directors, for the debts of the corporation. You can contract out of the liability, and I can assure you when you've got an unequal bargaining power, like the fisherman versus a fish purchaser. Every contract is going to have an exculpation clause in it.

The problem is that I think the issues put forth probably would be, or the issue more properly addressed, may be in terms of a fisheries bond that we have readily available. We do have a present fisheries tax bond that buyers have to post, and that could be expanded if that's felt to be the solution. So there are other ways of possibly dealing with this issue that would not affect all the corporations from ARCO down to the corner grocery store. And I think that that's something that also should be looked at.

But finally, I guess the bottom line is we would just like to have another 30 days to complete our study and make some report to the committee.

FRENZEL: Good morning, my name is Bruce Frenzel. I am an attorney with ARCO Alaska, Inc. I am also a member of the corporate code revision task force referred to here previously with the business law committee of the Alaska Bar Association. I am speaking today on behalf of ARCO Alaska, Inc., a wholly owned subsidiary of Atlantic Richfield Company.

Proposed HB 343 envisions a completely new corporate code. As noted in the House and Senate Joint Journal Supplement

No. 11, dated April 8, 1983, major portions of this bill are "without major precedent in Alaska law." Any such major changes deserve adequate time for persons affected by this bill to review and comment. We recognize that the bill was introduced last April, but has layed dormant until now.

We especially appreciate the hard work of the Alaska Code Revision Committee which has gone into the preparation of this bill, but are strongly opposed to certain portions of it and are uncomfortable with others. ARCO respectfully requests that consideration of this bill be deferred for 30 days so that specific, constructive comment on the precedent-setting portions of this bill can be made. With constructive changes to the bill, ARCO may be able to support it.

As currently drafted, one specific objectionable provision allows individual liability for corporate officers which destroys the basic purpose of incorporation which is to limit liability for corporate officers and shareholders. For a large corporation such as ours, the proposed provision combined with the very large number of creditors, would amount to completely unlimited liability for a few of our high level employees. Such a provision is also likely to be the more onerous for small or closely held corporations.

We will commit ourselves to recommend specific language changes to make the bill acceptable. Unless consideration is deferred, however, we must strongly oppose the bill as drafted.

COWDERY: Thank you. If that's prepared testimony, could you make that available for the committee. Any questions of the witness? I would like to touch on Paul's area of fishermen, or in the fishing industry it would seem to me that a corporation could have many very quick liabilities and if the runs are heavy could create some problems, if that was what you were alluding to, the $25,000 limit could get very small. The aggregate of limits could actually get very large, if I understood what you were saying. Basically, that possibility . . .

KELLY: Well, under the present bill right now it's $25,000 per creditor so it's an unlimited liability in the sense that one company I dealt with, we have 200 fishermen delivering. I was representing the fishermen on that joint venture. So it's 200 times $25,000, if they caught that much. But speaking of salmon season, that would not be that unusual.

It's an uninsurable risk, I think. According to Mr. Block, he was alluding to it as a performance bond, his analogy. To me it would be an uninsurable risk. I cannot imagine an insurance company unless they put limits on the risk. Obviously, they'd have to. You would have an uninsurable risk because you would have an unknown liability, depending on how large your

company is. An electric company which has a lot of contracts, an engineering company which has tremendous potential liability regarding the projects they are dealing with.

So to me I think it would be technically an uninsurable risk. And it would affect the mom and pop businesses all the way up to ARCO. And, again, when you've got this unequal bargaining power, when you've got a big company that can tell its suppliers you're going to deal with us, we're not going to have liability. But the people on the other end, the suppliers are going to get stuck for the people further down the line because they are not in the same bargaining position. They cannot impose these conditions because they need the business to continue in business.

So these are all problems that need to be dealt with, and I hate to get side tracked by this one issue because I think there are a lot of other issues in the bill, too.

COWDERY: I just wanted to bring that one point up. Rep. Furnace.

FURNACE: Thank you, Mr. Chairman. In your opinion, should the secondary liability be $25,000 aggregate as opposed to per creditor?

KELLY: If that was the only position left, I'd say yes. I think, you know, what I'm looking at right now is what essentially you'd be doing if your corporate officers and directors would be sureties for the corporation debt of $25,000. Maybe the possibility would be to require a minimum funding of $25,000. Minimal capitalization. That might be another possibility. So at least you would have a corporation with a minimum capitalization of $25,000. Maybe that's an issue, would that affect your small mom and pop corporations that are trying to start up and they just want to start a little printing business down the road, or they want to.

There's a lot of small businesses with liability, initial liability, that wouldn't seem to be that much. And they want to start a minimal investment program to see, you know it's an entrepreneurship that Mr. Block was alluding to earlier.

FURNACE: You indicated perhaps a minimum capitalization of the corporation at $25,000. It doesn't appear to properly address the question. The question is, heretofore, we have considered there being a limited liability of corporate officers. And you're indicating that under the present bill, the liability is uncertain. There is no limit on it. It appears there should be some effort to at least cap that in come way. Put a dollar figure so as to make it predictable. Or, if no more, at least make it insurable. That's why my thinking was to have at least an aggregate amount of secondary liability that is

certain and predictable as opposed to having it unlimited all the way through. That would be the major concern.

KELLY: I'd say, yes, you know, that again if the public policy is going to be adopted that we are going to make corporate officers and directors liable for corporate activities. If that's the public policy change we want at this point beyond what our present case law says, there is a present case law liability that goes through the courts. It's going to take extensive lititgation, and I'm aware of all those problems. But aside from that, if our public policy change is going to be we are going to have a $25,000 surety bond by the officers and directors from now on then, yes, that would be much more palatable than an unlimited, unknown liability.

COWDERY: Rep. Uehling.

UEHLING: Thank you, Mr. Chairman. I know you talked about California case law and also New York case law. And if this code revision were passed and becomes part of the statutes, how do you feel, don't you feel that you can take precedent on other states as far as how they followed the same sort of approach that we have in Alaska, as far as other case law in other states. You said you had to have a new, this would be a new precedent, and it would be awfully difficult to be able to guage it because you never had this kind of new effect.

KELLY: Yes, definitely you would be able to refer to other jurisdictions who have a similar statute and try an analogize there and say, well, look what they did over here in California. Yes, there would be that capability all the time. But I am saying that again Alaska is amalgamating this case law from at least three bodies of case law. California, New York and the Model Act. And I am saying that maybe we ought to look, a possibility we are going to explore is maybe adopting the provisions of the Model Act, which has its own commentary and which will be developing in other jurisdictions that are adopting the Model Act at the same time. I am saying you'd have a greater developing case law along those lines.

VOICE: Can you hear me, Anchorage?

COWDERY: Yes, we can hear you. Go ahead.

UEHLING: Another follow up question. If, in fact, we were to clean up this liability section, and considering that the present code is in many people's terms, ambiguous, do you feel that if this particular section was cleaned up that you would have no problem with the rest of the code?

KELLY: You ask a lawyer a question like that? We just need our 30 days. And to be honest with you, I've read through the Act. I've tried to understand a lot of the provisions. I see

some excellent changes, really well thought out changes. And I think we should adopte them today, but there are other things that definitely we need to have further consideration and input from a larger segment of th community.

We have attorneys here representing insurance companies, banks, mom and pop grocery stores, fishermen, oil companies, and to get the input from this broader base might be helpful at this point.

COWDERY: Any more questions of the House Committee? Rep. Bussell.

BUSSELL: Thank you, Mr. Chairman. Are there questions of Judiciary Committee members? Rep. Malone.

MALONE: Thank you, Mr. Chairman. So far it seems like most of the testimony we've heard has focused on two points. One of which is this 30 days, and I'd like to ask of people who are testifying now, is 30 days, when do you envision the starting and when do you envision it ending? As Mr. Wendte pointed out, the bill has been introduced in the legislature for, well, he said ten months. I'd say close to a year, but I can understand it because the committee is seriously getting work on it, it's getting people's attention. When do you envision this 30 days would be completed and this task force report would be finished? Is there a specific date we are looking at, or 30 days from whenever you start on it?

KELLY: Well, we've already started. We had our organizational meeting yesterday morning at seven, in fact. Mr. Block called it. I'd say by the end of March we'll have the report in your hands. That's our goal. We wanted to give the committee a palatable, you know, something they could accept. And I think 30 days, by the end of March, you'll have a written report in your hands. And I hope that doesn't cause any problems with your concerns about this bill, getting it passed this year.

MALONE: I think that with the additional 30 day delay that the likelihood of the legislation be adopted by the legislature this year is, starts to become very remote. Nonetheless, I'd still like to have the information, and if we could have it by the end of March, it might well be worth waiting for.

BUSSELL: Are there other questions or comments by other Judiciary Committee membership?

KOPONEN: Question from Fairbanks, one question. ARCO Alaska. Where is ARCO Alaska and its affiliate corporation organized? What state?

FRENZEL: ARCO Alaska, Inc. is a Delaware corporation,

and Atlantic Richfield Company is a Pennsylvania corporation.

BUSSELL: Are there further questions of other people wanting to talk on the network that are here today. If not, I would like to ask both of you just a brief question. How long have each of you been in Alaska?

FRENZEL: I've been in Alaska almost three years.

KELLY: Continuously since '76.

BUSSELL: Have either of you asked or had conversations with anybody in the legislature to bring about this type of change in the corporation law, or ask any member of the legislature to submit legislation changing corporate law?

KELLY: I, myself, no.

FRENZEL: No, we have not.

BUSSELL: Have either one of you been aware of the code review commission's work on this document, or on this or any other work that the code review commission does?

KELLY: I heard about it last year on this particular bill right here. And then in February I got a call explaining that there was a goal this year I guess to pass this bill. And since that time, in other words, I'm explaining my understanding anyway of what happened. And that's when I called Mr. Block and said we have an obligation I think to provide the commission itself with some type of input right away if they are going to pass this thing this year.

FRENZEL: I was aware last year that the revision of the corporate code was proposed. I was not aware of the director/officer liability issues.

BUSSELL: Do either or both of you know about the other work that the code review commission is doing right now with regard to other corporate law that is contained in statute, i.e., the nonprofit part and the cooperative corporations.

KELLY: I am generally aware that there are proposed code revisions to both of those areas.

FRENZEL: And I was not.

BUSSELL: Thank you, gentlemen. I almost have to apologize to both of you, too. I've been very inactive for this last year. I don't personally attend any of the meetings, but I do have staff that goes to them. As a legislative member, if I don't have any other part of the thing I should be telling people about what they're doing. I am ashamed of my part of it. Thank

you.

KELLY: Let's hope we can also catch up and assist you in providing input on this.

WENDTE: Mr. Chairman.

COWDERY: Rep. Wendte.

WENDTE: Again, to clarify the point on the other work of the commission. The Labor and Commerce Committee does have HB 437 in it dealing with the nonprofit code revision. And it has gone from the commission to the legislature. It was introduced eight months ago, in June of last year. And that's the bill I was referring to, although the chairman didn't seem to recall we had that committee. But that is another piece of legislation, and I would ask, although it's clearly not going to go anywhere this year, it probably would be good for you to keep in contact with with commission or get a copy of that bill. Again it's 437 in the House, and begin a review of that, so we're not caught in a similar situation next year.

KELLY: I'd like to thank the respective committees for their interest, and we hope to be able to be a better source of information and cooperate better with you in the future. Thank you.

COWDERY: The next one, witness up, Mr. Jack Thompson.

THOMPSON: Yes, my name is Jack Thompson. I'm the vice president of Air Van Lines and the secretary-treasurer of Craftsman Associates, Inc. One of the few people here today that's probably not an attorney, so I'll try to keep my remarks short. I'm involved with two companies. One is a fairly good sized moving company and the other is a small furniture repair business. So contrary to what somebody said, I read the whole bill, and being a nonattorney, I didn't understand most of it.

However, I did read carefully sec. 488 because some friends of mine had mentioned it to me. And I guess I'd have to agree with Mr. Block in one respect that this would be a public policy philosophy position. It's either going to be or it's not going to be. I personally believe that officers of corporations should have some kind of responsibility, fiscal responsibilty for their corporations.

In Europe you've got, in some countries, you've got two kinds of limited liability corporations. Some where you have no liability like we do here and some where you have some liability. So I'm not sure how to address the idea that Mr. Furnace has mentioned about the, as an aggregate. That might be an idea. But I certainly think that there should be something in there to make people think twice before they do certain things

with their corporation.

I'd like to remind everybody what happened when the pipeline ended. There was a number of trucking companies that went bankrupt. I guess everybody got stuck with a certain amount of money. I remember one of them that was in the process of selling their assets on the side right here in town, and the courts and the creditors couldn't do anything about it because of the time consumed. Mr. Block alluded to the fact that there are avenues one can go after people if they pirate their corporation. You know, if somebody does something by fraud, trying to prosecute fraud is an exercise in futility I think. If one can get the A.G. to prosecute to start with, which is also doubtful, I'm not trying to denegrate the A.G., but it's just a matter of fact you're not going to get anybody to . . . prosecutorial discretion I guess is the phrase and that stops a lot of things.

I've been involved in workers' comp for the last few years. And I recall three years ago there was a commission set up by Governor Hammond. And I went to all of those meetings. And I recall an individual that worked in a cafe up in Glenallen. And he had injured himself. And after he injured himself, it turned out that that corporation did not have workers' compensation. And his concern now, what happened to him because he couldn't get any money from anybody. There wasn't any. But that he thought it was wrong that this should happen to a working man, and there should be some kind of avenue that it wouldn't happen again.

Two weeks after his testimony, that restaurant went into bankruptcy. Senator Stimson at the time promised that individual that the state would pierce the corporate veil and try to get those people. I don't know if in fact that is a fact. My involvement in workers' comp leads me to the one thing, though, that there are people that form corporations here that either through ignorance or through a nonknowledge of the economics of their business, they don't do certain things. For instance, the procuring of workers' comp.

I'd like to mention my furniture repair business. I have a partner in it that is a young fellow that doesn't understand a lot of these things. And when I told him we had to have workers' comp, and I wouldn't be a party to it unless we were and because I am a partner that's the way it goes, and it is a corporation, we bought workers' comp. I found out that most other people in that business don't even have it, because when I went to find a rating for furniture repairman, it turned out they didn't have one in this state. And the reason they didn't have one in this state is because apparently nobody had ever bought it for this particular profession. Which meant that everybody that practiced that business in the state does not have workers' comp.

So there are a number of people who form corporations for the purpose of tax avoidance. There's all kinds of reasons that I think that corporations, and maybe small ones more than the big ones, should have some form of liability. And I have no idea what the dollar amount should be. I hear a lot of talk today about liability, liability of directors being a problem. I think that the responsibility of directors and officers is equally important. And for me personally I take it personally that any corporation that I'm involved with, that I am going to try and run it ethically and honestly. And if things get bad financially, I'd just better decide to cut my losses and get out of business, and not dump as much as I can on other businessmen around. That's all that I've got.

COWDERY: Thank you. I understand what you said when it was a very complex one hundred and some page bill and a lot of things wasn't understood. And that's what we're trying to make it understandable. It's not that we are trying to cut the bill up, we are just trying to clarify some of the areas that might save some legal problems later on. And you touched on foreign corporations. I was wondering maybe what some of the other witnesses might think about this. That a foreign corporation that operates here, I was wondering if we could penetrate the corporate shield for liability, that's a question that maybe should be thought about, too. You not being an attorney, maybe don't have an answer to that.

THOMPSON: I could probably give you the right answer, but I'll leave it to the attorneys.

COWDERY: Rep. Wendte.

WENDTE: Thank you. This is not a question. I would like to commend you for your attitude in business. It appears to me the Judiciary Committee, it seems to me we deal with a lot of things where you hear a lot, particularly in the crime area, a lot of the horrible things in Alaska and attitudes and things that we have to deal with directly. It's pleasing to have comments such as yours.

COWDERY: Any other questions? Thank you. Representative, Jack.

WENDTE: How did you hear about this bill?

THOMPSON: I have lunch every Wednesday with a number of attorneys because they are friends of mine. And three others of us that pursue honest endeavors. And we talk about a lot of things and this happened to come up. And I also know John Abbott. I don't know about Professor Fessler's background, but I know that he makes the best spaghetti and meatballs in the world. And that's basically, I found out about it some time ago and got a copy of the bill and read it. But I know John Abbott,

and it's just based on conversations with John and other friends that talk together.

WENDTE: You certainly weren't implying that those three attorneys you have lunch with weren't the only honest attorneys in the state.

THOMPSON: There is nine of them.

COWDERY: Thank you. I was hoping that, Rep. Wendte, we have advertised this and we were hoping that some of the people had noticed some of the advertisement in the newspapers.

THOMPSON: I did notice the ad. As a matter of fact, it's probably the largest ad I ever saw and . . .I was looking for the word starring.

COWDERY: Rep. Malone.

MALONE: Mr. Chairman, I also appreciate the testimony, but I wanted to ask a question that hasn't anything to do with this legislation and that is, I would be interested to know, not necessarily now, could get the information later, as to the name of the person involved in this, the worker who was injured in this insurance case . . . sometime I'd like . . .

THOMPSON: It would be a matter of public record because it was in the hearings. And the name of the cafe, the Hub Cafe was the name of the cafe. And this is '84, so it must have been in January or February of '81. It was when Mr. Hammond was still the governor. It was in February of that last year that the hearings were being held because he appointed the commission. And Senator Stimson and Brian Rogers chaired that meeting, and they were both present, as well as Dennis Maloney who was on the committee and Tom O'Keefe of Industrial Indemnity. And the man came in from Glenallen. There was a lot of allegations including the fact that the local magistrate knew about all of this. I mean it was a very serious thing, it sure would leave one with that it's an important thing to make sure that there are no disadvantaged persons that one may not think about. And workers' comp that hit my particular mind because that's my particular advocation bent in that direction.

COWDERY: Thank you. Any more questions? Mr. Henderson, Roger Henderson.

HENDERSON: Ladies and gentlemen. I have spoken before some of you before last year on another matter. I am an attorney in private practice here in Anchorage. And I represent a number of small corporations as general counsel in a wide range of corporate and business activities. And over the years I have also represented hundreds of suppliers outside the state who are on one end of some of this legislation. So I feel that I've got

a rather broad background from both aspects, both creditors and small corporations.

Initially, I would like to say one thing. There has been interest shown by these two committees and the questions asked about the possiblity of insurance. And the two attorneys who testified before me have both analogized any insurance which might be available for this corporate liability to payment and performance bond. Well, as a practical matter, I agree with them, incidentally, that if there were any insurance available to cover this kind of liability for general creditors, it would be in that nature. But as a practical matter, as some of you already know, in order to get a payment and performance bond you've got to pledge personal liability to the bonding company. So you're looking at a full of the wisp. I think this kind of liability as a practical matter not insurable.

I would agree that this proposed legislation does call for substantive changes in both social and economic philosophy. Those changes, not just in Alaska, but changes from the accepted social and economic philosophies that prevail in other states throughout the nation. Now, I'm not going to necessarily criticize all the aspects of this particular legislation. Some of it is very good and probably has been needed for a long time. But I think it is important that you be aware of the potential impact and changes that this bill is likely to bring about should it pass in its present form.

I am going to touch on just a few brief examples that I'll bring to your attention now. I am sure that the committee who is going to be working on this will do a much more, a very thorough job of analyzing this bill in total. For example [TAPE CHANGE] . . . bill would impose an additional requirement for the service of process in the event the registered agent cannot be located or if there is no registered office. Now, I submit that that is an additional imposition upon the creditors of a corporation which I question whether is necessary given the fact that the corporation is the one who is required by law as a condition to coming into existence. To establish a named person as a registered agent and an office where he can be located.

Sec. 310 for example, requires, this has already been mentioned incidentally, requires items to be contained in the articles of incorporation which are presently contained in the bylaws. Here, again, you've heard other witnesses testify as to the increase in costs to start up a corporation. And my estimation is that it probably would increase the initial legal fees either two or three fold.

And one observation I would like to make, and I think it's necessary you keep this in perspective, I have not done a statistical analysis. But it is my opinion that the majority of corporations in this state consist of three or fewer

stockholders. And that the majority of those corporations have a commonality of stockholders, directors and the managers or the officers.

Sec. 230, frankly, I find too complicated for the average person to understand. I read it lightly myself last night. I'm not saying that I couldn't thoroughly comprehend it if I spent the time and went through it line by line. But, sec. 230. There, for example, I suspect that that section if it every raised any issues, that would be resolved by litigation. That the courts would spend quite some time and probably a number of cases would have to be taken up before that could be decided. At the present time the statute is very simple, I don't find anything unworkable about it. It allows the number of directors if less than three to be equal to the number of shareholders in the corporation. The formula is straightforward, and I am not aware of any particular problems with it, at least in the class that I've represented.

Sec. 233, for example, I find that too burdensome. Many corporations at the present time maintain one set of books and records, and it's in the registered agent's office. For about half of the corporations that I represent, I keep the books and records in my office. As a matter of present law, the records are required to be available to any shareholder upon request. If they request the president or the registered agent for a copy or permission to review the corporate records, the person at this time if he doesn't have them is required to tell him where they are. For example, any shareholder who calls my office and says I want to see the records of so and so, is entitled to do so as a matter of law, and he can come in my conference room and do it.

Secs. 358 through 383 are extremely complicated. In my opinion if those sections were enacted, they are basically going to open the door to countless lawsuits as compared to the present law. I am not one of those persons who advocates anything which will cause attorneys to have more work and earn more money from their clients. I like to see the least complicated statutes as possible, and the least amount of litigation. I think these sections are going to open the door to litigation for years to come.

Sec. 450, for example, is another one that is a radical from the existing financial and legal philosophy. Sec. 450, in my interpretation, would impose liability on directors for negligence in judgment. Traditionally, the corporate directors have always been shielded from misjudgment, from mismanagement even, as long as it was not done in bad faith. And I submit that this is going to change the philosophy within the business community and also it's going to open the door for a large number of lawsuits.

Sec. 488, which, of course, is the one that probably has gotten the most attention, the secondary liability allowing the piercing of the corporate veil. I think that the effect of this particular section would be to definitely dampen entrepreneurism. The way it works at the present time is if a small, risky venture started, and many small ventures are risky, and the stockholders are willing to put a certain amount of money into this. As an example, a service that is needed or at least as people perceive is being needed in the community, might require an investment initially of $50,000. Two people who want to start this business are each willing to put up $25,000. But they are certainly not willing to put up any more because they don't know whether the business is going to fly or not. The only way they are going to find out is to get in really and try. But they are willing to make that much of a risk. The business could get started up, for example, and it might do extremely well. It's good for the people who started it, it's good for the community, and it's good for the suppliers that these people deal with. At the present time, if, in fact, it turns out for whatever reason that the business was not there or it was a bad gamble, the risk of that failure is spread among, for example, creditors, many of whom probably include outside suppliers. The type of people who I represent. And just because I represent that type of people, doesn't mean that I'm advocating their position. What I am telling you is that in my opinion you are going to be shifting the risk of failure from the people who supply this operation, and who in fact know the risk they are taking at the present time when they extend credit to a small corporation, to the directors or the managers. And then the question, I think, this group has to ask is whether or not you want to make that radical a change in present philosophies.

So basically, that's all I have to say. I just want members to be aware of the radical changes. In my opinion they are radical departures from existing statutes and philosophies.

COWDERY: Thank you. Rep. Wendte.

WENDTE: You indicated going into your testimony that you've represented both sides of that equasion . . .

HENDERSON: Both the creditors and the small business corporations.

WENDTE: In your judgment, should we make that shift of risk in relation to the creditors.

HENDERSON: In my personal judgment? No.

WENDTE: Your judgment is that the risk should remain with the creditors.

HENDERSON: With some exceptions. Now the workers' comp

problem has been brought out. I would treat that not as a shifting of responsibility, but I think the appropriate place to look at the workers' comp situation is a change in the workers' comp law. It's entirely possible that that is one area where liability should be imposed on directors and managers. But that's a special instance. That's an instance where a form of insurance is required by law to be obtained, and there you would be having a specific sanction for failure to do something that's already required. I see that as a different situation than protection of general creditors.

COWDERY: On my question I asked about the corporate shield of some foreign corporations, do you think that could be penetrated, stockholders of foreign corporations under this?

HENDERSON: Yes, I do. There again this is not based on a thorough reading and a thorough analysis of the bill. The question that should be addressed, in my opinion, is whether or not there is any reason or any need to treat foreign corporations or stockholders of foreign corporations differently from domestic corporations.

FURNACE: Thank you, Mr. Chairman. One of the concerns is that officers and directors of some foreign corporations may be outside of the jurisdiction of the Alaska courts, can you see this as posing a potential problem?

HENDERSON: Not really. They are subject, the foreign corporation is subject to jurisdiction of this court if the corporation is doing business in Alaska.

FURNACE: Excuse me, I'm sorry, I should have referred specifically to the secondary liability in being able to hold the officers and directors of a foreign corporation who may not be subject to the jurisdiction of Alaska courts, I should clarify that.

HENDERSON: Now you are asking a lawyer to do something that he never likes to do, which is to give a legal opinion off the top of his head. My opinion, my initial opinion, is that probably should this statute be passed, Alaska would have jurisdiction over the directors or people personally through our long-arm statute. There again that's going to take some case law to determine specifically, and I'm sure that it would be challenged. And the State Supreme Court ultimately would rule on whether there was personal jurisdiction or not.

COWDERY: Are there further questions? Rep. Liska.

LISKA: Thank you, Mr. Chairman. Mr. Henderson, I sure thank you for your input on this. It's very thorough. The way I read what you're trying to tell us is that this is so radical, this piece of legislation, that we'll have no case law to back it

up. That we're going to end up with a lot, we're inviting a lot of lawsuits. Is the way I'm reading you?

HENDERSON: There again, like my predecessors, I don't claim to be an expert on the corporate codes of the other states. But from reading the comments and the letter of transmittal from the code revision commission to the chairman, I get the impression that even though New York and California are considering revisions to their corporate code, they haven't adopted this statute or this code at the present time. And nobody knows whether they will or not. So at the present time it is my understanding that if this were adopted, many of the exceptions would be new law and would be standing out there for the first time.

COWDERY: Are there other quick questions of the other teleconference sites or other committee members?

KOPONEN: Yes, Mr. Chairman, this is Rep. Koponen in Fairbanks. Does the witness have a copy, or has he read the House and Senate Joint Journal Supplement, dated April 8, 1983, the official commentary of the Alaska Code Revision Commission.

HENDERSON: Not that I am aware of. I've read a lot of things recently, but I don't believe that's one of them.

KOPONEN: I believe there will be a copy there. Page 64. And I'll comment on the statutory restraints and the evasion of corporate assets, which is, of course, you mentioned . . . We've had information about a number of having statutes to govern that is perhaps desirable, whether these are the desirable ones or not. But the absence of this kind of information seems to create just as many suits.

HENDERSON: Well, I think the point that I am trying to make and some of the witnesses before me have been making without coming right out and saying it, is that anytime that you have a statute, certain portions of it are going to be subject to interpretation in the courts.

KOPONEN: Absence in the statutes seems to do the same thing.

HENDERSON: That's true. But case law is, or what we call common law, is basically pretty well established and has been evolved over several hundred years. In a case like this, you're changing what is referred to as the common law, and you're not simply codifying or immortalizing by the legislature existing common law. You are creating law which is contrary to existing common law. And whenever you do that, you create potential court cases where the specific language and the interpretation of the statutes is a matter for the courts to determine.

KOPONEN: Have you read the Western California statutes?

HENDERSON: No, I have not.

KOPONEN: These do seem to be drawn in part from the statutes that we've been . . .

HENDERSON: There again I don't claim to be an expert in the matter, but it's my understanding from reading this single document that portions of the California statute are included in this, but that this does go farther in some respects that the California code as it now exists.

BUSSELL: Are there further questions from any people on the teleconference network or other committee members? If not, just before you leave, Mr. Henderson, can I ask you just a couple of questions? How long have you lived in Alaska and practiced law here?

HENDERSON: I've lived in Alaska 23 years. I've practiced law since 1975.

BUSSELL: And one more question, Roger. Out of all of these, you mentioned you represent a number of corporations. How many of those corporations do you sit on as a board member? And generally, that's the practice of an awful lot of attorneys here.

HENDERSON: It is. It's one that I try to avoid. I give counsel to the board of directors frequently, as a board and individually. And I give legal counsel to the managers and officers. As a matter of my personal practice, I attempt to avoid becoming a board member myself.

BUSSELL: That answer was anticipated. Out of all of these folks that you represent, how many of them, what kind of a percentage would you say have members that carry O & E insurance?

HENDERSON: You mean for the personal liability of officers and directors to creditors?

BUSSELL: No, no. A lot of these, I don't know, you said you represented middle of the road clients, are there a number of these corporations that you represent where O & E insurance is carried?

HENDERSON: I'm not aware of any.

BUSSELL: I think that's an important statement to be made here. And if you represent a large block of what you consider middle corporate, and no one presently carries O & E

insurance?

HENDERSON: Not to my knowledge. There again you must remember the majority of the corporations which I do represent have three or fewer shareholders.

BUSSELL: Where, in your opinion because you've practiced law here so long, is the line generally drawn for O & E insurance? Is it because of the activity of the corporation that it is involved in, or the size of the corporation?

HENDERSON: Generally, the size of the corporation, would be my opinion. I believe that would be more of a determining factor than the nature. The larger corporations would be much more likely to obtain that for their officers and directors than the smaller ones.

BUSSELL: I don't know how far into tax law you go, but is O & E insurance when it's carried by a corporation a tax deductible item?

HENDERSON: Well, I do not have a specialty in taxes, and I think I'd better decline to answer that if you don't mind, Charlie.

BUSSELL: Mr. Henderson, I certainly thank you for taking the time out of your Friday to come down here and share those comments so openly with the committee. I've a lot of questions I could probably ask, but there are an awful lot of people to go. Once again, I really appreciate you coming down.

HENDERSON: Well, I appreciate your members for the opportunity to speak.

COWDERY: Rep. Wendte.

WENDTE: I request that the committee staff get in touch with the Department of Commerce and get the data in terms of the size of corporations. I think that'll be an important aspect of judging the impact of this statute. But I suspect as he said, as a matter fact he was probably conservative when he said just a majority of them are just these three or four people. And I would expect the Department of Commerce would be able to crank that out for us.

COWDERY: We will make that effort. I'm not certain that they have that. . .before, but I'll make that effort. The next person on the list is Mr. John Abbott.

ABBOTT: If I could defer to Professor Daniel Fessler and ask him to make some comments on some of the issues that have been raised.

WENDTE: If we are going to talk time available, I thought the principal purpose of this was to hear the people in Anchorage that wanted to comment essentially on his work. And it might be good to ask if those, I notice people walking out as we've gone through the morning, there may be those who might not be able to testify.

COWDERY: I was just trying to go through the list as it was written down. I didn't mean to preempt anyone. I would leave that discretion to, I think that is true that Mr. Fessler and Mr. Abbott have both been involved, and they're hear to listen as much as [illegible].

ABBOTT: [illegible], Rep. Wendte, we ask to let everybody else testify first [illegible]n . . .

COWDERY: [illegible] just going down through the list, I appreciate your . . .

ABBOTT: We'd like to testify when everybody else has had an opportunity to testify, Mr. Chairman.

VOICE: Any attorney wants the last word, Mr. Chairman.

COWDERY: The next one, Richard Retson.

ROSTEN: Thank you, Mr. Chairman. The name is Richard, Dick Rosten, I'm on the task force for the business law section in the bar also, and have been in private practice here for approximately seven years, representing both large and small corporations, and individuals and partnerships and joint ventures. I think it's a good thing that the code revision commission took a look at our statutes and made several recommendations. There are things which they had recommended which I think should be adopted, and there are other things which I think should at least be thought about some more before a decision is made. So I would join the other members of the task force who have asked for an additional 30 days. There are some things which we've had a chance to focus, and there are some things which we haven't.

I had lunch with one client yesterday and dinner with another client last night and was discussing some of these provisions. And the big one which hits them is this secondary liability issue. I think it potentially has a chilling effect on economic development in the state. People are willing to put up so much capital but perhaps no more. And they are going at risk by putting up that capital to start with. And in some situations if they go to a bank, they probably are going to have to put a personal guarantee down in addition. So they are at risk there. There is risk, different parties are going to have to take the risk. It's a public policy decision just where you want to place the risk. If you put a $25,000 minimum capitalization

requirement into the corporation code, you're effectively denying people who don't have $25,000 the opportunity to utilize a corporation. And I'm not saying it's good or bad necessarily. I just want you to be aware of the impact of that.

The Department of Commerce was mentioned a few minutes ago. I was curious whether anyone on the code revision commission asked the Department of Commerce as to what their thoughts as to what was needed. On the secondary liability, it seems to hit on protecting creditors. Were creditors asked if they felt, where did the initiative come from for that? The body of law, I think it's very good that Alaska be able to draw on a body of case law elsewhere. We are a young state. A lot of the issues that we face have been faced in other states. A lot of people devote a lot of time and money to those, and it's senseless to reinvent the wheel up here. So if we can draw on the law of other states with similar statutory provisions, I think that's far the better.

Some of the people on our task force referred to this thing as the lawyers relief act. Well, we are not looking for ways to make, have more business make more money under this. I think a lot of us, if they are sensible changes, that's fine. But we don't want to make work for ourselves and have our clients spend money on us. That's not what we view our world as a commercial lawyer.

The questions was raised earlier about piercing the corporate veil of a foreign corporation. You can pierce the corporate veil of any corporation if the proper facts are there regardless of whether it's domestic. As a practical matter, it may be more difficult to find out some of the facts and be more expensive to get at the facts. And even if you get a judgment against somebody else and forcing a judgment to another jurisdiction, it can be more difficult, if not impossible. And if you have a $25,000 judgment, for instance, you may or may not be able to find somebody who is going to go chase after their assets in a different state.

Also mentioned earlier was where records, corporate records of the corporations are kept. Some clients I have are very good about keeping up the corporation and they have good record keeping. They keep their corporate books. Other clients of mine say that's what I hire you for, I want you to do it because at least I know where it is. You're organized for that and I've got other things to worry about. I think that's something that should be left in the discretion of the individual client.

I think a lot of the issues as I've looked at this, I first became aware of the bill, by the way, at the bar convention where Professor Fessler made a presentation and quite frankly I think when we heard it wasn't going anywhere last year in the

legislature, we didn't pay that much attention to it. Not unlike the revolutionaries during the American war, until it starts to affect your pocketbook. You don't pay that much attention to change coming down the road. It's here now. I think it does deserve attention, and I think it does deserve the report of the task force so that you have the opportunity to consider that.

There are a number of issues that the code brings to light and leaves up the decision of the individuals involved in the corporation, which I think is a good thing. It says these are issues that need to be considered and under our present statutory scheme, they not, you don't have to consider them. It leaves the option to go one way or the other. I think that's a good thing. On the other hand, I've been in practice here seven years. I represent businesses, and I've not run into insurmountable problems under the present code. But I do think there is a lot of, a lot lacking in the present code, and I would certainly hope that at least some of these provisions would be adopted.

Lastly, I'd just like to mention that as far as the advertisement in the newspaper, I thought that was exceptionally well done as oppose to a tiny legal ad this is something that people would really look at and notice. I commend you for that.

COWDERY: Thank you. Rep. Wendte.

WENDTE: Listening to your comments, you mentioned you met your client at lunch yesterday, I have to acknowledge that some of my corporate records are on dinner napkins, and not particularly well kept. I'd ask the question though, how many are on the task force? How large is the task force?

