

1146 HOUSE LABOR & COMMERCE



REPRESENTATIVE BILL THOMAS

ALASKA STATE LEGISLATURE DISTRICT 5

e-mail: Representative.Bill.Thomas@legis.state.ak.us webpage: www.akreblicans.org/thomas/

State Capitol

Juneau AK, 99801-1182

907-465-3732

888-461-3732

FAX 907-465-2652

Sponsor Statement for HB 445 An Act Relating to the Alternative Energy Grant Fund and to Alternative Energy Grants.

The cost of fuel in Alaska has made it increasingly difficult for Alaskan residents to exist. Home heating fuel and gasoline prices have skyrocketed in recent years leaving families, who already struggle to make ends meet, to prioritize between basic necessities of life: heat or food. This has a direct impact on Alaska's economy. When people are sinking such a large chunk of their income into purchasing fuel they have less money available to spend on travel, groceries, and other necessities.

The time has come to seriously explore alternative sources of energy. Many of our communities have already been thinking of other ways to secure energy but need funding to help them harness these new sources of power. HB 445 takes 10 cents of the revenue received from each barrel of oil produced by Alaska and places this money into a fund. This fund will be made available for Alaska's power utilities to use for developing alternative sources of energy. The Alaska Energy Authority will administer grants of up to \$20 million to power utilities who have shown both need and responsibility by securing some matching funds in furtherance of a clear plan.

Based on the Legislative Finance Division's estimate of the production rate for Alaska's oil, it is estimated that the Alternative Energy Fund would receive more than \$30 million over the course of a year creating an excellent source of funding for new and existing projects.

Further, these alternative energy grants will not only move Alaska's communities into the future, but they will also assist those still completely crippled by the rising costs of fuel. By reducing the cost of power in some areas with alternative energy projects, Power Cost Equalization funds will be available to go to other communities who are still experiencing exorbitant power costs.

Our communities have paid enough for Alaska's wealth, they are poised to take control of their future energy needs, and it is up to Alaska's government to give them the tools to do so. I urge your support for this crucial piece of legislation.



Exploring Alaska's Alternative Energy

The state possesses vast sources of alternative energy in the forms of wind, geothermal, tidal, hydro and biofuels.

BY VANESSA ORR

The Klondike wind-power facility in Wasco, Ore. Oregon is one of about 30 states in the Lower 48 to use wind turbines. The primary requirement for identifying locations for constructing a wind farm is the annual amount of wind that area receives. To make a project worthwhile, the site must receive a year-round average wind speed of 14.2 mph.

In a state best known for its oil reserves, it might be considered surprising that a number of different Alaska entities, including rural and urban utilities, consumer and conservation groups, Native corporations and both large and small businesses, are working together to explore renewable energy sources. Though the 49th state has always been known for its fossil fuels, the fact is, the state possesses vast sources of alternative energy in the forms of wind, geothermal, tidal, hydro and biofuels.

"There are a number of reasons why it is important for Alaska to explore renewable energy resources," explained Chris Rose, director of the Renewable Energy Alaska Project (REAP). "Some areas, like Southcentral, are showing a shortage of natural gas, which the communities there really depend upon. It would also be wiser from a national security standpoint for the country not to be so dependent upon foreign fuels."

An investment in renewable energy development also could pay off handsomely for the state, according to Rose.

"This is a huge economic opportunity," he said. "Promoting this form of development could result in the creation of hundreds of jobs, increase the tax base and attract other industries to our state. If Alaska gets in on the ground floor, the state could reap the benefits of what is definitely the industry of the future."

There are already a number of projects under way throughout the state that take advantage of Alaska's renewable resources. The majority of these have been spearheaded by businesses and corporations that have made a commitment to

providing power in a new way. "There are still very few federal policies that support the exploration of renewable resources," explained Rose, "though some states have begun to provide incentives to companies that do so."

One of REAP's goals is to encourage Alaska to develop statewide incentives and policies that would make renewable energy exploration viable. Their other goals include advocating and supporting proposed renewable energy projects; building a market for renewable energy through public education; creating stakeholder unity and support among their members; and promoting energy efficiency and conservation throughout the state.

To this end, REAP recently held its first Renewable Energy Fair in Anchorage, during which workshops were held on subjects including wind in Alaska's villages, green building, landfill gas for Anchorage, Fire Island wind power, climate change and energy, and more. The group also hosted a group of renewable resource experts from Iceland, who have visited Alaska several times to share their knowledge on how Alaska can develop its geothermal resources. Iceland currently gets all of its electricity from a renewable energy grid, which includes 80 percent hydro energy and 20 percent geothermal energy.

"Once Alaska develops these resources, we can sell our expertise to other areas, just as Iceland is doing," said Rose.

WIND POWER

Once considered an alternative energy source, the use of wind to provide electricity is now considered part of the mainstream, and is in fact already competing against fossil fuels in other parts of the country to provide power. In Alaska, some areas have been using wind power for more than eight years with successful results.

"Kotzebue has been using wind turbines since 1998, and they have remained 98 percent available—they don't break down much," said Rose. "Using this power, the village displaced more than 100,000 gallons of diesel last year."

Alaska is in the perfect position to harvest the power of wind, which needs to be considered Class 4 or above to

be commercial grade. "Most wind in Alaska is in the Class 5 to 7 range," said Rose. "And if you look at a wind map of the United States, you'll see that we have most of the Class 7 winds in the whole country."

Some companies are taking advantage of this, including TDX Power, which has a 225-kilowatt wind turbine on St. Paul Island, and Alaska Village Electric Cooperative, which is planning to put three 100-kilowatt turbines into the villages of Selawik, Kasigluk and Toksook Bay this fall.

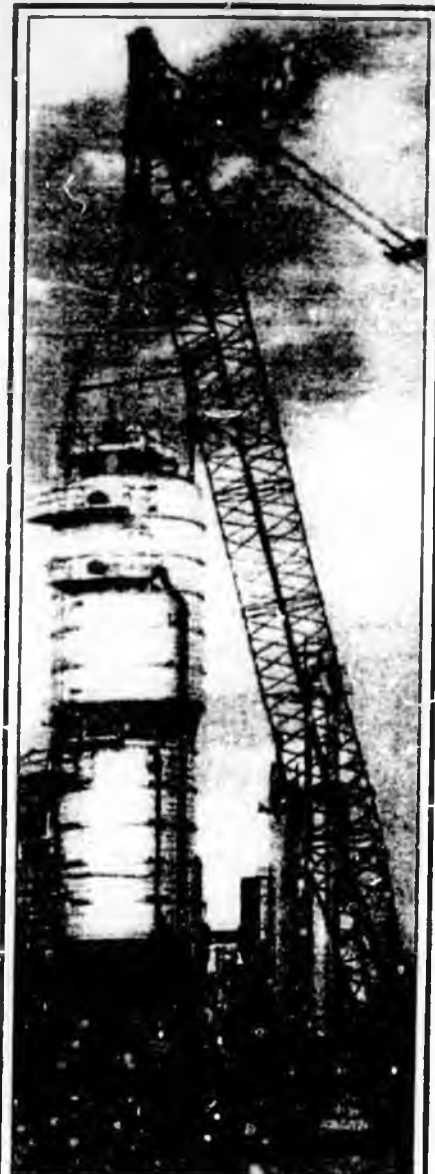
One of the biggest projects proposed is a 100-megawatt wind farm that will be built on Fire Island, west of Anchorage. The project, which would require an approximately \$175 million investment, is seriously being considered by Chugach Electric Association, and its two partners, Municipal Light & Power (ML&P) and Golden Valley Electric Association.

"We've gone beyond thinking 'this would be nice to have,' to seeing it more realistically as the levels of interest have increased," said Steve Gilbert, manager, Energy Projects Development, Chugach Electric Association. "We do have a Joint Action Agency Agreement (JAA) in place between Chugach, ML&P and Golden Valley to look at developing power generation resources together."

Gilbert credits some of this interest to the fact that equipment in the Railbelt is getting old and the utilities are looking at making significant investments in their infrastructure. "We're trying to strike a balance between replacing or adding machines to meet the demand, and our need to diversify," he explained. "There hasn't been a final decision made, though I believe that will happen by year's end."

One of the obstacles facing the utilities is the cost of the project itself. According to Gilbert, roughly \$41 million will be needed to build infrastructure, including sub-marine and overhead transmission lines to the island, a barge landing, roads and a substation. About \$134 million would be used to build the wind project itself.

"All renewables have a higher up-front cost than fossil-based power sources," he explained, "though fossil-based costs are going up quickly. Of



ENGINEERING EXCELLENCE

Complete Multi-Discipline
Engineering Services
& Project Management
Concept and Feasibility Studies
Project Scope and Development
Cost Estimating and Scheduling
Engineering and Detail Design
Procurement Services
Field Engineering
Inspection and Quality Control
Environmental Engineering

Serving Alaska Industry
Since 1974

**ALASKA ANVIL
INCORPORATED**

509 W. 3rd Ave.
Anchorage, AK 99501
(907) 276-2747
FAX (907) 279-4088

50720 Kenai Spur Hwy.
Kenai, AK 99611
(907) 776-5870
FAX (907) 776-5871

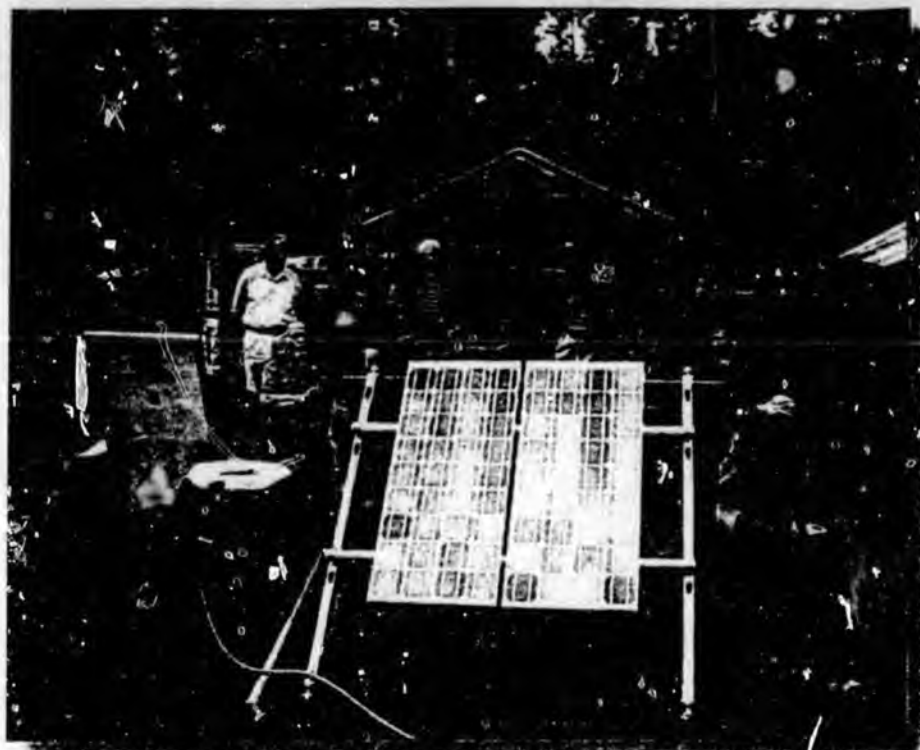
the \$41 million we need, we're looking for someone to help us with about \$20 million, from the Railbelt Energy Fund, for instance."

Another thought is to put the project out for bid to private developers who have experience in wind power development. "Developers are able to take advantage of tax incentives and other programs that utilities like Chugach can't," said Gilbert. "Having a developer install the system and sell power into the grid for the first 10 years of the project's life would help bring down the cost substantially. The new generating costs could go head-to-head with the cost of old generation."

GEOTHERMAL RESOURCES

Just as wind has already become competitive with fossil fuels in other states, so has the use of geothermal energy. Though there is huge potential to use this resource in Alaska, one of the drawbacks to its development is that much of the source of the energy is located far from the demand.

"Mount Makushin in Unalaska has great potential," explained Rose, who



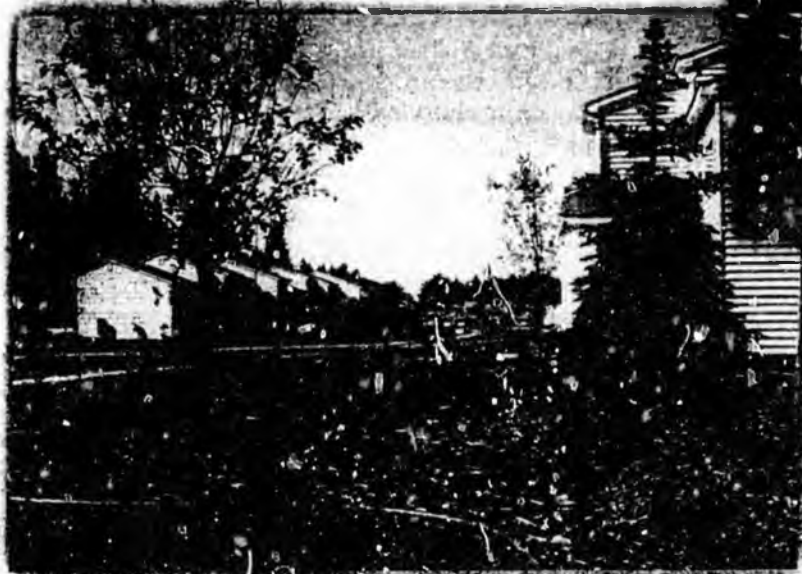
A solar workshop put on by ABS Alaska for Chena Hot Springs Resort.

says that the Aleutian Islands' volcanic makeup could provide a quality source of geothermal energy. "But the most exciting prospect that I see is Mount Spur, the volcano across Cook Inlet.

It is only 40 miles from the Anchorage power grid, which isn't that long a transmission line to build."

Chugach Electric Association also sees the potential in Mount Spur, and is

Alaska's Blueprint For Success.



Housing Privatization Phase II - Nebraska Area, Elmendorf AFB
Anchorage



Eagle River High School
Eagle River

**davis
constructors
& engineers inc.**

740 Bonanza Ave.
Anchorage, AK 99518
(907) 562-2336
davisconstructors.com

Plan: Details

in the "very preliminary" stages of exploration, according to Gilber. "While there is a fairly significant geothermal resource near Mount Spur, it is a tough, rugged location," he explained. "We are taking a look at early reports, and will explore it as a potential resource from there."

As the cost of importing diesel and developing fossil fuels goes up, Rose believes that the state will begin to look more seriously at using geothermal energy to provide for the Railbelt. Because geothermal power is a baseload resource, as compared to wind, which is intermittent, the resource is considered to be a more consistent, reliable option. Some cities, like San Francisco, already get their energy from geothermal sources, and have been doing so for more than 30 years.

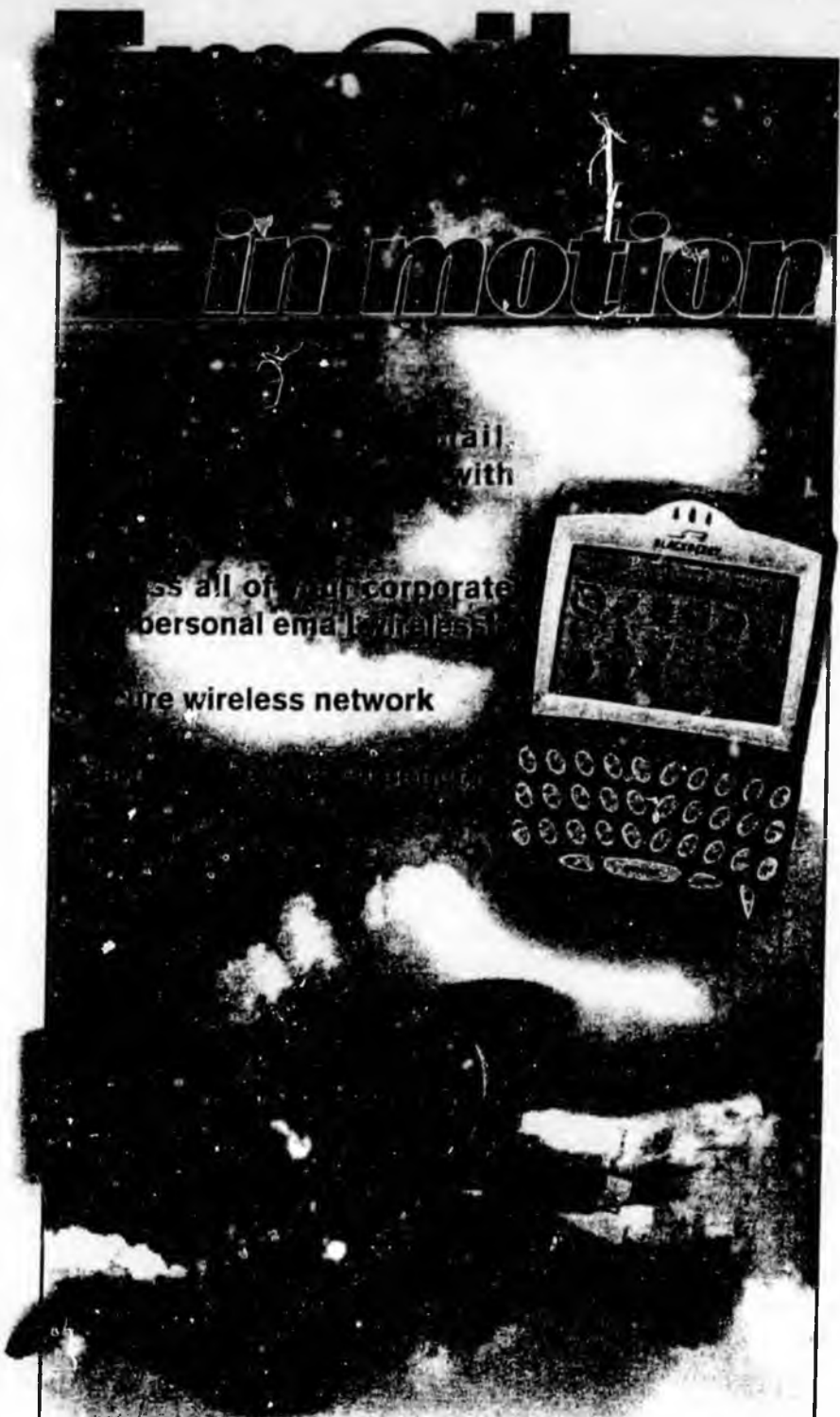
Chena Hot Springs Resort is one Alaska business that already takes advantage of this option. "Much of the heating provided at the resort is geothermal," explained Gwen Holdmann, vice president of new development. "Geothermal resources provide extensive direct-use heating to 46 buildings on the property, and we have also installed a custom-built absorption chiller in our ice museum that is powered by geothermal energy."

The prototype unit, which Holdmann says is the first of its type in the world, keeps the museum "on ice"



Photo courtesy of Chena Hot Springs Resort

A water ram used to water the gardens at Chena Hot Springs Resort.



Alaska Headquarters
6623 Brayton Drive
Anchorage, Alaska 99507
907-344-1223

Midtown Location
403 W. Northern Lights
Anchorage, Alaska 99503
907-277-9997

Fairbanks Office
721 Gaffney Rd.
Fairbanks, Alaska 99701
907-456-1223

800-722-4411
www.getdialed.com

 **BlackBerry**



ALASKA TELECOM, INC.

year-round, without the high cost of generated electricity. The machine uses both the hot spring water abundant at Chena and the cold river water at the site to generate power. "We're saving \$400 to \$500 a day by using these on-site resources," she explained.

The resort is also in the process of installing a power plant containing two 200-kilowatt units that will be powered by the geothermal resources to displace even more diesel fuel. "The initial 200-kilowatt unit will be used to help power the resort, and the second unit will enable us to expand, and possibly supply power to other homes in the area," explained Holdmann. The \$2.5 million project, which the resort is doing in partnership with United Technology Corp., will be completed by next summer.

