ABA
LEGAL
STATUS

#4

IN THE SUPREME COURT OF THE STATE OF ALASKA

BRUCE HOROWITZ, WILLIAM PARKER, JAMES LOVE, DAVID LOUTREL, WILSON A. RICE, JOHN E. DUGGAN, DONALD E. CLOCKSIN, THOMAS G. BECK, ELIZABETH RATNER, RANDALL SIMPSON, PHILIP R. VOLLAND, JEFFREY LOWENFELS,

Appellants/Cross-Appellees,

vs.

THE ALASKA BAR ASSOCIATION,

Appellee/Cross-Appellant,

Supreme Court No. 4310/4311
Superior Court No. 3AN78-1198 CIV

BRIEF OF THE APPELLANTS

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Filed in the Supreme Court
of the State of Alaska this
15th day of January, 1979.

Robert D. Bacon
Clerk of the Court

Nadine Rodlesburg
Deputy Clerk of the Court

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TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES (QUOTED OR SUMMARIZED IN PERTINENT PART)

Art. IX, Section 6:

> No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

Alaska Statutes

A.S. 01.05.006:

> The bulk formal revision of the laws of Alaska which was authorized by A.S. 24.20.070 and prepared under the direction of the Alaska Legislative Council and published by The Michie Company, legal publishers, of Charlottesville, Virginia, and titled "Alaska Statutes," as set out in the 47 titles of the Alaska Statutes, but not incluling the table of contents, indexes, citations to Alaska Compiled Laws Annotated, 1949, and session laws, chapter, article, section, subsection and paragraph headings, annotations, collateral references, notes and decisions, is adopted and enacted as the general and permanent law of Alaska.

A.S. 01.05.031:

> (a) Subject to the general policies which may be promulgated by the legislative council for the preparation and publication of the annual cumulative supplement to and replacement pamphlets for the Alaska Statutes and of the accompanying Temporary and Special Act pamphlets, the revisor of statutes shall revise for consolidation into the Alaska Statutes and the accompanying pamphlets all laws of a general and permanent nature and all laws of a temporary or special nature enacted by the legislature.
>
> (b) The revisor shall edit and revise the laws for consolidation without changing the meaning of any law in the following manner:

A.S. 08.08.010:

> 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.

A.S. 08.08.080:

(a) Except as may be otherwise provided in the Alaska Bar Rules, the board may adopt reasonable provisions

(1) concerning membership and the classification of membership in the Alaska Bar;

(2) providing for employees of the Alaska Bar, the time, place and method of their selection, and their respective powers, duties, terms of office, and compensation;

(3) concerning annual and special meetings;

(4) concerning the collection, deposit, and disbursement of membership and admission fees, penalties, and all other funds;

(5) providing for the organization and government of local subdivisions of the Alaska Bar;

(6) providing for all other matters affecting in any way the organization and functioning of the Alaska Bar.

(b) The board may

(1) approve and recommend to the state supreme court additional rules for promulgation by the court including rules concerning admission and discipline and defining the practice of law;

(2) adopt reasonable bylaws and regulations consistent with the Alaska Bar Rules;

(3) sue in the name of the Alaska Bar in a court of competent jurisdiction to enjoin a person from doing an act constituting a violation of this chapter;

(4) fix the annual membership fee for active and inactive members.

A.S. 08.08.100:

The bylaws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (A.S. 44.62).

A.S. 08.08.110:

[Repealed by § 11 ch. 181 SLA 1976, this statute derived from § 8, ch. 196, SLA 1955 (the Integrated Bar Act) and gave the ABA power over admission suspension, and disbarment of attorneys.]

A.S. 08.08.120(a) and (b):

[Repealed by § 11, ch. 181 SLA 1976, this statute derived from § 8, ch. 196 SLA 1955 (the Integrated Bar Act) and governed the disqualification of individuals from hearing ABA disciplinary matters under certain circumstances.]

A.S. 14.40.160:

(a) The provisions of A.S. 44.62.310 apply to meetings of the Board of Regents. All meetings of the board, its committees or subcommittees, are open to the public and press except as otherwise provided in A.S. 44.62.310(c). The findings of an executive session shall be made a part of the record of the proceedings of the Board of Regents. All records of the meetings and proceedings shall be open to inspection by the public and the press at reasonable times.

(b) The board may determine the time and place of its meetings. However, 30 days notice is required for all regular meetings and 10 days notice is required for special meetings of the board, its committees or subcommittees called under the bylaws or rules of procedure of the board. Emergency meetings may be called without notice.

(c) The Board of Regents shall provide adequate facilities for members of the public to attend the meetings of the board, its committees or subcommittees.

A.S. 24.20.070:

[This statute gives the Legislative Council tentative authority to revise the laws of the state in bulk, and a continuing responsibility for statutory revision.]

A.S. 37.10.090:

[This statute gives the Alaska Attorney General authority to pursue an action to recover public monies illegally expended.]

A.S. 39.20.140

(a) The Department of Administration shall not pay an official or employee for per diem or transportation

costs unless his travel is clearly necessary to benefit the state.

A.S. 44.62.310:

(a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;
(2) juries;
(3) parole or pardon boards;
(4) meetings of a hospital medical staff; or
(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

A.S. 44.62.312:

(a) It is the policy of the state that
(1) the governmental units mentioned in §310(a) of this chapter exist to aid in the conduct of the people's business;
(2) It is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
(3) the people of this state do not yield their sovereignty to the agencies which serve them;
(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;
(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) Section 310(c)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

A.S. 44.62.330:

(a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under §§ 330--630 of this chapter. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct

of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under §§ 330-630 of this chapter is limited to named functions of the agency.

. . .

(22) [repealed by § 11 ch. 181 SLA 1976, this section derived from Art. VII, sec. 2 of ch. 2, ch. 143 SLA 1959 (the Alaska Administrative Procedure Act) and made the ABA subject to the Administrative Adjudication requirements of the AAPA.]

A.S. 44.62.410:

The agency shall determine the time and place of hearing. The hearing shall be held in Juneau or Ketchikan, whichever is closer to the place where the transaction occurred or where the respondent resides, if the transaction occurred in or the respondent resides in the Southeastern Senate District; in Anchorage if the transaction occurred or the respondent resides within the South Central Senate District; in Fairbanks or Nome, whichever is closer to the place where the transaction occurred or where the respondent resides, if the transaction occurred in or the respondent resides in the Central or Northwestern Senate Districts. The agency may, if the transaction occurred in a senate district other than that of respondent's residence, select the place of hearing appropriate for either district. The agency may select a different place nearer the place where the transaction occurred or where the respondent resides, or the parties by agreement may select any place in the state.

A.S. 44.62.640:

(a) In §§ 10-320 of this chapter, unless the context otherwise requires,

. . .

(4) "state agency" means a department, office, agency, or other organizational unit of the executive branch, except one expressly excluded by law, but does not include an agency in the judicial or

legislative branches of the state government.

A.S. 44.62.650:

This chapter may be cited as the Administrative Procedure Act.

Session Laws of Alaska

Chapter 196 SLA 1955

Be it Enacted by the Legislature of the Territory of Alaska:

Section 1, Title of Act. This Act may be known and cited as the Alaska Integrated Bar Act.

Section 2. Objects and Powers. There is hereby created an instrumentality of Alaska, for the purpose and with the powers hereinafter set forth, to be known as the Alaska Bar Association, hereinafter designated as the Alaska Bar, which Association shall have a common seal, may sue and be sued, and which may, for the purpose of carrying into effect and promoting the objects of said Association, enter into contracts and acquire, hold, encumber and dispose of such real and personal property as is necessary thereto.

. . .

Section 5. Board of Governors. There is hereby constituted a Board of Governors of the Alaska Bar to be first elected pursuant to rules promulgated by the Alaska Bar Commission and, subsequent to the first election, to rules promulgated by the Board of Governors.

. . .

Section 6. Alaska Bar Governed by Board of Governors. The Alaska Bar shall be governed by the Board of Governors, which shall be charged with the executive functions of the Alaska Bar, the enforcement of the provisions of this Act and all rules adopted in pursuance thereof. The members of the Board of Governors shall receive no salary by virtue of their office.

Section 7. Powers of Governors. The Board of Governors shall have power to adopt reasonable rules having the force and effect of law:

a. Concerning membership and the classification of membership in the Alaska Bar into active, inactive and honorary members;

b. Concerning the enrollment and privileges of membership;

c. Providing for other officers of the Alaska Bar,

d. Concerning annual and special meetings;

e. Concerning the collection, the deposit and the disbursement of the membership and admission fees, penalties, and all other funds.

f. Providing for the organization and government of divisional, municipal and other local subdivisions of the Alaska Bar;

g. Defining the practice of law; and

h. Providing for all other matters, whether similar to the foregoing or not, affecting in any way whatsoever the organization and functioning of the Alaska Bar. Any such rule may be modified or rescinded, or a new rule may be adopted, by a vote of the active members of the Association under rules to be prescribed by the Board of Governors.

Section 8. Admission, Suspension and Disbarment. The Board of Governors shall have power to adopt rules fixing the qualifications, requirements and procedure for admission to the practice of law, except as otherwise provided in this Act: to establish and enforce rules of professional conduct for all members of the Alaska Bar, which shall conform but need not be limited to the standards of the Code of Ethics of the American Bar Association; to appoint boards or committees to examine applications for admission; to investigate, prosecute, hear and finally determine all causes involving discipline, disbarment, suspension or reinstatement; and to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing divisional or municipal agencies to assist therein to the extent provided by such rules. No person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same.

. . .

Section 14. Disciplinary Proceedings and Review. Upon finally determining any cause involving the discipline, disbarment, suspension or reinstatement of a member of the Alaska Bar, the Board of Governors shall certify its findings and recommendations thereon to the U.S. District Court for the Judicial Division wherein the accused member resides. Upon receiving the findings and recommendations, the Court shall, within thirty days thereafter, issue an order of disbarment, suspension, reinstatement, dismissal, or otherwise, in full accordance with the recommen-

dations of the Board of Governors, unless the accused member shall sooner petition the Court for review of the proceedings, findings and recommendations of the Board. In the event such petition is made, the Court shall proceed promptly with the review in the manner it may choose, and after completion of the review shall issue such order in the cause as the Court may, in its discretion, determine proper. Any hearings or other procedures before the Court shall be for the sole purpose of review of the determinations of the Board of Governors and shall not constitute a trial de novo of the cause. The procedure for review herein set forth shall be the exclusive method of appeal from the determinations of the Board of Governors in any matter involving the discipline, disbarment, suspension or reinstatement of a member of the Alaska Bar. A full stenographic record of all hearings on matters involving discipline, disbarment, suspension or reinstatement shall be kept. The Board of Governors shall have power to issue subpoenas and to invoke the aid of the U.S. District Court, if necessary, to compel the attendance of witnesses at hearings held pursuant to the powers granted herein.

. . .

Section 15. Alaska Bar Commisison. Nine persons actively eggaged (engaged) in the private practice of law in Alaska at the effective date of this Act shall, within ten days after the effective date of this Act, be appointed by the Governor of Alaska, with the advice and consent of a majority of the members of both Houses of the Legislature sitting in Joint Session, as members of the Alaska Bar Commission, which is hereby created.

. . .

Section 16. Repeal

. . .

It is the intent and purpose of this section to provide for an orderly transition from the governing of the practice of law in Alaska as at present, by the provisions herein specified for repeal, to its governing under rules and regulations, having the force of law, of the Board of Governors of the Alaska Bar. It is the further intent of this section to require the Board of Governors to act promptly in the promulgation of these rules and regulations and to make them effective on July 1, 1955. To accomplish the intent and purposes herein set forth this section shall be liberally construed.

Chapter 143 SLA 1959

Chapter 1. Rules and Regulations

Article I

General

Section 1. Short Title. This Act constitutes and may be cited as the Administrative Procedure Act.

Section 2. Definitions. In this chapter, unless otherwise specifically indicated:

(1) "State agency" means and includes all departments, offices, agencies, and other organizational units of the executive branch, except as may be expressly excluded by this Act or otherwise by law, but does not include an agency in the judicial or legislative departments of the State Government.

. . .

Article VI

Agency Meeting Public

Section 1. Agency Meetings Public. All meetings of governing bodies of all State and local government agencies, including municipalities, boroughs, school boards and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations (advisory or otherwise) of the State or local government, supported in whole or in part by public funds or entrusted with the expending of public funds, except juries and such other agencies as shall be expressly exempt by the Legislature, shall be public meetings, but the public may be excluded only from such portions therof as deal with matters, the immediate knowledge of which would deleteriously affect the finances of the government unit, or that deal with subjects that tend to prejudice the reputation and character of persons. When meetings are held at which such excepted subjects are to be discussed, the meeting must first be convened as a public meeting, and the question of holding an executive session to discuss matters that come within the two exceptions shall be determined by a majority vote of the agency, and no subjects can be considered at such executive session except those as are mentioned in the motion calling for the executive session, and no action shall be taken at said executive session.

Article VII
Legislative Review of Rules

Section 1. The Legislature, by resolution adopted by vote of both houses shall have the power to annul any agency or department rule or regulation. The Legislative Council shall annually review all agency regulations to determine if the legislative intent is being correctly followed. A comprehensive report of said annual review with recommendations shall be submitted to the members of the legislature fifteen days prior to the start of its regular session each January.

Chapter 2. Administrative Adjudication.

Section 1. Definitions. In this chapter, unless the context or subject matter otherwise requires:

(1) "Agency" includes the State boards, commissions and officers enumerated in Section 2 and those to which this chapter is made applicable by law or executive order involving reorganization under the Constitution.

. . .

Section 2. Application of Chapter. (1) The procedure of the following enumerated State boards, commissions, and officers or of their successors under the State Organization Act of 1959 or under reorganization pursuant to the Constitution shall be conducted pursuant to the provisions of this chapter;

. . .

Board of Governors of the Alaska Bar

. . .

