**INTRODUCTION TO PROPOSED AMENDMENTS**
**TO THE OMBUDSMAN ACT (HB 127)**

The Ombudsman Act (AS 24.55.010 – 24.55.340) was enacted in 1975. The ombudsman requested revisions to the statute after the first ten years of operation, and legislation enacting those revisions passed in 1990. After another twenty years of ombudsman work, a number of issues have accumulated and the Ombudsman is asking that the Legislature consider amendments that would allow the ombudsman's office to function more efficiently.

The Office of the Ombudsman, with considerable assistance from Legislative Legal Services, has prepared a bill draft addressing the areas in which the statute falls short of the current needs of the office.

**Sectional Analysis of HB 127**

**Section 1**. The Alaska Bar Association was created in AS 08.08.010 as an "instrumentality of the state" in order to license and regulate attorneys. As the state boards licensing other professions are clearly state agencies, the Bar Association looks like a state agency when judged by its function. The Office of the Ombudsman believes that the Bar Assocation falls within the ombudsman's jurisdiction over the administrative acts of agencies, because the Ombudsman Act defines "agency" very broadly as including "a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches." See AS 24.55.330(2). The Bar Association, however, has consistently maintained that it is not a state agency for purposes of the Ombudsman Act.

The Bar Association's argument that it is not a state agency is partially supported by the Alaska Supreme Court's multi-factor test for determining whether an entity is a state agency. Upon applying the factors listed in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986), it is not clear whether or not the Bar Association is a state agency, because roughly half of the factors indicate that it is a state agency, while the others indicate that it is not. This jurisdictional question can be resolved by either litigation or legislative decision. The ombudsman considers litigation to be a poor use of both the ombudsman's resources and those of the Bar Association, and therefore asks that the Legislature settle this matter one way or the other.

The ombudsman does not necessarily advocate for inclusion of the Bar Association within the ombudsman's jurisdiction, but would like this long-standing issue resolved as efficiently as possible. (For additional discussion of the relevant case law and the history of this issue, see **Appendix A**).

**Section 2**. The purpose of this amendment is to allow the ombudsman to receive step increases. The ombudsman is now the only head of a legislative agency who cannot receive step increases. Previously, the salary of the Victims' Rights Advocate was also frozen at Step A, Range 26, but in 2012, the legislature revised compensation for the Victims' Rights Advocate (AS 24.65.060) to allow the Victims' Rights Advocate to receive step increases. This section would provide parity in the statutory salary provision for the ombudsman as compared to other legislative agency heads. Looking ahead, the change would allow the legislature some flexibility in setting the salary of a newly appointed ombudsman. Also, this section deletes the wording "for Juneau" from AS 24.55.060, so that the Ombudsman's salary will

be set based on the Ombudsman's actual location. Presently, the pay scale for legislative employees is the same for Juneau and Anchorage, but if that eventually changes to provide Juneau employees with a geographic differential then this amendment would avoid an unintentional windfall to an Anchorage-based ombudsman.

**Section 3**. The Office of the Ombudsman currently hires individuals, such as retired former ombudsman staff, under personal services contracts. The ombudsman has received an opinion from the legislative personnel office that this practice is permissible for the Office of the Ombudsman. However, the existing statutes are somewhat ambiguous, or at least difficult to interpret, and the Ombudsman would like any doubt on this subject removed.

**Section 4**. The ombudsman's opinions and recommendations as provided to an agency are made confidential in AS 24.55.180 and AS 24.55.190, so that an agency may consider and respond without public embarassment. The problem is that those measures are rendered futile if the emails and other communications between the ombudsman and the agency prior to the ombudsman's report are available for publication. During an investigation, the ombudsman's questions to agency staff and requests for records may reveal the nature of the allegations and the ombudsman's potential criticisms of the agency, often to the same extent as the ultimate report of opinions and recommendations. The amendment to AS 24.55.160(b) extends the confidentiality provided to the preliminary and final ombudsman reports to encompass the communications that lead up to those reports.

**Section 5**. Executive branch personnel sometimes provide the ombudsman with the opinions offered by an assistant attorney general. This is often in the agency's interest, because reliance on the advice of their attorney may explain conduct that otherwise appears to be without an adequate explanation. However, sharing this material with the ombudsman's office has the potential to create an unintentional waiver of privilege. This legislation aims to preserve an agency's ability to communicate frankly with the ombudsman without causing harm to the agency's ability to protect itself in litigation against non-state entities.

