ABA
Ombud
Subpeona/
Court Docs.
#9

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

September 5, 1979

Mr. John Lohff
Executive Director
Alaska Bar Association
P.O. Box 279
Anchorage, Alaska 99510

Dear Mr. Lohff:

It has come to my attention that on September 6, 1979, the Board of Governors intends to develop a position regarding the recent ombudsman subpoena. As a matter of courtesy I wish to inform the Board of Governors of forthcoming informational requests of a similar nature.

Recently the House Judiciary Committee was informed by the Speaker of the House that the House Judiciary Committee would be the committee of referral in the House regarding the 1980 sunset review of the Alaska Bar Association. Advance notice of this intended referral was provided in order that committee staff might have sufficient time to collect the data necessary for such review. As staff to the committee, I have been assigned this project.

As you are probably aware, the Alaska sunset law, AS 44.66.010, et seq., requires the House committee of referral to submit to the Speaker, not later than the 60th day of the legislative session, a detailed report on the activities of a board or program under sunset review. In accord with this statutory requirement, I wish to inform the Board of Governors that I intend to request information, similar to that requested by the ombudsman, that is, financial records, together with statistical reports concerning grievances filed with the association. Furthermore, additional data will be requested as the sunset law requires.

Within the next several weeks, I intend to request from the association the specific data that the committee will require for its sunset review of the association.

I feel certain that, working together on this matter, we will be able to provide the legislature with sufficient information to conduct a thorough and fair sunset review of the association.

Sincerely yours,

Margaret W. Berck
Counsel to House Judiciary Committee

cc: Rep. Charlie Parr, Chairman

hand delivered Sept. 5th

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
P.O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

WILLIAM GARRISON, BAR COUNSEL

OFFICERS
DONNA C. WILLIARD
PRESIDENT
ANCHORAGE
WILLIAM B. ROZELL
PRESIDENT ELECT
JUNEAU
JONATHAN H. LINK
VICE PRESIDENT
FAIRBANKS
EDWARD G. KING
SECRETARY
KETCHIKAN

BOARD MEMBERS
ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
ELIZABETH P. KENNEDY
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

September 17, 1979

Margaret W. Berck
Counsel to
House Judiciary Committee
1016 West 6th Ave. #201
Anchorage, Ak. 99501

Dear Ms. Berck:

As I related to you over the telephone, the Board of Governors for the Alaska Bar Association has met and has considered your correspondence dated September 5, 1979.

It is the position of the Board that requests from the House Judiciary Committee for materials not held to be confidential by the Alaska Bar Association will be provided in an effort to cooperate with the Committee's investigation.

It is, however, the position of the Alaska Bar Association that it is not a State agency and is not subject to the Sunset review process. Therefore, provision of any requested materials is not to be construed as a waiver of the jurisdictional issue or any other defense which the Bar Association might have regarding the applicability of the statutes with respect to Sunset review.

If there is any way in which I could be of any assistance to the Committee and you, please do not hesitate to contact me.

Sincerely yours,

ALASKA BAR ASSOCIATION

Donna C. Willard
President

DCW/vg

cc: Board of Governors
Bruce Gagnon
Fred Tausend
Keith Brown

Filed: Aug 22, 1979
Dismissed [illegible]
9/09

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

79-5932

Civil Action No. 3AN-

MEMORANDUM IN SUPPORT OF
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

Statement of Facts

On June 12, 1979, the Office of the Ombudsman received two complaints concerning the Alaska Bar Association (Bar). Given case numbers A79-0641 and A79-0642, the first complaint was directed towards the adequacy of the Bar's investigation and resolution of citizen grievances against attorneys and the propriety of the salary and fringe benefits of the Bar Counsel. The second complaint alleged an improper use of Bar funds for travel and associated expenses not directly benefiting the Bar and further alleged an improper expenditure of Bar funds for the guest speaker at the 1979 Hawaiian Conference.

By letter dated July 16, 1979, the Ombudsman, Frank Flavin, advised Donna C. Willard, President of the Board of Governors of the Bar of the complaints and that the Office of the Ombudsman had commenced an investigation pursuant to AS 24.55.110. A copy of that letter is attached hereto as Exhibit "A". Basically, Mr. Flavin afforded Donna C. Willard the opportunity to voluntarily

IEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
NCHORAGE, AK 99501
(907) 279-5528
AND (907) 279-3633

cooperate with the investigation by providing copies of documents and by allowing an examination of the Bar's financial records.

By letter dated July 19, 1979, attached hereto as Exhibit "B", Donna C. Willard, while offering certain records to Mr. Flavin as a member of the Bar, further advised him that the Board of Governors "declines to recognize any jurisdiction" of the Office of the Ombudsman.

By letter dated July 31, 1979, a copy of which is attached as Exhibit "C", Frank Flavin reiterated the jurisdiction of his Office and further advised Donna C. Willard that any dealings with him in this matter were in his official capacity as Ombudsman and not individually as an attorney licensed to practice law in the State of Alaska.

On August 2, 1979, Donna C. Willard was personally served with a Subpoena for Production of Documents issued by Padeen Moriarty, Acting Ombudsman. A copy of the Subpoena is attached hereto as Exhibit "D".

