

HOUSE BILL NO. 127

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST

Introduced: 2/18/13

Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

1 **"An Act clarifying that the Alaska Bar Association is an agency for purposes of**
2 **investigations by the ombudsman; relating to compensation of the ombudsman and to**
3 **employment of staff by the ombudsman under personal service contracts; providing that**
4 **certain records of communications between the ombudsman and an agency are not**
5 **public records; relating to disclosure by an agency to the ombudsman of**
6 **communications subject to attorney-client and attorney work-product privileges;**
7 **relating to informal and formal reports of opinions and recommendations issued by the**
8 **ombudsman; relating to the privilege of the ombudsman not to testify and creating a**
9 **privilege under which the ombudsman is not required to disclose certain documents;**
10 **relating to procedures for procurement by the ombudsman; relating to the definition of**
11 **'agency' for purposes of the Ombudsman Act and providing jurisdiction of the**
12 **ombudsman over persons providing certain services to the state by contract; and**

amending Rules 501 and 503, Alaska Rules of Evidence."

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

* **Section 1.** AS 08.08.010 is amended by adding a new subsection to read:

(b) The Alaska Bar Association is an agency for purposes of AS 24.55.

* **Sec. 2.** AS 24.55.060 is amended to read:

Sec. 24.55.060. Compensation. The ombudsman is entitled to receive an annual salary equal to a step in [A,] Range 26 on the salary schedule set out in AS 39.27.011(a) [FOR JUNEAU].

* **Sec. 3.** AS 24.55.070 is amended by adding a new subsection to read:

(d) Notwithstanding (c) of this section, staff appointed by the ombudsman may be employed under a personal services contract as provided by AS 24.10.060(f).

* **Sec. 4.** AS 24.55.160(b) is amended to read:

(b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency. **Records of communication between the ombudsman and an agency relating to an investigation by the ombudsman under this chapter are not public records for purposes of AS 40.25.110 - 40.25.220.**

* **Sec. 5.** AS 24.55.160 is amended by adding a new subsection to read:

(c) Disclosure by an agency to the ombudsman under this chapter of a communication that is subject to the attorney-client privilege, or attorney work-product privilege, does not waive the privilege as to any other person.

* **Sec. 6.** AS 24.55.180 is amended to read:

Sec. 24.55.180. Consultation. Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person. **Before reporting an opinion or recommendation that is critical of an agency under AS 24.55.190, the** [THE] ombudsman **shall** [MAY] make a preliminary opinion or recommendation available to the agency or person for review,

1 but the preliminary opinion or recommendation is confidential and may not be
2 disclosed to the public by the agency or person.

3 * **Sec. 7.** AS 24.55 is amended by adding a new section to read:

4 **Sec. 24.55.185. Informal report after investigation.** (a) The ombudsman may
5 issue an informal report of the opinion and recommendations of the ombudsman to an
6 agency if the ombudsman finds a factor listed in AS 24.55.190(a)(1) - (7) and, under
7 regulations adopted by the ombudsman, finds that an informal report to the agency is
8 an appropriate remedy.

9 (b) The ombudsman may request the agency to notify the ombudsman, within
10 a specified time, of any action taken on recommendations provided under (a) of this
11 section.

12 (c) The report provided under (a) of this section is confidential and may not be
13 disclosed to the public by the agency. The ombudsman may publish a summary as
14 provided under (d) of this section and as provided in AS 24.55.200, only after
15 providing notice that the investigation has been concluded

16 (1) to the agency; and

17 (2) if the investigation was conducted in response to a complaint, to
18 the complainant under AS 24.55.210.

19 (d) Before disclosing a summary under (c) of this section, the ombudsman
20 shall provide the agency with reasonable advance notice of the planned disclosure and
21 a copy of the summary.

22 * **Sec. 8.** AS 24.55.190(a) is amended to read:

23 (a) **If the ombudsman has not issued an informal report under**
24 **AS 24.55.185(a), the** [THE] ombudsman shall report the opinion and
25 recommendations of the ombudsman to an agency if the ombudsman finds, after
26 investigation, that

27 (1) a matter should be further considered by the agency;

28 (2) an administrative act should be modified or cancelled;

29 (3) a statute or regulation on which an administrative act is based
30 should be altered;

31 (4) reasons should be given for an administrative act;

(5) any other action should be taken by the agency;

(6) there are no grounds for action by the agency; or

(7) the agency's act was arbitrary or capricious, constituted an abuse of discretion, or was otherwise erroneous or not in accordance with the law.

* **Sec. 9.** AS 24.55.190(b) is amended to read:

(b) The ombudsman may request the agency to notify the ombudsman, within a specified time, of any action taken on the report provided under this section [RECOMMENDATIONS].

