

**ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE**

March 12, 2013
8:06 a.m.

MEMBERS PRESENT

Representative Bob Lynn, Chair
Representative Wes Keller, Vice Chair
Representative Lynn Gattis
Representative Shelley Hughes
Representative Doug Isaacson
Representative Jonathan Kreiss-Tomkins

MEMBERS ABSENT

Representative Charisse Millett

COMMITTEE CALENDAR

HOUSE BILL NO. 127

"An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

- HEARD & HELD

HOUSE JOINT RESOLUTION NO. 8

Urging the United States Congress and the President of the United States to work to amend the Constitution of the United States to prohibit corporations, unions, and other organizations from making unlimited independent expenditures supporting or opposing candidates for public office.

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 127

SHORT TITLE: OMBUDSMAN

SPONSOR(s): RULES BY REQUEST

02/18/13 (H) READ THE FIRST TIME - REFERRALS
02/18/13 (H) STA, JUD
03/12/13 (H) STA AT 8:00 AM CAPITOL 106

BILL: HJR 8

SHORT TITLE: AMEND U.S. CONST. RE CAMPAIGN MONEY

SPONSOR(s): GARA

02/08/13 (H) READ THE FIRST TIME - REFERRALS
02/08/13 (H) STA, JUD
02/15/13 (H) SPONSOR SUBSTITUTE INTRODUCED
02/15/13 (H) READ THE FIRST TIME - REFERRALS
02/15/13 (H) STA, JUD
03/12/13 (H) STA AT 8:00 AM CAPITOL 106

WITNESS REGISTER

BETH LEIBOWITZ, Assistant Ombudsman
Office of the Ombudsman
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

LINDA LORD JENKINS, Ombudsman
Office of the Ombudsman
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing on HB 127.

STEVE VAN GOOR, Bar Council
Alaska Bar Association
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

GEORGE MEYER
Palmer, Alaska

POSITION STATEMENT: Testified during the hearing on HJR 8.

REPRESENTATIVE LES GARA
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: As sponsor, presented HJR 8.

MIKE FRANK
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HJR 8.

KATHARINE VEH
Soldotna, Alaska

POSITION STATEMENT: Testified in support of HJR 8.

ACTION NARRATIVE

[8:06:39 AM](#)

CHAIR BOB LYNN called the House State Affairs Standing Committee meeting to order at 8:06 a.m. Representatives Keller, Isaacson, Gattis, Hughes, Kreiss-Tomkins, and Lynn were present at the call to order.

HB 127-OMBUDSMAN

[8:07:39 AM](#)

CHAIR LYNN announced that the first order of business was HOUSE BILL NO. 127, "An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

8:07:49 AM

BETH LEIBOWITZ, Assistant Ombudsman, Office of the Ombudsman, Alaska State Legislature, in response to Chair Lynn, reviewed the function of the Office of the Ombudsman is to address the concerns of people who are unhappy with a state agency. The Office of the Ombudsman determines whether a complaint is justified and, if so, what can be done to remedy the situation. She said if the office is overworked, there may be no remedy for a valid complaint. She said most agencies want to correct "mistakes of fact." Ms. Leibowitz said the Office of the Ombudsman hears from: the Office of Children's Services (OCS), which involves children in state custody; parents, relatives, and family friends; people dealing with child support cases, because that agency deals with a lot of money and with children; the Department of Corrections, where the customer is usually in jail and unhappy; and every executive branch agency at some point or another. She stated that the Office of the Ombudsman can make recommendations, investigate, obtain records, and report, but cannot force change on anyone; it does not have enforcement power.

8:10:30 AM

MS. LEIBOWITZ said it has been about 20 years since the Office of the Ombudsman has had any major amendments to its "enabling legislation." She related that at the request of the Ombudsman, she worked with Legislative Legal and Research Services to produce draft legislation to address the accumulated problems.

MS. LEIBOWITZ ventured that the most important provision in the proposed legislation is that which would amend the testimonial privilege of the Office of the Ombudsman. She explained that currently the Office of the Ombudsman may not testify in court except to enforce the provisions of its legislation. She said that is a "perfectly good privilege statute," which has existed since 1975; however, it does not address production of documents or administrative hearings. The Office of the Ombudsman would like to amend the statute to express on matters of quasi-judicial forum. In response to Chair Lynn, Ms. Leibowitz explained her plan had been to cover HB 127 by topic.

8:12:16 AM

CHAIR LYNN requested Ms. Leibowitz talk about the bill by section, instead.

[8:12:37 AM](#)

MS. LEIBOWITZ directed attention to Section 1, which deals with the Alaska Bar Association (ABA). She said the Office of the Ombudsman would like a yes or no answer as to whether ABA is an agency over which it should have jurisdiction. She said in legal analysis, some of the factors used by the Alaska Supreme Court appear to make the ABA look like an agency over which the Office of the Ombudsman would have jurisdiction, while other factors do not. Since the early 1980s, the Office of the Ombudsman has maintained that the ABA should be in its jurisdiction, while the ABA has held the opposite view.

CHAIR LYNN asked if both sides are looking for clarity.

MS. LEIBOWITZ said she thinks the ABA would "simply like to have it be no and absolutely not." She clarified, "We do not have a position about which way it goes, other than that we want it settled."

[8:14:23 AM](#)

REPRESENTATIVE ISAACSON questioned what the value of having the ABA under the jurisdiction of the Office of the Ombudsman would be, since "the aspect of jurisdiction usually requires that you have the ability to enforce."

[8:14:43 AM](#)

MS. LEIBOWITZ offered her understanding that it would be the same value as for other licensing agencies. She said currently the Office of the Ombudsman has jurisdiction over the Alaska State Medical Board and all boards that are handled through professional licensing. The primary effect of that jurisdiction is that the Office of the Ombudsman can obtain records and talk to staff to find out if there is a problem in how a complaint or licensing is being handled. She said Representative Isaacson is correct that statute gives the Office of the Ombudsman no enforcement power; it gives the office access.