ROSTEN: We have, I think ten. We've broken it down into different subcommittees to look at different sections. Again, as Dick Block mentioned earlier hitting the economic impact as much as anything else. A scholarly review has already been done. We don't pretend to want to do that again. I think also that two of them would put everyone asleep. One is necessary, two of them would be too much. The particular task force that I'm on is meeting at 7:00 a.m. next Monday morning to go over this. I've asked people to make sure they review this statute before then, all statutes.

WENDTE: Are all ten members from the Anchorage area?

ROSTEN: I believe so.

KELLY: Yes, they are considering the time involved. We had to get a group that would get together immediately . . .

ROSTEN: We talked also about hopefully getting input from the chamber of commerce. At least drawing that to your

attention, I'll recommend that also. We can speak for our client's interests or come to ask questions, but I think it also would be very good if you can get some direct input from business people without having to go through lawyers.

COWDERY: Yes, I had planned, in fact, was going to may contract or had been scheduled to contact the chamber about this matter today, but we will. My intention to hold this, continue this meeting on until 1:00 p.m., and we're going to break for lunch and then come back if we have more people to testify. But we do intend to get a hold of the chamber. Rep. Uehling.

UEHLING: Thank you, Mr. Chairman. Just going over the Journal Supplement here, and a letter that was to Bill Ray from John Abbott, it was stated here that the proposed Alaska Corporations Code is what they call a middle of the road attempt here. Maybe you could comment on that, you had said that there was some problems in what you saw that they had put forward. Maybe you could comment on that.

ROSTEN: I'm not quite sure that I fully understand. It's middle of the road in the sense that it's not all shareholder oriented and it's not all management oriented. I believe that was the intent. And that I think is a good approach. It's a more detailed statute than many states, which may be a good or bad thing from the amount of litigation which may or may not ensue. This means to say, that in the absence of a precise statute sometimes issues don't come to light and you can rely on the common law which has been developed over a couple hundred years. On the other hand, when you put things down in statutes, sometimes they're answered precisely and there is not need to go to the courts. Other times you get a very detailed constitution as it were, and then you worry about well what if something wasn't in there. Was it left out on purpose. Unless I think you're talking about another concept, middle of the road. This is certainly more detailed than a lot of corporation code statutes. But it's hard to predict at this point, whether it's going to mean more or less litigation in the future.

UEHLING: Thank you, Mr. Chairman. And a follow up question, we talked a bit about corporations that were more venture capital intensive, and we also talked about entrepreneurs and getting the more risky ventures. In your opinion do you feel that the proposed changes in the code are really going to limit the venture capitalists, the entrepreneurs and that kind of thing?

ROSTEN: I do think it will as presently constituted. I'm also concerned about the large corporations who are coming in here to do mineral development, who will be subject to these, it may have an impact on them. I'm sensitive to the point where people can track a corporation, they should be paid. One of the risks you have. That's a risk they are generally aware of is

that it is a corporation and you can issue. It depends on the muscle power you have in bargaining. A bank has enough muscle power when you go in to get a loan and make you personally guarantee the loan. Whether you have that capacity when you're making your own contract with a corporation is up to the particular circumstances. So there is no magic answer which is going to protect everybody all the time. My own feeling is one particular issue, and I don't want to place too much emphasis on it, but it is the eyecatcher for everyone, is that it is going to have a chilling effect and it perhaps goes too far in that direction.

COWDERY: Thank you very much. Sec. 960 of the bill exempts officers and directors of many corporations under the provisions of sec. 488. Do you feel that constitution could be, it would seem to me that corporations and officers would certainly challenged that section in a court, if it ever got to court under the Fourteenth Amendment, do you think that could be good job security for attorneys, or how do you look at that?

ROSTEN: Well, I'd say very likely that would be challenged and yes it would created work for attorneys. And no, I don't know how it would come out.

COWDERY: Thank you. Any more, Rep. Bussell.

BUSSELL: Thank you, Mr. Chairman. Are there questions of, if there are none, I'd like to just ask you the same question I've asked most everyone else. How long have you been in Alaska, sir?

ROSTEN: Seven years.

BUSSELL: Seven years. And during your testimony you mentioned that under present statute if you really got a legitimate claim or if a corporation in your opinion has acted improperly, you can pierce the corporate veil and go after it if there is enough money involved in it . . . depending on the action the corporation is involved in.

ROSTEN: Yes, it's a sad fact of life that often times justice is what you can afford. And whether you can pierce the corporate veil, it takes more work than if you have just the individual out there on their own. But if you get a judgment against somebody, it's not worth much unless that person has money too. And the other thing you have to consider is if you pierce the corporate veil, sometimes the person's going to be run on assets and sometimes that person's going to form a coup anyway.

BUSSELL: I've done a little bit of business in Alaska over the years as I've been here too. And oft times as a businessman you have to look at who you're going after and decide

whether it's a risk of continuing your business just how much fuss you stir up. You may lose your shirt going after . . . I've . . . this piece of legislation we've got here, I don't really see changing that, do you?

ROSTEN: No. I think the basic, when clients come into my office and are upset and want to chase after somebody. I warn them that litigation is very expensive, it's a headache to live with no matter which side you're on, and you ought to think very carefully before you pursue that course. Those basic decisions, rules, still need to be made. And I recommend, I do some bankruptcy law also and one of the first questions I ask people is make sure you're not throwing good money after bad. Those sorts of decisions will still need to be made if this code were adopted.

BUSSELL: I don't see anyone on this list from the court system, but being as you've practiced law here seven years, I presume you practiced law . . .can you just give me an estimate from your prospective of what this would do, this piece of legislation's going to do to the case load at the courts, as opposed to present statute?

ROSTEN: It will increase it. It will increase it because any time you adopt a new statute, there is more uncertainty, there is going to be more litigation which will ensue. Whether in five years time there would be more or less case load in the courts is hard to predict because after a certain number of years when things have worked all the way up to the supreme court, decisions have come down, things become clarified, and this code does spell out a lot of things which are not mentioned or otherwise ambiguous under the present code. It's a necessary part of change, and I think if the code overall is a thing worthwhile adopting, that's the price society pays. I'm chuckling because who's going to make money during that. Well, we all know who makes money during that. That is just a price, and that's something you need to consider going into that.

BUSSELL: That answer's about like I thought it would come out, too. But you know I try to avoid saying that this piece of legislation is a a lawyers relief act, although . . .

ROSTEN: Well, this, one of the attorneys in our firm has a cartoon in his office which I find very apt. It shows two farmers arguing over a cow and a lawyer in the middle milking the cow.

BUSSELL: Let me ask you one more question about this $25,000. I don't know exactly how that $25,000 was reached at, whether it was with aid of a dart board or what. After this five years period, let's just say we make up a scenario here, that this thing is adopted tomorrow and we begin this five years. Is

that $25,000 in your opinion going to be $100,000 in five years?

ROSTEN: I think, because it would be increased simply because of inflation or for whatever reason . . .

BUSSELL: Increased as a result of these cases that are going to come forward out of this . . .

ROSTEN: I should say that the five year period, and I guess one exception to that is if this code were adopted in its present form, the number of cases would not decrease after five years under the $25,000. If they can go after somebody for $25,000, you're going to do. And increasing it to $100,000 would increase slightly the number of cases.

BUSSELL: I'm trying to think of the future impact, or impact on future legislatures. If you do this, obviously, or at least if I was out there trying to whack somebody, I would be putting pressure on legislators to increase that amount. And if I were a member of the bar association, I'd be putting pressure on them to increase that turkey so I could get some dough to . . .

ROSTEN: Well, no, not necessarily. I mean I take exception . . . Certainly, speaking as commercial lawyer, my job is to protect my clients. And I represent clients on both sides. And what I think is reasonable is just that. Look at the policy behind the statute, that's a social, philosophical decision to reach what amount, and I think there would be just as many attorneys trying to keep the limit to $25,000 or to decrease it to better protect the corporate clients as there would be on the other side. I think that if you do pass this piece of legislation or something that comes out of this, then it behooves the legislature to stay very closely tuned over the next several years to the good things and the bad things about the legislation as they prove out and to be very willing to take a second look at it. And not say that, well, we've spent a lot of time and effort, now our job is done, and we don't have to worry. And I'm sure there'll be people lobbying you one way or the other.

BUSSELL: Thank you, sir. I don't have any further questions. I do thank you for coming down here and sharing your comments with us. Rep. Wendte.

WENDTE: I just, given the one question that, Rep. Furnace I believe this morning distributed a letter from the court system . . .

BUSSELL: Yes, I have it. And that's the court system's opinion. I'd like an attorney's opinion, practicing here for seven years, and it goes right along with mine. I think that the number of cases would probably quadruple, and I think in five years they would probably double again.

ROSTEN: I don't know that that would necessarily be true in five years.

VOICE: I'm sure Mr. Snowden would not hestitate to point out additional case loads in consideration of his budget, so, they're not known to be too conservative in their budget requests.

BUSSELL: He may want to revise his fiscal note after this . . .

COWDERY: Thank you. Next person up, Mr. Reitman.

VOICE: A question here from Commissioner Brown.

COWDERY: Yes, Mr. Brown.

BROWN: Yes, thank you, Mr. Chairman. What I want to ask Mr. Rosten was one question. Also I would just hope that members of the task force will be in touch both with John Abbott who lives in Anchorage and also Commissioner Jerry Kurtz, because Jerry is the designee of the Alaska Bar Association. In fact, he is their representative on the code revision commission. Mr. Rosten, I hope you know that. You may know Jerry very well. I just wanted to ask about this mention of problems of a burden of requirement of inspection at the place of business. Are you referring to sec. 233 which requires the copy of bylaws to be at the place of business?

ROSTEN: I was referring to what Roger Henderson was referring to. And I don't have the section number right at hand. That would be one instance, yes.

BROWN: O.K. That was the section that he referred to. I'm not really sure how burdensome it is to have a few dozen places for a document has its headquarters office. The other thing, maybe as a footnote either for committee staff or for Professor Fessler or something. I suggest that maybe the response or comment on the Native corporations in 960 might have a different answer after 1991. I don't know if anybody's looked into that. That's all I have, Mr. Chairman.

COWDERY: O.K. Thank you, Mr. Brown. I'm sure the task force will be in contact with the code revision board.

ROSTEN: Yes, we will, and thank you for bringing that to our attention, again.

COWDERY: Stan, is it, it looks like a doctor, no.

REITMAN: My name is Stan Reitman, and I'm an attorney in Anchorage. And I've been here some twenty odd years, and I

have practiced in this area for some length and for some time. I'd just like to make a couple of general observations, if I may, without getting too much in the specifics.

Number one, the existing statute is not broke. It ain't. I think any implication that Alaska picked up something off the shelf that was some sort of absurdity, or some sort of half-baked corporation code is just not true. The genesis of the existing statute was developed in the '50s and has been kept up to date by a series of amendments over the years, which Alaska hasn't kept up with unfortunately. And the people who worked on that statute were, came from a pretty diverse group. There were academics, there were practitioners, there were people in the business world, there were financial types, there were governmental people. And the statute received widespread approval and was picked up by Alaska. [TAPE CHANGE] . . . inovation's sake. You don't want to be different just because you're in Alaska. You want to be like the other jurisdictions. If anything, we want to encourage capital to come in here. We want to encourage lenders to come in. We want entrepreneurs to come in. We don't want to have some special statute in Alaska because we ostensibly have special needs. We have some special needs, but they're not that different than they are in Oregon, or New York, or California. Now admittedly in those two large states, particularly New York and California where there are literally thousands and thousands of competing forces, they have tinkered or developed their own philosophy. But they can do it. They can go it alone to some extent. Alaska doesn't necessarily want to do that. If you've ever dealt with an outside concern that wanted to invest in Alaska, and they want to know something about the climate in which they're going to operate, they want predictibility. That's one of the goals of any law writer or law giver or law academic, or what have you is predictibility. And we want to be able to move freely across state lines.

Now whenever you've had a question or inquiry from somebody in another jurisdiction, whether it was a bank or whether it was an investor, or what have you, we were able to say we have the Model Corporation Act in Alaska. That was recognized and stood us well, in good stead as I say. So just get over the myth that we don't have something that's working because it's not true. It has worked. Now, there are people who, particularly in the last few years, and in regard, I know with the Native corporations who have found some areas which probably need some beefing up or some change or some clarification. And I know that a number of the practitioners who work for the Native corporations have participated in this code, but there are many other people who haven't unfortunately.

Now the second thing that I think is worthy of note is that there definitely has not been adequate consideration to the small corporations or the small group, the ma and pa as it was referred to here. In fact I see in addition to this liability

matter which has been talked about this morning which I think is definitely going to discourage anybody from using a corporation. Just to give you a quick example. If I was going to start an enterprise tomorrow, and I want to hire some talent. And one of the inducements for hiring talent is to make that person an official, an officer, or to give that person some stock in the corporation, you'd be a chump, you'd be a fool, you say, to accept that assignment. I mean you've got to have your head examined. And that's what you'd be foisting on unsuspecting people that are going to go into assisting entrepreneurs. You know the creditors are big boys. If you are in the business of extending credit, whether you're a bank or a materialman or whether you're a lawyer or a lumberman or what have you, you know what it is to grant credit. You're supposed to investigate, you're supposed monitor, you're taking a risk, and that's part of the ball game. So all this great concern about the creditors who are being cheated here in Alaska, I think is just so much poppycock. They're not. We have adequate tools to get at them. And as indicated this morning, if there is any fraud involved, middle-v there is a road to take, that it's dueable. Again, in the small corporation area, or small investor area, one of the tools that's frequently used and very effectively used is a shareholder's agreement. It's a treaty as referred to in the commentary, a treaty if you will. Well, I don't know what's wrong with a treaty. And the treaty, if you will, if there is unanimity among the shareholders is designed to in effect create an operational form that's akin to a partnership, which is very beneficial to the small organization. We are going to have much more difficulty with that. We are going to have a lot more trouble with it that we've got to work through the articles of incorporation as was alluded to this morning.

For example, there has been a swing towards more informality in that if you have less than three shareholders under existing statute, you can have fewer number of directors. In other words, you got two shareholders, you can have two directors. If you have one shareholder, you can have one director. Well, that's been knocked out. And that's symptomatic of what I think is the failure to deal with the small ma and pa corporations, if you will. I think this statute as it stands is going to do a great deal to discourage the use of corporations. If that's what you want to do fine. The movement in the tax law is definitely towards the partnership. I mean, nowadays it isn't as important to use corporations for tax purposes as it used to be. Because to a great extent there is what we call parity now in the law. And many of the advantages that you could procure from a tax standpoint at the corporate level is now available at the unincorporated level. And as also as you know, that for tax purposes now the corporation in the form they call the S corporation is in effect a partnership for all practical purposes. But what you're doing here is you're taking away the corporation in its traditional form as a means of limiting liabity for the investor. And I might add the corporation is a

very useful tool for bringing people in and out of ownership and bringing them in and out of management.

At any rate, I think that the statute does have a number of beneficial provisions in there. But they could have accomplished very much the same thing, ladies and gentlemen, by simply taking the Model Act, which we do have, comparing it with the Model Act as amended at the national level, all right, and seeing those areas where there are deficiencies, and then curing them without sweeping this thing away with one big swoop. And I realize if I were a law writer and I was a law giver, I might want to put my stamp of approval or my name on an auspicious pigce of legislation, but whether or not the public is going to be served is another question.

And I wouldn't be too concerned about this business of the creditors getting put upon. I don't think that's true. I think what you're doing is you're foisting on us without an opportunity for a lot of folk who really work and need the tools that are presently available to have a chance to digest the darn thing. Thank you.

COWDERY: Could you spell your last name.

REITMAN: Yes. R-e-i-t-m-a-n.

COWDERY: Rep. Pestinger.

PESTINGER: Thank you, Mr. Reitman. It looks like we have the opportunity to try to identify the best of the proposed provisions. While we have a practical opportunity which you suggested which is to take our original model act and compare it to how it's been amended on the national level. Can you characterize what kind of a job we would be facing if we took our existing law and compared it to how it's been amended on the national level? Could you characterize what kind of an effort that would be? And could you characterize any particular or identify any particular areas where you d. think we do need to supplement our existing act?

REITMAN: No, well, I wouldn't want to ask a lot of questions. No, I prefer not to get into the detail on that. I think the comparison I'm sure has been done. I'm sure logically and hopefully the revision code committee and Professor Fessler have done this. As to what would be involved in that comparison, I don't think it would be a tremendous undertaking in terms of scholarship or in terms of man days. No, I imagine it could be done in you know less than a week in terms of, less than five days, or something if somebody did it.

PESTINGER: Well, we have this 30 day problem of the task force from the business law section of the Alaska Bar. And I wonder if that task force would be interested in making that

comparison. Now I can't speak for the task force, they're already volunteering as it is. They're taking on a tremendous work load, but I wonder if that may be is a very practical comparison.

REITMAN: I think that's a good suggestion.

COWDERY: Rep. Furnace.

FURNACE: I believe Rep. Pestinger was reading my notes here. No, I appreciate that, I had a question along those same lines. I think you have answered it.

COWDERY: Rep. Bussell.

BUSSELL: Thank you, Mr. Chairman. Mr. Reitman, how long have you been in Alaska?

REITMAN: Twenty-five years.

BUSSELL: I guess I should probably put that on the sheet when everybody signs up so I don't have to ask that question. Thank you.

COWDERY: Thank you. Next person to testify, Mr. Bob Vasquez.

VASQUEZ: Mr. Vasquez. Thank you, Mr. Chairman. Most of the comments, all of the comments, in fact, that I was going to make this morning have already been addressed by the previous witnesses. And in the interests of the committee's valuable time, I will let the comments stay . . .

VOICE: Moderator in Juneau, we have lost the Anchorage transmission for now.

COWDERY: O.K. Fine, we're back on now. Thank you. Mr. David Bendell. State your name and spell your last name for the record, please.

BENDELL: David Bendell, B-e-n-d-e-l-l. And I'm also a member of the Alaska Bar Association's task force. I guess my comments primarily are directed as Mr. Kelly's were, that it is simply difficult, if not impossible, for those members of the task force who at the present time give really any sort of opinion as to the efficacy fo the bill, since we really haven't had that much time to study it. Our organizational meeting was very recently, the other morning. And we're just now in the process of parceling out portions of the bill to be analyzed by various of the volunteers. I'd just like to make a few comments.

The first one is, I guess, a couple of comments have

been made here today that this might be a lawyers relief act. Well, in my case I think that's really quite on point because I'm a bankruptcy lawyer and this is really going to be a relief act for me if this thing gets passed because all these directors and all these officers are going to come knocking on my door. And they're going to say, well, you know I've got all these debts and I've got to get out from under and I'm going to put them under. As to whose benefit that's going to be, I'm not entirely sure. All they're going to say is I'm not really looking for that kind of relief.

The second point, I mentioned I'm practicing in the bankruptcy act, actually practicing in bankruptcy securities. The second concern I have and it's something that we most particularly analyze during the 30 day period, which is why we think it's essential, is the effect that this type of bill is going to have on public offerings of stock in the State of Alaska. As I'm sure many of you are aware, whenever there is a public offering of stock, there has to be a document prepared, a very lengthy document, as an offering statement. And that has to elucidate what is know as risk factors. Risks associated with the offering. I would assume that any offering of any stock of any corporation that's going to operate and do business in the State of Alaska is going to have to have listed as a risk factor for potential stockholders the fact that we have this rather peculiar law in the State of Alaska that in essence does away with limited liability. And my concern is, as I said, my opportunity to review the bill has been minimal. My concern is is what effect this is going to have on the ability to sell such stock. We talk about getting input from the Department of Commerce and from the task force. I think we ought to get some input from people who are securities dealers and find out if they can sell anything from the State of Alaska if we are going to do this. Are the people in New York when they see an offer from the State of Alaska to develop oil and gas or fisheries or anything that's going to make jobs in this state, are they going to say well, we can't sell this, we're not going to touch anything from Alaska because we're concerned that we're going to get sued by investors or stockholders because they end up getting tagged with this liability problems. I think it's an area of concern. I think we'll all have to look at.

And I think the one final comment I was going to make has to do with experience. The people who are affiliated with the business law section are people who work in business all the time. We go into shootouts involving lien priorities and tax liens and adversary proceedings in bankruptcy. And I think the joint experience of the committee will be invaluable to this committee in deciding whether this is a good bill and deciding what type of bill. I think that Mr. Kelly's comment of the essentialness of the 30 days is very valid, and it's something we humbly request.

COWDERY: Thank you. We have, we intend to extend that time. Any questions.

KOPONEN: From Fairbanks.

COWDERY: Rep. Koponen.

KOPONEN: Thank you. Do you think that New York or California corporations have any difficulty in selling stock?

BENDELL: Well, it's my understanding that they have not yet adopted this type of act, and it's something they are talking about . . .

KOPONEN: They are in the statutes.

BENDELL: I'm not entirely sure . . .

KOPONEN: The 1977 revision of the California Code and in New York it goes back to the Dutch . . . and even though . . . did not surrender their limitation on limited liability which most other states did.

BENDELL: I'd like an opportunity to examine that. I'd like to examine what type of effect this has had on public offerings, specifically to the extent limited liability is being done away with respect to shareholders, and that's something I'm not entirely sure of. Like I said, it's difficult for us to comment at this point because I think the business law section was alerted to this just a very short time ago. I got a call from Paul Kelly around two weeks ago. He was very concerned. He was making a flurry of phone calls to various persons who over the years have been involved in the business law committee and our CLE programs. And I just very recently got a copy of the Act, and as to what the effect has been in New York and so forth, I guess that's a real good question. And maybe the best way to answer that question is to call some underwriters in New York and some lawyers in New York and find out what their Act says, and what effect it has had on their offerings, and see if this is something we want to do. You mentioned New York and California, and I haven't seen their enactments, but I think the key thing we have to keep in mind is this is a developing state. This is a frontier. Our needs to have new money and new people to come in here and build this state are much more important than say a state like New York, which is immensely populated and already has very substantial development.

KOPONEN: Can I ask Professor Dessler for the background, I understand he's there. I also understand that he did give a presentation to the bar association. I wonder of the members of the task force, have you been designated by the society of governors, or a part of the business law section of the Anchorage Bar or the State Bar?

BENDELL: We are an ad hoc committee of the business law section of the Alaska Bar Association, which is a, as you may be aware, most bar associations have sections which are committees of lawyers which deal with new developments in the law and put together educational programs for lawyers to educate them in new developments in the law.

KOPONEN: Thank you. That's an ad hoc section of the Anchorage business law section, or is this statewide?

BENDELL: It's statewide. I think Mr. Kelly is the statewide coordinator of the Alaska Bar Association business law section.

KOPONEN: Thank you.

COWDERY: Thank you. Rep. Bussell.

BUSSELL: I have that same question, Mr. Bendell, how long have you lived in Alaska.

BENDELL: I've been here for six years, practicing for five.

BUSSELL: And where did you come from?

BENDELL: New Jersey.

BUSSELL: Did you practice in New Jersey?

BENDELL: No, I didn't.

BUSSELL: Where did you go to law school?

BENDELL: Rutgers.

BUSSELL: Thank you, sir.

BENDELL: Thank you. Thank you for your time.

COWDERY: Next witness up, Mr. Brian Brundin.

BRUNDIN: Thank you, Mr. Chairman. Members of the committee, my name is Brian Brundin and I'm a lawyer with the firm of Huges, Thorsness, Gantz, Powell & Brundin. We practice law in Alaska in Anchorage, Fairbanks, Juneau and Valdez offices. I've been in Alaska 33 years, and I've practiced law for 18 years. I'm a CPA lawyer, and I involve myself primarily in the area you're dealing with today.

I have as I grow older, I have less inhibitions against expressing my own opinions. So I'll do that for you today. Mr.

Reitman said it, I second it. The corporate law of Alaska is not broke. I really didn't know that it needed any particular fixing. My own personal bias for law is this: That if something needs to be done, and there is a public request for it, then there is a reason to do it. And there have been over the years public requests for some changes in our corporate law. But when you come down with a whole brand new one, I'll tell you what the result will be. And that is, and I represent by the way, national, international corporations down to the mom and pop's, the whole range. And the experience will be this, that the national and international ones will hire me and others like them to fix whatever problems exist in here for them. The mom and pop's will get it in the you know where. Because they'll get caught with things that they are not aware of. They don't have lawyers they go to, except when they get in trouble. And when they're in trouble, it'll be too late. Well, didn't you know the law changed and what you were used to is no longer so. Whoops, no I didn't.

I, and many of them, the in betweens, we have in Alaska's business community a lot more in betweens, no mom and pops, no national or international, lots of in betweens. And many of the in betweens have in these recent years found that the wholesale changing of laws costs a lot of money. I'll give you one example that some of you may have experienced. Congress has changed the laws regarding pension/profit sharing plans two or three times in the last five or six years, under URESA, you've heard of that, and so forth. Tax laws have changed constantly, you know that. Every time one of these changes happens, I've clients who have pension and profit sharing plans that had to amend them twice for no good reason. They never were doing anything wrong to begin with, but the law required they amend them. Every corporation will have to be changed if this becomes law. And for those who will have to do the changing, most of them haven't done anything wrong, don't want to do anything different, have never cheated anyone out of anything, and won't. But they will have to incur the cost or run into one of the traps, one of the speed traps down the highway, if they don't change their laws. That's practically what'll happen.

And that goes as well for this one that seems to gather more comment today, and that's the secondary liability. I suspect the other provisions in here are going to cause much more trouble over the years, for the reasons stated that many of them are new. And I think if you stay with model acts you are much better off. But on the liability matter, there really is no difference in my view from saying if a president of a corporation or a secretary is going to be liable, why not a manager of a partnership who is not a partner. Why shouldn't he be liable. Why not the manager of a sole proprietorship. If the reason for making liability is an assumption on your part that the president is the owner and can determine how much money the corporation has to pay its creditors, that's an error, isn't it, because he

doesn't. He doesn't run the corporation. He's hired. Several others, the manager of the grocery store that is not incorporated is hired. He really can't control what the owner does, how much money is in the business. If he's going to be liable because of management decisions, instead of how much money is there, why then I guess any employee of any organization ought to be liable for any of his decisions up to $25,000 to every creditor. It makes just as much sense to me, if that's the reason for it. So I think that passing a law that supposedly fixes this social problem that concentrates on corporations must have some basis other than someone's thought that this is one way to fix something. It goes far more than that, if the reason for it is if you're going to be responsible for your decisions, then everyone in every organization who makes decisions should be responsible. Not just corporate officers.

If I were in your place, I'd put the law aside until someone says section so and so is troubling me, I'd like that changed. And I'd look at section so and so. What you do if you adopt this completely is that the sections that won't raise points today, I expect before this would get passed if it were passed as is, there would be some changes to this liability sections. But there's five or six or seven sections back here that no one's excited about today. They're going to cause someone an awful lot of trouble next year or the year after that nobody thought about or talked about today, or in the next couple of weeks or in the next 30 days for this task force, that weren't broken to begin with and didn't need to get fixed. And you're going to fix somebody, though, for reasons unknown today why it should be done. I'm keeping it short and sweet.

COWDERY: Thank you, Mr. Brundin. Rep. Wendte.

WENDTE: Brian, is it your opinion that every set of articles of incorporation would have to be revised if this bill passes?

BRUNDIN: From the brief reading I've given of this, yes.

COWDERY: Any more House members, anybody on the network care to, any questions? Rep. Furnace.

FURNACE: I just wanted to say Mr. Chairman, I've known Brian for many years and I certainly do respect his opinion.

BRUNDIN: I do have a tax comment I wanted to make, too, if you'd allow. When we put the professional corporation act into law in Alaska, when we first did that, we put a section in that left the professional liable period. We had a tax problem with that so we had to amend it and say, he's liable only for his own malpractice. That's the way the professional corporation act was done. That was done, and I think the same would occur here

on this liability thing. The Internal Revenue Service, if it finds we have a corporation act that says, if you are, as many Alaskans are, the owner, the officer and the director, if you're liable for $25,000 per creditor, friend, you don't have a corporation. And that's what the IRS will say. And so those small corporations, if this law were passed as it now says, who are corporations for tax purposes are going to find they're not.

COWDERY: Thank you. Rep. Bussell.

BUSSELL: Thank you, Brian. That was really my next question, since you said you were a CPA attorney, was about that. And the other question I asked earlier was on the insurance, is that a corporate . . .

BRUNDIN: I guess half of what our law firm does is known as an insurance defense firm. From what I know of it, there is now no director's liability insurance available in the United States. I've looked into that personally. There is not a director's liability policy available. There is one sold which people bought, but there never has been a successful claim made against it. I asked the guy who wrote it whether anyone had ever, it comes out of Chicago, and he said, nope. And that's because it doesn't cover anybody for anything. There is no insurance that I'm aware of which protects businessmen in any shape for their debts, except bonding. And that's not insurance. And when you have bonding, the comment earlier made is quite correct, they'll bond you if you give them your personal assets and the like. In which case, bonding is simply an added, additional cost factor to the liability, since you pay the bill yourself anyway.

BUSSELL: Brian, can I ask you to explain to the committee just what a bond is. I know what it is, but I suspect most of the committee doesn't know what a bond is and how it works if you try and exercise.

BRUNDIN: I think the clearest analogy, it's like you guarantee someone else's debt. You guarantee someone else, borrows from the bank, you guarantee it, and you have to pay it if he doesn't. That's what a bond is only it's done on a more formal basis.

BUSSELL: That's right and they take the bond holder or the guy they sold it to completely to the cleaners before they begin to exercise. That's the important thing about a bond. Thank you, sir.

COWDERY: Rep. Malone.

MALONE: Thank you, Mr. Chairman. I'd like to ask Mr. Brundin, did you see our ad in the newspaper?

BRUNDIN: No, I didn't.

MALONE: Thank you.

BRUNDIN: I missed something pretty good apparently.

COWDERY: Thank you, Mr. Brundin. I think we're going to make the deadline here. We have one more witness, I think, Mr. Bill Cook. Not here, he's left then. So then if we'd like . . .

KELLY: Mr. Chairman, we have one additional witness who was unable to sign up on the sheet. He can come after Mr. Abbott . . .might as well let Mr. Abbott testify.

COWDERY: If you'd like to come forward at this time, we'd appreciate it. State your name and spell your last name, and affiliation.

COPELAND: My name is Mark Copeland. I'm an attorney here in Anchorage. I've been in Anchorage, first came up in 1960, actually came back again in '77 and practiced law since that time. Practiced law since '67. My name is spelled C-o-p-e-l-a-n-d. I would basically concur with Brian Brundin's statements and rather than repeat them, I would like to just add a couple of quick comments.

One is, there has been a lot of concern about unsecured creditors reaching people used corporations to avoid their liabilities. Those same people whether they're incorporated or not will avoid their liabilities Even if they have to move out of state and go in business in another state. So you're not going to catch up with the person who truly desires to avoid his liabilities. I would emphasize that the bill as written is just a trap for the unwary. There are provisions in the bill that we haven't talked about, including provisions with regard to reports as to inside transactions between members of the corporation, shareholders and the corporation. I doubt very much that most people in Alaska would recognize the fact that they have two different businesses that's involving an insider transaction without a lot of discussion and a lot of education by the bar. So those people are going to find that they've failed to meet a statutory requirement. Some way they're going to find foreign corporations as having the same problem.

I find it really amusing that the entire section, or the entire commentary, goes back to New York and California law. I have never heard people who intend to enter into business deliberately seeking out the New York or California codes. Basically, people seek out a Delaware code or another statute that has a long history of business activity and which appears to provide the limited liability that is so important to capital formation and to getting into business.

Someone touched earlier on sec. 450 which provides a negligence standard. You know this is even more extensive than the apparent secondary liability standard of sec. 488. And once you give a lawyer a negligence standard to go after, that's everything. You can sit down and make a business decision and some member of the board of directors, and it turns out that you weren't right. Now it's really a question, were you right because you didn't, because you were negligent, or because you acted in good faith, but you were wrong. And negligence can be anything from you didn't spend enough money to go out and research the new area you were going into, the amount of funding it would take to build your new building, or some other reason. And what you've done is, is you've opened up a very expensive litigation section.

Just one comment, I was reading page 140 of the comments, I guess, and maybe it says it all. It says as early as 1848, the State of New York addressed the interest of employees and others to look at this limited liability question or the secondary liability question. I have now made a survey of the states, and I believe that what we're being asked to look at here is something kind of like the Edsel, it's unique. But this one's been around since 1848, and a large number of other jurisdictions and bodies have looked at it and not rushed out to adopt this proposal. This is a major change in the social and economic philosophy of corporations. And I feel that we should wait and see what happens.

The concept that was talked about earlier about whether or not there is some shareholder liability. There may not be shareholder liability except to the extent that often times an officer, director is also a shareholder. And I thought Mr. Reitman's comment with regard to anyone that accepted the job as a president of a corporation in Alaska if this were passed, would just be out of his mind, is absolutely appropriate. I also wonder about the personal secretary who under this act happens to sign, being the corporate secretary and she's making maybe $24,000 a year and finds out that she's just mortgaged the farm or the house or whatever it is, and to fairly look at this act as a complete act would be very difficult. I favor the other approach which is let's find those sections we don't like and change those.

COWDERY: Thank you. Are there questions from the Labor and Commerce side? Any questions from Fairbanks?

VOICE: Commissioner Brown has a comment.

BROWN: This is Fred Brown in Fairbanks. I'm asking if the next witness or one of the next witnesses is going to be Professor Fessler or some of the attorneys who've just testified have time that they could catch at least some of his remarks. I assume he's going to respond to some of the matters that have

been mentioned here. I know that they have busy schedules, and probably have other engagements, but if th[illegible]'s at all possible, I would hope there would be some kind of . .

COWDERY: O.K. Thank you, Mr. Brown. Any more questions for the witness? Thank you. It's approaching 1:00 p.m., and we had intended to break from 1:00 til 2:30 p.m. now. I'm here for the pleasure of the witnesses here if, I know some of the committee has appointments for lunch with various other people in town, so it would be the pleasure, I would sit here if . . .

VOICE: Mr. Chairman, might I suggest that we invite the witnesses to come back at 2:30 p.m.?

COWDERY: That's what I was getting at. I hope that . .

FESSLER: Mr. Chairman, as somebody who has been working with the code revision commission on this bill . . .

COWDERY: Would you come up to the mike at this time.

FESSLER: Yes, I am Dan Fessler and I've obviously been playing a role in the working on the drafting of this bill for some four years. I'm here from California this afternoon. I'd be very happy to return at 2:30 p.m. You've heard many comments this morning, some of which I think raise questions that are policy questions which only you can address. Some of which because, perhaps of the admitted paucity of time the witnesses have had, have involved statments about the content of the bill which were simply flatly inaccurate, and I would not wish the committee members to be under the illusion that they were. And also, I think that I would like to have the opportunity this afternoon if it is the committee's pleasure to respond to questions from members of the committee. So, of course, I'll be back here at 2:30 p.m. For many of the very busy members of the House, this would be the first time in the three years since this bill has been pending, it was first introduced in March of 1982, that we will have had an opportunity to directly supply information and to answer and respond to questions. So I look forward to that opportunity, sir.

COWDERY: We look forward to seeing you at 2:30 p.m. We'll adjourn this, or recess this meeting until 2:30 p.m.

VOICE: Mr. Chairman, is it your intention to come back with more testimony on this bill, or were you going to go to other subjects at 2:30?

COWDERY: We're going to stay with this and then go to the other subjects as time permits.

VOICE: Do you have any indication as to how many people

are left to testify?

COWDERY: On our list, just the code commission.

VOICE: It's my understanding that the network down here is going to be tied up for something else, so we probably won't be able to tie into that.

COWDERY: O.K. Well, we will certainly have transcripts of all this testimony, so if it's not possible for you to tie in, we'll fill you in Monday. At this time we'll sign off.