An even bigger project on the horizon is the digging of a 4,000-foot well to quantify the resource and determine what the true production potential is. The resort is working with the Department of Energy on this \$1.8 million project, which could conceivably allow them to build a larger-scale power plant to provide power for Golden Valley in the future.

BIOFUELS

There are a number of different types of biofuels available for Alaska's use, ranging from fish oil, which can be burned in boilers and diesel generators, to trash and wood waste, and even landfill gas. These fuels, which are normally considered waste products from other industries, could actually help to displace the use of fossil fuels, while disposing of unused byproducts.

At Denali National Park this past summer, fish oil, made from pollock and other fish byproducts from the Dutch Harbor area, was converted into 100 percent diesel fuel to run the Toklat maintenance yard and housing facility. While biodiesel had previously been used in national parks in the Lower 48, their fuel was provided by oil seeds, ethanol and animal fat rather than fish.

"Biodiesel has been proven to work in a variety of situations," said Tim Hudson, the project leader for the National Park Service and the agency's regional engineering, planning and design chief.

"The National Park Service is interested in this fuel as a way to reduce emissions and reduce petroleum consumption, especially in sensitive environments."

The test this summer also included using a blend of fish oil and traditional petroleum-based diesel in a few park vehicles, and NPS is also considering testing the fuel at Brooks Camp in Katmai National Park.

In other parts of Alaska, biofuels are being considered for use as well. Nova Fuels in California has proposed building an ethanol plant in Ketchikan,

which would use trash and wood waste to create transportation fuel. In 2004, UniSea Inc. in Dutch Harbor displaced more than 1 million gallons of diesel fuel by using fish oil.

"What's even more exciting is that municipalities including Anchorage, are looking into ways to capture the methane produced at their landfills to create power," added Rose. "There are plants all over the world already using landfill gas, and since landfills have a life of 30 to 40 years, this could become a tremendous resource."

BUSINESS LINES TO FIT YOUR BOTTOM LINE.

From multi-national
companies to one-
person offices,
we have business
solutions for you.



HOME • BEDROOM • FUTON **scanoffice**

Free design & consultation. Browse our web store 24 hours a day at www.scanhome.com
907.562.6911 • 1.800.478.SCAN • OLYMPIC CENTER 36TH & ARCTIC • ANCHORAGE

TIDAL POWER AND HYDROFUELS

With so much of the state surrounded by water, it would seem a natural fit for Alaska to use this resource as a source of energy. Already in the Railbelt there are three hydropower projects, including the state-owned Bradley Lake resource, which is operated by Homer Electric; the Eklutna project, which is jointly owned by ML&P, Matanuska Electric Association and Chugach Electric; and the Cooper Lake Power Plant, owned by Chugach Electric.

While Chugach Electric and REAP

both say that they support the exploration of small-scale, low-impact hydropower projects, there are some drawbacks to the use of this source of energy, including the amount of time it takes to get a hydropower plant up and running.

"As far as I know, there are currently no study initiatives to look at the use of more hydro power in the Railbelt," said Gilbert.

There are also no current plans to explore the use of tidal power in Alaska, though it might very well become

"Promoting this form of development (renewable energy) could result in the creation of hundreds of jobs, increase the tax base and attract other industries to our state. If Alaska gets in on the ground floor, the state could reap the benefits of what is definitely the industry of the future."

—Chris Rose, Director
Renewable Energy Alaska Project

an option in the future. Tidal power requires a large tidal differentiation, which in the United States, occurs only in Maine and Alaska.

"The technology needs to mature—we are not there yet," said Rose. "We do know that tidal power works to provide energy, but it is not necessarily economical to do so right now. As more information is developed on how to build such a project, we might find a way to make tidal power economically competitive, but for now, there is not even a pilot project in the works."


SOLAR POWER

Though solar power is used extensively in Alaska by people off the grid, it has not been determined that there is any commercial application for its use, according to Rose. "Like tidal power, it is just not as competitive economically," he explained. "We'd have to find ways to deal with the fact that solar power provides a lot of electricity for part of the year and not enough during the rest of the year. It would require a large investment, and even so, solar power would still be much more expensive than wind."

THE FUTURE OF ENERGY

As interest in renewable energy grows and the cost of fossil fuels continues to rise, some of the power sources once thought "alternative" are gaining new acceptance. "Here in the Railbelt, I can see a change happening in the paradigm," said Gilbert. "Between all of the utilities, there is definitely an interest in exploring non-fuel generation."

"Alaska could become a model for the whole world in how to use renewable resources," added Rose. "There is a huge market out there for clean, inexhaustible power sources that also provide economic opportunities." □



At home or in the field, Chenega Corporation is proud to provide support for our troops. Our contracting services are found in 42 states and seven countries including Afghanistan, Iraq, Cuba, Saudi Arabia, Japan, Italy, and Germany.

Our commitment to excellence and superior management extends to government contracts in Intelligence Gathering, Information Technology, Base Operations and Maintenance, Training, Border Protection, Light Manufacturing, and Logistics Support.

CHENEGA CORPORATION

3000 C Street, Suite 201, Anchorage, Alaska 99503
(907) 552-7700 <http://www.chenega.com>
Chenega Corporation is an Equal Opportunity Employer, M/F/D/V

State of Alaska Fiscal Summary

(\$ millions)

	FY06 Authorized				FY07 Governor's Budget				GF Change
	GF	Federal	Other	Total	GF	Federal	Other	Total	
1 REVENUE (Excludes Permanent Fund Earnings)									
2 U. Restricted General Fund Revenue (1)	2,664.0			2,664.0	3,139.3			3,139.3	
3 Bond Proceeds and Other Borrowing (2)			330.2	330.2			89.3	69.3	
4 Corporate Dividends (3)			114.9	114.9			105.2	105.2	
5 Retained Corporate Dividends (3)			(59.9)	(59.9)			(31.9)	(31.9)	
6 Federal and Other Funds		2,787.8	880.3	7,894.0		2,893.8	1,058.9	3,952.7	
7 Total Revenue	2,664.0	2,787.8	1,265.5	6,717.3	3,139.3	2,893.8	1,221.3	7,254.4	
9 APPROPRIATIONS									
10 Operating	2,225.5	1,683.2	1,022.4	4,931.0	3,131.4	1,800.7	1,039.1	5,971.1	
11 Agency Operations (Non-Formula) & RPLs	1,310.8	825.2	1,362.1	3,498.1	1,509.7	845.8	1,448.8	3,804.3	
12 Formula Programs (4)	1,257.5	816.0	148.6	2,222.1	1,440.9	915.0	109.8	2,470.7	
13 Debt Service	53.1	8.0	241.1	302.4	74.7	9.7	243.3	327.7	
14 Fund Capitalization	(396.0)	33.9	15.3	(346.8)	73.3	30.1	40.1	143.5	
15 New Legislation				0.0	27.8			27.8	
16 Duplicated Authorization (5)			(744.8)	(744.8)	0.0	0.0	(802.9)	(802.9)	
17 Capital	338.7	1,102.0	238.7	1,679.4	432.1	1,093.1	182.3	1,707.5	93.4
18 Project Appropriations & RPLs (Revised Programs)	332.2	1,102.0	198.1	1,632.3	429.1	1,093.1	109.5	1,631.8	
19 Mental Health Projects	6.5	0.0	5.6	12.1	3.0	0.0	3.9	6.9	
20 Projects Funded with Debt Proceeds			308.2	308.2	0.0	0.0	212.4	212.4	
21 Duplicated Authorization (5)			(273.2)	(273.2)			(143.5)	(143.5)	
22 Total Authorization (unduplicated)	2,564.2	2,785.1	1,261.0	6,610.4	3,563.5	2,893.8	1,221.3	7,678.7	
23 Surplus (Draw From CBR) at Session End	99.8				(424.2)				
24 ADJUSTMENTS TO REVENUE									
25 F& Revenue Forecast (Increase of \$15.84/bbl) (1)	1,145.7			1,145.7					
26 Public Education Fund used in Subsequent Fiscal Year (6)	416.8			416.8	3.4			3.4	
27 Other Carryforward from FY05 (6)	41.5	0.9	4.5	47.0					
28 Total Revenue	4,268.1	0.9	4.5	4,273.5	3,142.7	0.0	0.0	3,142.7	(1,125.4)
29 ADJUSTMENTS TO AUTHORIZATION									
30 Public Education Fund used in Subsequent Fiscal Year (6)	416.8			416.8					
31 Other Carryforward from FY05 (6)	41.5	0.9	4.5	47.0					
32 Supplemental Placeholder	60.0			60.0	60.0	0.0	0.0	60.0	
33 Total Authorization (unduplicated)	3,082.6	2,786.0	1,265.5	7,134.2	3,623.5	2,893.8	1,221.3	7,738.7	540.9
34 Revised Surplus (Draw From CBR)	1,185.5				(480.9)				
35 Governor's Proposed Uses of the Surplus									
36 Supplemental Appropriations (7)	180.0			180.0					
37 Public Education Fund to be used in FY07	565.0			565.0	(565.0)			(565.0)	
38 Gas Pipeline Ownership (7)	400.0			400.0					
39 Total Authorization (unduplicated)	4,227.6	2,786.0	1,265.5	8,279.2	3,058.5	2,893.8	1,221.3	7,173.7	
40 Revised Surplus (Draw From CBR)	40.5				84.1				
41 Permanent Fund Dividends			610.0	610.0			795.0	795.0	
42 Deposits to Permanent Fund Principal		1.7	901.0	902.7		0.0	691.0	691.0	
43 Capital Income Fund			30.0	30.0			28.0	28.0	
44 TOTAL WITH PERMANENT FUND	4,227.6	2,787.8	2,806.5	9,821.9	3,058.5	2,893.8	2,735.3	8,687.7	

Notes:

- (1) Revenue assumptions are from the Fall 2005 Revenue Sources Book. The oil forecast is .865 million barrels per day at \$57.30 per barrel in FY06 and .843 mbd at \$49.20 per barrel in FY07.
- (2) Money borrowed for FY06 projects and debt service includes \$62.1 million in revenue bonds, \$138 million in Airport bonds, \$20.4 million in COPs, \$85 million in ASLC bonds and \$20 million in line of credit. The FY07 budget includes \$89.3 million in funding from securitization of the tobacco settlement revenue stream, which reduces future revenue.
- (3) Corporate dividends include funds made available to the State by the boards of AHFC, AIDEA, and ASLC. Dividends retained by AHFC for debt service on state capital project bonds are subtracted.
- (4) FY06 appropriations for formula programs exclude \$416 million FY05 capitalization of the Public Education Fund (line 26) that was used for K-12 education in FY06. That amount reduces fund capitalization (on line 14) by \$416 million. FY07 appropriations for formula programs exclude \$565 million of FY06 capitalization of the Public Education Fund. That amount is shown on line 37.
- (5) Duplicated authorizations are in the budget twice, such as when funds flow in and out of a holding account or one agency pays another for services provided.
- (6) Money appropriated in one fiscal year for use in later fiscal years shows as offsetting adjustments to revenue and authorization.
- (7) The Governor has not yet provided details on the how this money is to be used.

- AUTOS
- JOBS
- REAL ESTATE
- CLASSIFIEDS

You are not logged in. [Log in here.](#)

[log in](#) [log out](#) [my account](#) [faq](#)

MEMBER SERVICES

You are not logged in
[Log In](#) • [Log Out](#)
[My Account](#) • [FAQ](#)
[Join Now](#)

Web posted August 17, 2005

Gas, diesel prices bust all records

Spike worries businesses that will have to pass on costs to customers

By **ANDREW PETTY**
JUNEAU EMPIRE

Gasoline prices continue to hit all-time highs in Juneau and diesel prices have surpassed unleaded costs in some places.

Unleaded gas and diesel have climbed about 20 cents in the last three months. Gas started at \$2.71 a gallon at the Douglas Depot on Tuesday, while the Taku Fleet Fuel station in Lemon Creek priced diesel at \$2.68 a gallon.

- Print this
- E-mail this
- Send Editor Comment

"That's higher than I can remember," said Jeff Hansen, manager of Taku Oil Sales.

The spike continues to affect businesses that must decide whether to pass the cost on to the consumer.

Independent excavator Jerry Godkin's dump truck guzzles about five gallons per hour and he spends about \$1,100 to \$1,200 a month on diesel. In early April, diesel was at \$2.49, he said.

"The prices have flip-flopped," Godkin said. "Diesel is higher than gasoline."

Seven years ago when he began his business, the only increase he said he worried about was for insurance.

Instead of charging a fuel surcharge like others in his line of work, he adjusts his rates along with the price of diesel. It's a good thing his customers aren't complaining, he said.

"They know as well as anybody that when they get fuel at the gas pump that it's been higher than before," Godkin said.

In the last two weeks, trucking and shipping company Alaska Marine Lines bumped up its fuel surcharge from 11 percent to 14 percent.

Kevin Anderson, vice president of sales in Seattle, said diesel is traditionally cheaper than unleaded gasoline; it was only 50 cents in January 2002.



Brian Wallace / Juneau Empire

► Fuel prices spiral up: Jerry Godkin, an independent excavator, fills a Cat excavator with diesel fuel Tuesday at Taku Fleet Fuel. Fuel prices have continued to hit all-time highs in Juneau, with diesel prices now on a par with gasoline.

NEWS

- » Empire Front Page
- » Local News
- » Opinion
- » Letters To The Editor
- » Neighbors
- » State & Regional News
- » Obituaries
- » Weather
- » Business News
- » Archives
- » Alaska AP Wire
- » National AP Wire
- » RSS Feed
- » Health
- » Juneau-Skagway Road Series
- » Looking Forward

SPORTS

- » Local Sports
- » Empire Outdoors
- » Juneau Softball
- » Gold Medal 2005
- » Golf News & Scores

JUNEAUdirect

POWERED BY YELLOW ADVANTAGE
THE JUNEAU BUSINESS DIRECTORY

Enter Search Term & Location

Examples:

- hotels by the Juneau Airport
- sushi near 99801

Search

More than a phone book...
It's a fresh look!

Get Your Business Listed

FUN

- » Summer Monthly
- » UAS Connections
- » Job Fair
- » Capital City Weekly
- » This Week
- » Food Challenge!
- » Submit "Around Town" Event

As
Ma
bel

As
Bic
So

Sa
Pla
for

Ca
hel
Se

CO
MA
cra

Av
3B
rer

1:
wit
\$1

Su
3B
lm,

FS
lin
on

FS
Wa
gar

FS
3B
he.

Fo
Isl
C..

- » Calendar
- » Books
- » Slideshows
- » Select TV
- » Movie Listings
- » Juneau History
- » Poll Results

USEFUL

- » Classifieds
- » Email Newsletter
- » Stop N' Shop
- » Subscribe
- » Jobs At The Empire
- » Open Carrier Routes
- » Local Maps
- » Advertising
- » Contact Us



JUNEAU WEATHER

12° clear

[View Weather](#)

Wind:

Hi Tide: 01:29am

Lo Tide: 07:15am

Hi Tide: 01:20pm

Lo Tide: 07:35pm

Select Your City

CALENDAR February

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28				

"Who knows what's creating this?" Anderson said.

Alaska North Slope crude oil closed Monday at \$63.52 per barrel. It broke the \$60 crest for the first time Aug. 5 by jumping 93 cents from the day before.

In the global market, the price of crude oil Tuesday hovered beyond \$66 per barrel, a slight dip from its peak at \$67 on Friday.

Californians are paying the most in the Lower 48 at the pump with prices more than \$3 a gallon in some places.

About a dozen refineries nationwide reported problems or unplanned shutdowns last week. Also, the U.S. Department of Energy reported declines in gasoline inventories. Industry experts say fears of Iran cutting back on production continues to fuel the bullish behavior of the market as well.

Hansen of Taku Oil Sales said in years past prices were expected to go up every summer and then taper off after Labor Day. But now Hansen says he can't predict when they will go down again.

Market diesel prices have fluctuated as much as 13 cents a day, he said. Hansen adjusts his prices with the markets in Seattle, where he buys the fuel every four weeks.

James Harris, owner of Juneau Taxi and Tours, said the increase is something he doesn't like to see, but his company will not have to increase rates until the price hits \$3 a gallon.

Another taxicab company owner says when pump prices hit \$2.75 a gallon, he may consider adjusting fares.

"We would have to do something," said Andrew Beattie, owner of Capital Cab.

The city allowed Juneau taxis to raise their rates by 90 cents in May due to rising gas prices. At the time, gasoline was around \$2.50 a gallon.

Beattie said the increase hurts locals who take short, frequent trips the most.

Harris said if gas prices drop, he wants to reduce the fares.

"Hopefully gas prices will go down after Labor Day," he said.

- Andrew Petty can be reached at andrew.petty@juneauempire.com

High gas prices mean tough winter in the Bush

Friday, November 4, 2005 - by Rhonda McBride



Anchorage, Alaska - Shakespeare wrote "Now is the winter of our discontent." But it seems fitting to describe the winter ahead for villages in Alaska that are off the road system.

In Anchorage, gas is running around \$2.50 a gallon. While that's still higher than it was this spring, it's a price that people in the Bush would be happy to pay.

Just the sounds on the radio tell you that things are different out here as you are woken up to the weather in being told in Yup'ik. Lillian Michael's Yup'ik name is Atmak, which means backpack, and she carries a heavy load these days. She's the bearer of mostly bad news about the high cost of fuel. Her home village in Kwethluk recently made the news.



"On October 7, they jacked up their price... on their gas and stove oil. They're both now over \$4 a gallon," said Michael, Yup'ik news director (right).

Atmak joined us on a trip up the Kuskowkim River by hovercraft. Kwethluk is one of the stops along the way.



It's a race against time for villagers to stock up for winter. The river is icing over, and until it freezes solid enough to make an ice road, the only place to buy food, unless you can afford fly out, is in the village. Kids still buy treats, but it's getting harder for parents to come up with the cash. Most buy on credit and many are overextended. As the high cost of fuel drives the prices up, the problem will only get worse.

"When people feel a little richer, they buy these (Lucky Charms). I used to buy these for my grandchildren. This one is \$8.19," said Michael.

It's a tough tradeoff: food or fuel. It's a choice villagers must weigh every day.



"If I get a five-gallon stove oil, how am I gonna get a pamper?" said James Nick, Kwethluk Native store manager.

Those with wood stoves might fare better. But if you live out on the tundra, it takes a lot of gas to go upriver and get wood, and most homes in this region don't have wood stoves anymore. So on average, it takes about 300 gallons of stove oil to get through the winter. That's more than \$1,200 here in Kwethluk.



Samuel Snyder grew up in Akiak, our next stop. Snyder says he's lucky to have a job on the hovercraft because he can afford to pay for fuel. But his relatives in Akiak don't fare as well.

"It's a scary thought to have to go up anymore because a lot of people in the villages are not employed," said Snyder (left).

Akiak is already on thin ice. The village government fell behind on its payroll taxes and the Internal Revenue Service seized money that was earmarked for fuel to run this power plant. It was a high voltage drama. With no fuel to run these boilers, the village was about to go dark.

"We start scrounging around. We start borrowing some fuel from the school district and the corporation," said Adam Kashetok, Akiak city administrator (right).



An emergency loan saved the day, but the circumstances that led to this crisis remains. Most people in the village had fallen way behind in their power bills and the price of fuel hovers at around \$4.20.

"It is ridiculous. It's too high," said Kashetok.



The hope is by the time barges come in next spring, the price of fuel will go down. But until the ice goes out, the price is frozen. When people get tired of crying about the cost of fuel, they joke about going back to the old days, when people traveled by dog teams to hunt and fish. But that's easier said than done. Today they fly to travel outside the village, but they're flying a lot less with the cost of fuel so high.

"It's not like people are living high on the hog in the villages in the first place," said Scott Bailey, Hageland Aviation (left).