On August 10, 1979, three days prior to the date for production of documents pursuant to the Subpoena, the Office of the Ombudsman received a Response to Subpoena for Production of Documents from Donna C. Willard. That document is attached hereto as Exhibit "E". The main thrust of that exhibit is contained in two unsupported, conclusory statements concerning the jurisdiction of the Ombudsman. Suffice it to say, the response indicates that there would be no compliance with the Subpoena. While Donna C. Willard also asks that the Ombudsman defer action enforcing the Subpoena until after the September 6, 1979 meeting of the Board of Governors, Donna C. Willard in her letter of July 19, 1979 (Exhibit "B") advised the Ombudsman of the Board's position that there was no jurisdiction over the Bar. In view of

IEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
NCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

the jurisdictional issue raised by the Bar and the Ombudsman's obligation to investigate complaints, the Ombudsman has sought an Order from the Court requiring compliance with the Subpoena.

The Office of the Ombudsman Has Jurisdiction to Investigate Acts of the Alaska Bar Association

The Office of the Ombudsman was established in July, 1975 and has since that time been heavily utilized by its citizenry. The Office of the Ombudsman has two responsibilities: (1) to receive complaints from the public and to investigate and act upon such complaints; and (2) to improve public administration. As an external critic of governmental operations, scrutiny by the Office of the Ombudsman is not always welcome.

In any event, AS 24.55.100 gives the Ombudsman "... jurisdiction to investigate the administrative acts of agencies". AS 24.55.150 sets forth those administrative acts which are appropriately the subject of investigation because they may be:

> "...(1) contrary to law;
>
> (2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;
>
> (3) based on a mistake of fact;
>
> (4) based on improper or irrelevant grounds;
>
> (5) unsupported by an adequate statement of reasons;
>
> (6) performed in an inefficient or discourteous manner; or
>
> (7) otherwise erroneous."

The term "administrative act" is defined in AS 24.55.330(1) as:

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

"... an action, omission, decision, recommendation, practice, policy, or procedure of an agency, but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion;"

The definition of the term "agency", the issue raised by the Bar in this case, is defined in AS 24.55.330(2) to include:

"a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality, or in the executive, legislative, or judicial branches of state government, and a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality or of the state government independent of the executive, legislative and judicial branches; it also includes an officer, employee or member of an 'agency' acting or purporting to act in the exercise of his official duties, but does not include the governor, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the superior or district court, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board;"

The extremely broad jurisdictional grant to the Ombudsman is certainly consistent with the legislative desire to provide, in the Office of the Ombudsman, an accessible and official clearinghouse for citizen complaints. The Bar fits one or more of the entities defined as "agency" in AS 24.55.330(2). First, it is a creature of the state legislature having been created by the legislature as "... an instrumentality of the state ..." AS 08.08.010. The legislature further established the Board of Governors and conferred upon it certain powers and duties. AS 08.08.030 and .080. Those powers relate in part to the holding of annual and special meetings, the collection and disbursement of funds and the organization and functioning of the Bar.

FEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

In essence, the legislature has charged the Bar with certain managerial functions relating to matters of public concern. That such functions are matters of public concern can hardly be contested. As the Court stated in In Re Paul, 17 Alaska Reports, 360 (D.C. Alaska, 1957):

> "For over 30 years there has been a constant growth in the system of integrated bars throughout the nation; in some states they have been created by statute, in some by court rule, but in all, the Bar of the state or other jurisdiction, has taken a leading role in policing their membership so that the standards of the lawyers would be kept at a high level in order that in their dealings with the public they would maintain proper comportment so as to protect the public interest and safeguard the general welfare of those with whom they dealt." Id. at 368.

The Court in Petition of Moody, 524 P.2d 1261 (Alaska 1974) also discussed the public benefits of an integrated bar stating that:

> "The disadvantages to an individual in such a system are believed to be outweighed by the advantages achieved by the profession as a whole, and by the public to whose benefit it is that the profession be governed effectively by an authoritative organization." Id. at 1266.

As far as the jurisdiction of the Office of the Ombudsman over the Bar is concerned, given the absence of any statutory exemption which explicitly or even implicitly contravenes the broad jurisdictional grant, an investigation by the Office of the Ombudsman of alleged administrative abuses by the Bar is clearly contemplated by the legislature. In the case of Application of Peterson, 499 P.2d 304 (Alaska, 1972), Peterson petitioned the Alaska Supreme Court for admission to the Alaska Bar Association alleging that the hearing afforded him by the Bar after he failed

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

the January and September, 1967 bar examinations was inadequate and that the scoring system utilized was unfair. The Court held that the "substantial evidence test" was the appropriate standard of administrative review stating that "...we have consistently adhered to the substantial evidence test as the appropriate scope of review with regard to appeals from administrative agencies." Id. at 307 (Emphasis added).

The Court obviously considered the Bar to be an administrative agency when it stated that:

> "The legislature has expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Alaska Administrative Procedure Act, AS 44.62.010-650." Id. at 306.

However, the Court did not find that the Bar was an agency because it was subject to the A.P.A. but rather that it was an agency which was subject to that Act. The subsequent action of the legislature in deleting the Bar from the list of agencies subject to the Administrative Procedure Act cannot seriously be relied upon to support a conclusion that the legislature was therefore indicating that the Bar was not an agency. Such an analysis was rejected by the Court in Chronicle Publishing Company v. Superior Court, 354 P.2d 637 (Calif. 1960). In Chronicle, the publishing company served interrogatories on the State Bar of California seeking information as to complaints and disciplinary actions taken against Victor E. Cappa, an attorney who had filed a libel action against it. In considering whether or not the State Bar could claim a privilege based upon a section of the Code of Civil Procedure relating to testimony of a "public officer" the Court stated:

IEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

> "That the Legislature considered the State Bar as at least akin to a state public body or agency and hence its officers as 'public officers' is illustrated by the last paragraph of section 6001, where it appears that the Legislature felt the necessity of providing that laws prescribing procedures for state bodies, agencies, or classes, did not apply to the State Bar, thus indicating that the Legislature considered the State Bar in their category..." Id. at 645.