COWDERY: . . . to order at this time and three members of the Judiciary Committee are here. Anyway, are we back on? We've reconvened the continuing from the morning meeting, and we had one more witness on the, Mr. Fessler from the code revision commission. If he would come forward at this time, we're dealing with HB 343, an act revising the Alaska Corporate Code. Professor, if you would please identify yourself for the record . . .

FESSLER: Yes, for the record, I'm Dan Fessler. I'm a professor of law at the University of California at Davis and for the past four years have been retained by the code revision commission as its consultant in first surveying the state of existing Alaska law, determining the potential need for revision and then acting as the person who has done the technical work of drafting the value judgments made by the members of the code revision commission. I'm appearing here this afternoon with John Abbott, a member of the Alaska Bar who is the chairman, and with your permission, Rep. Cowdery, Chairman Abbott had some remarks he wished to make before I spoke.

COWDERY: Yes, I would like to announce we have some other people on confirmation that we intend to get right into that as soon as we're through here, so if you'd just please stand by, we'd appreciate it. Mr. Abbott.

ABBOTT: Thank you, Mr. Chairman, members of both of the committees. I'd like to preface my remarks by saying that we are here today, we do have under consideration a rather complex piece of legislation, and it does need to bear full scrutiny as far as the code commission is concerned. What I would like to do, however, is briefly dispel any misapprehension on the part of the committee members as to whether or not this matter was adequately noticed, and I can assure you that it was. The bar association has been represented on the code commission since its inception in 1975.

When this bill was first taken on as a code revision project, the bar association requested, both formally and informally, input from the bar association, and specifically from any business law committee that could be convened to consider

this. In May of 1982 the bar association through its then chairman of the business law committee, Mr. Dick Block who was the first witness to appear here today, specifically requested that the code commission provide Professor Fessler as a speaker to explain the bill that's now in front of the joint committees today. That was 1982. At that time Mr. Dick Block was still the chairman of the business law committee of the business law committee of the bar association. There have been repeated efforts, both formal and informal, to involve the bar association in deliberations in seeking input from them on the drafting, the implementation of this corporation's bill. It's inconceivable to me that anybody could argue that the bar association was not put on notice of what we were doing with the bill, did not have any idea of what was happening with it, or that any of the members could claim that they didn't know or shouldn't have known that this bill was under consideration. Be that as it may, they've asked for a certain amount of time to review the bill. With grave reluctance, I will say on behalf of the commission that we would acquiesce in a 30 day period with review, and we'd hope that the joint committees would hold firm to that 30 day period. As Rep. Malone earlier pointed out, that may or may not be the death knell for this particular bill, and we are pushing hard for consideration of this bill this year.

You've heard a fair amount of testimony concerning the existing Alaska law and the new bill. And I'll let Professor Fessler respond to the claims that it's innovative or radical. It is not. Input on this bill has been provided by me and by Commissioner Jerry Kurtz, who represents the bar association. I have been in Alaska since 1969 and practiced law since that time. Commissioner Kurtz has been in Alaska since 1961 and has practiced law during that time. We both have extensive background in private practice dealing with corporation and corporate abuses. And it was our opinion that there were significant abuses which cried out for [TAPE CHANGE] . . . of the existence of public hearings on a bill. In short, we have taken great pains to contact everybody that might have an interest in this bill. And I think it would be misleading for anyone to claim that they didn't have an opportunity to comment. That opportunity has been present.

At this point in time, if there are no questions, I would turn this over to Professor Fessler.

COWDERY: Yes, I would like to just like comment on your comments, that I think that this morning the question was asked of individuals here if they had known about it, and I think they were expressing their views that maybe they had known about it, but this is the first time they really got serious about listening to it. And under that I think there are 1,400 bills or so that are in the hopper that probably 100 won't become law in the 13th, maybe 150 will become law. So this is in that 1,400 bills, so until it gets down to where there is some action, a lot

of times on bills, people don't get too serious about them until they think there might be some action.

ABBOTT: I appreciate that, Mr. Chairman, and I guess my response would be that I feel there is a professional responsibility on the part of lawyers to participate on bills that will affect them or their clients. And I'm not just talking about notifying the bar association, I'm referring to specific requests for assistance from the bar association to help us, to give us their input as private practitioners in how this law should be drafted. Something we would have welcomed.

COWDERY: I think that's what they expressed this morning, they want to have a part in it. Rep. Wendte.

WENDTE: Could you educate me to the extent of what, could you go through the membership of the commission?

ABBOTT: Yes, I would, Rep. Wendte . . .

WENDTE: And if they represent designated or what their affiliation is.

ABBOTT: Yes, and I'll go just a little further than that. The legislature in 1976 created the Alaska Code Revision Commission due to the success that it felt it had with the subcommission on Title 11, which was the criminal code. Because of the success of that commission enacted a permanent commission, the Alaska Code Revision Commission, gave it a broad mandate to examine all existing laws, statutes, to entertain requests from the court system, the administration, and the legislature as to areas that needed to be looked into. Since that time numerous requests have been entertained from the legislature and from, very few from the private section, some from the administration. The composition of the code commission was such that it fairly represented all three branches of government. There were at that time, one public member appointed by the governor, there was a member from the attorney general's office who also represented the governor through the attorney general's office, there was a representative from the state legislature, there was a senator from the state senate, both appointed by their respective chairs, there was a member of the Alaska Bar Association, and there was a designee of the Alaska Supreme Court chosen by the chief justice. In 1981, I believe it was, that was expanded to include two additional public members, one of whom has been appointed by Governor Sheffield, that's former Representative Fred Brown, the other position is currently vacant. We have as such representation of all three branches of government, and the parties that are readily identifiable as those that would be interested in legislation being passed.

The work of the commission is such that it is transmitted to the legislature in two ways. First, we report on

everything that's done by the commission to the Legislative Council, which is reponsible for oversight of the code revision commission. Secondly, individual materials are sent to individual legislators. You should have just recently received a package of some six bills along with commentary advising you as to what the code commission is doing. We have spread a lot of paper in advising the legislature as to what bills we are considering and what we are doing.

WENDTE: How did this bill been issued, within the commission or administration? How did you begin this review?

ABBOTT: The normal process for consideration of a bill, unless it's a specific request from a legislator or somebody from the administration, is to generally review laws in the State of Alaska, particularly those of a sophisticated nature, since we don't deal with laws that legislatures would normally handle. We deal with those they might not be interested in handling or don't have time to handle. One of the laws that had not been reviewed in quite some time was the corporation code. There was some six months, and that's an estimate, of deliberation in the commission before it was adopted as a formal project to be taken on by the commission. That review indicated that there were some serious needs for revision. So in answer to your question, the bill had its genesis in the code commission itself.

COWDERY: Thank you. Mr. Fessler.

FESSLER: Yes, gentlemen, I'd like if I can to briefly touch on four areas that seem to be sinful to the testimony you heard this morning.

First, I'd like to briefly describe, to clarify for the members, the origin of the bill and at point I'd left the issue of whether or not the bill is radical. Second, what is the state of current Alaska law which comments on the necessity of doing something. Third, sec. 488, the secondary liability of officers and directors, was a matter of great concern this morning. In that connection, I have, I would like to talk about is the bill generally inscrutable, is the drafting such that it cannot be read. And then finally, the issue that was of particular concern to Chairman Bussell, will the bill clog the courts with litigation if you were to enact it into law.

The origin of the bill is as follows: The code commission asked me if I would be interested in doing a survey of existing statutory and decisional law in the business field with a view toward determining whether or not, given the passage of some 23 years since the enactment of the original code, it was time for Alaska to have a code in the corporate field of its own creation. I undertook that by comparing the existing Alaska law to the model corporation act as it has been evolving since that period of time to the corporation experience that had taken place

in New York, which had gone through a similar plenary revision of its law in the late 1960's and to the revision of the California Corporation Act, which had also gone through a some five year, and in that instance, multimillion dollar process of analysis and revision in the early 1970's which culminated in the adoption of the California Corporations Code in the fall of 1972 by that legislature. Now when I reviewed the existing Alaska law, I came back with the following general recommendations.

First, Alaska had adopted at the time of statehood what was then the Oregon version of the model act. And since that time had paid no apparent consistent attention to the corporations code. The Alaska Corporations Code, therefore, was no longer in compliance with the model act. The model act had gone through twenty years of revision and evolution, most of which had not been tracked by amendments to the law here in the State of Alaska.

Second, if one tried to look to decisional law in the Alaska Supreme Court to fill in the gaps, one found there was very little decisional law. The consequence that I drew, or the conclusion I drew, is that a lawyer or citizen in Alaska asking questions the answers to which ought to be ascertainable in very many areas of corporate law, ran up against an absolute blank wall. There was no statutory provision on point, and the Alaska Supreme Court had never spoken to the area at all. Some people today referred to this as the lawyers relief act. The existing Alaska law could only be described as hayday for chiromantists, palm readers, and individuals who stare at crystal balls. If one looks outside of Alaska to the model act on the theory you will find in other states decisional law that readily tell you what Alaska law means, I submit to you that ten minutes of analysis would not support that statement. The model act in various degrees is the law in some 18 to 20 jurisdictions. Their courts over a period of time have reached frequently conflicting interpretation as to the meaning of identical statutory language. And, therefore, it's delightful to sit in a negotiation with a client in which the same statutory language, coupled with a decision that the Supreme Court of West Virginia, of the Court of Appeals in Tennessee, and a federal district court sitting in diversity in Florida is on my side, while on your side you lead off the bidding with a decision of the supreme judicial court of Massachusetts, the Supreme Court of Illinois and a federal district court sitting in New Mexico. Now it is again as to which view would be adopted by an Alaska court, and in a moment I'll talk about the costs both in time and in treasure to citizens of this state in following up that guess with litigation.

It was the philosophy of the code revision commission that the state's economy would be better off if there was in one place a rther thorough expression of basic statutory policy so one did not have to look at a bill supported by a variety of

crutches in order to determine what, exactly, is the answer to a client's question. That is also why the law is organized the way it is. You'll notice it is organized in a manner totally unlike existing Alaska law, which has no organization whatsoever. It is organized in a manner which attempts to restate the area from the beginning of a corporation right on through to dissolution. And to organize it so that it has comprehensive statutory treatment of these important topics in one place and at one time.

The comments which were prepared are an attempt to synthesize in those areas where we continue, and in most areas we continue the policies of the model act, but we have looked at, taken into account, the divergent interpretations and had written the comments in a manner that says that it appears most in concert with our understanding of the law and where this statute as a whole wishes to go, to follow the Tennessee view on this matter and not the Florida view. Now if the legislature were to adopt by concurrent resolution recognition of those comments, you would go a long way toward clearing up the log jam and confusion of outside, lower 48 interpretations of the model act.

This bill hopefully brings to you the best of existing law under the model act. Virtually all provisions of the model act, including the most recent provisions of that act, are contained in this draft. So to the extent that people were wishing this morning that that might happen, gentlemen, it has happened. It also looks to the law of New York for its basic organization. It examined the law of Delaware very carefully, the law of North Carolina with some care because Carolina has gone through a somewhat sweeping although not total reform of its statutory law, and finally the law of California.

Is it a radical bill? Rep. Liska asked the question this morning in several areas. It deserves a very frank answer. Sir, it is not a radical bill. What it attempts to do is to draw a middling, fair, straightline position saying we're not trying to develop a bill that is totally management oriented. Most lawyers would tell you that is the existing law in Delaware. We are not attempting to recommend to you a bill that is totally shareholder oriented. That is the general characterization of the law of California. What we have attempted to do is draw a bill that is more or less neutral on the issue of whether it is to be management overall or shareholders overall, but leave great flexibility to individual Alaskans and their advisors, whether they deem themselves capable of making these decisions or they wish to hire an attorney to structure in the articles of incorporation how this particular corporation will be. There was a lot of complaint this morning that the articles of incorporation would be important for the first time in Alaska if you were to adopt this bill. Since the articles of incorporation function is the very constitutional document in any corporate setting, it seems to me that it is sensible that the basic decisions about the structure of the corporation, prerogatives of

shareholders, limitations, if any, upon the prerogatives of directors and officers, should be stated in that single document. People are not frozen in concrete. The articles may always be amended. The impression was left this morning that you had to be prescient and put it in the original articles, and that is simply not the fact.

Now, there is one area of this bill which is innovative, which has no direct statutory support in any state. And the members of the House Labor and Commerce Committee will recognize this, but for the benefit of those from the Judiciary Committee, that is sec. 488. I might add that we tried to go out of our way to advertise the fact that this is something deserving of your greatest scrutiny. We believe that over a period of time an abuse of the corporation has crept in which it is responsibility of the legislature as the duly elected representatives of the people to think about every 20 or 30 years before it allows it to just go on and on and on. And that is the question as to whether or not merely because someone has achieved corporate status whether they have torn out forms from a book, or if you've been on an airline recently, and you've seen these advertisements for "send me $49.95, and I'll send you something that can show you how without any of your money, without the need of any lawyer, you can reduce your taxes, you can keep all your fortune, and you can be responsible to nobody." Now I submit to you that that is a decision which you must make, but the greatness of this country was never built on premeditated irresponsibility to creditors. And that is being advertised at the present time as a great virtue of the corporate form.

The corporate form with limited liability is a state conferred privilege. It does not exist unless the members of the Alaska Legislature says that it exists. And the question as to whether you have a right from time to time to look at that privilege and to decide whether it's working for the common good or whether it should be fine tuned to rescue any abuse that has crept in, is something which I think you ought not be denied. Now all that sec. 488 does, it does not repeal limited liability to the corporate form. What it does do is this. It recognizes and suggests a solution to the problem if you agree that there is a problem. It recognizes that limited liability is the norm if you have a corporation. It is true, as was stated by some of the attorneys this morning, that there are common law doctrines called "piercing the corporate veil" or disregard of limited liability that theoretically act as a check upon people who abuse limited liability. My survey of Alaska Supreme Court cases in this area reveals two cases in the 25 years that Alaska has been a state. From this we can either conclude that there is simply no problem, and therefore there could not be millions upon millions of dollars in damaging liability under sec. 488, or that the problem is not adequately being addressed under the existing common law doctrine. I suggest that it is likely to be the latter and not the former that is true. To litigate all the

way to the Alaska Supreme Court the issue of piercing the corporate veil requires an individual who has great resources both in time and in treaure. And if you are a creditor who has an $8,000 bill that is owed you, you do not have the money to bring this question to any court. The only individuals that sec. 488 is trying to protect are those individuals with their small claims who have not got, because of the cost of litigation, any attempt to even challenge the question as to whether or not there should be a disregard of limited liability. The solution which is suggested is to impose liability on designated corporate officers and directors. The only other state that has a law in this area, that is remotely comparable, is New York's position, which is limited only in favor of employees. So our recommendation to you goes beyond New York law. And New York fastens the liability upon the ten largest shareholders in the corporation. And that liability cannot be shaken. We did not recommend that you fasten liability on the shareholders on the theory that frequently some shareholders will be totally passive, playing no role in the actual conduct of the business. The suggestion was instead that you place it upon the officers and directors on the theory that they are running the business. Further, we did not follow New York in making this an unshakeable source of liability. Please recognize that sec. 488 says this liability, like any other created here, can be contracted away. That it requires that the corporation obtain in writing the agreement of the potentially advantaged creditor under sec. 488, you employees, etc. That they will not look to the liability which you would have under statute, but instead would release you from that.

We heard two things about that today. First, one of the attorneys who testified this morning that you don't need it because large corporations in dominant market positions will always insist that that be waived. And very small and needy individuals in the marketplace entering contracts are in no market position to resist the demand of waiver. The other was that it doesn't make much difference whether you do go after the owners of these fly by night corporations, because the truth of the matter will be, they, themselves, are going to wind up having no assets. The only analogy I would offer to you is that the same justification could be used if you were out in the waters off the coast of this state in this month and you saw somebody in those waters for not throwing him a rope. First, he might not catch it and second, he might not be able to hold on. But if you at least afford the opportunity to people to have something in lieu of what they now have, which is nothing, you will have gone some distance toward, I think, a useful reform of the law. So that's sec. 488, and any time there are questions, I would be happy to answer.

Rep. Furnace asked several times this morning, would it be wise to reduce the dimension of exposure to an aggregate of $25,000. Rep. Furnace, there are many things you could do. You

could reduce the amount of dollars, you could try and create exemptions, you could wait until the legislature decides that too many people are brought under the umbrella of sec. 488. What I do ask is that you give serious consideration to doing something. Large institutional lenders don't need the protection of 488, and they are not given it by this bill. They will always insist upon the fact that there be personal guarantees, or they should. What we are attempting to do is to offer some hope to people who have no voice and no position because of the de facto costs of litigation. And unless the legislature does something here, that is not the classical American way, to defeat people who cannot afford to take you to court and to try and build the economic future of this state paved on the backs of those individuals. Or if there are thousands or should there be millions of dollars in liability here. Gentlemen, please understand that is already liability in this state. It's just that it is being borne by employees, and it is being borne by materialmen and suppliers. We are not creating a liability here, we are shifting the liability from the creditors. You heard this morning that these creditors should understand that when they do business with a corporation, they are taking that chance. Well, the philosophical question was never better posed. Should it be heads, I win, if there is prosperity as the owner of the business, the prosperity is mine. If, however, the busines should fail, one group of people I will certainly not owe anything to are the people who cannot even afford to sue me for the debts I have incurred to them. That is the only group of people who are the target of sec. 488.

One other matter this morning in this area, is the bill difficult to read. Well, I readily confess that the bill is lengthy. I've attempted to explain why the code revision commission drafted a bill of this nature was recognizing that Alaska has very little common law in the business field. That if questions were to be asked and answered by Alaska sources, not guesstimate, it would be better to have it done by statute in this jurisdiction, rather than wait for 50, 60 or 70 years to build up a large body of common law. Several statements that were made this morning are simply inaccurate in terms of representing to you problems that exist under the bill. I pick out two, because it will not take much of your time to dispel them. And I think that when the gentlemen who testified this morning have greater opportunity to read it, they may conclude that some of the things said this morning are not the problems which through the lack of time they represented them to be.

I would ask you to look at page 54, if you have the bill in front of you. Many of you are not attorneys and therefore I will pose a hypothetical to you. The question was, does this bill require a corporation to have three directors when it may have fewer shareholders than that. Wouldn't that be a ridulous thing. One individual sat in the chair that I'm sitting in this morning and told you that he just found it impossible to

understand this bill's provision on that point. The section is 453, gentlemen, lines 27 and 29. Now if you read that and come away with the conclusion that you don't understand that if a corporation has fewer than three directors, it doesn't need to have any more directors than it does shareholders, then I will be happy to take this and leave. That is not a problem here.

Another statement was made this morning that the bill expands the secondary liability to shareholders. I don't think it takes 30 seconds of attention to page 67, sec. 488, to discover that shareholders have no liability per se under sec. 488 at all. Now there are philosophical problems that many raise with sec. 488, and I would be the last person to try and forestall a clear and vigorous debate on that. And I am the first person to recognize that as the 60 elected representatives of the people of Alaska, the ultimate decision on that point is yours. But I would not want you to make that decision under the influence of misinformation about the bill, no matter how innocent its origin might have been.

Finally, Rep. Bussell was increasingly interested in the issue of would this clog the courts. Rep. Furnace was ahead of him on that question. Rep. Furnace posed that question to the Alaska Court System and has received after their opportunity to review the bill and to comment upon the sections they found of interest and would affect the judiciary, a conclusion which as it is stated very succinctly in the cover letter to the committee. "Reviewed the proposed bill in detail. Our comments are attached". Based upon her comments, the court system concludes that the superior court will not be substantially burdened by passage of this bill. So I suggest to you that the one inquiry to the individuals most likely to be knowledgeable has been lodged by Rep. Furnace and it has been asked. Surely there will be litigation under this bill, but I hope that as the court system recognizes, they will have substantially greater guidance from the legislature as to what the value judgments are that should be brought and not left to the question ultimately of the five appointed members of the Alaska Supreme Court to decide about these matters. The judiciary recognizes that it is desirable that these matters of high public policy be decided by the elected representatives of the people, and I believe that this bill gives you an opportunity to face those questions and to resolve them.

I have volunteered and I wish to simply make it a matter of record to work with the ad hoc group of people who formed themselves at 7:00 a.m yesterday morning who wish 30 days to review the bill. I would because of the press on you and your business have hoped that that would have come earlier. It has not. I addressed that group in May of 1982, the state bar association's annual convention, business law section. In December of 1982 I returned to Anchorage and conducted a two-day seminar on this very bill, and every member of the business law

section in attendance was given a copy of the bill and the comments. This bill, of course, is with very minor revisions nearly identical to the bill that was first introduced in March of 1982. That is the past. In the future in the next 30 days, I will be happy to supply any information. And I reiterate there is a great deal of study of contrasts with the model act, in looking at the Oregon, Washington acts, looking at their decisional law that I will make available to any member of this House or any staff member you designate. You have already spent a great deal of your time and money hiring me and the individuals who serve without any compensation at all, the code revision commissioners, to work on this matter for some four years. We would like to continue to work on the matter and to work with you in the manner that you deem most productive.

If there are any questions, I would welcome the opportunity to respond.

COWDERY: Yes, I'd just like to comment on this bill. How long has this bill been active in the Senate, in the other body? Is that, the point I'm making, this is the second time we've dealt with this bill in the House.

FESSLER: There was a Senate hearing on the bill last year, Mr Chairman, but I would not represent to you and you would have to ask your colleagues in the Senate, that it received extensive attention in the Senate in the last legislature, excuse me, in the first session of the current legislature. The legislature which was immediately passed, had the bill introduced, but it did not hold hearings on it.

COWDERY: Well, the point I'm making, it seems like we've had some criticism, you might have taken it personal, I don't think it was intended to be a personal criticism, but I think we have to hear both sides and the philosophy of the code revision commission is certainly to be commended of this bill. But the philosophy of the legislature will probably be a balance that it has to go through, and these hearings I think are very necessary. And even though we had people that expressed their views, we listened to all sides, including yourself, and respect all the views . . .

FESSLER: The only thing I ask is the opportunity to, if there are areas where through inadvertence or otherwise, misrepresentations are made, you'll spend a great deal of time attempting to acquaint me with the content of this bill. And I would never wish to have you make a judgment that was predicated upon misinformation. That was my, I am offended by little, when it happens, I lose hair, and it's obvious I can't afford much more offense in my life.

COWDERY: One of your comments about creditors that could sign releases, well, I come from, that might sound good in

paper or textbook, but in the real world I've found in my business, I've been in the business for a few years, that when something seems to go sour in creditors, it concerns, the hardest thing you can get them to do is to sign anything that would weaken their chance of getting paid. And any promises or anything in the real world outside of a cashier's check or cash, to get anybody to sign anything, and I think . . .

FESSLER: Yes, most businesses are born in the spirit of optimism. And the time to deal with the creditors on this issue is at that optimistic moment. If you wait until it is evident that the business is going under to ask for releases, it would not be, in the words of one individual, a propitious time.

COWDERY: Yes, well I've worked with companies for years that eventually have something go wrong, so anyway, Rep. Uehling.

UEHLING: Thank you, Mr. Chairman. I just would like to sort of reiterate probably some of the things that you've mentioned here. It's my understanding that when the original code revision code was put into effect in 1953, that we're still under the present Oregon statutes then, I mean we've taken the code question from the Oregon statutes, is that correct?

FESSLER: That is correct and was also the recollection of Judge Stewart who is a member of the commission who was in the first legislature that adopted . . .

UEHLING: And actually there hasn't been any changes in those statutes since that time, but although in Oregon there has been changes that have occurred in that state under the model business act.

FESSLER: There have been amendments to the Alaska act since its original enactment. Some of them as recently as two years ago, when the legislature decided to shift to a biannual reporting as opposed to an annual one. Another one was the requirement, which is an Alaska requirement not in the model act, of identifying individuals who are foreign to the State of Alaska who have a significant interest in the corporation. But Oregon has certainly gone much further. Oregon's law looks less like it did in 1954 than Alaska's does.

UEHLING: And then also another question. If you could, I understand that under the provisions in this code revision, we are talking about value decisions that are made as far as, in regard to shareholders' rights and the board of directors, is there a pretty well of a balance there, maybe you could be more specific about what occurs in this bill regarding that. Because I understand there is a lot of flexibility.

FESSLER: The basic flexibility is in the provision which deals with the mandatory content of the articles and also

with the optional content of the articles. There you decide such basic questions as to whether the shareholders will have along with incumbent directors the right to propose amendments to the bylaws or to the articles, whether or not the shareholder when you have votes on them will vote with simple majorities or whether there will be less than simple majorities or greater than simple majorities. In other words, if you just go down that . . . Chairman Abbott used to have a phrase which was drummed into his brothers and at that time sister on the code revision commission, that he wanted the thing to read like a cookbook, so that a lawyer or a layperson who was setting up a corporation would go right down that matter and begin to discuss. I think one of the great advantages of requiring that they be in the articles is that it provokes the basis of discussion. Even if you're going down a checklist, do you want the shareholders to have the right to vote on amendments to the bylaws. Yes or no. If you're a lawyer, the client may ask well, gee, whether, should we or should we not. And then it's the job of the attorney to explain the advantages and disadvantages. Whether we are going to have cumulative voting, whether there are to be preemptive rights of shareholders are other matters which must be settled.

As statement was made this morning, well, those matters could right now be put in an agreement. Well, under this bill if you enact it, as a side letter of agreement, it wouldn't be effective. It would have to be in the articles. Why did we want that? Because we wanted everybody to focus on that question. We wanted to have a single document which as a prospective shareholder I could ask to examine and see where these basic decisions are. That I couldn't be surprised if there was a letter of agreement that had never come to my attention. We thought that was very important for protecting shareholders, especially shareholders who weren't on board when the corporation was formed, but acquired their shares later.

UEHLING: Then, also, Mr. Chairman, a follow up question, my last question. There was a lot of comment this morning and testimony in regard to case law and evidently there was a real concern about the attorneys and other people who testified that by putting this code revision into effect that we really wouldn't have any kind of a basis to work from. Maybe you could comment on that.

FESSLER: With the exception of sec. 488, every provision in this act is drawn from the statutory law of some other jurisdiction if it is not already existing Alaska law. The whole purpose of the provisions here, which are in the comments, is to point out to people what are the basic decisional laws that you will find out there that have interpreted this or similar language. So that the comments are an attempt to marry this statute to a body of decisional law, far from coming into the world with a law like no other states, I respectfully suggest that that is not accurate. The one major reform that is

conducted here is with regard to accounting, how you go about determining when you can make dividend distributions. That is the law now in the State of California. It is pending in the legislatures of nine other states and the American Bar Association's committee on business law, which is the orator of the content of the model act, has recommended the very provisions in the bill in front of you on the financials of the corporations as being the new provisions of the model act. So in that one other area where there is reform, you are not charting new waters, you have California behind you, you have a number of states ahead of you lining up to get on board, and you have the model act now recommending this to the legislatures of several states.

UEHLING: Now one other follow up question quickly here. Then there was also the question of cost, cost to the people that set up the corporations and costs as far as the mom and pop type of corporations, as it being a very expensive type of operation if we change into this code system, because there would be higher attorney fees, at least I got that sort of feeling. Maybe you could comment very briefly on that . . .

FESSLER: Very briefly I think that the job of anyone setting up a corporation under this code is easier than under existing law because the decisions that are to be made and how they are to be expressed and when the corporation comes into existence and when limited liability obtains, are all set forth here with brightline rules so you know what you're doing. All the problems addressed by statutory provisions in this bill exist in Alaska today. It's just that with regard to half of them, you have no way of knowing what you're doing. I don't regard that as a costless state of affairs when you force people to behave in a world where they are simply surrounded by ambiguity. They may pay now, or pay dearly later. So I think from the vantage point of costs, I have had the privilege in my life of being an attorney since 1966, and of incubating if that can be claimed, it's from my perspective a privilege whether it would be the unanimous consent in this room, I do not know, of thousands of others, but rarely have I seen anything more conducive to handsome livelihood than the ability of a lawyer to conjecture. And we are trying to replace conjecture with learned advice.

COWDERY: Thank you. Rep. Furnace.

FURNACE: Thank you, Mr. Chairman. I've come to the conclusion at lunch today that there's basically nothing wrong with the document as presented. But I think what we're dealing with is somewhat of a philosophical shift within the State of Alaska. It's no great secret that Alaska is still an emerging economy and we go a little slow in some instances. And I guess the main question is, are we ready for such a broad philosophical jump in a number of areas. The legislative body in my opinion often times, should be in a position of responding to changes

that the voters said we need to address, as opposed to heaping upon them massive changes all at one time. And I think that's where some of our indecisions are coming from. You spoke in the bill of the attempt to balance the concerns of the interaction between management and shareholders. I think you've done that. You've shifted, however, the burden from the creditor to the officers and directors of a corporation. That in itself is not bad. A statement was made earlier that creditors are often times very sophisticated, particularly in the State of Alaska. They get all kinds of guarantees and affirmation of debt. They are very selective as to who they will take on as a potential creditor, and whatever. So we do deal with somewhat of a very sophisticated economy in that respect. When we look at sec. 488 and look at the secondary liability which, indeed, is most concerned. It's been my experience that people in the State of Alaska normally in incorporating look to the fact of limited liability whether that's a truism or not, I am aware that you can reach beyond the corporate veil, but it takes some time, but to pass a piece of legislation that somewhat shortens that, that put in the statute perhaps a real firm, the fact that the secondary liability, gives me some concern there. And I'm not saying, I don't think what, simply do away with it, but it's an item that we may not be ready as a community at this point.

One of the other sweeping changes has to do with the serving of process. And surely in the State of Alaska we have a number of persons who are sued daily, under the present act as I recall, a process server must deliver the process to the address of the registered agent. Under the new bill, if he can't find that address or can't find that person, he can simply deliver the process to the commissioner. And I would assume the commission in this instance as being the commissioner of commerce. That the commissioner somewhat acts on behalf of the corporation. Well, indeed that is a sweeping change of taking the responsibility from the corporation, you are putting it back in as a state function and I question if we ought to do that. I mean granted we can amend that out of the bill. The other question that I asked earlier in the deliberation, was it broke, and if it's not broke why fix it. Well, I think we've heard here from some people I respect a great deal, principally Mr. Brundin and Mr. Reitman that I know to be well respected attorneys in this community, and they say basically it's not broke. There are some good sections in this bill that we ought to perhaps endorse and support at this point, but there doesn't appear to be a need to do a sweeping overhaul of our corporate code at this time, and it appears that what this committee is faced with is going through and trying to determine what can we digest at this early stage, what should be phased in over time, and then we do that in concert with the people that we represent. That's the people who have testified and the people, the small business guy that's sitting there. A lot of the realtors are here today, and I would recommend that they read this bill, because a lot of things that they do in a very new area of real estate development could

certainly be affected by this a great deal. They need to know. And I guess I'm concerned too that we've covered the accountants, we've covered the attorneys, we've covered some other persons, but the main persons that will be affected by this, is the little, small business guy. We have not seemed to be able to reach out and make that person aware that we are doing something here that can have a major impact on the way they conduct their business. I'm not saying that's right and I'm not saying that's wrong. But it will affect them and we have not been to date, to my satisfaction . . .committee's satisfaction, been able to reach out and advise these people something is happening that will affect you and you ought to be involved in it.

VOICE: Mr. Chairman, I think that summarizes my concern. Thank you.

COWDERY: Rep. Wendte.

WENDTE: I was very interested in your review of the extent to which you have exposed the bar association to this bill both as it was being formed and then after it was put together. I guess given that background it's not surprising we only have one or two of those who object to this at how it's put together and what your views were bothered to come back to listen to your testimony. I would note though that 100% of the nonattorneys did come back to listen, although he just left, to hear your presentation. The question I would ask, is could you identify by letter I guess if there are extensive, if not you could respnd now, the extent of the sections of this bill that do not match the model act aside from 488.

FESSLER: Yes, sir, if you'll take this commentary . . . the way it works is that with regard to each section in the bill you have a statement under the scope note of exactly what it is to the best of my ability to express it that the bill do. And to the extent that it must interrelate with common law developments, that is done there. Then you have a provision on every section on every section which says change in former Alaska law. There you will find the provisions of Alaska law identified that are affected. You are told the origin of this draft's thing. You'll be told that it's sec. 47 of the model act, or you will be told that it's sec. X of the North Carolina law, or the New York law. And then you will be told as best as I am able to do it, if there is existing statutory law in Alaska, and we didn't simply reenact it, exactly what changes would be made. So you will be able to go through here and identify the source of every provision in this act. Now you will find the model act is here when you get to the area on the "financials", Article 5 of the act. You will find that it is heavily reliant on California law. As I just represented to you that view has now taken hold with the model act, and the revised model act is now in congruence with that provision. It was not when this was written.

The other provisions you will find is that if you look at the model act as it came out originally and as it now exists, it has no organization whatsoever. This act organizes the statutory law in a manner which is taken from New York's act, so it differs from the model act in its organizational format. But I think all for the better, for the existing Alaska Corporations Code would be the Anchorage telephone directory nonalpabetized. And at least it has been set up in an alphabetical manner for you now.

VOICE: Can I gather from that then, that every section with the exception of 488 . . .

FESSLER: Has statutory precedence.

VOICE: Well, is a part of the model act.

FESSLER: No, no, sir. As I say, there are provisions in this act which would, for instance, come from New York or California that might not have exact model act corollaries. The model act itself is not a very comprehensive statutory basis for corporate law, and the reason that the drafters of the model act did that [TAPE CHANGE] . . . And then the legislature having taken the model act is invited to flush it out as it thinks best for the particular jurisdiction. The statement I did make, and I will reiterate, is that the model act and more is here. There are provisions here that go beyond the model act. But I will also tell you that that would not surprise the drafters of the model act. Illinois, which is the state upon whose law the model act was originally adopted, has gone substantially beyond the model act in flushing it out in that state.

VOICE: The identification of those sections is in your memo . . .

FESSLER: Is in your Joint House/Senate Journal, you will find it under the so called change in former Alaska law. The first thing it tells you is where it came from, the second thing it tells you is what the status of existing Alaska law is, and the third thing is it tries to interpret the meaning of that change, if any change there is.

COWDERY: Rep. Malone.

MALONE: Thank you, Mr. Chairman. Question for Mr. Fessler. First I want to see if I understand the explanation you made during your original testimony on how Alaska case law is affected by this new revised version. As I understood the argument, the gist of it was that we have so little case law in Alaska that this legislation in your opinion being clear, and the commentary which further defines it, will give people a better basis for interpretation than our present case law and much

sooner than any case law would ordinarily be developed. Is that right?

FESSLER: That is my belief, sir.

MALONE: The second question I had was that during your testimony you mentioned you found two cases which I think had something to do with trying to . . .

FESSLER: Pierce the corporate veil.

MALONE: Yes, get past the limitation of corporate liability. If those were cases in Alaska, were they successful or . . .

FESSLER: They are Alaska cases. One was and one wasn't. Those cases are identified, Rep. Malone, in the discussion of sec. 488. And so you will find that discussion commencing at page 140 and carrying over to page 143 in which the Alaska cases as well as some cases from other states of interest would be found.

VOICE: A final point, isn't a question, but since we have not had any extensive hearings on this, at least in the Judiciary Committee yet, and since this request made by a group of attorneys in Alaska, I personally would appreciate very much, even if it is at a late date, if Mr. Fessler and the code revision commission would work with the ad hoc group of the Alaska Bar Association on it. Because I don't pretend to be an expert and I would guess that even though I might agree or disagree with various interpretations or proposals, I'll be in a lot better position if there are judgments on the issues.