**Sections 6-9**. When the Office of the Ombudsman opened in 1975, nearly every closing letter was counted as an "investigation" issued by the Ombudsman under AS 24.55.190 ("The ombudsman shall report the opinion and recommendations of the ombudsman to an agency…."). Reports under AS 24.55.190 are a non-delegable duty of the Ombudsman, which means that the reports cannot be signed by an assistant ombudsman. Since 1975, the office has evolved to the point where the Ombudsman cannot, as a practical matter, review every closing letter. The office has developed a practice of staff discontinuing investigations with suggestions to an agency, in cases where there may be improvements that an agency can undertake but the issue is not significant enough to warrant the Ombudsman's resources for a full report under AS 24.55.190. The proposed changes, particularly a new AS 24.55.185, provide a clear statutory path for the ombudsman's staff to handle these "gray area" complaints. If this legislation is enacted, the ombudsman anticipates undertaking a regulations project to further define implementation of the "informal reports" provision.

Section 6 amends AS 24.55.180 to maintain the requirement that the ombudsman (or her staff) consult with an agency prior to issuing a critical opinion, whether formal or informal; however, for an informal opinion, the consultation be done via email or even verbally. The provision of a preliminary report –

usually a fairly cumbersome document sent to the director and/or commissioner – is reserved for investigations that are proceeding to an ombudsman's formal report issued under AS 24.55.190.

Section 7 outlines the process for the office of the ombudsman to provide an informal report to an agency.

Sections 8 and 9 make the necessary amendments to AS 24.55.190 to harmonize it with the new statute, AS 24.55.185.

**Section 10**. This section updates the ombudsman's testimonial privilege to match the privilege granted to the Office of Victims' Rights when that office was created in 2001. It removes any ambiguity regarding the protected status of the ombudsman's documents. It also clarifies that the privilege extends to administrative hearings as well as to court proceedings.

**Section 11**. The procurement statute, AS 24.55.275, contains language that matched a prior version of the executive branch procurement code (AS 36.30). The provisions of AS 36.30 have been comprehensively revised since then, and AS 24.55.275 is now a poor fit for the office of the ombudsman. The amendments bring the ombudsman's procurement procedures into line with the rest of the legislative branch, while still allowing for the ombudsman's relative autonomy.

**Sections 12-13**. Since enactment of the original Ombudsman Act in 1975, more services previously thought of as state government functions have been shifted from state agency employees to contractors. The proposed amendments expand the ombudsman's jurisdiction to encompass a portion of the contracted services. The intent is to provide the ombudsman with jurisdiction when a contractor performs services of the same custodial nature as those already performed by the Department of Corrections (and the Division of Juvenile Justice). In particular, an Alaska inmate should be able to complain to the ombudsman whether he is held in a facility owned by the Division of Institutions or in a contractor's facility that is absorbing the overflow from the Division of Institutions. According to the contracts DOC has entered into with private prisons, Alaska inmates are supposed to be able to access the same grievance process as they would while housed in a state facility; while the contracts only address DOC's internal grievance process, the extension of the ombudsman's jurisdiction is a logical corollary.

The ombudsman does not anticipate that this expansion in the ombudsman's jurisdiction would require more staff. First, the effective date of this provision is delayed until 2015. Second, some of these issues, in practice, already take up ombudsman staff time, including time spent referring the issue to the relevant department and then following up on the referral. For example, the ombudsman's staff received multiple serious complaints related to medical care at the Hudson, Colorado, contract facility, but many of these complaints proved unsupported. Because the ombudsman did not have direct access to Hudson personnel and records, these complaints were actually open longer than necessary.

The expansion of jurisdiction also encompasses contractors who have been authorized to determine eligibility for state programs, a task probably carried out by state agency personnel when the legislature created the Office of the Ombudsman. An example would be contractors who make eligibility determinations for the Alaska Temporary Assistance Program on behalf of the Division of Public

Assistance. An agency should not be able to use out-sourcing to avoid the ombudsman's review of how the agency provides or denies access to a state program.

**Sections 14 and 16**. Two sections of this bill (§ 5 and § 10) are indirect amendments of the court rules. Sections 14 and 16 state that the changes to the court rules are not effective without a two-thirds majority vote of each house of the legislature.