In McGregor v. Clawson, 506 S.W.2d 922 (Tex. 1974) the Court was faced with a question concerning the proper venue for a disbarment brought by the State Bar of Texas against McGregor, an attorney licensed in Texas. While the case turned on whether venue provisions in the State Bar Act prevailed over a more general civil rule, the Court did discuss the governmental status of the Bar.

> "The State Bar Act is purely a creature of statute, prescribing the machinery and procedure by which the State Bar has been empowered to bring and maintain the disbarment suit in question. But for the statute, the State Bar and District Grievance Committee would have no existence." Id. at 928.

The Court went on to say that:

> "The State Bar and its Grievance Committees exist solely by virtue of the exercise of the power of the State, acting through its legislative department. They are administrative agencies of the State. ... The Legislature could at any time terminate their existence and provide other and different means for handling of the matters now entrusted to them. They (the State Bar and Grievance Committee) are creatures of the State. An agency created by the State for the better ordering of government has no privileges, immunities or rights under the State and Federal constitutions which it may invoke in opposition to the will of its creator." Id. at 929.

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1018 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

The Office of the Ombudsman
Properly Subpoenaed Donna C. Willard

AS 24.55.170(a)(1) confers upon the Office of the Ombudsman the power to issue subpoenas compelling production of documents. AS 24.55.170(b) further sets forth the procedures to be followed should the person subpoenaed refuse to comply. The Ombudsman has properly applied to this Court for an order compelling compliance.

Conclusion

For the reasons set forth above, this Court should make and enter its Order requiring Donna C. Willard to comply with the Office of the Ombudsman's Subpoena for Production of Documents.

DATED at Anchorage, Alaska, this 21st day of August, 1979.

HEDLAND, FLEISCHER & FRIEDMAN, P.C.
Attorneys for the Office of the Ombudsman

By: _____
Saul R. Friedman

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 16, 1979

Donna C. Willard, Esq.
President
Board of Governors
Alaska Bar Association
360 K Street
Anchorage, Alaska 99501

Re: Ombudsman Complaints A79-0641 and A79-0642

Dear Ms. Willard:

Please take notice that the Office of the Ombudsman has received the following complaints:

A79-0641: that the Alaska Bar Association has not adequately investigated or resolved grievances filed by citizens against attorneys subject to the Bar Association's grievance and disciplinary procedures and that the employment contract for the Bar Counsel is excessive in salary and vacation.

A79-0642: that members of the Board of Governors have expended excessive amounts of Bar Association funds for travel and associated expenses outside the State of Alaska for activities not directly benefitting the Alaska Bar Association or its membership; that the expenditure of Bar Association funds for the guest speaker at the 1979 Hawaiin Conference was improper.

The Office of the Ombudsman has commenced this investigation pursuant to AS 24.55.110. The Office of the Ombudsman has jurisdiction over administrative acts of the Alaska Bar Association pursuant to AS 24.55.100 and AS 08.08.010.

Our investigators plan to examine the financial records of the Association on July 30, 1979, beginning at 8:00 a.m., at the Bar Association offices. If this time is inconvenient we will be glad to reschedule the inspection.

Pursuant to AS 24.55.160 we also request copies of the following documents:

1) Minutes of the Board of Governor's meetings for the last two fiscal years;

2) A copy of the employment contract for the Alaska Bar Counsel; and

EXHIBIT 'A'

3) A copy of statistical reports concerning the number and disposition of all grievances filed with the Bar Association in the last two years.

We would appreciate receiving the above information prior to July 30, 1979.

Thank you very much for your consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:rj

BOARD OF GOVERNORS

ALASKA BAR ASSOCIATION

P.O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

WILLIAM GARRISON, BAR COUNSEL

OFFICERS

DONNA C. WILLARD
PRESIDENT
ANCHORAGE

WILLIAM B. ROZELL
PRESIDENT ELECT
JUNEAU

JONATHAN H. LINK
VICE PRESIDENT
FAIRBANKS

EDWARD G. KING
SECRETARY
KETCHIKAN

BOARD MEMBERS

ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
ELIZABETH P. KENNEDY
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

HAND DELIVERED

July 19, 1979

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Frank Flavin
Ombudsman
840 K Street, Room 203
Anchorage, Alaska 99501

Dear Frank:

As you are aware, the Board of Governors is in receipt of your letter dated July 16, 1979, setting forth two complaints directed at the Board and staff of the Alaska Bar Association.

I found our meeting with you, on July 18, 1979, to be very informative and have relayed to the Board the information that you provided.

After due consideration, the Board wishes me to inform you that all members of this Association are entitled to inspect all books and records not catalogued as confidential. Therefore, we will be pleased to provide you, in the near future, for review at the Bar office, the following records:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for 1979; and

JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

4. Upon request I will furnish, from my personal files, the brochures and other data concerning the various programs in connection with the American Bar, Western States, and Bar Leadership meetings.