COWDERY: I would hope, too, and it's my intent that, or interpretation of what was said this morning, it's the intent of the ad hoc group or the other people that testified this morning, to work together to come up with some balance of agreement. And so when it comes back or before we work on it again in this committee, that as it leaves our committee, hopefully, we'll have some agreement that will go on to the next committee of referral for action hopefully.

FESSLER: As I indicated, it would be my pleasure to work with the gentlemen and other interested Alaskans, particularly my office will supply all of the background memoranda and studies that were done over a period of time so that . . . the statement was made this morning by Mr. Block that there was no desire to reinvent the wheel. I can save them the trouble of reconstructing the society that reinvented the wheel. We can and will give them all of that information.

One final point that addressed a concern that Rep. Bussell raised repeatedly this morning. The issue of costs. The

Alaska Federation of Natives appointed a subcommittee to review this bill, and they did it over an extended period of time. One of their interesting conclusions was they felt it would save hundreds of thousands of dollars in legal costs, because they now would be able to ascertain from a statute that originated with the Alaska legislature, rather than from opinions that are, as they put it, frequently expensive guesstimates, not infrequently coming from Washington, D.C. law firms, of what the state of law would be on many areas of great concern to them. And this bill has no more ardent supporters than the AFN at the present time, because they recognize that having had Congress decide for them they should be corporations, they have run a length experiment in exactly what it's like to try and live under existing statutory and common law in the State of Alaska in the corporate field. And they feel that they will save time, not only in litigation, which they will not go through, but on paying lawyers. And the one thing that did come out of everything this morning, is you have an extremely altruistic bar, never have I heard attorneys be so disdainful of future business. Well, there wish will be satisfied if the AFN is correct in its assessment of what would happen should this bill be enacted.

COWDERY: Thank you. We have people on our next committee that have planes to catch and we're running over so I'll, with this comment I hope you'll keep it short.

WENDTE: It is a comment, but I personally have a problem with the second hand expression of reporters, I would request the chairman to specifically invite the AFN, if they had not expressed their opinion.

FESSLER: They were at the hearing, I am reiterating their testimony at the hearing that took place in Juneau, Rep. Wendte, which supports . . .

COWDERY: Like I said, this was the first really hearing that we've had on the bill in the House, but we joined with the hearing of the Senate, but anyway we appreciate your comment.

FESSLER: I thank you very much.

COWDERY: It's the intent, I'm going to recess for about 5 minutes so we can get some of this stuff cleaned off, and we appreciate everybody coming in and being patient with us. And we'll get back to the confirmation. Thank you.

SENATE LABOR & COMMERCE
STANDING COMMITTEE
May 17, 1983
3:00 p.m.

Members Present: Senator Pa[illegible] Rodey

Members Absent: [illegible]enator Dick Eliason, Chairman
Senator Bob Mulcahy
Senator Don Bennett
Senator John Sackett

COMMITTEE CALENDAR

SB 246 Amended Title: An Act revising the corporations code; and providing for an effective date.

WITNESS REGISTER

Professor Dan Fessler, Consultant
Code Revision Commission
University of California, Davis, CA
Phone not provided
Position Statement: Outlined Corporate Code Revision.

Henry Lancaster, Aide
Senator Josephson's Office
Pouch V, Juneau, AK 99811
465-3787
Position Statement: Asked for points of clarification.

Jeff Berry, Aide
House Labor & Commerce Committee
Pouch V, Juneau, AK 99811
465-3892
Position Statement: Asked for points of clarification.

John Abbott, Chairman
Alaska Code Revision Commission
Address and phone not provided
Position Statement: Answered questions from the committee.

Willis Kirkpatrick, Director
Division of Banking, Securities and Corporations
Department of Commerce & Economic Development
Pouch D, Juneau, AK 99811
465-2521
Position Statement: Stated concern regarding the method of keeping the records.

PREVIOUS ACTION

SB 246--There is no previous action to report on this bill.

ACTION NARRATIVE

The meeting of the Senate Labor & Commerce Committee was called to order at 3:00 p.m., with Senator Rodey present. Senators Eliason Chair, Mulcahy, Bennett and Sackett were absent. This meeting was called for the purpose of receiving public testimony on SB 246. The following is a verbatim transcript of the proceedings from a cassette tape of the reel-to-reel tape of the meeting.

SENATOR RODEY: . . . This is a subcommittee meeting of the Labor & Commerce Committee. The task is to review the Code Commission's work on the corporation's statute. We have with us today the Chairman of the Code Revision Commission, Mr. John Abbott, attorney from Anchorage. With us also is Professor Daniel Fessler, who is the author of the corporations code, along with the Code Commission. John, did you have any questions, or rather any comments, you'd like to make? Perhaps the best thing you can do is . . . would be to give everybody here, we have mostly staff people and people from the administration here with us today who, they are the ones that do the real work. And, of course, the legislature . . . this is a complicated matter, the legislature really has to take the opinion of those people who have the time and expertise to work on it.

JOHN ABBOTT: Thank you, Senator Rodey. Just a few preliminary comments before I turn it over to Professor Fessler. The corporations code has been under advisement, so to speak, for about four years now. It has undergone a number of revisions, a lot of thought and a lot of man hours. It is a technical bill. It is the first time that the Alaska Corporations Code will have been substantially revised since its adoption in 1962, at which time it was probably not a very good code. And what the Code Commission has tried to do is to improve it, bring it to modern status as a corporation code governing the activities of people that have acquired a state charter and to fill in a number of voids in areas which the Legislature has not spoken to and which need to be spoken to since a corporate charter is, in effect, a set of directions to anyone wishing to incorporate as to how they are to act as a corporation in the legal diction. That is basically what the Code Commission has done and without further ado, I'll turn it over to Professor Fessler. He'll give you a run down on technical aspects of the code.

PROFESSOR FESSLER: And if it would be helpful, Senator, anytime either, particularly you or any members of the staff that are here have questions, please feel free to interrupt me. I should first begin by identifying myself. I am from the University of California at Davis. I am here in the capacity as a consultant to the Code Revision Commission. I was first retained in the fall of 1979 and asked to review the content of Alaska statutory law on for profit corporations, with a view toward advising the commission as to whether or not I thought that any kind of basic reform

PROFESSOR FESSLER (cont'd): was necessary. I concluded that it was, and I can briefly highlight for you what my thoughts were. When Alaska became a state, the legislature adopted with virtually no modification of what was then the current corporation law of the State of Oregon. The Oregon law in turn was a 1954 version of the model act. Now subsequent to Alaska's adoption of the Oregon act, there have been significant change both in the recommended content of the law. The model act, I should point out parenthetically, is an act which is recommended to the legislatures of the several states by a committee of the American Bar Association. Of necessity, it is a very general act. It pertains to the conditions and experience of no single jurisdiction and over the years it has become the basic act in numerous smaller states. It has never been successful in having much of an impact on the law of those states where any legislature sat down and decided to craft their own corporation's law. The Delaware, New York and California laws, which are the three major approaches to the organization and discipline of corporate activity in the United States, and have reflected very little influence on the model act. We have adopted the model act. Now the model act that was adopted in Oregon in 1954 was obviously not adopted with a view toward any interest that might be in Alaska or in legislatures not be given credit or presence in figuring out their law to become that of another state. Unlike the State of Oregon, which in 1954 had ninety years of common law decisions in the business field, and therefore when the legislature enacted a statute to regulate business activity in Oregon, it could take into account that the Oregon Supreme Court is speaking to these questions for nearly a century. The Alaskan act was brought into our state against a background of a near void of decisional law. And in the years that have intervened, our Supreme Court has had occasion to speak from time to time on business matters. But I think that not even the most optimistic leader of the Alaskan courts would feel that there is today a background of supplemental decisional law. So from a practitioner's vantage point or from a client's vantage point, the corporate law in Alaska starts off as being, bearing no rational relationship to the state. It is subsequent to being enacted here. It has been tinkered with from time to time. There have been some amendments. It has never been thoroughly restated. Amendments to the model act as they have been recommended have some been adopted in Alaska, but most have not. And there is virtually no common law in Alaska, pre-statehood and post-statehood, in this area. So that the biggest problem Alaskans face is that the law with regard to business associations in the state is very sparse, very difficult to determine, and therefore it threatens business with the one thing which business cannot deal with--uncertainty. When questions are raised and business people need legal advice, they need to be told yes or no. The answer maybe isn't very useful at all. For the answer that we may get this eventually decided by the Supreme Court is both an expensive and hideously time consuming period at which to try and predicate corporate decisions or corporate action. So what I have recommended, and over the years what the commission

has evolved, is an extremely comprehensive statute. The bill which is pending in the Senate is Senate Bill 246. It is probably the most elaborately stated corporation's code in the United States. If it has a rival, it would be the California act from the mid-1970's. The reason that this statute speaks on subjects that go considerably beyond the model act is because we are attempting to answer by legislative provision many questions which in other states are answered by well known common law decisions, which decisions we simply do not have in the State of Alaska. So in order to have a thoroughly conceptual and detailed statute, it was felt necessary to begin by looking at some basic philosophical choices. And when the commission looked beyond the State of Alaska it found that the attitude of state government toward corporations varies dramatically from state to state. The most impressive distinction would be between Delaware on the one hand and the State of California, where I come from, on the other. It is sort of surprising to people when they first get into this field that Delaware is the most important American jurisdiction for corporate purposes. If you look at the Fortune list of the 100 largest American corporations, 97 are incorporated in post office boxes in Dover, Delaware. And this is because over the years people in business, in management, have found in the Delaware legislature a very, very receptive and understanding body. Also, the State of Delaware has maintained chancery courts long after they were abolished in all other American jurisdictions with the result that you can get a matter litigated, tried and finally disposed of on appeal in the State of Delaware inside of a 100 days. Again, business cannot stand to be told maybe with regard to a question. Delaware's act is considered a management oriented statute. If there are value judgments to be made giving preference to the prerogatives of shareholders on the one hand, or those of the incumbent management, the officers and directors on the other hand. The Delaware act makes all those value calls in favor of incumbent management. In stark contrast, the State of California has the most pro-shareholder, anti-incumbent management corporations code in the United States. In California, Delaware, excuse me, California directors can serve only one year terms of office. It is illegal to attempt to give a director a longer term of office. The entire board must stand for election at a single meeting held every year. And beyond that, in California shareholders are given the mandatory right to cumulate their votes. The voting scheme designed to maximize the opportunity for minority share interest to gain board representation. Now when one looks at the management oriented Delaware act on the one hand, and the California approach which is to bend everything in favor of shareholders, a decision was made by the Code Revision Commission that we would craft a statute which had no inherent internal bias. Under this proposed bill, it would be possible for individuals desiring to form a corporation, to form a corporation that had all of the prerogatives which California insists upon for a California corporation. In other words, you could choose to have one year terms for directors. You could choose to have no classification of the boards, so that the entire board must stand for

annual elections. You can choose to have cumulative voting, but none of these choices are forced upon you by the state. Therefore, it would be possible under this statute to choose three year terms for directors, to classify the board so that only one-third of the board comes up for election every year, and to deny to the shareholders cumulative voting. What we have attempted to do is to allow people in this state the freedom to make their own business decisions and to make their own decision about what it is they want in terms of management and the rights and prerogatives of the beneficial owners, the shareholders. What we have sought by way of reform, however, is to insure that all of these basic decisions are taken within the context of the articles of incorporation so that there is a single document which shareholders or other interested parties can look to that will you a totally accurate picture of what basic decisions have been made with regard to this specific corporation. For that reason, you will notice that there is important language in the provisions of the act dealing with the articles of incorporation. Two sections, the section that speaks to the mandatory terms which must be covered by the articles and the succeeding section which refers to the optional terms. That has a very important caveat. All of the topics covered in that section are stated by the statute to be effective only if made the object of provision in the articles. Therefore, if you put them in bylaws, if you try to put them in shareholder agreements, statutorily they would be null and void. So that our attempt has been made to make the articles of incorporation and the process of incorporation of a new corporate entity is very much like a cookbook. The statute is a recipe of choices to be made. They are clearly presented. Both the counsel and client should find it very easy to go through the process of incorporation, giving to the clients the opportunity to make basic decisions about the corporation being formed. Thereafter any potential investors will find those decisions clearly reflected in terms of the articles of incorporation. So you have here a statute which is pretty much devoid of any internal bias, in favor of shareholders or in favor of management prerogatives, which has also sought to minimize the role of government. Certain states have recently been adopting acts which have attempted to intrude the government more and more into the area of corporate activity. There is concern about the social responsibility of corporate behavior. There is solicitude about the question as to whether corporate management, the people whom Louis Brandeis once referred to as managing other people's money, the degree to which they were truly, honestly and efficiently exercising their business judgment and what the state's interest ought to be. Our decision has been to recommend to the legislature adoption of a pact which renders certain reporting obligations which must be made to the Department of Commerce and Economic Development which standardizes the reporting obligations, both in terms of their content, their form and their title, so that there will be a habitual pattern of reporting to the state. But beyond that does not seek to give the state a very intrusive role to play in the

operation of for profit corporations. The old pro warranto provision brought by the Attorney General which has never enjoyed much use in the State of Alaska does not come in for much of an enhanced role in statute. Yes?

HENRY LANCASTER: Excuse me, but does your definition of state intrusiveness extend to fiduciary duties and . . . type of shareholders?

PROFESSOR FESSLER: No, when I am speaking now of a statement, I appreciate the opportunity to clarify. I am speaking now of the executive branch of government. I am not speaking now of attempting to minimize the role of the judiciary in the event litigation should take place, but rather to what extent would there be an investigative presence of the Attorney General looking into the operation of corporations. We have two provisions: There is a provision in this act which allows the Attorney General to commence a cause of action designed to seek the dissolution of a corporation. That's the old classical pro warranto procedure for very serious offenses against state law or public policy. There is also a provision for the administrative dissolution of corporations which are merely habitually ignoring the various reporting requirements and tax obligations which the state has created. And those enforcement procedures are placed in the hands of the Commissioner of Commerce and Economic Development. They are administrative procedures. There is a provision in the act which would allow a corporation who just had its charter suspended pursuant to this to appeal to the superior court for a trial de novo on the matter so that the state's role is certainly going to be vindicated in terms of tax obligations or reporting obligations. The prerogatives of the Attorney General of the Department of Law have been protected in this legislation. But basically what we have attempted to do is to force those who control the corporation, especially larger corporations having numerous shareholders, to make annual reports to shareholders. And we assume that the shareholders will be the best source of discipline over the stewardship of people who are managing corporate resources which the shareholders have the beneficial interest in protecting. So for the first time if this act were adopted, there would be mandatory reporting obligations every year on the part of the corporation to its shareholders, giving the shareholders a fairly facile means of gathering what the financial status of the corporation is. Also, you'll be interested in looking at the section on what are called transactions with interested directors and officers. These transactions are specifically defined in the statute, and every year corporate management must disclose to the shareholders the identities, dates and amounts of transactions falling within the statutory definition. The shareholders will have a much better opportunity to decide whether or not there have been abuses of fiduciary obligations. I should also point out the reference to the inquiry about fiduciary obligations, that this statute for the first time gives a clear definition of the duties of care

and loyalty which are owed by a director to the corporation. The statute also specifically delineates the rights of a director to rely on certain information supplied by corporate officers including the opinion of counsel or by committees on which that particular director does not happen to serve. Also for the first time in this statute, fiduciary duties are articulated on behalf of corporate officers. There is no statutory formulation of fiduciary of corporate officers in the State of Alaska today. They would be left intrusive to common law conjecture as to what they were and what the dimension might be. So those are the basic approaches which are taken to this very important question.

HENRY LANCASTER: Does it do anything to relieve the burden or reduce the cost of shareholder litigation in seeking to find that information?

PROFESSOR FESSLER: Well, first, the statute clearly defines the rights in which shareholders will have with regard to inspecting corporate books and records. A distinction is drawn, you'll notice in the provisions of this act, between a shareholder whose basic interest is examining the shareholder list and gaining knowledge of the identity of the other shareholders or even greater interest in trying to figure out how the shares are proportionately handled. We also have created a right of inspection with regard to corporate books and records. The statute specifically includes in that description the books and records of subsidiary corporate entities. Because one of the basic problems that has arisen in jurisdictions in recent times has been that corporations will frequently hide transactions that they know may be objectionable by having those transactions take place within the guise of subsidiary or other affiliated corporate entities. So shareholders are now given statutory rights of inspection, and they are given certain teeth. You'll be interested in the provisions that deal with the consequence to a corporate officer who denies to a shareholder what are that shareholder's statutory rights of inspection, including a $5,000 civil liability to that shareholder in addition to whatever actual damages the shareholder may be able to show by virtue of the denial. In the past, one could simply, in the jargon of the trade, tough it out or stumble when faced with shareholder demands. There were no statutory penalties. There was no legally defined downside risk for such a strategy. There was always the possibility that you might well be sued, but you could take a chance that you could resist any liability on the theory that the shareholder could not show that she had suffered any discreet, provable, ascertainable damages. Those matters have been thought out by the commission, debated at some length, and the commission's recommended positions on that are reflected in this bill. In addition to that, in other words, in addition to the prerogatives which a shareholder who suddenly makes it her business to want to look into these matters, there is as I stated a few moments ago the mandatory

reporting obligations which corporations have. They become more elaborate as the size of the corporation increases, and the inertia of shareholders is thought to require that the corporate management be forced to come to them with annual reports. Some are the twelve pay reports that are required by the Securities and Exchange Commission, so that shareholders would at least be alterted by the basic information imparted in those reports. And then might be well alerted to follow up by inquiries and take advantage of their rights of inspection. And in this regard, there is one other area of Alaska law that I think is shockingly deficient. Alaska is one of two jurisdictions in the United States that has no statutory regulation of the shareholder derivative cause of action. If there has been a reform which has had rough sledding in the United States since the 1940's, it has been the theory that the shareholders could be relied upon like Cincinnatus, at their own expense, to enter lists against those who are managing the corporation and sue using the corporation as the beneficial plaintiff for the litigation. The theory in the 1940's when this became a matter of great vogue in corporate literature was that in this manner corporate responsibility would be returned to corporate. . . The role of government was receding as corporations became more and more, there are more than eight thousand for profit corporations in Alaska already. And that number can only be expected to go up. If the Department of Law were to look into their affairs, they would have to be massively inspected. So the theory was, let the shareholders do it. The difficulty was, of course, the flaw in nature of humankind is nicely reflected in the cross section of individuals who are likely to be shareholders. Therefore, section 435 in the bill is addressed to the statutory regulation of shareholder derivative cause of action. However, it has been to attempt to ferret out the shareholder who was most likely to bring a meritorious cause of action and have the legal resources to stick with that cause of action through a process of prosecution and final adjudication. The basic abuses, of course, over the years have become shareholders would bring what are now . . . referred to as strike suits. The causes of action initiated against the corporation with full knowledge that the corporation could find the expense, both in time and treasury, the adverse publicity of the media picking up that a corporation has been sued for a hundred million dollars or a million dollars, alleging that all of the people who are running the corporation are crooks. And that any individuals who brought these types of action were frequently very interested in having incumbent management simply buy them off with non-judicially supervised, out of court settlements. It is not surprising that the fruits of these non-judicially supervised out of court settlements never went to the corporate treasury, which is a theory in a derivative cause of action, but went to the shareholder who was keeping his peace. All of these types of abuses I think have been prophylactically dealt with in section 435. You will notice that the statute defines standing on the part of

shareholders who will be allowed to bring the derivative cause of action. For the first time the statute clearly settles the issue of when such a shareholder is obliged to exhaust intracorporate remedies by making a demand for the action which the shareholder seeks to have effectuated on the incumbent directors, settles for the first time the question as to what the status of incumbent directors and their business judgment should be, recognizing that the question of whether it is in the best interests of XYZ corporation to engage in litigation for the next two years is not purely a question for lawyers to decide, but for businessmen and businesswomen to decide. And, therefore, unless the directors are themselves accused of being the wrongdoers or under the direct or indirect control of those who are alleged to be the wrondoers, the good faith, independent business judgment of disinterested directors is to be respected and will terminate the cause of action which is created by section 435(a).

HENRY LANCASTER: Yes, (a), I guess that leads me to my next question. I noticed you were expressing corporations for profit. What I am going to ask is what protections does that give public corporations in Alaska. The state oversees some of them against residents claiming themselves to be shareholders who want to take some kind of action.

PROFESSOR FESSLER: Nonprofit corporate entities?

HENRY LANCASTER: Well, AHFC, or any other public corporation.

SENATOR RODEY: This section, this bill we have before us doesn't deal with that question. It's just for profit corporations.

PROFESSOR FESSLER: They are not covered at all.

SENATOR RODEY: Mr. Lancaster is legal counsel with Senator Josephson.

PROFESSOR FESSLER: I see. Well, they are not covered at all. Any government created corporation, either by the state or federal government or any nonprofit corporate entity created, has fallen outside the purview of this particular act. Although the Code Revision Commission has prepared an extensive draft of a not for profit corporations bill which very shortly will be submitted by Chairman Abbott to the Legislative Council with the request that it be introduced.

SENATOR RODEY: Let me ask one question . . .

PROFESSOR FESSLER: Senator.

SENATOR RODEY: . . . particularly since we have the banking director here as well, what impact will this bill have on the banking code?

PROFESSOR FESSLER: Well, basically, you are asking me a question that I am afraid that I cannot answer.

SENATOR RODEY: I always wanted to ask a professor a question that he couldn't answer.

PROFESSOR FESSLER: This does not address banking and corporations.

HENRY LANCASTER: Separate titles also.

SENATOR RODEY: Yes, I know that. Is there, which is the reason I asked, as you know, when you draft corporate articles now as a lawyer you say except for insurance and banking in the State of Alaska is the magic words that you put in. But is there anything in the bill that would affect banking?

PROFESSOR FESSLER: Since banks cannot be formed under the terms of this act, I would say that there would be nothing in this act which would directly affect banking.

SENATOR RODEY: I wanted to put that on the record.

PROFESSOR FESSLER: Well, I think that would be my opinion. I was trying to remember, I think several years ago the commission decided to stick with the basic scheme which was that the current Alaska Corporations Code does not extend to banking. It is receiving discreet statutory treatment, and so it continues to do so.

SENATOR RODEY: That answers my question, and many, many bankers will probably rest easier.

PROFESSOR FESSLER: Well, I assume it will not be because of the enhanced fiduciary obligations that are defined in this code. The bankers will be resting easier, but they are not covered, merely because they would be superfluous . . .

SENATOR RODEY: They become nervous when anybody attempts to change the law.

PROFESSOR FESSLER: If I could generally in terms of suggesting that areas that you might wish to look into for various senators and representatives and committees of the legislature. Article 4 of this act deals with corporate finance. It brings about a suggested reform that I think will be most welcome in the state. One of the most difficult legal issues of the present time is to decide when it is licit for corporate management to make a distribution of corporate assets to the beneficial owners, most commonly in the form of payment of dividends. The difficulty has been that the legal profession in the 1920's began to intrude concepts which were apparently meaningful to lawyers, concepts such as earned surplus, reduction surplus, which had no meaning then or now to

accountants. They also had no meaning then or now to individuals who are in the business world. Consequently, we have the sort of Alice in Wonderland business of the law speaking one language venerating certain very ill defined value judgments with regard to this basic issue, and the accounting profession which was charged with obeying the law or keeping accounting clients within the law, and men and women of good faith desirous of obeying the law in an abysmal state of ignorance as to what exactly it was that the law wanted. Now, California in the 1970's spent a great deal of time and no little treasure attempting to solve this question. They came up with a scheme which is called the ratio/assets surplus test. And with very minor modifications, that is the basis of Article 4 of this proposed bill. It answers the very primitive question of when can a corporation make a licit distribution of assets with a very simple answer. Any time the assets of the corporation exceed its liabilities by a ratio of five dollars of assets to four dollars of liabilities. Any corporate assets beyond that ratio are free to make distributions to shareholders. So that if a corporation has five hundred thousand dollars in assets and four hundred thousand dollars in liabilities, it could make no distribution to shareholders at all. If it had six hundred thousand dollars in assets and four hundred thousand dollars in liabilities, it could make a distribution up to one hundred thousand dollars at which point its assets would have been brought into the statutory equilibrium of liabilities, and no further distribution would be licit. There is a further caveat. The statute does take into account that there is a big distinction between fixed and current assets. If a corporation which had most of its assets tied up in illiquid matters such as land or a factory and had in its liabilities recurrent, short-term money obligations, even though the total ratio of assets to liabilities might meet the so called ratio/assets surplus test, there is a requirement that giving a prospective effect of the proposed distribution that current assets, which is a term of art to accountants, equal current liabilities, another term of art to accountants. The basic scheme here with regard to all accounting concepts is to leave them to the evolved understanding of the accounting profession. You will notice here that the statute does not contain definitions of accounting concepts at all. It simply says that in reckoning the ratio/assets surplus test, that management is to be guided by the decisions or recommendations of members of the Certified Public Accounting field. So as they evolve their various understandings, our act will also beneficially evolve. We will never be wedded to a set of accounting principles which are constantly being eroded as they are being improved by the accounting profession. So that I think that reform will be very deducible in allowing people to be prudentially advised now or frequently to be able to get along without the needed advice, because it is a fairly easy test for accountants to apply. So that in Alaska at the present time, you have a statute which contains elements of two antiquated tests, the so called earned surplus test and

the balance sheet surplus test, are used by various jurisdictions that have a model act. In other words, if you look at our statutory language it doesn't define the test. If you then look at other states that have similar statutory language, you run into a sea of confusion. Since we have no decisional law interpreting our statute, an accountant or businesswoman in this state faces one of the most vexing of all dilemmas. A statute which we have not interpreted which faces divergent and frankly at war interpretations of other jurisdictions. That would all be swept aside and replaced now by fairly easily understood concepts.

SENATOR RODEY: Could you deal with the question of the secondary liability of directors. I think that's an important one. Obviously there are problems in this jurisdiction in that area, and it would probably be one of the more controversial aspects of the bill.

PROFESSOR FESSLER: Yes, one of the most difficult questions that I think the legislature may well wish to face is the idea of corporations being used in a manner which is very, very unlike the classical image of a corporation. Remember now I am talking about limited liability. The corporation is the only vehicle for the conduct of business which carries with it the presumption of limited liability for all participants. For both tort and contract claimants the theory is that the assets of th individual shareholders are not at risk beyond the assets which they have contributed by the way of capitalization of corporation in subscribing for stock. Limited liability was extended to corporations in the United States in the 19th Century on the assumption that this permitted individuals who were risked at first, but who had surplus assets to give those assets over to individuals who were without assets themselves, but who had management talents and were very interested in taking other people's money and developing them into businesses which would later on become manufcturers and employers. And, in other words, major economic entities for the benefit of everybody. Limited liability to those shareholders was thought to be essential because the shareholders almost by definition were going to play an extremely passive role in the corporation. Having large public issue corporations today, that is still generally true. I have inherited fifteen shares of stock in Western Union Corporation, an entity for whatever virtues it may have, I would state on the record has never produced large dividends for me and is an entity which has had some substantial difficulties. There is literally nothing which I as an owner of fifteen shares in Western Union can do to meaningfully influence the business decisions of those in management of Western Union. The notion that I should enjoy limited liability for the debts of Western Union or even the tort claims against Western Union is probably senseless. But since 1950, and there have been several books, if you ever fly on an airliner, you are aware that you see constantly ads in all the airline magazines, how to set up

your own corporation. So you've been bankrupt five times, so you don't have any assets, etc., you, too, can have a great tax dodge. You don't have to put up any money at all, and none of your personal assets are at risk here. The sad part about that forty-nine dollar trap is that it is pretty much true. And I think it became true not because any legislature in any state ever said that that should be what would happen. That I as a one single sole could incorporate myself, or that two or three people could incorporate, put up a few dollars in assets, conduct the business so long as it was to our interests. And when it was no longer to our self advantage to simply walk away from that business in this state and you are not at all unique. You have several thousand more corporations that you haven't heard from in months or years. They were never dissolved. They just went away. And they likely went away owing lots of relatively small people money that to those individuals meant a lot. There were employees who weren't paid, and then they found out that the owner of the business didn't owe them the money because business had been incorporated. There were materialmen and suppliers who were not paid because the business had been incorporated. The same enterpriser not infrequently goes on the start another business in another corporate personna and operate that business so long as it is convenient. In other words, what I am suggesting is that limited liability, just as the airline magazines now advertise, has become a very, very simple means of abusing one's creditors. You can only take bankruptcy once every six years, but you can walk away from a corporation once every six days, and there is nothing illegal about it. Banks aren't too interested in this problem. Insurance companies and other institutional lenders are not too concerned about this problem, because when an individual in a business goes to them and wants to borrow money they always ask for individual cosigners. They ask for the incursion of personal liability. The people who are the fall guys in this situation are the hundreds of small creditors who extend credit on open account. So, one of the questions which was debated at length in the Code Revision Commission was what could be done to make people running corporations have any greater sense of responsibility to creditors. In theory, of course, each of you who is a lawyer well knows, that limited liability has never been guaranteed, and there are numerous common law doctrines for quote piercing the corporate veil. Indeed, in California the idea that the business has been thinly capitalized, a term not well defined but at least well conceptualized, is a ground for a court to overturn the limited liability of some or all the shareholders. But if you are an individual who has a four or five thousand dollar claim against the business, you certainly do not have the assets to prosecute through the court system a suit designed to pierce the corporate veil and gain the personal liability of shareholders who have abusively conducted business in the corporate forum. The time and cost of litigation means this is a fairly availing strategy. Now New York, which was the first major American jurisdiction to

permit corporations to come into existence, has never granted total limited liability. This is not well known outside of New York, but it has been the content of New York statutory law from 1834 until this afternoon. And they appear to have no intention of changing it. In New York with regard to employee claims to compensation, wages owed, etc., the ten largest shareholders in the corporation have always been totally statutorily liable, jointly and severally, in their personal assets. Now the problem isn't limited just to employees, and we felt that putting the liability on the ten largest shareholders was not the best way to go. Most corporations doing business under the Alaska Corporations Code as it exists today would have fewer than ten shareholders. Some of those shareholders would be very active in the conduct of the business but others might be quite passive, either because they have retired, they are the surviving spouses of individuals who were active in the business, or they have inherited stock from parents who were active in the business, or because they never planned to be active in the business to begin with. Therefore, putting liability on those individuals seemed to be putting liability on individuals who have not made the decisions which created the liability to third party claimants. So, the act has come up with this notion of secondary liability of officers and directors. Those are the people who make the business decisions. They incur the liabilities to third parties. They are active. If the legislature were to adopt the Code Revision Commission's recommendations, directors and certain named officers of the corporation, or individuals who were discharging the functions of those offices even if they were given different titles. You can see that if the president of the corporation has statutory liability, you might try to create a corporation that had a great pooh-bah but no president on the theory that nobody would be behind the label to whom the statute can pin the liability. So the persons who would occupy and discharge the functions which were normally to be attributed to the president, vice president, etc., of the corporation are liable to creditors for an amount up to twenty-five thousand dollars. Now, that is per creditor. So there could be very significant liability under this statute. If you have ten creditors then there could be a quarter of a million dollars in total liability here. The liability is joint liability with the right of contribution. The liability extends in favor of a statutorily defined class of creditors. Those creditors include employees, materialmen and suppliers and others who extend credit to the corporation on open account. The liability is not mandatory. The statute specifically says, and some individuals who read this statute have either refused to recognize that this is the way it is written or they just simply don't wish to read it carefully. The statute plainly says that the liability which was created can be contracted away. In other words, in writing any individual who is made the beneficiary of this liability can release

any or all of the individuals who are incurring the liability. Therefore, if the corporation and its officers and directors desire to do business if you ran a restaurant in this town and you habitually bought fresh fish down on the wharves. Almost always that is presently sold to you on open account. You get a little bill at the end of the month. There is nothing in writing. At the present time if you closed the restaurant and walk away from it, the individual to whom you owe five thousand dollars or ten thousand or twelve thousand dollars for fish if you incorporate the business has no tactical recourse against you. He can't afford to get a lawyer, he can't afford to try to pierce the corporate veil, he just eats the loss. Now, you could go to that individual and say do you realize that my restaurant is a corporation, and I would like you to agree that in the event that this business fails, you will right here in writing state and you will not look to any of us for payment, but you will accept whatever payment the corporation is able to make. But unless the corporation takes the precaution to gain the written release of reduction of that liability, it is open to total contractual modification. This statute would create that secondary liability.

JEFF BERRY: Is that provision in the statute?

PROFESSOR FESSLER: It certainly is.

JEFF BERRY: So an employer could go to an employee and say it is a term or condition of your employment that you must release us from any liability if we strip the corporation.

PROFESSOR FESSLER: If we what?

JEFF BERRY: Strip the corporation. In other words, strip all the assets out along the way.

PROFESSOR FESSLER: Well, that would certainly be done in form, sir, but I mean whether or not that contract would stand up against an assault in could would be another question. And there are going to be some problems with allowing this contractual modification. You pose a very difficult one of the employer saying to somebody, I want your conscience, your conscious waiver of this right you have. Not on the theory that I am going to strip the corporation, but that I am not guaranteeing that this business will be successful. And, therefore, I want you to help share the risk with me if the business . . . [END OF FIRST SIDE OF TAPE] of the commission. I would find that this is probably a tolerable pattern of behavior.

JEFF BERRY: I think it would run afoul of some labor laws. The rights of employees cannot be waived of minimum wage, for instance, and that may run afoul to federal labor law statutes which guarantee certain rights to individuals that would be setting a term or condition of employment that cannot be waived . . .

JOHN ABBOTT: Okay, but you have to keep in mind that the present corporation law doesn't provide this cause of action or this liability against officers and directors.

PROFESSOR FESSLER: So they don't have that right today.

JOHN ABBOTT/SENATOR RODEY: They don't right now.

JOHN ABBOTT: We are not talking about doing away with some protection that employees presently have.

PROFESSOR FESSLER: You might want to look into, in terms of the Labor Committee, might wish to look into the question as to whether or not it thinks it's a good idea that employees could be put in a position to be asked to waive this secondary liability. But right now it's a right they don't have. So I doubt that any existing legislation would protect it.

JEFF BERRY: Well, if you put it in this form, it may be a right that they would never have. It would exist only on paper.

JOHN ABBOTT: No, no. You are assuming that there is some right there presently that there is not. There is . . .

JEFF BERRY: Well, we hopefully would be creating that right.

PROFESSOR FESSLER/JOHN ABBOTT: Sure.

PROFESSOR FESSLER: Yes, that's fine.

JEFF BERRY: For potential abuses or for, particular for potential abuses because that is really the only area that it would go into. If a person had started a corporation and it failed, they are not going to have anything anyway. And they are going to take everything that they have traditionally and attempt to satisfy the creditors. I think it is a pretty safe assumption that we could make. The question would be in those cases where they may have transferred the funds for whatever purposes elsewhere and walked away. . . then you may not be creating that right. Maybe as far as wages, certainly it's a different bargaining position, employer and employee as opposed to that. I am willing to open an account with you and everything. I think that there is a balancing effect that we could quite possibly look at as to say, can an employee actually bargain with the employer on an equal footing. And that basis would be really creating a right or a disservice, perhaps.