REPRESENTATIVE ISAACSON said he has directed people to the Office of the Ombudsman, and he expressed appreciation for Ms. Leibowitz' review of what the office does. He drew attention to a letter from the ABA, [dated March 7, 2013, included in the committee packet], which talks about the ABA's strict oversight of its disciplinary responsibilities, as well as mentioning the issue of confidentiality. He asked Ms. Leibowitz to describe

the difference between the ABA and OCS, in terms of how the Office of the Ombudsman handles complaints.

MS. LEIBOWITZ said she thinks the closest analogy would be the Alaska State Medical Board. She said occasionally the Office of the Ombudsman receives complaints about the process for licensing discipline and it looks at what the investigator pulled, whether the licensing was a timely process, and whether access to speak to the board was granted if desired. If someone filed a complaint about a doctor, the Office of the Ombudsman would consider whether the board reviewed the medical files, whether it did what it should do when reviewing such a case, and whether the complaint was handled in a timely manner. She said the ABA is different, because even with jurisdiction over the ABA's administrative agency, it is likely that disciplinary issues still would not be within the reach of the Office of the Ombudsman, because it cannot view judicial decisions; it is not an appeals court. She said disciplinary decisions, such as suspending or disbaring an attorney, are reviewed and decided by justices of the Alaska Supreme Court. She said that part is a little bit like OCS, because there are decisions in OCS cases that are decided by judges. The Office of Ombudsman must groom through those cases and determine which decisions are administrative and which are cases that have been ruled on by a judge, thereby making them off limits.

[8:18:53 AM](#)

REPRESENTATIVE ISAACSON offered his understanding that Ms. Leibowitz is saying that it would be no different to have the ABA under the jurisdiction of the Office of the Ombudsman than any other agency, because the primary focus of the office is to ensure that a person's complaint is heard.

MS. LEIBOWITZ said she thinks that is the case; however, she said she thinks if the legislature wants the Office of the Ombudsman to deal with ABA matters, an additional section of statute would be necessary to address Bar Rules 21 and 22.

REPRESENTATIVE ISAACSON asked Ms. Leibowitz if she is recommending that the proposed legislation be held until that specific language can be brought to the committee. He said he does not want to pass a bill out of committee that is not well thought out or complete.

MS. LEIBOWITZ said that depends on how the committee would answer the basic jurisdictional question. She explained that if

the answer is no, then there is no need to hold the bill; Section 1 could be amended. She stated, "I cannot offer you an ultimate opinion about whether it's a great thing for us to have jurisdiction, because, as I said, our office just needs to know, as a policy call: Does the legislature want us to do this or not?"

[8:21:08 AM](#)

CHAIR LYNN expressed his intent is not to move the bill today to give time to address controversial topics within it. He said, "I can see where ... if we don't get it straightened out on this Section 1, we would need further information on it."

REPRESENTATIVE ISAACSON echoed the chair's remark.

[8:22:03 AM](#)

MS. LEIBOWITZ proffered that the aforementioned bar rules provide for the confidentiality of complaint and disciplinary proceeding within the bar. She said a subsection would need to be added to indicate that the Office of the Ombudsman is one of the entities that are allowed to access those records.

[8:22:34 AM](#)

LINDA LORD JENKINS, Ombudsman, Office of the Ombudsman, Alaska State Legislature, confirmed Ms. Leibowitz' testimony that the Office of the Ombudsman is looking for legislative guidance. She said she thinks the documents and backup documents produced are fairly evenhanded, and the office just wants the question settled. She said she thinks it would be appropriate, if necessary, to amend the proposed bill to address the questions raised about amending the bar rules.

[8:23:35 AM](#)

REPRESENTATIVE KELLER concurred with the remarks of Chair Lynn and Representative Isaacson, regarding the committee's need to see the language of the bar rules in order to make an informed decision.

MS. LEIBOWITZ said she would be happy to provide that language via Legislative Legal and Research Services.

[8:24:07 AM](#)

STEVE VAN GOOR, Bar Council, Alaska Bar Association, stated that in 1965, the legislature decided this issue when it created the bar as an instrumentality of the state, not as an agency under either the executive, legislative, or judicial branches. He said there are two levels of review for any complaint. A person dissatisfied with the decision by the Bar Council can go to a board liaison and have the decision reviewed. The liaison has the complete authority to direct the council to conduct further investigations. Even after the liaison makes a decision on a complaint, the complainant can take that decision up to the Alaska Supreme Court. Mr. Van Goor said the ABA is regularly reviewed by the Division of Legislative Budget and Audit. He said that as pointed out by Ms. Leibowitz, by court rule the ABA could not afford access to the Office of the Ombudsman, unless the attorney waived confidentiality, unless an exception applied in Bar Rule 21, or the [Alaska] Supreme Court ordered disclosure. He said there would have to be litigation, because the bar is essentially "in the middle." He explained that the bar is ordered by court rule to enforce confidentiality of the process up to the point of formal charges or public discipline, and it does not have the authority to uniformly waive confidentiality.

MR. VAN GOOR said there is a comment in the report given to the committee that states there have been six matters since December of 1999, where there was a jurisdictional dispute regarding whether or not the Office of the Ombudsman could investigate the ABA. He pointed out that since January of 2000, the ABA has processed nearly 3,079 complaints. Of those, the six matters referenced in the report are two-tenths of one percent of the matters reviewed by the ABA. Mr. Van Goor stated that the ABA is mindful of its responsibilities to Alaska citizens. He said it cooperates thoroughly with the legislature in periodic audits conducted by Legislative Audit, with the executive branch in the governor's appointment of the three public members of its board of governors, and with the Alaska Supreme Court, as it supervises the admission and disciplinary process. Mr. Van Goor opined that Section 1 of HB 127 is not necessary.

[8:27:06 AM](#)

CHAIR LYNN asked Mr. Van Goor if he thinks there is clarity as to "who can do what" without the proposed legislation.