Section 9. Time and Place of Hearing. The agency shall determine the time and place of hearing. The hearing shall be held in Juneau or Ketchikan, whichever is closer to the place where th transaction occurred or where the respondent resides, if the transaction occurred or the respondent resides within the Southeastern Senatorial District; in Anchorage if the transaction occurred or the respondent resides within the South Central Senatorial District; in Fairbanks or Nome, whichever is closer, to the place where the transaction occurred or where the respondent resides if the transaction occurred or the respondent resides within the Central or Northwestern Senatorial Districts. The agency may, if the transaction occurred in a senatorial district other than that of respondent's residence, select the place of hearing appropriate for either district; the

agency may select a different place nearer the place where the transaction occurred or the respondent resides; or the parties by agreement may select any place within the State.

Chapter 178 SLA 1960

. . .

Sec. 3. Subsec. h., Sec. 7, Ch. 196, SLA 1955 is amended to read as follows:

h. Providing for all other matters, whether similar to the foregoing or not, affecting in any way whatsoever the organization and functioning of the Alaska Bar. Any such rule may be modified or rescinded, or a new rule may be adopted, by a vote of the active members of the Association under rules to be prescribed by the Board of Governors. Rules adopted by the Board of Governors are not subject to the provisions of the Administrative Procedure Act.

. . .

Chapter 48 SLA 1966

AN ACT

Requiring that the meetings of agencies of the state and its subdivisions be open to the public with certain exceptions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. A.S. 44.62.310 is repealed and re-enacted to read:

Sec. 44.62.310. AGENCY MEETINGS PUBLIC. (a) All meetings of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would adversely affect the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding, or to juries, or to parole or pardon boards.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

Chapter 78 SLA 1968

AN ACT

Relating to meetings of public bodies not required to be open to the public.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. A.S. 44.62.310(d) is amended to read:

(d) This section does not apply to

(1) judicial or quasi-judicial bodies

when holding a meeting solely to make a decision in an adjudicatory proceeding,

(2) juries,

(3) parole or pardon boards,

(4) meetings of a hospital medical staff or meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

Chapter 7 SLA 1969

AN ACT

Relating to the openness of meetings of public agencies.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. A.S. 44.62.310(d) is amended to read:

(d) This section does not apply to
(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;
(2) juries;
(3) parole or pardon boards;
(4) meetings of a hospital medical staff; or
(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

Chapter 100 SLA 1972

[This Act in Section 1 repealed and reenacted A.S. 14.40.160 and in Section 2 amended A.S. 44.62.310(a) to require meetings of the University of Alaska Board of Regents to be open to the public.]

Section 3 of ch. 98 SLA 1972

[This Act amended A.S. 44.62.310 (the open meeting act) to add A.S. 44.62.312 and to include the legislature and its subordinate units within A.S. 44.62.310.]

I

JURISDICTIONAL STATEMENT

Judgment was entered by the Superior Court, Third Judicial District in this case on September 11, 1978. A timely notice of appeal was filed on October 11, 1978. The Supreme Court has authority to review this appeal by virtue of A.S. 22.05.010.

II

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the meetings of the Alaska Bar Association are subject to the provisions of Alaska's open meeting act, A.S. 44.62.310.312. R. 3, 72-75.

2. Whether, if the meetings of the Alaska Bar Association are subject to the provisions of Alaska's opening meeting act, the meeting of the Association's Board of Governors held in Hawaii in February, 1978 and without public notice violated this act. R. 6, 71-75

3. Whether, if the meetings of the Alaska Bar Association are not subject to the provisions of Alaska's open meeting act, the meeting of the Association's Board of Governors held in Hawaii in February, 1978 and without public notice nevertheless violated plaintiffs' rights to due process of law. R. 6, 117-119.

BY THE CROSS APPELLANT

1. Whether "[t]he Trial court erred in denying the Defendant's Motion for an Award of Attorneys' Fees filed pursuant to Civil Rule 82." Cross-Appellant's Statement of Points on Appeal, October 20, 1978. R. 138-42.

III

STATEMENT OF THE CASE

A. Nature and Procedural History of the Case

Plaintiff-appellants (hereinafter plaintiffs) filed this suit for declaratory and other relief on February 22, 1978 challenging the defendant Alaska Bar Association's (hereinafter ABA) actions in holding a business meeting in the State of Hawaii in February, 1978. Record (hereinafter R.) 1-7. Plaintiffs asserted that the conduct of the meeting violated Alaska's open meeting act, their federal and state due process rights, and Alaska Const. Art. I, Sec. 2. R.6.

The ABA answered the Complaint on March 20, 1978, and plaintiffs' First Set of Interrogatories on May 24, 1978. R. 12-15, 43-49. The ABA moved, pursuant to Civil Rule 12(c), for judgment on the pleadings on May 25, 1978, claiming that since its by-laws and regulations were exempt from the operation of the Alaska Administrative Procedure Act (hereinafter AAPA), it need not comply with Alaska's open meeting act. R. 62-64.

On June 23, 1978 plaintiffs filed a brief opposing the ABA's motion, and a cross motion for summary judgment pursuant to Civil Rule 56, claiming the ABA's Hawaii meeting was not exempt from the requirements of the open meeting act, and that in any event the meeting violated plaintiffs' federal and state due process rights. R. 93.

After exchange of briefs on the motions, the Superior Court heard oral argument on August 2, 1978, and thereafter

from the bench orally dismissed plaintiffs' suit.

On August 11, 1978, the ABA filed a motion seeking attorneys fees pursuant to Civil Rule 82. Plaintiffs opposed this motion on the grounds that their lawsuit constituted public interest litigation. R. 129. On September 11, after finding that the suit did in fact constitute public interest litigation, the Superior Court denied the ABA's motion. TR. 9-10. Judgment was entered immediately thereafter. R. 136-137.

On October 11, 1978 plaintiffs[1] filed a Notice of Appeal pursuant to Appellate Rule 7(b), along with a Designation of Record on Appeal and Statement of Points on Appeal. The ABA filed a cross-appeal on the issue of attorneys' fees on October 20, 1978. R. 138-142.

B. Statement of Facts Relevant to the Issues Presented for Review.

The thirteen plaintiffs are residents of Alaska, and all but two are attorneys and members of the ABA, R. 2, 12, which is an instrumentality of the State. A.S. 08.08.010. The ABA collects mandatory membership dues, and receives monies under contract with the State of Alaska Court System for the provision of attorney disciplinary services. R. 2, 12, 86.

The ABA Board of Governors (hereinafter Governors) held a regular business meeting in Kauai, Hawaii from February 20 through February 23, 1978. R. 2, 13, 43-44. The

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[1] One plaintiff, Sue Ellen Tatter, is not an appellant.

Governors were reimbursed from ABA funds for their travel and per diem expenses, and the ABA so admits. R. 2-3, 13, 48, 61.

The ABA also admits it gave no public notice of the business meeting. R. 45, Response to Interrogatory 5(e).

Among topics discussed at the Governors' meeting were a residency requirement for bar examination applicants, for ABA offices, and for pro bono publico appointments; mandatory pro bono publico work; cutting of ABA dues; continuing legal education; expenditure of surplus funds; agenda of the June, 1978 ABA meeting; responsibilities of the Alaska Bar Counsel; ABA office facilities needs; contributions to the City of Fairbanks; lay members on the ABA Board of Governors; the Bar Brief; ABA committees; this lawsuit; malpractice insurance; and a Civil Procedure Handbook. R. 52-57. At the meeting various motions were made, and some were voted upon. R. 52-57. The Governors also held Executive Sessions during the meeting. R. 52-59.

The aforementioned facts are not in dispute between the parties and are fully reflected in the Complaint and Answer, at R. 1-15, the plaintiffs' First Set of Interrogatories at R. 16-42, the Answers thereto, at R. 43-61, and the ABA published materials attached as Exhibits to plaintiffs' summary judgment opening brief, at R. 79-92.

IV. ALASKA'S OPEN MEETING ACT PROHIBITED THE ALASKA BAR ASSOCIATION FROM HOLDING A MEETING FINANCED WITH PUBLIC FUNDS IN HAWAII.

The Alaska open meeting act requires all meetings of a broad range of public bodies to be "open to the public," and requires reasonable public notice prior to such meetings. A.S. 44.62.310 (a) and (e). The ABA Governors held a regular business meeting in Hawaii, inaccessible to the vast majority of the Alaska public, although there was no reasonable connection between the location of the meeting and the agenda to be acted upon. See the Agenda at R. 8-11. The ABA, further, admits it held the meeting without public notice and the meeting was not a "public meeting." R. 45, 48, Responses to Interrogatories 5(e) and 10. Thus, if the open meeting act applies to the ABA, then the Hawaii meeting was illegal, and all action taken during it is void under A.S. 44.62.310(f).

In the discussion which follows, the plaintiffs will first demonstrate that the intrinsic construction of the relevant statutory provisions provides the ABA with no exemption from the open-meeting requirements of A.S. 44.62.310. The plaintiffs will then turn to the legislative history of the open meeting act and the Integrated Bar Act, which shows, consistently with the intrinsic statutory construction principles, that the legislature did not intend to exempt the ABA from the open meeting act. Finally, plaintiffs will demonstrate that canons of extrinsic statutory construction also require application of the open meeting act to the ABA.

A. On Its Face, the Open Meeting Act Applies to the ABA.

Courts must first seek the meaning of a statute in its language; if the meaning is plain, the court's sole function is to enforce the statute. Application of Babcock, 387 P.2d 694, 696 (Alaska 1963); Paulin v. Zartman, 542 P.2d 251 (1975), reh. 548 P.2d 1299 (Alaska 1975). This rule is subject, of course, to the most fundamental one to which all other rules are subordinate, and that is that the legislature's purpose and intent govern all statutory interpretations. United States v. Hardcastle, 10 Alaska 254, 266-267 (1942); National Railroad Passengers Association v. National Association of Railroad Passengers, 414 U.S. 453 (1974); Thomas County Taxpayers Association v. Finney, 573 P.2d 1073 (Kan. 1978); 2A J. Sutherland, Statutes and Statutory Construction, (hereinafter Sutherland), sec. 46.07, at 65-66 (4th ed. Sands 1973). The intent of the legislature evidences itself in the words used to express it in that part of the statute involved, as construed with reference to the whole instrument. State v. City of Anchorage, 513 P.2d 1104, 1110 (Alaska 1973).

Generally, a clear and unambiguous statutory provision is one which has meaning uncontradicted by other language in the same act. 2A Sutherland, sec. 46.04, at 55.

Here, the open meeting act requires all meetings of virtually all categories of public entities to be open to the public "except as otherwise provided by this section." A.S. 44.62.310(a). No exception for ABA meetings is made "by this

section." The ABA does not deny that it, at least literally, fits one or more of the categories of entities described.

Thus, looking only at the language of A.S. 44.62.310, the ABA and its meetings are subject to the statute. The intent of the legislature, evidenced in the strongly worded state policy regarding meetings in the open meeting act, at A.S. 44.62.312, fully supports this conclusion. City of Anchorage, supra; Hardcastle, supra.

Moreover, while application of more particularized intrinsic statutory construction rules is unnecessary when the plain meaning rule applies, Babcock, supra, at 696 n. 6, a conclusion that the open meeting act applies to the ABA is consistent with each of these other rules.

For example, a general rule is that the interpretative construction made must give effect, if possible, to every word, clause, and sentence of the statute, so that each part has a useful purpose. 2A Sutherland, sec. 46.06, at 63; Issakson v. Rickey, 550 P.2d 359 (Alaska 1976); Hardcastle, supra, at 267, 272. An interpretation of the phrase "except as otherwise provided by this section" and the categories of entities the open meeting act describes, which includes coverage of ABA meetings, fully satisfies this rule.

Such an interpretation also satisfies the rule that exceptions to the coverage of a statute will not be implied, particularly where there is an express exception clause in the statute, as there is here. 2A Sutherland, sec. 47.11, at 90n.

6 and 7; Israel-British Bank (London) Ltd. v. F.D.I.C., 536 F.2d 509, 513 (2d Cir. 1976). Exception clauses, moreover, are strictly construed. Hafling v. Inland Boatmen's Union of the Pacific, 585 P.2d 870, 875 (Alaska 1978).

The interpretation further satisfies the rule that "all sections of an act are to be construed together so that all have meaning and no one section conflicts with another." In the Matter of the Estate of Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978). If the exception clause ("except as otherwise provided by this section") of the open meeting act[2] is to be construed consistently with those sub-sections of the act (A.S. 44.62.310(b)-(d)) which expressly state which meetings and entities are excepted from the act's coverage, then the ABA must not be impliedly excepted from the act's coverage. Indeed, an implied exception for the ABA would contravene the policy section of the act, A.S. 44.62.312, particularly since the ABA would become the only instrumentality of the State so impliedly excepted.

B. The Exemption From the AAPA Provided the ABA's Bylaws and Regulations on Its Face Does Not Exclude the ABA From Coverage Under the Open Meeting Act.

The crux of the ABA's defense to this suit is that A.S. 08.08.100, which makes the ABA's by-laws and regulations

[2] The open meeting statute, passed originally as part of the AAPA, became a separate "act" in 1966. See ch. 48 SLA 1966. Even were the open meeting law still part of the AAPA, however, the statutory construction rule mentioned in the text above would still only be satisfied by construing the statute to include the ABA within its coverage. See part I-B-1 & 2 of this brief, infra at 10-13.

"not subject to the Administrative Procedure Act (A.S. 44.62)," frees it from coverage under the open meeting act, since it has by-laws covering meetings and complied with them for the Hawaii meeting. See R. 62-64, 99-100. This defense erroneously assumes the open meeting statute is a mere section of the AAPA, instead of an independent act. Even were this assumption correct, however, the AAPA on its face plainly does not exempt the ABA's meetings from coverage under the open meeting act.

