
ALASKA BAR

ASSOCIATION

March 7, 2013

Rep. Bob Lynn, Chair,
House State Affairs Committee
State Capitol, Room 108
Juneau, AK 99801-1182

Rep. Wes Keller, Vice-Chair
House State Affairs Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Rep. Lynn Gattis, Member
House State Affairs Committee
State Capitol, Room 420
Juneau, AK 99801-1182

Rep. Shelley Hughes, Member
House State Affairs Committee
State Capitol, Room 409
Juneau, AK 99801-1182

Rep. Doug Issacson, Member
House State Affairs Committee
State Capitol, Room 13
Juneau, AK 99801-1182

Rep. Charisse Millett, Member
House State Affairs Committee
State Capitol, Room 403
Juneau, AK 99801-1182

Rep. Jonathan Kreiss-Tomkins,
Member
House State Affairs Committee
State Capitol, Room 426
Juneau, AK 99801-1182

RE: House Bill No. 127

Dear Rep. Lynn and members of the Committee:

I'm writing regarding Section 1 of House Bill No. 127 that would add a section to AS 08.08.010 making the Alaska Bar Association an "agency" for the purposes of Ombudsman's investigations under AS 24.55.

Respectfully, this portion of House Bill No. 127 should be removed for three reasons:

(1) The Legislature classified the Alaska Bar Association as an "instrumentality" of the state in 1955 when AS 08.08.010 was enacted. As such, it is not an "agency" of the executive, legislative, or judicial branch of state government;

(2) The disciplinary responsibilities of the Alaska Bar Association are strictly supervised by operation of the Alaska Bar Rules, adopted by the Alaska Supreme Court, and by the Court itself. If a complainant is dissatisfied with a grievance decision, the complainant may ask for review by the Board Discipline Liaison. Alaska Bar Rule 22(a). If the complainant is still dissatisfied, the complaint may file an original application for review by the Alaska Supreme Court. *Anderson v. Alaska Bar Association*, 91 P.3d 271 (Alaska 2004); and,

(3) Because of the confidentiality provisions of Alaska Bar Rules 21 and 22, bar counsel's office would be unable to acknowledge the existence of a grievance much less provide access to bar counsel files unless the respondent attorney consented, an exception applied in Bar Rule 21, or disclosure was ordered by the Alaska Supreme Court.

For the Committee's convenience, I have attached a copy of the statute, rules, and case I've referenced.

If there is any further information I may provide, please let me know.

Sincerely,

ALASKA BAR ASSOCIATION

A handwritten signature in blue ink that reads "Deborah O'Regan". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Deborah O'Regan
Executive Director

Encl.

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Alaska Statutes

08.08.010. Creation of Alaska Bar Association.

There is created an instrumentality of the state known as the Alaska Bar Association, referred to in this chapter as the Alaska Bar. The Alaska Bar shall have a common seal, may sue and be sued, and may, for the purpose of carrying into effect and promoting the objects of the Alaska Bar, enter into contracts and acquire, hold, encumber, and dispose of real and personal property.

Alaska Bar Rules

Rule 21. Public Access to Disciplinary Proceedings.

(a) Discipline and Reinstatement Proceedings. After the filing of a petition for formal hearing, hearings held before either a Hearing Committee or the Board will be open to the public. This Rule will not be interpreted to allow public access to disability proceedings described in Rule 30.

(b) Deliberations. The deliberations of any adjudicative body will be kept confidential.

(c) 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. This provision will not be interpreted to:

(1) preclude Bar Counsel from introducing into evidence any documents from his or her files;

(2) preclude Bar Counsel from providing the Board, the Court, or the public with statistical information compiled pursuant to Rule 11(e), provided that the name of the Respondent is kept confidential;

(3) deny a complainant information regarding the status or disposition of his or her grievance;

(4) deny the public facts regarding the stage of any proceeding or investigation concerning a Respondent's conviction of a crime;

(5) deny the Alaska Judicial Council confidential information about attorney applicants for judicial vacancies;

(6) preclude a court from reviewing in camera a confidential file upon a discovery request made pursuant to Criminal Rule 16(b)(7), and from exercising discretion as to whether to release relevant information from the file to counsel pursuant to Criminal Rule 16(d)(3); or

(7) prevent the Board Discipline Liaison from having access to any and all files maintained by Bar Counsel as necessary in the performance of the Liaison's duties.

(d) Director's File. The file maintained by the Director, acting in his or her capacity as clerk, will be open for public review.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 13 effective April 1, 1979; rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989; by SCO 963 effective July 15, 1989; by SCO 1043 effective January 15, 1991; and by SCO 1082 effective January 15, 1992)

Rule 22. Procedure.