There is no employment contract, in writing, with Bar Counsel. However, I can inform you that, on May 19, 1979, the Board unanimously approved a one year contract, retaining Mr. Garrison at an annual salary of $45,000.00 and providing for thirty-five days of paid vacation. This constituted an additional twenty days of vacation over his 1978 contract, in lieu of any salary increase.

Furthermore, Mr. Garrison's right to take his vacation was restricted to times when no bar examination was in progress and when no heavy case load on admissions or discipline was pending.

Of further benefit to you may be the fact that Mr. Garrison has been admitted to the practice of law since 1966 and that, prior to being retained by the Bar Association in 1977, he was an Assistant District Attorney in this state for some five years.

With respect to the Minutes, which will take about two days to review for deletion of Executive Session material, they will be ready for your review on or before July 27, 1979, together with the Discipline reports.

In connection with both Discipline and Admissions matters, we are sure you realize that the Bar Association and the Board of Governors act only as agents of the Supreme Court of Alaska. Therefore, any further requests dealing with either areas should be directed to that entity.

I would request, with respect to the financial records, that your review await my return from the Ninth Circuit Judicial Conference when I shall finally have an opportunity to review and approve the audit which, as I informed you, is currently being conducted by a Certified Public Accountant. That task should be completed no later than August 3. Also, I would prefer to be present during your examination and would appreciate it if you would coordinate with me.

As I mentioned earlier, the foregoing information is being provided to you in your capacity as a member of the Alaska Bar Association. The Board believes, however, that the Association does not fall within the jurisdiction of the Ombudsman. Not only has the Superior Court in Horowitz v The Alaska Bar Association determined that we are not a state agency but also, similar rulings have been made at the administrative level. Specifically, admission to the State Employee Retirement System and to the State Employee Credit Union have both been denied.

EXHIBIT 'B'

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Therefore, the Board, at this time, respectfully declines to recognize any jurisdisticiction which you may feel you have in your official capicity. Furthermore, nothing contained in this letter or any agreements which we might arrive at with you to provide materials constitutes a waiver of the Bar Association's right to assert the jurisdictional issue and any other defenses which it might have.

If I can be of any further assistance, please do not hesitate to call.

Sincerely yours,

ALASKA BAR ASSOCIATION

Donna C. Willard
President

wj

EXHIBIT 'B'

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 31, 1979

Donna C. Willard, Esq.
President
Alaska Bar Association
P.O. Box 279
Anchorage, Alaska 99510

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

I have reviewed our statute and relevant court cases and feel strongly that the Alaska Bar Association is subject to the jurisdiction of the Office of the Ombudsman.

All previous and future contacts between myself or any other member of this office are within the scope of the authority and duties of the Office of the Ombudsman.

I am treating these complaints as any other complaints in this office. Consequently, they have been assigned to Paddy Moriarty, Deputy Ombudsman and Supervisor of the Anchorage office, for investigation. Any future contacts will be made by her.

I have reviewed the specific information given by our complainants. While we are interested in all Board of Governor's travel for the past two fiscal years, the complainants specifically mentioned Atlanta, San Diego, Chicago and Hawaii.

Thank you for your patience and consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:rj

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

In the matter of)
)
) SUBPOENA FOR PRODUCTION OF DOCUMENTS
Ombudsman Complaint)
No. A79-0641, A79-0642

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials relating to grievances concerning attorneys;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for fiscal year 1979; and

4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79

Padeen Moriarty
Acting Ombudsman

EXHIBIT 'D'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on Donna C. Willard by delivering a copy thereof to ~~him~~ her

DATED: August 2, 1979

Catherine M. Allen

EXHIBIT 'D'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on John R. LOAFF by delivering a copy thereof to ~~him~~ at Bar Association.

DATED: August 2, 1979

Corwin M. Allen

Received by John R. Loaff

Date: 2 August 1979

EXHIBIT 'D'

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

PERSONALLY DELIVERED

In the matter of Ombudsman Complaint No. A79-0641, A79-0642	)

RECEIVED
AUG 10 1979
HEDLAND, FLEISCHER & FRIEDMAN

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

EXHIBIT 'E'

The Board of Governors will meet on September 6, 1979 to consider the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

ORDER SETTING HEARING ON APPLICATION FOR ORDER COMPELLING COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

TO: Donna C. Willard, President
Alaska Bar Association

Pursuant to the Application for Order Compelling Compliance with Office of the Ombudsman Subpoena and the supporting documents filed therewith, a hearing on said Application will be held before this Court in Courtroom "____" in the Alaska State Court Building at Anchorage, Alaska, on the ____ day of _____ 1979, at the hour of _____ o'clock __.m.

DATED at Anchorage, Alaska, this ____ day of August, 1979.

_____
Judge of the Superior Court

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

ORDER COMPELLING COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

This matter having come before the Court upon the Application for Order Compelling Compliance with Office of the Ombudsman Subpoena, and the Court having considered said Application, the pleadings and file herein and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that Donna C. Willard, President, Alaska Bar Association, shall produce the documents requested in the Office of the Ombudsman Subpoena for Production of Documents at the office of the Alaska Bar Association on _____, 1979, at _____ o'clock ____.m.

DATED at Anchorage, Alaska, this ____ day of _____ 1979.

_____
Judge of the Superior Court

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

MEMORANDUM IN SUPPORT OF
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

Statement of Facts

On June 12, 1979, the Office of the Ombudsman received two complaints concerning the Alaska Bar Association (Bar). Given case numbers A79-0641 and A79-0642, the first complaint was directed towards the adequacy of the Bar's investigation and resolution of citizen grievances against attorneys and the propriety of the salary and fringe benefits of the Bar Counsel. The second complaint alleged an improper use of Bar funds for travel and associated expenses not directly benefiting the Bar and further alleged an improper expenditure of Bar funds for the guest speaker at the 1979 Hawaiian Conference.