MR. VAN GOOR said in order to make a jurisdictional decision, the first decision to be made would have to be whether or not the ABA is an agency, and since 1965, the ABA has not been

classified as an agency, but rather as an instrumentality of the state, much the same as the University of Alaska is an instrumentality of the state. He said, "Quite frankly, we believe the legislature has decided this issue already"

8:28:12 AM

REPRESENTATIVE KELLER said Mr. Van Goor had mentioned litigation, and he questioned whether making appropriate changes in Bar Rules 21 and 22 would take away the threat of a law suit.

MR. VAN GOOR responded that Representative Keller is right: The ABA is bound to follow the rules of procedure adopted by the Alaska Supreme Court regarding confidentiality of the grievance process. If those rules are changed, of course the ABA would be obligated to follow the dictates of those rule changes.

REPRESENTATIVE KELLER asked if, in his previous remarks, Mr. Van Goor was saying he thinks the University of Alaska and the ABA are above the basic fact checking conducted by the Office of the Ombudsman. He asked, "Instrumentality of the state ... is not above the law, right?"

MR. VAN GOOR answered that Representative Keller is correct. He clarified the point he was trying to make in his concluding remarks is that ABA is responsible to all three branches of government. He posited that the input of the three public members on the ABA Board of Governors has been extremely affective in terms of disciplinary and admission matters. He said the Alaska Supreme Court has the ultimate responsibility not only in deciding who is and is not admitted to practice law, but also who remains in practice. He emphasized, "So, by no means, in calling the Alaska Bar Association an instrumentality, am I saying that we're above the law and not subject to the three branches of government." He said the intent of classifying the ABA as an instrumentality in 1955 was to underline that the ABA is an important function of state government, which though not directly under the three branches of government, is directly accountable to all three branches.

8:32:07 AM

REPRESENTATIVE KELLER said the Office of the Ombudsman answers to the legislative branch. He stated his belief that the intent behind the creation of the Office of the Ombudsman was to have an entity that stands between potential excesses by agencies or instrumentalities and the people of Alaska, because "there is

nothing else there." He said it is important for the committee to determine whether there may be excesses by the ABA that should be brought to light. He then asked Mr. Van Goor to clarify his previous statistical information regarding complaints.

MR. VAN GOOR directed attention to a paragraph in the middle of page 7 of a handout in the committee packet entitled, "Introduction to Proposed Amendments to the Ombudsman Act (HB 127)," which read as follows:

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.

MR. VAN GOOR explained he was not saying that only two-tenths of one percent of 3,000 complaints resulted in discipline, but was saying that the six complaints the Office of the Ombudsman looked at and determined were a jurisdictional issue has to be compared to the 3,079 complaints that "we" looked at. He said if there was an issue about the ABA not doing a proper job with complaints, it would be reflected in a couple places: First, there would be a finding by the ombudsman in those six complaints that there was a problem, but there was not. Second, there would have been a finding by the Legislative Audit Division that the ABA had failed in its disciplinary and investigative function, but there has been no such finding in any of the audit reports that have been submitted to the legislature since the early 1980s. Mr. Van Goor said the ABA's annual report shows that the association is in a serious disciplinary business and reports annually the number of lawyers that have been disciplined, suspended, or disbarred. Unlike other investigatory and licensing agencies, he said, the ABA publishes notice of discipline, including the type of discipline, in the four major newspapers in the state. He said he does not think there is any other entity that does that, and it is done at significant expense to the association. He said those records are public, and the ABA is currently working to get them on line.

REPRESENTATIVE KELLER asked Mr. Van Goor if it could be the case regarding the six complaints that there were no findings because there was no access to the records at the time.

MR. VAN GOOR answered Representative Keller is correct; however, he said the number of complaints that come to the Office of the Ombudsman pale in comparison with the number of complaints the ABA processes. He surmised that those who are incarcerated "probably complain about their lawyers as they complain about other state agencies, including the Department of Corrections." He said the ABA has a specific way of investigating and responding to concerns expressed by inmates who complain that their representation is ineffective; the Alaska Court System has a method by which it investigates ineffective assistance of counsel; and if an inmate disagrees with the ABA's decision not to investigate or dismiss, that decision can be reviewed by the board liaison and further go to the Alaska Supreme Court. He said he would compare the supervision and responsibility the ABA has for the proper handling of these complaints to any licensing agency in the state. He said the ABA is strictly regulated and takes its job seriously.

[8:38:55 AM](#)

REPRESENTATIVE HUGHES asked Mr. Van Goor to define agency and instrumentality, and to explain why he thinks it is appropriate for the Alaska State Medical Board to be an agency, but not for the ABA to be an agency.

MR. VAN GOOR pointed out that [the Alaska State Medical Board] was created in statute as an agency while the ABA was created "by an instrumentality." He emphasized that the Division of Professional Licensing comes to the legislature on an annual basis to receive legislative funds in order to do its job. The ABA is not funded by public money. He said there was a time the ABA sought reimbursement for the expenses incurred by public members on the Board of Governors, but that occurred 20-30 years ago. Mr. Van Goor said he understands Ms. Leibowitz' argument that under the Sullivan case that "you ought to look at the factors that determine whether or not an agency exists." He said other occupational licensing entities were created as agencies, and he reiterated that the ABA was not.

REPRESENTATIVE HUGHES asked for further explanation regarding the difference between an agency and an instrumentality.

MR. VAN GOOR answered that agencies must adhere to requirements under the Administrative Procedures Act, the Procurement Act, and other state requirements. The ABA has been specifically excluded from the Administrative Procedures Act, he said, primarily because its rule-making function is to suggest rules to be adopted by the Alaska Supreme Court. The ABA is responsible for open records and open meetings, but differs from other state agencies in that it needs the independence to investigate complaints and make rational, thoughtful decisions by its disciplinary board that it submits to the Alaska Supreme Court. He said it is possible that function could be adversely impacted if there were outside pressures brought to bear on the association in making its decision. He said the ABA is represented statewide by members elected from the membership in the various judicial districts. He reiterated that the ABA has the important contribution of governor-appointed public members on the board. He concluded, "So, I think when you look at the requirements that are imposed at other agencies and the oversight imposed on those other agencies, the [Alaska] Bar Association isn't an agency for the purpose of this ... legislation."