1. The Open Meeting Act Is Not Part of the AAPA.

In 1966 A.S. 44.62.310 was repealed and reenacted. See ch. 48 SLA 1966.[3] The reenactment significantly changed the language of the original open meeting statute, passed as ch. I, Art. VI of ch. 143 SLA 1959 (the AAPA), as a comparison of the two will show. For example, the 1959 version excepted "juries and such other agencies as shall be expressly exempt by the Legislature," while the 1966 re-enactment, A.S. 44.62-.310(a) excepted no meetings "except as otherwise provided by this section." Apparently this change was made to insure that only "this section" be looked to for exemptions, and to guarantee that other statutes not be misconstrued as containing exceptions.

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[3] The Michie Co. Reporter (and perhaps the official revisor, i.e., the Legislative Council) erroneously report in the notes to A.S. 44.62.310 that ch. 48 SLA 1966 was an amendment to A.S. 44.62.310. The revisor, of course, has no authority to change the meaning of a statute. See A.S. 01.05.006; A.S. 01.05.031(b); A.S. 24.20.070.

Moreover, while the 1959 version was silent on excepting meetings of judicial or quasi-judicial bodies, the 1966 re-enactment expressly excepted them under certain circumstances; while the 1959 version was silent as to prior public notice, the 1966 re-enactment mandated it; and while the 1959 version was silent on the question of violations of the open meeting statute, the 1966 re-enactment voided actions taken contrary to it.

Repeal and re-enactment of a statute in part is ordinarily "treated" not as a repeal, but as an amendment, the re-enacted part continuing in full force. See, e.g., Chesapeake & Potomac Company of West Virginia v. State Tax Department, 239 S.E.2d 918 (W. Va. 1977); Allied Veterans Council v. Klamath County, 544 P.2d 190, 194 (Or. App. 1975); 77 A.L.R.2d 336. The key word here is "treated." The "re-enactment" still creates a new act, although for the sake of continuity the former act is "treated" as if never repealed. More importantly, a material change of language in the re-enactment must be regarded, unless otherwise indicated, as evidencing a purpose to change the force and effect of the existing law. Cf. Warren v. Thomas, 568 P.2d 400, 403 (Alaska 1977); In re Cutshaw, 432 P.2d 474, 477 (Ariz. App. 1977); In re Loakes Estate, 32 N.W.2d 10, 11 (Mich. 1948); Volkswagen of America, Inc. v. United States, 340 F. Supp. 983, 989 (Cust. Ct. 1972) aff'd, 494 F.2d 703 (Ct. Cust. & Pat. App. 1974); 1A Sutherland, sec. 22.33, at 191 and sec. 23.28, at 272. Here,

while it is sensible to treat the repeal and re-enactment as continuing the open meeting requirements in force, it is also consistent to acknowledge the significant revisions and additions to the law as evidence the legislature meant to set it apart from the AAPA. In so doing it closed any real or imagined loopholes for agencies whose meeting "by-laws or regulations" might be exempt from AAPA coverage.

This interpretation is consistent, furthermore, with sec. 1 Art. I, ch. I of ch. 143 SLA 1959 (the AAPA), which declared that "This Act constitutes and may be cited as the Administrative Procedure Act."[4] The words "This Act" obviously refer to, in the words of ch. 143 SLA 1959, "AN ACT Establishing administrative procedures. . . .," and not to the later 1966 "ACT Requiring that the meetings of agencies of the state and its subdivisions be open to the public with certain exceptions." Ch. 48 SLA 1966.

Indeed, the just quoted title of the open meeting act's repeal and re-enactment at ch. 48 SLA 1966 also evidences complete separation of the act from the AAPA. The subject of a legislative bill must be expressed in its title, Alaska

[4] The codification, at A.S. 44.62.650, now reads, "This chapter may be cited as the Administrative Procedure Act," Of course, the revisor's change of the word "Act" to "chapter" may not change the meaning of the law. A.S. 01.05.031. In any event, "This chapter" obviously refers to ch. 143 SLA 1959 as amended, and not to ch. 48 SLA 1966, the chapter repealing and re-enacting the open meeting statute.

Const. Art. II, Sec. 13, in order to give notice of the contents of the legislation. Hardcastle, supra, at 269-270. Thus, courts can consider the title of an act to resolve any questions as to the Act's intent. 2A Sutherland, sec. 47.03 at 73 and n. 6; Sullivan v. Green Manufacturing Company, 575 P.2d 811, 815 (Ariz. App. 1977). The legislature labeled ch. 48 SLA 1966 a separate "act" designed to govern open meetings and did not label or include it as part of the AAPA. Thus, the exemption of the ABA's "by-laws and regulations" from the AAPA does not remove the ABA from coverage by Alaska's open meeting act.

2. Even Were the Open Meeting Act Part of the AAPA, the AAPA Does Not on Its Face Exempt the ABA from the Open Meeting Requirements.

Assuming arguendo that the open meeting act at A.S. 44.62.310-.312 is still part of what the legislature considers the AAPA, A.S. 08.08.100 on its face plainly exempts only the ABA's "by-laws and regulations" from the AAPA, and not the ABA, i.e., the agency itself, from the AAPA. As defined in the AAPA, a State agency means

> a department, office, agency, or other organizational unit of the executive branch, except one expressly excluded by law, but does not include an agency in the judicial or legislative branches of the state government.

A.S. 44.62.640(a)(4).[5]

The ABA was rendered generally subject to the provisions of the AAPA upon its enactment in 1959. This conclu-

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[5] See this section as originally worded at ch. I, Art. I, sec. 2(1) of ch. 143 SLA 1959.

sion follows both from the genesis of the ABA's Board of Governors in the Alaska Bar Commission (see the Alaska Integrated Bar Act, sec. 15 of ch. 196 SLA 1955), and from the ABA's literal inclusion in the administrative adjudication chapter of the AAPA. Moreover, the subsequent 1960 amendment of the Integrated Bar Act (at sec. 3, ch. 178 SLA 1960) exempting ABA rules from the AAPA demonstrates the legislature's belief that the ill-defined ABA was an entity sufficiently in the nature of an executive agency to require legislative action to remove the ABA's rulemaking function from the ambit of the AAPA. Thus, through the operation of the broad "agency" definition quoted above, the ABA was also subject to the open-meeting requirements that were originally part of the AAPA at sec. 1, Article VI, ch. I of ch. 143 SLA 1959.[6]

Thus, while the legislature may have eventually freed the ABA from the AAPA's administrative adjudication and rule making requirements, it never expressly freed it from the remaining requirements of the AAPA, including those concerning open meetings of public bodies. This conclusion is consistent with the requirement that exclusions from the AAPA must be express, see Alaska State Housing Authority v. Dixon, 496

[6] This section is now codified, with later amendments, at A.S. 44.62.330(a). Not until 1976, via ch. 181 SLA 1976, was the ABA's inclusion on the list of agencies subject to the Administrative Adjudication chapter of the AAPA repealed. See A.S. 44.62.330(a)(22); Application of Peterson, 499 P.2d 304, 306 (Alaska 1972) (holding the ABA subject to AAPA administrative adjudicatory rules). The ABA was first exempted from the AAPA's rule making provisions (at Art. IV, ch. I of ch. 143 SLA 1959) by sec. 3 of ch. 178 SLA 1960.

P.2d 649, 651 (1972), and with the intrinsic statutory construction rule requiring that exclusion clauses, such as the AAPA's in A.S. 44.62.640(a)(4), be strictly construed. The adjunct rule prohibiting implied exclusions where express exclusions are required also supports this conclusion. Hafling, supra at 875. Moreover, a restrictive construction of the exemption of ABA rulemaking is consistent with legislative intent concerning the open meeting act, as expressed in A.S. 44.62.312.

To accept the ABA's broad interpretation of its "by-laws and regulations" AAPA exemption would also affront the principle that delegations of sovereign power, in this case the power to regulate the practice of law and lawyers, are to be strictly construed. 3 Sutherland, sec. 64.01 at 106 and n. 1 & 2; A.S. 44.62.312(a)(3) and (4); Alaska Const. Art.1, Sec. 5. Cf., People v. Centr-O-Mart, 214 P.2d 378, 379 (Cal. 1950); City of Jackson v. Mississippi State Building Commission, 350 So.2d 63, 65 (Miss. 1977).

Furthermore, if the ABA and its by-laws and regulations were exempt from the AAPA, the legislature's express reservation of power to overrule administrative regulations, embodied in the AAPA at A.S. 44.62.320(a), would be nullified, but only as to the ABA among all state instrumentalities. This result, aside from affronting the public sovereignity, would ignore the interpretative rule mandating that "[w]here a reasonable construction of a statute can be adopted which realizes the legislative intent and avoids conflict or incon-

sistency with another statute. . .," that construction should be adopted. Gordon v. Burgess Construction Company, 425 P.2d 602, 604 (Alaska 1967); see also, Hafling, supra, at 875. The ABA's construction of the AAPA and open meeting act causes conflicts; the plaintiffs' construction avoids them.

The ABA's construction also assumes that its statutory right in A.S. 08.08.080(b)(2) to promulgate by-laws and regulations free of the rule-making requirements of the AAPA was designed to permit its monopolization of every field of ABA activity it decided to regulate, including meetings. In fact, A.S. 08.08.080(a)(3) indicates that "the board [of Governors] may adopt reasonable provisions . . . concerning annual and special meetings." If this sub-section is to have any meaning at all, it must be construed as an indication that meeting "provisions," even if in by-law form, would not be exempted from a statute governing the class of all public meetings.

Thus, the AAPA does not exempt the ABA from the obligation to comply with the open meeting act.

C. The Legislative History of the Pertinent Statutes Demonstrates that the Open Meeting Act Applies to the ABA.

In cases of statutory ambiguity, courts often look to the legislative history of a statute to aid in its interpretation. 2A Sutherland, sec. 48.01, at 182 n. 7 and 8; Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union Local 879 v. Thomas, 551 P.2d 942, 944 (Alaska 1976).

While plaintiffs do not believe the pertinent statutes here are ambiguous, nonetheless a review of their legislative history supports plaintiffs' construction of them in the previous sections of this brief.

The Alaska Bar Association Integrated Bar Act became law as ch. 196 SLA 1955. In sec. 7(d) the Governors were given power "to adopt reasonable rules . . . concerning annual and special meetings." There was no separate section giving the ABA power to enact "by-laws and regulations," but in sec. 8 the Governors were given power to enact admission, suspension and disbarment "rules." In sec. 14 an attorney disciplinary procedure was set up.

Four years later the Alaska Administrative Procedure Act was passed. Ch. 143 SLA 1959. As has been described above, the Act had three aims: to prescribe procedures for agency rule-making (ch. 1, Art. I-V, VII), to regulate public meetings (ch. 1, Art. VI), and to prescribe procedures for administrative adjudications (ch. 2). (It is significant that the AAPA has always required administrative adjudications to be held in the State of Alaska. Sec. 9, ch. 2 of ch. 143 SLA 1959, A.S. 44.62.410.) The ABA was not exempt from any portion of the AAPA when passed. See the discussion in part I-B-2 above, at 13. Thus, in 1959 the open meeting Article of the AAPA clearly applied to the ABA.

In 1960 the Integrated Bar Act was amended to exempt the ABA from the rule-making requirements of the AAPA.

Sec. 3, ch. 178 SLA 1960. The amendment read in pertinent part: "Rules adopted by the Board of Governors are not subject to the provisions of the Administrative Procedure Act." The ABA expressly remained subject to the Administrative Adjudication provisions of the AAPA, since ch. 2, sec. 2(1) of ch. 143 SLA 1959 remained unchanged. The 1960 amendment to the Integrated Bar Act also made no change in the open meeting Article of the AAPA. To accept, however, the ABA's interpretation of the power granted to it via this 1960 amendment would mean that it could have passed regulations exempting itself from the AAPA adjudication provisions, as it claims it did with respect to the open meeting requirements.

In 1966 the open meeting provisions, by then codified as A.S. 44.62.310, were repealed and re-enacted, as told in section I-B-1 of this brief above. Ch. 48 SLA 1966. Major changes were made in the thrust of the provisions, not the least of which was to require exceptions to the law to be made "by this section." Meetings of judicial and quasi-judicial bodies in certain situations were excepted at this time. Note that judicial and quasi-judicial bodies were not previously covered by what was called the AAPA by virtue of the AAPA's definition section 2, ch. I, Art. I of ch. 143 SLA 1959. If the legislature had felt that the open meeting act was inextricably part of the AAPA, then there would have been no need to exempt judicial bodies from the act's coverage. This 1966 legislation is entitled to significant weight in declaring the

intent of the 1959 open meeting provisions. Hafling, supra at 874.

In 1968 and 1969, via ch. 78 SLA 1968 and ch. 7 SLA 1969, hospitals and parole boards were excepted from the open meeting act by amendments to it.

In 1972, the University of Alaska Board of Regents was included within the purview of the open meeting act in ch. 100 SLA 1972, which amended A.S. 44.62.310(a) and A.S. 14.40-.160. This legislation may have been necessitated by the University's unique constitutional origin, which arguably placed it inside none of the judicial, executive, and legislative branches of government and thus outside the purview of the AAPA, and outside the open meeting act's coverage. See University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121, 128 (Alaska 1975) (a unique "constitutional corporation").

In 1972 the legislature also added A.S. 44.62.312, enunciating the State policy regarding meetings. The Judiciary Committee Report on this addition, sec. 3 ch. 98 SLA 1972, stated that it was meant to make

> clear that state law requiring that meetings of public agencies be open to the public applies to the legislature and its subordinate units. The bill also reemphasizes state policy against closed meetings of public bodies. (Emphasis supplied).

Jud. Comm. R. SB No. 253, House Journal (February 2, 1972), at 158.