Normally, this is a busy time of the year for Hageland Aviation, but traffic is slower this season.

"The less demand, the less we fly. The less we fly, the less employees I can employ," said Bailey.

As the economy heads downward, it won't be a soft landing. The more remote the village, the higher the cost of fuel.



"One gallon of gas is \$4.40 without tax," said Raphael Jimmy, Mountain Village.



"I'm from Hooper Bay and gas is probably like almost \$5," Effram Smith.

"I bought 11 gallons of gas yesterday for \$51," said Minnie Nook, Lower Kalskag (left).

And the question hangs heavy in the air: What will people do in the darkest days of winter?

"I don't know. I don't even know," said Patrick Edwards of Pilot Station.

Out in the Bush, gasoline is needed to fuel more than just cars.

"A lot of people out here, they depend on their snowmobiles, like a guy in the city would depend on a car," said Mike Riley, Norinstar Gas, station manager (right).



At these prices, villagers may not be able to afford the gas to go out and hunt for food, which they can't afford to pay for.

"We have these Eagle brand milk, a lot of people hardly ever buy these. But they're for \$3.49 for this size," said Michael.

As Atmak works on a story about high fuel prices, she wonders how villagers, especially those with small children, can afford to survive.

"If they don't move into relatives or the relatives don't take care of them, they'll just have to live in the cold like they did a long, long time ago," said Michael.



On the Kuskokwim, the ice floes will soon come to a standstill, but many along this river already feel trapped. It will be a long winter of discontent, one many will feel grateful to survive.

In case you're curious, we went out and bought some of the goods that Lillian Michael was checking out in Kwethluk. Our purchase included Cheerios, Lucky Charms, Gold Medal Flour and Eagle brand milk. In Kwethluk, that would cost you about \$27. In Anchorage, we paid about \$13 for the same goods, using a Carr's card, which gave a \$4 discount. So the regular price of those goods in Anchorage was about \$17.



Serving Haines and Klukwan since 1966

Chilkat Valley News

Volume XXXVI Number 6 Feb. 16, 2006

Front Page

High fuel prices drive new habits

Duly Noted

By Matt Hawthorne

Letters

With gasoline and stove oil prices at an all time high, residents of the Chilkat Valley increasingly are turning to conservation and fuel alternatives.

Unclassifieds

"We've been selling tons of woodstoves," said hardware store sales clerk Dave Parks. "We've sold three this week, which is more than normal, and we've been selling them at that rate for some time now."

Yukon Quest

News Archive

Home heating oil, number 1 grade, was selling in Haines for \$2.98 per gallon this week, up more than 40 percent from last October, when the price was only \$2.11, according to fuel distributor Fred Gray. Locals pay about 30 cents per gallon more than the national average of \$2.69, according to the Energy Information Administration.

About CVN

Nick Degtoff said escalating fuel prices helped clinch his decision to open a firewood business this year. "I decided to start this business because of unregulated oil prices and the price hikes going on," said Degtoff.

Contact Us

Subscribe

Sales are booming, he said, "between 15 and 20 cords a week."

Advertise

But even his prices have climbed as the cost of cutting and delivering wood has increased. Degtoff said. "We depend upon oil too."

High prices are not only driving some consumers away from petroleum products, it's also prompting others to trim what they do consume.

Search This Site

Parks said he's seen increased demand for efficient oil-burning stoves and insulation this fall. "We've also been selling more Toyos (oil-burning stoves) because they are efficient. And we've had several requests for bids on insulation and more demand for rigid foam and other insulating materials."

To help ease the pinch of high prices, the borough assembly has proposed exempting home heating fuel from sales tax this winter. The four-month exemption period, which is set to begin Nov. 1, is expected to cost the borough about \$60,000 in revenue, but is a goodwill effort to recognize that many families will be struggling this winter. Assembly members said in endorsing a resolution for the tax break at their meeting last month.

Commuters have also begun to look to alternative practices to lower personal gasoline consumption and expenses. Kim King, who lives at 26 Mile Haines Highway, has begun carpooling to town twice a week since gas prices went up in September. "We've been doing it about a month now, and it's been working great. We work out, shop, and come home."

King said the three members alternate cars, while each individual is responsible for paying for the gas in their own car. "I'm pretty frugal, and wouldn't be going to town twice a week without this," said King.

SEARHC clinic administrator Marcia Scott had considered joining a carpool for her 64-mile daily commute, but said her schedule usually prevents such collaboration.

Instead, she's found another solution. "I got a Honda CRV in December to replace our Ford Explorer. Getting a smaller, fuel efficient car was the top priority on the list."

Gasoline prices in the valley range from \$3.32 to 3.45 for regular and \$3.38 to 3.51 for diesel. A year ago Delta Western sold regular for \$2.54 and diesel for \$2.78. The Energy Information Administration's national average, tax excluded, for regular gasoline is \$2.92, up from \$1.98 a year ago.

Chilkat Valley News
Main Street/ PO Box 630
Haines AK 99827
(907) 766-2688
cvn@chilkatvalleynews.com

This site copyright (c) 2006
Chilkat Valley News

Last modified: Sunday, 23-Oct-2005
16:52:33 PDT

Representative Bill Thomas, Jr.
and Representative Jim Elkins
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182
February 16, 2006



Dear Representatives Thomas and Elkins,

This letter is in response to your recently-introduced "Alternative Energy" legislation (HB-445). I would like to offer resounding applause to you and Representative Elkins for your initiative to address a long-overdue Alaskan need. If I or my company can be of assistance, I would be glad to do so.

My company (Juneau Biofuels Research) has undertaken a joint venture with a local not-for-profit to produce renewable fuel right here in southeast Alaska. The enterprise will recycle waste cooking oil and refine it on a regional scale into fatty acid alkylate esters, commonly called biodiesel. This undertaking solves a chronic solid-waste-disposal problem for Alaska restaurants, while at the same time producing a clean, non-toxic, locally-consumed energy source. These two organizations have been working directly with Waste Management/Capital Disposal, Arrow Refuse, Juneau Wastewater, Southeast Conference, and Alaska Department of Environmental Conservation to address the complex issues of waste cooking oil disposal and diesel emissions reductions. Our combined effort has also garnered support from the Alaska Energy Authority, the National Park Service, Juneau's Friends of Recycling, and numerous local business establishments.

Our plan is to build a refinery and make fuel here in Juneau that will serve the whole region. It will divert nearly 800 tons (1.6 million pounds) of locally generated waste from Juneau's landfill and sewer system annually (another 2 million pounds in the rest of southeast Alaska). It will solve a costly disposal problem for regional businesses. It will create a value-added product for Juneau and other southeast communities. It will create jobs for the regional economy. Incentives through Arrow Refuse and Waste Management for businesses will encourage participation, avoiding much of the need to impose regulatory intervention on businesses with existing Alaska statutes. It is a WIN-WIN-WIN enterprise and your proposed grant fund can make similar efforts a success throughout the state.

Thank you very much for your time and efforts. I hope that all of your colleagues in the State House as well as those in the Senate see the wisdom of your hard work and rally their support behind you. Again do not hesitate to call on me or my company for support.

Sincerely,

Amy Darcie Neff

Cc:
Senator Kim Elton, Juneau
Representative Beth Kerttula, Juneau
Representative Bruce Weyhrauch, Juneau
Representative Carl Moses, Unalaska
Senator Thomas Wagoner, Resources Committee
Senator Con Bunde, Labor and Commerce Committee

HB

447

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 23, 2006

SUBJECT: CSHB 447(L&C); Work Order No. 24-LS1664\G

TO: Representative Tom Anderson
Chair of the House Labor and Commerce Committee
Attn: Josh

FROM: Pam Finley 
Revisor of Statute

Enclosed is the CS you requested. Note that we have changed the title somewhat to cover the insertion of language related to animal classics on page 1, lines 6-7. In keeping with the spirit of amendment #2, we used "charitable classics." For the committee's general information, I note that the reference to AS 05.15.690 at the end of the bill is unnecessary because the definition of "raffle and lottery" in AS 05.15.690 applies to all of AS 05.15, including AS 05.15.640.¹ Nevertheless, since the committee adopted it, it is in the CS. Please let me know if you have any questions about the above.

PM:ljw
06-147 ljw

Enclosure

¹ The reference to "a type of classic defined in AS 05.15.690" on line 7 is there because AS 05.15.690 does not define "classic," but instead defines each type of "classic" separately.

ALASKA STATE HOUSE OF REPRESENTATIVES

716 W. 4th Ave
Anchorage, AK 99501
Room 610



Phone (907)-269-0265
Fax# (907)-269-0264

Representative Tom Anderson

FACSIMILE

To: Legislative Legal Fax: 2029
From: Josh Applebee Date: 3/22/2006
Re: Amendments to HB 447
CC:

Urgent For Review Please Comment Please Reply Please Recycle

Good afternoon,

Attached are the amendments adopted by the House Labor & Commerce Committee to HB 447. Amendment # 2 is a conceptual amendment with multiple changes included. Please let me know if you have any questions or if there is anything else you need. Please deliver the bill final to Room 408.

Thank you.

-Josh Applebee

465-4954

AMENDMENT #1

Passed
yc

OFFERED IN THE HOUSE

BY REPRESENTATIVE LYNN

TO: HB 447

- 1 Page 1, line 6, following "classic":
- 2 Insert "other than animal classics,"

CONCEPTUAL AMENDMENT

#2

PASSED
v/c

OFFERED IN THE HOUSE
TO: HB 447

BY REPRESENTATIVE CRAWFORD

- 1 Before each use of the word "raffle" or "lottery," including the title of the bill, insert the
- 2 word "charitable."
- 3
- 4 Page 1, line 8:
- 5 Following "lottery" insert "as defined in AS 05.15.690."

AMENDMENT

#3

FAILS
4-3

OFFERED IN THE HOUSE
TO: HB 447

BY REPRESENTATIVE CRAWFORD

- 1 Page 1, line 5, following "broadcasting":
- 2 Insert, "if the broadcasting is limited to public service announcements provided
- 3 free of charge by a broadcaster to a permittee."
- 4
- 5 Page 1, line 8:
- 6 Delete " "broadcasting" "
- 7 Insert " "broadcasting," if the broadcasting is limited to public service
- 8 announcements provided free of charge by a broadcaster to a permittee,
- 9 ["BROADCASTING"]"

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 447
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
 Title Broadcasting Promoting RDU Tax and Treasury
Charitable Gaming Component Tax
 Sponsor Rep. McGuire
 Requester (H) L&C Component No. 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
-------------------------------	------------	------------	------------	------------	------------	------------

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would allow a permittee [or operator under contract with an authorizing permittee] to broadcast promotion of a raffle or lottery. The means allowed to include radio, television and, by extension, the internet: email and web sites. Anyone who can conduct a raffle can promote it with broadcasting.

Though the bill language applies to raffles and lotteries, the statutory definition [AS 05.15.690(38)] equates the two, effectively giving two different names to the same activity. Thus, there is no apparent authorization to expand the kinds of gaming activity that can be conducted.

Prepared by: Jeff Prather Phone (907) 465 3410
 Division Tax Division Date/Time 2/20/06 10:42 AM
 Approved by: Jerry Burnett Date 2/20/2006
 Agency Department of Revenue



PO Box 367 * Valdez, AK 99686
Phone: 907-835-5825 * Fax: 907-835-5825
E-Mail: Laurie@kvakradio.com

February 16, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol Room 118,
Juneau, AK 99801-1182

Dear Representative McGuire,

I am writing to request that Alaska Statute §05.15.640(a) be amended to allow radio and television stations to announce charitable gaming. While broadcasters are currently not allowed by law to have charitable gaming like raffles on radio and television, the State of Alaska allows the print media to do so.

In our community, raffles are the primary tool used for non-profit funds so that is where amending this statute could really be beneficial to non-profit organizations. In Valdez the newspaper is weekly, and we have missed out on many opportunities to help people because we cannot broadcast charitable gaming. I would contend that most charitable gaming efforts are admirable and beneficial to the public. Gaming efforts are also closely regulated by the State, so I don't understand why broadcasters are prohibited from broadcasting them.

I understand there are a lot of important issues to contend with in Juneau, and the inequity of this law seems to be more of an oversight than an affront to our industry, but a change in this statute has the potential to be overwhelmingly helpful to a large number of people.

Radio does not anticipate this law will increase revenues. In fact, it will open the door for us to make even more donations than we already do. I take my role as a broadcaster seriously and take pride in using the power of radio to do good. Amending Alaska Statute §05.15.640(a) will just give me more tools in my box with which to do that.

Best Regards,

Laurie Prax
Owner/Manager



February 16, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

Dear Representative McGuire,

I submit this letter of support for your HB 477. Thank you very much for creating this bill. Its passage is important for two reasons:

- by allowing radio and television stations to broadcast promotions for non profit organizations that constitute a lottery or game of chance will help Alaska's non profits increase needed income in a decreasingly unstable funding environment. The increase in funding resulting from the inclusion of radio and television in the promotion of these fund raising lotteries for non profits is clearly in the public interest.
- your bill creates fairness. Unlike radio and television, Newspaper in Alaska has always been allowed to run advertising for non profits involved in promotional lotteries. This discrimination should never have been allowed to happen and should be stopped. Your bill stops this unfair treatment.

In the public interest, in service to Alaska's non profits, who desperately need to maximize their funding opportunities, and to finally eliminate an unfairness to Alaska Broadcasters, I urge swift adoption of your HB 477. Again, on behalf of Alaska Broadcasters and non profits, thank you for proposing this legislation.

Sincerely,

Al Bramstedt, Jr.
General Manager
KTUU-TV Channel 2

Channel 2 Broadcasting Company
701 East Tudor Road • Suite 220 • Anchorage, AK 99503-7444
(907) 762-9202 • Fax (907) 561-0882
www.ktuu.com



CLEAR CHANNEL RADIO

GARY DONOVAN
Regional Vice President

February 16, 2006

The Honorable Lesil McGuire
House of Representatives
State Capital Room 118
Juneau, AK 99801-1182

Dear Representative McGuire,

I am writing on behalf of Clear Channel Radio's ten Alaska Radio stations, in support of House Bill 447.

For decades, Alaska's broadcasters have been forced to compete on an uneven playing field because of Alaska Statute 05.15.640. This statute prohibits the advertising of lawful charitable gaming activities, but only by Radio and Television broadcasters – newspapers and other print media are free to advertise these very same activities.

Alaska Statute 05.15.640 is bad for business and denies broadcasters the equal protection afforded by Federal and State Constitutions because it discriminates without rational substantiation, against broadcasters, and in favor of print media.

HHB would serve to level the playing field for broadcasters, allowing us to carry third party advertising promoting lawful charitable gaming activity. Presently we cannot even assist not-for-profit organizations in their efforts to raise charitable contributions.

Thank you for your courageous step towards correcting this on-going discrepancy by sponsoring HB 447.

Sincerely,

Gary Donovan
Regional Vice President
Clear Channel Radio



516 Stedman Street • Ketchikan, AK 99901
(907) 247-3699 • (907) 247-5365 FAX
kfmj@alaska.fri

February 16, 2006

To: The Honorable Lesil McGuire:

Re: House Bill 447

The staff of KFMJ Radio in Ketchikan is rully behind and asks for your support in the passage of HB447. Numerous not-for-profit organizations have been told "no" in the past when they have approached our radio station to advertise their raffles to benefit the organizations. It has been difficult to explain to these well-minded individuals that, though we would love to help them, our hands are tied because of this Alaska Statue that bans radio and television stations from advertising lawful charitable gaming or conduct. They often respond with, "Well, the NEWSPAPER ran our ad.... Why can't you?" We sigh and tell them it's illegal and that we could be fined for it. Often the response is resignation, but a few times we have been accused of lying.

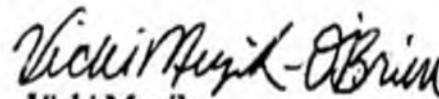
After just a few minutes of brainstorming, our staff came up with this short list of not-for-profit organizations in the Ketchikan area that are unable to advertise a raffle or similar game of chance on our radio station. These organizations are: The Rainy Day Quilt Guild, Ketchikan Rotary, The Harley Riders Association, Ketchikan Killer Whales Swim Club, Ketchikan Little League, nearly ALL of the Ketchikan High School Athletic teams, The Alaska Native Brotherhood/ Alaska Native Sisterhood, Alaskan Seibukan, Ketchikan Area Arts and Humanities Council, Holy Name Catholic Church, First City Council on Cancer, Ketchikan Dribblers League, Ketchikan Youth Football League, Ketchikan Youth Soccer League, Ketchikan Area Boy Scouts and Girl Scouts, Hoopmania, Ketchikan CHARR, Friends of the Library, the Lions Club, the Eagles Club, Ketchikan-Kanayama Exchange Program, Ketchikan Gymnastics Club, Ketchikan Fishing Derby, Ketchikan Theatre Ballet, The Ketchikan Chamber of Commerce, Ketchikan's chapter of the National Rifle Association, the Leask Lakes Users Coalition, The University of Alaska-Southeast, Ketchikan Indian Community, Women in Safe Homes, Ketchikan PATH Homeless Shelter, Ketchikan HeadStart and Saxman HeadStart.

These organizations and others would benefit greatly from the opportunity to advertise their raffles on the radio stations in our community. It is very troubling to our staff to witness flourishing organizations that are trying desperately any means they can to stay afloat - usually a raffle due to the high amount of revenue that one can generate - and not be able to help them with the power and reach of our media. For some not-for-profits, this can be a death sentence, as they are required to obtain community matching funds to secure their grants. If they cannot reach their monetary goals, their very existence becomes threatened.

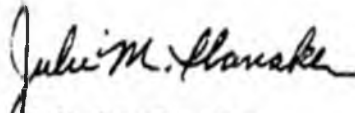
In closing, we, the entire staff of KFMJ Radio in Ketchikan and its management ask you support and make every effort to pass HB447 to amend Alaska Statute §05.15.640(a). To do so affords an equal playing field for Alaska's Broadcasters and affords a greater chance to flourish for Alaska's nonprofits.



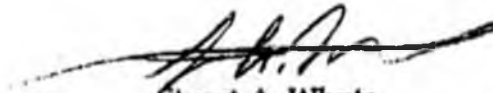
Bob Kern
Owner, KFMJ Radio



Vicki Muzik
Production Director

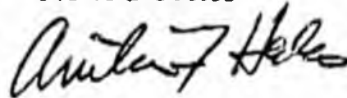


Julie M. Slanaker
Sales Manager



Stuart A. Whyte
Advertising Consultant

Anita Hales
News Director



HOUSE BILL NO. 447

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE MCGUIRE

Introduced: 2/13/06
Referred: Labor and Commerce, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the use of broadcasting to promote raffles and lotteries."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. AS 05.15.640(a) is amended to read:

4 (a) A person may not use broadcasting to promote or conduct a charitable
5 gaming activity under this chapter except that a person may use (1) broadcasting to
6 promote a fish derby or a type of classic [OR SWEEPSTAKES] defined in
7 AS 05.15.690, or (2) radio or television broadcasting to promote a raffle and
8 lottery. In this subsection, "broadcasting" includes television and radio transmission
9 by 2,500 megahertz, microwave video and audio programming, slow-scan television
10 programming, and programming by way of [VIA] satellite, cable, teletype, or
11 facsimile transmission and distribution methods.

- NO-COST
REAS
- LIMIT PROHIBIT

Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
Phone: (907) 465-2995
Fax: (907) 465-6592



Interim:
716 W 4th Avenue, Suite 430
Anchorage, AK 99501-2133
Phone: (907) 269-0250
Fax: (907) 269-0249

Representative Lesil McGuire

Chair, Judiciary Committee

Sponsor Statement HB 447

"An Act relating to the use of broadcasting to promote raffles and lotteries"

HB 447 would afford an equal playing field for Alaska's broadcasters. Alaska Statute prohibits broadcasters from airing truthful and non-misleading advertisements of lawful "charitable gaming activity". HB 447 would avoid a likely constitutional challenge to the Statute.