By letter dated July 16, 1979, the Ombudsman, Frank Flavin, advised Donna C. Willard, President of the Board of Governors of the Bar of the complaints and that the Office of the Ombudsman had commenced an investigation pursuant to AS 24.55.110. A copy of that letter is attached hereto as Exhibit "A". Basically, Mr. Flavin afforded Donna C. Willard the opportunity to voluntarily

AND, FLEISCHER
FRIEDMAN
ORNEYS AT LAW
SUITE 400
WEST 6TH AVENUE
ORAGE, AK. 99501
07) 279-5528
907) 278-3633

cooperate with the investigation by providing copies of documents and by allowing an examination of the Bar's financial records.

By letter dated July 19, 1979, attached hereto as Exhibit "B", Donna C. Willard, while offering certain records to Mr. Flavin as a member of the Bar, further advised him that the Board of Governors "declines to recognize any jurisdiction" of the Office of the Ombudsman.

By letter dated July 31, 1979, a copy of which is attached as Exhibit "C", Frank Flavin reiterated the jurisdiction of his Office and further advised Donna C. Willard that any dealings with him in this matter were in his official capacity as Ombudsman and not individually as an attorney licensed to practice law in the State of Alaska.

On August 2, 1979, Donna C. Willard was personally served with a Subpoena for Production of Documents issued by Padeen Moriarty, Acting Ombudsman. A copy of the Subpoena is attached hereto as Exhibit "D".

On August 10, 1979, three days prior to the date for production of documents pursuant to the Subpoena, the Office of the Ombudsman received a Response to Subpoena for Production of Documents from Donna C. Willard. That document is attached hereto as Exhibit "E". The main thrust of that exhibit is contained in two unsupported, conclusory statements concerning the jurisdiction of the Ombudsman. Suffice it to say, the response indicates that there would be no compliance with the Subpoena. While Donna C. Willard also asks that the Ombudsman defer action enforcing the Subpoena until after the September 6, 1979 meeting of the Board of Governors, Donna C. Willard in her letter of July 19, 1979 (Exhibit "B") advised the Ombudsman of the Board's position that there was no jurisdiction over the Bar. In view of

HEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

the jurisdictional issue raised by the Bar and the Ombudsman's obligation to investigate complaints, the Ombudsman has sought an Order from the Court requiring compliance with the Subpoena.

The Office of the Ombudsman Has Jurisdiction to Investigate Acts of the Alaska Bar Association

The Office of the Ombudsman was established in July, 1975 and has since that time been heavily utilized by its citizenry. The Office of the Ombudsman has two responsibilities: (1) to receive complaints from the public and to investigate and act upon such complaints; and (2) to improve public administration. As an external critic of governmental operations, scrutiny by the Office of the Ombudsman is not always welcome.

In any event, AS 24.55.100 gives the Ombudsman "... jurisdiction to investigate the administrative acts of agencies". AS 24.55.150 sets forth those administrative acts which are appropriately the subject of investigation because they may be:

> "...(1) contrary to law;
>
> (2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;
>
> (3) based on a mistake of fact;
>
> (4) based on improper or irrelevant grounds;
>
> (5) unsupported by an adequate statement of reasons;
>
> (6) performed in an inefficient or discourteous manner; or
>
> (7) otherwise erroneous."

The term "administrative act" is defined in AS 24.55.330(1) as:

DLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
16 WEST 6TH AVENUE
CHORAGE, AK. 99501
(907) 279-5528
D (907) 278-3633

> "... an action, omission, decision, recommendation, practice, policy, or procedure of an agency, but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion;"

The definition of the term "agency", the issue raised by the Bar in this case, is defined in AS 24.55.330(2) to include:

> "a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality, or in the executive, legislative, or judicial branches of state government, and a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality or of the state government independent of the executive, legislative and judicial branches; it also includes an officer, employee or member of an 'agency' acting or purporting to act in the exercise of his official duties, but does not include the governor, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the superior or district court, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board;"

The extremely broad jurisdictional grant to the Ombudsman is certainly consistent with the legislative desire to provide, in the Office of the Ombudsman, an accessible and official clearinghouse for citizen complaints. The Bar fits one or more of the entities defined as "agency" in AS 24.55.330(2). First, it is a creature of the state legislature having been created by the legislature as "... an instrumentality of the state ..." AS 08.08.010. The legislature further established the Board of Governors and conferred upon it certain powers and duties. AS 08.08.030 and .080. Those powers relate in part to the holding of annual and special meetings, the collection and disbursement of funds and the organization and functioning of the Bar.

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

In essence, the legislature has charged the Bar with certain managerial functions relating to matters of public concern. That such functions are matters of public concern can hardly been contested. As the Court stated in In Re Paul, 17 Alaska Reports, 360 (D.C. Alaska, 1957):

> "For over 30 years there has been a constant growth in the system of integrated bars throughout the nation; in some states they have been created by statute, in some by court rule, but in all, the Bar of the state or other jurisdiction, has taken a leading role in policing their membership so that the standards of the lawyers would be kept at a high level in order that in their dealings with the public they would maintain proper comportment so as to protect the public interest and safeguard the general welfare of those with whom they dealt." Id. at 368.