In 1976 A.S. 08.08.100 was amended, changing the AAPA exemption for the ABA's "rules" to its "by-laws and regulations." Ch. 181 SLA 1976. The ABA argued in the Superior Court that this change represented a ratification of its by-laws concerning meetings, by-laws which they assert they fully complied with for the Hawaii meeting. R. 97, 99-101. However, ch. 181 SLA 1976 made numerous minor changes in the use of the word "rule" in the Integrated Bar Act, no doubt to insure there would be no confusion with the Supreme Court developed Alaska Bar Rules, inaugurated in February, 1972. See ch. 181 SLA 1976. This becomes clear when it is noted that 181 SLA 1976 repealed A.S. 08.08.110, which had governed attorney bar admission, suspension and disbarment, in favor of those procedures adopted in the Alaska Bar Rules. See also A.S. 08.08.120(a) and (b). Cf. the result reached in Dorrier v. Dark, 540 S.W.2d 658, aff'd on reconsid., 537 S.W.2d 888 (Tenn. 1976).

There is nothing in the legislative history of the AAPA, the open meeting act, or the Integrated Bar Act supporting the ABA's position in this case. Rather, it is clear that legislative history supports plaintiffs' construction of the pertinent statutes.

D. Other Extrinsic Statutory Construction Rules Demonstrate that the Open Meeting Act Applies to the ABA.

Since the plain meaning rule applies, extrinsic statutory construction aids, like legislative history, need not be employed to decide this case. Nonetheless, the outcome

of the application of each such rule supports the conclusion that the ABA is subject to the open meeting act.

For example, the in para materia construction rule requires that the "reasonable meeting provisions" phrase of A.S. 08.08.080(a)(3) be read consistently with the open meeting act itself, since they both deal with meetings. See generally, 2A Sutherland, sec. 51.01 at 287; sec. 51.03, at 298-300 n. 1 and 2; Gordon, supra, at 604; Jackson v. State, 541 P.2d 23 (Alaska 1975). "Reasonable" provisions, thus, must include public notice, and must insure the meetings are "open" to the public. This view is consistent with the presumption that whenever the legislature enacts a statute, it has in mind previously enacted statutes on the same subjects, and all of them should be construed consistently. Hafling, supra, at 877.

A second extrinsic statutory construction rule requires special acts to control general ones dealing with the same subject matter, no matter their order of passage, unless there is evidence of contrary legislative intent. 2A Sutherland, sec. 51.05, at 315 n. 3 and 4; Thompson v. IDS Life Insurance Company, 549 P.2d 510, 513 (Or. 1976); Preiser v. Rodriquez, 411 U.S. 475 (1973); Monte Vista Lodge v. Guardian Life Insurance Company of America, 384 F.2d 126, 129 (9th Cir. 1967), cert. den. 390 U.S. 950 (1968). Cf., Hafling, supra, at 877 n. 22. Here the special act, the detailed open meeting act, must control A.S. 08.08.080(a)(3).

Finally, it should be emphasized that courts construe open meeting statutes liberally in favor of the public and strictly against public agencies. See, e.g., Carter v. City of Nashua, 308 A.2d 847, 853 (N.H. 1973); News & Observer Publication Company v. Interim Board of Education for Wake City, 223 S.E.2d 580 (N.C. App. 1976); Jones v. East Windsor Regional Board of Education, 362 A.2d 1228, 1232 (Sup. Ct. N.J. 1976); City of Miami Beach v. Berns, 245 So.2d 38, 40-41 (Fla. 1971) ("Our duty is to interpret this [open meeting] law as it is written and, if possible, do so in a manner to prevent its circumvention."); Bagley v. School District No. 1, Denver, 528 P.2d 1299, 1302 (Colo. 1974); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969); Laman v. McCord, 432 S.W.2d 753, 755 (Ark. 1968); see also, A.S. 44.62.312. See generally, 38 A.L.R.3d 1070.

Thus, other extrinsic construction rules support a holding that the ABA is subject to the open meeting act.

E. Comparison of the Open Meeting Act Requirements With the ABA's Conduct Demonstrates the Act Was Violated.

Since the open meeting act applies to meetings of the ABA, its conduct in holding the Hawaii business meeting must be judged under it. The ABA admits that no "public notice" was given for the meeting, R. 45, Response to Interrogatory No. 5(e), and that the meeting was not public. R. 48, Response to Interrogatory No. 10.

Thus, A.S. 44.62.310(e) was violated. Cf., Sullivan

v. Credit River Township, 217 N.W.2d 502, 505-6 (Minn. 1974).

Secondly, the meeting was not held in Alaska. It thus was not "open to the public," and was consequently violative of A.S. 44.62.310. Courts have been quick to find that meetings of public officials held outside their sovereign boundaries violate applicable open meeting statutes. For example, in Quast v. Knutson, 150 N.W.2d 199 (Minn. 1967) the court held that a school board which met 20 miles outside the school district's boundaries violated an open meeting law requiring "all meetings . . .[to] be open to the public." Id., at 200. Accord, State v. Rural High School District No. 3, 220 P.2d 164 (Kan. 1950).

In Paradise Valley v. Acker, 111 P.2d 168 (Ariz. 1966), the court held invalid a common council meeting held in Phoenix and outside Paradise Valley, a suburb adjacent to the Phoenix city limits. The Arizona statute involved required that meetings "shall be public." The court said the statute

> means public to the citizenry directly concerned, in this case to the citizens of Paradise Valley, Arizona, without the necessity of their leaving the incorporated limits of the municipality to attend a town council meeting. It does not seem reasonable that a meeting held outside of the town limits can comply with the statutory requirement. If a valid meeting can be held in Phoenix, then why not elsewhere, be it close or far distant.

Id., at 169.

Of similar effect is City of Lexington v. Davis, 221 S.W.2d 659 (Ky. App. 1949), holding illegal a city board

meeting held in the bedroom of its seriously ill mayor in the face of a statute requiring all meetings to be public. While the court found no deliberate effort on the part of the board to conceal facts, to exclude anyone, or to mislead the public, it said that "a public meeting presupposes the right of the public freely to attend. . . . Anything which tends to 'cabin, crib or confine' the public in this respect . . ." violates the statute. Id., at 661.

Finally, in State v. Kessler, 117 S.W. 85 (Mo. App. 1909), the court, after voiding action taken at a school board meeting held in a city outside the school district's boundaries in violation of the mandate of an open meeting statute, stated:

> Without any statutory enactment on the subject, it is obvious that considerations of public policy demand that the official meetings of public bodies be held within the limits of their territorial jurisdiction; otherwise public servants might do in secret what they would not attempt to do under public scrutiny, and thereby much injury might be done to the public welfare. It would be just as proper for the state legislature to hold its sessions outside the state or for a county court to meet and transact business in another county. . . . (Emphasis supplied)

Id., at 86.

Alaska's citizens cannot protect their "right to remain informed," A.S. 44.62.312(a)(5), if their public agencies hold business meetings outside the State of Alaska. Cf. Bigelow v. Howze, 291 So.2d 645, 647 (Fla. App. 1974) ("[A] public meeting could not have feasibly been held on this subject in Tennessee."); Berns, supra, at 41 ("A secret meeting occurs

when public officials meet at a time and place to avoid being seen or heard by the public.") This conclusion is rooted in the nation's earliest expression of public meeting policy:

> He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

Charge against King George III, United States Declaration of Independence, July 4, 1776.

V. BECAUSE THE ABA GOVERNORS' HAWAII BUSINESS MEETING VIOLATED THE OPEN MEETING ACT, ALL ACTION TAKEN IN THE MEETING IS VOID, AND ALL PUBLIC FUNDS SPENT ON THE MEETING ARE RECOVERABLE.

A. All Meeting Action Taken Is Void.

The open meeting act is explicit: "Action taken contrary to this section is void." A.S. 44.62.310(f). Thus, all actions of the ABA in connection with the Hawaii business meeting of the Governors, including motions, votes and agenda topic discussions, are void. That such votes, etc., occurred has been admitted by the ABA. R. 53-59.

B. Public Funds Spent on the Meeting Are Recoverable.

A.S. 44.62.310(f) voids not just what occurs at unlawful meetings. It voids all "action." Thus, the ABA's expenditure of public monies[7] to finance the meeting and to reimburse the travel and other expenses of the Governors, was also unlawful and void. (See R. 48, 61 for the ABA's admission as to the expenditure of its monies to reimburse the Governors.[8]) This result is consistent with the thrust of Alaska Constitution,

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[7] The ABA is financed with dues monies and contract monies from the Alaska Court System. The latter are obviously "public" funds. Mandatory dues or license fees, imposed by a State instrumentality, are "state funds no less than revenues deposited in the State Treasury . . . ." State Licensing Bd. of Contr. v. State Civ. Serv. Comm., 110 So.2d 847, 851 (La. App. 1959); see also, A.S. 08.08.010, making the ABA an instrumentality of the State.

[8] Cf. A.S. 39.20.140, which prohibits the Department of Administration from paying a State employee for transportation outside Alaska unless the employee's travel is "clearly necessary to benefit the state."

Art. IX, Sec. 6, which prohibits the expenditure of public funds except for a public purpose.

If public funds are expended for an unlawful purpose, citizens have standing to seek reimbursement for the public treasury in the amount of the funds so spent. City of Chicago ex rel. Cohen v. Keane, 357 N.E.2d 452 (Ill. 1976). Cf. A.S. 37.10.090. As public officers are fiduciaries, the funds they manage are held in trust, the officers are insurers of the funds, and strict care must be used in their handling. People v. Savaiano, 359 N.E.2d 475, 480 (Ill. 1977); Brewer v. Hawkins, 455 S.W.2d 864 (Ark. 1970); State ex rel. O'Connell v. Egan, 371 P.2d 638 (Wash. 1962); Secretary of State v. Hanover Insurance Company, 411 P.2d 89 (Or. 1966).

In Kerby v. State ex rel. Frohmiller, 157 P.2d 698, at 703 (Ariz. 1945) the court denied the secretary of state the right to "charge for expenses by a public officer for services without the State, where the law does not authorize the performance of such service beyond the State's boundaries." The court further indicated that the reasonableness, practicability, or expediency of unlawful expenditures is no justification. Id. As in Kerby, the ABA can point to no authority justifying its violation of the open meeting act and its consequent unlawful expenditure of public monies.

VI. THE ACTIONS IN HOLDING A BUSINESS MEETING IN HAWAII, AND WITHOUT PUBLIC NOTICE, VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS.

The Fourteenth Amendment, United States Constitution and Article I, Sec. 7, Alaska Constitution guarantee that no citizen may be deprived of life, liberty or property by a state instrumentality without due process of law.

Arbitrary government conduct, whether in the form of legislative enactments or agency actions, is violative of the principles of substantive due process. Cf. Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447 (Alaska 1974); Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92 (Alaska 1974). Here, plaintiffs assert that the ABA's action in holding a business meeting in Hawaii, and without public notice, violated the due process guarantees afforded them even if Alaska's open meeting act did not apply to the ABA.

The standard for judging arbitrariness was enunciated by the Supreme Court in Concerned Citizens, supra, a decision upholding the constitutionality of a local ordinance. In disposing of plaintiffs' due process claims the court noted that: "Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." 527 P.2d at 452. The constitutional principles binding a local government must apply with equal force to state instrumentalities. Thus, in determining

plaintiffs' due process claims the question is whether the ABA's act of holding a business meeting in Hawaii bore a reasonable relationship to the ABA's legitimate public purposes. Given the statutory functions of the ABA, clearly no such reasonable relationship exists.

The ABA has been vested by statute with regulatory responsibilities directly affecting the justice system and of interest to all segments of the Alaska population. Through its Board of Governors it decides who will and will not practice law. A.S. 08.08.080(a)(1). The Legislature has also given it a voice in determining what acts constitute the practice of law and what rules will govern the operation of the State's courts. A.S. 08.08.080(b)(1). Indeed, it is responsible for all "matters in any way affecting the organization and functions of the Alaska Bar." A.S. 08.08.080(a)(6).

The importance of these functions to the public at large should be self-evident. Items before the Governors in Hawaii--especially such questions as mandatory pro bono, laymen on the Board of Governors, formation of a political action group, malpractice insurance, and surplus funds (which are, after all, public monies) -are clearly of interest to all citizens of the State. See R. 10-11, 50-60.

A Governors' meeting removed from the scrutiny of Alaska's public and media does nothing to further the ABA's broad policy responsibilities. It also ignores the agency's

statutory duty to act in a reasonable manner with respect to its meetings. See A.S. 08.08.080(a)(3).

By the same token the ABA's action in holding a business meeting in Hawaii unjustifiably infringed on plaintiffs' liberty and property interests which are protected by the due process clauses of both the Federal and State Constitutions.

"Liberty" is not confined to mere freedom from bodily restraint; it extends to the full range of conduct an individual is free to pursue, and it may not be restricted except for a proper governmental objective. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). Liberty includes all those rights protected under the First Amendment, United States Constituion (and correspondingly those protected by Art. I, Sec. 5 & 6 of the Alaska Const.). Id.; United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 221-223 (1967); Gay Coalition v. Sullivan, 578 P.2d 951 (Alaska 1978).

Further, under the Alaska Constitution, Art. I, Sec. 2, the right of the people to retain their sovereignity, i.e., their liberty, by maintaining access to and control over those to whom they have delegated power, is also a fundamental right protected by due process, one so obvious as to need no elucidation. See Coppock v. Patterson, 272 F. Supp. 16, 18 (S.D. Miss. 1967), where the court acknowledges the people's right to observe the proceedings of their legislature and courts, and

to visit their executive. Such right of observation, or access, is frustrated when the public business is conducted outside the boundaries of the public's sovereignity, and without prior notice.