**Section 15**. The ombudsman's prospective jurisdiction over certain private contractors is delayed until 2015, to allow time for the ombudsman to work with affected agencies and their contractors and to avoid unjust surprise to contractors who have never had to consider the possibility of an ombudsman investigation.

## APPENDIX A

## The Ombudsman's jurisdiction and the Alaska Bar Association

*Why the Bar Association's status is unclear*

The Ombudsman Act gives an exceptionally broad definition of "agency" for purposes of the ombudsman's jurisdiction. *See* AS 24.55.330. However, the definition does not specifically include the phrase "instrumentality of the state," which is the term used to define the Bar Association in its enabling statute. *See* AS 08.08.010. Our office turned to the criteria adopted by the Alaska Supreme Court for answering whether an entity is a "state agency" for a given purpose. The criteria, as stated in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986) ("*CFAB*"), are:

- Language in the statute creating the entity, including whether it is expressly located within a department;
- Whether the Governor appoints the directors of the entity, and whether any commissioners or other state officials are statutorily appointed to the board;
- Whether the entity is required to report to the governor and/or the Legislature;
- Whether Legislative Audit audits or may audit the entity;
- Whether the Legislature can dissolve the entity, and, conversely, whether the entity must obtain legislative approval prior to dissolution;
- The degree to which funding is provided by the Legislature;
- Whether the entity can dispose of its own income or whether revenue must be deposited in the state's general fund;
- Whether the entity is clearly performing a government function.

Three of these factors are unequivocally on the "state agency" side of the scale: the Bar Association must report annually to the Legislature under AS 08.08.085; Legislative Audit audits the Bar Association; and its existence or dissolution depends on the Legislature. A fourth factor –performance of a governmental function – also makes the Bar Association look more like a state agency, because it is performing an occupational licensing and regulatory function, just like the boards regulating other occupations under Title 8 of the Alaska Statutes. The Alaska Supreme Court appears to have considered the Bar Association's function to be governmental, as of the court's decision in *Sullivan v. Alaska Bar Association*, 551 P.2d 531 (Alaska 1976): "The Bar Association, which was created by the State Legislature, acts as an *administrative arm of the judiciary* for the admission of lawyers to practice law before the courts of the State of Alaska" (Italics added).

On the other hand, the Bar Association does not receive legislative appropriations, and it disposes of its own income. Although three members of its Board of Governors are appointed by the Governor, nine members are elected by the attorney membership. The language creating the Bar Association refers to it as an "instrumentality of the state" but does not locate it within the executive branch, or even clearly place it within the judicial branch.

In short, the multi-factor test used by the Alaska courts offers support for both sides of the argument and does not clarify whether the Bar Association is a state agency for purposes of the ombudsman's office.

*History of jurisdictional dispute*

In 1983, then-Ombudsman Jack Chenoweth described the jurisidictional dispute over ombudsman investigations of the Alaska Bar Association:

> The issue of this office's jurisdiction over the Alaska Bar Association traces back to two complaints, A79-0641 and A79-0642, filed against the association in June, 1979. The two complaints were generally directed against the association's grievance procedures and charged financial and other irregularities involving members of the board of governors and employees of the association.
>
> The matters involved my predecessor, Frank Flavin, so I do not have direct understanding of past events to guide my response. I am advised that the bar association refused access of the ombudsman's office to certain files essential to the conduct of the investigation. The ombudsman sought enforcement of the subpoena in the superior court. Judge Moody denied the relief requested because Mr. Flavin was a member of the association and had access to the records independently of his official position. The argument whether the association was or was not subject to the ombudsman's jurisdiction was not resolved.

*See* March 31, 1983 letter from Ombudsman Jack Chenoweth to Rep. Jerry Ward. The Bar Association appeared to be on the verge of "sunsetting" without renewal in 1980, and the ombudsman discontinued the pending investigations. Eventually, legislation renewed the Bar Association. Apparently, one version of that legislation specifically included the Bar Association within the ombudsman's jurisdiction, but that wording did not make it into the enacted law. (Rep. Ward sponsored legislation during the 1983 session (HB 293) that would have expressly placed the Bar Association within the ombudsman's jurisdiction; but this provision did not pass).

Jack Chenoweth's position in 1983 actually states the ombudsman's current viewpoint quite adequately:

> The matter deserves clarification by legislation. Please understand that I am not committed to making the association subject to our jurisdiction. The legislature could as well conclude that the association was <u>not</u> subject to our jurisdiction. I have enough "business" from complainants dissatisfied with agencies, boards, commssions and other entities for which there is no jurisdictional challenge.