The Court in Petition of Moody, 524 P.2d 1261 (Alaska 1974) also discussed the public benefits of an integrated bar stating that:

> "The disadvantages to an individual in such a system are believed to be outweighed by the advantages achieved by the profession as a whole, and by the public to whose benefit it is that the profession be governed effectively by an authoritative organization." Id. at 1266.

As far as the jurisdiction of the Office of the Ombudsman over the Bar is concerned, given the absence of any statutory exemption which explicitly or even implicitly contravenes the broad jurisdictional grant, an investigation by the Office of the Ombudsman of alleged administrative abuses by the Bar is clearly contemplated by the legislature. In the case of Application of Peterson, 499 P.2d 304 (Alaska, 1972), Peterson petitioned the Alaska Supreme Court for admission to the Alaska Bar Association alleging that the hearing afforded him by the Bar after he failed

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

the January and September, 1967 bar examinations was inadequate and that the scoring system utilized was unfair. The Court held that the "substantial evidence test" was the appropriate standard of administrative review stating that "...we have consistently adhered to the substantial evidence test as the appropriate scope of review with regard to appeals from administrative agencies." Id. at 307 (Emphasis added).

The Court obviously considered the Bar to be an administrative agency when it stated that:

> "The legislature has expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Alaska Administrative Procedure Act, AS 44.62.010-650." Id. at 306.

However, the Court did not find that the Bar was an agency because it was subject to the A.P.A. but rather that it was an agency which was subject to that Act. The subsequent action of the legislature in deleting the Bar from the list of agencies subject to the Administrative Procedure Act cannot seriously be relied upon to support a conclusion that the legislature was therefore indicating that the Bar was not an agency. Such an analysis was rejected by the Court in Chronicle Publishing Company v. Superior Court, 354 P.2d 637 (Calif. 1960). In Chronicle, the publishing company served interrogatories on the State Bar of California seeking information as to complaints and disciplinary actions taken against Victor E. Cappa, an attorney who had filed a libel action against it. In considering whether or not the State Bar could claim a privilege based upon a section of the Code of Civil Procedure relating to testimony of a "public officer" the Court stated:

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3623

> "That the Legislature considered the State Bar as at least akin to a state public body or agency and hence its officers as 'public officers' is illustrated by the last paragraph of section 6001, where it appears that the Legislature felt the necessity of providing that laws prescribing procedures for state bodies, agencies, or classes, did not apply to the State Bar, thus indicating that the Legislature considered the State Bar in their category..." Id. at 645.

In McGregor v. Clawson, 506 S.W.2d 922 (Tex. 1974) the Court was faced with a question concerning the proper venue for a disbarment brought by the State Bar of Texas against McGregor, an attorney licensed in Texas. While the case turned on whether venue provisions in the State Bar Act prevailed over a more general civil rule, the Court did discuss the governmental status of the Bar.

> "The State Bar Act is purely a creature of statute, prescribing the machinery and procedure by which the State Bar has been empowered to bring and maintain the disbarment suit in question. But for the statute, the State Bar and District Grievance Committee would have no existence." Id. at 923.

The Court went on to say that:

> "The State Bar and its Grievance Committees exist solely by virtue of the exercise of the power of the State, acting through its legislative department. They are administrative agencies of the State. ... The Legislature could at any time terminate their existence and provide other and different means for handling of the matters now entrusted to them. They (the State Bar and Grievance Committee) are creatures of the State. An agency created by the State for the better ordering of government has no privileges, immunities or rights under the State and Federal constitutions which it may invoke in opposition to the will of its creator." Id. at 929.

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

The Office of the Ombudsman
Properly Subpoenaed Donna C. Willard

AS 24.55.170(a)(1) confers upon the Office of the Ombudsman the power to issue subpoenas compelling production of documents. AS 24.55.170(b) further sets forth the procedures to be followed should the person subpoenaed refuse to comply. The Ombudsman has properly applied to this Court for an order compelling compliance.

Conclusion

For the reasons set forth above, this Court should make and enter its Order requiring Donna C. Willard to comply with the Office of the Ombudsman's Subpoena for Production of Documents.

DATED at Anchorage, Alaska, this 21st day of August, 1979.

HEDLAND, FLEISCHER & FRIEDMAN, P.C.
Attorneys for the Office of the Ombudsman

By: _____
Saul R. Friedman

EDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
16 WEST 6TH AVENUE
CHORAGE, AK. 99501
(907) 279-5528
D (907) 278-3633

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

PERSONALLY DELIVERED

In the matter of Ombudsman Complaint No. A79-0641, A79-0642	)

RECEIVED
AUG 10 1979
HEDLAND, FLEISCHER & FRIEDMAN

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
ATKINSON CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

EXHIBIT 'B'

The Board of Governors will meet on September 6, 1979 to consider the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
INSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
CHORAGE, ALASKA
EPHONE 279-5563

EXHIBIT 'B' PAGE 2 of 2

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch W0
Juneau, Alaska 99811
(907) 465-4370

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 16, 1979

Donna C. Willard, Esq.
President
Board of Governors
Alaska Bar Association
360 K Street
Anchorage, Alaska 99501

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

Please take notice that the Office of the Ombudsman has received the following complaints:

A79-0641: that the Alaska Bar Association has not adequately investigated or resolved grievances filed by citizens against attorneys subject to the Bar Association's grievance and disciplinary procedures and that the employment contract for the Bar Counsel is excessive in salary and vacation.