[8:44:05 AM](#)

CHAIR LYNN remarked that any legislature can change what previous legislatures have done.

[8:44:32 AM](#)

REPRESENTATIVE HUGHES asked why it is important for the ABA to remain an independent entity and not for the State Board of Medicine to do so.

MR. VAN GOOR answered that the practice of law is different from other occupations licensed by the state, primarily because lawyers are administered the bar [exam], take the oath of office to the ABA as officers of the court, and are responsible for the faithful performance of their duties as lawyers representing clients, as government lawyers representing agencies, and as lawyers appearing ultimately to the Alaska Supreme Court. He said the practice of law is important in maintaining the independence of citizens, so that decisions are merit-based. He said it is important to have an independent, functioning practice of law in any state and that the Alaska Supreme Court has the ability to properly supervise and regulate.

MR. VAN GOOR clarified that he is not by any means saying that the ABA is not subject to the three branches of government. He reiterated his remarks regarding the communication system between the ABA and the three branches. He ventured that the role the Office of the Ombudsman would like is to make suggestions regarding the conduct of a complaint; however, he suggested that that function is already done on a regular basis by the disciplinary board in reviewing the operations of the ABA office and by the supreme court in reviewing how well the ABA is complying with the rules set up for investigations.

[8:47:45 AM](#)

REPRESENTATIVE KELLER remarked that the Office of the Ombudsman has been very clear that it wants clarity, not expansion.

MR. VAN GOOR responded that it did seem that the Office of the Ombudsman was "a bit ambivalent about whether this was necessary or not." He opined that it is not a necessary change. He stated, "Clearly, if the ombudsman wants a yes or no answer, respectfully, the position of the bar is that the answer should be no."

[8:49:03 AM](#)

MS. LEIBOWITZ stated that the strongest argument against ombudsman jurisdiction is the level of [Alaska] Supreme Court review that is involved with the ABA's decisions, and that is because the Office of the Ombudsman does not review judicial decisions. She said that issue is discussed in the appendix of the sectional analysis included in the committee packet. In response to the chair, she said the strongest argument for [ombudsman jurisdiction] is that "at the end of the day, they still look like a licensing entity." She explained that even though the ABA is an instrumentality rather than an agency, it appears to be carrying out the functions of a state regulatory body.

[8:50:35 AM](#)

REPRESENTATIVE KELLER said he thinks there are a number of issues between "what the [Alaska] Supreme Court may or may not decide and the issues that may arise," judging by the work done by the Office of the Ombudsman, which is important to the people.

MS. LEIBOWITZ responded, "If we didn't think there were some [issues], we might not think it necessary to raise this question; though frankly, given the long history of ambiguity on this point, I think it's about time to give it a yes or no, regardless." She said she thinks the ABA has more intense judicial involvement; the Alaska Supreme Court's level of involvement in ABA decisions is higher than for any other type of licensing body in the state. Ms. Leibowitz said, "That would be argument for saying, 'Let the judiciary handle them.'" She added, "But I don't think that covers absolutely everything they do."

[8:52:43 AM](#)

REPRESENTATIVE ISAACSON asked where the Office of the Ombudsman comes into play if someone has a complaint against a doctor versus an attorney.

MS. LEIBOWITZ answered that the Office of the Ombudsman does not attempt to make a substantive call regarding a doctor's standard of care; it gets involved with matters of due process. For example, the office may consider whether the licensee was "heard" when "coming up for discipline" and about to lose his/her license or consider whether the board and its staff of investigators responded in a timely manner and as candidly as the law allows.

REPRESENTATIVE ISAACSON asked Ms. Leibowitz to further her explanation by describing how the Office of the Ombudsman's involvement would differ between legal and medical for "this type of complaint."

MS. LEIBOWITZ offered her understanding that if the ABA determines no disciplinary action is necessary after considering a complaint against an attorney, the complainant has the option of filing a petition asking the Alaska Supreme Court to review that case. She said, "In other words, it can go directly to a judicial decision; not just a deferential one, but one looking right into the Bar Association decision." She relayed that a complainant in a medical case could file an Alaska Superior Court appeal of the decision to decline the complaint; however, she offered her understanding that the court's review would be "a good deal more deferential toward the administrative agency." She added, "It's usually less court involvement."

[8:56:06 AM](#)

REPRESENTATIVE ISAACSON said he can appreciate Mr. Van Goor's testimony "to a certain level," but concurred with Ms. Leibowitz that there is a question about the licensing aspect that makes all the entities appear to be on equal footing and therefore under the jurisdiction of [the Office of the Ombudsman]. He said he guesses that is why further clarification is needed regarding Bar Rules 21 and 22.

[8:56:50 AM](#)

CHAIR LYNN stated that this may be one of the more controversial parts of the bill, so he does not mind spending more time on it.

[8:57:19 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked if there are other states in which the state bar association falls under the purview of the ombudsman's office.

MS. LEIBOWITZ answered there don't seem to be other states, partly because most of the state ombudsman's offices take the entire judicial branch out of their jurisdiction. She said Alaska is unusual in that the Office of the Ombudsman has been given jurisdiction over administrative agencies, even within the judicial branch. For example, it has looked at complaints about the Clerk of Courts Office. She said she thinks at least one of the states that has a general jurisdiction ombudsman has a voluntary bar association, which she said looks even less like a state regulatory agency.

[8:58:30 AM](#)

REPRESENTATIVE KELLER asked Ms. Leibowitz how the Office of the Ombudsman responds to complaints regarding the legislative branch.