PROFESSOR FESSLER: Well, again, the section we are referring to, sir, that everyone can look at it later is section 488, which shows up at page 67 of SB 246. The group of individuals who are made liable are defined by section 488(a). They are the president, secretary and treasurer or individuals performing the functions of those offices. Notice that section 488 also extends to foreign

corporations doing business in Alaska. This is necessary if you are going to conclude an end run around whatever the legislature does by the simple expedience of foreign incorporation, and then coming back to Alaska to do business as a Delaware corporation, or as an Oregon corporation, or a Nevada corporation. So that this act is applied to foreign corporations doing business in the state. And then you'll notice that there is language here that says to the extent that the act as a corporate entity prove insufficient. In other words, the person seeking to be covered under section 488 would first have to exhaust the liability of the corporation. You couldn't come after a director just because that individual was a more obvious target as a defendant. Now, you'll notice that the liability is for contract indebtedness, whether formal or otherwise, for materials, supplies, inventory or services furnished, and that's what covers the employees. During the period of service, so if a director wants to know how long would I be liable and for what amount. Well, it would only be for those contract indebtedness claims arising during my period of service on the board. (b) is the point that I was making a few minutes ago. The terms of a written contract, not an oral understanding, but a written contract between a corporation and a third party may modify or preclude the liability. And then (c) is designed to keep a large creditor from dividing the claim and assigning twenty five thousand dollar portions of the claim to friends or family members, etc., in order to get more liability than the legislature intends here. Large creditors were perfectly willing to fend for themselves in dealing with corporations. It is the small person who we are interested in protecting here. And then you'll notice under (d) that a party against whom a claim is asserted under this section is entitled to a contribution from others under (a) so that there is a right of contribution that is created to spread the loss. Yes, sir.

JEFF BERRY: I have a tangential question, since you said the word foreign corporation. A question was asked from the insurance administrator. At the current time the Director of Insurance is the registered agent for all foreign corporations. And they are exempt from registering under the corporation statutes. How would this proposed legislation affect that? Would they then become subject to dual registration for the purpose of legally serving anyone who is an admitted insurer, whether it is excess or insurance for that state. I looked through and I really didn't see it and . . .

PROFESSOR FESSLER: The answer, sir, is clear in section 5, that a corporation may be organized under this chapter for any lawful purpose except for the purposes of banking and insurance. So insurance corporations are totally excluded from this legislation. They would face no dual reporting or . . .

JEFF BERRY: They weren't really too sure.

PROFESSOR FESSLER: Well, I mean, one of the problems which I certainly recognize is that a bill of this complexity which has evolved through drafts, repeated drafts, and hearings, most recently six months work with the Alaska Federation of Natives study subcomittee on this subject. It is itself now, by the time it comes to the members of the House and Senate an extremely lengthy, and I think it does not betray the reality to say, a complex piece of legislation. And even I who find gardening thrilling in my pastoral existence in Davis, would not find this the most exciting reading in the world. But we have to the extent possible attempted to provide very extensive comments that are designed to explain, not only to members of the House and Senate and professional staff, but also to citizens, lawyers, and other interested persons in the greater world that lies outside this building, exactly what the intentions were. You will notice that one of the other things which the official comments seeks to do is to give Alaska an instant common law heritage by taking into account certain of the very major common law decisions in allied areas. And stating whether or not in the commission's view, hopefully in the legislature's view, adherence to those famous decisions in other jurisdictions would or would not be consistent with the rules and philosophies that are being framed legislatively here. This is very important where we have continued provisions of existing law, because they were model act provisions and we felt that they were adequate. But when you went outside of Alaska you found that they were the object of conflicting interpretation. The comments will tell you which line of common law interpretation are being approved and specifically which common law decisions are being disapproved. So that a lawyer now would be able to advise a client as to what the legislative history was and to be able to integrate it with the greater body of common law. Senator, do you have any other specific questions?

SENATOR RODEY: Not any specific questions, no.

PROFESSOR FESSLER: Fine. The other factor which I would commend to the general attention of the members is that the rights of members when a corporation is going through what is called an organic change where there is going to be a merger, corporation (A) merges into corporation (B), a consolidation. Corporations (A) and (B) emerge as new corporation (C), or a sale of all or substantially all corporate assets other than in the usual course of business where a corporation sells virtually all of its assets to (B) corporation which takes them over. These organic changes which are very ill defined in existing Alaska statutory law are now very clearly defined, and the rights of shareholders to be allowed to vote before such a plan is affected and not a fait accompli is guaranteed by this new statute. And also shareholders who vote no on the question of organic change are given the statutory rights which are called dissenter's rights which

is a right to have the new corporation buy the shares of the dissenting stockholders at a fair value which is to be determined on the day before the vote in favor of the organic change is taken. And as we always do, you'll notice consistently here when value comes up, the statute first gives to the shareholder and the corporation made liable to pay the dissenting shares the opportunity to fix the value by mutual agreement. If they are unable to do so, the statute provides that the court may appoint appraisers, and the decision of the appraisers as to the value of the stock is binding both on the dissenting shareholders all of them so no one is paid five dollars, and somebody else is paid three-fifty, and the corporation, and that this matter can be expeditiously settled within sixty days, because the last thing that the corporation which has just gone through an organic change needs is protracted uncertainty as to the dimension of its liabilities to any dissenting shareholders.

JEFF BERRY: What is the ratio of percentage of what a shareholder can buy into this new corporation that's in a sell-out situation. Corporation (C) sells out to a multinational corporation, what percentage do they automatically get to buy. The shareholder can't do that with a multinationational.

PROFESSOR FESSLER: The statute creates the general presumption that they are entitled, in other words, all shares must be treated equally. So that if any of the shares in the corporation are going to be given shares of stock in the multinational purchaser then all of the shareholders must be accorded similar rights. You cannot discriminate between shareholders of the same class of stock and say, we find it very convivial to bring in the family of the new corporation. All of the shareholders in this room, except Fessler, and we really don't want him as a participant in our new business, so we are going to give him a thousand dollars for his stock. That would be discriminatory treatment, and we either have to give everybody money or everybody stock.

JEFF BERRY: But what percentage of stock? What portion of the corporation?

PROFESSOR FESSLER: That would be framed by the boards of directors of the two corporations. In other words, if there is a merger the statute puts upon the board of directors of "X" corporation framing the terms of the merger and upon the board of "Y" corporation consent to those terms. That's done at the board level. Then each corporation is obliged to go to its respective shareholders and bring to those shareholders the terms of the proposed organic change. The statute grants a right to all shareholders to vote on this organic change even if they otherwise hold nonvoting classes of stock. And if the corporation has classified its stock, there is an obligation that before the organic change can be affected it must command a majority, not only of all the shares, but of each class of the shares. So we do not seek to build in any guaranteed

ratio of the shares, but we do seek to have it brought to the attention of the shareholders of the respective corporations. And then by giving everybody voting rights, we are trying to make certain that in their self-interest the shareholders will reject or accede to the request. And as I say, any shareholder who votes no on the organic change is given the right to have the successor corporation buy out those percentage shares at a value that was supposed to be the fair value not taking the organic change into account at all. So it is an elaborate balancing of values, but generally what we are doing is we are saying that we like the result that the Supreme Court of Delaware came up with in the Singer v. Magnavox case, and we don't care for the Panzer decision which came along ten months later. And you'll notice that the comments specifically confer a seal of approval on Singer and Magnavox, both as a result and its reasoning, and indicate that the legislature has adopted and framed this statute to carry into effect the Magnavox decision. And if the legislature would regard a judicial construction of this act in a manner that is consonant with the Panzer case as being contrary to the legislature's intention. So we tried to stay on top of the major decisions that have come along and influenced corporate law. Just as in the area of derivative suits, you will find that we are literally, thoroughly up to date. We know all about Flynn and Muldinaro cases; we know about Barr v. Wackman. And therefore, the commentaries to the provisions on derivative causes of action in section 435 specifically indicates to what extent we are willing to sanction the result and reasoning in Barr v. Wackman, on the opinion of disinterested directors, their business judgment and to what extent we are favoring the Muldinaro case decided by the Supreme Court of Delaware. We specifically indicate that our statute would be subverted by the interpretation of the Delaware law given by the federal district court in some of the instances . . . which said that the opinion of the board of directors that in their business judgment the litigation was not meritorious. This is one of the problems in Alaska, that in so many of these areas counsel just simply cannot advise clients because we don't know what the law is, and none of us has an interest in perpetuating that. And that's not good for business. You take in . . . comments, and that's antithetical to the economic evolution of this jurisdiction. Senator, I have no further observations other than to indicate that at any time I will be, if my schedule at the University permits it, be willing to answer questions in writing or by conference calls or by personal appearances for any of the committees of either house.

SENATOR RODEY: I am very unable to predict exactly the course of the legislation will be, and John is, of course, available to help out on it also. Essentially, the recommendation of staff is very important on this. That's why we have a number of staff people here today, because a complicated corporations code has

to be taken in part on faith because most of the legislators will be unfamiliar with the content. The fact that it has had a broad review in the state, has been signed off on by a variety of interested individuals, I think that speaks well for it. I am going to talk with Senator Ray who is Chair of the Judiciary Committee. I don't know what the Chairman of Labor and Commerce will wish to do with the bill. Hopefully, we will move it out in a very timely fashion so it can go to Judiciary again, having that staff and members look at it. There are a number of attorneys on the Judiciary Committee, which is helpful. I don't know whether we'll pass the corporations code this year, given the amount of time it takes for everybody to become familiar with it. It is a complicated piece of legislation, but a very important piece of legislation for the business community. Perhaps nothing else is as important as the structuring of corporate activity in the State of Alaska. And you very eloquently set forth some of the difficulties we have had in the State of Alaska or the lack of any real corporate history or law. And it, of course, was reflected in the statutes and other areas which is the reason for the code commission. The legislature simply doesn't have the tiem to redraft completely in many cases what is law generally taken from the State of Oregon wholesale at the time it was taken or slightly before. Perhaps the best course is for myself to talk with the Chairman of Labor and Commerce, and at that point talk with Chairman Abbott. We very much appreciate your efforts, and we probably will at some point in time call on you to answer questions or make comments. I think that the only way that the bill will really pass, at least pass comfortably, is with the broadest possible dissemination of information about the bill, and I will try to do that. Are there any other questions from anyone that is here today about the contents of the bill or anything that is attended to the bill? If there are no other comments then the subcommittee meeting is . . . Willis.

WILLIS KIRKPATRICK: I don't know whether I should bring it up now, would there be other hearings on this?

SENATOR RODEY: There probably will, but go ahead.

WILLIS KIRKPATRICK: Let me point out, for the record my name is Willis Kirkpatrick. I am Director of Banking, Securities, Small Loans and Corporations. On the corporation part there are three areas that have come to mind, and I have discussed it with the commission. One of them is that there is a requirement for foreign corporations to file their articles of incorporation with the State of Alaska. We have been in touch with other state jurisdictions, and this is a provision that has been deemed eliminated actively as far as foreign corporations are concerned in filings. We have done some research on it, and prepared a paper in that respect, but we feel that it would be for the amount of usage that it would be, that it would get as far as the

practicing attorney and find out what the articles are. This is probably more current and better obtained when they . . . regardless of whether they are . . . The other thing is that there is a requirement in the proposed act that the department file with the Superior Court some updated records weekly, and we would like to have the intent of the legislature if that is passed to make it a microfische copy acceptable for filing in the division. If we print weekly, the updates are going to be very expensive and very encumbering, a massive paper production. So we would request that microfische be considered as meeting the provisions of that section. The other section that we had some concern about is section 910 that gives the provisions for filing writings with the department, and we would like the writings to be specifically suitable for microfilming. Everything is microfilmed now, and we are totally dependent upon microfilming. So we don't want to be in a position where we have no statutory authority to turn down a filing because it is not legible for microfilming. Those are the only comments that we have at this time, Senator.

SENATOR RODEY: Thank you, Willis. Are there, Professor Fessler, Mr. Abbott, did you have any comments this?

JOHN ABBOTT: Well, the code commission is not opposed to any of those changes. And as to the last two, I don't think there is anything in the statute that precludes these microfilm and microfilming format, so I know of nothing in the act that would preclude the director from promulgating any regulations which would provide for microfische. . . district courts or in the districts or requiring documents be susceptible for microfilming. So we have no objection to the foreign corporation articles.

SENATOR RODEY: Actually it fits in with recordations ideas that the code has expressed in the past.

PROFESSOR FESSLER: I would point out, Senator, that I had hoped that we had accommodated this by the provisions of section 868 which say that the reports required by this chapter to be filed with the department by the commissioner shall be on forms prescribed and furnished by the commissioner.

JOHN ABBOTT: I was under the same opinion.

PROFESSOR FESSLER: We are trying to give you the broadest possible authority to prescribe the forms and say what scheme you want in. Your liability with regard to processing them under section 910 presupposes their conformity under section 890.

WILLIS KIRKPATRICK: We weren't quite sure whether actually under 910 weakened the other section.

PROFESSOR FESSLER: Well, if there is any concern circling what Chairman Abbott has stated, there is nothing in this draft that

was intended to do anything other than what you are now seeking to accomplish. And we didn't want to wed you to microfische if at some point in the future there was some other dazzling means of handling information and you were statutorily burdened with a statement that you had to come to the legislature and get it changed.

WILLIS KIRKPATRICK: We wrestled with the fact that we didn't specifically want you to name microfische in there.

PROFESSOR FESSLER: Oh.

SENATOR RODEY: If you could get the committee a memo on that and perhaps consider artful language that would allow you to do what you've stated, give you the authority to make the administrative decisions. I don't think they will have any difficulty with that. Are there any other questions? If not, the subcommittee meeting is adjourned.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 13, 1984

RE: Profit corporations--HB 343/SB 246

You may wish to include the following background information with materials for the Joint House/Senate Labor and Commerce Committee hearing at 8:30 a.m., Monday, January 23, 1984, in the House Labor and Commerce Committee Room in the Behrends Building.

HB 343/SB 246 would replace the Alaska Business Corporations Act, AS 10.05, with the Alaska Corporations Code (ACC). The bill was introduced in both houses on April 8, 1983, to facilitate joint committee work.

On May 17, 1983, a joint hearing was set up on the bill. However, last minute conflicts developed that prevented the House committee's participation and also prevented most of the Senate members attendance.

The meeting was held, however, as a Senate Labor and Commerce meeting, chaired by Senator Pat Rodey, subcommittee on the bill. Staff of some legislators and other interested persons attended. An overview of the bill was given by Professor Dan Fessler who drafted the bill with the code revision commission, and questions were asked and answered.

A transcript of that hearing is attached. It was retyped in the code revision commission office from a garbled original. The original is available in Senate Labor and Commerce and in the code revision commission office.

The hearing set for Monday, January 23, will be the first hearing on the bill for the House committee and the second hearing on the bill for the Senate committee. However, it is anticipated that the hearing will lead off again with an explanation of the bill by Professor Fessler as in the May 17, 1983 hearing.

A general overview of the bill is also contained in the transmittal letter at the start of a section commentary on the bill in House and Senate Joint Journal Supplement No. 11. That overview is followed by in-depth commentary on the bill.

Attached also is a miniature summary of the bill.

DR:chw

Attachments

HB 343 SB 246
on
Business Corporations

Summary

The bill provides for replacing the Alaska Business Corporation Act, AS 10.05, with the Alaska Corporation Code (ACC), a comprehensive revision.

The proposed ACC sets minimum requirements that must be met for the privilege of doing business in the corporate form.

Within limits it leaves to incorporators how to divide powers between shareholders and directors.

It standardizes reporting required to shareholders and the state.

It seeks to clearly define in what circumstances it is permissible to pay a dividend.

While maintaining the right of shareholders to sue corporate officers and directors in appropriate circumstances, it seeks to control the misuse of these "derivative suits".

It also seeks to control misuse of the limited liability of officers and directors that the corporate form provides.

In the covering letter at the start of the commentary that follows in this binder, there is an expanded summary of the bill. Following that is a section analysis which includes the background and basis for choices that have been made in drafting the bill.

Status

The bill is introduced in both houses for greater flexibility and for the possibility of joint hearings should that be the choice of the house and senate committees.

Status going into the Second Session of the Thirteenth Legislature: In House and Senate Labor and Commerce Committees, the first committees of reference. Second reference: House and Senate Judiciary Committees.

Draft

January 13, 1984

John Clough, President
Juneau Bar Association
801 W. 10th St., Suite 300
Juneau, Alaska 99801

Dear Mr. Clough:

Please inform persons attending the next Juneau Bar lunch:

Regarding HB 437/SB 313. On Friday, January 20, at 1:30 p.m., in Court Room A, Dan Fessler, a UC Davis law professor and consultant to the code revision commission on corporation law, will review the bill now in the legislature for a revision of law on nonprofit corporations. The attached notice which is going out to nonprofit corporations further explains the purpose of the session. It will be a teleconference.

Regarding HB 343/SB 246. On Monday, January 23, at 8:30 a.m., in the House Labor and Commerce Committee Room in the Behrends Building, a joint hearing of the House and Senate Labor and Commerce Committees will be held on the proposed revision of the business corporation law. Fessler will be on hand there, too, to explain the bill.

Persons interested in corporation law can attend these meetings, get an overview of the proposed codes, and offer testimony on good or bad features of the bills.

Very truly yours,

Dick Regan, Research Director
Alaska Code Revision Commission

DR:chw
Enclosure

Draft

MEMORANDUM

TO: ALL LEGISLATORS

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 12, 1984

RE: Profit and Nonprofit Corporations
Codes ~~Teleconferencing~~

Alaska Nonprofit Corporations Code, HB 437/SB 313.

With the concurrence of the appropriate committee chairmen, the code revision commission will teleconference part of its next meeting to explain and discuss the nonprofit corporations bills, HB 437/SB 313. The teleconferenced part of the meeting will be in the Juneau Court and Office Building, Court Room A, at 1:30 p.m, Friday, January 20.

The attached notice is in the mail to over 3,000 nonprofit corporations. The notice explains the purpose of the teleconference.

Sitting in on the code revision commission teleconference would serve to inform legislators or staff about the purpose and the bill on nonprofit corporations which probably will be coming up for hearings of the House and Senate Labor and Commerce Committees later in the session.

Alaska Corporations Code, HB 343/SB 246.

The Friday, January 20th teleconference of part of the code revision commission's meeting should not be confused with a joint hearing of the House and Senate Labor and Commerce Committees on the for profit code--HB 343/SB 246--scheduled for 8:30 a.m., Monday, January 23rd, in the House Labor and Commerce Committee Room. Professor Fessler will be here for that meeting also, and that, too, would be a chance for staff to hear an outline of the lengthy bill. Of course, the joint committee will take testimony from others who wish to be heard.

DR:chw
Attachment

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4078

MEMORANDUM

TO: Nonprofit corporations and interested parties

FROM: Alaska Code Revision Commission

DATE: January 6, 1984

RE: Teleconference on nonprofit corporations law, House Bill 437/Senate Bill 313

This is notice that at 1:30 p.m., Friday, January 20, 1984, the Alaska Code Revision Commission will hold a teleconference concerning a proposed revision of Alaska law on nonprofit corporations.

The proposed revision is in the form of a bill drafted by the commission and introduced as two identical bills, one in each house of the legislature, House Bill 437 and Senate Bill 313. Here we generally refer to them as "the bill".

Although the bill is already in the legislature and referred to the Labor and Commerce Committees of the House and Senate, the teleconference is neither a meeting of those committees nor a substitute for hearings of those committees.

Rather, it is part of a regular meeting of the code revision commission that drafted the bill, an informational hearing and a chance for the commission to hear suggestions about the bill that it will, if it believes warranted, pass on to the Labor and Commerce Committees in the form of proposed changes.

The bill will go through hearings of the legislative committees. However, we expect a bill revising for profit corporation law, as differentiated from nonprofit corporation law, will be treated first by the committees. Legislative committee hearings on the nonprofit bill may be weeks or months away. The early teleconference provides an early look at the bill before the legislature is actively working with it.

We ask that persons who wish to either listen in or testify at the January 20 teleconference notify their local teleconference center as soon as possible, so that center will be included in the teleconference. The list of centers is attached.

We hope and trust the teleconference will be helpful for all that are concerned with the bill.

DR:chw
Attachment

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

Senator Richard I. Eliason, Chairman
Senator Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 1, 1984

RE: Transcript of joint hearing on
HB 343/SB 246 on profit corporations

Enclosed is a transcript made from the House Labor and Commerce Committee's tape of the joint hearing on HB 343/SB 246 held Monday, January 23, 1984. Catherine Walsh of this office typed it at the request of the code revision commission.

Any members of the House or Senate Labor and Commerce Committees who were absent from the January 23rd meeting may be especially interested in the transcript.

Since the House members had to leave for a floor session before the meeting was concluded, they may be interested in the testimony at the last of the transcript--testimony of Elizabeth Johnston of the Alaska Federation of Natives subcommittee on the bill and Irv Bertram, legal counsel for Alaska Airlines.

DR:chw

Enclosure

JOINT HOUSE /SENATE LABOR AND COMMERCE COMMITTEE
HEARING ON HB 343/SB 246--FOR PROFIT CORPORATIONS
JANUARY 23, 1984
8:30 a.m.

COWDERY: I'd like to call the Labor and Commerce meeting to order. It's January 23, 1984, at 9:50 a.m. (sic) 8:50 a.m. I'd like to note those present: Rep. Ueling, Rep. Pestinger, Rep. Koponen and James Cowdery. And I'd also like to note present Senator Mulcahy. The purpose of this morning's meeting is to have testimony on an act revising the corporate code. At this time I think that we would like to call on John Abbott and anyone that would like to testify sign in. The first one to testify that I believe I'd like to have is John Abbott. State your name and affiliation.

ABBOTT: Thank you, Rep. Cowdery. My name is John Abbott and I am the chairman of the Alaska Code Revision Commission. The code revision commission, for those of you who are unaware of this, was a Title 24 commission created by the legislature in 1976. It is comprised of individuals representing the Alaska Court System, the Attorney General's office representing the Governor, the Alaska Bar Association representative, representatives from both the House and the Senate, at this time, Rep. Charlie Bussell and Senator Patrick Rodey. Myself as an appointment of the Governor, as a layperson and Fred Brown as a representative of Governor Sheffield. We have one vacancy on the commission at the present time. Generally, the purpose of the commission is to entertain requests by the legislature, by any branch of government for that matter, to look into areas of statutory law of a technical nature that are in need of revision for any number of reasons including the fact that they no longer comport with the Alaska life, because we are a more sophisticated state, because they haven't provided for a number of years, that they are out of sync with the present needs of the law. The commission also entertains its own projects and has at any given point in time two major projects at least, plus a number of minor projects for consideration by the legislature. We have at the present time five major bills, some of which will be considered by the legislature this session, others will die and not get consideration. The bill in front of you today has been introduced by the Rules Committee in both the House and the Senate as HB 343 and SB 246. The two bills are identical in what they do and were introduced simultaneously for the purpose of consideration by both the House and Senate without the necessity of going through one and then going through the other. This is the practice the code revision commission has used for the past several years to expedite consideration of the bill. Myself, as chairman, and Jerry Kurtz who represents the Alaska Bar Association have been present on the commission during the entire

period of time the corporations bill has been considered and worked on, and we along with with other members of our staff and other commissioners are most anxious to meet with you or your staff to further explain the bill itself. It's a very large bill; it's complicated; it is a sophisticated bill. It determines all of the areas of responsibility which are taken on when a company seeks a corporate charter and seeks a privilege conferred by the State of Alaska. We have with us today Professor Daniel Fessler. He is a professor of law at the University of Davis, California, who has been the consultant on this bill since its inception and is one of the recognized authorities on corporate law in the United States. He will give you a thumbnail sketch of this bill and attempt to answer any questions that you may have concerning the specific technical aspects of the bill. The bill was the result of concern on the part of members of the code commission, both in private practice and in the other areas represented by the code commission, that some work needed to be done because the basic bill had been, as it were, an off-the-rack bill adopted from Oregon statutes at the time of statehood. Whether or not it was appropriate to Alaska even at the time it was adopted leaves some question. Certainly the existing law does not in any respect really meet the needs of Alaskans for incorporation. The new bill attempts to set out and define all the relationships between the various principals or players in the corporate status. So that one need only look at this bill to determine how you become a corporation; how you act as a corporation; how you terminate as a corporation. The bill that's presently before this committee was introduced, I believe, on April 9, 1983. Since that time, some changes have been made as a result of public hearings held by the code revision commission and input from various different organizations concerning some of the specific features of the bill. And as a result, the code commission will be making some recommendations for changes to the committees considering this bill. The work on sections, written comments to the bill and requests that certain changes be made. These changes address concerns raised by Alaska Airlines, one of probably the state's largest corporations, a special subcommittee of the Alaska Federation of Natives that has worked for quite some time with the code commission, has graciously, generously provided its own time and expertise and its legal staff in various of the corporations and has provided us with some good and needed amendments to the bill. Those, too, will be entertained. We also have worked very closely with Mr. Willis Kirkpatrick, deputy director of corporations in the Commissioner of Commerce office. And he, too, has recommended some changes that if made will reduce any financial impact on his office. So that it was the intent of the commission to draft a bill that would have no financial impact on the Commissioner of Commerce office or the director of corporations. So you will be getting some recommendations for amendments pursuant to our discussions and the exchange of ideas of Alaska Airlines, the Commissioner of

Commerce and the Alaska Federation of Native's subcommittee. I think without further ado I'll ask Professor Daniel Fessler to come up and give you a brief summary, an overview of what the bill does. If there are any questions, we also have signed up as witnesses, Commissioner Jerry Kurtz, Fred Brown to provide additional testimony or comments or, in the event you have some questions, we'll do our best to answer them for you. Thank you.

COWDERY: Thank you. I'd like to note that Senator is present. And at this time, I'd like to have John Abbott . . . then the next one up is . . .

RODEY: Rather than invite any comments, I think that Professor Fessler can do a better job of explaining the material than anybody else I know. Mr. Chairman, I'm the Senate member of the code revision commission, and the code has labored long and hard, particularly Professor Fessler and Chairman Abbott on this particular legislation. And I think it is worthy of the committee's very serious consideration. It is in final form, but it is very near passage.

FESSLER: Gentlemen, I am a school teacher at the University of California at Davis. And the subjects that I teach are contracts and corporations. Four years ago I was approached by the commission and asked if I would be interested in serving as a consultant to first survey the content of existing Alaska statutory law in the business field, and then work with the commission should it determine that there was need for revision. The survey of existing Alaska law was undertaken, and the conclusion was arrived at that the existing Alaska law was not the law that the state would most like to have its citizens functioning under. The law that we currently have in Alaska was adopted by the legislature, the first legislature after statehood, by adopting the then Alaska, excuse me, the then content of the Oregon corporation law. The Oregon corporations law in turn was taken from something called the Model Business Corporation Act, which act was put out by the Business Law Section of the American Bar Assocation in the early 1950's. By the time Alaska adopted the Oregon law, the Oregon legislature was on the verge of changing it. And, subsequently, the Oregon legislature has changed much of the content of the law. So, and this is because the model act, which was the basis of the Oregon law and then became the basis of our sort of stepchild has been in the process of evolution. The commission also noted that in the intervening near quarter of a century, that there have been significant changes in corporate law in three of the most critical jurisdictions to which other states generally look for guidance. And that is that New York had rewritten its corporations laws in the late 1960's; California undertook a similar project in which I was involved on the working committee with the legislature in the mid-1970's. And finally the model

act itself has been recalled and is in the process of a three-year study in which a couple of years from now will result in further recommendations. So there have been changes with regard to the theoretical basis of the law. Further, there are changes in Alaska in a quarter of a century. Changes which suggested that it might be time for the State of Alaska to have a corporation law that is a product of its own deliberate creation, rather than something borrowed from elsewhere. The result of this four-year effort is the bill which you have in front of you. And with the exception of some minor amendments which resulted in final meetings with representatives of the Alaska Federation of Natives subcommittee and various other private parties who have testified before the commission that the bill which the commission is seeking your legislative approval and enactment is now in final form. In addition to the bill, the commission has prepared very lengthy commentaries. These commentaries, hopefully, are designed to explain to members of both the House and Senate the origin of each and every provision of the act, to share the value judgments which caused the members of the code revision commission to recommend that particular content, to disclose to you to the extent that the statute is borrowed or modified from statutory law in other jurisdictions the specific genesis of the law, and then to state what change would be made in existing Alaska law were the legislature to adopt this bill. In addition, your staffs will be furnished, and the members will be invited, to work with another document. I apologize for the prodigious size of these documents, but this document is useful in that if an individual is familiar with the provision of existing Alaska law, this works backwards from existing Alaska law, section by section, and shows how that provision would fare should this particular bill be adopted. So those study aids hopefully will be useful to staffs and will be useful to the various committees of the legislature. What I had hoped to do this morning was to share with you some of the value judgments which the commission has made and which are embodied in the multiple provisions of this act. One of the major disadvantages of existing Alaska law is that if an individual were to pick it up seeking to know the content of the law the individual might follow, existing Alaska corporate law is totally disorganized. Provisions which may relate or surround the problem are scattered throughout the bill. One of the initial impressions that you will gain from looking at this bill is that it is very tightly organized. it is organized by major topical sections with the hope that if an individual has a problem with the formation of a corporation, all provisions of the act that deal with corporate formation will be found in Article 3. If the issue relates to corporate finance, Article 4 contains all the relevant law. So that, in essence, the commission directed me to draft the value judgments which it had made very much in the form of a cookbook, but hopefully getting the ingredients in the right order so that it should be something which an individual, whether

a layperson or a practitioner desirous of knowing the content of the law, will be able to find it. And once in the right area, will find all of the related provisions of the statute rather than have them lying around in land mines some 25 to 30 credit pages later, which is the rather dubious distinction of the current provisions of chapter 5, Title 10. Now the areas wherein significant value judgments are found would be Article 3 which deals with the formation of a corporation. Some states like California have attempted to say that if you are going to form a corporation in California, certain major value judgments have been made by the legislature. And the price for forming a corporation in California is that you comply with the value judgments. They would include such things as the requirement that there be cumulative voting for shareholders; that the board cannot be classified; that the directors can only serve one-year terms. California is a statute which is very pregnant with value judgments that sort of tell citizens this is the only way we are going to permit it to be done. Now the reason that this statute does not do that is first there was a fundamental philosophical disagreement that the State of Alaska should be in the business of making value judgments about how people who enter in the corporate form ought to behave. The value judgment which took precedence over that was that people should be informed by reading the statute what the possibilities are. And that they should be allowed, knowing what the possibilities are, to make their own decisions as to whether there will be cumulative voting; how large a board they will have; whether they will classify the board; whether the board will have terms that exceed one year. But that those value judgments should be layed out, and they are layed out in Article 3 in a manner which an individual determining to form a corporation can quickly see that these are the basic things with which the individuals desirous of entering this association should come to some agreement. Further, there is the advantage that we say that if you are going to make these fundamental decisions, you must put them in the articles of incorporation. So that if a person who is a potential investor desiring to know what the lay of the land is for XYZ corporation need only obtain a copy of the articles of XYZ corporation, and that individual will have a definitive statement of the basic value judgments which citizens forming that corporation have made. And there is a further problem, while California has attempted to make value judgments and impose them on citizens, the scandal is that people then simply leave the state and foreign incorporate. They come back as Oregon corporations. They come back across the state line as Nevada corporations. And so it was deemed that this was probably not the best thing to attempt, and that the attempt in the state that's pursuing it isn't working. So in that respect, although you'll see the California corporation code has had a significant impact on many of the provisions of this recommended legislation, the basic thing that the California corporation code is known for

is not carried forward here. It is possible to form a corporation in Alaska which is every bit as straightlaced as a corporation mandated under California law. That is a value judgment that citizens can make. It is not a value judgment that the legislature would be making for you. Now with regard to Article 4 on corporate finance, Here Alaska law was deemed to be flawed in a manner that is true of virtually every state. Lawyers, at least in my experience of being one and teaching others for a longer period of time than I like to recollect, generally make a career decision to go into law sometime after they learn that they have no aptitude whatsoever for arithmetic, let alone mathematics. The consequence is that most lawyers cannot, including myself, balance a checkbook. And lawyers are horrified by concepts of accounting. Therefore, over the years we have sort of developed our own accounting techniques. Because over the years we have had perhaps a bigger voice than we should have whispering in the ears of elected representatives and people, our versions of the myths of accounting rather than the accounting profession have begun to creep into the law. Alaska's current corporation law suffers from perhaps a terminal case of lawyer-accounting terms. One of the major things which corporations must worry about if they are to behave in a socially responsible manner, since they are given the presumption of limited liability. If I form a corporation, my creditors and even victims of calamaties such as torts must look only to the assets of the corporation, not to my own personal assets. Circumstances are important to the state, all people who come into contact with corporations. Well, then what assets must I leave with the corporate entity? What accounting principles must I observe in keeping the books of the corporation? The law has always been interested in this question. But the problem is that we allowed a gulf to grow between what the law seemed to be suggesting and what accountants were telling people are the intelligent way to parse through matters and to resolve them on the books and records of a corporate entity. California broke new ground in 1977 when it said that it would abolish all concepts of legal accounting. It would substitute some straight, common sense ideas as to when a corporation could pay a dividend. A corporation could pay a dividend within the discretion of the board of directors at any time so long as the assets of the corporation equal the liabilities of the corporation with the protective ratio of $5.00 in assets to every $4.00 in liabilities. A very simple concept to understand. There are no longer reduction surplus, earned surplus, all of the notions which lawyers have invented over the years. It's a very simple idea. If we are going to make distribution, whether we make it in money, whether we make it in corporate property to shareholders, we have what is called the ratio of assets to liabilities which must be maintained. This bill adopts what is turning out to be one of the most successful decomplications of corporate life which was done in California. It also follows both

California and now New York in saying that in complying with the law, that so long as a corporation keeps its books and records in a manner which reflects generally accepted accounting principles, he has complied with the law. So we leave to the accounting profession and not to my brothers and sisters-in-law the determination as to what is the best way for that craft and science to proceed to advise. So accounting is left to accountants, but we make a simple value judgment to protect people. It's this ratio of liabilities to assets. Five dollars in assets to four dollars. You can make any distribution you want so long as you do not go below that floor. That, I think, will make it much easier for people determined to comply with the law to do so and make the detection of those few people who are determined to evade the law much easier. Now with regard to Article 5, a major question has been in existence for many years. What are the proper prerogatives of shareholders as opposed to the directors and officers of the corporations? Is it to be an Athenian democracy, or is the better model that you elect the directors and you vest control and management of the corporate entity during the period of tenure of their terms in the individuals? Article 5 has a default provision that the powers of control and management of the corporation are vested in the board. However, a corporation may by the terms of its articles modify this presumption and confer greater prerogatives upon shareholders. If it is going to do that, however, it must do it by an affirmative provision in the articles of incorporation. The thrust of Article 5 is to ensure that shareholders have acess to reliable and up-to-date information as to the condition and record of accomplishment or failure of the people they have elected to be the directors of the corporation. You will notice that for the first time we would standardize notice requirements. Under current law, one of the defects is that we have no standardization of notice requirements. For certain matters, 30 days' notice is sufficient. For others, 40 days is required. Under this bill, notice requirements are standardized, and it should make people who are determined to evade it much easier to ferret out. So again the act reflects the commission's value judgment that the basic policy or power between shareholders on the one hand and directors on the other that the act should specify what should be that ratio or relationship if the parties don't wish to change it. But if they do wish to make a different arrangement, if they put it in the articles they are free to do so. Article 6 deals with the prerogatives and responsibilities of officers and directors. Here I think you'll be very pleased to see that for the very first time we have a statutory definition of the duties of care and duties of loyalty which directors and officers are expected to obey. At the present time in Alaska, it would be a matter of conjecture what the Alaska Supreme Court would eventually say with the content of those important duties. This makes it difficult for an individual who is embarking upon the career of

being a corporate director, perhaps out of accommodation to friends, and many small corporations know exactly what it is I am expected to do, a peril of later on being held accountable for not having done it. Another important feature of this bill which has received wide support by those people who have read it, is Section 435. Section 435 for the first time in Alaska subjects shareholder derivative causes of action to statutory regulation. Alaska presently has the dubious distinction of being one of two American jurisdictions which has no statutory regulation of the derivative suit. This is a suit in which a shareholder comes forward and brings a cause of action that alleges that not I, the shareholder, have been injured but that the corporation has been injured. And I as a shareholder appoint myself to litigate this matter on behalf of the corporation. The tension between the prerogatives of the incumbent directors of the corporation to make that decision and to control that litigation and the rights of a shareholder to say that I am going to elbow my way into the pilot's seat in this plane for the next several years, is a very important one because it may be that there is corruption at the board level. Maybe there is not. I urge your very careful attention to Section 435 to point out that I believe you would find that you would go from having no statutory regulation on this important subject to having one of the most balanced, comprehensive regulations of the subject in this country. Section 435, therefore, is an important innovation. Article 7 is rather technical in nature. It deals with the question of how we go about making amendments and changes to the articles of incorporation. Again, it standardizes procedures and forces the attention of those who wish to change the basic format of a corporation into doing it by way of amending the articles so that there is regularity. And again so that potential investors interested in the corporate entity can look at the articles of incorporation and have not only an historical impression of what the corporation was like in yesteryear, but an accurate, modern impression of where the power within this corporation is currently being distributed. Article 8 is going to be a matter of great interest to your constituents. It deals with what are called organic changes. In essence, mergers; consolidations; share exchanges; sale of all the corporate assets other than in the usual course of business. As each of us is aware, the United States right now is going through what is called a merger craze. Corporations are appearing to be attractive takeover candidates by individuals who may or may not have legitimate desires or desires which would advance the interest of shareholders should they be in a position to seize control of the board of directors. At the present time, Alaska law is very unclear as to the respective roles of incumbent boards as opposed to shareholders. And, therefore, Alaska corporations look vulnerable to individuals who are determined to launch a takeover bid. Article 8 clearly defines the prerogatives of existing management and the shareholders of a corporation with respect to

framing the content of one of these organic changes and taking it through the shareholder approval level. Essentially, what Article 8 does is vest with the existing board the power to frame the terms of a merger, a consolidation, a share exchange, or sale of assets in an extraordinary transaction. And then require two-thirds approval by the shareholders of the corporation in order to approve. This should bring Alaska corporations into line with California and New York and other major states which have moved to protect the integrity of their corporations from being the victims of an easy takeover in which the will of the shareholders and existing management would simply be subverted and brushed aside. Reform needs to be taken in Alaska in this area. I would hope that you would be satisfied with the commission's recommendations which are embodied in Article 8. Article 9, dealing with dissolution, is very important because of the changes that have been made in the federal bankruptcy law. It coordinates with modern federal bankruptcy law and creates for the Alaska judiciary a far more sensible approach to protecting the rights of creditors as well as the rights of senior shareholders in the event that a corporation goes to either voluntary or involuntary dissolution. It also contains some very innovative, and I think, useful provisions that deal with giving shareholders who are being oppressed or frozen out of the role of management or income where other shareholders are being afforded such prerogativees a right in the final analysis to petition for involuntary dissolution in order that the grievance which would have to rise to the level of a very serious grievance to get the attention of Alaska courts. Again, these are not new ideas. They might be the final decision of the Alaska Supreme Court if someone were to spend $100,000 litigating that. But if you enact this bill, all Alaskans with only the expense of supporting their government will have presumptive answers to these important questions. Those are the basic provisions and value judgments which underlie this bill. Both myself and the law students who have assisted me in working with the technicians in this area will be available to any member of either body and staff members. I am prepared now to answer any questions which any members of the committee may have.