* **Sec. 10.** AS 24.55.260 is repealed and reenacted to read:

Sec. 24.55.260. Ombudsman's privilege not to testify or disclose documents. (a) The ombudsman and staff of the ombudsman may not testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions of this chapter.

(b) The records of the ombudsman and staff of the ombudsman, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public in accordance with AS 24.55.200, are not subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as the ombudsman determines may be necessary to enforce the provisions of this chapter. Disclosure by the ombudsman is subject to the restrictions on disclosure in AS 24.55.160 - 24.55.190.

* **Sec. 11.** AS 24.55.275 is amended to read:

Sec. 24.55.275. Contract procedures. The ombudsman shall adopt by regulation procurement procedures that are appropriate for the office of the ombudsman and that are similar to those adopted by the legislative council under AS 36.30.020, as they may be amended from time to time. The procedures shall [CONSISTENT WITH AS 36.30 TO] be followed by the office of the ombudsman in contracting for professional and other services, supplies, construction, and office space. However, competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do [THE PROCEDURE FOR

1 REQUESTS FOR PROPOSALS DOES] not apply to contracts for investigations
 2 under AS 24.55.100, and the office of the ombudsman shall comply with
 3 AS 36.30.170(b).

4 * **Sec. 12.** AS 24.55.330(2) is amended to read:

5 (2) "agency" includes a department, office, institution, corporation,
 6 authority, organization, commission, committee, council, or board of a municipality or
 7 in the executive, legislative, or judicial branches of the state government, and a
 8 department, office, institution, corporation, authority, organization, commission,
 9 committee, council, or board of a municipality or of the state government independent
 10 of the executive, legislative, and judicial branches, or a person under a contract
 11 with a state agency to provide a prison, halfway house, or similar residential
 12 service on behalf of the Department of Corrections, to provide a juvenile
 13 detention facility, treatment facility, or residential treatment program accepting
 14 placement of juveniles committed to the custody of the Department of Health and
 15 Social Services, or to determine eligibility for a state program or benefit; it also
 16 includes an officer, employee, or member of an "agency" acting or purporting to act in
 17 the exercise of official duties, but does not include the governor, the lieutenant
 18 governor, a member of the legislature, the victims' advocate, the staff of the office of
 19 victims' rights, a justice of the supreme court, a judge of the court of appeals, a
 20 superior court judge, a district court judge, a magistrate, a member of a city council or
 21 borough assembly, an elected city or borough mayor, or a member of an elected
 22 school board;

23 * **Sec. 13.** AS 36.90 is amended by adding a new section to read:

24 **Sec. 36.90.310. Ombudsman's jurisdiction.** A contract between the state and
 25 a person providing a service in AS 24.55.330(2) shall include a provision that the
 26 person is subject to the jurisdiction of the office of the ombudsman as provided in
 27 AS 24.55.

28 * **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to
 29 read:

30 INDIRECT COURT RULE AMENDMENTS. (a) The change made to
 31 AS 24.55.160(c), added by sec. 5 of this Act, has the effect of changing Rules 501 and 503,

1 Alaska Rules of Evidence, by clarifying that disclosure by an agency to the ombudsman under
 2 AS 24.55 of a communication that is subject to the attorney-client privilege or attorney work-
 3 product privilege does not waive the privilege as to any other person and that the ombudsman
 4 has a privilege not to testify or disclose documents as provided under AS 24.55.260, added by
 5 sec. 10 of this Act, and may not be made to disclose a communication provided by an agency
 6 to the ombudsman that is subject to the attorney-client privilege or attorney work-product
 7 privilege.

8 (b) The change made by sec. 10 of this Act has the effect of changing Rule 501,
 9 Alaska Rules of Evidence, by clarifying that the ombudsman and the staff of the ombudsman
 10 have a privilege not to testify or disclose or produce records in a judicial or administrative
 11 proceeding, except as provided under AS 24.55.160 - 24.55.200.

12 * **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to
 13 read:

14 APPLICABILITY. Sections 12 and 13 of this Act apply to contracts entered into after
 15 January 1, 2015.

16 * **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to
 17 read:

18 CONDITIONAL EFFECT. (a) AS 24.55.160(c), added by sec. 5 of this Act, takes
 19 effect only if sec. 14(a) of this Act receives the two-thirds majority vote of each house
 20 required by art. IV, sec. 15, Constitution of the State of Alaska.

21 (b) Section 10 of this Act takes effect only if sec. 14(b) of this Act receives the two-
 22 thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of
 23 Alaska.