In 1993, then-Ombudsman Duncan Fowler drafted an office policy regarding complaints against the Bar Association, and stated the basic problem for our office: in order to assert what we believe is our statutory jurisdiction, we would expect to engage in prolonged litigation with the Bar Association, a commitment for which our office has often lacked resources. Ombudsman Policy & Procedure 6000 states in relevant part:

> This office believes that complaints alleging error or omission by the Alaska Bar Association are jurisdictional; the Bar Association's officers believe just as strongly that its activities are outside our jurisdiction.
>
> Complaints against the bar association should be called to the attention of the ombudsman promptly so that there can be a review of the matter…. The first case accepted against the bar association would require, as a prerequisite to resolution, this

> office to request that the court enforce a request, subpoena or deposition issued against a bar association officer; moreover, the case would almost surely have to be resolved by the state supreme court. We haven't the money now to retain attorneys to drive home our point. If there is a very strong case, I would try, so let me know what comes in. However, for the moment you may discretionarily decline. In your letter of decline, please explain that the history of the office leads to the conclusion that we would be unable to investigate the bar association without taking on a major court case.

If we do in fact have jurisdiction, this "wait for the big case" approach is a disservice to complainants. If the Legislature concludes that we do not have jurisdiction, then complaints against the Bar Association can be declined immediately, without discussion of whether a given complaint is the one that will be worth litigating.

*Number of Complaints Received Regarding the Bar Association*

Our current case management software tracks complaints received from December 1999 through the present date. Assistant Ombudsman Beth Leibowitz found 11 complaints against the Bar Association during that period, with results as follows:

Declined as premature: 2
(Complaint either not raised with Bar Association or Bar Association not given reasonable time to respond to the complainant)

Resolved: 1
(Complainant said he had not received paperwork to file a complaint about an attorney; the ombudsman investigator asked the Bar Association staff to send another packet).

Declined due to lack of merit on its face: 1

Declined due to jurisdictional dispute: 7

Out of the seven complaints declined due to lack of clarity over our jurisdiction, six complaints alleged that the Bar Association had failed to adequately investigate a complaint about attorney competence – these were generally complaints by criminal defendants regarding their court-appointed counsel. The seventh complaint involved a client's effort to collect on a fee arbitration award ordered by the Bar Association.

If our office had undisputed jurisdiction to investigate Bar Association complaints, the number of complaints in this category would probably rise gradually, as individuals realized that our office was reviewing these complaints.

*Problems and limitations on the ombudsman's exercise of jurisdiction*

We believe that many of the complaints regarding the Bar's response to grievances about attorneys would still be declined by the ombudsman due to lack of resources. This is because grievances alleging poor quality of representation would tend to become evaluations of whether the attorney met minimal standards of competence, and our office is not in a position to supply expertise on what are essentially attorney malpractice claims. This is especially so in the area of criminal defense – some of our staff are attorneys, but our previous practice has been in civil cases, not criminal defense or prosecution.

The other issue is that some of the Bar Association's functions are directly supervised by the Alaska Supreme Court. As our office does not have jurisdiction over judicial decisions, we are mindful that the line between the Bar Association's administrative decisions and the court's orders may not always be

completely clear. For example, attorney suspension or disbarment must be approved by the court. Although the Bar Association has a fairly elaborate administrative process for attorney discipline, the Bar Association by itself cannot suspend or disbar an attorney. *See* Alaska Bar Rule 16. Similarly, in *Sullivan v. Alaska Bar Association*, 551 P.2d 531 (Alaska 1976), the court concluded that even though admission procedures were "delegated" to the Bar Association, the court "ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar." The Bar Association had refused to waive the application deadline for an applicant who requested permission to sit for the bar exam at the last minute. The court did not require the applicant to exhaust appeals within the Bar Association, nor did the court offer any deference to the Bar Association's decision. The court ordered the Bar Association to allow the applicant to sit for the exam, based on the court's inherent authority over admission (licensing) of attorneys.

In other words, some complaints about Bar Association "administrative actions" may actually be decisions that should be made by the justices of the Alaska Supreme Court, and, as judicial decisions, are not within the ombudsman's jurisdiction regardless of the Bar Association's status.