(a) **Grievances.** Grievances will be in writing, signed and verified by the Complainant, and contain a clear statement of the details of each act of alleged misconduct, including the approximate time and place of each. Grievances will be filed with Bar Counsel. Bar Counsel will review the grievance filed to determine whether it is properly completed and contains allegations that warrant investigation. Bar Counsel may require the Complainant to provide additional information and may request a voluntary verified response from the Respondent prior to accepting a grievance.

If Bar Counsel determines that the allegations contained in the grievance do not warrant an investigation, Bar Counsel will so notify the Complainant and Respondent in writing. Complainant may file a request for review of the determination within 30 days of the date of Bar Counsel's written notification. The request shall be reviewed by the Board Discipline Liaison, who may affirm Bar Counsel's decision not to accept the grievance for investigation or may direct that an investigation be opened as to one or more of the allegations in the grievance.

If a grievance is accepted for investigation, Bar Counsel will serve a copy of the grievance upon the Respondent for a response. Bar Counsel may require the Respondent to provide, within 20 days of service, verified full and fair disclosure in writing of all facts and circumstances pertaining to the alleged misconduct. Misrepresentation in a response to Bar Counsel will itself be grounds for discipline. Failure to answer within the prescribed time, or within such further time that may be granted in writing by Bar Counsel, will be deemed an admission to the allegations in the grievance.

For the purposes of this Rule, a grievance or response is "verified" if it is accompanied by a signed statement that the writing is true and correct to the best knowledge and belief of the writer.

(b) **Confidentiality.** 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. It will not be regarded as a breach of confidentiality for a person so contacted to consult with an attorney. A Respondent may waive confidentiality in writing and request disclosure of any information pertaining to the Respondent to any person or to the public.

(c) **Dismissal Before Formal Proceedings.** If after investigation it appears that there is no probable cause to believe that misconduct has occurred, Bar Counsel may dismiss the grievance.

(d) **Imposition of Private Admonition or Reprimand.** Upon a finding of misconduct, and with the approval of one Area Division member, Bar Counsel may impose a written private admonition upon a Respondent. A Respondent will not be entitled to appeal a private admonition by Bar Counsel but may demand, within 30 days of receipt of the admonition, that a formal proceeding be instituted against him or her before a Hearing Committee. If Respondent demands a formal proceeding, the admonition will be vacated and Bar Counsel will proceed under Section (e) of this Rule.

In the discretion of Bar Counsel, (s)he may refer a matter to the Board for approval and imposition of a reprimand by the Board, provided that the Respondent has, under Section (h) of this Rule, consented to the discipline before the Board.

(e) Formal Proceedings. Upon a finding of misconduct, and after seeking review in accordance with Rule 25(d), Bar Counsel may initiate discipline proceedings by filing with the Director a petition for formal hearing which specifically sets forth the charge(s) of misconduct. A copy of the petition will be served upon the Respondent.

Respondent will be required to file the original answer with the Director, and serve a copy upon Bar Counsel, within 20 days after the service of the petition for formal hearing. Should Respondent fail to timely answer, the charges will be deemed admitted without need of any further action by Bar Counsel.

Charges before a Hearing Committee will be presented by Bar Counsel. Bar Counsel will have the burden at any hearing of demonstrating by clear and convincing evidence that the Respondent has, by act or omission, committed misconduct as provided in Rule 15.

Bar Counsel may amend a petition for formal hearing at any time before an answer is filed. Bar Counsel may amend a petition for formal hearing after an answer is filed only by leave of the Hearing Committee or by written consent of the Respondent. Leave to amend will be freely given when justice requires. A Respondent will file an answer to an amended petition for formal hearing within the time remaining to file an answer to the original petition, or within 10 days after service of the amended petition, whichever is later.

(f) Assignment to Hearing Committee. In accordance with Rule 12(e), a petition for formal hearing will be assigned by the Director to a Hearing Committee after an answer is filed or after the expiration of the time for filing an answer, unless Respondent tenders conditional consent to a specific discipline. The notice of assignment to Hearing Committee will indicate the names of the members of the Hearing Committee assigned to hear the matter and will advise Respondent that (s)he is entitled to

(1) be represented by counsel;

(2) examine and crossexamine witnesses;

(3) present evidence in his or her own behalf;

(4) have subpoenas issued in his or her behalf; and

(5) challenge peremptorily and for cause members of the Hearing Committee, as provided in Rule 12(h).

(g) Pre-Hearing Conference. A pre-hearing conference may be convened by the Chair of the Hearing Committee or the Director for stipulation as to matters of fact, simplification of issues, scheduling of pre-hearing motions, the establishment of a date for the formal hearing, and other similar matters which may be resolved prior to hearing.

