



Reply to:

☐ P.O. Box 101140
Anchorage, AK 99510-1140
(907) 269-5290
(800) 478-2824
(FAX) 269-8291

☒ P.O. Box 113000
Juneau, AK 99811-3000
(907) 485-4970
(800) 478-4970
(FAX) 485-3330

March 15, 2013

The Honorable Rep. Bob Lynn, Chair
Alaska House State Affairs Committee
State Capitol, Room 108
Juneau, Alaska 99801

Re: HB 127 (Ombudsman Act Amendments)

Dear Representative Lynn:

This letter responds to concerns raised in the March 12th State Affairs Committee regarding the Alaska Office of the Ombudsman and the Alaska Bar Association. As you are aware, section 1 of HB 127, as currently drafted, states that the Bar Association is an "agency" for purposes of the ombudsman's jurisdiction over state agencies. Among other objections, the Bar Association cited Alaska Bar Rules 21 and 22 as preventing the Alaska Bar Association from providing records to the Office of the Ombudsman under AS 24.55.160. The committee requested that the Office of the Ombudsman suggest language to address the apparent conflict.

Alaska Bar Rule 21(c) restricts access to the Bar Counsel's attorney discipline files: "All files maintained by Bar Counsel and staff will be confidential Bar Counsel's Files. All files maintained by Bar Counsel and staff will be confidential and are not to be reviewed by any person other than Bar Counsel or Area Division members appointed for purposes of review or appeal under these Rules." The rule then list seven exceptions to non-disclosure, such as access by the Alaska Judicial Council for information about attorney applicants for a judicial vacancy. Alaska Bar Rule 22, setting forth the procedure for a grievance against an attorney, contains subsection (b), which reads in part: "Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings subject to Bar Rule 21(c). It will be regarded as contempt of court to breach this confidentiality in any way."

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The Ombudsman Act, however, generally overrides confidentiality provisions, as stated in AS 24.55.160(a):

- (a) In an investigation, the ombudsman may
- (1) make inquiries and obtain information considered necessary;
 - (2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;
 - (3) hold private hearings; and
 - (4) *notwithstanding other provisions of law, have access at all times to records of every state agency, including confidential records, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.* [Emphasis added]

Assuming for the sake of argument that AS 24.55.160 does not already override such a confidentiality provision in a court rule, the legislative response would usually be to amend the court rule by a two-thirds majority in both houses of the Legislature (as is already being done regarding sections 5 and 10 of HB 127). However, upon consultation with Legislative Legal Services Director Doug Gardner, we concluded that the Bar Rule provisions appear different than the other Alaska Rules of Court; a difference that led Mr. Gardner to recommend against proposing language that would alter or attempt to override Bar Rules 21 and 22.

The Alaska Constitution, Article IV, § 15, specifically gives the Alaska Supreme Court the power to make court rules, coupled with a mechanism for the Legislature to change the rules:

The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

However, the Alaska Supreme Court regards the Bar Rules as originating, not in Article IV, § 15, but in Article IV, § 1, which provides:

The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

In *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162 (Alaska 1991), the Alaska Supreme Court categorized the court's authority to set the Bar Rules as originating in section one of Article IV, not section 15:

[I]n exercise of our inherent power, we have adopted rules that govern beyond the "administration . . . practice and procedure" limitations of article IV, section 15, most notably the Alaska Bar Rules and the Code of Professional Responsibility

See also *In re MacKay*, 416 P.2d 823 (Alaska 1964), in which the court declared that Bar Rules pertaining to attorney discipline superseded the preexisting statute regarding disciplinary

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procedure. In *In re Stephenson*, 511 P.2d 136 (Alaska 1973), the court held that the Bar Rule requirements for admission to practice prevailed over a statute, and that the court's authority to set rules for admission to practice originated in Article IV, § 1 as an "inherent power" of the court.

Despite the fact that the Bar Rules are published as part of the Alaska Rules of Court, which contain the procedural and administrative rules provided for in Article IV, § 15, the court has treated the Bar Rules as a special category not controlled by § 15. If the court's authority over the Bar Rules is based in Article IV, § 1, instead of Article IV, § 15, then even a two-thirds majority of the legislature may lack the constitutional basis to alter a Bar Rule. While the answer to that question is not absolutely certain, I must concur in the assessment informally provided by Legislative Legal Services, which is that a legislative amendment of a Bar Rule is likely to lead to a legal challenge based on a separation of powers issue, and the legislative branch is not likely to prevail.

For the above reasons, our office does not believe we can offer viable language to amend Alaska Bar Rules 21 and 22. The Legislature still has the option of deciding that the Bar Association is an agency for purposes of the Ombudsman Act; however, the ombudsman's ability to investigate complaints related to grievances against attorneys and attorney discipline would be severely limited by the Bar Association's adherence to Bar Rules 21 and 22. We would still be able to make inquiries regarding the timeliness and courtesy of the Bar's responses to grievances brought against attorneys, but it would be impractical to investigate more substantive issues. Given that the majority of the complaints our office has received regarding the Bar Association have related to the Bar's handling of grievances against attorneys, we would not be able to substantively address many of the complaints received by our office.

The Office of the Ombudsman continues to believe that this jurisdictional question is for the Legislature to resolve, and we request clarification one way or other. We are offering our analysis of the pros and cons of ombudsman jurisdiction over the Bar Association, but we do not take a position for or against jurisdiction in this area.

Sincerely,



Linda Lord-jenkins
State of Alaska Ombudsman