MS. LEIBOWITZ answered that the office does not have jurisdiction over elected officials. In theory, the office has jurisdiction over legislative branch agencies, such as Legislative Affairs; however, in practice the office does not "see much of that" and is not "terribly enthusiastic about investigating a sister agency." She deferred to Ms. Lord-Jenkins for further comment.

[8:59:33 AM](#)

MS. LORD-JENKINS said the Office of the Ombudsman has, on occasion, received complaints about legislative aides, which it forwards to the employer of the aide. The office has received complaints about legislative agencies and has made inquiries about the complaints as appropriate; however, she offered her understanding that in the time she has been with the Office of the Ombudsman, since 1989, the office has not issued a formal report or even gone beyond a few inquiry calls.

REPRESENTATIVE KELLER said that really illustrates the value of the Office of the Ombudsman.

[9:00:53 AM](#)

REPRESENTATIVE HUGHES asked how having oversight of the ABA would impact the workload of the Office of the Ombudsman.

[9:01:12 AM](#)

MS. LEIBOWITZ surmised that the number of ABA cases seen by the Office of the Ombudsman would increase, but not by much, in part because the ABA would be "running" its process, and some of its decisions would be reviewed by the supreme court rather than by the Office of the Ombudsman. In response to a follow-up question, she estimated that over the last decade, the Office of the Ombudsman has seen no more than an average of one or two ABA cases a year. She said there have been cases the office was unable to go forward with, and thus was unable to resolve one way or the other. She said if the legislature appointed the Office of the Ombudsman as overseer of ABA cases, she does not know the ultimate impact, because that would be a new area of focus. Notwithstanding that, she estimated the office initially would see approximately five or six cases a year, at most, and she said she does not know how much that case load would increase after that.

[9:03:30 AM](#)

REPRESENTATIVE KREISS-TOMKINS ventured that the argument against placing the ABA within the jurisdiction of the Office of the Ombudsman would be that it would be redundant; the judicial branch already supervises the ABA. He asked in what cases complaints against the ABA would not be adequately reviewed by the court system.

MS. LEIBOWITZ answered, "I think it's some of the same problems that ... we see with other state agencies, where it's timeliness

of response; it's how clear the response was. ... Those tend to be the big ones we see with all state agencies of complaints that aren't really susceptible to judicial review. It's, 'How is this being handled while it's getting to the end point?'"

REPRESENTATIVE KREISS-TOMKINS asked Ms. Leibowitz to explain what she means by "timeliness of response." He asked if she means that the Supreme Court has a lengthy review process for complaints against the ABA.

MS. LEIBOWITZ responded as follows:

Actually, the first part of that is that before it ever would go to the court, the Bar Association is reviewing it, and I think most agencies at some point, whether it's justified or not, we get a complaint saying, "I ... asked the agency for such and such and it fell into a black hole." You know, ... sometimes those are really not justified and sometimes they are; it's basically a responsiveness issue. The other part of that, ... especially for a complaint that the Bar Association turns down: the [Alaska] Supreme Court is only going to review that if the complainant then files a request for the court to review it.

[9:05:41 AM](#)

MS. LEIBOWITZ, in response to Representative Hughes, emphasized that the Office of the Ombudsman is not a replacement for the ABA's process. She explained that if a person calls the Office of the Ombudsman with a complaint about an attorney, the office first would advise him/her to get a complaint packet from the ABA, and from there the Office of the Ombudsman can determine whether the ABA is managing its process well.

REPRESENTATIVE HUGHES explained she is trying to determine how the decision the committee makes regarding HB 127 will affect the public.

MS. LEIBOWITZ said she does not think it is possible to know the answer to that concern yet, because the Office of the Ombudsman has never actually completed an investigation of the ABA process. She said to some extent it will not be a complete resolution, because in a disciplinary decision against an attorney, "the justice's jurisdiction over that would tend to indicate that we would not be there." She concluded, "So, to

some extent we're not going to be able to address some of the issues that we might address with other state agencies."

[9:08:21 AM](#)

CHAIR LYNN requested that Ms. Leibowitz continue with the sectional analysis, for the time being skipping Sections 12 and 13, which he described as needing more time for discussion.

[9:09:11 AM](#)

MS. LEIBOWITZ directed attention to Section 2. She said currently the ombudsman's salary is set at a Step A, Range 26, and under Section 2 of HB 127, the Step A would be removed, thus allowing the ombudsman to occasionally receive a step increase within a Range 26.

CHAIR LYNN asked how much of an increase that would provide.

MS. LEIBOWITZ answered, "In a year where the ombudsman received a step increase, budget permitting, it would be about \$3,000-\$4,000 as a salary increase." In response to a follow-up question, she said she would find out how much the ombudsman currently makes and let the committee know later. She related that in 2012, the legislature revised compensation for the salary of the Victims' Rights Advocate from a Step A, Range 26, to allow that position to receive step increases.

MS. LEIBOWITZ said the legislature has a provision that allows the hiring of individuals under a personal services contract, which is done primarily to allow legislative offices to hire retirees to work on contract. The provision states that it is applicable to the entire legislative branch; however, the ombudsman's statute, which predates the personal services contract provision, states that employment policies under [AS] 24.10 do not apply to the Office of the Ombudsman. Ms. Leibowitz explained that Section 3 would clarify that the personal services contract provision applies to the ombudsman.

[9:12:13 AM](#)

MS. LEIBOWITZ relayed that under current statute, the opinions and recommendations provided to an agency by the Office of the Ombudsman are confidential; however, correspondence between the Office of the Ombudsman and the state agency personnel prior to making those opinions and recommendations is not guaranteed

confidentiality. Ms. Leibowitz said Section 4 would ensure the confidentiality of that correspondence.

REPRESENTATIVE ISAACSON asked Ms. Leibowitz to confirm that the Office of the Ombudsman is not requesting to conceal information, but rather to have transparency after the opinion or recommendation is made.