As it stands now, AS 05.15.640(a) bans, but only via radio and television, the advertising of lawful charitable gaming or conduct. Newspapers are free to advertise the very same activity and conduct that radio and television stations may not advertise.

In addition, the statute also impedes positive governmental interests. ABA member stations cannot assist deserving not-for-profit organizations in their efforts to raise money to meet their goals.

AS 05.15.640(a) may well deny broadcasters equal protection under the Federal and State Constitutions since the act prohibits, without rational basis, the broadcast media from engaging in conduct which is allowed by the print media, namely the carriage of third party advertising promoting a lawful "charitable gaming activity"

As an example of the current misguided law, local church raffles cannot be promoted by local radio and TV stations. Boy Scout fundraisers involving raffles may not be included in public service announcements. Not-for-profit groups such as the Boys and Girls Club are excluded from promoting fundraisers involving games of chance using radio and TV. Even various statewide fundraising events such as the Iditarod may not be promoted by broadcasters, thus reducing the organizations fundraising ability.

Craig Johnson

From: Ric Schmidt [rschmidtknom@nome.net]
Sent: Wednesday, February 15, 2006 4:30 PM
To: Craig Johnson
Cc: Alaska Broadcasters Association
Subject: ABA letter of support for amendment



PO Box 102424 Anchorage AK 99510 P: 907-258-2424 F: 907-258-2414

February 15, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol Room 118,
Juneau, AK 99801-1182

Dear Representative McGuire:

Alaskan Broadcasters provide millions of dollars in community service annually to the citizens of Alaska. As TV and Radio professionals, we continually pledge an unwavering dedication to the communities we serve. Our support for nonprofit organizations and projects can help guarantee a successful campaign; building a wing on a Children's Clinic, raising awareness for breast cancer detection, or spearheading a critical blood drive.

There exists, however, a great many community service projects in which we, as broadcasters, are prohibited. By State Law, we may not promote ANY form of charitable gaming despite the fact that the State of Alaska *allows* the print media to do so.

This misguided law means that local VFW raffles cannot be promoted by local radio and TV stations—local Girl Scout fundraisers may not be included in public service announcements—Non-profit groups such as the Boys and Girls Club are unfairly excluded from promoting fundraisers involving games of chance using Radio and TV. This State of Alaska statute limits worthy fundraising efforts and impedes positive governmental interests. ABA member stations cannot assist deserving not-for-profit organizations in their efforts to raise money to meet their goals.

On behalf of all broadcasters in Alaska, I ask that Alaska Statute §05.15.640(a) be amended in order to allow each of us to better serve our communities fundraising efforts through the power of radio and television broadcasting.

2/16/2006

Regards,

Ric Schmidt
President

2/16/2006



ALASKA COMMUNICATIONS CENTER

520 Lake Street, Sitka, Alaska 99835

(907) 747-8200 FAX (907) 747-8440 (800) 490-8468 foxnet@ptialaska.net

"Bringing Rural and Urban Alaska Together"

February 16, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol Room 118
Juneau, Alaska 99801-1182

Dear Representative McGuire:

Alaska Communications Center, headquartered in Anchorage, is acquiring TV channel 38 construction permit to produce and to broadcast Alaska programming primarily for rural Alaskans. KACN, featuring these Alaska broadcasts, will initially be presented in Anchorage for the 20,000 plus rural Alaskans. As soon as services are available, the programming will be broadcast statewide via satellite and Internet.

To assist our endeavors to provide interesting and informative Alaska programming for our rural Alaskans, our staff is requesting you to sponsor HB 447. This legislation will amend Alaska Statute 05.15.640 (a) to allow over-the-air broadcasts to air spots or include fund raising information in Public Service Announcements for charitable gaming. This modification will allow KACN (Alaska Community Network) staff to assist many rural non-profits by enhancing their capacity to raise funds for their many projects.

Please let us know how we can be helpful as you in this process. If you would like to have additional information, please give me a call at (907) 747-8200.

With best regards,

Dan Etulain Ph.D.

Dr. Dan Etulain President
Alaska Community Network
Anchorage/Sitka

DRE/d

P. S.: As the owner of KATH-TV, Juneau, and KSCT-TV, Sitka, our local staff is also in support of your sponsoring HB 447.



PUBLIC BROADCASTING
FROM ALASKA'S CAPITAL

February 15, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol Room 118
Juneau, Alaska 99801-1182

Dear Representative McGuire:

I am writing in support of your bill HB 447, which would lift the ban on promoting charitable gaming on radio and television stations in Alaska.

We know that many Alaska charities depend substantially on the proceeds of charitable gaming to fund their operations and provide needed services to their local communities. The ban on advertising these activities on radio and television limits the effectiveness of the charities' efforts, especially in places where radio and television provides the best opportunity at an affordable cost to get the message out.

Even though I'm a long-time public broadcaster in Alaska, I know that our commercial radio and television stations in the state could provide an enormous public service if your bill passes. There's no public policy reason that I can think of that would support this ban. Lifting the restriction would allow charities a choice of media for promoting their fundraising activities.

Thank you for your interest and for all of your efforts to help Alaska's non-profit groups.

Sincerely,

Bill Legere
President and General Manager



Kodiak Island Broadcasting Co., Inc
P.O. Box 708 1315 Mill Bay Road Kodiak, Alaska 99615
(907) 486-5159 Fax (907) 486-3044

February 15, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol Room 118,
Juneau, AK 99801-1182

Dear Representative McGuire:

As a Kodiak Broadcaster we provide thousand's of dollars in community service annually to the residents of Kodiak. As Radio professionals, we continually pledge an unwavering dedication to the island of Kodiak that we serve. Our support for nonprofit organizations and projects can help guarantee a successful campaign; supporting local high school programs, raising awareness for local community events, or spearheading a fundraiser for the Salvation Army.

However, there are many community service projects in which we, as Kodiak broadcasters, are prohibited. By State Law, we may not promote ANY form of charitable gaming despite the fact that the State of Alaska *allows* the print media to do so.

This misguided law means that local non-profit raffles cannot be promoted by our local radio station—local Girl Scout fundraisers may not be included in public service announcements—Non-profit groups such as the Special Olympics are unfairly excluded from promoting fundraisers involving games of chance using Radio. This State of Alaska statute limits worthy fundraising efforts and impedes positive governmental interests. We cannot assist deserving not-for-profit organizations in their efforts to raise money to meet their goals.

On behalf of the staff of KVOK / KRXX, I ask that Alaska Statute §05.15.640(a) be amended in order to allow each of us throughout the state to better serve our communities fundraising efforts through the power of radio and television broadcasting.

Regards,

Matt Wilson
General Manager
ABA Board Member
KVOK-AM/KRXX-FM
Kodiak, Alaska



KUAC FM/TV
University of Alaska Fairbanks
P.O. Box 755820
Fairbanks, Alaska 99775-5620
Phone (907) 474-7491
Fax (907) 474-5064
www.kuac.org

February 15, 2006

The Honorable Lesil McGuire
House of Representatives
State Capitol Room 118
Juneau, Alaska 99801-1182

Dear Representative McGuire:

I am writing in support of your bill HB 447, which would lift the ban on promoting charitable gaming on radio and television stations in Alaska.

Alaskan charities provide greatly needed services to their local communities. Critical to the charities' success, however, is the operational revenue derived from the proceeds of charitable gaming. The current ban on advertising charitable gaming activities on radio and television unnecessarily limits an organizations' effectiveness, especially in places where broadcast media provides the best opportunity for informing the public with regard to their service missions.

Broadcasters are always eager to help through service to their local communities; and even though I work at a public broadcast station, I support your efforts to give commercial radio and television stations in the state an opportunity to extend their service back to the communities they serve. By lifting this restriction, it will allow Alaskan charities a choice of media for promoting their fundraising activities.

Thank you for your interest and for all of your efforts to help Alaska's non-profit groups.

Sincerely,

A handwritten signature in cursive script that reads 'Greg Petrowich'.

Greg Petrowich
General Manager & CEO

Craig Johnson

From: Al Bramstedt [bramstedt@ktuu.com]
Sent: Thursday, February 16, 2006 9:36 AM
To: Craig Johnson
Cc: akba@gci.net; dianna@ktuu.com; Laura Swen
Subject: HB477

Craig,

If you would pass this e-mail on to Representative Lesil McGuire I would be grateful.

The Honorable Lesil McGuire, House of Representatives,

Dear Representative McGuire,

I submit this letter of support for your HB 477. Thank you very much for creating this bill. Its passage is important for two reasons:

- by allowing radio and television stations to broadcast promotions for non profit organizations that constitute a lottery or game of chance will help Alaska's non profits increase needed income in a decreasingly unstable funding environment. The increase in funding resulting from the inclusion of radio and television in the promotion of these fund raising lotteries for non profits is clearly in the public interest.
- your bill creates fairness. Unlike radio and television, Newspaper in Alaska has always been allowed to run advertising for non profits involved in promotional lotteries. This discrimination should never have been allowed to happen and should be stopped. Your bill stops this unfair treatment.

In the public interest, in service to Alaska's non profits, who desperately need to maximize their funding opportunities, and to finally eliminate an unfairness to Alaska Broadcasters, I urge swift adoption of your HB 477. Again, on behalf of Alaska Broadcasters and non profits, thank your for proposing this legislation.

Sincerely,
Al Bramstedt, Jr.
General Manager
KTUU-TV Channel 2

HB

480

Rep. Tom Anderson

From: Donna J. McCready [djm@anchorlaw.com]
Sent: Wednesday, April 05, 2006 10:57 AM
To: Rep. Tom Anderson; Rep. Gabrielle LeDoux; Rep. Bob Lynn; Rep. David Guttenberg; Rep. Harry Crawford; Rep. Pete Kott; Rep. Norman Rokeberg
Cc: Donna J. McCready; Jeffrey K. Rubin
Subject: HB 480

Dear Chairman Anderson and Members of Labor and Commerce,

My name is Donna McCready and I testified on April 3rd against HB 480 on behalf of myself and the Alaska Action Trust. I appreciated the opportunity to testify and I wanted to follow up on some concerns that I have regarding the bill. I have written this letter with the input and assistance of Jeff Rubin, an attorney who is very knowledgeable on insurance issues.

Before I talk about a practical example of how this legislation could hurt consumers and business owners I want to explain some basic principles that apply to the insurance industry that do not necessarily apply to other businesses, or to government officials or legislators. Most of us have insurance, whether it is for our automobiles, homes, businesses, and/or to insure our lives, to insure against disabilities etc. Generally we pay, in the way of premiums, for insurance to provide us with a safety net in case something really bad happens to us or our property or in case we negligently hurt someone else. Because of the unique relationship between insurance companies and their insureds, insurance companies owe their insureds a fiduciary duty. Along with the fiduciary duty comes the duty of honesty and disclosure. That makes sense because, while most of us are consumers of insurance, we are not experts in insurance and may not understand fully the benefits provided under a policy we purchase one year but do not have the need for until much later and we may not actually understand how to collect those benefits when we are injured, disabled or face the loss of property. What honesty and disclosure means is, for instance, that if an insured wants to make a claim, the insurance company has an obligation to assist the insured with making the claim. An insurance company has an obligation to fairly investigate a claim and if an insurance company denies a claim by its insured it has a duty to explain why the claim is being denied. The insurance company can not put its interests above the interests of an insured. And the claims adjustor is not supposed to be an adversary – the claims adjustor is supposed to help the insured.

These are well established principles within the insurance industry and Alaska law. See A.S. 21.36.125; 3 AAC 26.010-300; *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241 (9th Cir. 1998) (summarizing Alaska law on first party insurance). Simply put, a claims department is not supposed to be a profit center for an insurer. Rather, because of the fiduciary and fiduciary like responsibilities that arise when claims occur, the proper place for an insurer to make money is in its product design, investments, and underwriting.

Now, here is one example of how HB 480 could hurt insureds in Alaska: Suppose a well-liked and successful physician in Alaska owns his own practice and purchased “own occupation” disability insurance to protect his ability to practice within his specialty. And suppose the doctor becomes disabled in a car accident and is no longer able to practice within his medical specialty. He applies for disability payments under his policy for which he has faithfully paid his premiums. At first his insurance company pays benefits but then stops the disability payments and sends a letter to its insured disabled doctor that does not disclose why the benefits are being denied, or raising pre-textual grounds for terminating benefits. What is really going on and what is not disclosed to the insured doctor is that the disability insurance company has been monitoring the financial performance of its “own occupation” policies and through that has learned it is losing a lot of money on those policies (because it wrote the policies in a competitive environment when the market was doing well and now the market is not doing so well and premiums are not covering the claims). It therefore undertakes a company wide review including a voluntary audit of claim practices and determines that by changing the way it handles claims it can stop the loss and in fact make substantial profits. The insurance company determines that it will solve the problem by setting goals for terminating claims, by revamping its claim practices, and creating

an environment which rewards adjusters for denying claims regardless of individual merit. Because it is a large insurer, that controls a substantial portion of the market for disability insurance, it decides it will call its activities "best practices" in an attempt to redefine industry standards. This attempted redefinition of industry standards includes procedures called "round table reviews" where groups of adjusters, managers and other personnel attempt to come up with reasons to deny payment and the use of biased investigations to create grounds for denying claims. See, for example, *Hangarter v. Provident Life and Accident Insurance Company*, 373 F.2d 998 (9th Circuit 2004). It includes practices such as attempting to redefine the insured's occupation so as to deny coverage for the claim and interpreting its policies in a manner unsupported by the law or policy language. In order to effect these practices the company trains its personnel in these new procedures and methods of doing business.

The insured doctor is in a difficult financial situation because he can not work as a physician, and his disability benefits have been cut off. He now has to sue his insurance company in order to get what he bargained for in purchasing the own occupation policy. My questions to members of this Committee are: don't you think the insured physician should have access to the real reason his disability claim was denied? Moreover, how can he prove the real reason for his claim being denied unless he is able to obtain the documents that show what lead to "whole blocks of claims" being denied without reference to their merit? How can he prove that what happened to him was not an accident or mistake, but was rather part of a corporate plan or scheme without access to documents that shows the company audited its claim procedures, decided to meet what it decided were industry standards by instituting its so called "best practices", and trained its personnel and evaluated the performance of its claims operation in meeting its financial goals?

By the way, this example is based on a real case(s) out of California. I've attached the State of California Division of Insurance Documents outlining this conduct by three carriers:

<http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2005/upload/ACCUSATION.pdf>

<http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2005/upload/CSA.pdf>

<http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2005/upload/exhibit-a.pdf>

See also *Hangarter v. Provident Life and Accident Insurance Company*, 373 F.2d 998 (9th Circuit 2004). There are many more published and unpublished decisions illustrating how an insurer may, in violation of industry standards, adopt a practice and policy of wrongfully denying claims. It is in these cases, were there to be a self-analysis privilege, that the insured would be denied the very information he needs to be able to prove his case and to obtain a remedy against his insurance company. Access to the underlying claims file alone will not do.

Perhaps the response from those promoting the legislation is that there is a fraud exception to the privilege. My questions are: how would you ever know there was fraud if the privilege is being invoked to protect the information? How will the consumer ever know?

A good point raised at the hearing on Monday was the fact that insurance companies are going to be doing voluntary audits whether or not a privilege applies or not. As one commentator critical of the privilege explains:

Because a corporation functions in a competitive commercial environment, it must constantly evaluate its organization and personnel in order to survive. Failure to critically review its performance inevitably leads to misperceptions about the market and within a short time, penalties from the marketplace. This pressure to conduct critical appraisals is not only imposed by the milieu in which the corporation operates, but also emanates from within the organization, which creates incentives for employees to review its operations.

Flanagan, James, 51 GEO. WASH. L. REV. 551, 561 (1983).

Another point raised on Monday was, if such a privilege existed, what incentives would be created? Again the same commentator cited above observed that:

Moreover, protection for corporate investigations would do little to induce the candor or cooperation of those being investigated. It is more likely that assurances of confidentiality may cause corporate employees to believe that their conduct can be concealed successfully, thereby encouraging them to engage in the improper activities the investigation was intended to discover.

Flanagan, James, 51 GEO. WASH. L. REV. 551, 569 (1983).

Finally, to the extent that any of the information that is sought to be protected by this new and unique privilege contains confidential or proprietary information the release of which could create legitimate competitive harm, mechanisms currently exist in the law under Civil Rule 26 to protect such information and courts routinely enter, and parties routinely agree to legitimate protective orders that balance the concerns of insurers who claim the information needs to be protected from disclosure with the needs of policyholders to have access to information to prove their claims. This is a far better method for addressing legitimate concerns than the creation of evidentiary privileges which at their heart impede rather than assist in the truth finding function. See, e.g., *Werley v. United Services Automobile Association*, 526 P.2d 28, 31 (Alaska 1974) (recognizing that privileges should be restricted because liberal discovery is consistent with courts' truth-finding functions)

The proposed legislation is harmful to Alaskans. It is harmful to the truth finding function of courts. It is harmful to legitimate insurers who try to compete fairly against insurers who engage in illegitimate procedures to gain unfair competitive advantages. I hope that the Committee members will reject this legislation.

Thank you for your time and consideration.

Donna McCready
645 G Street No. 100
PMB 668
Anchorage, Alaska 99501
djm@anchorlaw.com

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 480
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
Title Insurance Company Self-Audit Information RDU Insurance (116)
Component Insurance Operations
Sponsor Anderson
Requester House Labor & Commerce Component No. 354

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation relates to voluntary self-evaluative audits by insurers, and among other things provides for an insurance compliance self-evaluative privilege. It does not impact the operations of the division.

Prepared by: Linda S. Hall, Director Phone 907-269-7900
Division Insurance Date/Time 3/30/2006 5:54 PM
Approved by: William C. Noll, Commissioner Date 3/30/2006
Agency Commerce, Community, and Economic Development

24-LS1592\Y
Bailey
3/15/06

CS FOR HOUSE BILL NO. 480()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE ANDERSON

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to voluntary self-evaluative audits by insurers and providing for an
2 insurance compliance self-evaluative privilege."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 FINDINGS. The legislature finds that

7 (1) an insurance compliance self-evaluative privilege will encourage insurance
8 regulated companies and persons to conduct voluntary internal audits of their compliance
9 programs and management systems and to assess and improve compliance with state and
10 federal statutes, rules, and orders;

11 (2) protection of insurance consumers is enhanced by companies' voluntary
12 compliance with this state's insurance laws and other laws, and that the public will benefit
13 from incentives to identify and remedy insurance and other compliance problems.

14 (3) protection against inappropriate disclosure of insurance company internal

1 compliance audit information will encourage voluntary compliance and improve insurance
2 market conduct; and

3 (4) the voluntary provisions of this Act will not inhibit the exercise of the
4 regulatory authority by those entrusted with protecting insurance consumers.

5 * Sec. 2. AS 21.06.060(e) is amended to read:

6 (e) In the performance of duties under this title, except as provided in
7 AS 21.06.175, the director may

8 (1) disclose confidential information or records to the legislature, state,
9 federal, and international regulatory or law enforcement agencies, or the National
10 Association of Insurance Commissioners if the recipient will maintain the
11 confidentiality of the information or records;

12 (2) receive information or records from state, federal, and international
13 regulatory or law enforcement authorities or the National Association of Insurance
14 Commissioners and maintain the confidentiality of the information or records if
15 requested to do so or given notice that the information or records are confidential
16 under the law of the jurisdiction supplying them; and

17 (3) enter into agreements consistent with this section governing the
18 sharing of information or records that are confidential under this title with other state,
19 federal, and international regulatory or law enforcement agencies or the National
20 Association of Insurance Commissioners for the purpose of furthering any regulatory
21 or legal action that may be taken as part of the recipient's official duties.