The First Amendment, United States Constitution and its counterparts Alaska Constitution, Art. I, Sec. 5 and 6, include a bundle of rights within their purview and within the notion of "liberty." The bundle includes the right to petition for redress of grievances, California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508, 510 (1972); United Mine Workers of America, supra, a right that extends to state agencies, Center for United Labor Action v. Consolidated Edison Company, 376 F. Supp. 699, 701 (S.D.N.Y. 1974). It also includes the right to secure accurate, up-to-date information concerning the operation of public agencies, In re Verplank, 329 F. Supp. 433, 437 (C.D. Cal. 1971); to receive suitable access to social, political, esthetic, moral, and other ideas, Red Lion Broadcasting Company v. F.C.C., 395 U.S. 367, 390 (1969); and to hear public speeches, Malpus v. Fortune, 311 F. Supp. 240, 245 (N.D. Miss.), aff'd, 432 F.2d 916 (5th Cir. 1970) (where students sued to secure the right to hear a controversial speaker on campus).

To show a violation of any of these rights and thus a violation of due process, one need only show their abridgement, direct or indirect, with no need to show injury. Gay Coalition, supra, at 960; Laird v. Tatum, 408 U.S 1, 13-14 (1972).

Here the ABA's action in holding its Governors' business meeting outside Alaska, without public notice, affronts all these liberty rights, and thus violates plaintiffs' due process guarantees. It is at best difficult to petition the governing body of the ABA if it officially convenes outside the jurisdiction it serves. Cf. Kessler, supra. It is at best difficult to secure up-to-date, reliable information on the operations of the ABA, including data on such publicly important areas of concern as pro bono publico work, residency and admission rules, and others discussed in Hawaii (see R. 52-60), if the official meetings are held at places inconvenient even to Alaska's media. Holding ABA business meetings in Hawaii makes impossible any relevant public scrutiny or criticism of the orders, pronouncements, and general activities of the ABA Governors. The consequence is a gross overextension of the people's delegation of power to the ABA (one that already rises to a legal monopoly over the practice of law) in violation of their sovereign rights.

Plaintiffs, all Alaskan taxpayers and most of whom must pay dues to the ABA, also had their property interests infringed in violation of due process when the ABA unjustifiably expended public monies to hold a business meeting in Hawaii.

Plaintiffs clearly have due process rights during the assessment of such dues and taxes, and once they are collected these due process protections do not fade away. For the monies so collected are held in trust by the public offi-

cials responsible for them. See Savaiano, City of Chicago, and Brewer, supra. As trust funds they may not be spent except for a valid public purpose. Alaska Constitution, Art. IX, Sec. 6; Kerby, supra, at 703.

The ABA did not suggest in the Superior Court any "public purpose" that justified holding a business meeting in Hawaii, without public notice, but instead defended against all of plaintiffs' claims by seeking refuge behind its AAPA by-laws and regulations' exemption. Indeed, it would be difficult to find a rational reason for convening the meeting in Hawaii, so far removed from the boundaries of Alaska and aloof from its citizens and media. Even if the ABA were exempt from the open meeting act, state policy embodied in A.S. 44.62.312, while thus not literally binding on the ABA, is still a helpful guage against which to measure the propriety of the ABA's actions. See also, Kessler, supra, at 86 (even absent an open meeting law, public policy would prevent out-of-state business meetings).

Since this part of plaintiffs' brief assumes, arguendo, that the open meeting act does not apply, its section A.S. 44.62.310(e), which voids action taken contrary to it can be looked to only for advice. Its mandate is, however, instructive, and fully consistent with public policy (as otherwise enunciated both in A.S. 44.62.312 and in Alaska Constitution, Art. II, Sec. 6). Were action that is taken contrary to public policy and contrary to the due process protections afforded the

public's liberty and property interests merely voidable, rather than void, public officials might be more willing to chance illegality. A blanket "voiding" rule makes for surer, easier enforcement and for greater deterrence, and insures that delegations of authority are strictly construed by agencies. Centr-O-Mart, supra. See part I-B-2, above. Cf. the result reached in Kerby, supra.

Thus, the same treatment should be afforded the ABA's actions with regard to the Hawaii business meeting when violations of plaintiffs' due process rights are found as that afforded when violations of the open meeting act are found. All such actions must be voided.

VII

CONCLUSION

For the foregoing reasons, plaintiffs seek the following:

(1) a declaration that the meetings of the ABA Governors are subject to A.S. 44.62.310-.312;

(2) a declaration that the ABA violated A.S. 44.62-.310-.312 in holding a Governors' business meeting in Hawaii in February, 1978;

(3) a declaration that the ABA violated plaintiffs' due process rights in holding a Governors' business meeting in Hawaii in February, 1978;

(4) a declaration that all action taken at the unlawful ABA Governors' Hawaii business meeting is void, and that the public funds expended for the meeting are recoverable;

(5) an award of costs and attorneys' fees for this appeal as determined pursuant to Appellate Rule 29; and

(6) such further relief as the court deems just and reasonable.

Respectfully submitted this 15th day of January, 1979.

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Cross-Appellees

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THE SUPREME COURT OF THE STATE OF ALASKA

BRUCE HOROWITZ, WILLIAM PARKER, JAMES LOVE, DAVID LOUTREL, WILSON A. RICE, JOHN E. DUGGAN, DONALD E. CLOCKSIN, THOMAS G. BECK, ELIZABETH RATNER, RANDALL SIMPSON, PHILIP R. VOLLAND, JEFFREY LOWENFELS,	)
Appellants/Cross-Appellees,	)
vs.	)
THE ALASKA BAR ASSOCIATION,	)
Appellee/Cross-Appellant.	)

File No. 4310/4311

BRIEF OF APPELLEE/CROSS-APPELLANT
THE ALASKA BAR ASSOCIATION

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON

By _____
John M. Conway

By _____
Patrick B. Gilmore

Filed in the Supreme Court of the
State of Alaska the 6th day of
March, 1979.

ROBERT D. BACON
Clerk, Supreme Court

_____
Deputy Clerk

SUBJECT INDEX

TABLE OF AUTHORITIES

SESSION LAWS

STATUTORY PROVISIONS

ALASKA STATUTES

A.S. 08.08.080(a)(3). Powers of board. (a) Except as may be otherwise provided in the Alaska Bar Rules, the board may adopt reasonable provisions

(3) concerning annual and special meetings;

(6) providing for all other matters affecting in any way the organization and functioning of the Alaska Bar.

A.S. 08.08.100. Administrative Procedure Act. The by-laws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62).

A.S. 22.05.020. Composition and general powers. The supreme court is a court of record and consists of three justices including the chief justice. On December 1, 1968, the total number of justices shall be increased to five. The supreme court is vested with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction, according to the constitution, the laws of the state, and the common law. It may prescribe by rule the fees to be charged by all courts for judicial services.

A.S. 22.05.010(a). Jurisdiction. (a) The supreme court has final appellate jurisdiction in all actions and proceedings. The supreme court may issue injunctions, writs of review, mandamus, certiorari, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction. Each justice may issue a writ of habeas corpus, upon petition by or on behalf of any person held in actual custody and may make the writ returnable before the justice himself or before the supreme court, or before any judge of the superior court of the state. An appeal to the supreme court is a matter of right, except that the state shall have no right of appeal in criminal cases, except to test the sufficiency of the indictment or information and under (b) of this section.

A.S. 44.62.310. Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of

its political subdivision, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in party by public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municpal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

A.S. 44.62.312. State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in §310(a) of this chapter exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
(3) the people of this state do not yield their sovereignty to the agencies which serve them;
(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;
(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.
(b) Section 310(c)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

A.S. 44.62.650. Short Title. This chapter may be cited as the Administrative Procedure Act.

RULES

Alaska Rule of Appellate Procedure 5:

Judgments From Which Appeal May Be Taken.

An appeal may be taken to this court from a final judgment entered by the superior court or a judge thereof in any action or proceeding, civil or criminal, except that the state shall have a right to appeal in criminal cases only to test the sufficiency of the indictment or on the ground that the sentence is too lenient.

Alaska Rule of Civil Procedure 82(a)(1) and (a)(2):

Attorney's Fees.

(a) Allowance to Prevailing Party as Costs.
(1) Unless the court, in its discretion, otherwise directs, the following schedule ot attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

SESSION LAWS

Chapter 48 SLA 1966

AN ACT

Requiring that the meetings of agencies of the state and its subdivisions be open to the public with certain exceptions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. A.S. 44.62.110 is repealed and re-enacted to read:

Sec. 44.62.310. AGENCY MEETINGS PUBLIC. (a) All meetings of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss

matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would adversely affect the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding, or to juries, or to parole or pardon boards.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

§8, 181 SLA 1976:
Sec. 8. AS 08.08.100 is amended to read:

Sec. 08.08.100. ADMINISTRATIVE PROCEDURE ACT. The by-laws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62).

United States Constitution:

14th Amendment, Section 1:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law....

Alaska Constitution:

Art. I, Section 2:

> All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

Art. I, Section 7:

> No person shall be deprived of life, liberty, or property, without due process of law.

CROSS-APPEAL

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the Honorable Mark C. Rowland, Judge of the Superior Court, Third Judicial District, at Anchorage, Alaska on September 11, 1978. This Court has jurisdiction pursuant to A.S. 22.05.010(a), A.S. 22.05.020, and Rule 5 of the Rules of Appellate Procedure of the State of Alaska.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in holding this case constitutes public interest litigation, thereby preventing an award of attorney's fees to the prevailing party?

STATEMENT OF THE CASE

This is a civil action in which Plaintiffs-Cross Appellees (hereinafter Plaintiffs) seek to void action taken by the Board of Governors of the Alaska Bar Association (hereinafter ABA) during a business meeting held in Kaui, Hawaii in February, 1978. Plaintiffs' Complaint asserts the Hawaii meeting violated Alaska's Open Meeting Act, the federal and state due process clauses, and Alaska Constitution Article I, Section 2. (R 1-7).

The ABA moved for judgment on the pleadings based on A.S. 08.08.100 which exempts its by-laws and regulations from the Alaska Administrative Procedure Act (hereinafter APA). (R 62-64). Plaintiffs cross-moved for summary judgment, claiming the ABA is not exempt from the Open Meeting Act and that the meeting violated their due process rights. (R 93).

The ABA's motion for judgment on the pleadings was granted, Plaintiffs' motion for summary judgment was denied, and the ABA timely moved for an award of attorney's fees pursuant to Civil Rule 82. (R 125-126) The Superior Court orally denied the ABA's motion on September 11, 1978, holding this suit constitutes public interest litigation. (R 136-137).

This cross-appeal followed.

STATEMENT OF FACTS

The ABA accepts Plaintiffs' Statement of Facts. (Brief of Appellants, pp. 4-5).

ARGUMENT

I

THE ALASKA BAR ASSOCIATION IS ENTITLED TO RULE 82 ATTORNEY'S FEES

The ABA was the prevailing party at trial, having achieved dismissal of Plaintiffs' Complaint with prejudice. It timely moved for reasonable attorney's fees pursuant to Civil Rule 82(a)(1) and (2). The Superior Court orally denied the ABA's motion in a hearing held September 11, 1978, on the basis that this action constitutes public interest litigation. The ABA submits the public interest exception to Civil Rule 82 is inapplicable here.

This court has carved out an exception to Civil Rule 82's general mandate that attorney's fees shall be awarded to the prevailing party. Where a losing party has in good faith raised questions of genuine public interest before the courts, the party may escape an award of attorney's fees under Rule 82. Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974). A lawsuit qualifies as public interest litigation when: (1) it advances strong public policies; (2) numerous people will benefit if the Plaintiff is successful; and (3) only a private party could be expected to bring a suit. Anchorage v. McCabe, 568 P.2d 986, 991 (Alaska 1977), citing LaRaza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D.Cal. 1972). This lawsuit does not constitute public interest litigation under the foregoing test.

There is no strong public policy favoring open meetings for the Board of Governors of the Alaska Bar Association. A.S. 08.08.100 specifically exempts the ABA from the provisions of the Alaska Administrative Procedure Act. This court has recognized that legislative enactments declare the public policy of this State. See, Modern Constr. Inc. v. Barce, Inc., 556 P 2d 528, 529, n. 1 (Alaska 1976). Thus, there is a specific legislative determination that the policy favoring open meetings is inapplicable to the ABA, and such policy will not immunize the Plaintiffs from an award of attorney's fees.

This action is not potentially beneficial to numerous citizens. There is no provision in state law or the ABA by-laws for public participation in the Governors' meetings. Plaintiffs have not established they would have benefitted personally had the action been successful, much less that the general public would have been served. There is no advantage to the public in having a non-public meeting held in Alaska as opposed to another location. Further, there is no indication that voiding the actions taken at the Hawaii meeting would have benefitted anyone. The potential public benefit which is a requisite to invoking the public interest exception is not present here.

Finally, this is not an action which only a private party could be expected to bring. The Alaska Attorney General

is empowered to bring any action which he feels is necessary to protect the public interest. Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975). There is no indication that Plaintiffs sought to have the Attorney General bring this action, or even to render an opinion on the applicability of the open meeting laws to the ABA. The result was an unnecessary court proceeding, further increasing the congestion of our court system. The Attorney General is the proper party to bring an action for violation of state law. Inasmuch as Plaintiffs do not contend they consulted with the Attorney General prior to filing the instant action, it cannot be said that only a private party would bring the suit.

Plaintiffs brought this suit seeking to void actions taken by the Board of Governors of the ABA. This action presents no potential public benefit. No strong public policies are advanced by maintenance of the suit. Plaintiffs have apparently not attempted to have the appropriate public body bring the action. Any one of the foregoing factors is sufficient to remove Plaintiff from the public interest exception to Rule 82. LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D.Cal. 1972).

The ABA has incurred substantial expenses in defending itself. It should be partially compensated for those expenses, under the salutory principles of Civil Rule 82.

ANSWER TO DIRECT APPEAL

STATEMENT OF CASE

The ABA accepts Plaintiffs' Statement of the Case and Statement of Facts.