MS. LEIBOWITZ responded, "Currently the only part of the ombudsman's report that is releasable is when the ombudsman publishes after investigation, and the ombudsman can choose to make the investigation report public. ... These communications would remain nonpublic even afterwards," for example, if the ombudsman discovered a complaint had no merit and did not publish on it.

REPRESENTATIVE ISAACSON said that disturbs him, "because we want to be able to know that all issues that are settled are settled properly." He mentioned the Freedom of Information Act (FOIA), and asked if there is a current problem where people are asking for the e-mails to be made public before the Office of the Ombudsman is able to release a report or if [requesting Section 4] is a preventative measure.

MS. LEIBOWITZ responded there was one case last year when an individual asked the Office of the Ombudsman for a copy of a letter to an agency and the office refused; however, she said it is not clear whether the agency would have to give the information to the person if asked to do so. Ms. Leibowitz commented on the irony of information being kept confidential by the Office of the Ombudsman while perhaps being shared by the agency involved.

[9:15:45 AM](#)

MS. LEIBOWITZ said Section 5 also addresses the issue of confidentiality. She explained that under current statute, the Office of the Ombudsman does not have access to attorney/client privilege material or attorney work product, and it is not contesting that fact. However, executive branch personnel sometimes provides the ombudsman with opinions given by the Office of the Attorney General, and Section 5 would offer an anti-waiver provision to "protect their attorney/client privilege from ... being considered waived if they offered the information to our office to explain what they're doing."

MS. LEIBOWITZ stated that Sections 6-9 would provide a statutory mechanism for the Office of the Ombudsman to issue an informal report. She explained that under original statute, the ombudsman personally "shall report," and she said that report made by the ombudsman is formalized and cumbersome; the office issues approximately one dozen of them a year. Last year, she relayed, the Office of the Ombudsman received 1,000 complaints, many of which were unsupported or declined as "premature," but about 200-300 of which received a substantial amount of investigative work. She said some of those complaints were discontinued, while some resulted in the office suggesting to the agency involved that there was something that needed to be fixed; it did not go to a formal report. She stated, "We would like it to be clear in statute that we have a mechanism for ... investigating and resolving a complaint short of that formal report at the end."

[9:18:48 AM](#)

MS. LEIBOWITZ said Section 10 relates to testimonial privilege. She explained that the Office of the Ombudsman currently has the privilege to not testify in court except as necessary to "enforce the provision of this chapter." She said that dates from the establishment of the Office of the Ombudsman in 1975 and is designed to keep the ombudsman out of collateral litigation. She said, "We would like that testimonial privilege made more express to make it clear that it applies to administrative hearings as well as to court [proceedings], and to make it very clear that we do not produce records any more than we go and testify verbally."

[9:19:42 AM](#)

REPRESENTATIVE ISAACSON asked if this has been a problem.

MS. LEIBOWITZ answered not to date. She explained that the Office of Victims' Rights statute, which was modeled, in part, on the Ombudsman Act, has a lot of identical language, except that the testimonial privilege section enacted for the Office of Victims' Rights in 2001 is more express and much clearer. She opined that it is time to upgrade the language for the Office of the Ombudsman.

[9:20:20 AM](#)

MS. LEIBOWITZ said AS 24.55.275 is the procurement statute, and it has a couple problems: first, it refers only to contracts

for services, and second, it basically states that the office shall have regulations consistent with AS 36.30, which refers procurement for legislative branch agencies back to Legislative Counsel and the procurement policies made by the legislature. She said, "We'd like that amended to make it clear that our procurement applies to all types of procurement, not simply contracts to services, and we would like it tied to the legislative procurement policies."

[9:21:37 AM](#)

CHAIR LYNN reminded the committee of his intent to bypass Sections 12 and 13, and he asked committee members to review those sections carefully before the next bill hearing.

[9:21:51 AM](#)

MS. LEIBOWITZ explained that Sections 5 and 10 are indirect amendments of the court rules; Sections 14 and 16 state that the changes to the court rules would not be effective without a two-thirds majority [vote of each house of the legislature].

MS. LEIBOWITZ noted that Section 15 relates to Section 12 and 13.

CHAIR LYNN asked the committee to also consider Section 13 before the next bill hearing.

[9:23:12 AM](#)

GEORGE MEYER stated that he finds it interesting that the previous testifier for the ABA "classifies himself as an instrument of the state." He questioned if that means school teachers, union halls, and preachers fall into the same category.

CHAIR LYNN asked if anyone had a response to that query.

[9:24:00 AM](#)

MS. LEIBOWITZ proffered that a union is a private entity, and she said the Office of the Ombudsman does not deal with churches or have jurisdiction over school districts, unless the school district has signed up to work with the Office of the Ombudsman. In response to Mr. Meyer, she said, "If I had a clear answer for what 'instrumentality of the state' meant, then I think that we might not be here today."

[9:24:51 AM](#)

REPRESENTATIVE KELLER said he looked up "instrumentality" in the dictionary and found that one of the synonyms for the word is "agency." He indicated that the committee is considering the term as it relates to the bill.

[9:25:23 AM](#)

MR. MEYER emphasized the importance of the legislature conducting the state's business with integrity and doing things in "the proper way."

[9:25:58 AM](#)

MS. LEIBOWITZ thanked the committee for the opportunity to speak on HB 127.

[9:26:12 AM](#)

CHAIR LYNN [announced that HB 127 was held over].

[9:26:41 AM](#)

The committee took a brief at-ease at 9:26 a.m.

HJR 8-AMEND U.S. CONST. RE CAMPAIGN MONEY

[9:29:08 AM](#)

CHAIR LYNN announced that the final order of business was SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 8, Urging the United States Congress and the President of the United States to work to amend the Constitution of the United States to prohibit corporations, unions, and other organizations from making unlimited independent expenditures supporting or opposing candidates for public office.

[9:29:26 AM](#)

REPRESENTATIVE KELLER moved to adopt the proposed committee substitute (CS) for SSHJR 8, Version 28-LS0424/C, Bullard, 3/11/13, as a work draft. There being no objection, Version C was before the committee.