22 * Sec. 3. AS 21.06.060(f) is amended to read:

23 (f) The following information or records submitted to or obtained by the
24 director are confidential:

25 (1) personally identifiable consumer information; however, the director
26 may disclose the information or records for the purpose of attempting to resolve a
27 consumer complaint;

28 (2) information or records established by a showing satisfactory to the
29 director to be a trade secret or proprietary business information, including

30 (A) detailed health insurance claim cost data; and

31 (B) justification for usual, customary, and reasonable charge

1 determinations;

2 (3) information or records provided by a person not subject to this title
3 at the request of the director if the information or records are identified as confidential
4 by the director; [AND]

5 (4) financial analysis ratios and examination synopses concerning
6 insurance companies that are submitted to the director by the National Association of
7 Insurance Commissioners; and

8 (5) information related to the insurance compliance self-evaluative
9 privilege under AS 21.06.175.

10 * Sec. 4. AS 21.06.150(d) is amended to read:

11 (d) The director may disclose the content of an examination report,
12 preliminary examination report or results, or a matter relating to it to the insurance
13 division of this or another state or country and to law enforcement officers of this or
14 another jurisdiction. Except as allowed by this section or other provision of law, the
15 director may not disclose the contents of a preliminary examination report before the
16 report is filed in the office of the director under AS 21.06.060. The provisions of this
17 subsection do not apply to insurance compliance audits conducted under
18 AS 21.06.175(b).

19 * Sec. 5. AS 21.06 is amended by adding a new section to read:

20 **Sec. 21.06.175. Insurance compliance self-evaluative privilege.** (a) Except
21 as otherwise provided in this section, an insurance compliance audit document is
22 privileged and is not discoverable or admissible as evidence in a legal action in a civil
23 or administrative proceeding. The privilege created is a matter of substantive law of
24 this state and is not merely a procedural matter governing civil procedures in the
25 courts of this state.

26 (b) Except as otherwise provided in this section, if a company, person, or
27 entity performs or directs the performance of an insurance compliance audit, an
28 officer, employee, or agent involved with the insurance compliance audit or a
29 consultant who is hired for the purpose of performing the insurance compliance audit
30 may not be examined in a civil or administrative proceeding regarding the insurance
31 compliance audit or any insurance compliance audit. The privilege in this subsection

1 may be expressly waived by the company that prepared or caused to be prepared the
2 insurance compliance audit document.

3 (c) An insurer may voluntarily submit a confidential insurance compliance
4 audit document to the director in connection with examinations conducted under this
5 chapter without waiving a privilege to which the insurer would otherwise be entitled.

6 (d) A document made confidential under (a) or (b) of this section may not be
7 disclosed as provided under AS 21.06.060(e)(1) and 21.06.060(e)(3). A document
8 made confidential under (a) or (b) of this section furnished to the director may not be
9 provided to any other person or entity and shall be given the same confidentiality and
10 other protection as provided for voluntarily submitted documents.

11 (e) The director may use an insurance compliance audit document furnished as
12 a result of a request of the director only to determine whether a disclosed defect in an
13 insurer's policies and procedures or inappropriate treatment of a customer has been
14 remedied or whether an appropriate plan for its remedy is in place. This provision does
15 not preclude the director from performing, based on the information disclosed in the
16 self-audit document, an independent examination under this title.

17 (f) An insurance compliance audit document submitted to the director shall
18 remain subject to all applicable statutory or common law privileges, including the
19 attorney-client privilege, the work product doctrine, and subsequent remedial
20 measures under Rule 407, Alaska Rules of Evidence. Nothing in this section,
21 including the release of an insurance compliance audit document limits, waives, or
22 abrogates the scope or nature of a statutory or common law privilege, including the
23 attorney-client privilege, the work product doctrine, and subsequent remedial
24 measures under Rule 407, Alaska Rules of Evidence.

25 (g) An insurance compliance audit document submitted to the director remains
26 the property of the insurer and may not be subject to disclosure or production under
27 AS 40.25.110 - 40.25.220.

28 (h) Disclosure of an insurance compliance audit document to a governmental
29 agency does not waive the privilege set out in (a) and (b) of this section with respect to
30 another person or governmental agency.

31 (i) A court of record, after an in camera review, may require disclosure of

1 privileged material under (a) or (b) of this section if the court determines, in a civil or
2 administrative proceeding, that

3 (1) the privilege is asserted for a fraudulent purpose; or

4 (2) the material is not subject to the privilege.

5 (j) At any time during a proceeding, the parties may stipulate to the entry of an
6 order directing that specific information contained in an insurance compliance audit
7 document is or is not subject to the privileges under this section. The stipulation may
8 be limited to the proceeding and, absent specific language to the contrary, may not be
9 applicable to any other proceeding.

10 (k) An insurer asserting the insurance compliance self-evaluative privilege
11 under (a) or (b) of this section has the burden of demonstrating the applicability of the
12 privilege. Once an insurer has established it is qualified for the privilege, the party
13 seeking disclosure has the burden of proving that the privilege is not available because
14 the provisions of (i) of this section apply.

15 (l) The privileges set out in (a) and (b) of this section do not extend to

16 (1) documents, communications, data, reports, or other information
17 expressly required to be collected, developed, maintained, or reported to a regulatory
18 agency under this title;

19 (2) information obtained by observation or monitoring by a regulatory
20 agency;

21 (3) information obtained from a source independent of the insurance
22 compliance audit.

23 (m) In this section,

24 (1) "insurance compliance audit" means a voluntary, internal
25 evaluation, review, assessment, audit, or investigation for the purpose of identifying or
26 preventing noncompliance with, or promoting compliance with laws, regulations,
27 orders, or industry or professional standards conducted by or on behalf of an insurer
28 licensed or regulated under this title;

29 (2) "insurance compliance audit document" means a

30 (A) a document prepared as a result of or in connection with an
31 insurance compliance audit;

1 (B) a written response to the findings of an insurance
2 compliance audit, together with related field notes, records of observations,
3 findings, opinions, suggestions, conclusions, drafts, memoranda, drawings,
4 photographs, exhibits, computer-generated or electronically recorded
5 information, telephone records, maps, charts, graphs, and surveys collected or
6 developed for the primary purpose and in the course of the audit;

7 (C) an insurance compliance audit report prepared by an
8 auditor, who may be an employee of the insurer or an independent contractor,
9 which may include the scope of the audit, the information gained in the audit,
10 and the conclusions and recommendations, with exhibits and appendices;

11 (D) a memorandum or document analyzing portions or all of
12 the insurance compliance audit report and discussing potential implementation
13 issues;

14 (E) an implementation plan that addresses correcting past
15 noncompliance, improving current compliance, and preventing future
16 noncompliance; and

17 (F) analytic data generated in the course of conducting the
18 insurance compliance audit;

19 (3) "insurer" has the meaning given in AS 21.90.900.

ALASKA STATE HOUSE OF REPRESENTATIVES

Labor & Commerce Committee, Chair
Administrative Regulation Review, Chair
Judiciary Committee, Vice-Chair
Health, Education and Social Services



716 W 4th Ave
Suite 610
Anchorage, AK 99501

Phone (907) 269-0265
Fax (907) 269-0264

Representative Tom Anderson

Sponsor Statement

HB 480

"An Act relating to voluntary self-evaluative audits by insurers and providing for an insurance compliance self-evaluative privilege; and indirectly amending Rules 104, 402, and 501, Alaska Rules of Evidence, Rules 16, 26, 30, 31, 33, 34, 36, and 40, Alaska Rules of Civil Procedure, and Rules 15, 16, and 17, Alaska Rules of Criminal Procedure."

BACKGROUND:

The public policy rationale for a self-evaluative privilege is that it encourages insurers to perform voluntary internal self-audits of their operations, without fear that such reviews will be improperly used against them in litigation. Consumers, the industry and the regulator all benefit from such internal reviews. The privilege is limited and does not prevent access to information by the Division of Insurance. It in fact provides an environment for more liberal access and communication between insurer and regulator as it provides certainty that the privilege will be honored as to outside interests.

SUPPORT:

Scholarly and public policy articles support self-evaluative privileges for corporations generally, as the benefits of internal, voluntary reviews are immense.¹ The Alaska Legislature has already adopted the public policy of encouraging self-review, allowing for privileges in areas such as medical peer reviews and environmental self-audits. The same policy applies in the insurance arena. The National Conference of Insurance Legislators ("NCOIL") supports the privilege and provides the model act upon which HB 480 is based (although modified significantly to be much more limited). The National Association of Insurance Commissioners, of which Alaska is a member, supports increased use of self-audits. The privilege is supported by NAMIC, AIA, PCI and most if not all of the industry.

¹ See, e.g., Note, *The Privilege Of Self-Critical Analysis*, 96 Harvard Law Review 1033 (1983); *Establishing A Self-Evaluative Privilege For Corporate Internal Investigations*, 46 William & Mary Law Review 1137 (2004); *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 Kan. J.L. & Pub. Pol'y 221 (1999).

Key Points:

- For the limited privilege to apply, there must be a voluntary internal evaluation, not otherwise expressly required by law that is designed to identify and prevent noncompliance and to improve compliance with laws and regulations.
- Audits may not be used to hide illegal or improper activity.
- The privilege does not apply to pre-existing materials. It does not protect documents created in the normal course of business, and access to insurance company records will remain the same as it is today.
- The privilege does not create immunity from lawsuits or from prosecution. It is only designed to protect the voluntary audit from being used improperly against the company in a civil proceeding.

ALASKA STATE HOUSE OF REPRESENTATIVES

Labor & Commerce Committee, Chair
Administrative Regulation Review, Chair
Judiciary Committee, Vice-Chair
Health, Education and Social Services



716 W 4th Ave
Suite 610
Anchorage, AK 99501

Phone (907) 269-0265
Fax (907) 269-0264

Representative Tom Anderson

Sectional Analysis of HB 480

- Section 1:** Legislative findings and intent. Voluntary self-audits should be encouraged.
- Section 2:** This section amends 21.06.060(e) by excluding insurance compliance audit information from certain confidential information that the director has the discretion to disclose to the National Association of Insurance Commissioners ("NAIC") and other agencies.
- Section 3:** This section amends AS 21.06.060(f) by adding the insurance compliance audit document to the list of information the director is required to keep confidential.
- Section 4:** This section amends AS 21.06.150(d) by excluding the insurance compliance audit from the director's discretion to release examination reports to other states and other Alaska state agencies.
- Section 5:** This section adds a new statutory section, AS 21.06.175, which sets forth and defines the basic privilege:
- Subsection (a): sets forth the basic privilege for an insurance compliance audit document.
 - Subsection (b): precludes a person or entity who performs or directs the insurance compliance audit from being compelled to testify about the self-evaluative information. The privilege may be expressly waived by the company that prepared or caused the insurance compliance audit.
 - Subsection (c): an insurer may voluntarily submit an insurance compliance audit document to the director in connection with examinations allowed by law without waiving the privilege.
 - Subsection (d): the director may not agree to share an insurance compliance audit document with other agencies as provided in AS 21.06.060(e)(1) and (e)(3).
 - Subsection (e): the director may use a self-evaluative document only to determine whether a disclosed defect in an insurer's policies and procedures, or inappropriate treatment of a customer, has been remedied or whether an appropriate plan for its remedy is in place; but

does not preclude the director from, based on privileged information learned from the compliance document, conduct the director's own examination.

- Subsection (f): the insurance compliance privilege does not waive any other privileges that may apply to the document or information.
- Subsection (g): the insurance compliance audit document submitted to the director remains the property of the insurer and is not subject to disclosure under AS 40.25.110 - 40.25.220 (public inspection of public documents).
- Subsection (h): disclosure of an insurance compliance audit document to a governmental agency does not waive the privilege with respect to another agency.
- Subsection (i): in a civil proceeding, a court of record, after an *in camera* review, may require disclosure of privileged material if the court determines:
 - (1) the privilege is asserted for fraudulent purposes; or
 - (2) the material is not subject to the privilege.
- Subsection (j): clarifies the parties in a proceeding may stipulate to an order directing that specific information in an insurance compliance audit document is or is not subject to the privilege.
- Subsection (k): insurer has the burden of demonstrating applicability of the privilege. If insurer meets this burden, the party seeking disclosure has the burden of proving the privilege is not available under the provisions of subsection (i).
- Subsection (l): the privilege does not apply to:
 - (1) documents and information expressly required to be collected, maintained or reported to a regulatory agency under this title;
 - (2) information obtained by observation or monitoring by a regulatory agency;
 - (3) information obtained from a source independent of the insurance audit.
- Subsection (m): defines the requirements for application of the privilege:
 - (1) "insurance compliance audit" means a voluntary, internal evaluation for the purpose of identifying or preventing noncompliance with, or promoting compliance with, laws, regulations or industry standards conducted by or on behalf of an insurer.
 - (2) "insurance compliance audit document" means:
 - (A) a document prepared as a result of or in connection with an insurance compliance audit;
 - (B) a written response to the findings of an insurance compliance audit together with related field notes etc.;

- (C) an insurance compliance audit report prepared by an auditor;
- (D) a memorandum or document analyzing portions or all of the insurance compliance audit report;
- (E) an implementation plan that addresses correcting past noncompliance, improving compliance and preventing future noncompliance; and
- (F) analytic data generated in the course of conducting the insurance compliance audit.

Westlaw

96 HVLR 1083

Page 1

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

c

Harvard Law Review
March, 1983

Note

***1083 THE PRIVILEGE OF SELF-CRITICAL ANALYSIS**

Copyright 1983 by the Harvard Law Review Association

Institutions and individuals are called upon to make critical self-evaluations for a variety of different reasons. [FN1] For example, federal law requires certain government contractors to analyze frankly their past performance in providing equal employment opportunity. Similarly, police departments and railroad companies regularly investigate mishaps in which their employees are involved. After any of these internal investigations has been completed, an outsider may seek discovery of the resulting analysis. In recent years, those from whom such information has been sought have successfully balked at disclosure. As a result, a privilege of self-critical analysis has developed to shield certain institutional self-analyses from discovery.

Part I of this Note examines the nature of this privilege and some important background principles applicable to discovery privileges in general; these background principles largely dictate the shape of the privilege for self-critical analyses. Part II identifies the three primary types of documents to which the privilege is applied: minutes of hospital committee meetings, reports of internal disciplinary investigations, and title VII compliance documents. Finally, Part III delineates the ways in which courts have applied the privilege in each of these areas, and examines the three principles that constitute the majority approach. Although this Note attempts primarily to trace the outline of this discovery privilege, it also offers criticism of certain features of the majority approach.

I. DEVELOPMENT OF THE PRIVILEGE

The Federal Rules of Civil Procedure explicitly recognize the role of privileges in discovery. [FN2] Yet parties asserting a nascent privilege - such as that of self-critical analysis - during discovery must counter the strong tendency of courts to scrutinize claims of privilege [FN3] because of the general rule *1084 that the public "has a right to every man's evidence." [FN4] The way in which the public need for all available evidence balances against the public interest in confidentiality determines whether a developing privilege has any merit. Some commentators have translated these conflicting policies into factors to be considered in determining whether a developing privilege deserves recognition. [FN5] Privileges have historically been recognized when, as is true in the case of self-critical analysis, the public interest weighs heavily in favor of confidentiality. [FN6]

Because the term "privileged" in the Federal Rules of Civil Procedures refers to privileges as they arise under the law of evidence, [FN7] federal courts must look to the Federal Rules of Evidence for guidance in both developing

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVL R 1083

Page 2

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

and applying discovery privileges. Rule 501, [FN8] which governs the development of privileges in federal courts, embodies a congressional intent that privilege doctrine be fluid rather than static. [FN9] Courts *1085 therefore need not feel unduly constrained in developing previously unrecognized privileges. Rule 501 is also crucial to application of the privilege because it gives primacy to state law in the federal courts, at least in cases in which state law provides the rule of decision. [FN10] The privilege of self-critical analysis, unlike many other privileges, has been the subject of state legislation; [FN11] federal courts thus cannot make the often valid assumption that practically identical state and federal common law doctrines govern privileges. [FN12] Moreover, even *1086 the common law governing the privilege of self-critical analysis may vary widely among the states. [FN13]

If one party seeks discovery of a self-critical analysis in federal litigation, the other party may object by claiming that the information is privileged under the Federal Rules of Civil Procedure. Courts have responded to this objection by developing a privilege for such analyses [FN14] that shields from discovery information meeting three criteria: first, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

Although the breadth of the "public interest" criterion will largely determine the breadth of the privilege of self-critical analysis, the concept of a public interest is difficult to define, particularly at this early stage in the development of the privilege. If the concept is defined too broadly, it will threaten to preclude discovery completely, because much of the information sought in discovery satisfies the other two criteria. If the concept is defined too narrowly, however, the privilege will be largely eviscerated. As the privilege is applied in more instances, courts and legislatures will delineate more fully the extent of the public interest in the kinds of information to which the privilege is relevant.

Although most privileges are based on a desire to protect the flow of socially useful information, [FN15] the privilege of self-critical *1087 analysis warrants separate treatment for two reasons. First, it represents the application of that desire to a previously unprotected type of information. Privileges are generally distinguished by the types of materials that they protect; thus, the type of material that falls within the purview of a self-critical analysis privilege should be delineated more fully than it currently is. Second, because the privilege is both nascent and widely applied, it has not been sufficiently defined doctrinally. In general, courts and legislatures have approached the privilege in an ad hoc manner. Indeed, some courts have even criticized the privilege. [FN16] Nevertheless, these responses involve not several privileges, but one privilege that applies to a number of similar problems and that has generally applicable parameters, some consistent with the rationale of the privilege and some contrary to it, capable of identification and description.

II. APPLICATIONS OF THE PRIVILEGE

Courts and commentators have acknowledged that the federal district court in *Bredice v. Doctors Hospital, Inc.* [FN17] put forth the classic statement of the self-critical analysis privilege when it protected the minutes of a committee meeting in which staff members were asked for their frank analyses of hospital procedures. The *Bredice* court emphasized that confidentiality is often essential to the free flow of information and that the free flow of information is essential to promote recognized public interests. [FN18] Implicit in any application of the privilege *1088 is an acknowledgement of the self-defeating nature of allowing discovery of frank self-analyses: in the long run, denying protection will stifle more information than will applying the privilege. Refusing to recognize the privilege will thus hinder the flow of information not only to parties seeking protection, but also to the courts themselves. Long-term accessibility to vital information must not be sacrificed on the altar of immediate discovery needs.

The principles enunciated in *Bredice* apply equally to other areas in which the privilege arises. For example,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 3

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

railroad companies often investigate accidents to discipline any culpable employees and ultimately to improve the railroad's safety. [FN19] If the results of such an investigation are later sought in discovery by the injured party, the court may appropriately apply the privilege of self-critical analysis. [FN20]

Similarly, some courts have shielded from discovery the results of police department investigations when, following an arrest or shooting, a plaintiff has either alleged a civil rights violation or asserted a wrongful death claim. [FN21] These cases have hinged on the public interest in permitting police departments to conduct thorough investigations to reduce the number of improper police actions by providing the basis for disciplinary action and other necessary changes. In this context, the self-critical analysis privilege and the executive privilege overlap; [FN22] either would independently shield the investigations involved, and courts should therefore look to both doctrines for guidance in this area.