(h) Discipline by Consent. Respondent may tender a conditional consent to a specific discipline contained in Rule 16. This conditional consent will be submitted to Bar Counsel for his or her approval. If accepted by Bar Counsel, (s)he will refer the conditional admission to the Board for its approval or rejection of the requested discipline.

The consenting Respondent will present to the Board an affidavit stating that (s)he desires to consent to the specific discipline and that

(1) his or her consent is freely and voluntarily given and is not the subject of any coercion or duress; and

(2) (s)he admits to the charges stated in the grievance.

Acceptance of the conditional consent by the Board will be subject to Court approval if the specific discipline to be imposed includes discipline provided in Rule 16(a) (1), (2), (3) and (4). Any conditional admission rejected by the Board or the Court will be withdrawn and Bar Counsel will proceed under Section (e) of this Rule. Any admission made by Respondent in a conditional consent rejected by the Board or the Court cannot be used against the Respondent in any subsequent proceeding.

If the Court or the Board rejects a conditional consent, the matter will be remanded to the Hearing Committee, if any, which was appointed to hear the petition. If no Hearing Committee has been appointed, the Director will appoint one in accordance with Section (f) of this Rule.

(i) Notice of Hearing. The Director will serve a notice of formal hearing upon Respondent, or his or her counsel, indicating the date and place of the formal hearing.

(j) Rules of Evidence. The rules of evidence applicable in administrative hearings will apply in all hearings before Hearing Committees. No new evidence shall be allowed by the Committee chair after the hearing without notice to the opposing party and an opportunity to respond.

(k) Motions, Findings, Conclusions, Recommendation. Hearing Committees may consider and rule on pre-hearing motions. On procedural motions, the Committee chair will rule; on dispositive or substantive motions, the full Hearing Committee will rule. The Hearing Committee may direct either or both parties to submit proposed findings of fact, conclusions of law, and a recommendation after the formal hearing, which will be filed within 10 days of the date of the request by the Committee.

(l) Report of Hearing Committee and Appeal. Within 30 days of the conclusion of a formal hearing, the Hearing Committee will submit its report to the Board in accordance with 12(i) (4), unless an extension of time is granted by the President of the Board. Within 10 days of service of the report, Bar Counsel or Respondent may appeal the Hearing Committee's findings of fact, conclusions of law, and recommendation and request oral argument before the Board, as provided in Rule 25(f). The Director will thereafter set the dates for submission of briefs and oral argument before the Board.

(m) Oral Argument. Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (1) of this Rule.

(n) Board Recommendation or Order. The Board will review the Hearing Committee report and record and enter an appropriate recommendation or order as provided in Rule 10(c) (4), (5), and (6). If the Board has recommended discipline as provided in Rule 16(a) (1), (2), (3) or (4), it will submit to the Court its findings of fact, conclusions of law, recommendation, and the record. The record will include a transcript of all proceedings before the Board as well as the Hearing Committee report.

(o) Notification of Disposition. The Director will promptly notify all parties of the Board's action.

(p) Appeal from Board Order or Recommendation. Bar Counsel or Respondent may appeal from an order or recommendation of the Board made under Section (n) of this Rule by filing a notice of appeal with the Court within 10 days of service of the Board's order or recommendation. Parts II

and V of the Alaska Rules of Appellate Procedure will govern appeals filed under this Rule, except that for purposes of Appellate Rule 210(c)(2), excerpts of record must contain:

- (1) the petition for formal hearing and answer and any amended petition or answer;
 - (2) the Hearing Committee report and any amended or supplemental report;
 - (3) all briefing and transcripts of proceedings before the Board and the Board's findings of fact, conclusions of law, and recommendation, and any amended or supplemental findings of fact, conclusions of law, and recommendation;
 - (4) all Hearing Committee or Board orders or rulings sought to be reviewed;
 - (5) if the grant or denial of a motion is at issue in the appeal, the motion, the transcript of any discussion of the motion, and briefs, memoranda, and relevant portions of documents filed in support of or in opposition to the motion; and
 - (6) specific portions of other documents in the record, including documentary exhibits, that are referred to in the brief and essential to the resolution of an issue on appeal.
- (q) Record of Proceedings. A complete stenographic or electronic record of all proceedings before Hearing Committees and before the Board will be made and preserved. The Court shall furnish at its expense the necessary equipment, operator, and stenographic services for the preservation of the record of all such proceedings, and for the preparation of transcripts of all such proceedings.
- (r) Review by Supreme Court. The Court will review findings of fact, conclusions of law, and recommendations of discipline made by the Board pursuant to Section (n) of this Rule. The Court will decide the grounds for discipline, pursuant to Rule 15; the type of discipline to be imposed, pursuant to Rule 16(a); and any requirements to be imposed, pursuant to Rule 16(c). When no appeal has been taken pursuant to Section (p) of this Rule, and if the Court determines that discipline different than that recommended by the Board may be warranted, the Court will so notify the parties and give them an opportunity to be heard.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 14 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 962 effective July 15, 1989; by SCO 963 effective July 15, 1989; by SCO 1048 effective nunc pro tunc September 12, 1990; by SCO 1153 effective July 15, 1994; by SCO 1454, effective October 15, 2003; and by SCO 1601 effective April 16, 2007)

91 P.3d 271 (Mem)
Supreme Court of Alaska.

John A. ANDERSON, Appellant,
v.
ALASKA BAR ASSOCIATION, Appellee.