[9:30:05 AM](#)

CHAIR LYNN reviewed the changes incorporated in Version C. The first change was to replace the word "large" with "unlimited" when preceding the word "contributions". The next change was to delete language from the sponsor substitute, on page 2, lines 1-5. The last change was to add two "whereas" clauses, which are found on page 2, lines 1-6.

[9:31:00 AM](#)

REPRESENTATIVE LES GARA, Alaska State Legislature, as sponsor, presented HJR 8. He explained that the proposed legislation is a response to Citizens United, a [U.S.] Supreme Court decision a couple years ago, which allowed environmental groups, corporations, unions, and "all sorts of special interest groups" to make unlimited [campaign] contributions. He said the groups have to list whether the money they contribute is in support of or in opposition to a candidate, and 80 percent of the contributions are listed as being made in opposition to a candidate. Representative Gara said the statements made in opposition to candidates are negative and often untrue. He said these large groups, including foreign groups, are influencing elections. He related that in 2008, before Citizens United, independent expenditures on the national level totaled \$150 million; for the most recent Presidential Election in 2012, independent expenditures totaled over one billion dollars - a seven-fold increase. He said the airways have been flooded with negative advertisements.

CHAIR LYNN remarked that what is negative for one candidate can be positive for another.

REPRESENTATIVE GARA indicated that he would not like certain negative statements made about his opponent, even if those statements benefitted his own campaign.

REPRESENTATIVE GARA said the question is: Do we want money to flood out the best ideas? He said [false] negative advertising aired or printed just days before an election gives no time for the candidate being attacked to respond, and "all of a sudden the election gets dictated and the issues get dictated by outside groups, not by the candidates who are running against each other.

[9:34:11 AM](#)

CHAIR LYNN said the House Judiciary Standing Committee in a previous legislative session debated at length the requirements for disclosure, and he offered his understanding that there is a requirement for the top three contributors to be announced not only in writing at the bottom of the television screen, but also audibly announced so that someone listening to the television but not watching it can hear who the contributor is.

REPRESENTATIVE GARA indicated that Alaska and some other states adopted that requirement, and the subject has been debated by Congress. He said "they" have found a loophole regarding that requirement; therefore, it is not working well. In response to Chair Lynn, he explained that top donors are filtering their money through local groups. He said that is something that could be fixed in law, but stated that that is not really the focus of the proposed joint resolution.

[9:36:04 AM](#)

REPRESENTATIVE GARA, in response to Representative Keller, indicated that the previous statement he made regarding the percentage of money focused on negative advertising can be found among the information he provided in the committee packet; it has been documented.

REPRESENTATIVE GARA stated that the goal of CSSS HJR 8 is to obtain a federal Constitutional amendment when three-quarters of the states ratify the Constitutional amendment put out by Congress. He said roughly 11 states thus far have told Congress they want a Constitutional amendment, while 20 other states are considering resolutions like CSSS HJR 8. He said he anticipates more states will follow suit.

[9:37:29 AM](#)

REPRESENTATIVE GARA responded to a request from the chair to summarize the purpose of each "whereas" clause in the proposed joint resolution. He said the first whereas clause talks about the ability of groups to put unlimited amounts of money into campaign expenditures; the second whereas clause says Citizens United was highly contested, but is the law of the land, and independent expenditures cannot be stopped as long as Citizens United exists; and the third whereas clause states that unlimited expenditures skew the political system in favor of those who have money. He opined that states should have the right to limit independent expenditures, and he suggested

perhaps there should be limits, such as there are for political action committees (PACs).

CHAIR LYNN offered his understanding that for campaigns run in Alaska, individual campaign contributions were limited to \$1,000 and are now limited to \$500, while PACs were limited to \$2,000 and are now limited to \$1,000.

REPRESENTATIVE GARA ventured a person could predict what someone who gives \$25 to a campaign would say when asked whether that \$25 gives him/her the same voice in politics as a group that donates a million dollars.

[9:39:15 AM](#)

REPRESENTATIVE GARA noted that the fourth whereas clause was added by the committee.

[9:39:30 AM](#)

CHAIR LYNN addressed the fourth whereas clause, on page 2, lines 1-3, which read as follows:

WHEREAS the boards of directors and management of corporations, unions, and other organizations permitted to make unlimited independent expenditures may include individuals who are not citizens of the United States; and

CHAIR LYNN offered his understanding that the decision to put forth campaign expenditures rests with the board of directors of a corporation, and members of many boards are not U.S. citizens. He opined that only U.S. citizens should be able to contribute for or against a candidate or proposition, which is why he proposed this whereas clause. He offered his understanding that legislative candidates cannot accept campaign contributions from individuals who are not citizens of the U.S.

REPRESENTATIVE GARA confirmed that is correct. He said a Swiss corporation, Astra Zeneca Pharmaceuticals, donated money for an election in the U.S. He remarked, "You can imagine as we have the pipeline debate that maybe a Chinese company or a Japanese company or some other company would get involved, and at some point it's meddling in Alaska politics ... by foreign entities."

[9:41:21 AM](#)

REPRESENTATIVE GARA directed attention to the fifth whereas clause, which states that few candidates are able to stand up to big money, and campaigns are defined by the big donations and not by what the candidates have to say. In response to Chair Lynn, he said in close races, if an entity spends millions of dollars against a candidate in the final days of a political race, that candidate will probably lose.

REPRESENTATIVE GARA said the seventh whereas clause, on page 2, lines 7-9, says the only way to [reverse the Citizens United decision] is through a constitutional amendment. He said he is not a fan of resolutions; however, he said he thinks that if 36 other states back this resolution and send the message to Congress that "enough is enough," there will be support for this change in Congress. He noted that U.S. Senator Lisa Murkowski has spoken against "the evils of this kind of money." He said people want to run their own campaigns and don't mind running against other candidates who run their own campaign, but he said he thinks "we all mind when outside groups get involved, especially with this concept of unlimited expenditures" He said the "Be It Resolved" language urges the U.S. Congress and the President of the United States to work across party lines to put a constitutional amendment on the ballot.