*1089 Another important application of the privilege arises in suits brought under title VII of the Civil Rights Act of 1964. [FN23] There exists a tangle of executive orders and regulations promulgated under title VII [FN24] that require government contractors and subcontractors to file specified documents with federal agencies. [FN25] Although these contractors and subcontractors are obliged to be candid in appraising their equal employment policies, [FN26] the government largely relies on voluntary compliance *1090 and therefore must trust the parties filing the forms to be candid. [FN27] Plaintiffs in title VII suits often seek to discover equal employment documents from employers, but some courts have held the documents to be privileged. [FN28] The courts have feared that exposing such documents would diminish the candor with which the documents are produced, and thus would undermine government initiatives to ensure equal employment opportunity. [FN29]

In sum, courts have forged a privilege of self-critical analysis for three types of documents: hospital committee reports, certain internal investigatory reports, and the various equal employment opportunity forms submitted to the government *1091 under title VII. These examples, however, are only illustrative; the privilege itself is applicable to any document that meets the criteria mentioned above, [FN30] and courts have justifiably denied a privilege in cases in which one of the criteria was absent. [FN31]

III. PRINCIPLES OF APPLICATION CONSTITUTING THE MAJORITY APPROACH

To preserve the future flow of information, the privilege of self-critical analysis attempts to reassure future self-analysts and those from whom analysis receive their data. Unfortunately, courts have not consistently examined all of the ways in which these persons are assured or deterred. Courts have, however, frequently articulated three principles in their efforts to further both the rationale behind the privilege and the countervailing policies behind the broad scope of discovery. [FN32] The principles are related in their attempt to balance these competing interests, and the strength or weakness of each principle can be measured by determining whether a proper balance has been achieved.

A. The Dual Chilling Effect of Disclosure

The chilling effect of disclosure of self-critical analyses has a twofold nature. First, if a plaintiff obtains discovery, there may be a direct chilling effect on the institutional or individual *1092 self-analyst; this effect operates to discourage the analyst from investigating thoroughly and frankly or even from investigating at all. In practice, the self-analyst is usually two distinct entities: the institution that commissions a self-analysis and the individuals who actually conduct the analysis. The chilling effect on the institutional self-analyst's frankness or thoroughness, an effect that results from the threat of liability, has received the most judicial attention. [FN33] Fear of lawsuits, however, is not the only cause for hesitancy on the part of self-analysts. If an individual self-analyst is asked by his superiors to conduct an internal analysis, the individual may temper his criticism out of a fear that reprisals will result if the analysis ultimately leads to liability or adverse publicity for the employer.

96 HVLR 1083

Page 4

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

Second, courts should be concerned about the ability of the self-analyst to gather the information that it needs to make its evaluation. Knowledge that a final report may be disclosed will often discourage individuals from coming forward with relevant information. Therefore, courts must be aware of the chilling effect not only on the self-analyst, but also on persons asked to supply the data that make internal analyses possible.

Courts should be as cognizant of this second type of chilling effect as they are of the first; it is equally likely to dam the future flow of important information. If, for example, a witness to a police beating or a railroad accident is a co-worker or friend of the allegedly culpable party, the witness may be unwilling to expose that party to retribution for making the institution vulnerable. As the risk of retribution faced by the alleged transgressor increases, the chance that his friendly co-workers will not provide the information needed by the self-analyst increases as well. Because one would expect the risk of retribution to be a function of an institution's potential liability, the likelihood of witnesses' coming forward with useful information absent a privilege should vary inversely with the likelihood of and amount of damages for which the institution would be liable. In other words, without a privilege, as the risk of liability for the institution increases, the likelihood that witnesses will come forward decreases.

Further, the lodging of the complaints that initiate investigations can be chilled as easily as can the contribution of *1093 information to ongoing investigations. If the confidentiality of an employee's complaint about a title VII violation is compromised, similar violations may go unreported in the future. Courts should thus protect the confidentiality of such documents as EEOC complaints. [FN34] Finally, holding privileged the reports of complainants and witnesses is necessary to avoid giving employers an incentive to weed out potential "whistle blowers." As the risk of liability for an institution increases, so too does the incentive of the employer to weed out individuals who might be a future source of honest information concerning alleged wrongdoing.

Courts have deemphasized the second type of chilling effect in cases in which disincentives to be frank already existed - when, for example, frankness itself might lead to disciplinary action. In such cases, courts have discounted the additional chilling effect that would result from fear of discovery. [FN35] The preexisting disincentive to be frank, however, operates only on the individual self-analyst; courts must still be concerned with the chilling effect that makes the institutional self-analyst unlikely to commission an analysis. Further, although existing disincentives to be frank will necessarily bear on a court's judgment about the existence or severity of the chilling effect of disclosure, courts should not completely disregard the possibility of an additional chilling effect from disclosure. In some cases, an employee may weigh heavily the additional wrath - no matter how subtly manifested - that would result from a large judgment against his employer. Although an employee may reluctantly submit himself to his employer's internal disciplinary mechanisms, he may be unwilling, because of either institutional loyalty or fear of retribution, to risk exposing his employer to liability.

B. The Factual-Evaluative Distinction

Courts currently interpret the privilege of self-critical analysis to protect the evaluative but not the factual portions of self-analyses. [FN36] Yet the self-analyses that institutions generate *1094 are rarely of the purely evaluative kind to which the privilege typically applies. Rather, the self-analyses that plaintiffs seek often also contain purely factual material or material that can be characterized as a hybrid of the factual and the evaluative.

1. The Merits of the Factual-Evaluative Distinction. - Courts have seemed to assume that all factual portions of self-analyses fall outside the privilege's rationale. [FN37] Such an assumption must be qualified, however, because the two chilling effects of disclosure often operate on facts as well as evaluations. [FN38] Although courts are justified in distinguishing facts from evaluations under certain circumstances in which the rationale underlying the privilege does not operate, application of the distinction should be limited to those situations.

96 HVL R 1083

Page 5

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

The rationale for the privilege of self-critical analysis does not apply when the factual portions of the self-analyses sought are independently replicable, as is often the case with raw statistics. [FN39] Replicability reduces the likelihood that the self-analyst will fail to undertake an investigation for fear of reprisals; by definition, the party seeking discovery could reconstruct the self-analyst's work without discovery.

The rationale for the privilege likewise does not apply to discovery of documents whose existence is assured and that are independently verifiable. For example, employers are required under title VII to produce certain documents for submission to the government. The chilling effect of discovery can thus affect only the veracity of these documents, not their original production. If veracity can be double-checked, however, the analyst will be less likely to be untruthful. If the institution in question has the option of not producing the report sought, verifiability, unlike replicability, could inhibit *1095 investigation. An unreplicable damning report that is verifiable is not likely to be produced if it can be discovered, because production will provide the only means possible for plaintiffs to obtain and analyze the information that would go into such a report.

Thus, if the information sought in discovery is independently replicable or of the type whose existence is assured and that is independently verifiable, one of the privilege's essential criteria is not met: permitting discovery will not curtail the flow of important information. In contrast, the quality of factual data that are neither independently replicable nor verifiable could be adversely affected by discovery.

Similarly, factual data not in the control of the defendant, which will be compiled regardless of impending litigation, do not fit the rationale of the privilege. [FN40] Such information is immune from any chilling effect. Only when this immunity exists should courts continue to assume that the privilege of self-critical analysis does not apply to factual portions of self-analyses.

2. Difficulties in Applying the Factual-Evaluative Distinction. - Even in cases in which the distinction between facts and evaluations is justifiable, courts have encountered difficulties in applying it, some of which are endemic to judicial control of the discovery process. Because the distinction is vague, courts have at times improperly drawn the line between *1096 the factual and the evaluative. [FN41] Further, they have often found that factual or objective material is contained in a document that also contains evaluative or subjective material. [FN42] In such cases, the court may inspect the material in camera [FN43] and order that it be edited, but such an editing scheme can prove complex [FN44] and hence costly. [FN45] Of course, pretrial procedure is almost always costly. Courts should seek to minimize expense whenever possible, however, and the substantiality of the cost of a procedure weighs proportionately against its advisability. If applying the distinction between facts and evaluations proves too costly, it should be abandoned. [FN46]

C. Qualifications of the Privilege

The third principle in the majority approach is the idea that the privilege of self-critical analysis, in cases in which it applies, is not absolute. The privilege is applied generally on *1097 a case-by-case basis, and courts have indicated that it can be overcome by a showing of exceptional need by the party seeking discovery. Neither of these limitations is commendable.

1. Case-by-Case Determination. - With the adoption of rule 501 of the Federal Rules of Evidence, Congress mandated that privileges be developed on a case-by-case basis. [FN47] and the Supreme Court has taken this directive quite seriously. [FN48] The directive does not, however, imply that privileges must be applied on a case-by-case basis. In fact, to apply the privilege of self-critical analysis in such a manner is to risk its evisceration.

Because this privilege is forward-looking, courts must be concerned with how future self-analysts will react to the privilege and to any exceptions that are established. To have its desired effect, the privilege must assure the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 6

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

self-analyst that his product will not be used to his legal detriment. Similarly, the privilege must assure potential witnesses and complainants that their statements will remain confidential. Analysts, witnesses, and complainants are likely to take little comfort from an assurance that a court will balance the equities should discovery be sought. Therefore, as courts have acknowledged, a case-by-case analysis by which judges in each case weigh anew the competing equities is undesirable. [FN49]

*1098 Under a more reasoned approach, courts would apply the privilege of self-critical analysis in the manner in which they apply more established privileges; with established privileges, the temptation to examine the equities in each case is not as pronounced as it is with nascent privileges. The attorney-client privilege provides a typical example of the way in which privileges were applied under the common law of evidence. Courts did not weigh the equities in each case to determine whether protection would be appropriate. [FN50] Rather, they made a syllogistic application of the privilege: courts asked whether the elements of an attorney-client privilege were present, and if they were, the privilege applied. [FN51] Judges should take the same approach to the privilege of self-critical analysis. Rather than weigh the equities in each case, they should simply determine if the material under consideration is of the type generally protected by the privilege.

Indeed, the language of rule 501 indicates that this method is desirable. [FN52] Rule 501 mandates a continuation of the common law approach to privileges. Congress adopted rule 501 specifically to facilitate the recognition - as opposed to the application - of new privileges on a case-by-case basis as the need arose, [FN53] not to require de novo examination of the continued desirability of a recognized privilege. Thus, a syllogistic application of the self-critical analysis privilege seems to comport with the intent of Congress.

2. Exceptional Need. - The qualification that plaintiffs may counter the privilege of self-critical analysis by demonstrating exceptional need is similar to the notion that courts should balance the equities on a case-by-case basis. Both qualifications of the privilege pit the interests of the plaintiff against those of the defendant and the public. But allowing a qualification for exceptional need is different from conducting a balancing test. The exceptional-need qualification provides an opportunity for the plaintiff to show, once the court has determined that circumstances give rise to the privilege, that equitable considerations demand that the privilege not be applied. A balancing test focuses on two competing interests simultaneously, whereas allowing the plaintiff an opportunity to show exceptional need focuses only on the interests of one party.

*1099 The opportunity for the plaintiff to demonstrate exceptional need has become part of the standard doctrine surrounding the privilege of self-critical analysis. Presumably, this qualification evidences general judicial [FN54] and legislative [FN55] reluctance to weave blanket privileges, a reluctance that stems in turn from the pervasively negative attitude toward screening pertinent evidence from view. [FN56] But this reluctance has its costs. Allowing plaintiffs to overcome the privilege by showing exceptional need has the same deleterious effect as that produced by a case-by-case weighing of the privilege's equities: each qualification leaves self-analysts uncertain of their protection.

In fact, the importance of the material sought by the plaintiff actually makes the operation of the privilege's rationale more likely and thus makes application of the privilege more desirable. The more crucial the material is to the plaintiff's case, the more likely it is to be the type of material that the privilege was designed to protect. If a plaintiff could obtain the material elsewhere or if the material were not particularly probative, future self-analyses would be less likely to be chilled by the potential of disclosure. In other words, for unimportant or readily available information, courts need not be concerned with the possible interruption of informational flow. To give the privilege its desired effect, therefore, courts should not consider a plaintiff's claim of exceptional need.

The syllogistic approach that should be used in applying the privilege of self-critical analysis also creates a strong

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 7

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

presumption in favor of protecting documents that meet the privilege's criteria. Whereas the risk of evisceration is a forward-looking concern, a court applying the privilege of self-critical analysis should also remember that syllogistic application embodies the policy choice of the institution that decided to adopt the privilege. In adopting the privilege, a determination was made that the public interest weighed in favor of confidentiality. Whether this decision was made by a higher court, the *1100 same court at an earlier time, or a legislature, judges should give due weight to the binding effect of a prior determination that the privilege furthers the public interest.

Individual courts will continue to determine the point at which a plaintiff's need becomes "exceptional," and to the extent that judges continue to permit claims of exceptional need to narrow the scope of the self-critical analysis privilege, courts should at least scrutinize these claims to avoid eviscerating the privilege. [FN57] Indeed, a proper recognition of the long-range effects of denying the privilege when the three criteria are met will often lead to the same result that would be produced by eliminating the exceptional-need qualification altogether.

IV. CONCLUSION

Courts and legislatures have begun to create a discovery privilege for self-critical analyses. This privilege has been used to protect documents in three different situations. The problems with the three principles generally enunciated in applying the privilege, however, demonstrate that courts have failed to give the privilege sufficiently broad application to effectuate the important policies underlying it. To further these policies, courts should recognize the privilege of self-critical analysis as a single multifaceted privilege rather than as many unrelated qualified privileges. Courts should also recognize all of the various ways in which self-analysis may be chilled, and protect factual portions of self-analyses that meet the privilege's criteria. Finally, courts should adopt the syllogistic approach to applying the privilege, and abandon the exceptional-need qualification. Although courts have been primarily responsible for developing privileges, [FN58] legislatures have increasingly assumed some of this responsibility. [FN59] Neither courts nor legislatures *1101 should hesitate to act in situations in which the rationale underlying the privilege of self-critical analysis operates. Only through such developments will the privilege of self-critical analysis properly perform its function.

[FN1] This Note refers generally to the individuals and institutions making critical self-evaluations as "self-analysts."

[FN2] The Federal Rules of Civil Procedure limit the scope of permissible discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). The claim of privilege is but one useful protective device available to the self-analyst's counsel. See Fed. R. Civ. P. 26(c). This Note focuses on issues of privilege, not on broader notions of nondiscoverability.

[FN3] See *Nazareth Literary & Benevolent Inst. v. Stephenson*, 503 S.W.2d 177, 179 (Ky. Ct. App. 1973); see also *United States v. Nixon*, 418 U.S. 683, 710 (1974) (privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth"). Some courts also tend to construe statutory privileges strictly. See, e.g., *Young v. King*, 136 N.J. Super. 127, 129-30, 344 A.2d 792, 794 (Law Div. 1975) (refusing to extend to other hospital committees protection granted to utilization review committees).

[FN4] *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 J. WIGMORE, EVIDENCE § 2192 (3d ed. 1940)).

[FN5] See, e.g., 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2285 (J. McNaughton ed. 1961).

[FN6] See 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.60[3] 2d ed. 1982) ("The public interest may be a reason for not permitting inquiry into particular matters by discovery."); James, *Discovery*, 38

96 HVLR 1083

Page 8

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

YALE L.J. 746, 748 n.20 (1929) (the public interest was one ground for resisting discovery in Chancery practice).

[FN7] See *United States v. Reynolds*, 345 U.S. 1, 6 (1953); *Campbell v. Eastland*, 307 F.2d 478, 485 & n.6 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976); Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."). Arguably, these authorities could stand only for the proposition that, if a matter is privileged at trial, it will be protected from discovery - not for the proposition that, if a matter is privileged from discovery, it necessarily is privileged at trial. Because an evidentiary privilege implies a discovery privilege, however, the relationship that courts have recognized shows that the principles of rule 501 of the Federal Rules of Evidence, see *infra* note 8, apply to discovery privileges, a proposition sufficiently broad for the purposes of this Note.

[FN8] Rule 501, as adopted in 1975, reads as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

[FN9] The evidence rules governing privileges that were recommended by the advisory committee and approved by the Supreme Court explicitly listed matters to be privileged. See 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶¶ 501- 509 (1982). Congress balked, however, and the present rule 501 was the result: "Rule 501 amounts to a total rejection of the approach taken by the Advisory Committee and Supreme Court on the matter of privileges - a rejection not only of the specific proposals made by the Committee and the Court, but also of the basic premises underlying the proposal." 2 D. Louisell & C. Mueller, *Federal Evidence* § 200, at 400 (1978). As enacted, rule 501 calls on the courts to apply privileges as they had done before its passage. See *supra* note 8. Because the public interest was a valid justification for applying a privilege at common law, see *James*, *supra* note 6, at 748 n.20, that factor should continue to be relevant. A public interest justification might not have been relevant had Congress approved the rules as they were submitted. The suggested list of nine bases for privileges did not contain a "public policy" privilege and might well have been interpreted as an exhaustive list of permissible privileges. See 2 J. Weinstein & M. Berger, *supra*, ¶ 501[1], at 501-13.

[FN10] See *supra* note 8. Rule 501 settled the debate that had raged for years in federal courts over the appropriate law of privilege in a diversity case. Compare *Gaison v. Scott*, 59 F.R.D. 347, 351 (D. Hawaii 1973) (federal law of privilege applies in discovery), with *Hill v. Huddleston*, 263 F. Supp. 108, 110 (D. Md. 1967) (state law of privilege applies in discovery). See generally 2B W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE WITH FORMS* § 967 (C. Wright rev. 1961) (noting controversy among jurisdictions); C. Wright, *Law of Federal Courts* § 93, at 460-61 (3d ed. 1976) (same). Rule 501 now states explicitly that state laws of privilege apply "with respect to an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 501. Together with the principle that the law of evidence governs discovery privileges, this passage establishes that state law principles apply to an asserted privilege during discovery if state law will supply the substantive rule of decision at trial. See 4 J. Moore & J. Lucas, *supra* note 6, ¶ 26.60[7], at 26-255.

[FN11] See, e.g., Neb. Rev. Stat. § 71-2048 (1981); Wis. Stat. Ann. § 146.38 (West Supp. 1982).

[FN12] As a practical matter, federal courts see the conduct of discovery as their domain and rarely mention state

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 9

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

law when addressing discovery privileges. As applied to the privilege of self-critical analysis, this approach probably results from the fact that questions concerning the privilege tend to arise in the context of interlocutory rulings on discovery requests. This tendency has three implications. First, the privilege of self-critical analysis is currently being formulated almost exclusively by trial court judges, a fact that leads to inconsistent application of the doctrine. Second, because the scope of a trial judge's discretion on interlocutory orders is considerable, the privilege will continue to be developed largely by trial courts. Finally, much of the law of privilege is probably unreported, a fact that inhibits development of a coherent doctrine. Therefore, the practitioner may find that the privilege of self-critical analysis is controlled by a federal common law, and should direct his attention accordingly.

[FN13] Compare *Oviatt v. Archbishop Bergen Mercy Hosp.*, 191 Neb. 224, 214 N.W.2d 490 (1974) (approving the privilege for hospital committees), with *Shibilski v. St. Joseph's Hosp.*, 83 Wis. 2d 459, 266 N.W.2d 264 (1978) (disapproving the privilege for hospital committees).

[FN14] This privilege has been given a variety of names by courts and commentators. See *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979) ("privilege against disclosure of self-evaluative documents"); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 667 (4th Cir. 1977) ("qualified privilege for self-evaluative documents"); *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 433 (E.D. Pa. 1978) ("privilege of 'self-critical analysis'" and "defense of self-critical analysis"); Note, A Balanced Approach to Affirmative Action Discovery in Title VII Suits, 32 HASTINGS L.J. 1013, 1024 (1981) ("public policy privilege"); Comment, The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and *Diversified Industries, Inc. v. Meredith*, 40 OHIO ST. L.J. 699 (1979) ("self-evaluative report privilege").

[FN15] See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (work-product doctrine); *United States v. Reserve Mining Co.*, 21 Fed. R. Serv. 2d (Callaghan) 796, 799 (D. Minn. 1976) (offers of settlement); *Pilar v. SS Hess Petrol*, 55 F.R.D. 159, 163 (D. Md. 1972) (informer's privilege); *Olsen v. Camp*, 328 F. Supp. 728, 731 (E.D. Mich. 1970) (government's intraoffice memoranda); *Hardy v. Riser*, 309 F. Supp. 1234, 1238 (N.D. Miss. 1970) (physician-patient privilege).