No. S-11215. | May 14, 2004.

*271 Appeal from the Superior Court of the State of Alaska,
Third Judicial District, Anchorage, Morgan Christen, Judge.

Attorneys and Law Firms

John A. Anderson, pro se, Anchorage.

Mark Woelber, Assistant Bar Counsel, Alaska Bar
Association, Anchorage, for Appellee.

Before: BRYNER, Chief Justice, MATTHEWS,
EASTAUGH, FABE, and CARPENETI, Justices.

Opinion

OPINION

PER CURIAM.

Anderson filed a grievance with the Alaska Bar Association alleging various instances of attorney misconduct. After taking preliminary steps, Bar Counsel decided that a formal investigation was not warranted and so notified Anderson. When Anderson sought reconsideration, Bar Counsel forwarded the file to Board Discipline Liaison to review. Board Discipline Liaison concurred in Bar Counsel's decision not to open an investigation.

*272 Each of the above steps was authorized and taken pursuant to Bar Rule 22(a). What Anderson did next is not covered by any rule. He filed a "Notice of Appeal from Administrative Agency" with the superior court, seeking review of the decision not to open a formal investigation of the grievance that he had filed. On motion of the Bar Association the superior court dismissed the appeal. Anderson then appealed to this court, urging that we review the Bar Association's decision not to accept the grievance for investigation.

In an order dated February 24, 2004, we affirmed the order of the superior court on the ground that the superior

court lacks jurisdiction to hear appeals from the Alaska Bar Association concerning lawyer disciplinary matters. But we also concluded that grievance-closing decisions under Bar Rule 22(a) may, upon timely request of a complainant, be reviewed by this court. We based this conclusion on the presumption of reviewability pertaining to all final administrative orders, and the inherent authority of this court to regulate the practice of law. We called for further briefing on the question whether Bar Counsel abused his discretion in determining that the allegations contained in the grievance did not warrant an investigation.¹

The additional briefing is now complete. Based on our review of the parties' arguments and the record, we conclude that Bar Counsel did not abuse his discretion in declining to accept the grievance for investigation. This proceeding is therefore DISMISSED.

Order

1. The order of the superior court of August 23, 2003, dismissing this case is AFFIRMED because the superior court lacks jurisdiction to hear appeals from the Alaska Bar Association concerning lawyer disciplinary matters.

2. Although the Bar Rules do not provide for supreme court review of decisions of the board discipline liaison when the liaison affirms the decision of bar counsel not to accept a grievance for investigation under Bar Rule 22(a), such review is appropriate. All final administrative actions are presumed to be reviewable. *State, Dep't of Fish & Game v. Meyer*, 906 P.2d 1365, 1370 (Alaska 1995). A case-closing decision rejecting a grievance for investigation is a final administrative action by the Alaska Bar Association. *See id.* at 1370-72. As an adjunct of the judicial power vested in it by article IV, section 1 of the Alaska Constitution, this court has the inherent authority to regulate the practice of law which encompasses the power to discipline members of the Alaska Bar Association. *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 165 (Alaska 1991).

3. In light of the presumption of reviewability and the court's inherent authority, we conclude that grievance-closing decisions under Bar Rule 22(a) may, upon timely request of a complainant, be reviewed by this court. The standard of review should be deferential, namely, whether bar counsel abused his or her discretion in determining that the allegations contained in the grievance do not warrant an investigation.

See *Vick v. Board of Electrical Examiners*, 626 P.2d 90, 93 (Alaska 1981).

4. Appellant describes the substance of his grievance in his opening brief filed November 3, 2003. On or before March 25, 2004, the Alaska Bar Association shall file a brief in support of bar counsel's decision not to accept the grievance for investigation and the affirmance of that decision by board discipline liaison. If deemed necessary, the bar association

may submit a confidential disciplinary file as an appeal record.

5. The appellant shall have twenty days after receipt of the bar association's brief within which to file a reply brief.

Entered at the direction of the full court.

Footnotes

1 The order of February 24, 2004, is appended to this opinion.

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