ARGUMENT

I

THE ALASKA BAR ASSOCIATION IS NOT SUBJECT TO THE ADMINISTRATIVE PROCEDURE ACT

This is a civil action in which Plaintiff-Appellants (hereinafter Plaintiffs) seek to void actions taken by Defendant, ALASKA BAR ASSOCIATION, (hereinafter ABA) at its annual Board of Governor's meeting held in Kauai, Hawaii in February of 1978 (R1-7). Plaintiffs allege the Hawaii meeting was convened in violation of Alaska's Open Meeting Act and the due process clauses of the Federal and State Constitutions. The Superior Court dismissed Plaintiffs' Complaint, holding the ABA is not subject to the Administrative Procedure Act, (hereinafter APA), including its open meeting provisions, and that Plaintiffs' due process rights had not been violated. This appeal followed.

The instant dispute centers around A.S. 08.08.100, which provides:

> "Administrative Procedure Act. The by-laws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62)."

The ABA submits the foregoing provision exempts it from the open meeting requirements of A.S. 44.62.310-312.

The ABA's Board of Governors is vested with certain enumerated powers. A.S. 08.08.080. Included among those powers is the power to adopt reasonable provisions "concerning annual and special meetings." A.S. 08.08.080(a)(3). The by-laws adopted on May 15, 1974, include specific provisions concerning annual and special meetings of the Board of Governors. (R 35-36) Article V, Section 8, of the ABA's by-laws provides:

> "Section 8. MEETINGS.
>
> (a) Regular Meetings. Unless otherwise ordered by the Board of Governors, the regular meetings of the Board shall be held at such times and places as designated by the President. It shall be the duty of the Executive Director to mail timely notice of each meeting of the Board of Governors to the officers of the Alaska Bar Association, members of the Board of Governors, and to the presidents of local Bar Associations, together with a tentative agenda.
>
> (b) Special Meetings. The President, in his discretion may upon written request of three (3) governors, filed with the Secretary, shall call special meetings of the Board of Governors. If the President shall, for any reason fail or refuse, for a period of five (5) days after request therefore, to call a special meeting, the Secretary or some other person designated by the three (3) governors joining in the request may call the meeting. The date fixed for such meeting shall not be less than five (5) days nor more than ten (10) days from the date of the call. Notice of a special meeting shall be signed by the Secretary or by the person designated by three (3) governors in their call. The notice shall set forth the day and hour of the meeting, and

> the place and purpose for holding it. Special meetings may consider only such matters as are set forth in the call of the meeting, except by unanimous consent of all members. The notice must be given to each governor, unless waived by him. A written waiver, signed by a governor, shall be equivalent to notice as herein provided. Notice to governors not waived, as aforesaid, shall be in writing and may be communicated by telegraph or by letter through the United States mail in the usual course, addressed to each governor at his law office address. Notice by telegraph shall be filed with the telegraph transmission at least three (3) days, and notice by mail shall be deposited in the United States Post Office at least five (5) days before the date fixed for the special meeting."

The Board of Governors' meeting held in Kauai in February of 1978 was called pursuant to the foregoing by-laws, and the Board of Governors complied with the by-laws in every respect (R45; Appellants' Brief, p.10). The ABA has been empowered to "adopt reasonable provisions...concerning annual and special meetings...(and)...providing for all other matters affecting in any way the organization and functioning of the Alaska Bar." A.S. 08.08.080(a)(3) and (6). It is also empowered to "adopt reasonable by-laws and regulations consistent with the Alaska Bar Rules." Id. §(b)(2). The foregoing provisions establish the ABA is entitled to enact by-laws concerning annual and special meetings. The by-laws and regulations so adopted are not subject to the APA. A.S. 08.08.100. It follows that the ABA's regular meeting held in Kauai pursuant to

and in compliance with its by-laws, is not subject to attack for failure to comply with the APA.

In spite of the foregoing considerations, Plaintiffs argue the ABA is subject to the open meetings provision of the APA, A.S. 44.62.310-312. Plaintiffs' contend the foregoing provisions are not part of the APA, A.S. 44.62 et seq. Alternatively, Plaintiffs assert even if the ABA's by-laws and regulations are exempt from the Administrative Procedure Act, the ABA itself is not. Plaintiffs are asking this court to accept a warped and distorted interpretation of the pertinent statutes not in harmony with the intentions of the Alaska legislature.

Plaintiffs contend changes worked in A.S. 44.62.310 by Chapter 48 SLA, 1966, removed the statute from the APA, Chapter 44 of the Alaska Statutes. The simple answer to this argument is, if the legislature had intended the result urged by Plaintiffs, it would have so stated. It is not the function of this court to read nonexistent provisions into a legislative enactment in the guise of statutory construction. The legislature is presumed to know what it was saying and to mean what it said when it enacts and amends legislation. Santa Clara County v. Hall, 100 Cal.Rptr. 629, 633, 23 Cal.App.3d 1059 (1972).

Plaintiffs are asking this court to presume that the legislature erroneously omitted a material provision from 48 SLA 1966, i.e.; a provision removing the open meeting require-

ments from the APA To adopt Plaintiffs' position would be to rewrite the statute to conform to an assumed legislative intention which does not appear therein. This is contrary to one of the most basic rules of statutory construction. See, Rowan v. City and County of San Francisco, 53 Cal.Rptr. 88, 92, 244 Cal.2d 308 (Cal. 1966); Alexander v. Michigan Employment Sec. Commission, 144 N.W.2d 850, 853 (Mich.App. 1966). The opposite result is required. When the legislature has before it a particular statute and makes changes in the statute, the failure to enact other changes evidences a legislative intent to leave the law unchanged with regard to other considerations. Santa Clara County v. Hall, 100 Cal.Rptr. 629, 634, 23 Cal.App.3d 1059 (1972).

The Open Meeting Act remained in Chapter 44.62 of the Alaska Statutes after 1966. A.S. 44.62.650 states:

> "This chapter may be cited as the Administrative Procedure Act." (Emphasis added.)

The preceding provision was in effect long before 48 SLA 1966. See Alaska Statutes, Chapters Replaced, December, 1962. It is implausible to assume, as Plaintiffs do, that the legislature would reenact the Open Meeting Act within the APA Chapter while intending to remove the Act from the APA. Furthermore, all sections of Chapter 44.62 deal in some respect with administrative procedure. The logical position for the Open Meeting Act,

which also deals with administrative procedure, is within the same chapter. To accept Plaintiffs' argument would require a holding that any provision of Chapter 44 altered since 1959 is no longer a part of the APA, regardless of how intimately involved with administrative procedure. This cannot be the result intended by the legislature.

Plaintiffs are essentially arguing 48 SLA 1966 impliedly repealed the ABA exemption from the APA set forth in A.S. 08.08.100. An implied repeal occurs when "...enforcement of the prior statute is in irreconcilable conflict with...(the legislature's intent in enacting the allegedly repealing act)..." Peters v. State, 531 P.2d 1263, 1268 (Alaska 1975). A.S. 08.08.100 does not conflict with the Open Meeting Act. Accordingly, there was no implied repeal under the rationale announced in Peters v. State, supra. This principle is particularly apt here, where the ABA's exemption was reaffirmed and expanded in 1976, after its alleged repeal. §8, 181 SLA 1976.

Plaintiffs also contend A.S. 08.08.100 is intended to exempt the ABA's by-laws and regulations from the APA, but not the ABA itself. This argument is based on the erroneous assumption that an association can act apart from its by-laws and regulations. Furthermore, the ABA's exception from APA requirements was broadened in 1976 from "rules" to "by-laws and regulations." §8, 181 SLA 1976, now A.S. 08.08.100. The ABA by-

laws pertaining to regular and special meetings were enacted in 1974. (R 25) A fundamental rule of statutory construction is that the legislature is presumed to be aware of conditions existing at the time of enactment. cf., Knowles v. Gladden, 254 F.Supp. 643, 644 (D.C. Or. 1965); U.S. v. Douglas Aircraft Co., 510 F.2d 1387, 1392-93 (CCPA 1975). Thus, it must be presumed the legislature was aware of ABA practices and by-laws concerning meetings. Chapter 181 SLA 1976, therefore, constitutes a legislative ratification of ABA actions regarding regular and special meetings.

Plaintiffs' theory of partial exemption ignores the express language employed in A.S. 08.08.100. The statute is clear and unambiguous; it states the APA is not applicable to by-laws and regulations adopted by the ABA. It does not state or imply that the exemption granted is partial. It would be improper for this court to limit the exemption by judicial construction. Poulin v. Zartman, 542 P.2d 251, 259 (Alaska 1975), Rehearing 548 P.2d 1299 (Alaska 1975); State ex rel. Kennedy v. Frauwirth, 355 A.2d 39, 41 (Conn. 1974). A.S. 08.08.100 applies to the entire Adiministrative Procedure Act, and its affect should not be narrowed through judicial construction.

A.S. 08.08.100 should be construed according to its plain and obvious meaning without reading anything in or out.

Sealand Service, Inc. v. Federal Maritime Commission, 404 F.2d 824, 828 (D.C. Cir. 1968). A court "cannot disregard plain substance of a statute ecause of theoretical and irrelevant ambiguities." U.S. v. Second National Bank of North Miami, 502 F.2d 535, 540 (5th Cir. 1974), Cert. denied 421 U.S. 912; "the plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." Gemsco, Inc. v. Walling, 324 U.S. 244, 260, 65 S.Ct. 605, 89 L.E.2d 921 (1945).

The statute at issue here should be applied as it is written. The ABA's by-laws, adopted pursuant to powers granted by the Alaska legislature, are entirely exempt from the APA.

II

PLAINTIFFS HAVE NOT BEEN DEPRIVED OF DUE PROCESS

Plaintiffs claim they were denied due process by the Board of Governors' action in meeting in Hawaii. The ABA submits Plaintiffs have no constitutionally protected interest in the location of the Board of Governors meeting.

The courts will take cognizance of a due process claim only where there is an alleged deprivation of an individual interest of sufficient importance to warrant constitutional protection. Herscher v. State Dept. of Commerce, 568 P.2d 996, 1002 (Alaska 1977); Nicholas v. Eckert, 504 P.2d 1359, 1362 (Alaska 1963). Plaintiffs contend they have a property interest in the location of governors' meetings based on their claimed status as Alaska tax payers and dues-paying ABA members. They claim a liberty interest in access to governors' meetings. Neither of the rights claimed by Plaintiffs are of sufficient import to merit constitutional protection. Further, there has been no showing that the alleged rights have been infringed.

The property rights protected by the due process clause are ill-defined. It is clear, however, that a mere unilateral expectation or abstract desire for a particular benefit will not invoke the protections of due process. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701,

33 L.E.2d 548 (1972). Rather, the party raising a due process claim must demonstrate a legitimate entitlement to the property allegedly deprived. Id. Although the exact nature of Plaintiffs' claimed entitlement is difficult to discern, it apparently consists of a claimed right to dictate the location of governors' meetings, such right being derived from payment of ABA dues and Alaska taxes.

The right claimed by Plaintiffs does not consist of property in any recognizable sense. The property rights protected by the Due Process Clause are created by existing "rules or understandings that stem from an independent source such as state law..." Board of Regents of State Colleges v. Roth, supra, 408 U.S. at 577. Thus, it has been held an untenured teacher has no property right in renewal of his contract, Id. at 578, and no property right exists in the location of a branch of the Postal Service, NAACP (Atlanta Local) v. United States Postal Service, 398 F.Supp. 562, 564 (N.D. Ga. 1975). Compare, Herscher, supra (Property interest in a hunting guide's license); Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd., 524 P.2d 657, 659 (Alaska 1974) (Property interest in a license to sell liquor); and Matter of Robson, 575 P.2d 771, 773 (Alaska 1978) (Property interest in license to practice law).

There are no existing state laws, rules, or understandings granting Plaintiffs the right to dictate the location of Board of Governor's meetings. On the contrary, the Alaska Statutes and ABA by-laws expressly grant the governors the power to select the time and location of their meetings. The property interest claimed by Plaintiffs consists of a mere desire or expectation on their part for action by the Board of Governors, and as such is not entitled to constitutional protection. Further, Plaintiffs have failed to show their property was in any sense "taken" by the governors holding their meeting in Hawaii. Absent a recognizable property interest or a "taking" of property, Plaintiffs' due process claim must fail.

Nor was there a deprivation of Plaintiffs' liberty rights. Plaintiffs' theory seems to be that the Board's action in holding its annual meeting in Hawaii denied Plaintiffs access to the meeting. Plaintiffs give no hint as to which constitutional provision guarantees the "right" of access to a Bar Association's Board of Governors meeting. In order to warrant due process protection, a liberty right must be expressly or impliedly established in a constitutional provision, e.g., Nichols v. State, 425 P.2d 247, 254 (Alaska 1967) (right to counsel); Anniskette v. State, 489 P.2d 1012, 1015 (Alaska 1971) (freedom of speech); Green v. State, 462 P.2d 994, 999

(Alaska 1969) (right to jury trial). The claimed "right" to a locally-conducted Bar Association Board of Governors meeting is simply not cognizable in any constitutional sense.

Even if Plaintiffs' claim of liberty right in a local meeting were constitutionally cognizable, there is no indication in the record that such right was abridged. While Plaintiffs make vague allegations of "difficulties" created by the situs of the meeting, there has been no concrete showing that Plaintiffs were prevented from doing anything as a consequence of the governors' meeting in Hawaii. Plaintiffs have not established the existence of a liberty right, nor its deprivation.

Assuming, arguendo, the Plaintiffs do have a constitutionally protected interest in the location of a Board of Governors meeting, there remains a question as to "what process is due." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.E.2d 484 (1972). Due process consists of both procedural and substantive elements. It is undisputed that the Hawaii meeting was set and conducted according to procedures set forth in the ABA by-laws. Plaintiffs do not contend the procedures employed were constitutionally defective. They argue, however, the governors' action was so irrational as to violate the substantive requirements of due process.

A party claiming a denial of substantive due process must demonstrate there is no rational basis for the challenged

action. The burden is a heavy one. The complaining party must show there is no conceivable justification for the action taken. Concerned Citizens of South Kenai Peninsula Borough v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974).