[FN16] One court has suggested that the privilege be carefully limited, given the strong interest in broad discovery. *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 433 (E.D. Pa. 1978). Other courts have rejected claims of privilege for certain materials that are often protected by the self-critical analysis privilege. *EEOC v. ISC Fin. Corp.*, 14 Empl. Prac. Dec. (CCH) ¶ 7729, at 5586 (W.D. Mo. 1977); *Shibilski v. St. Joseph's Hosp.*, 83 Wis. 2d 459, 465-66, 266 N.W.2d 264, 267-68 (1978). Still another court has criticized the rationale underlying the privilege. *Ligon v. Frito-Lay, Inc.*, 19 Fair Empl. Prac. Cas. (BNA) 722, 722-23 (N.D. Tex. 1978). These decisions, however, represent only a minority position. See cases cited *infra* notes 20 & 21.

[FN17] 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

[FN18] *Bredice* and its rationale have been approved by many courts. See, e.g., *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971); *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117 (Fla. Dist. Ct. App. 1979); *Oviatt v. Archbishop Bergen Mercy Hosp.*, 191 Neb. 224, 226-27, 214 N.W.2d 490, 492 (1974). But see *Shibilski v. St. Joseph's Hosp.*, 83 Wis. 2d 459, 467, 266 N.W.2d 264, 268 (1978) (refusing to follow *Bredice*); *Nazareth Literary & Benevolent Inst. v. Stephenson*, 503 S.W.2d 177, 179 (Ky. Ct. App. 1973) (suggesting that *Gillman* may limit *Bredice* to its facts). See generally Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 AM. J.L. & MED. 245 (1975) (discussing discoverability of hospitals' internal committee proceedings and reports).

[FN19] See, e.g., *Richards v. Maine Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957), cited in 4 J. MOORE & J. LUCAS,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 10

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

supra note 6, ¶ 26.60[3], at 26-241.

[FN20] In *Richards v. Maine Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957), the plaintiff sought information concerning defendant's disciplining of an engineer whose train allegedly injured the plaintiff. The court upheld the defendant's objection to discovery, in part because both railroad workers and the public have such a stake in effective internal discipline that it would be contrary to public policy to inhibit such discipline. *Id.* at 591-92.

Bredice and Richards contain typical statements of the rationale underlying the privilege of self-critical analysis, but there are many other statements. See, e.g., *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218 (D. Mass. 1980); *Stevenson v. General Elec. Co.*, 18 Empl. Prac. Dec. (CCH) ¶ 8777, at 5148, 5149 (S.D. Ohio 1978); *Sanday v. Carnegie-Mellon Univ.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,659, at 6795, 6796 (W.D. Pa. 1975).

[FN21] See, e.g., *Brown v. Thompson*, 430 F.2d 1214 (5th Cir. 1970); *Kott v. Perusi*, 283 F. Supp. 1 (N.D. Ohio 1968).

[FN22] Cases discussing the chilling effect on police investigations often call the privilege under consideration an executive privilege, "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 342 (E.D. Pa. 1973); see *Wood v. Breier*, 54 F.R.D. 7, 11 (E.D. Wis. 1972).

[FN23] 42 U.S.C. § 2000e (1976 & Supp. V 1981). If an employee believes that he has been the victim of a title VII violation, he should first lodge a complaint with the EEOC, which will conduct an investigation for probable cause. The EEOC will then negotiate with the employer. If an agreement is not reached through this conciliation process, the EEOC can bring suit. If an agreement is reached but the employee is not satisfied with the settlement, he can sue. *Id.* § 2000e-5(b), -5(f)(1) (1976).

[FN24] Following passage of title VII, President Johnson signed Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.), part II of which proscribes employment discrimination by government contractors and subcontractors. Exec. Order No. 11,246 was amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 comp.), to include sex discrimination among the proscribed practices. These executive orders have the force of law. *United States v. Local 189, United Papermakers*, 282 F. Supp. 39, 43 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The regulations promulgated under Exec. Order No. 11,246 are codified at 41 C.F.R. §§ 60-1.1 to -60.8 (1982).

[FN25] Included in the regulations promulgated under Exec. Order No. 11,246 is the requirement that all contractors and subcontractors file an Affirmative Action Program (AAP). 41 C.F.R. § 60-1.40(a) (1982). The AAP must candidly discuss minority hiring, firing, and promotion practices and goals; it must include statistics, projections, and timetables for minority hiring; and it must be openly self-critical. *Id.* §§ 60-2.10 to -2.12.

Exec. Order No. 11,246 also provides that a Compliance Report (CRR), which must contain "information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor," must be filed with the contracting agency (or with a delegate of the Secretary of Labor). Exec. Order No. 11,246, § 203(a), 3 C.F.R. 339, 341 (1964-1965 comp.). Courts have given a variety of names to the documents filed with the Office of Federal Contract Compliance Programs (OFCCP). See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 286 (1979) (CRR's); *Rubbermaid v. Kleppe*, 14 Empl. Prac. Dec. (CCH) ¶ 7611, at 5006, 5006 (D. Md. 1976) ("compliance review reports"). Other courts simply refer to the documents as reports filed with the OFCCP. See, e.g., *Brown v. Ford Motor Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8969, at 6026, 6027 (N.D. Ga. 1978).

The regulations promulgated under Exec. Order No. 11,246 require an employer to file an Employer Information Report (EEO-1) with the OFCCP and the EEOC. See *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 901 (8th

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 11

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

Cir. 1979).

[FN26] Each contracting agency must designate compliance personnel whose duty it is to seek compliance "by conference, conciliation, mediation, or persuasion." Exec. Order No. 11,246, § 205, 3 C.F.R. 339, 342-43 (1964-1965 comp.). If contractors do not comply, the Secretary of Labor or the contracting agency itself can impose sanctions on the contractor, such as recommending a title VII suit by the EEOC or debaring the offender from further government contracts. Id. § 209, 3 C.F.R. at 343-44. Aside from the sanctions specifically provided for in Exec. Order No. 11,246, the Secretary of Labor may promulgate his own. Id. § 201, 3 C.F.R. at 340. Such sanctions have been validated by the courts: "The government is free to set the terms and conditions of its contracts, and potential contractors are free not to contract with the government if its terms are undesirable." *Crown Zellerbach Corp. v. Marshall*, 441 F. Supp. 1110, 1121 (E.D. La. 1977).

[FN27] See, e.g., *Brown v. Ford Motor Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8969, at 6026, 6027-28 (N.D. Ga. 1978); *Dickerson v. United States Steel Corp.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,095, at 5070-5071 (E.D. Pa. 1976).

[FN28] See, e.g., *Stevenson v. General Elec. Co.*, 18 Empl. Prac. Dec. (CCH) ¶ 8777, at 5148 (S.D. Ohio 1978); *Sunday v. Carnegie-Mellon Univ.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,659, at 6795 (W.D. Pa. 1975). The court in *Dickerson v. United States Steel Corp.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,095, at 5070 (E.D. Pa. 1976), protected from discovery what it called "critical self-evaluation" material, but did not discuss privileges. Id. at 5071. The case therefore can be used to support the nondiscoverability of self-evaluative elements in AAP's, see *supra* note 25, but cannot be taken to accept the privileged nature of such elements. Compare Fed. R. Civ. P. 26(b) (privileges) with Fed. R. Civ. P. 26(c) (other reasons for denying discovery).

[FN29] Because of the complexity of title VII litigation, courts addressing the self-critical analysis privilege in such suits must weigh considerations not normally present in other litigation. For example, courts have often expressed the view that discovery in title VII litigation should be particularly broad. See *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 343 (10th Cir. 1975); *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 305 (5th Cir. 1973); *Milner v. National School of Health Technology*, 73 F.P.D. 628, 632 (E.D. Pa. 1977). Courts have sometimes justified this position by acknowledging that, when plaintiffs are asked to be "private attorneys general" in enforcing congressional policies, the importance of disclosure is heightened. See, e.g., *Wood v. Breier*, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972). Courts have also noted that plaintiffs often find it difficult to establish the prima facie title VII case. See, e.g., *Senter v. General Motors Corp.*, 532 F.2d 511, 527 (6th Cir.), cert. denied, 429 U.S. 870 (1976). It is unclear, however, whether the inability of a party to prove his case indicates that judicial aid is needed or, alternatively, that courts should be more wary of spurious suits. Courts and commentators have agreed that title VII goals can be achieved more effectively through broad systematic agreements than through private actions. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); Comment, Access to EEOC Files Concerning Private Employers, 46 U. CHI. L. REV. 477, 488-89 (1979). One court has suggested that this preferred method of enforcement would be jeopardized by disclosure of certain materials in discovery. *Johnson v. Southern Ry. Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 9076, at 6639, 6645 (N.D. Ga. 1977). But see Katz, Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process, 28 HASTINGS L.J. 877, 922-23 (1977) (effect of disclosure on conciliation process unclear).

[FN30] See *supra* p. 1086.

[FN31] See, e.g., *State v. Driscoll*, 53 Wis. 2d 699, 706, 193 N.W.2d 851, 856 (1972) ("We think public policy is not so definitely compelling or clear ... that we should grant testimonial confidentiality by court decision to social workers."); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114, at 777 (4th ed. 1971) ("Absolute

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 12

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

immunity [for defamation] has been confined to a very few situations where there is an obvious policy in favor of permitting complete freedom of expression."'). In *Ligon v. Frito-Lay, Inc.*, 19 Fair Empl. Prac. Cas. (BNA) 722 (N.D. Tex. 1978), the court cited *Palma v. Lake Waukomis Dev. Co.*, 48 F.R.D. 366 (W.D. Mo. 1970), to counter the argument that disclosure of Affirmative Action Programs (AAP's) would inhibit frankness. 19 Fair Empl. Prac. Cas. (BNA) at 723. The court in *Palma* had denied the existence of a privilege for a corporation's interoffice communications. The *Ligon* court reasoned that disclosure of AAP's would inhibit frankness no more than would discovery of the nonprivileged interoffice communications. The court's analogy, however, is flawed: courts have declared that there is a public interest in encouraging frankness in AAP's, but any such interest in encouraging frankness in a corporation's interoffice memos is attenuated at best.

[FN32] Courts and commentators, usually without discussion, have been prone to list criteria for applying the privilege, some of which are of questionable relevance. See, e.g., *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978) (three "guideposts" in title VII litigation); *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (10 criteria in police investigation litigation).

[FN33] See, e.g., *Gillman v. United States*, 53 F.R.D. 316, 318 (S.D.N.Y. 1971) ("[If discovery were allowed, c]onstructive criticism would be suppressed for fear of the consequences. Indeed, the Government suggests that directors of hospitals might find it more expedient, in such event, to have no official inquiry at all to the detriment of the safety of the hospital.")

[FN34] See *Johnson v. Southern Ry. Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 9076 at 6639, 6645 (N.D. Ga. 1977) ("The Fifth Circuit has adopted a strict rule of confidentiality with regard to EEOC complaints, since disclosure might inhibit employees from bringing such charges.... The same approach should be taken with regard to internal complaints and government investigations."). But see *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431 (E.D. Pa. 1978) (failing to discuss the chilling effect on complainants).

[FN35] See *Wood v. Breier*, 54 F.R.D. 7, 13 (E.D. Wis. 1972); *Jolly v. Superior Court*, 112 Ariz. 186, 190, 540 P.2d 658, 662 (1975) (en banc).

[FN36] Another distinction made in several title VII cases decided in the Northern District of Georgia is between the three types of forms typically sought: AAP's, EEO-1's, and CRR's. See *Brown v. Ford Motor Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8969, at 6026 (N.D. Ga. 1978); *Parker v. Kroger Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8995, at 6163 (N.D. Ga. 1977); *Ylla v. Delta Airlines*, 18 Empl. Prac. Dec. (CCH) ¶ 8937, at 5897 (N.D. Ga. 1977). See generally supra note 25 (describing the forms). The three cases were all decided by the same judge and follow one another serially; *Brown* relies on *Parker*, and *Parker* relies on *Ylla*. Given the apparently evaluative nature of each of the three types of documents, a relevant distinction cannot be sustained for purposes of the self-critical analysis privilege.

[FN37] See, e.g., *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978).

[FN38] See, e.g., *Johnson v. Southern Ry. Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 9076, at 6639, 6645 (N.D. Ga. 1977) (denying discovery of employees' names).

[FN39] See *Dickerson v. United States Steel Corp.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,095, at 5070, 5071 (E.D. Pa. 1976) ("Allowing discovery of statistical information will not impair the government's affirmative action policies since the quality of statistics does not depend to any great extent on the employer's voluntary cooperation, and statistics can easily be checked on a random basis.").

96 HVLR 1083

Page 13

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

[FN40] See e.g., *United States v. Arthur Young & Co.*, __ Fed. R. Serv. 2d (Callaghan) 1628 (2d Cir. 1982). In *Arthur Young*, the Second Circuit ruled on an IRS discovery request for audit workpapers and tax accrual workpapers compiled during an audit of the Amerada Hess Corporation. The court ordered the audit workpapers turned over, because they were primarily factual verifications of financial statements that used spot-checking of bookkeeping entries or confirmations of transactions. Such verifications are an essential part of the auditing process that would be performed regardless of an year of discovery. See American Institute of Certified Public Accountants, *Statement on Auditing Standards No. 16* (1977), reprinted in relevant part in D. HERWITZ, *ACCOUNTING FOR LAWYERS* 112-18 (1980). The tax accrual workpapers were distinguished, however, because they evaluated the validity of certain positions taken by Amerada Hess, judgments about company policy, the positions likely to be taken by the IRS, and settlement possibilities should the IRS contest any positions. 33 Fed. R. Serv. 2d (Callaghan) at 1636-37.

The court's statement of the rationale for protecting the tax accrual workpapers mirrors the rationale for the privilege of self-critical analysis: "The prejudice involved in exposing to the Service appraisals of a taxpayer's weaknesses and settlement positions on audit is of such proportions that a prudent organization might not be perfectly candid with independent auditors once it knew that the information revealed would be reachable [by the IRS]." *Id.* at 1637. The privilege granted, however, was not that of self-critical analysis. The court based its decision on the need for an independent auditing system, and internal audits have not generally been protected, because there exists no general common law privilege for accountants. See, e.g., *Couch v. United States*, 409 U.S. 322, 335 (1973).

[FN41] See, e.g., *Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis. 1972). In *Wood*, the plaintiff claimed to have been beaten by a police officer and sought discovery of internal investigation materials. The court examined the materials in camera and ordered the defendant to turn over firsthand reports of the incident prepared by other members of the force, summaries of interviews with police officers conducted by other investigating officers, and related correspondence. *Id.* at 10. Although the material could be termed nonevaluative in the sense that it apparently included no conclusions of the investigators, it included material not factual in the way that statistics are factual the materials necessarily required the subjective observations of witnesses, many of whom were colleagues of the alleged transgressor. Therefore, the *Wood* conception of what is factual would not prevent the feared chilling effects on which the privilege of self-critical analysis is based.

[FN42] See, e.g., *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980).

[FN43] In camera inspection has proved a popular judicial device for differentiating between protected and unprotected materials. See, e.g., *Dickerson v. United States Steel Corp.*, 12 Empl. Prac. Dec. (CCH) ¶ 11,095, at 5070, 5070-71; Note, *supra* note 14, at 1039.

[FN44] The court in *O'Connor* divided all material into three categories. The first was composed of statements of fact and data compilations that the court held discoverable. The second contained evaluative material that the court protected. Finally, if passages were a mixture of the first two categories, the court placed the burden of editing the materials on the disclosing party and ordered that, when deletions were made, two different types of marks be used to indicate whether the editor felt that the material deleted was definitely factual (marked by three asterisks) or questionable (six asterisks). The court was to make spot checks to ensure compliance. *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218-19 (D. Mass. 1980).

[FN45] Not only must the court use valuable resources, but generally the same judge who inspect documents during discovery will also be the finder of fact at trial. Use of a magistrate to review documents, albeit an attractive option, also consumes valuable resources. For a discussion of these problems, see *Id.* at 218.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

96 HVLR 1083

Page 14

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

[FN46] Naturally, these limitations on discovery apply only to factual portions of self-analyses and should not be applied to facts in general, which are discoverable. Neither should factual materials that are otherwise discoverable be protected merely because they also happen to be contained in a critical self-analysis.

[FN47] "[O]ur action [deleting the enumeration of specific privileges proposed by the advisory committee and the Supreme Court] should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis." S. Rep. No. 1277, 93d Cong., 2d Sess. 13 (1974) (emphasis added).

[FN48] See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Trammel v. United States*, 445 U.S. 40, 47 (1980). In *Upjohn* (which involved the attorney-client privilege), Justice Rehnquist, having first expressed his disapproval of case-by-case determination of privileges, went on to note that courts must take such an approach, and pointed out that "it obeys the spirit of the Rules." 449 U.S. at 397.

In *Upjohn*, the Supreme Court held privileged from discovery certain materials relating to a corporation's internal investigation of suspected illegal payments to foreign government officials. The Court, however, apparently did not consider the privilege of self-critical analysis; the investigation had been conducted by *Upjohn's* general counsel and thus was protected by the attorney-client privilege. *Id.* at 395.

[FN49] If this Court were to accept petitioner's contention that this privilege should be approached in an ad hoc manner, being dissolved when necessity for the privileged information is shown, and no specific reasons for the upholding of the privilege advanced, then the underlying reasons for the existence of the privilege would be thwarted just as fully as if it did not exist. The members of a police department must be able to rely upon their confidential records and notations being preserved for their internal use in all cases, for if it were otherwise, the knowledge that some of the confidential information recorded might be later exposed to outside parties would have a certain and chilling effect upon the internal use of such record making.

Kott v. Perini, 283 F. Supp. 1, 2 (N.D. Ohio 1968); see *Upjohn v. United States*, 449 U.S. at 393. But see *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 n.8 (E.D. Pa. 1973) (declining to follow *Kott's* rejection of the case-by-case balancing test).

[FN50] See, e.g., *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600-06 (N.D. Tex. 1981); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

[FN51] See cases cited supra note 50.

[FN52] See supra note 7.

[FN53] See supra note 47.

[FN54] See, e.g., *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. Dist. Ct. App. 1979).

[FN55] See, e.g., Neb. Rev. Stat. § 71-2048 (1981).

[FN56] See *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 433-34 (E.D. Pa. 1978) ("Carried to its logical extreme, such a privilege [of self-critical analysis] would foreclose discovery of material which might be most strongly probative of discriminatory intent."). Such a statement can best be viewed as a recommendation that a plaintiff's needs for probative material not be overlooked. If the court meant to disparage privileges generally insofar as they hide such material, the consequences for the privilege of self-critical analysis and other privileges

96 HVLR 1083

Page 15

96 Harv. L. Rev. 1083

(Cite as: 96 Harv. L. Rev. 1083)

would be extensive and deleterious; discovery privileges by nature mask the relevant.

[FN57] If a plaintiff has no alternative method to prove his case aside from using a self-critical analysis, courts are more likely to find exceptional need. Such a need may arise in situations in which it is impractical to allow discovery of the raw data that make up the self-evaluative report. For example, in *Ylla v. Delta Airlines*, 18 Empl. Prac. Dec. (CCH) ¶ 8937, at 5897 (N.D. Ga. 1977), a title VII discovery case, the court denied on the ground of undue burden discovery of all job applications and transfer requests over a period going back approximately 10 years. *Id.* at 5901. Plaintiff was thereby foreclosed from discovery of the raw data upon which defendant's compilations were based.

[FN58] See, e.g., *Trammel v. United States*, 445 U.S. 40, 53 (1980) (judicial modification of spousal privilege).

[FN59] See sources cited supra note 11; see also *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 2d 190, 203-04, 248 N.W.2d 433, 440-41 (1977) (claiming that judicially created privileges are giving way to legislative privileges; citing authorities); 2 D. LOUISELL & C. MUELLER, supra note 9, § 202 app. (listing statutes); C. McCormick, McCormick's Handbook of the Law of Evidence § 77, at 156-60, § 112, at 238-39 (2d ed. 1972) (same).