REPRESENTATIVE GARA relayed that 95 percent of candidates who receive the most money get elected. He said, "This issue has sort of put that problem on steroids." He said in Ohio, people got so turned off by the election they started ignoring the television advertisements. He opined, "When you have people ignoring the political debate, the country is harmed. There should be positive ads where people actually talk about what they're going to do."

[9:45:33 AM](#)

REPRESENTATIVE GARA said CSSS HJR 8 will level the playing field, and he mentioned getting rid of misleading advertisements.

CHAIR LYNN said he does not think the proposed joint resolution would eliminate misleading advertisements.

REPRESENTATIVE GARA said that is true, but the amount of money being spent on misleading advertising at this point is out of control, and when a shadow group puts out a misleading advertising, no one directly is blamed.

[9:46:33 AM](#)

REPRESENTATIVE KELLER mentioned the Alias Addition Acts, which he said disallowed criticism of U.S. Congress or the President. He said the resulting resolutions of 1798 defied the federal government, much like addressing the federal overreach of the U.S. Supreme Court, which Representative Keller commended Representative Gara for doing. He stated that the issue then and now is the First Amendment; the question being asked now is whether there should be any limits. He said, "I appreciate your ... saying ... and pointing out that we as individuals have limits on what we and get, and I would look at that personally as a bigger wrong than what the [U.S.] Supreme Court did." He told the bill sponsor that this is an interesting issue, but that he will have "a long ways to go" before he can vote for it.

[9:48:39 AM](#)

MIKE FRANK testified in support of HJR 8. He related that he is an attorney who, in the '90s, drafted an initiative to reform the state's campaign finance laws via a group called, "Campaign Finance Reform Now." He relayed that 600-700 signature gatherers collected over 30,000 signatures to put the initiative on the ballot; when the legislature at the time passed legislation with a similar purpose, Lieutenant Governor Fran Ulmer took the initiative off the ballot. The law that was passed was subsequently upheld by the Alaska Supreme Court and by the 9th Circuit Court of Appeals. The law that existed at the state level until the Citizens United case had a provision that forbid corporations, unions, and "the shadowy groups that Representative Gara mentioned" from making independent expenditures in candidate elections; they were still allowed to make independent expenditures in the context of ballot propositions, as was consistent with the jurisprudences surrounding the First Amendment at the time. Mr. Frank opined that the law worked well until the Citizens United case, which, in effect, held that corporations, unions, and other groups should be allowed to make independent expenditures in candidate elections. He stated, "Since then, we've seen an explosion of largely negative, misleading, sometimes false, and generally uninformative advertising that doesn't help voters make wise decisions with respect to which candidate to oppose or support."

CHAIR LYNN asked, "Would that fall under freedom of speech?"

MR. FRANK answered that it does according to the U.S. Supreme Court's decision, which he said "in effect equates money with

freedom of speech." He said that decision dates back to the Buckley v. Valeo case in 1976; however, after that, in Austin v. Michigan Chamber of Commerce, the U.S. Supreme Court decided that because corporations and unions could aggregate such immense wealth, they could constitutionally be prohibited from making independent expenditures. However, that all changed with the Citizens United case, and he opined it will not get better without a constitutional amendment to forbid corporations, unions, and other organizations from making independent expenditures in the context of elections. He urged the committee to support HJR 8. He said it is really up to each state to decide how to best regulate its state and federal elections of candidates.

[9:53:48 AM](#)

KATHARINE VEH testified in support of HJR 8. She recollected the second commandment in the Holy Bible, regarding graven images. She related, "So, I'm saying, knowing all about the separation of church and state, that this guides me." She posited that currently the U.S. Government is violating the second commandment, because "an enormous part of being a respected leader is to tap into the spiritual side of yourself" and "spend some time in prayer with God," then speak with the people and make legislative decisions based on that. She stated, "Money doesn't have anything to do with it." She clarified that decisions need to be made about money, but money should not be a primary focus -a graven image - in the political sphere.

MS. VEH further stated that it is immoral to buy and sell candidates. She said, "Slavery was already outlawed over a hundred years ago in the Thirteenth Amendment." She said it is corrupt to give money to candidates "for favor." She stated, "Candidates are lined up on the auction block and sold to the highest bidder, and this is extremely scary." She expressed her desire for people to like their political leaders again, and she related that her grandfather served his community and was respected. She concluded, "This kind of integrity will happen once a measure of honesty is built into the system through a constitutional amendment."

[9:57:23 AM](#)

CHAIR LYNN said money is an important part of politics; it facilitates communication of the issues. He stated his support

of CSSS HJR 8, and he asked what the will of the committee was regarding the proposed joint resolution.

[9:58:20 AM](#)

REPRESENTATIVE ISAACSON said he favors CSSS HJR 8. He said he is interested in hearing more from Representative Keller regarding the First Amendment. He expressed appreciation for the comments of Mr. Franks regarding Alaska's past legislation in 1996 to level the playing field. He said he does not think CSSS HJR 8 would harm freedom of speech, but would make voices equal by not allowing unlimited contributions. Notwithstanding that, he said it sounds like more discussion is needed.

REPRESENTATIVE KELLER ventured that there would be people to testify on both sides of this issue, and he said he would not mind looking for [testifiers who might round out the opinions heard]. He asked that the committee hold CSSS HJR 8.

REPRESENTATIVE GATTIS said she would like the bill to be held "for the same reasons."

REPRESENTATIVE HUGHES said she agrees. She opined that the states should be making the decision rather than a federal court. She said she would find it helpful to hear more testimony from "groups that have worked on this issue."

[10:00:12 AM](#)

CHAIR LYNN reiterated his strong support, and he announced that CSSS HJR 8 was held over.

[10:00:56 AM](#)

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:01 a.m.