Plaintiffs' chief complaint is that the location of the meeting prevented "public scrutiny or criticism" of the governors' actions. (Appellant's Brief, p.32) The record is devoid of factual support for this contention. This court may judicially notice the fact that modern technology has greatly reduced the burdens of interstate travel and communication. Assuming, arguendo, the convenience of Alaska's news media is a consideration of constitutional import, Plaintiffs have failed to demonstrate it is more inconvenient for the media to travel to Hawaii in February than, for instance, to Barrow.

Plaintiffs have failed to establish the action of the Board of Governors in holding their meeting in Hawaii was totally arbitrary and without justification. Their substantive due process claim must, therefore, fail. Concerned Citizens of South Kenai Peninsula Borough, supra.

Plaintiffs are asking this court to elevate what is, in reality, an internal ABA dispute to the level of a constitutional issue. The courts are generally reluctant to interfere in such matters. See, e.g., Tennessee Secondary School Ass'n. v. Cox, 425 S.W.2d 597, 601 (Tenn. 1968). See generally, 7

CJS, Associations, §34(a), at 79. Most of the Plaintiffs are ABA members. They are entitled to elect their Board of Governors. (R 32) They may recall a governor once elected. (R 35) If they are dissatisfied with the governors' actions, they have ample recourse within the ABA.

The Hawaii meeting did not infringe upon Plaintiffs' constitutional rights.

DATED this 6th day of March, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for Appellee/
Cross-Appellant

By _____
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IN THE SUPREME COURT OF THE STATE OF ALASKA

BRUCE HOROWITZ, WILLIAM PARKER, JAMES LOVE, DAVID LOUTREL, WILSON A. RICE, JOHN E. DUGGAN, DONALD E. CLOCKSIN, THOMAS G. BECK, ELIZABETH RATNER, RANDALL SIMPSON, PHILIP R. VOLLAND, JEFFREY LOWENFELS,

Appellants/Cross-Appellees,

vs.

THE ALASKA BAR ASSOCIATION,

Appellee/Cross-Appellant.

Supreme Court No. 4310/4311
Superior Court No. 3AN78-1198 CIV.

APPELLANTS' REPLY BRIEF/ CROSS-APPELLEES' OPPOSITION BRIEF

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Filed in the Supreme Court of the State of Alaska this 27th day of March, 1979.

Robert D. Bacon
Clerk of the Court

Nadya Baddeley
Deputy Clerk of the Court

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I.

ARGUMENT IN REPLY ON PLAINTIFFS' APPEAL

A. The ABA's Argument Concerning Its Exemption From The Open Meeting Act Is Erroneous.

According to its exception proviso, the open meeting act does not exempt State agencies from its requirements "except as otherwise provided by this section." A.S. 44.62.310(a). In its brief the ABA claims no express exemption in "this section" from the requirements of the open meeting act, and indeed, no express exemption exists for ABA meetings. Nor does the ABA claim that its Board of Governors is not a "board" or one of the other entities covered by the open meeting act. Id.

To successfully avoid coverage of the Hawaii meeting under the act, thus, the ABA must somehow circumvent the plain language of the act. In other words, it must convince the Court not to apply the "plain meaning" statutory construction rule. It must also convince the Court not to strictly construe and apply the exception clause of the act, although settled legal authority requires precisely that result. Hafling v. Inland Boatmen's Union of the Pacific, 585 P.2d 870, 875 (Alaska 1978); 2A Sutherland, Section 47.11 at 90 n.6 & 7. It must convince the Court to ignore the express legislative history of the open meeting act as well as the Legislature's vigorous statement of policy in A.S. 44.62.312 mandating open meetings for all public entities. It must convince the Court

to disregard the impact of the other intrinsic and extrinsic rules of statutory construction discussed in plaintiffs' opening brief, at 8-9, 20-23. And, more broadly, it must convince the Court to ignore a national public policy favoring open, accessible, truly "public" meetings. Cf. State v. Kessler, 117 S.W. 85, 86 (Mo.App. 1909) ("Without any statutory enactment on the subject, it is obvious that considerations of public policy demand that the official meetings of public bodies be held within the limits of their territorial jurisdiction; otherwise public servants might do in secret what they would not attempt under public scrutiny ...."); 5 U.S.C. § 552b(b) (requiring that "[e]xcept as provided in [5 U.S.C. § 552b(c)], every portion of every meeting of an agency shall be open to public observation." [1]).

By focusing solely on A.S. 08.08.100, however, the ABA makes instead a markedly unconvincing argument in support of its position. The premises of the argument are two-fold. First,

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[1] The legislative history of 5 U.S.C. § 552b(b), which is part of the Government in Sunshine Act of 1976, indicates:

> The basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter ... is derived." Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.
>
> * * *
>
> Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process first-hand.

H.R. Rep. No. 94-880, 94th Cong., 2nd Sess. 2; reprinted in 1976 U.S. Code Cong. & Ad. News 2184.

ABA claims that the open meeting act remains part of the AAPA despite tha act's repeal and reenactment in 1966 in ch. 48 SLA 1966. Second, since the act is part of the AAPA and the ABA's by-laws and regulations are exempt from the AAPA via A.S. 08.08. 100, the ABA concludes that the open meeting act does not apply to its meetings. Neither premises nor conclusion are correct.

The ABA only off-handedly deals with the 1966 repeal and reenactment of the open meeting act (ch. 48 SLA 1966), which plaintiffs argue resulted in the act's separation from the AAPA. The ABA says: "The simple answer to this argument is, if the legislature intended the result urged by Plaintiffs, it would have so stated." ABA brief, 12. But the simple answer to that argument is that the Legislature did so state. It said at the very beginning of ch. 48 SLA 1966:

> AN ACT
>
> Requiring that the meetings of agencies of the state and its subdivisions be open to the public with certain exceptions.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA
>
> Section 1. A.S. 44.62.310 is repealed and re-enacted to read:

(Emphasis Supplied.) As can easily be seen from the above quotation, the Alaska Legislature expressly made the open meeting requirements a separate "Act" in 1966. What could be more emphatic of legislative intent to accomplish this separation than a repeal and reenactment? What could be more emphatic than a

title like that of ch. 48 SLA 1966? Cf. Sullivan v. Green Manufacturing Company, 575 P.2d 811, 815 (Alaska 1977) (court can consider title of an act to resolve any questions of intent.[2])

The ABA also claims at page 13 of its brief that ch. 48 SLA 1966 repealed and reenacted the open meeting statute within "Chapter 44.62 of the Alaska Statutes." Since A.S. 44.62.650 states that "[t]his chapter may be cited as the Administrative Procedure Act", the ABA concludes it is, therefore, "implausible to assume, as Plairtiffs do, that the legislature would reenact the Open Meeting Act within the APA Chapter while intending to remove the Act from the APA." ABA brief, 13. However, as plaintiffs pointed out in th[illegible] opening brief at page 12 n.4, A.S. 44.62.650 is a statutory codification. A statutory codification may not change the true meaning of the

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[2] The cases the ABA cites in support of its position, ABA brief, 12-13, are not on point either factually or legally. County of Santa Clara v. Hall, 100 Cal. Rptr. 629 (Cal. 1972), does not concern a statute's repeal and reenactment, but its amendment, and what the legislative history of the particular amendment meant in construing the statute as a whole. Rowan v. City and County of San Francisco, 53 Cal. Rptr. 88 (Cal. 1966), merely reemphasizes the "plain meaning" statutory construction rule. Alexander v. Mich. Employ. Sec. Com., 144 N.W. 2d 850 (Mich. App. 1966), stands for the proposition that courts must not read into statutes provisions which the legislature did not include. Plaintiffs heartily agree. They believe this Court must not read an exemption for ABA meetings into the open meeting act, since the Alaska Legislature did not expressly provide for one. Compare the cases plaintiffs discuss at pages 11-12 of their opening brief on the import of the repeal and reenactment of a statute.

law. A.S. 01.05.031. Section 1, Art. I, ch. I of ch. 143 SLA 1959 (the AAPA) as passed actually reads: "This Act constitutes and may be cited as the Administrative Procedure Act" and not "This chapter constitutes and may be cited as the Administrative Procedure Act." (Emphasis supplied.) The words "This Act" clearly refer to "AN ACT establishing administrative procedures ... ", and not to the later 1966 "ACT requiring that the meetings of agencies of the state and its subdivisions be open to the public with certain exceptions." Ch. 48 SLA 1966.

Thus, the ABA is incorrect in its assertion that the open meeting act is part of the AAPA. Were the ABA claim correct, nonetheless the other premise of the ABA's argument, that it is entirely exempt from the AAPA via A.S. 08.08.100, is still erroneous. A.S. 08.08.100 exempts the ABA's by-laws and regulations from the rule-making requirements of the AAPA. These requirements are procedural, not substantive. In other words, the ABA does not have to go through the public process of interim rule formulation, proposals, hearings, and so forth required of other agencies prior to the adoption of final rules.[3] This exemption does not give the ABA the power to adopt rules

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[3] One subtle error in its argument blows a hole in the ABA's result large enough to figuratively engulf the island of Kauai. The ABA asserts at page 15 of its brief that "A.S. 08.08.100 applies to the entire Adiministrative [sic] Procedure Act, and its affect [sic] should not be narrowed through judicial construction." (Emphasis supplied.) See also the final sentence on page 16 of the ABA's brief. A.S. 08.08.100 was passed in 1960, as section 3, ch. 178 SLA 1960; it exempted the ABA's then "rules" from the AAPA. If, as the ABA claims, [cont.]

that are discordant with substantive requirements of other laws, including the open meeting act.

One ABA response to this contention is that plaintiffs are improperly claiming that ch. 48 SLA 1966 (the repeal and reenactment of the open meeting act) repealed the ABA exemption from the AAPA. ABA brief, 14. This is also incorrect. The plaintiffs agree that the ABA's by-laws and regulations are exempt from the AAPA. This is not to say that whatever is done pursuant to those by-laws or regulations, perhaps reasonable on their face, is necessarily legal.

Another ABA response is that the plaintiffs' "argument is based on the erroneous assumption that an association can act apart from its by-laws and regulations." ABA brief, 14. The Integrated Bar Act, however, does not require the ABA to adopt by-laws and regulations. It says "[t]he board [of governors] may adopt reasonable bylaws and regulations consistent with the Alaska Bar Rules." (Emphasis supplied.) A.S. 08.08.080(b)(2). Moreover, the ABA cites no authority showing that an association cannot exist apart from its by-laws and regulations. The ABA exists as an entity subject as an "agency" under A.S. 44.62.640(a)(4) to the open meeting act, whether

[3 cont.]
A.S. 08.08.100 exempted it in 1960 from the entire AAPA, then this Court erred in 1972 when it held in Application of Peterson, 449 P.2d 304, 306, that the ABA was subject to the AAPA's administrative adjudication provisions. On the other hand, if the ABA is right in saying that it has been entirely exempt from the AAPA since 1960, and if the plaintiffs are also right in saying that the open meeting act is no longer part of the AAPA, then logically the ABA still must lose this case.

or not it ever adopted by-laws and regulations, as the ABA was "created an instrumentality of Alaska", and derives its life from its originating statute, not its rules. A.S. 08.08.010.

The ABA also defends its position with a vague sort of ratification theory. It asserts that when the Legislature changed the word "rules" to the phrase "by-laws and regulations" throughout the Integrated Bar Act in 1976, it ratified the ABA's by-laws and regulations concerning meetings. ABA brief, 15-16. This conclusion certainly cannot be read from ch. 181 SLA 1976, which clearly was only designed to make the use of the word "rules" consistent with the meaning of the word as used in the Alaska Bar Rules promulgated by the Supreme Court. See plaintiffs' opening brief, 19-20. The ABA offers no legislative history in support of its claim. Nor do the two cases it cites, ABA brief, 14, support this ratification theory.[4]

The ABA's open meeting act exemption argument, based entirely on the exemption of its by-laws and regulations from the AAPA under 08.08.100, simply asks too much. Under the ABA's theory, as long as it complied with its by-laws and regulations on meetings, it could hold those meetings not only without regard

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[4] United States v. Douglas Aircraft Co., 510 F.2d 1387 (CCPA 1975), cited at ABA brief, 15, concerned the non-conclusive presumption that could be derived from the reenactment of a statute without significant change and which might indicate correctness of a prior judicial interpretation of the statute. Knowles v. Gladden, 254 F. Supp. 643 (D. Or. 1965), merely held that Congress was presumed to have in mind the definition of the word "deposition" in the Supreme Court promulgated Civil Rules when it passed a statute permitting the taking of depositions in habeas corpus proceedings.

for public access, but also in enforced secrecy no matter where conducted--whether in downtown Anchorage, Kauai, Hong Kong, or Tangier. The Legislature did not sanction such results. The AAPA does nothing more than free the ABA of the onus of procedural rule-making requirements which would be burdensome to a small, thinly staffed agency. No similar policy favors the exemption of the conduct of meetings from the requirements of the open meeting act. See A.S. 44.62.312.

In its brief the ABA fails to mention at all the "except as otherwise provided by this section" clause in the open meeting act. On this shaky footing no structurally sound argument can be built. The ABA, furthermore, provides no relevant discussion of the pertinent statutory construction rules as applied to the laws involved. Nor does the ABA discuss the recorded legislative history of the open meeting act. That is not surprising. It is difficult to argue around the emphatic language of the Judiciary Committee Report for the 1972 changes to the open meeting act: "This bill also reemphasizes state policy against closed meetings of public bodies." Jud. Com. R. SB. No. 253, 1972 House Journal, 158 (emphasis supplied). That state policy, as well as the open meeting act itself, controls the outcome of the present dispute.

B. The ABA's Due Process Arguments Are Erroneous.

"The ABA submits Plaintiffs have no constitutionally protected interest in the location of the Board of Governors meeting." ABA brief, 17. This statement mischaracterizes the

due process issue. The issue is: assuming the open meeting act does not apply, have the plaintiffs' due process rights nonetheless been violated by the ABA's action in holding a business meeting in Hawaii? Plaintiffs do not claim a "right to dictate the location of governors' meetings ...." ABA brief, 18.