END OF DOCUMENT

PERSONAL FINANCE

New IRA Protects Against Lawsuits, Bankruptcy

Two Delaware Trust Firms Offer Retirement Products Shielded by State's Statutes

By RACHEL EDNA SILVERMAN

A NEW TYPE of individual retirement account aims to address an increasing concern among doctors, business executives and other professionals: how to protect your IRA if you're sued or have to file for bankruptcy.

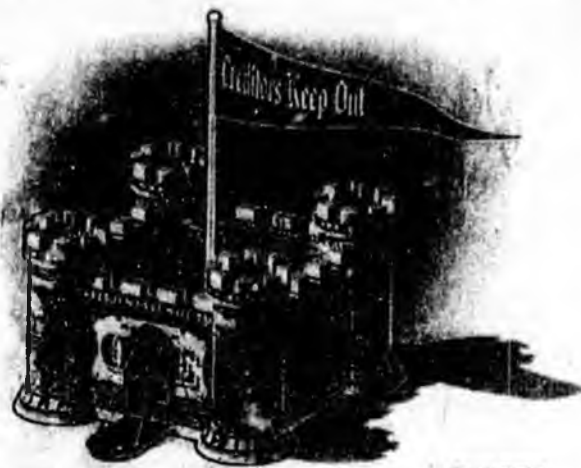
Unlike 401(k)s and other employer-sponsored retirement plans, IRAs generally aren't protected from creditors under federal law. Instead, IRA protection is covered by state laws, which vary. In recent years, a few states, such as Delaware, have also changed their trust laws to offer additional protections that may affect IRAs.

Two Wilmington, Del., trust companies, NaCity Trust Co., a unit of National City Corp. in Cleveland, and Capital Trust Co., now offer souped-up IRAs that are structured to take advantage of the state's generous asset-protection and trust laws. These IRAs operate like typical custodial IRAs, where the money is held in a bank or investment firm, but they offer the protection of a trust, which can have special provisions to stave off creditors.

These "Delaware IRAs" are targeted at wealthy professionals who have big retirement accounts and are worried about professional liability. NaCity Trust's president, Jeffrey Getty, says the number of accounts has grown 66% since the start of the year, with the average account size at more than \$1 million. But how effective these IRAs are in keeping creditors at bay is still an open question.

Asset Protectors

The Delaware IRAs are some of the latest offerings of the booming asset-protection industry. The growth of the industry is being driven by increasing concern among doctors, business executives and other professionals concerned about lawsuits and creditors. Financial services companies and specialized asset-protection lawyers have been rolling out sophisticated trusts, partnerships and other ve-



Graphic: Marked

Limited Protection

Keeping individual retirement accounts from creditors is a growing concern, especially among doctors and other professionals worried about lawsuits and bankruptcy. IRA protection varies depending on where you live.

- Unlike employer-sponsored 401(k)s and pensions, IRAs generally aren't protected from creditors under federal law.
- IRA protection depends on state law, which varies. Most states, such as Delaware, have statutes that broadly protect IRAs from creditors, while others, such as Minnesota, have more limited exemptions.
- Delaware also allows IRAs to have "spendthrift" provisions, which are another measure that might keep creditors at bay.

hicles to keep up with the demand for asset protection.

IRAs, however, are a thorny problem in asset-protection planning. Although retirement accounts make up a substantial portion of many people's wealth—there was more than \$3 trillion in IRA assets at the end of last year—the question of whether creditors can pierce IRAs is still an unsettled area of the law.

"It's a convoluted area," says Ralph Minto Jr., a Pittsburgh asset-protection lawyer, who has had four physician clients, all Pennsylvania residents, set up Delaware IRAs in the past year because of creditor fears.

The legal landscape for IRA creditor protection is expected to shift further next month when the U.S. Supreme Court weighs in on the issue. The case, *Rousey v. Jacoway*, involves whether funds in IRAs are subject to creditors under Chapter 7 bankruptcy proceedings.

IRAs aren't safe from creditors under the federal Employee Retirement Income Security Act which protects 401(k)s and pension plans. Many states, such as New York, Texas, Florida and Delaware, offer broad protections for IRAs. However, some states, such as California and Minnesota, provide more-limited protection—exempting, for instance, only what is reasonably necessary to support IRA owners and their dependents or limiting the exemption to a specific dollar amount.

Some lawyers and financial advisers are urging clients with creditor concerns to use the Delaware IRA, which might offer stronger protection. These IRAs operate like other retirement accounts, but the twists are in how they are structured. The IRAs are set up as trusts, rather than the typical custodial IRAs. The two vehicles are similar, but trusts are generally more complex and expensive structures to set up. Trusts also can offer greater legal protection against creditors, as well as

more estate planning options. Individual retirement trusts are popular among the wealthy and are offered by numerous private banks and trust companies.

The Delaware IRAs stand out because they use special language called a spendthrift provision. This spendthrift provision is meant to limit the rights of creditors to reach the funds inside the account. Delaware is one of only a few states that permit these spendthrift provisions in trusts, such as IRAs, where the individual setting up the trust is also the beneficiary. Just a handful of financial-services companies, including NaCity and Capital Trust, offer IRA trusts with the spendthrift provision.

The spendthrift clause "puts extra obstacles before creditors, so it's not an easy snatch and grab," says Marc Singer, who has developed many asset-protection plans for clients as a partner at Singer Xenos, a Coral Gables, Fla., wealth-management firm.

The Cost

Fees for Delaware IRAs vary. NaCity charges roughly 1.1% of assets, which includes asset management and requires an account minimum of about \$750,000. (The fee is about half that for just an administrative trust.) Capital Trust, which sells its services through financial advisers, charges 0.3% on the first \$1 million, with a minimum fee of \$1,250. A typical Merrill Lynch custodial IRA is less expensive—0.25% of net assets, with a \$50 minimum annual fee.

But how well Delaware IRAs hold up as asset-protection vehicles is still unclear, since they haven't been tested in court yet. There is still a possibility that a court in another state could rule that the assets in a Delaware IRA are fair game to a creditor outside the state. That's because the U.S. Constitution mandates that each state should have "full faith and credit" in the legal judgments made in other states. So a plaintiff who wins a judgment in a California court might be able to grab funds in an IRA located in Delaware.

Moreover, a Delaware IRA, like all retirement accounts, is still vulnerable in divorce proceedings, since family-court judges have wide discretion in divvying up marital assets. "In divorce, all bets are off," Mr. Singer says.

And since IRAs are already well protected in many states, setting up a Delaware IRA might not be worth the extra hassles or expenses of having an out-of-state trustee for many individuals.

10/13/2004

HB

494

24-LS1763\F
Mischel
4/4/06

CS FOR HOUSE BILL NO. 494(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

**Offered:
Referred:**

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to private professional conservators and private and public
2 guardians."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 08.26.010 is amended to read:

5 **Sec. 08.26.010. License required.** Except as provided by AS 08.26.180, an
6 individual [A PERSON] may not engage in the business of providing services as a
7 private professional guardian or a conservator unless the individual [PERSON] has a
8 license issued under this chapter.

9 * **Sec. 2.** AS 08.26.020 is amended to read:

10 **Sec. 08.26.020. Requirements for [INDIVIDUAL] private professional full**
11 and partial guardian licenses [LICENSE]. The department shall issue a [AN
12 INDIVIDUAL] private professional full guardian license to an individual

- 13 (1) who is at least 21 years of age;
14 (2) who has two or more years of professional client casework

1 experience or at least an associate degree in human services, social work, psychology,
2 sociology, gerontology, special education, or a closely related field;

3 (3) who is certified as a guardian by a nationally recognized
4 organization in the field of guardianships;

5 (4) [WHO PROVIDES PROOF SATISFACTORY TO THE
6 DEPARTMENT THAT THE INDIVIDUAL IS ABLE TO BE BONDED AND
7 INSURED;

8 (5)] whose criminal history record checks under AS 08.26.070 show
9 that the individual has not been convicted of a felony or a misdemeanor offense
10 involving fraud, misrepresentation, material omission, misappropriation, theft,
11 or conversion in the state or in any other jurisdiction; [CRIME WITHIN 10
12 YEARS OF THE APPLICATION THAT WOULD AFFECT THE INDIVIDUAL'S
13 ABILITY TO PROVIDE THE SERVICES OF A GUARDIAN COMPETENTLY
14 AND SAFELY FOR THE WARD; AND]

15 (5) [(6)] who satisfies the application requirements of AS 08.26.060;
16 and

17 (6) who satisfies the requirements for obtaining a private
18 professional conservator license under AS 08.26.030.

19 * Sec. 3. AS 08.26.020 is amended by adding a new subsection to read:

20 (b) The department shall issue a private professional partial guardian license
21 to an individual who satisfies the requirements under (a)(1) - (5) of this section. A
22 licensed private professional partial guardian may not perform conservator services.

23 * Sec. 4. AS 08.26.030 is amended to read:

24 **Sec. 08.26.030. Requirements for [INDIVIDUAL] private professional**
25 **conservator license.** The department shall issue a [AN INDIVIDUAL] private
26 professional conservator license to an individual

27 (1) who is at least 21 years of age;

28 (2) who has obtained a high school diploma, or a general education
29 development diploma or its equivalent;

30 (3) who has six months' employment experience in a position
31 involving financial management, or has at least an associate degree in accounting or a

1 closely related field;

2 (4) who is certified as a guardian by a nationally recognized
3 organization in the field of guardianships;

4 (5) [WHO PROVIDES PROOF SATISFACTORY TO THE
5 DEPARTMENT THAT THE INDIVIDUAL IS ABLE TO BE BONDED AND
6 INSURED;

7 (6)] whose criminal history record checks under AS 08.26.070 show
8 that the individual [PERSON] has not been convicted of felony or a misdemeanor
9 offense involving fraud, misrepresentation, material omission, misappropriation,
10 theft, or conversion in the state or in any other jurisdiction [CRIME WITHIN 10
11 YEARS BEFORE THE APPLICATION THAT WOULD AFFECT THE
12 INDIVIDUAL'S ABILITY TO PROVIDE THE SERVICES OF A CONSERVATOR
13 COMPETENTLY AND SAFELY FOR THE PROTECTED PERSON]; and

14 (6) [(7)] who satisfies the application requirements of AS 08.26.060.

15 * Sec. 5. AS 08.26.060 is amended to read:

16 **Sec. 08.26.060. Application requirements.** To apply for a license under this
17 chapter, a person shall submit an application on a form provided by the department
18 and submit

19 (1) two complete fingerprint cards containing fingerprints and other
20 information required by the Department of Public Safety to obtain state and national
21 criminal history record information under AS 12.62 and AS 12.64; [THE
22 FINGERPRINTS MUST BE THE FINGERPRINTS OF THE APPLICANT IF THE
23 APPLICANT IS AN INDIVIDUAL, OR, IF THE APPLICANT IS AN
24 ORGANIZATION, FINGERPRINTS OF THE

25 (A) OFFICERS OF THE ORGANIZATION, IF THE
26 APPLICANT IS A CORPORATION;

27 (B) MEMBERS OF THE ORGANIZATION, IF THE
28 APPLICANT IS A LIMITED LIABILITY COMPANY;

29 (C) PARTNERS OF THE ORGANIZATION, IF THE
30 APPLICANT IS A PARTNERSHIP;]

31 (2) proof of professional liability insurance and the ability to obtain

1 a surety bond if ordered by a court [THE ABILITY TO BE INSURED AND
2 BONDED];

3 (3) a written waiver of confidentiality signed by the applicant allowing
4 the department to access at any time relevant complaint information made about the
5 applicant to adult protective services, the designated protection and advocacy agency,
6 the long-term care ombudsman, or an entity that certifies or licenses private
7 professional guardians or private professional conservators;

8 (4) a written statement signed by the applicant that the applicant will
9 allow immediate access at any time to the department to the file of a ward or protected
10 person and to financial information regarding the applicant, including corporate or
11 other business records;

12 (5) a detailed resume, including relevant experience, for each
13 employee and contractor of the applicant who may provide services to a ward or
14 protected person; and

15 (6) payment of the application fee, any criminal history record
16 information checks fee charged under AS 12.62.160(d), and any other fees required by
17 the department [; AND

18 (7) IF THE APPLICANT IS NOT AN INDIVIDUAL, A COPY OF
19 THE DOCUMENTS UNDER WHICH THE APPLICANT WAS FORMED,
20 INCLUDING ARTICLES OF INCORPORATION AND BYLAWS IF THE
21 APPLICANT IS A CORPORATION].

22 * Sec. 6. AS 08.26.080 is amended to read:

23 **Sec. 08.26.080. Annual report.** Within 30 days following the end of each
24 calendar year, a licensee shall submit to the department

25 (1) evidence of the [INITIAL AND] continuing existence of a court
26 ordered bond, if any, and professional liability insurance [REQUIRED BY A
27 COURT] to be maintained by the guardian or conservator;

28 (2) a list, including case numbers, of the wards and protected persons
29 for whom the licensee is acting as a private professional guardian or private
30 professional conservator;

31 (3) an accurate financial statement of the licensee, including total fees

1 collected from the protected person, total business expenses, and documents
2 necessary to establish financial solvency;

3 (4) a letter stating that the licensee has filed all required court reports
4 in the previous calendar year, and

5 (5) a copy of all of the licensee's federal tax documents filed with the
6 Internal Revenue Service and all of the licensee's correspondence with the Internal
7 Revenue Service for the calendar year [; AND

8 (6) A LIST OF ALL PERSONS CURRENTLY EMPLOYED BY
9 THE LICENSEE IN THE BUSINESS FOR WHICH THE LICENSE WAS ISSUED].

10 * Sec. 7. AS 08.26.100 is amended to read:

11 **Sec. 08.26.100. Court appointment.** An individual [A PERSON] who
12 engages in the business of providing services as a private guardian or conservator
13 may not be appointed as a guardian or a conservator in a court proceeding unless the
14 individual [PERSON] is licensed under this chapter or exempt under AS 08.26.180.

15 * Sec. 8. AS 08.26.130 is amended to read:

16 **Sec. 08.26.130. Grounds for disciplinary action.** The department may take
17 disciplinary action against an individual [A PERSON] under AS 08.01.075 or refuse
18 to issue or renew a license if the department determines that the individual
19 [PERSON]

20 (1) obtained or attempted to obtain a license under this chapter through
21 deceit, fraud, or intentional misrepresentation;

22 (2) has not complied with the standards of conduct established by the
23 department under AS 13.26.001;

24 (3) forfeited a license in this or another jurisdiction as a result of
25 deceit, fraud, intentional misrepresentation, or professional incompetence;

26 (4) has been found by a court in this state to have engaged in
27 professional misconduct or incompetence;

28 (5) has advertised the individual's [ITS] services in a false or
29 misleading manner;

30 (6) has been convicted, including a conviction based on a guilty plea or
31 plea of nolo contendere, of a felony or other crime that affects the individual's

1 [PERSON'S] ability to provide [THE LICENSEE'S] services competently and safely
2 for the ward or protected person;

3 (7) has been found to have abandoned, exploited, abused, or neglected
4 a vulnerable adult; in this paragraph, "vulnerable adult" has the meaning given in
5 AS 47.24.900;

6 (8) has failed to comply with this chapter or with a regulation adopted
7 under this chapter;

8 (9) has continued or attempted to practice after becoming unfit due to
9 professional incompetence;

10 (10) has failed to maintain certification by a nationally recognized
11 organization in the field of

12 (A) guardianships, if the individual [PERSON] was issued a
13 [AN INDIVIDUAL] private professional guardian license; or

14 (B) conservatorships, if the individual was issued a [AN
15 INDIVIDUAL] private professional conservator license; or

16 (11) is not able to be bonded and insured [; OR

17 (12) IF THE LICENSEE HAS AN ORGANIZATIONAL LICENSE,

18 (A) DOES NOT MAINTAIN A PLACE OF BUSINESS IN
19 THIS STATE;

20 (B) IS NOT IN COMPLIANCE WITH THE STATE AND
21 FEDERAL REQUIREMENTS THAT APPLY TO THE ORGANIZATION;
22 OR

23 (C) HAS AN EMPLOYEE WHO PROVIDES THE
24 SERVICES OF A PRIVATE PROFESSIONAL GUARDIAN OR PRIVATE
25 PROFESSIONAL CONSERVATOR FOR THE ORGANIZATION AND IS
26 NOT LICENSED UNDER THIS CHAPTER].

27 * Sec. 9. AS 08.26.180 is amended to read:

28 **Sec. 08.26.180. Exemption. An individual who is employed by a [A]**
29 **financial institution regulated by the federal government or a financial institution**
30 **regulated under AS 06 by the department is not required to be licensed under this**
31 **chapter in order to engage, in the course of the individual's employment by the**

1 financial institution, in the business of providing services as a guardian or a
 2 conservator or be appointed as a private professional guardian or a private professional
 3 conservator by a court. In this subsection, "financial institution" does not include a
 4 person who is exempt under AS 06.26.020 or who has received an exemption under
 5 AS 06.26.200.

6 * Sec. 10. AS 08.26.190 is amended to read:

7 **Sec. 08.26.190. Definitions.** In this chapter,

8 (1) "conservator" has the meaning given in AS 13.06.050;

9 (2) "department" means the Department of Commerce, Community,
 10 and Economic Development;

11 (3) "guardian" has the meaning given in AS 13.06.050;

12 (4) "licensee" means a person licensed under this chapter;

13 (5) ["ORGANIZATIONAL LICENSE" MEANS A LICENSE
 14 ISSUED UNDER AS 08.26.040;

15 (6) "private professional conservator" means an individual [A
 16 PERSON] who acts as a conservator under AS 13.26.165 - 13.26.320 and receives
 17 compensation for acting in that capacity for an individual who is not an immediate
 18 family member of the conservator;

19 ~~(6)~~ [(7)] "private professional conservator license" means a license
 20 issued under AS 08.26.030;

21 ~~(7)~~ [(8)] "private professional guardian" means an individual [A
 22 PERSON] who acts as a guardian under AS 13.26.030 - 13.26.155 and receives
 23 compensation for acting in that capacity for an individual who is not an immediate
 24 family member of the guardian;

25 ~~(8)~~ [(9)] "private professional guardian license" means a license issued
 26 under AS 08.26.020;

27 ~~(9)~~ [(10)] "protected person" has the meaning given in AS 13.26.005;

28 ~~(10)~~ [(11)] "ward" has the meaning given in AS 13.26.005.

29 * Sec. 11. AS 13.26.400 is amended to read:

30 **Sec. 13.26.400. Staff; delegation of powers and duties.** The public guardian
 31 may employ staff and delegate to members of the staff or to volunteers the powers and

1 duties as guardian or conservator and other powers and duties under this chapter.
2 However, the public guardian retains responsibility for the proper performance of the
3 delegated powers and duties. The public guardian may only delegate powers and
4 duties under this chapter to an individual who meets [ALL DELEGATIONS
5 SHALL BE TO PERSONS WHO MEET] the eligibility requirements of
6 AS 13.26.145 and has passed the criminal history record information check
7 under AS 08.26.070. In addition, the individual must either hold a current
8 certification as a guardian from a nationally recognized organization at the time
9 of the delegation or apply for and receive that certification within one year of the
10 delegation.

11 * Sec. 12. AS 08.26.040 is repealed.

12 * Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to
13 read:

14 APPLICABILITY. A person who is not an individual who has a current organizational
15 license issued by the department under AS 08.26.040 may continue to provide guardianship
16 and conservatorship services under the requirements of AS 08.26 until the license expires.
17 Each individual performing guardianship or conservatorship services under an organizational
18 license must apply for and receive an individual license issued under AS 08.26 within 60 days
19 after the expiration of the license in order to continue to provide guardianship or
20 conservatorship services.