A79-0642: that members of the Board of Governors have expended excessive amounts of Bar Association funds for travel and associated expenses outside the State of Alaska for activities not directly benefitting the Alaska Bar Association or its membership; that the expenditure of Bar Association funds for the guest speaker at the 1979 Hawaiin Conference was improper.

The Office of the Ombudsman has commenced this investigation pursuant to AS 24.55.110. The Office of the Ombudsman has jurisdiction over administrative acts of the Alaska Bar Association pursuant to AS 24.55.100 and AS 08.08.010.

Our investigators plan to examine the financial records of the Association on July 30, 1979, beginning at 8:00 a.m., at the Bar Association offices. If this time is inconvenient we will be glad to reschedule the inspection.

Pursuant to AS 24.55.160 we also request copies of the following documents:

1) Minutes of the Board of Governor's meetings for the last two fiscal years;

2) A copy of the employment contract for the Alaska Bar Counsel, and

EXHIBIT 'A'

3) A copy of statistical reports concerning the number and disposition of all grievances filed with the Bar Association in the last two years.

We would appreciate receiving the above information prior to July 30, 1979.

Thank you very much for your consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:rj

EXHIBIT 'A'

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
P.O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

WILLIAM GARRISON, BAR COUNSEL

OFFICERS
DONNA C. WILLARD
PRESIDENT
ANCHORAGE
WILLIAM B. ROZELL
PRESIDENT ELECT
JUNEAU
JONATHAN H. LINK
VICE PRESIDENT
FAIRBANKS
EDWARD G. KING
SECRETARY
KETCHIKAN

BOARD MEMBERS
ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
ELIZABETH P. KENNEDY
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

HAND DELIVERED

July 19, 1979

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Frank Flavin
Ombudsman
840 K Street, Room 203
Anchorage, Alaska 99501

Dear Frank:

As you are aware, the Board of Governors is in receipt of your letter dated July 16, 1979, setting forth two complaints directed at the Board and staff of the Alaska Bar Association.

I found our meeting with you, on July 18, 1979, to be very informative and have relayed to the Board the information that you provided.

After due consideration, the Board wishes me to inform you that all members of this Association are entitled to inspect all books and records not catalogued as confidential. Therefore, we will be pleased to provide you, in the near future, for review at the Bar office, the following records:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for 1979; and

JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

4. Upon request I will furnish, from my personal files, the brochures and other data concerning the various programs in connection with the American Bar, Western States, and Bar Leadership meetings.

There is no employment contract, in writing, with Bar Counsel. However, I can inform you that, on May 19, 1979, the Board unanimously approved a one year contract, retaining Mr. Garrison at an annual salary of $45,000.00 and providing for thirty-five days of paid vacation. This constituted an additional twenty days of vacation over his 1978 contract, in lieu of any salary increase.

Furthermore, Mr. Garrison's right to take his vacation was restricted to times when no bar examination was in progress and when no heavy case load on admissions or discipline was pending.

Of further benefit to you may be the fact that Mr. Garrison has been admitted to the practice of law since 1966 and that, prior to being retained by the Bar Association in 1977, he was an Assistant District Attorney in this state for some five years.

With respect to the Minutes, which will take about two days to review for deletion of Executive Session material, they will be ready for your review on or before July 27, 1979, together with the Discipline reports.

In connection with both Discipline and Admissions matters, we are sure you realize that the Bar Association and the Board of Governors act only as agents of the Supreme Court of Alaska. Therefore, any further requests dealing with either areas should be directed to that entity.

I would request, with respect to the financial records, that your review await my return from the Ninth Circuit Judicial Conference when I shall finally have an opportunity to review and approve the audit which, as I informed you, is currently being conducted by a Certified Public Accountant. That task should be completed no later than August 3. Also, I would prefer to be present during your examination and would appreciate it if you would coordinate with me.

As I mentioned earlier, the foregoing information is being provided to you in your capacity as a member of the Alaska Bar Association. The Board believes, however, that the Association does not fall within the jurisdiction of the Ombudsman. Not only has the Superior Court in Horowitz v. The Alaska Bar Association determined that we are not a state agency but also, similar rulings have been made at the administrative level. Specifically, admission to the State Employee Retirement System and to the State Employee Credit Union have both been denied.

EXHIBIT 'B'

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Therefore, the Board, at this time, respectfully declines to recognize any jurisdistiction which you may feel you have in your official capicity. Furthermore, nothing contained in this letter or any agreements which we might arrive at with you to provide materials constitutes a waiver of the Bar Association's right to assert the jurisdictional issue and any other defenses which it might have.

If I can be of any further assistance, please do not hesitate to call.

Sincerely yours,

ALASKA BAR ASSOCIATION

Donna C. Willard
President

wj

EXHIBIT B'

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 31, 1979

Donna C. Willard, Esq.
President
Alaska Bar Association
P.O. Box 279
Anchorage, Alaska 99510

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

I have reviewed our statute and relevant court cases and feel strongly that the Alaska Bar Association is subject to the jurisdiction of the Office of the Ombudsman.

All previous and future contacts between myself or any other member of this office are within the scope of the authority and duties of the Office of the Ombudsman.

I am treating these complaints as any other complaints in this office. Consequently, they have been assigned to Paddy Moriarty, Deputy Ombudsman and Supervisor of the Anchorage office, for investigation. Any future contacts will be made by her.