RODEY: Mr. Pestinger.

PESTINGER: Thank you, Senator Rodey. Professor Pessler, to me this is a really excellent articulation of the rights and duties and obligations so that it gives our larger corporate participants a clearer understanding of where they stand, which is so essential to doing business. But what I am wondering about, though, is what burden this approach may place upon the smaller mom and pop family corporation. To me, if I had such a business I could not engage in corporate law comfortably without the assistance of counsel. Do you think that this packet necessitates the assistance of counsel as almost a mandate now

for anyone that does business in the corporate form? In other words, I am wondering, I see the need for this in California and New york, and I see the need for this in Alaska with that level of corporations that we deal with. But how about that other level that are just kind of, they get their articles punched out and they ask their lawyer to help them with the minutes, and they look at the Supreme Court that says that the only way you pierce the corporate veil is with an indicia of fraud. So they are using a whole different standard of operation. I mean this is really substantial. Do you think it might have a negative effect on that small family business?

FESSLER: In terms of cost of doing business in the corporate form, I think it will have the opposite effect. Right now, many small businesses probably are coming into corporate existence without the assistance of counsel at all. People are going out and buying little kits for $49.95 that contain forms that they fill in and send to the state. They are oblivious to the legislature's requirement that they file biannual reports to the legislature. They are not doing so. They are in danger of having their articles and their corporate status dissolved by the commission because the legislature has prescribed that as the penalty for not filing reports. And one of the basic difficulties with this situation will always be people who, to use your example, a two-person corporation, decides for one reason or another that they should do business in the corporate form, and then having done that they forget about it. They don't observe any of the formalities of corporate existence. They don't keep separate books and records. They don't segregate their assets from the assets of their corporation. And they don't file reports. Now they would be in trouble under existing Alaska law, sir. They will be in trouble under this bill. In the sense that when the State of Alaska confers a corporate charter on someone, whether or not they have sent $49.95 off to somebody who advertises in every airline magazine, that you don't need a lawyer and you, too, can be a corporation and somehow you will pay no income tax and like me you will turn out being rich. The only person that's probably ever done that is the individual who wrote that book, because he is getting rich by all of the people who write in and send their $50. I think this is the problem you'll want to keep in mind. What I am saying to all of you is that this bill is designed in such a manner that, although it is a complicated subject and I wouldn't suggest anyone could write a corporation code that could be so obvious that an individual could make casual reference to it and never need an attorney so they could guide themselves through the world of maintaining a corporation, this bill does organize the law. It does restate the law. It does have comments which are designed to assist people in understanding the law. Not one of those features can be said about current Alaska law. So there will be a problem of people who incorporate and thereafter regard it as a

little flag of convenience which they'll fly so long as it's useful and which, on the day that it isn't, they'll just forget about it. That will continue to be a problem not only in Alaska, but in Califo .. It's true in Nevada. It's true in Wyoming where I was reared. It's a major social problem we have. People who incorporate with no idea that there are responsibilities as well as privileges for taking on that status. Now, fortunately, the federal tax law which in years gone by caused people to believe that they could pay less income tax by somehow becoming a corporation, have because of movements undertaken first by the administration of President Carter and now of greater emphasis during the administration of President Reagan. As you know, the marginal income tax on individual income has now been reduced from a maximum of 70% now to where it is very close to the top corporate, there is only a two percent spread. But I still find that many people believe that they are going to get some tremendous tax benefit by becoming a corporation. What they do, of course, is eventually wind up in a hellacious tax audit. They find and the individual who wrote the $49 book and gave you the form never accompanies you to that audit because he is living in Bimini.

RODEY: Representative Koponen.

KOPONEN: I was interested in Section 488 which does create a liability for the officers of the corporation, and I'm not up on contract law and one of your notes, in terms of any written contract to modify or eliminate the liability created by this section, what happens to that liability, is it transferred or . . .

FESSLER: Let me explain to all of the members. Section 488, gentlemen, appears at page 67 of the draft in front of you. Section 488 relates also to Rep. Pestinger's question. One of the reasons that people incorporate is to achieve from the State of Alaska a presumption of limited liability. Now this presumption of limited liability means that to all individuals who do business with the entity which is incorporated, they are to look only to the assets which the individuals who incorporated have left with the corporation to satisfy their claim. This is true whether those individuals have made contractual relationships with the corporation or whether they have entered into an accidental injury situation, a tort. Section 488 is called secondary liability of directors and officers. It was reflected after lengthy discussions among members of the commission, a feeling that for small creditors of corporations, employees, tradesmen, materialmen, suppliers, individuals who generally have a credit relationship to a corporation which is not reduced to writing, that these individuals are the year in and year out, these are the individuals who pay the price for corporate existence. When corporations are run so long as it is

convenient to the individuals who find they are the owners and then when they are not, they are simply abandoned. Large institutional lenders, bankers, insurance companies, large contracting creditors, will get a lawyer and go out and they will quote, attempt to pierce the corporate veil. Alaska's common law on the circumstances in which it will disregard limited liability is found in only three cases since statehood. Those cases do not hold out great hope that in the absence of fraud in a transaction that the court would do. But if you have a claim for $1,000 in wages owed to you, there is no lawyer who is going to be able to successfully launch that lawsuit. If you are an individual who sold fish to a restaurant which has now gone out of business, and the owner has marched off leaving you unpaid and it's a $43,000 account receivable, you cannot get any modern recourse at all. Section 488 for the first time to a very limited extent shifts that presumption. It says that the officers and directors of a corporation to the extent that its assets prove insufficient to cover its liabilities, have a liability to a class of individuals who are defined as employees of the corporation as materialmen, tradesmen, etc., people who have extended credit on open account for up to $25,000. Now this liability, sir, is not inevitable. The statute clearly says that if I have a corporation and you have a fishing fleet, and you are supplying my incorporated restaurant with fresh salmon, that you can be approached by me saying I would like you to agree in writing that in the event that this business folds, my restaurant, you won't look to me for the liability which exists under the law. It would be a liability of up to $25,000. That's all you could ever recover under this. So for the first time there would be an incentive in dealing with the smallest people in the marketplace who are the recurrent little mules on which this business of limited liability is ridden out, year in and year out, that these people would have some relief and that there would be an incentive to talk about this question of limited liability. And then if I can convince you that you should give me a relaxation, a waiver of that, that's fine. But in the absence of a contractual modification, I would have the right to this.

KOPONEN: The contract then is between the creditor and the corporation, not between the corporation and its directors.

FESSLER: That's absolutely right. It's between the corporate debtor and its employees, between the corporate debtor and its materialmen or suppliers.

KOPONEN: It's a very useful section. I know there is a major business problem in the Fairbanks area, these collapsible corporations.

FESSLER: Mr. Chairman.

COWDERY: Would the effect of this, would it discourage say qualified managers from getting into taking over a trouble corporation that was having some problems, maybe through a lack of expertise in the past, would this discourage someone from coming in . . .

FESSLER: Well, it would certainly give me pause. Now there are two things relevant, sir, in the bill. First, if the corporation is in a process of dissolution, one of the ways to avoid dissolution under the provisions of this bill is for a court to appoint interim directors in order to resolve deadlocks. Those directors are not subjected to this type of liability. So the director who is brought on board to try and straighten things out by court order is the director who is exempted by the reference in the bill to other than the directors who are appointed pursuant to. Now that is one protection. Another factor, of course, would be that if a corporation is in trouble, and I am going to step in and attempt to save it, one of the things I'd want to do is be aware of Section 488 and go to the creditors and say, I am willing to come into this picture only if you are willing to contract to exempt me from any personal liability that I would incur. Yes, sir, it would be something that in the hypothetical you advance an individual would want to take into consideration.

RODEY: If I might interject, that would apply to directors but not to employees of the corporation?

FESSLER: It has no application to employees at all. In fact, I should tell you that this appears to be very novel, and I want you to understand that it has a great quality of being novel. But New York has never given total limited liability to anyone. And if anybody tries to come to you and say, my God, if we adopt this the wheels of commerce will grind to a halt. Since 1843 when New York adopted the first general incorporation statute, the ten largest shareholders in a New York corporation are subjected to liability in the event the corporate assets prove insufficient to the claims of all employees. New York has never stricken that from the books, and it has not prevented the development of the State of New York as a center of commerce. What we did here, was to say that in many Alaskan corporations we didn't want to have the liability on the ten largest shareholders because that might include many very passive people who really have nothing to do with the way in which the business was run. So put the liability on the people who are being paid, the officers, the president, and the secretary and the treasurer. They are the defined officers and the directors. They are not passive, or they oughtn't to be. So that is how we would differ from New York law. And we have broadened the exposure, because in New York the exposure is limited to claims of employees, and we broadened it to include the claims of materialmen and

suppliers.

COWDERY: In the past we have had some of the Native corporations who have had financial troubles and hired two people to direct them and turn it around. And this is an area I was wondering about, if that would be . . .

FESSLER: I appreciate the question. It is an important matter. The AFN subcommittee has looked into this question. I think that at that level, or at the level of any large corporation that is involved in an attempted turn around, that there would be awareness of the provisions of Section 488 and that there would be appropriate advice from counsel to deal with the subject. That would be my hope.

BROWN: Mr. Chairman, may I suggest . . .

RODEY: Mr. Brown.

BROWN: I am Fred Brown. It's nice to know that Labor and Commerce [garbled] . . . The one example you might think of is what would really happen . . . the example might be one of the most prosperous, currently most prosperous Alaska corporation is Alaska International Air. Originally, that was Interior Airways based out of Fairbanks. They expanded too fast for the building of the pipeline, which didn't get built fast enough as many Alaskans remember. What happened then was, and this sort of thing is really what happens when a corporation gets into trouble in most cases, and that's why I'm raising this as an example. What happened then was they went into reorganization and the creditors and shareholders hired Mr. Duncan McClaren, a legend in the Canadian air industry, a great manager and a legendary worker [TAPE CHANGE] . . . Section 488 to take care of that problem.

RODEY: Thank you, Mr. Brown. This is a problem currently in Alaska. It is possible for individuals who incorporate to run up all sorts of bills, not pay its creditors, and then just move away from that corporation, will eventually be resolved by the state, set up another corporation and then bilk a lot of small tradesmen who work for the corporation, creditors, what have you, move on. You can do it in serial fashion. It is currently being abused presently in the state. Mr. Abbott has kept an eye on this, has had a practice in that area of the law for 15 years. But it is currently a problem. There are a lot of honest Alaskans who lose money because of this problem.

FESSLER: And I think the problem is also that it has a broader ramification. To the extent that citizens get the impression that there are tricks out there for people who are in with lawyers, if you will. It demeans my profession of which I am very proud. We were never the source of this value judgment,

that people could pull this type of thing. But to the extent that people believe that if you quote, know the law, you can do bad things and get away with it. You can do hurtful things and have no accountability. It creates an impression of the law which none of us have an interest in seeing furthered in the minds of citizens. Because the minute one law becomes suspect like this, the cloud falls over all law. And so this is probably the most important value judgment about corporations. They have done great things for us. But the idea of a one-person corporation, and the only person that probably has pulled off that role real well in history, was Louis the Fourteenth and a tremendous price was paid for that notion.

UEHLING: If we can kind of go back to the section regarding the foreign corporations, maybe you could explain what the Alaska Code Revision Commission took as far as an approach as a comparison of what occurred in California regarding the foreign corporation situation there.

FESSLER: Because California has this basic social problem that in order to evade the restrictions on long-term director terms or in order to have a board classify itself, most important California business, most corporate business at the moment in my state, is foreign incorporated. Runs to a different jurisdiction and comes back home and says we've been gone 20 minutes, and we are now a foreign corporation, we're a Delaware corporation. The basic social problem we had in California when we approached the revision of the legislation was to say, well, will we give up these value judgments which we've had for many years. And the bar association, frankly, and the banking industry thought that's what was going to happen. That we were going to get a corporation law that looked more like that of other states. What the legislature did, interestingly enough, and I think it remains to be seen because it's costing us a lot of money in litigation in front of the federal supreme court, was to say, no, if a corporation has a certain percentage of its employees in California, does a certain volume of business in California, has a certain amount of its ownership owned by shareholders in California, then even though it purports to be an Alaska corporation or a Delaware corporation, we're going to say that it's merely a pseudo foreign corporation, and we're going to apply California's laws to it. Now the Arden-Mayfair litigation is pending in the California Supreme Court where it has been on hold for nearly three years. Delaware's courts have already litigated the Arden-Mayfair case and come to the conclusion that California was attempting to deny full faith and credit to the public acts of a sister state. Ultimately, the federal supreme court will have to decide whether California's notion of pseudo foreign corporations is an idea whose time has come. The judgment of the commission was that there are no pseudo foreign corporation concepts in this bill. Instead, we increased the

reporting obligations on foreign corporations to keep us informed of the nature of their activities. We greatly increased the circumstances under which it's clear that they must seek a certificate to do business in the State of Alaska. But we have not attempted to interfere with their internal control and management such as California has done, because we haven't done it to our own people. We haven't said you have to have a board with one-year terms, that you can't classify the board, that you have to have cumulative voting. Our default mode if you don't say is, you do have one-year terms, if you do have cumulative voting and you don't have b[illegible]ssification. But we didn't feel that it was necessary to [illegible]olved in that position. But later on in what may be five [illegible]ears as you see the outcome of the Arden-Mayfair matter, [illegible]a if you decide you want to adopt certain similar rules, t[illegible]ld be an appropriate time to do that. But there is nothing n[illegible] now that contains that.

BROWN: At least some of the members of the commission think the Delaware view is going to prevail in the state supreme court, and that's one of the reasons why the provision is written that way.

RODEY: Thank you, Mr. Brown.

UEHLING: This is a follow up question. And in just sort of reading through this I got the feeling what would be the situation like if you took a state like Delaware where we had a situation where companies are going to incorporate ther because it's a very pro-management kind of situation, where in California it's very pro-shareholder, the shareholder is a completely different situation, how does Alaska rate on that spectrum? Would they be considered a very pro-management situation?

FESSLER: No. The default provisions, ever since I learned to use the personal computer, I've picked up the jargon, excuse me. The provisions that are in place if you don't say otherwise of the Alaska statute today, because it's a version of the early '50's model act would today be called a pro-shareholder jurisdiction. And the provisions which would lock into place in the absence of agreement that they be otherwise under this bill are also pro-shareholder provisions. But so that Alaska would in the default mode line up looking very much more like California than Delaware. But it would be possible for people to make an intelligent and informed decision to form a very, very management oriented, reduced role for shareholder corporation, not going as far as Delaware has gone. For instance, a good example in Delaware, it is possible that the board of directors would have the exclusive power to amend the articles and bylaws, and the shareholders could be ousted from any role at all. That would not be possible in Alaska. It isn't possible under current law with regard to the articles. It would not be possible with

regard to the bylaws should the legislature enact this bill. So it continues to leave Alaska law with most other western jurisdictions as having a pro-shareholder bias, but not going nearly as far as California.

RODEY: Are there other questions from members of the committee? If there are . . .

FESSLER: I'll remain in the room, Mr. Chairman, in case anyone does have any questions for me, but there are other witnesses desiring to appear.

RODEY: The next witness is Willis Kirkpatrick, the director of the division of banking and securities.

KIRKPATRICK: Mr. Chairman and committee members. My name is Willis Kirkpatrick. I am director of banking and securities for the State of Alaska. I'd first like to say that we have appreciated the opportunity to join with the commission as a participant in discussion in their work. I believe that any of the concerns the state has had as far as the administration of this new code, the commission has known up front as to what the problems we've had. One of the things I'd like to point out is that what I am excited about in their work is that in a present situation where we have an old Oregon law, in a situation where we have very little, if any, state common law court cases the administration of the provisions of the Alaska Business Corporations Code as it stands today is somewhat suspect in some of its legislative intent. And to determine legislative intent, we go back to Oregon law, we go back to Oregon cases, we go back to the sparse official comments under the model code. With the passage of this bill, I think that our work as far as working with the corporations in maintaining their files is going to be a whole lot easier because of the official comments alone. Everything has been addressed. I would suggest that in considering the passage of this bill, that they make part of the record the official comments as to the new law. There is only one particular area that I have a problem with, and that is in Section 733 on page 127, in the filing of foreign corporations to do business in the State of Alaska. On line 7, beginning on line 7, it requires that together with a certified copy of its articles of incorporation all amendments to the articles . . . In other words, what they are saying here is that one of the provisions for a foreign corporation to qualify to do business in the State of Alaska, is that it would have to file its articles with the state and any amendments to those articles. In a hearing last session, we brought this up and I believe, you'd have to check with the code revision commission on this, but I believe it was agreed upon that they would reconsider that requirement to file articles. At the present time articles of foreign corporations are not filed with the state. We find that

some of our sister states, those that do have this provision, are looking at dropping them, I think the last one we've heard from is Texas. Now I don't believe that it is going to create any hardship to anybody in the State of Alaska that wishes to find out the substance of the articles of a foreign corporation. First of all, if they are looking for the officers and directors of the foreign corporation, we can look at the application they file with us giving us that particular information. If they do want a copy of the articles of incorporation or the amendments to the articles of incorporation of a foreign corporation, the place that would have the most current filing would be the state of domicile so that they are available. We would be more than happy to assist anybody that wanted that to find out the proper procedures to obtain those records. With my understanding that this provision, that the code revision commission had no particular problem with that being dropped, the fiscal note that I prepared was zeroed out. If this provision stays in, I am going to ask for a revision of the fiscal note because one of the problems we have now is just file maintenance. The biggest problem in file maintenance is amendments to articles. We receive a great number of amendments to articles every day, and one of the things we have to do is that we just don't file the amendments. A lot of times we have to look back through the files to see what the prior articles contain to see amendments are consistent. If nothing more than article order. That is the only comment that I have as far as any changes are concerned, and I am sorry I don't have an amendment prepared, but I would be most happy to. I would replace that word with a certificate of compliance executed by the officer of domicile, or the official of domicile. I am open to any questions.

RODEY: If I might ask either Chairman Abbott or Professor Fessler to respond.

ABBOTT: Yes, Mr. Chairman. We had previously agreed with Mr. Kirkpatrick that we would make that change. Unfortunately, consideration of this matter came up after the bill was printed. So it is the position of the commission that this requirement should be deleted when it was brought to our attention that it would serve no useful purpose and would impose an additional fiscal burden on the commissioner of commerce. We are in complete agreement that the provision should be deleted, and there should be no requirement to file foreign articles or amendments.

RODEY: Thank you, Chairman Abbott. Mr. Brown.

BROWN: On behalf of the commission, I am sure they would agree, it would be very nice if Professor Fessler were involved in structuring the amendment that the committee might be interested . . .

RODEY: That's a very good suggestion, Mr. Brown. Professor, would it be possible for you to prepare that amendment?

FESSLER: Certainly.

RODEY: Mr. Kirkpatrick, continue.

KIRKPATRICK: One other item that my notes show. On page 138 and 139, on line 28 of page 138 it refers to the misdemeanor, and my staff says that it should be either a rated misdemeanor A or B to be consistent with Title 9. And the same with line 9 on page 139. That also relates to a misdemeanor.

RODEY: If I might address Chairman Abbott or Professor Fessler, are we in that case talking about a Class A misdemeanor?

ABBOTT: That's our understanding, Mr. Chairman. Yes.

RODEY: If again I could request you, Professor Fessler, to prepare the appropriate amendment based on current Alaska criminal law.

FESSLER: The question has been asked, has been prepared, is one of the amendments that Chairman Abbott was referring to is being transmitted . . .

RODEY: Thanks, Professor. Obviously we can't take any official action here. If there are any questions, we'll have this prepared and delivered to committees on both sides for their consideration and Senator Hulcahy and myself will explain it on our side and . . .

COWDERY: Could I, I was wondering what financial burden would this, if we adopt this to the existing corporation for the state, would it be to conform, is there any grandfathering situations . . .

KIRKPATRICK: If I understand your question, Mr. Chairman, as to what this is going to do to existing corporations. I think the last two sections of the bill pretty well cover a timely transfer of the act, and I think we are gong to have some problems just as far as educating the corporations in switching them over. I don't see that a lasting problem. I don't see it as much more of a problem than we have now with the new corporation that is coming on board. I don't think there will be an financial, I think the problem is going to be basically on the state's side as far as getting the information out and getting the transition going. I don't envision any

economic problem on the corporation. I am wondering about correspondence fees, but . . . I don't see it as a major problem.

RODEY: I just might add that the proposed draft was written to reduce legal fees by putting a great element of certainty in there so that a layman would have a much greater understanding of the law just by reading the law without having to consult a lawyer. So I think there will be actually a reduction of attorney's fees. Are there any other questions for Mr. Kirkpatrick? If none, thank you very much Mr. Kirkpatrick. We do have floor session now at 10:00 a.m. We don't go in until 11:00 o'clock on Mondays, as a convenience to the Anchorage legislators. Would you like me to stay?

ABBOTT: Mr. Chairman, if I might, there are only two other people that intend to offer brief testimony. That's Liz Johnston and Irv Bertram.

RODEY: In consultation with House chairman, I will stay here if Senator Mulcahy is agreeable and listen to the comments of Elizabeth Johnston and Irv Bertram and then report to you, sir. Thank you, gentlemen. Next, I'd like to call Elizabeth Johnston. It's always disconcerting to be testifying and have everybody leaving. But, Senator Mulcahy and I will make up for any absence of numbers. You have the floor, madam.

JOHNSTON: Gentlemen. My name is Elizabeth Johnston. I'm general counsel to Bristol Bay Native Corporation. Today I am here speaking on behalf of the Alaska Federation of Natives concerning the bill on the revision of the corporate statutes, the profit corporate statutes. You will be delighted to know my comments will be brief. This is because we have had extensive opportunity to present our concerns before the code revision commission. By way of background, I can tell you that in the summer of 1982, the Alaska Federation of Natives created a subcommittee. And the member of the subcommittee had both regional and village corporation backgrounds, and the committee was created to review and testify on the proposed revision. We met with the code revision commission on three separate occasions and made extensive comments. Based on the receptivity of the commission to our comments, and the way they were able to meet our concerns, in April of 1983 Janie Leask, who is the president of the federation, wrote in support of the proposed revision. And she commented specifically on the quality of the new legislative scheme, on the technical commentary which has already been brought up by some of the other people. But the fact there there is technical commentary to back up the new code which should help all of us in the absence of court cases to understand the legislative history. The fact there there is this kind of backup, we feel will mean it will reduce the legal expenses for

the Native corporations. We also articulated, commented on the finance section, that it was an important reform. Unlike Professor Fessler I can read numbers, and I still feel that it is a significant accomplishment. I was forced to. So finally the only final comment is that this is a bill which does strengthen the rights of shareholders and does strengthen the requirements of periodic reporting by corporations to their shareholders. It is a pro-shareholder document, and the federation supports the revision.

RODEY: Senator Mulcahy, do you have any questions for Miss Johnston? Thank you, appreciate your coming. Next I'd like to call Irv Bertram.

BERTRAM: I'm Irv Bertram, and I am assistant counsel to Alaska Airlines. We have looked at the bill and discussed it with the commission to raise some of the concerns we have. Our bylaws and articles go back to 1938, at least the articles do. The bylaws have been changed on numerous occasions. And we did have some concerns, but we found that the commission has made some changes that will assist us in going forward. We think that the bill is very well drafted and very good and will be of benefit to the state as well as being helpful to us. In my current position as house counsel, I have an opportunity to advise management or answer questions about Alaska law. I have practiced in Alaska for a number of years before joining the airlines, and you don't feel so foolish when you have something layed out in front of you in the law. You can look at it and say, well, this is how it's done. Currently Alaska law on corporations has a number of areas where simply there is no law. And so you really have to say, gee, I don't know, maybe we can do it and maybe we can't. It's . . . you're not sure how to do something. But I think the bill answers that. It does provide a very well layed out road map, so to speak, which I think will be very helpful not only to large corporations such as ourselves, but I also believe this will be helpful to the small mom and pop operations. There is that old trite saying that ignorance of the law is no excuse. However, when the law is a body of common law with very few statutory references, it makes it fairly difficult to know what's going on. On the other hand, once things have been layed out in a fairly succinct form that can be followed, it's true a lawyer may still be required and should be used. But I think most people will have a better understanding of what corporate governess should be once they have this body of law in front of them. So we think it would be good for the state. Alaska Airlines will have to make one change in its bylaws as a result of this. It doesn't address everything we wanted. But on the other hand, we think on the whole it is very good and we do support it and would recommend it. Thank you.

RODEY: Thank you very much, Mr. Bertram. Senator

Mulcahy, do you have any questions? I am aware of the . . . if there are no other comments, Mr. Brown.

BROWN: One comment, Mr. Chairman. There have been much comment about the comments, and the people who are supporting the bill who are now part of the commission, are finding that the comments are very important. I would hope an admission to the members of the Senate and the House in the event this bill is considered, that an action be taken similar to what was taken when the criminal code revision was passed. And that is there be specifically an affirmative vote on the floor of each house approving the comments or the comments as you may have amended in concert with the commission to make a clear and unambiguous legislative history. To really make sure those are available and that they are important legislative history, since they will be relied on by people in the private sector as well as scholars.

RODEY: Thank you, Mr. Brown. That's a very good suggestion. Obviously it's wise. It's an area of law we don't know much about in terms of importance, and whether a separate vote on that really means much or not.

BROWN: Take it from Alaska's only published legal historian.

RODEY: And a distinguished member of the Fairbanks bar. I think it is a wise suggestion to incorporate in the journal and to vote separately and affirmatively on the commentary. I think it is a good and desirable method of annotating Alaska laws. It is certainly preferable to allowing Michie Company to do it back east. If there are no other comments, the committee meeting is adjourned.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 3, 1984

RE: Amendments to HB 343/SB 246 on for profit corporations

The subcommittee appointed by the Alaska Federation of Natives to work on the corporations bill has proposed these changes in the proposed amendments I transmitted to you on January 31, 1984: Those members of the code revision commission that could be polled by telephone have agreed that the changes are acceptable.

(1) CHANGE:

Page 12, line 27-29: In the previously proposed amendment change "January 1, 1983" to "March 24, 1982".

EXPLANATION: A relatively recent date is needed, but the specific date chosen is not of importance. The date of first introduction of the Alaska Corporations Code as a bill in the legislature is a date used elsewhere in the bill. Using it here is simply to avoid using many different dates in the bill.

(2) CHANGE:

Page 56, following line 28: In the previously proposed amendment, change "January 1, 1971" to "March 24, 1982".

EXPLANATION: The bill provides that staggered terms of directors must be provided for in the articles of incorporation. The effect of the change is that a provision in a corporation's bylaws providing for staggered terms of its directors would be valid if the provision was in the bylaws before a recent date--the date of first introduction of the Alaska Corporations Code bill in the legislature, March 24, 1982.

In other words, the amendment would make this provision of the bill prospective, keeping in effect valid bylaws on staggered terms; however, no corporation would be able to hurriedly enact bylaws now, simply in anticipation of passage of this bill.

(3) CHANGE:

Page 149, line 12, following the period: In the previously proposed amendment, following "section" insert "prior to December 19, 1991,".

EXPLANATION: The amendment as previously proposed was overbroad. Its only purpose was to conform to a requirement of Section 30 of the Alaska Native Claims Settlement Act, a copy of which is attached. The reason for the change will be clear by reference to the attached Section 30 of ANCSA.

Retyped with these three changes, the proposed amendments are attached.

- -

An identical text to the foregoing with the same attachments was sent to Senator Eliason, chairman of the Senate Labor and Commerce Committee. A hearing was held by Senate Labor and Commerce on the bill February 2, 1984, and the revised amendments were adopted in the form attached to the memorandum.

The committee voted the bill out as a committee substitute and adopted a statement of intent containing the two small changes in the commentary on the bill, as previously provided you. The statement of intent is also attached as it was adopted in the Senate committee.

Please note that the attached amendments are a retyping of the amendments previously provided you, with the changes explained in this February 3 memorandum.

DR:chw
Attachments

A M E N D M E N T

Offered in the HOUSE LABOR AND COMMERCE COMMITTEE BY:

TO: HB 343

Page 12, line 27-29:

Delete all material and insert:

"(3) if incorporation is after March 24, 1982, the address of it initial registered office and the name of its initial registered agent;"

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

"(c) a provision in the bylaws of a corporation which, were it a provision of the articles of incorporation, would accord with (a) of this section shall be valid provided that it was adopted prior to March 24, 1982."

Page 127, lines 7-9:

Delete "together with a verified copy of its articles of incorporation and all amendments to the articles,"

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

Delete ", except a village corporation that may be incorporated under either this chapter or AS 10.20,"

Page 148, line 8:

Delete "approved by the United States Secretary of the Interior"

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

Delete "may not be considered to be a distribution in partial liquidation" and insert "is not a 'distribution to its shareholders' as defined by AS 10.06.990(17)"

Page 149, line 12, following the period:

Insert "Notwithstanding the provisions of AS 10.06.574--10.06.586, a plan of merger, consolidation, or exchange qualified under this section prior to December 19, 1991, shall not include the right of shareholders to dissent."

Page 149, line 15:

Delete "that is required by the language of that Act"

Page 161, line 13:

Delete "July 1, 1983" and insert "July 1, 1984"

SAVING CLAUSE

SEC. 26. To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

SEPARABILITY

SEC. 27. If any provision of this Act or the applicability thereof is held invalid the remainder of this Act shall not be affected thereby.

TEMPORARY EXEMPTION FROM CERTAIN SECURITIES LAWS

SEC. 28. Any corporation organized pursuant to this Act shall be exempt from the provisions of the Investment Company Act of 1940 (54 Stat. 789), the Securities Act of 1933 (48 Stat. 74), and the Securities Exchange Act of 1934 (48 Stat. 881), as amended, through December 31, 1991. Nothing in this section, however, shall be construed to mean that any such corporation shall or shall not, after such date, be subject to the provisions of such Acts. Any such corporation which, but for this section, would be subject to the provisions of the Securities Exchange Act of 1934 shall transmit to its stockholders each year a report containing substantially all the information required to be included in an annual report to stockholders by a corporation which is subject to the provisions of such Act. (Added January 2 1976, P.L. 94-204 §§ 3, 18, 89 Stat. 1147, 1156)

RELATION TO OTHER PROGRAMS

SEC. 29. (a) The payments and grants authorized under this Act constitute compensation for the extinguishment of claims to land, and shall not be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States and the State of Alaska.

(b) Notwithstanding section 5(a) and any other provision of the Food Stamp Act of 1964 (78 Stat. 703), as amended, in determining the eligibility of any household to participate in the food stamp program, any compensation, remuneration, revenue, or other benefit received by any member of such household under the Settlement Act shall be disregarded. (Added January 2 1976, P.L. 94-204 § 4, 89 Stat. 1147)

MERGER OF NATIVE CORPORATIONS

SEC. 30. (a) Notwithstanding any provision of this Act, any corporation created pursuant to section 7(d), 8(a), 14(h)(2), or 14(h)(3) within any of the twelve regions of Alaska, as established by section 7(a), may, at any time, merge or consolidate, pursuant to the applicable provi-

sions of the laws of the State of Alaska, with any other of such corporation or corporations created within or for the same region. Any corporations resulting from mergers or consolidations further may merge or consolidate with other such merged or consolidated corporations within the same region or with other of the corporations created in said region pursuant to section 7(d), 8(a), 14(h)(2), or 14(h)(3).

(b) Such mergers or consolidations shall be on such terms and conditions as are approved by vote of the shareholders of the corporations participating therein, including, where appropriate, terms providing for the issuance of additional shares of Regional Corporation stock to persons already owning such stock, and may take place pursuant to votes of shareholders held either before or after the enactment of this section: *Provided,* That the rights accorded under Alaska law to dissenting shareholders in a merger or consolidation may not be exercised in any merger or consolidation pursuant to this Act effected prior to December 19, 1991. Upon the effectiveness of any such mergers or consolidations the corporations resulting therefrom and the shareholders thereof shall succeed and be entitled to all the rights, privileges, and benefits of this Act, including but not limited to the receipt of lands and moneys and exemptions from various forms of Federal, State, and local taxation, and shall be subject to all the restrictions and obligations of this Act as are applicable to the corporations and shareholders which and who participated in said mergers or consolidations or as would have been applicable if the mergers or consolidations and transfers of rights and titles thereto had not taken place: *Provided,* That, where a Village Corporation organized pursuant to section 19(b) of this Act merges or consolidates with the Regional Corporation of the region in which such village is located or with another Village Corporation of that region, no provision of such merger or consolidation shall be construed as increasing or otherwise changing regional enrollments for purposes of distribution of the Alaska Native Fund; land selection eligibility; or revenue sharing pursuant to sections 6(c), 7(m), 12(b), 14(h)(8), and 7(i) of this Act.