What the plaintiffs do claim is that their liberty and property interests were arbitrarily denied in violation of substantive due process[5] by the business meeting in Hawaii. The plaintiffs identified a number of both property and liberty interests affected by the Hawaii meeting. Opening brief, 28-34. They claim their dues and tax monies, certainly "property" protected by due process, were arbitrarily expended for the Hawaii meeting, although the meeting's location had no rational relationship to the statutory duties of the ABA. They claim their liberty interests, such as their rights to reasonable access to public officials, to hear public speeches, and to secure up-to-date, accurate information on the operations of their public agencies, were arbitrarily infringed when the ABA held its business meeting outside the territorial limits of Alaska, although there was no reason for doing so consistent with public policy against inaccessible meetings. The ABA makes no attempt to dispute the existence of these

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[5] Plaintiffs do not claim any procedural due process violations. Except to the extent that no public notice preceding the meeting itself may be classified as a "procedural" defect of the meeting, there is no procedural claim involved in this case. Thus, the ABA's discuss'on of "what process is due" is irrelevant at best. ABA brief, 20.

rights by citation of any contrary and relevant authority. Nor is there any attempt to distinguish plaintiffs' case citations supporting these rights.[6]

Furthermore, in defense the ABA identifies no rational justification for the expenditure of public funds for the Hawaii business meeting, a meeting held without public notice. The ABA does not contend the Hawaii location was necessary in order to garner facts obtainable only there and pertinent to ABA functions. Nor does the ABA deny the discussion of topics of importance to Alaska's citizens, such as the question of laypersons on the Board of Governors, occurred at the meeting.

Nor is it an adequate defense to point out that "modern technology has greatly reduced the burdens of interstate travel and communication." ABA brief, 21. First of all, this is still no excuse for holding a meeting of a public agency without public notice. Secondly, the ABA has no right to impose unnecessary burdens, whether slight or heavy, on public access to its activities.It functions for the people's benefit. It is not the final arbiter of the relative level of access the people are to have to its functions. Despite modern travel conveniences, Hawaii is not accessible to more

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6 Rather, the ABA cites three cases not even vaguely on point. ABA brief, 19. Nichols v. State, 425 P.2d 247 (Alaska 1967), held that an indigent defendant proceeding under Crim. Rule 35 had a right to counsel under the equal protection clause. Anniskette v. Alaska, 489 P.2d 1012 (Alaska 1971), overturned the conviction of a person charged with disorderly conduct on first amendment vagueness grounds. Green v. State, 462 P.2d 994 (Alaska 1969), denied a challenge to a jury array for lack of evidence that the array was not a fair cross-section of the community.

than a tiny portion of Alaska's wealthier citizens. At least in Barrow (the counterpoint suggestion of the ABA at brief, 21) the poorer residents of that Alaskan city might have had reasonable access to the meeting--assuming, of course, adequate prior notice.

The ABA also claims that this dispute is an internal one, and is therefore inappropriate for judicial resolution. This assertion ignores the fact that some of the plaintiffs are neither attorneys nor ABA members, but lay members of the public interested in ABA activities. One plaintiff, William Parker, is a State Representative. In any event, the ABA cites no authority for this claim save Tennessee Secondary School Athletic Association v. Cox, 425 S.W.2d 597 (Tenn. 1968), where the court refused to interfere with the internal affairs of a voluntary high school athletic association. The present dispute, in contrast, concerns Alaska's citizenry as a whole and one of the agencies they created to serve them. Moreover, the ABA's membership is not voluntary, but mandatory. The ABA-member plaintiffs are required to belong and are required to pay dues. Unlike a voluntary association, they cannot resign when dissatisfied with operation of the association, at least not without such severe consequences to their occupational standing as to make resignation an illusory remedy.

C. Conclusion.

Democratic government is a utilitarian social invention of a free, sovereign people. Its premise is that government

exists for the protection of the people. Its predicate is control by the people. Due process prohibitions against arbitrary governmental conduct as well as public access devices like the open meeting act are adopted to effectuate that predicate, to aid the people in preserving that control, to ensure democratic government, and thus to guarantee the sovereignty of the people. When government agencies are able to meet without prior notice at inconvenient locations to determine the people's business, public scrutiny becomes at best difficult and these purposes are thwarted.

For the foregoing reasons, therefore, the plaintiffs respectfully request that the decision of the lower court be reversed in part, that the Hawaii business meeting of the ABA Board of Governors be held void, and that the case be remanded for further proceedings.

II.

ARGUMENT IN RESPONSE TO CROSS-APPEAL: THE TRIAL COURT WAS CORRECT IN DENYING THE ABA'S MOTION FOR ATTORNEYS' FEES.

A. A Determination That A Prevailing Party Is Not Entitled To Attorneys' Fees May Not Be Reversed Unless There Has Been An Abuse Of Discretion By The Trial Court.

It is settled that determinations with respect to attorneys' fees "are committed to the broad discretion of the trial court." Tobeluk v. Lind, ___ P.2d ___, Opinion No. 1781 at 12 (Alaska 1979). See also Stordohl v. Government Employees Insurance Company, 564 P.2d 63, 68 (Alaska 1977); Haskins v.

Sheldon, 558 P.2d 487, 496 (Alaska 1976); Alaska Placer Company v. Lee, 553 P.2d 54, 63 (Alaska 1976); Western Airlines, Inc. v. Lathrop Company, 535 P.2d 1209, 1217 (Alaska 1975); City of Valdez v. Valdez Development Corporation, 523 P.2d 177, 184 (Alaska 1974). Consequently, the Superior Court's determination that this lawsuit falls within the "public interest" exception to Civil Rule 82 created by Gilbert v. State, 526 P.2d 1131 (Alaska 1974), and that, therefore, the ABA is not entitled to fees cannot be overturned absent a showing that the trial court abused its discretion.

B. The Trial Court Did Not Abuse Its Discretion When It Denied Attorneys' Fees To The ABA.

The trial judge stated he denied attorneys' fees to the ABA because:

> Considering the nature of the relief sought and the issues raised in Gilbert and McCabe and of course [La Raza Unida v. Volpe], I believe [the lawsuit] does constitute public interest litigation.

Transcript, 9-10.

Thus, the court expressly found that under the standards enunciated in Gilbert, supra, Anchorage v. McCabe, 568 P.2d 986 (Alaska 1977), and La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D.Cal. 1972), this case was brought in the public interest. Such a determination may be reversed only if it is "manifestly unreasonable." Gilbert, supra, 526 P.2d at 1136. The party seeking to overturn the trial court's decision in this regard carries a heavy burden of persuasion. Western Airlines, Inc,

supra, 535 P.2d at 1417.

The record in this case demonstrates that the trial court's decision was eminently reasonable. In examining the character of the lawsuit the court used the standards set forth in La Raza, supra, as guidelines.[7] La Raza required fees to be awarded to public interest plaintiffs in federal litigation where: 1) the suit was aimed at effectuating a strong public policy; 2) it was intended to benefit numerous people; and 3) only a private party could have been expected to bring the action. 57 F.R.D. at 101. McCabe, supra, 568 P.2d at 991, states that these factors help to delineate public interest litigation in Alaska. The La Raza standards were clearly met in this litigation.

As to the first element of the La Raza test, there is, without question, a strong public policy in favor of open meetings in Alaska. The present litigation seeks a judgment applying this policy to an ABA business meeting in the same fashion that it applies to every other agency and meeting not expressly exempted by the language of A.S. 44.62.310.

The ABA argues, however, that since the trial court found that A.S. 08.08.100 exempted it from the coverage of

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[7] Obviously, because La Raza and McCabe involved prevailing plaintiffs who sought attorneys' fees, the facts of those cases do not precisely fit the situation where a losing plaintiff seeks to avoid an assessment of attorneys' fees by invocation of the Gilbert exception to Civil Rule 82. The focus, however, is not on the party winning or losing, but on the nature of the litigation, making the principles of Gilbert applicable here nonetheless. See Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975).

the open meeting act there could not have been issues of public concern raised in the lawsuit. If the Court adopted this retrospective approach, the Gilbert rule would be eliminated. For in any case in which a public-interest plaintiff did not prevail, the defendant could successfully urge that, based upon the court's decision on the merits, the public interest the plaintifffs thought they were promoting did not exist in the specific context of that litigation. Clearly, such a retrospective analysis has not been employed to determine whether a plaintiff sought to effectuate a strong public policy by commencing litigation. See Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1227 (Alaska 1975), wherein the losing plaintiff was held exempt from an assessment of attorneys' fees because she litigated several "important public questions."

The issues presented in the instant case are even more fundamental than those involved in Girves. They concern a principle which is at the very heart of our system of democratic government: actions of government agencies are to "be taken openly and ... their deliberations are to be conducted openly." A.S. 44.62.312(a)(2).

In other jurisdictions, statutes similar to Alaska's open meeting act have been liberally construed in favor of the public and strictly construed against public agencies. See cases cited in plaintiffs' opening brief at 22. Given the clear language of the open meeting act itself, it was reasonable for the plaintiffs to conclude that A.S. 08.08.100, which

on its face addresses the adoption of by-laws and regulations and not the conduct of meetings, was not an exemption from the open meeting act's coverage.

As to the second element of the La Raza test, the ABA paradoxically argues that since it is exempt from the open meeting act and its meetings are not open to the public, a judgment favorable to the plaintiffs could not have benefitted a large number of people. Here again the ABA advocates an analysis which would eliminate the Gilbert rule. The focus under the La Raza test is not on the actual result of the litigation, but on the results sought by the litigation and on the number of people who would have received the benefit of the litigation had it been successful. Clearly, a determination that the open meeting act governs the conduct of that State agency which is responsible for regulating the practice of law would confer a benefit on Alaska's citizenry as a whole. Reference to the agenda of the 1978 Hawaii meeting in dispute demonstrates that those segments of the public who were concerned with lay representation on the Board of Governors or political action groups fostered by the ABA could well have benefitted from an accessible meeting conducted with adequate public notice in accordance with the open meeting act.

With respect to the third element of the La Raza test, the ABA contends that the plaintiffs should have attempted to convince the Attorney General to bring this litigation. The ABA is an instrumentality of the State of Alaska, A.S. 08.08.010,

and the Attorney General is the State's legal advisor. A.S. 44.23.020. It is unreasonable to expect the Attorney General to sue the State's own agency. Moreover, this Court has never before considered the enforcement of statutory or constitutional rights an exclusive option of the executive branch of government. Cf. State v. Lewis, 559 P.2d 630, 635 n.15, 636 (Alaska) cert. denied, 432 U.S. 901 (1977). See also Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1962) (suit by private citizen to compel branch of Department of Commerce to hold public hearings as required by AAPA). No statute or constitutional provision requires a citizen of Alaska to first seek the State to sue itself in circumstances similar to those of this case. The ABA, moreover, suggests no authority to the contrary.

The ABA has not shown that the trial court's decision on the attorneys' fees issue was manifestly unreasonable and thus an abuse of discretion. Consequently, if the Court reaches the issue, the ABA's cross-appeal should be held without merit, and the trial court's decision refusing the ABA an award of attorneys' fees on public interest grounds affirmed.

Respectfully Submitted this 27th day of March, 1979.

Michael J. Frank
Richard Brown
Gregory M. O'Leary

BY: Michael J. Frank

Attorneys for Appelants/
Cross-Appellees

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FILED IN OPEN COURT
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

BRUCE HOROWITZ, WILLIAM PARKER, JAMES LOVE, DAVID LOUTREL, WILSON A. RICE, JOHN E. DUGGAN, DONALD E. CLOCKSIN, THOMAS G. BECK, ELIZABETH RATNER, RONDALL SIMPSON, PHILLIP R. VOLLAND, SUE ELLEN TATTER, JEFFREY LOWENFELDS,

Plaintiffs,

vs.

THE ALASKA BAR ASSOCIATION,

Defendant.

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT
SEP 11 1978
Clerk of the Trial Courts
By _____ Deputy

No. 3AN-78-1198 Civ.

JUDGMENT

This matter came on before the Court on the Defendant's Motion for Judgment on the Pleadings filed pursuant to Rule 12(c) of the Rules of Civil Procedure, and the Plaintiffs' Motion for Summary Judgment filed pursuant to Rule 56 of the Rules of Civil Procedure, and the Court having reviewed the records and files herein and having heard oral argument, finds that the Alaska Administrative Procedure Act, Chapter 44.62 of the Alaska Statutes, is not applicable to meetings held by the Board of Governors of the Alaska Bar Association by virtue of A.S. 08.08.100, and the Court further finding that there is no genuine issue as to any material fact with respect to the Plaintiffs' Motion for Summary Judgment in which the Plaintiffs contended that they have been denied due process pursuant to Article 1, Section ?, and Article 1, Section 7 of the Constitution of the State of Alaska, and the due process provisions of the United States Constitution, and

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the Court further finding that the Defendant is entitled to judgment as a matter of law with respect to the due process claims, and further finding that pursuant to Rule 56(c) of the Rules of Civil Procedure summary judgment is appropriately granted against the Plaintiffs dismissing their claims, it is therefore

ORDERED, ADJUDGED AND DECREED that judgment be and it hereby is entered in favor of the Defendant and against the Plaintiffs and that the Plaintiffs' Complaint be and it hereby is dismissed with prejudice. ~~The Defendant is therefore the prevailing party and judgment be and it hereby is entered in favor of the Defendant against the Plaintiffs for attorneys' fees in the amount of $_____, plus interest at the rate of eight per cent (8%) per annum from the date of this judgment until paid.~~

DATED this 11 day of ~~August~~ September, 1978.

Mark C. Rowland
Judge of the Superior Court

I certify that on 9/19/78 a copy of the above was sent to each of the following at their addresses of record: All Attny

Deputy Clerk

Service Acknowledged this 7 day of AUGUST, 19 78

d.c.e.: 9/19/78

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