

# LEGAL SERVICES

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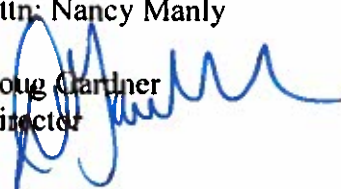
## MEMORANDUM

March 21, 2013

**SUBJECT:** Alaska Bar Association; Agency of the State (HB 127)  
(Work Order No. 28-1.S0088\R)

**TO:** Representative Bob Lynn  
Chair of the House State Affairs Committee  
Attn: Nancy Manly

**FROM:** Doug Gardner  
Director



**QUESTION PRESENTED:** For purposes of the Ombudsman Act, is the Alaska Bar Association (Bar) an agency and, if so, does the Ombudsman have the authority to investigate the administrative acts of the Bar under AS 24.55.100?<sup>1</sup>

**SHORT ANSWER:** The Bar is an agency for purposes of the Ombudsman Act and under the test articulated by the Alaska Supreme Court in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986).<sup>2</sup> However, even if

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<sup>1</sup> AS 24.55.100(a) provides:

(a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.

<sup>2</sup> The following are the factors the Alaska Supreme Court identified in *C/FAB* that the court considers in the context in which the question is presented, to determine whether an entity is a state agency (each factor with a brief answer is provided below):

- Does language of the statute creating the entity expressly locate the entity within a state department? No. AS 08.08.010 appears to create the Bar as an "instrumentality of the state" that is outside the legislative, executive, or judicial branches of government.
- Are appointments to the board of directors of the entity made by the governor, and are other state officials statutorily on the board? Yes, the governor appoints three of the twelve member board.
- Is the entity required to report to the governor and the legislature? Yes. AS 08.08.085 requires an annual report to the legislature.
- Is the entity subject to audit by the legislative budget and audit division? Yes, since AS 08.03.010 provides for a sunset date, the legislative budget and audit division is required to audit the Bar under AS 44.66.050 and AS 24.20.271.

the Bar is an agency, it is questionable whether the Ombudsman may exercise jurisdiction over the Bar regarding matters within the inherent authority of the Supreme Court under article IV, sec. 1.<sup>3</sup>

## DISCUSSION

AS 24.55.330(2) provides:

(2) "agency" includes *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*; it also includes an officer, employee, or member of an "agency" acting or purporting to act in the exercise of official duties, but does not include the governor, the lieutenant governor, a member of the legislature, the victims' advocate, the staff of the office of victims' rights, a justice of the supreme court, a judge of the court of appeals, a superior court judge, a district court judge, a magistrate, a member of a city council or borough assembly, an elected city or borough mayor, or a member of an elected school board; [Emphasis added.]

Section 1 of HB 127 by specifically listing the Bar may clarify that the Bar is an "agency," but in my view the Bar already falls under the existing definition.<sup>4</sup>

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- Can the legislature dissolve the entity, or must the entity request legislative approval prior to dissolution? Yes, and the legislature has provided a sunset date in AS 08.03.010.
  - To what degree is the entity funded each year by the legislature? No substantial funding.
  - Can the entity dispose of its own funds without legislative approval? The Bar is doing so currently, however if the Bar is an agency, it is my view that under article IX, sec. 7, and AS 37.05.146, that money received by the Bar must be deposited into the general fund of the state subject to legislative appropriation.
  - Is the entity clearly performing a governmental function? Regulation of most other occupations falls under the auspices of a board or commission as provided by AS 08.08, and the Bar's function is to regulate the profession of practicing law.

<sup>3</sup> Those matters may include such things as standards of admission and the regulation to the practice of law.

<sup>4</sup> I note, the Alaska Supreme Court in *Sullivan v. Alaska Bar Ass'n*, 551 P.2d 531 (Alaska 1976) described the Bar as the "administrative arm" of the Alaska Supreme Court regarding attorney admission, licensing, and discipline. As an "administrative arm" of

Even if the Bar is an agency for purposes of the Ombudsman Act it is not clear that the Ombudsman has the jurisdiction to investigate all of the acts of the Bar.

The Alaska Supreme Court has stated that its authority to regulate and govern the practice of law comes from the court's exercise of its inherent judicial power and jurisdiction in article IV, sec. 1 of the Alaska Constitution.<sup>5</sup> See e.g. *Citizens for Tort Reform, v. McAlpine*, 810 P.2d 162 (Alaska 1991); *In re MacKay*, 416 P.2d 823 (Alaska 1964); *In re Stephenson*, 511 P.2d 136 (Alaska 1973). In the *Stephenson* case, the court held that requirements in the Bar Rules regarding the admission to practice law prevailed over the Alaska Statutes, due to the court's exclusive and inherent authority.

Therefore, even if the Bar is an agency as defined by AS 24.55.330(2), if the Ombudsman attempts to assert jurisdiction under AS 24.55.100 over matters that are committed to the Supreme Court under the constitution the court is likely to rely on article IV, sec. 1, and severely limit the jurisdiction of the Ombudsman with regard to those matters.

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the supreme court, it would be a logical conclusion that the Bar is engaging in administrative acts, which fall within the definition of "administrative acts" in the Ombudsman Act in AS 24.55.330(1).

<sup>5</sup> SECTION 1. Judicial Power and Jurisdiction. 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.