(c) Notwithstanding the provisions of section 7 (j) or (m), in any merger or consolidation in which the class of stockholders of a Regional Corporation who are not residents of any of the villages in the region are entitled under Alaska law to vote as a class, the terms of the merger or consolidation may provide for the alteration or elimination of the right of said class to receive dividends pursuant to said section 7 (j) or (m). In the event that such dividend right is not expressly altered or eliminated by the terms of the merger or consolidation, such class of stockholders shall continue to receive such dividends pursuant to section 7 (j) or (m) as would have been applicable if the merger or consolidation had not taken place and all Village Corporations within the affected region continued to exist separately.

(d) Notwithstanding any other provision of this section or of any other law, no corporation referred to in this section may merge or consolidate with any other such corporations unless that corporation's shareholders have approved such merger or consolidation.

(e) The plan of merger or consolidation shall provide that the right of any affected Village Corporation pursuant to section 14(f) to withhold consent to mineral exploration, development, or removal within the boundaries of the Native village shall be conveyed, as part of the merger or consolidation, to a separate entity composed of the Native residents of such Native village. (Added January 2 1976, P.L. 94-204 § 6, 89 Stat. 1148)

ASSIGNMENTS OF RIGHTS BY REGIONAL CORPORATIONS

SEC. 31. (a) Notwithstanding the provisions of section 3477 of the Revised Statutes, as amended (31 U.S.C. 203), the Secretary is authorized to recognize validly executed assignments made by Regional Corporations of their rights to receive payments from the Alaska Native Fund. Such assignments shall only be recognized to the extent that the Regional Corporation involved is not required to distribute funds pursuant to subsection (j) or (m) of section 7 of this Act.

(b) The Secretary shall not recognize any assignment under this section which does not provide that the United States reserves the right to assert against the assignee and successors of the assignee, any setoff or counterclaim which the United States has against the assignor Corporation.

(c) No stockholder of any Regional or Village Corporation shall have any claim against the Secretary or the United States as the result of any assignment duly recognized by the Secretary pursuant to this section. (Added November 15 1977, P.L. 95-178 § 4, 91 Stat. 1370)

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811
(907) 465-3844

OFFICIAL BUSINESS

LETTER OF INTENT

It is the intent of the Senate Labor and Commerce Committee that the detailed commentary accompanying S.B. 246, House and Senate Joint Journal Supplement No. 11, be considered a comprehensive guide to the proposed new Alaska Corporation Code and as such should be amended and revised accordingly if any changes are made to S.B. 246.

The following narrative changes reflect the amendments adopted in CSSB 246 (L&C).

(At page 89 of the House and Senate Joint Journal Supplemental for April 8, 1983, the Official Comment to Section 388 should be amended to read):

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

While sec. 388 abolished the antiquated accounting concept of "treasury shares", nothing in this section is intended to prejudice the present or contingent contract rights which pre-ACC corporations may have created in reacquired shares described as "treasury shares."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

(At page 123 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read):

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of the entire board.

Subsection (c) is new. It permits board classification pursuant to the terms of a provision on the bylaws rather than the articles of incorporation. In order to classify a board under sec. 455(c) it is necessary that the bylaw have been adopted prior to March 24, 1982 with or without shareholder participation, and that it contains nothing which, were it a provision in the articles of incorporation, would offend sec. 455(a). Thus, all of the restrictions on the minimum size of the board, the minimum number of classes, and the terms of the director office set forth in sec. 455(a) limit the terms of any bylaw which would be effective under sec. 455(c).

Alaska Court System
State of Alaska

KARLA L. FORSYTHE
General Counsel

OFFICE OF ADMINISTRATIVE DIRECTOR

303 K Street
Anchorage, AK 99501

Feburary 7, 1984

Representative Walt Furnace
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Furnace:

You had asked Arthur Snowden to provide comments about the anticipated impact on the courts of HB 343, revising the Alaska Corporations Code.

Carole Baekey, Judicial Education Coordinator for the court system, has extensive background in corporate litigation. Ms. Baekey reviewed the proposed bill in detail; her comments are attached. Based upon her comments, the court system concludes that the superior court will not be substantially burdened by passage of this bill.

Thank you for the opportunity to submit comments. If you have any questions or concerns, please let me know.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
General Counsel

KLF:smh

cc: Arthur H. Snowden, II
Carole Baekey
Judge Stewart

Memorandum

Alaska Court System

TO: Karla Forsythe
General Counsel

DATE : February 1, 1984

FROM: Carole A. Baekey
Judicial Education Coordinator

SUBJECT: House Bill No. 343, Revisions of the Alaska Corporation Code

You requested that I review House Bill No. 343 and its commentary, with a view to any increased burden on the court system.

Generally, House Bill No. 343 strives for greater clarity and flexibility with respect to corporate organization and operation. The bill contains several new legal concepts which could give rise to interpretation in superior court. Historically, when a statute containing new standards or legal concepts is developed, cases are brought to interpret the statute. I have briefly outlined the provisions of the proposed Alaska Corporation Code which could conceivably alter the court's burden. Only issues which might affect court caseloads have been addressed. From this overview, it does not appear that the superior court would be substantially burdened by enactment of the proposed Alaska Corporation Code.

The proposed provisions which have the potential to affect causes of action filed in superior court are highlighted below:

1. Proposed A.S. 10.06.358-365, inclusive:

These proposed sections address a corporation's distribution of corporate assets, usually in the form of dividends, and imposition of restrictions to prevent the dissipation of corporate assets by an insolvent corporation. The specific problem addressed is the distribution of dividends by a corporation to shareholders, after which the corporation is unable to meet its obligations to creditors or to meet its contractual preferences to holders of senior share of stock.

Existing A.S. 10.05.201 imposes an "equitable insolvency test" upon distribution of dividends. This test is the "inability of the corporation to pay its debts as they become due in the regular course of business." This test is also imposed upon existing A.S. 10.05.309 setting forth the restrictions on the redemption or purchase of redeemable shares. (It should be noted that page 76 of the March, 1983 commentary of the Alaska Code Review Commission refers to this

restriction in A.S. 10.05.012, which section does not exist in the present corporation code. Perhaps this is a typographical transposition referring to either existing A.S. 10.05.201 or A.S. 10.05.210.)

Existing A.S. 10.05.369 imposes a second accounting method, "use of capital surplus to reduce losses," upon distribution of dividends. As the commentary notes, existing A.S. 10.05.369 permits the board of directors to eliminate an operating deficit by simply writing down or reducing capital surplus. Any subsequent net profits could then be charged against stated capital or capital surplus and distributed as earned surplus notwithstanding the former deficit. The danger here is that dividends to common or junior shareholders might be distributed by a corporation so as to prejudice the ability of the corporation to meet its debts or dividend obligations to senior shareholders in subsequent accounting periods.

Each of the equitable insolvency tests and the use of capital surplus to reduce losses is reflected in existing A.S. 10.05.204 - payment of dividends, A.S. 10.05.207 - distribution in partial liquidation and A.S. 10.05.210 - payment of accumulated dividends out of capital surplus.

The commentary covers these issues in depth and this brief sketch is to frame the major change in accounting methods in the proposed law. Assuming a corporation is equitably solvent as defined in proposed A.S. 10.06.360, proposed A.S. 10.06.358 permits licit distribution of dividends if: (i) the distribution is made to the extent of retained earnings, or (ii) the distribution is in satisfaction of (a) the "ratio/assets surplus test" which requires that the assets of the corporation are equal to one and one-fourth of its current liabilities and (b) current liquidity requirements are met. Unlike the existing law, there are no exceptions to the stated requirements.

Proposed A.S. 10.06.360 would give limited protection to preferences of senior shares by forbidding any corporate distribution which would raid corporate assets. Proposed A.S. 10.06.365 restricts the board's authority under proposed A.S. 10.06.358 to make a distribution on junior shares unless certain requirements are met; the goal is to impose restrictions designed to protect shares with a dividend preference.

In short, proposed A.S. 10.06.358-365, inclusive, is a change in accounting procedures to clarify and strengthen standards for distribution of assets, namely dividends. If the proposed legislation becomes law, undoubtedly cases will be brought to test the law. That is the function of the court. However, it should be noted that proposed A.S. 10.06.358-365, inclusive, is an attempt to protect shareholders by simplifying accounting procedures and getting rid of numerous exceptions enabling corporations to dissipate assets. This simplification could conceivably reduce complex corporate litigation.

The only apparent lack of clarity I perceive is in proposed A.S. 10.06.363 which does not protect liquidation preferences when a distribution is made to either shares of the same class or series or to a class with superior preferences upon liqudation. Inequities could easily be remedied by proper corporate planning done by counsel. In any event, this provision is not likely to result in a flood of litigation.

2. Proposed A.S. 10.06.378.

This proposed section addresses shareholders who receive any distribution of corporate assets with knowledge of facts indicating the impropriety of the distribution. The commentary notes a shareholder would be liable "if a reasonable person in like circumstances exhibiting reasonable effort would have recognized an indication of impropriety in the distribution." Any suit would be brought in the name of the corporation and a shareholder's liability under this section would be brought for the amount received by the shareholder with interest at the legal rate on judgments until paid.

This proposed section, new to Alaska law and a new cause of action, is an extension of liability in existing A.S. 10.06.225(a). Present law provides that a director against whom a claim is asserted for the payment of distribution of assets is entitled to contribution from shareholders who knowing a payment to be illicit took it. Existing A.S. 10.05.225(a) is in the proposed code as A.S. 10.06.480(b).

3. Proposed A.S. 10.06.405.

This proposed section would require that shareholders of a corporation meet annually. If management defaults in the calling of an annual meeting, under proposed A.S. 10.06.405(b), on the application of a shareholder, the superior court may order a meeting held.

This is a new remedy for an aggrieved shareholder, giving rise to a new statutory cause of action in superior court.

4. Proposed A.S. 10.06.425.

This proposed section which would explicitly permit the formation of voting trusts and agreements among shareholders has its genesis in existing A.S. 10.05.171. As the commentary notes, A.S. 10.06.425(b), by not being more specific, leaves to common law development the development of limitations upon agreements between or among shareholders which fall short of a voting trust.

Clearly, under this proposed section courts could be called upon to determine what, short of a voting trust, constitutes a valid agreement of shareholders. Irrespective of the proposed changes, this issue historically has been and would remain a proper cause for determination in superior court. Therefore, no measurable change would seem to be wrought.

5. Proposed A.S. 10.06.430.

This proposed section has its origins in existing A.S. 10.05.237-249, inclusive, addressing inspection of books and records. Proposed A.S. 10.06.430 strengthens the penalties for restricting and refusing inspection, but creates no new cause of action.

Irrespective of the increased penalties for restricting or refusing inspection of books and records, this issue is presently within the domain of the superior court. Therefore, no measurable change would be wrought by the increased penalties.

6. Proposed A.S. 10.06.433.

This proposed section would establish a corporation's obligation to prepare and send an annual report to shareholders. No similar requirement exists in the present law Therefore, this proposed section would create a new obligation of domestic and foreign corporations to shareholders. This obligation would be enforceable by superior courts.

While this section gives rise to a new corporate obligation and thus a new cause of action, it is inconceivable that this would create a flood of litigation.

7. Proposed A.S. 10.06.435.

This proposed section would be Alaska's first statutory attempt to regulate shareholders' derivative actions. Presently, shareholders' derivative actions are regulated by the Supreme Court's adoption of Rule 23.1 of the Federal Rules of Civil Procedure.

Since this cause of action already exists in fact, the proposed statute should create no major changes.

8. Proposed A.S. 10.06.460.

This proposed section would permit the removal, by shareholders of a corporation, of a director without cause. This would be a new provision since existing A.S. 10.05.177-192, inclusive, provides only for removal of directors at the time of the annual meeting. The proposed section gives shareholders of a corporation more latitude in choosing and terminating directors and sets out restrictions on this right of shareholders.

This proposed section would seem to create no new causes of action, save the validity of an election, which, if challenged, would come under the court's scrutiny. A deluge of cases is unlikely.

9. Proposed A.S. 10.06.463.

If there would be insufficient votes to remove a director under proposed A.S. 10.06.460, proposed A.S. 10.06.463 provides for judicial removal of a director for specific types of acts. The corporation could be made a party to the action.

This section creates a new cause of action. Generally, corporations should be able to handle these matters internally with recourse to the court only in extreme cases. A deluge of such cases is unlikely.

10. Proposed A.S. 10.06.488.

This proposed section would provide for secondary liability of directors and officers personally, the cost of doing business, if the assets of the corporation should provide insufficient. This is an attempt to get at thinly capitalized or mismanaged corporations. The total secondary liability of an officer or director could not exceed $25,000 and contribution is authorized. A written contract could be competent to modify or eliminate liabilty.

This section is without precedent in Alaska and is an attempt to pierce the corporate veil and address ultra vires acts of directors and officers. Settling disputed claims is an obligation of the court and this proposed section falls within that obligation. This specific cause of action could give creditors additional parties to pursue in satisfaction of claims. Whether this would increase cases is not clear since, conceivably, directors and officers could be impleaded or otherwise joined as defendants.

11. Dissolution of Corporation.

Proposed A.S. 10.05.465-10.05.594, inclusive, addresses the dissolution and winding up of affairs of a corporation. Dissolution is noted herein because it is a major area of court intervention. Since this is usually a contentious area among corporate management, shareholders and creditors, courts have a long history of intervening in the affairs of a dissolving corporation. Proposed A.S. 10.06.605-675, inclusive, appears to create no substantial new duties for the court.

12. Proposed A.S. 10.06.818.

This proposed section has its origins in existing A.S. 10.05.777 which permits interrogatories by the commissioner if interrogatories are necessary to ascertain whether a corporation has complied with the state's corporation code.

Proposed A.S. 10.06.818(d), unlike existing law, provides that a petition from the corporation to extend the date for answer, to modify or set aside the interrogatories may be filed by the corporation with the commissioner.

Proposed A.S. 10.06.818(d) gives a corporation an unprecedented recourse to superior court. The use of this tool in superior court would largely depend on the extent to which the commissioner propounded unwelcome interrogatories to corporations. Lacking an abuse of discretion in the commissioner, it is unlikely this tool would create a deluge of superior court cases.

Please see me if you have any questions.

CB:tr

TESTIMONY OF ARCO ALASKA, INC.
JOINT HEARING OF HOUSE LABOR
AND COMMERCE COMMITTEE AND
HOUSE JUDICIARY COMMITTEE
PROPOSED HB 343
"AN ACT REVISING THE CORPORATION CODE"

Good morning. My name is Bruce Frenzel. I am an attorney with ARCO Alaska, Inc. here in Anchorage. I am also a member of the Corporation Code Revision Task Force of the Business Law Committee of the Alaska Bar Association. I am speaking today on behalf of ARCO Alaska, Inc., a wholly owned subsidiary of Atlantic Richfield Company.

Proposed House Bill 343 envisions a completely new Corporate Code. As noted in the House and Senate Joint Journal Supplement, No. 11, dated April 8, 1983, major portions of this bill "are without precedent in Alaska law." Any such major changes deserve adequate time for persons affected by the bill to review and comment. We recognize that the bill was introduced last April, but has laid dormant until now.

We especially appreciate the hard work by the Alaska Code Revision Committee which has gone into the preparation of this bill, but we are strongly opposed to certain portions of it, and are uncomfortable with others.

ARCO respectfully requests that consideration of this bill be deferred for 30 days so that specific, constructive comments on the precedent-setting portions of this bill can be made. With constructive changes to the bill, ARCO may be able to support it.

As currently drafted, one specific objectionable provision allows individual liability for corporate officers, which destroys a basic purpose of incorporation, which is to limit liability

for corporate officers and shareholders. For a large corporation such as ours, the proposed provision combined with the large number of creditors would amount to completely unlimited liability for a few of our highest-level employees. Such a provision is also likely to be even more onerous for small or closely-held corporations.

We will commit ourselves to recommend specific language changes to make the bill acceptable. Unless consideration is deferred, however, we must oppose this bill as currently drafted.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

Dick Regan

DATE: February 8, 1984

RE: Amendments to HB 343/SB 246 on
for profit corporations

At the joint hearing of the Labor and Commerce Committees January 23, 1984, reference was made to certain proposed amendments that would be forthcoming.

It was agreed that the amendments would be prepared by Professor Dan Fessler and would be provided to the committees after a final review of the form by the parties who had initiated them--the Division of Banking, Securities and Corporations, the spokesperson for the Alaska Federation of Natives subcommittee appointed to work on the bill, and counsel for Alaska Airlines.

Those steps were followed.

The amendments were provided to committee staff of the House and Senate Labor and Commerce Committees, both before and after the final review.

On February 1st, Senate Labor and Commerce approved the amendments as submitted, together with a Letter of Intent that two changes in the commentary on the bill be approved as submitted. The committee voted the bill out as CSSB 246(L&C), incorporating the agreed amendments.

Except for one date, the substance, and in some instances the form of the amendments had been agreed upon by the code revision commission many months ago, with the understanding that they would be offered to the legislative committees at the appropriate time.

The proposed amendments and proposed form of the Letter of Intent are attached, as previously provided on February 3.

Also attached are a few words of explanation keyed to the page and line of each proposed amendment.

DR:chw

EXPLANATION OF PROPOSED AMENDMENTS TO HB 343

Page 12, lines 27-29:

Section 5(b) at page 160 of the bill requires existing coorporations to restate their articles of incorporation within five years after the effective date of the new code. It was pointed out that in some instances a corporation cannot provide the name and address of its initial registered agent because the information has been lost. This amendment would take care of the problem.

A relatively recent date in the section is needed, but the specific date chosen is not of importance. The date of first introduction of the Alaska Corporations Code as a bill in the legislature is a date used elsewhere in the bill. Using it here is simply to avoid using many different dates in the bill.

Page 12, line 29:

The amendment is subsumed in the above amendment.

Page 16, line 5:

This corrects an erroneous cross reference. There is no section 10.06.873 in the bill.

Page 56, following line 28:

The bill provides that staggered terms of directors are invalid unless provided for in the articles of incorporation. The effect of the change is that a provision in a corporation's bylaws providing for certain staggered terms of its directors would be valid if the provision was in the bylaws before a recent date--the date of first introduction of the Alaska Corporations Code bill in the legislature, March 24, 1982.

In other words, the amendment would make this provision of the bill prospective, keeping in effect valid bylaws on staggered terms; however, no corporation would be able to hurriedly enact bylaws now, simply in anticipation of passage of this bill.

Page 127, lines 7-9:

The commission agreed with Director Kirkpatrick that requiring a corporation from another state to file its articles and all amendments to its articles in Alaska would be costly to administer and that the ready availability of those articles and amendments from the parent state of the corporation adequately serves the needs of Alaskans. The change was agreed upon in the committee hearing May 17, 1983, and again in the hearing January 23, 1984.

Page 138, line 28; Page 139, line 9:

These are only changes to preferred drafting style. A misdemeanor is a "Class A" misdemeanor if no class is designated in the statute. (Reference existing AS 11.81.250(c)).

Page 147, lines 28-29

This is a deletion of unnecessary and possibly confusing verbiage.

Page 148, line 8:

The deleted phrase is obsolete. Originally the articles of incorporation of an ANCSA corporation had to be approved by the Secretary of the Interior (ANCSA, Section 7(d)). However, after five years the articles could be freely amended. Because many such amendments have been made, articles that are "approved by the Secretary of the Interior" are a thing oof the past in some of the ANCSA corporations.

Page 149, line 18:

The change is to conform to a decision made by the legislature in existing law, AS 10.05.005(a)(2)(B)(ii), that ANCSA Section 7(i) money is not included in "capital". Section 7(i) income is from the poolled 70% of revenue from the subsurface estate and timber.

Page 148, lines 25-26:

This is a change in form only, to conform to language elsewhere in the Act.

Page 149, line 12, following the period:

The section of the bill amended here deals only with ANCSA corporations. The only purpose of the amendment is to conform to Section 30 of the Alaska Native Claims Settlement Act.

Page 149, line 15:

Surplus and confusing language is deleted.

Page 161, line 13:

An update of the effective date clause.

A M E N D M E N T

Offered in the HOUSE LABOR AND COMMERCE COMMITTEE BY:

TO: HB 343

Page 12, line 27-29:

Delete all material and insert:

"(3) if incorporation is after March 24, 1982, the address of its initial registered office and the name of its initial registered agent;"

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

"(c) a provision in the bylaws of a corporation which, were it a provision of the articles of incorporation, would accord with (a) of this section shall be valid provided that it was adopted prior to March 24, 1982."

Page 127, lines 7-9:

Delete "together with a verified copy of its articles of incorporation and all amendments to the articles,"

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

Delete ", except a village corporation that may be incorporated under either this chapter or AS 10.20,"

Page 148, line 8:

Delete "approved by the United States Secretary of the Interior"

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

Delete "may not be considered to be a distribution in partial liquidation" and insert "is not a 'distribution to its shareholders' as defined by AS 10.06.990(17)"

Page 149, line 12, following the period:

Insert "Notwithstanding the provisions of AS 10.06.574--10.06.586, a plan of merger, consolidation, or exchange qualified under this section prior to December 19, 1991, shall not include the right of shareholders to dissent."

Page 149, line 15:

Delete "that is required by the language of that Act"

Page 161, line 13:

Delete "July 1, 1983" and insert "July 1, 1984"

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811
(907) 465-3844

OFFICIAL BUSINESS

LETTER OF INTENT

It is the intent of the Senate Labor and Commerce Committee that the detailed commentary accompanying S.B. 246, House and Senate Joint Journal Supplement No. 11, be considered a comprehensive guide to the proposed new Alaska Corporation Code and as such should be amended and revised accordingly if any changes are made to S.B. 246.

The following narrative changes reflect the amendments adopted in CSSB 246 (L&C).

(At page 89 of the House and Senate Joint Journal Supplemental for April 8, 1983, the Official Comment to Section 388 should be amended to read):

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

While sec. 388 abolished the antiquated accounting concept of "treasury shares", nothing in this section is intended to prejudice the present or contingent contract rights which pre-ACC corporations may have created in reacquired shares described as "treasury shares."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

(At page 123 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read):

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of the entire board.

Subsection (c) is new. It permits board classification pursuant to the terms of a provision on the bylaws rather than the articles of incorporation. In order to classify a board under sec. 455(c) it is necessary that the bylaw have been adopted prior to March 24, 1982 with or without shareholder participation, and that it contains nothing which, were it a provision in the articles of incorporation, would offend sec. 455(a). Thus, all of the restrictions on the minimum size of the board, the minimum number of classes, and the terms of the director office set forth in sec. 455(a) limit the terms of any bylaw which would be effective under sec. 455(c).

HB 343 TITLE & SPONSOR SUMMARY 14:39 1/30/84 PAGE 1 OF 2
AMENDED TITLE:
AN ACT REVISING THE CORPORATIONS CODE; AND PROVIDING FOR
AN EFFECTIVE DATE

PRIME SPONSOR: HOUSE RULES COMMITTEE.
CO-SPONSORS:
CURRENT STATUS: 4/08/83 IN (H) LABOR & COM REFERRAL: JUDICIARY

HB 343 HOUSE ACTION 14:39 1/30/84 PAGE 2 OF 2

DATE	SEQ	PAGE	LEGISLATIVE ACTION
04/08/83	01	0791	FIRST READING -- COMMITTEE REPORTS
04/08/83	02	0792	COMMENTARY HSE JOINT SUPPL #11
			LABOR & COMMERCE
			JUDICIARY
			RULES
****	**	**	*** *** ***

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

Senator Richard I. Eliason, Chairman
Senator Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 1, 1984

RE: Transcript of joint hearing on
HB 343/SB 246 on profit corporations

Enclosed is a transcript made from the House Labor and Commerce Committee's tape of the joint hearing on HB 343/SB 246 held Monday, January 23, 1984. Catherine Walsh of this office typed it at the request of the code revision commission.

Any members of the House or Senate Labor and Commerce Committees who were absent from the January 23rd meeting may be especially interested in the transcript.

Since the House members had to leave for a floor session before the meeting was concluded, they may be interested in the testimony at the last of the transcript--testimony of Elizabeth Johnston of the Alaska Federation of Natives subcommittee on the bill and Irv Bertram, legal counsel for Alaska Airlines.

DR:chw

Enclosure

JOINT HOUSE /SENATE LABOR AND COMMERCE COMMITTEE
HEARING ON HB 343/SB 246--FOR PROFIT CORPORATIONS
JANUARY 23, 1984
8:30 a.m.

COWDERY: I'd like to call the Labor and Commerce meeting to order. It's January 23, 1984, at 9:50 a.m. (sic) 8:50 a.m. I'd like to note those present: Rep. Ueling, Rep. Pestinger, Rep. Koponen and James Cowdery. And I'd also like to note present Senator Mulcahy. The purpose of this morning's meeting is to have testimony on an act revising the corporate code. At this time I think that we would like to call on John Abbott and anyone that would like to testify sign in. The first one to testify that I believe I'd like to have is John Abbott. State your name and affiliation.

ABBOTT: Thank you, Rep. Cowdery. My name is John Abbott and I am the chairman of the Alaska Code Revision Commission. The code revision commission, for those of you who are unaware of this, was a Title 24 commission created by the legislature in 1976. It is comprised of individuals representing the Alaska Court System, the Attorney General's office representing the Governor, the Alaska Bar Association representative, representatives from both the House and the Senate, at this time, Rep. Charlie Bussell and Senator Patrick Rodey. Myself as an appointment of the Governor, as a layperson and Fred Brown as a representative of Governor Sheffield. We have one vacancy on the commission at the present time. Generally, the purpose of the commission is to entertain requests by the legislature, by any branch of government for that matter, to look into areas of statutory law of a technical nature that are in need of revision for any number of reasons including the fact that they no longer comport with the Alaska life, because we are a more sophisticated state, because they haven't provided for a number of years, that they are out of sync with the present needs of the law. The commission also entertains its own projects and has at any given point in time two major projects at least, plus a number of minor projects for consideration by the legislature. We have at the present time five major bills, some of which will be considered by the legislature this session, others will die and not get consideration. The bill in front of you today has been introduced by the Rules Committee in both the House and the Senate as HB 343 and SB 246. The two bills are identical in what they do and were introduced simultaneously for the purpose of consideration by both the House and Senate without the necessity of going through one and then going through the other. This is the practice the code revision commission has used for the past several years to expedite consideration of the bill. Myself, as chairman, and Jerry Kurtz who represents the Alaska Bar Association have been present on the commission during the entire

period of time the corporations bill has been considered and worked on, and we along with with other members of our staff and other commissioners are most anxious to meet with you or your staff to further explain the bill itself. It's a very large bill; it's complicated; it is a sophisticated bill. It determines all of the areas of responsibility which are taken on when a company seeks a corporate charter and seeks a privilege conferred by the State of Alaska. We have with us today Professor Daniel Fessler. He is a professor of law at the University of Davis, California, who has been the consultant on this bill since its inception and is one of the recognized authorities on corporate law in the United States. He will give you a thumbnail sketch of this bill and attempt to answer any questions that you may have concerning the specific technical aspects of the bill. The bill was the result of concern on the part of members of the code commission, both in private practice and in the other areas represented by the code commission, that some work needed to be done because the basic bill had been, as it were, an off-the-rack bill adopted from Oregon statutes at the time of statehood. Whether or not it was appropriate to Alaska even at the time it was adopted leaves some question. Certainly the existing law does not in any respect really meet the needs of Alaskans for incorporation. The new bill attempts to set out and define all the relationships between the various principals or players in the corporate status. So that one need only look at this bill to determine how you become a corporation; how you act as a corporation; how you terminate as a corporation. The bill that's presently before this committee was introduced, I believe, on April 9, 1983. Since that time, some changes have been made as a result of public hearings held by the code revision commission and input from various different organizations concerning some of the specific features of the bill. And as a result, the code commission will be making some recommendations for changes to the committees considering this bill. The work on sections, written comments to the bill and requests that certain changes be made. These changes address concerns raised by Alaska Airlines, one of probably the state's largest corporations, a special subcommittee of the Alaska Federation of Natives that has worked for quite some time with the code commission, has graciously, generously provided its own time and expertise and its legal staff in various of the corporations and has provided us with some good and needed amendments to the bill. Those, too, will be entertained. We also have worked very closely with Mr. Willis Kirkpatrick, deputy director of corporations in the Commissioner of Commerce office. And he, too, has recommended some changes that if made will reduce any financial impact on his office. So that it was the intent of the commission to draft a bill that would have no financial impact on the Commissioner of Commerce office or the director of corporations. So you will be getting some recommendations for amendments pursuant to our discussions and the exchange of ideas of Alaska Airlines, the Commissioner of

Commerce and the Alaska Federation of Native's subcommittee. I think without further ado I'll ask Professor Daniel Fessler to come up and give you a brief summary, an overview of what the bill does. If there are any questions, we also have signed up as witnesses, Commissioner Jerry Kurtz, Fred Brown to provide additional testimony or comments or, in the event you have some questions, we'll do our best to answer them for you. Thank you.

COWDERY: Thank you. I'd like to note that Senator is present. And at this time, I'd like to have John Abbott . . . then the next one up is . . .

RODEY: Rather than invite any comments, I think that Professor Fessler can do a better job of explaining the material than anybody else I know. Mr. Chairman, I'm the Senate member of the code revision commission, and the code has labored long and hard, particularly Professor Fessler and Chairman Abbott on this particular legislation. And I think it is worthy of the committee's very serious consideration. It is in final form, but it is very near passage.

FESSLER: Gentlemen, I am a school teacher at the University of California at Davis. And the subjects that I teach are contracts and corporations. Four years ago I was approached by the commission and asked if I would be interested in serving as a consultant to first survey the content of existing Alaska statutory law in the business field, and then work with the commission should it determine that there was need for revision. The survey of existing Alaska law was undertaken, and the conclusion was arrived at that the existing Alaska law was not the law that the state would most like to have its citizens functioning under. The law that we currently have in Alaska was adopted by the legislature, the first legislature after statehood, by adopting the then Alaska, excuse me, the then content of the Oregon corporation law. The Oregon corporations law in turn was taken from something called the Model Business Corporation Act, which act was put out by the Business Law Section of the American Bar Assocation in the early 1950's. By the time Alaska adopted the Oregon law, the Oregon legislature was on the verge of changing it. And, subsequently, the Oregon legislature has changed much of the content of the law. So, and this is because the model act, which was the basis of the Oregon law and then became the basis of our sort of stepchild has been in the process of evolution. The commission also noted that in the intervening near quarter of a century, that there have been significant changes in corporate law in three of the most critical jurisdictions to which other states generally look for guidance. And that is that New York had rewritten its corporations laws in the late 1960's; California undertook a similar project in which I was involved on the working committee with the legislature in the mid-1970's. And finally the model

act itself has been recalled and is in the process of a three-year study in which a couple of years from now will result in further recommendations. So there have been changes with regard to the theoretical basis of the law. Further, there are changes in Alaska in a quarter of a century. Changes which suggested that it might be time for the State of Alaska to have a corporation law that is a product of its own deliberate creation, rather than something borrowed from elsewhere. The result of this four-year effort is the bill which you have in front of you. And with the exception of some minor amendments which resulted in final meetings with representatives of the Alaska Federation of Natives subcommittee and various other private parties who have testified before the commission that the bill which the commission is seeking your legislative approval and enactment is now in final form. In addition to the bill, the commission has prepared very lengthy commentaries. These commentaries, hopefully, are designed to explain to members of both the House and Senate the origin of each and every provision of the act, to share the value judgments which caused the members of the code revision commission to recommend that particular content, to disclose to you to the extent that the statute is borrowed or modified from statutory law in other jurisdictions the specific genesis of the law, and then to state what change would be made in existing Alaska law were the legislature to adopt this bill. In addition, your staffs will be furnished, and the members will be invited, to work with another document. I apologize for the prodigious size of these documents, but this document is useful in that if an individual is familiar with the provision of existing Alaska law, this works backwards from existing Alaska law, section by section, and shows how that provision would fare should this particular bill be adopted. So those study aids hopefully will be useful to staffs and will be useful to the various committees of the legislature. What I had hoped to do this morning was to share with you some of the value judgments which the commission has made and which are embodied in the multiple provisions of this act. One of the major disadvantages of existing Alaska law is that if an individual were to pick it up seeking to know the content of the law the individual might follow, existing Alaska corporate law is totally disorganized. Provisions which may relate or surround the problem are scattered throughout the bill. One of the initial impressions that you will gain from looking at this bill is that it is very tightly organized. it is organized by major topical sections with the hope that if an individual has a problem with the formation of a corporation, all provisions of the act that deal with corporate formation will be found in Article 3. If the issue relates to corporate finance, Article 4 contains all the relevant law. So that, in essence, the commission directed me to draft the value judgments which it had made very much in the form of a cookbook, but hopefully getting the ingredients in the right order so that it should be something which an individual, whether

a layperson or a practitioner desirous of knowing the content of the law, will be able to find it. And once in the right area, will find all of the related provisions of the statute rather than have them lying around in land mines some 25 to 30 credit pages later, which is the rather dubious distinction of the current provisions of chapter 5, Title 10. Now the areas wherein significant value judgments are found would be Article 3 which deals with the formation of a corporation. Some states like California have attempted to say that if you are going to form a corporation in California, certain major value judgments have been made by the legislature. And the price for forming a corporation in California is that you comply with the value judgments. They would include such things as the requirement that there be cumulative voting for shareholders; that the board cannot be classified; that the directors can only serve one-year terms. California is a statute which is very pregnant with value judgments that sort of tell citizens this is the only way we are going to permit it to be done. Now the reason that this statute does not do that is first there was a fundamental philosophical disagreement that the State of Alaska should be in the business of making value judgments about how people who enter in the corporate form ought to behave. The value judgment which took precedence over that was that people should be informed by reading the statute what the possibilities are. And that they should be allowed, knowing what the possibilities are, to make their own decisions as to whether there will be cumulative voting; how large a board they will have; whether they will classify the board; whether the board will have terms that exceed one year. But that those value judgments should be layed out, and they are layed out in Article 3 in a manner which an individual determining to form a corporation can quickly see that these are the basic things with which the individuals desirous of entering this association should come to some agreement. Further, there is the advantage that we say that if you are going to make these fundamental decisions, you must put them in the articles of incorporation. So that if a person who is a potential investor desiring to know what the lay of the land is for XYZ corporation need only obtain a copy of the articles of XYZ corporation, and that individual will have a definitive statement of the basic value judgments which citizens forming that corporation have made. And there is a further problem, while California has attempted to make value judgments and impose them on citizens, the scandal is that people then simply leave the state and foreign incorporate. They come back as Oregon corporations. They come back across the state line as Nevada corporations. And so it was deemed that this was probably not the best thing to attempt, and that the attempt in the state that's pursuing it isn't working. So in that respect, although you'll see the California corporation code has had a significant impact on many of the provisions of this recommended legislation, the basic thing that the California corporation code is known for

is not carried forward here. It is possible to form a corporation in Alaska which is every bit as straightlaced as a corporation mandated under California law. That is a value judgment that citizens can make. It is not a value judgment that the legislature would be making for you. Now with regard to Article 4 on corporate finance. Here Alaska law was deemed to be flawed in a manner that is true of virtually every state. Lawyers, at least in my experience of being one and teaching others for a longer period of time than I like to recollect, generally make a career decision to go into law sometime after they learn that they have no aptitude whatsoever for arithmetic, let alone mathematics. The consequence is that most lawyers cannot, including myself, balance a checkbook. And lawyers are horrified by concepts of accounting. Therefore, over the years we have sort of developed our own accounting techniques. Because over the years we have had perhaps a bigger voice than we should have whispering in the ears of elected representatives and people, our versions of the myths of accounting rather than the accounting profession have begun to creep into the law. Alaska's current corporation law suffers from perhaps a terminal case of lawyer-accounting terms. One of the major things which corporations must worry about if they are to behave in a socially responsible manner, since they are given the presumption of limited liability. If I form a corporation, my creditors and even victims of calamaties such as torts must look only to the assets of the corporation, not to my own personal assets. Circumstances are important to the state, all people who come into contact with corporations. Well, then what assets must I leave with the corporate entity? What accounting principles must I observe in keeping the books of the corporation? The law has always been interested in this question. But the problem is that we allowed a gulf to grow between what the law seemed to be suggesting and what accountants were telling people are the intelligent way to parse through matters and to resolve them on the books and records of a corporate entity. California broke new ground in 1977 when it said that it would abolish all concepts of legal accounting. It would substitute some straight, common sense ideas as to when a corporation could pay a dividend. A corporation could pay a dividend within the discretion of the board of directors at any time so long as the assets of the corporation equal the liabilities of the corporation with the protective ratio of $5.00 in assets to every $4.00 in liabilities. A very simple concept to understand. There are no longer reduction surplus, earned surplus, all of the notions which lawyers have invented over the years. It's a very simple idea. If we are going to make a distribution, whether we make it in money, whether we make it in corporate property to shareholders, we have what is called the ratio of assets to liabilities which must be maintained. This bill adopts what is turning out to be one of the most successful decomplications of corporate life which was done in California. It also follows both

California and now New York in saying that in complying with the law, that so long as a corporation keeps its books and records in a manner which reflects generally accepted accounting principles, he has complied with the law. So we leave to the accounting profession and not to my brothers and sisters-in-law the determination as to what is the best way for that craft and science to proceed to advise. So accounting is left to accountants, but we make a simple value judgment to protect people. It's this ratio of liabilities to assets. Five dollars in assets to four dollars. You can make any distribution you want so long as you do not go below that floor. That, I think, will make it much easier for people determined to comply with the law to do so and make the detection of those few people who are determined to evade the law much easier. Now with regard to Article 5, a major question has been in existence for many years. What are the proper prerogatives of shareholders as opposed to the directors and officers of the corporations? Is it to be an Athenian democracy, or is the better model that you elect the directors and you vest control and management of the corporate entity during the period of tenure of their terms in the individuals? Article 5 has a default provision that the powers of control and management of the corporation are vested in the board. However, a corporation may by the terms of its articles modify this presumption and confer greater prerogatives upon shareholders. If it is going to do that, however, it must do it by an affirmative provision in the articles of incorporation. The thrust of Article 5 is to ensure that shareholders have acess to reliable and up-to-date information as to the condition and record of accomplishment or failure of the people they have elected to be the directors of the corporation. You will notice that for the first time we would standardize notice requirements. Under current law, one of the defects is that we have no standardization of notice requirements. For certain matters, 30 days' notice is sufficient. For others, 40 days is required. Under this bill, notice requirements are standardized, and it should make people who are determined to evade it much easier to ferret out. So again the act reflects the commission's value judgment that the basic policy or power between shareholders on the one hand and directors on the other that the act should specify what should be that ratio or relationship if the parties don't wish to change it. But if they do wish to make a different arrangement, if they put it in the articles they are free to do so. Article 6 deals with the prerogatives and responsibilities of officers and directors. Here I think you'll be very pleased to see that for the very first time we have a statutory definition of the duties of care and duties of loyalty which directors and officers are expected to obey. At the present time in Alaska, it would be a matter of conjecture what the Alaska Supreme Court would eventually say with the content of those important duties. This makes it difficult for an individual who is embarking upon the career of

being a corporate director, perhaps out of accommodation to friends, and many small corporations know exactly what it is I am expected to do, a peril of later on being held accountable for not having done it. Another important feature of this bill which has received wide support by those people who have read it, is Section 435. Section 435 for the first time in Alaska subjects shareholder derivative causes of action to statutory regulation. Alaska presently has the dubious distinction of being one of two American jurisdictions which has no statutory regulation of the derivative suit. This is a suit in which a shareholder comes forward and brings a cause of action that alleges that not I, the shareholder, have been injured but that the corporation has been injured. And I as a shareholder appoint myself to litigate this matter on behalf of the corporation. The tension between the prerogatives of the incumbent directors of the corporation to make that decision and to control that litigation and the rights of a shareholder to say that I am going to elbow my way into the pilot's seat in this plane for the next several years, is a very important one because it may be that there is corruption at the board level. Maybe there is not. I urge your very careful attention to Section 435 to point out that I believe you would find that you would go from having no statutory regulation on this important subject to having one of the most balanced, comprehensive regulations of the subject in this country. Section 435, therefore, is an important innovation. Article 7 is rather technical in nature. It deals with the question of how we go about making amendments and changes to the articles of incorporation. Again, it standardizes procedures and forces the attention of those who wish to change the basic format of a corporation into doing it by way of amending the articles so that there is regularity. And again so that potential investors interested in the corporate entity can look at the articles of incorporation and have not only an historical impression of what the corporation was like in yesteryear, but an accurate, modern impression of where the power within this corporation is currently being distributed. Article 8 is going to be a matter of great interest to your constituents. It deals with what are called organic changes. In essence, mergers; consolidations; share exchanges; sale of all the corporate assets other than in the usual course of business. As each of us is aware, the United States right now is going through what is called a merger craze. Corporations are appearing to be attractive takeover candidates by individuals who may or may not have legitimate desires or desires which would advance the interest of shareholders should they be in a position to seize control of the board of directors. At the present time, Alaska law is very unclear as to the respective roles of incumbent boards as opposed to shareholders. And, therefore, Alaska corporations look vulnerable to individuals who are determined to launch a takeover bid. Article 8 clearly defines the prerogatives of existing management and the shareholders of a corporation with respect to

framing the content of one of these organic changes and taking it through the shareholder approval level. Essentially, what Article 8 does is vest with the existing board the power to frame the terms of a merger, a consolidation, a share exchange, or sale of assets in an extraordinary transaction. And then require two-thirds approval by the shareholders of the corporation in order to approve. This should bring Alaska corporations into line with California and New York and other major states which have moved to protect the integrity of their corporations from being the victims of an easy takeover in which the will of the shareholders and existing management would simply be subverted and brushed aside. Reform needs to be taken in Alaska in this area. I would hope that you would be satisfied with the commission's recommendations which are embodied in Article 8. Article 9, dealing with dissolution, is very important because of the changes that have been made in the federal bankruptcy law. It coordinates with modern federal bankruptcy law and creates for the Alaska judiciary a far more sensible approach to protecting the rights of creditors as well as the rights of senior shareholders in the event that a corporation goes to either voluntary or involuntary dissolution. It also contains some very innovative, and I think, useful provisions that deal with giving shareholders who are being oppressed or frozen out of the role of management or income where other shareholders are being afforded such prerogativees a right in the final analysis to petition for involuntary dissolution in order that the grievance which would have to rise to the level of a very serious grievance to get the attention of Alaska courts. Again, these are not new ideas. They might be the final decision of the Alaska Supreme Court if someone were to spend $100,000 litigating that. But if you enact this bill, all Alaskans with only the expense of supporting their government will have presumptive answers to these important questions. Those are the basic provisions and value judgments which underlie this bill. Both myself and the law students who have assisted me in working with the technicians in this area will be available to any member of either body and staff members. I am prepared now to answer any questions which any members of the committee may have.

RODEY: Mr. Pestinger.

PESTINGER: Thank you, Senator Rodey. Professor Fessler, to me this is a really excellent articulation of the rights and duties and obligations so that it gives our larger corporate participants a clearer understanding of where they stand, which is so essential to doing business. But what I am wondering about, though, is what burden this approach may place upon the smaller mom and pop family corporation. To me, if I had such a business I could not engage in corporate law comfortably without the assistance of counsel. Do you think that this packet necessitates the assistance of counsel as almost a mandate now

for anyone that does business in the corporate form? In other words, I am wondering, I see the need for this in California and New york, and I see the need for this in Alaska with that level of corporations that we deal with. But how about that other level that are just kind of, they get their articles punched out and they ask their lawyer to help them with the minutes, and they look at the Supreme Court that says that the only way you pierce the corporate veil is with an indicia of fraud. So they are using a whole different standard of operation. I mean this is really substantial. Do you think it might have a negative effect on that small family business?

FESSLER: In terms of cost of doing business in the corporate form, I think it will have the opposite effect. Right now, many small businesses probably are coming into corporate existence without the assistance of counsel at all. People are going out and buying little kits for $49.95 that contain forms that they fill in and send to the state. They are oblivious to the legislature's requirement that they file biannual reports to the legislature. They are not doing so. They are in danger of having their articles and their corporate status dissolved by the commission because the legislature has prescribed that as the penalty for not filing reports. And one of the basic difficulties with this situation will always be people who, to use your example, a two-person corporation, decides for one reason or another that they should do business in the corporate form, and then having done that they forget about it. They don't observe any of the formalities of corporate existence. They don't keep separate books and records. They don't segregate their assets from the assets of their corporation. And they don't file reports. Now they would be in trouble under existing Alaska law, sir. They will be in trouble under this bill. In the sense that when the State of Alaska confers a corporate charter on someone, whether or not they have sent $49.95 off to somebody who advertises in every airline magazine, that you don't need a lawyer and you, too, can be a corporation and somehow you will pay no income tax and like me you will turn out being rich. The only person that's probably ever done that is the individual who wrote that book, because he is getting rich by all of the people who write in and send their $50. I think this is the problem you'll want to keep in mind. What I am saying to all of you is that this bill is designed in such a manner that, although it is a complicated subject and I wouldn't suggest anyone could write a corporation code that could be so obvious that an individual could make casual reference to it and never need an attorney so they could guide themselves through the world of maintaining a corporation, this bill does organize the law. It does restate the law. It does have comments which are designed to assist people in understanding the law. Not one of those features can be said about current Alaska law. So there will be a problem of people who incorporate and thereafter regard it as a

little flag of convenience which they'll fly so long as it's useful and which, on the day that it isn't, they'll just forget about it. That will continue to be a problem not only in Alaska, but in California. It's true in Nevada. It's true in Wyoming where I was reared. It's a major social problem we have. People who incorporate with no idea that there are responsibilities as well as privileges for taking on that status. Now, fortunately, the federal tax law which in years gone by caused people to believe that they could pay less income tax by somehow becoming a corporation, have because of movements undertaken first by the administration of President Carter and now of greater emphasis during the administration of President Reagan. As you know, the marginal income tax on individual income has now been reduced from a maximum of 70% now to where it is very close to the top corporate, there is only a two percent spread. But I still find that many people believe that they are going to get some tremendous tax benefit by becoming a corporation. What they do, of course, is eventually wind up in a hellacious tax audit. They find and the individual who wrote the $49 book and gave you the form never accompanies you to that audit because he is living in Bimini.

RODEY: Representative Koponen.

KOPONEN: I was interested in Section 488 which does create a liability for the officers of the corporation, and I'm not up on contract law and one of your notes, in terms of any written contract to modify or eliminate the liability created by this section, what happens to that liability, is it transferred or . . .

FESSLER: Let me explain to all of the members. Section 488, gentlemen, appears at page 67 of the draft in front of you. Section 488 relates also to Rep. Pestinger's question. One of the reasons that people incorporate is to achieve from the State of Alaska a presumption of limited liability. Now this presumption of limited liability means that to all individuals who do business with the entity which is incorporated, they are to look only to the assets which the individuals who incorporated have left with the corporation to satisfy their claim. This is true whether those individuals have made contractual relationships with the corporation or whether they have entered into an accidental injury situation, a tort. Section 488 is called secondary liability of directors and officers. It was reflected after lengthy discussions among members of the commission, a feeling that for small creditors of corporations, employees, tradesman, materialmen, suppliers, individuals who generally have a credit relationship to a corporation which is not reduced to writing, that these individuals are the year in and year out, these are the individuals who pay the price for corporate existence. When corporations are run so long as it is

convenient to the individuals who find they are the owners and then when they are not, they are simply abandoned. Large institutional lenders, bankers, insurance companies, large contracting creditors, will get a lawyer and go out and they will quote, attempt to pierce the corporate veil. Alaska's common law on the circumstances in which it will disregard limited liability is found in only three cases since statehood. Those cases do not hold out great hope that in the absence of fraud in a transaction that the court would do. But if you have a claim for $1,000 in wages owed to you, there is no lawyer who is going to be able to successfully launch that lawsuit. If you are an individual who sold fish to a restaurant which has now gone out of business, and the owner has marched off leaving you unpaid and it's a $43,000 account receivable, you cannot get any modern recourse at all. Section 488 for the first time to a very limited extent shifts that presumption. It says that the officers and directors of a corporation to the extent that its assets prove insufficient to cover its liabilities, have a liability to a class of individuals who are defined as employees of the corporation as materialmen, tradesmen, etc., people who have extended credit on open account for up to $25,000. Now this liability, sir, is not inevitable. The statute clearly says that if I have a corporation and you have a fishing fleet, and you are supplying my incorporated restaurant with fresh salmon, that you can be approached by me saying I would like you to agree in writing that in the event that this business folds, my restaurant, you won't look to me for the liability which exists under the law. It would be a liability of up to $25,000. That's all you could ever recover under this. So for the first time there would be an incentive in dealing with the smallest people in the marketplace who are the recurrent little mules on which this business of limited liability is ridden out, year in and year out, that these people would have some relief and that there would be an incentive to talk about this question of limited liability. And then if I can convince you that you should give me a relaxation, a waiver of that, that's fine. But in the absence of a contractual modification, I would have the right to this.

KOPONEN: The contract then is between the creditor and the corporation, not between the corporation and its directors.

FESSLER: That's absolutely right. It's between the corporate debtor and its employees, between the corporate debtor and its materialmen or suppliers.

KOPONEN: It's a very useful section. I know there is a major business problem in the Fairbanks area, these collapsible corporations.

FESSLER: Mr. Chairman.

COWDERY: Would the effect of this, would it discourage say qualified managers from getting into taking over a trouble corporation that was having some problems, maybe through a lack of expertise in the past, would this discourage someone from coming in . . .

FESSLER: Well, it would certainly give me pause. Now there are two things relevant, sir, in the bill. First, if the corporation is in a process of dissolution, one of the ways to avoid dissolution under the provisions of this bill is for a court to appoint interim directors in order to resolve deadlocks. Those directors are not subjected to this type of liability. So the director who is brought on board to try and straighten things out by court order is the director who is exempted by the reference in the bill to other than the directors who are appointed pursuant to. Now that is one protection. Another factor, of course, would be that if a corporation is in trouble, and I am going to step in and attempt to save it, one of the things I'd want to do is be aware of Section 488 and go to the creditors and say, I am willing to come into this picture only if you are willing to contract to exempt me from any personal liability that I would incur. Yes, sir, it would be something that in the hypothetical you advance an individual would want to take into consideration.

RODEY: If I might interject, that would apply to directors but not to employees of the corporation?

FESSLER: It has no application to employees at all. In fact, I should tell you that this appears to be very novel, and I want you to understand that it has a great quality of being novel. But New York has never given total limited liability to anyone. And if anybody tries to come to you and say, my God, if we adopt this the wheels of commerce will grind to a halt. Since 1843 when New York adopted the first general incorporation statute, the ten largest shareholders in a New York corporation are subjected to liability in the event the corporate assets prove insufficient to the claims of all employees. New York has never stricken that from the books, and it has not prevented the development of the State of New York as a center of commerce. What we did here, was to say that in many Alaskan corporations we didn't want to have the liability on the ten largest shareholders because that might include many very passive people who really have nothing to do with the way in which the business was run. So put the liability on the people who are being paid, the officers, the president, and the secretary and the treasurer. They are the defined officers and the directors. They are not passive, or they oughtn't to be. So that is how we would differ from New York law. And we have broadened the exposure, because in New York the exposure is limited to claims of employees, and we broadened it to include the claims of materialmen and

suppliers.

COWDERY: In the past we have had some of the Native corporations who have had financial troubles and hired two people to direct them and turn it around. And this is an area I was wondering about, if that would be . . .

FESSLER: I appreciate the question. It is an important matter. The AFN subcommittee has looked into this question. I think that at that level, or at the level of any large corporation that is involved in an attempted turn around, that there would be awareness of the provisions of Section 488 and that there would be appropriate advice from counsel to deal with the subject. That would be my hope.

BROWN: Mr. Chairman, may I suggest . . .

RODEY: Mr. Brown.

BROWN: I am Fred Brown. It's nice to know that Labor and Commerce [garbled] . . . The one example you might think of is what would really happen . . . the example might be one of the most prosperous, currently most prosperous Alaska corporation is Alaska International Air. Originally, that was Interior Airways based out of Fairbanks. They expanded too fast for the building of the pipeline, which didn't get built fast enough as many Alaskans remember. What happened then was, and this sort of thing is really what happens when a corporation gets into trouble in most cases, and that's why I'm raising this as an example. What happened then was they went into reorganization and the creditors and shareholders hired Mr. Duncan McClaren, a legend in the Canadian air industry, a great manager and a legendary worker [TAPE CHANGE] . . . Section 488 to take care of that problem.

RODEY: Thank you, Mr. Brown. This is a problem currently in Alaska. It is possible for individuals who incorporate to run up all sorts of bills, not pay its creditors, and then just move away from that corporation, will eventually be resolved by the state, set up another corporation and then bilk a lot of small tradesmen who work for the corporation, creditors, what have you, move on. You can do it in serial fashion. It is currently being abused presently in the state. Mr. Abbott has kept an eye on this, has had a practice in that area of the law for 15 years. But it is currently a problem. There are a lot of honest Alaskans who lose money because of this problem.

FESSLER: And I think the problem is also that it has a broader ramification. To the extent that citizens get the impression that there are tricks out there for people who are in with lawyers, if you will. It demeans my profession of which I am very proud. We were never the source of this value judgment,

that people could pull this type of thing. But to the extent that people believe that if you quote, know the law, you can do bad things and get away with it. You can do hurtful things and have no accountability. It creates an impression of the law which none of us have an interest in seeing furthered in the minds of citizens. Because the minute one law becomes suspect like this, the cloud falls over all law. And so this is probably the most important value judgment about corporations. They have done great things for us. But the idea of a one-person corporation, and the only person that probably has pulled off that role real well in history, was Louis the Fourteenth and a tremendous price was paid for that notion.

UEHLING: If we can kind of go back to the section regarding the foreign corporations, maybe you could explain what the Alaska Code Revision Commission took as far as an approach as a comparison of what occurred in California regarding the foreign corporation situation there.

FESSLER: Because California has this basic social problem that in order to evade the restrictions on long-term director terms or in order to have a board classify itself, most important California business, most corporate business at the moment in my state, is foreign incorporated. Runs to a different jurisdiction and comes back home and says we've been gone 20 minutes, and we are now a foreign corporation, we're a Delaware corporation. The basic social problem we had in California when we approached the revision of the legislation was to say, well, will we give up these value judgments which we've had for many years. And the bar association, frankly, and the banking industry thought that's what was going to happen. That we were going to get a corporation law that looked more like that of other states. What the legislature did, interestingly enough, and I think it remains to be seen because it's costing us a lot of money in litigation in front of the federal supreme court, was to say, no, if a corporation has a certain percentage of its employees in California, does a certain volume of business in California, has a certain amount of its ownership owned by shareholders in California, then even though it purports to be an Alaska corporation or a Delaware corporation, we're going to say that it's merely a pseudo foreign corporation, and we're going to apply California's laws to it. Now the Arden-Mayfair litigation is pending in the California Supreme Court where it has been on hold for nearly three years. Delaware's courts have already litigated the Arden-Mayfair case and come to the conclusion that California was attempting to deny full faith and credit to the public acts of a sister state. Ultimately, the federal supreme court will have to decide whether California's notion of pseudo foreign corporations is an idea whose time has come. The judgment of the commission was that there are no pseudo foreign corporation concepts in this bill. Instead, we increased the

reporting obligations on foreign corporations to keep us informed of the nature of their activities. We greatly increased the circumstances under which it's clear that they must seek a certificate to do business in the State of Alaska. But we have not attempted to interfere with their internal control and management such as California has done, because we haven't done it to our own people. We haven't said you have to have a board with one-year terms, that you can't classify the board, that you have to have cumulative voting. Our default mode if you don't say is, you do have one-year terms, if you do have cumulative voting and you don't have board classification. But we didn't feel that it was necessary to get involved in that position. But later on in what may be five or six years as you see the outcome of the Arden-Mayfair matter, and then if you decide you want to adopt certain similar rules, that would be an appropriate time to do that. But there is nothing here now that contains that.

BROWN: At least some of the members of the commission think the Delaware view is going to prevail in the state supreme court, and that's one of the reasons why the provision is written that way.

RODEY: Thank you, Mr. Brown.

UEHLING: This is a follow up question. And in just sort of reading through this I got the feeling what would be the situation like if you took a state like Delaware where we had a situation where companies are going to incorporate ther because it's a very pro-management kind of situation, where in California it's very pro-shareholder, the shareholder is a completely different situation, how does Alaska rate on that spectrum? Would they be considered a very pro-management situation?

FESSLER: No. The default provisions, ever since I learned to use the personal computer, I've picked up the jargon, excuse me. The provisions that are in place if you don't say otherwise of the Alaska statute today, because it's a version of the early '50's model act would today be called a pro-shareholder jurisdiction. And the provisions which would lock into place in the absence of agreement that they be otherwise under this bill are also pro-shareholder provisions. But so that Alaska would in the default mode line up looking very much more like California than Delaware. But it would be possible for people to make an intelligent and informed decision to form a very, very management oriented, reduced role fc shareholder corporation, not going as far as Delaware has gone. For instance, a good example in Delaware, it is possible that the board of directors would have the exclusive power to amend the articles and bylaws, and the shareholders could be ousted from any role at all. That would not be possible in Alaska. It isn't possible under current law with regard to the articles. It would not be possible with

regard to the bylaws should the legislature enact this bill. So it continues to leave Alaska law with most other western jurisdictions as having a pro-shareholder bias, but not going nearly as far as California.

RODEY: Are there other questions from members of the committee? If there are . . .

FESSLER: I'll remain in the room, Mr. Chairman, in case anyone does have any questions for me, but there are other witnesses desiring to appear.

RODEY: The next witness is Willis Kirkpatrick, the director of the division of banking and securities.

KIRKPATRICK: Mr. Chairman and committee members. My name is Willis Kirkpatrick. I am director of banking and securities for the State of Alaska. I'd first like to say that we have appreciated the opportunity to join with the commission as a participant in discussion in their work. I believe that any of the concerns the state has had as far as the administratio of this new code, the commission has known up front as to what the problems we've had. One of the things I'd like to point out is that what I am excited about in their work is that in a present situation where we have an old Oregon law, in a situation where we have very little, if any, state common law court cases the administration of the provisions of the Alaska Business Corporations Code as it stands today is somewhat suspect in some of its legislative intent. And to determine legislative intent, we go back to Oregon law, we go back to Oregon cases, we go back to the sparse official comments under the model code. With the passage of this bill, I think that our work as far as working with the corporations in maintaining their files is going to be a whole lot easier because of the official comments alone. Everything has been addressed. I would suggest that in considering the passage of this bill, that they make part of the record the official comments as to the new law. There is only one particular area that I have a problem with, and that is in Section 733 on page 127, in the filing of foreign corporations to do business in the State of Alaska. On line 7, beginning on line 7, it requires that together with a certified copy of its articles of incorporation all amendments to the articles . . . In other words, what they are saying here is that one of the provisions for a foreign corporation to qualify to do business in the State of Alaska, is that it would have to file its articles with the state and any amendments to those articles. In a hearing last session, we brought this up and I believe, you'd have to check with the code revision commission on this, but I believe it was agreed upon that they would reconsider that requirement to file articles. At the present time articles of foreign corporations are not filed with the state. We find that

some of our sister states, those that do have this provision, are looking at dropping them. I think the last one we've heard from is Texas. Now I don't believe that it is going to create any hardship to anybody in the State of Alaska that wishes to find out the substance of the articles of a foreign corporation. First of all, if they are looking for the officers and directors of the foreign corporation, we can look at the application they file with us giving us that particular information. If they do want a copy of the articles of incorporation or the amendments to the articles of incorporation of a foreign corporation, the place that would have the most current filing would be the state of domicile so that they are available. We would be more than happy to assist anybody that wanted that to find out the proper procedures to obtain those records. With my understanding that this provision, that the code revision commission had no particular problem with that being dropped, the fiscal note that I prepared was zeroed out. If this provision stays in, I am going to ask for a revision of the fiscal note because one of the problems we have now is just file maintenance. The biggest problem in file maintenance is amendments to articles. We receive a great number of amendments to articles every day, and one of the things we have to do is that we just don't file the amendments. A lot of times we have to look back through the files to see what the prior articles contain to see amendments are consistent. If nothing more than article order. That is the only comment that I have as far as any changes are concerned, and I am sorry I don't have an amendment prepared, but I would be most happy to. I would replace that word with a certificate of compliance executed by the officer of domicile, or the official of domicile. I am open to any questions.

RODEY: If I might ask either Chairman Abbott or Professor Fessler to respond.

ABBOTT: Yes, Mr. Chairman. We had previously agreed with Mr. Kirkpatrick that we would make that change. Unfortunately, consideration of this matter came up after the bill was printed. So it is the position of the commission that this requirement should be deleted when it was brought to our attention that it would serve no useful purpose and would impose an additional fiscal burden on the commissioner of commerce. We are in complete agreement that the provision should be deleted, and there should be no requirement to file foreign articles or amendments.

RODEY: Thank you, Chairman Abbott. Mr. Brown.

BROWN: On behalf of the commission, I am sure they would agree, it would be very nice if Professor Fessler were involved in structuring the amendment that the committee might be interested . . .

RODEY: That's a very good suggestion, Mr. Brown. Professor, would it be possible for you to prepare that amendment?

FESSLER: Certainly.

RODEY: Mr. Kirkpatrick, continue.

KIRKPATRICK: One other item that my notes show. On page 138 and 139, on line 28 of page 138 it refers to the misdemeanor, and my staff says that it should be either a rated misdemeanor A or B to be consistent with Title 9. And the same with line 9 on page 139. That also relates to a misdemeanor.

RODEY: If I might address Chairman Abbott or Professor Fessler, are we in that case talking about a Class A misdemeanor?

ABBOTT: That's our understanding, Mr. Chairman. Yes.

RODEY: If again I could request you, Professor Fessler, to prepare the appropriate amendment based on current Alaska criminal law.

FESSLER: The question has been asked, has been prepared, is one of the amendments that Chairman Abbott was referring to is being transmitted . . .

RODEY: Thanks, Professor. Obviously we can't take any official action here. If there are any questions, we'll have this prepared and delivered to committees on both sides for their consideration and Senator Hulcahy and myself will explain it on our side and . . .

COWDERY: Could I, I was wondering what financial burden would this, if we adopt this to the existing corporation for the state, would it be to conform, is there any grandfathering situations . . .

KIRKPATRICK: If I understand your question, Mr. Chairman, as to what this is going to do to existing corporations. I think the last two sections of the bill pretty well cover a timely transfer of the act, and I think we are gong to have some problems just as far as educating the corporations in switching them over. I don't see that a lasting problem. I don't see it as much more of a problem than we have now with the new corporation that is coming on board. I don't think there will be an financial, I think the problem is going to be basically on the state's side as far as getting the information out and getting the transition going. I don't envision any

economic problem on the corporation. I am wondering about correspondence fees, but . . . I don't see it as a major problem.

RODEY: I just might add that the proposed draft was written to reduce legal fees by putting a great element of certainty in there so that a layman would have a much greater understanding of the law just by reading the law without having to consult a lawyer. So I think there will be actually a reduction of attorney's fees. Are there any other questions for Mr. Kirkpatrick? If none, thank you very much Mr. Kirkpatrick. We do have floor session now at 10:00 a.m. We don't go in until 11:00 o'clock on Mondays, as a convenience to the Anchorage legislators. Would you like me to stay?

ABBOTT: Mr. Chairman, if I might, there are only two other people that intend to offer brief testimony. That's Liz Johnston and Irv Bertram.

RODEY: In consultation with House chairman, I will stay here if Senator Mulcahy is agreeable and listen to the comments of Elizabeth Johnston and Irv Bertram and then report to you, sir. Thank you, gentlemen. Next, I'd like to call Elizabeth Johnston. It's always disconcerting to be testifying and have everybody leaving. But, Senator Mulcahy and I will make up for any absence of numbers. You have the floor, madam.

JOHNSTON: Gentlemen. My name is Elizabeth Johnston. I'm general counsel to Bristol Bay Native Corporation. Today I am here speaking on behalf of the Alaska Federation of Natives concerning the bill on the revision of the corporate statutes, the profit corporate statutes. You will be delighted to know my comments will be brief. This is because we have had extensive opportunity to present our concerns before the code revision commission. By way of background, I can tell you that in the summer of 1982, the Alaska Federation of Natives created a subcommittee. And the member of the subcommittee had both regional and village corporation backgrounds, and the committee was created to review and testify on the proposed revision. We met with the code revision commission on three separate occasions and made extensive comments. Based on the receptivity of the commission to our comments, and the way they were able to meet our concerns, in April of 1983 Janie Leask, who is the president of the federation, wrote in support of the proposed revision. And she commented specifically on the quality of the new legislative scheme, on the technical commentary which has already been brought up by some of the other people. But the fact there there is technical commentary to back up the new code which should help all of us in the absence of court cases to understand the legislative history. The fact there there is this kind of backup, we feel will mean it will reduce the legal expenses for

the Native corporations. We also articulated, commented on the finance section, that it was an important reform. Unlike Professor Fessler I can read numbers, and I still feel that it is a significant accomplishment. I was forced to. So finally the only final comment is that this is a bill which does strengthen the rights of shareholders and does strengthen the requirements of periodic reporting by corporations to their shareholders. It is a pro-shareholder document, and the federation supports the revision.

RODEY: Senator Mulcahy, do you have any questions for Miss Johnston? Thank you, appreciate your coming. Next I'd like to call Irv Bertram.

BERTRAM: I'm Irv Bertram, and I am assistant counsel to Alaska Airlines. We have looked at the bill and discussed it with the commission to raise some of the concerns we have. Our bylaws and articles go back to 1938, at least the articles do. The bylaws have been changed on numerous occasions. And we did have some concerns, but we found that the commission has made some changes that will assist us in going forward. We think that the bill is very well drafted and very good and will be of benefit to the state as well as being helpful to us. In my current position as house counsel, I have an opportunity to advise management or answer questions about Alaska law. I have practiced in Alaska for a number of years before joining the airlines, and you don't feel so foolish when you have something layed out in front of you in the law. You can look at it and say, well, this is how it's done. Currently Alaska law on corporations has a number of areas where simply there is no law. And so you really have to say, gee, I don't know, maybe we can do it and maybe we can't. It's . . . you're not sure how to do something. But I think the bill answers that. It does provide a very well layed out road map, so to speak, which I think will be very helpful not only to large corporations such as ourselves, but I also believe this will be helpful to the small mom and pop operations. There is that old trite saying that ignorance of the law is no excuse. However, when the law is a body of common law with very few statutory references, it makes it fairly difficult to know what's going on. On the other hand, once things have been layed out in a fairly succinct form that can be followed, it's true a lawyer may still be required and should be used. But I think most people will have a better understanding of what corporate governess should be once they have this body of law in front of them. So we think it would be good for the state. Alaska Airlines will have to make one change in its bylaws as a result of this. It doesn't address everything we wanted. But on the other hand, we think on the whole it is very good and we do support it and would recommend it. Thank you.

RODEY: Thank you very much, Mr. Bertram. Senator

Mulcahy, do you have any questions? I am aware of the . . . if there are no other comments, Mr. Brown.

BROWN: One comment, Mr. Chairman. There have been much comment about the comments, and the people who are supporting the bill who are now part of the commission, are finding that the comments are very important. I would hope an admission to the members of the Senate and the House in the event this bill is considered, that an action be taken similar to what was taken when the criminal code revision was passed. And that is there be specifically an affirmative vote on the floor of each house approving the comments or the comments as you may have amended in concert with the commission to make a clear and unambiguous legislative history. To really make sure those are available and that they are important legislative history, since they will be relied on by people in the private sector as well as scholars.

RODEY: Thank you, Mr. Brown. That's a very good suggestion. Obviously it's wise. It's an area of law we don't know much about in terms of importance, and whether a separate vote on that really means much or not.

BROWN: Take it from Alaska's only published legal historian.

RODEY: And a distinguished member of the Fairbanks bar. I think it is a wise suggestion to incorporate in the journal and to vote separately and affirmatively on the commentary. I think it is a good and desirable method of annotating Alaska laws. It is certainly preferable to allowing Michie Company to do it back east. If there are no other comments, the committee meeting is adjourned.

alaska federation of natives, inc.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

PRESENTATION TO THE JOINT SENATE AND HOUSE
LABOR AND COMMERCE COMMITTEE HEARING ON
SENATE BILL NO. 246 AND HOUSE BILL NO. 343
January 23, 1984

Mr. Chairman:

My name is Elizabeth B. Johnston. I am Secretary and General Counsel of Bristol Bay Native Corporation. Today I am speaking on behalf of the Alaska Federation of Natives concerning Senate Bill No. 246 and House Bill No. 343.

My comments will be brief. This is because the Federation has already been given the opportunity to present its concerns to the Code Revision Commission.

In the summer of 1982, the Alaska Federation of Natives created a subcommittee, with both regional and village corporation experience represented, to review and testify on the proposed revision to the profit corporation code. The Code Revision Commission received testimony from the Federation subcommittee on three separate occasions and satisfied its major concerns.

In April, 1983, Janie Leask, President of the Federation, wrote in support of the proposed revision. Her letter is attached, but I would like to quote from the last paragraph. "The proposed corporations code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditor's security."

I would like to add that the proposed code strengthens the rights of shareholders and the requirements of periodic reporting. In other words, the proposed bill is a pro-shareholder document.

The Federation supports this revision.

Elizabeth B. Johnston

ELIZABETH B. JOHNSTON
Attorney at Law
For the Alaska Federation of
Natives Subcommittee

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

April 8, 1983

Mr. John W. Abbott, Chairman
Alaska Code Revision Commission
Pouch Y
State Capitol
Juneau, Alaska 99811

Dear Mr. Abbott:

I would like to take this opportunity to thank the Commission for fully providing the AFN with the opportunity to review and comment on the proposed Alaska Corporations Code. The AFN now supports the passage of Senate Bill No. 246 and House Bill No. 343.

The proposed Corporations Code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditors' security. If you need us to testify on behalf of the Bill, we will do so.

Sincerely,

Janie Leask

Janie Leask
President

cc: Honorable Joe L. Hayes
Honorable Jay M. Kerttula
Honorable Walter R. Furnace
Honorable Charlie Bussell
Honorable Richard I. Eliason
Honorable Bill Ray
Honorable Al Adams
Honorable Don Bennett
Honorable John C. Sackett