I have reviewed the specific information given by our complainants. While we are interested in all Board of Governor's travel for the past two fiscal years, the complainants specifically mentioned Atlanta, San Diego, Chicago and Hawaii.

Thank you for your patience and consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:cj

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

In the matter of)
)
) SUBPOENA FOR PRODUCTION OF DOCUMENTS
Ombudsman Complaint)
No. A79-0641, A79-0642

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials relating to grievances concerning attorneys;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for fiscal year 1979; and

4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79

Padeen Moriarty
Acting Ombudsman

EXHIBIT 'D'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on Donna C. Willard by delivering a copy thereof to ~~him~~ her

DATED: August 2, 1979

Catherine M. Allen

EXHIBIT 'D'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on John R. LOAFF by delivering a copy thereof to ~~him~~ at Bar Assoc.

DATED: August 2, 1979

Catherine M. Allen

Received by John R. Loaff

Date: 2 August 1979

EXHIBIT 'D'

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

PERSONALLY DELIVERED

In the matter of Ombudsman Complaint No. A79-0641, A79-0642	)

RECEIVED
AUG 10 1979
HEDLAND, FLEISCHER & FRIEDMAN

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

EXHIBIT 'E'

The Board of Governors will meet on September 6, 1979 to consider the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
INSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
HORAGE, ALASKA
EPHONE 279-5563

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant.	)

Civil Action No. 3AN-

APPLICATION FOR ORDER COMPELLING COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

Comes now the State of Alaska, Office of the Ombudsman, by and through its attorneys, Hedland, Fleischer & Friedman, and respectfully applies to this Court, pursuant to AS 24.55.170(b), AS 44.62.590 and Rule 45(g) of the Alaska Rules of Civil Procedure, for an Order compelling the compliance of Donna C. Willard, President of the Alaska Bar Association with the Office of the Ombudsman Subpoena for Production of Documents served on her on August 2, 1979.

This Application is supported by the Affidavit of Frank Flavin, Ombudsman and the Memorandum filed herewith.

DATED at Anchorage, Alaska, this 22 day of August, 1979.

HEDLAND, FLEISCHER & FRIEDMAN

Attorneys for the Office of the Ombudsman

By: _____
Saul R. Friedman

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

AFFIDAVIT OF FRANK FLAVIN

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Frank Flavin, being first duly sworn upon oath, deposes and says:

1. That I am the Ombudsman of the State of Alaska, Office of the Ombudsman.

2. That on August 2, 1979, Padeen Moriarty, acting as Ombudsman because of my absence from the State of Alaska, executed a Subpoena for Production of Documents, a copy of which is attached hereto as Exhibit "A", page one.

3. That the official records of the Office of the Ombudsman, attached hereto as pages two and three of Exhibit "A", indicate that said Subpoena was personally served upon Donna C. Willard and was also served upon her through service on John R. Loaff at the Alaska Bar Association.

4. That on August 10, 1979, the Office of the Ombudsman received a Response to Subpoena for Production of Documents, a copy of which is attached hereto as Exhibit "B", contesting the

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

jurisdiction of the Office of the Ombudsman and further indicating that the Subpoena for Production of Documents requiring production on Monday, August 13, 1979 would not be complied with.

FRANK FLAVIN

SUBSCRIBED and SWORN to before me this ____ day of August, 1979.

NOTARY PUBLIC in and for Alaska
My Commission Expires: _____

HEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-1633

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

In the matter of)
)
) SUBPOENA FOR PRODUCTION OF DOCUMENTS
Ombudsman Complaint)
No. A79-0641, A79-0642

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials relating to grievances concerning attorneys;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for fiscal year 1979; and

4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79

Padeen Moriarty
Padeen Moriarty
Acting Ombudsman

EXHIBIT 'A'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on Donna C. Willard by delivering a copy thereof to ~~him~~ her

DATED: August 2, 1979

Catherine M. Collier

EXHIBIT 'A'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on John R. LOAFF by delivering a copy thereof to ~~him~~ at Bar room.

DATED: August 2, 1979

Catherine M. Allen

Received by John R. Loaff

Date: 2 August 1979

Extra cc

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

In the matter of)
)
Ombudsman Complaint)
No. A79-0641, A79-0642)
)

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
KINSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
CHORAGE, ALASKA
LEPHONE 279-5563

The Board of Governors will meet on September 6, 1979 to consider the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

BOARD OF GOVERNORS

ALASKA BAR ASSOCIATION

P.O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

RANDALL P. BURNS, EXECUTIVE DIRECTOR
WILLIAM GARRISON, BAR COUNSEL

OFFICERS
DONNA C. WILLARD
PRESIDENT
ANCHORAGE
WILLIAM B. ROZELL
PRESIDENT ELECT
JUNEAU
JONATHAN H. LINK
VICE PRESIDENT
FAIRBANKS
EDWARD G. KING
SECRETARY
KETCHIKAN

BOARD MEMBERS
ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
ELIZABETH P. KENNEDY
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

March 14, 1980

Hon. Charles H. Parr
Pouch V
Juneau, Ak. 99811

Dear Sir:

In accordance with previous representations, we are forwarding to you the 1979 Audit of the Alaska Bar Association which just been completed.

Sincerely,
ALASKA BAR ASSOCIATION

Donna C. Willard
President

DCW/vg

R. stewart mcdonald

certified public accountant

401 E. Northern Lights Boulevard
Suite 205
Anchorage, Alaska 99503 (907) 277-6651

January 25, 1980

Board of Directors
Alaska Bar Association
Anchorage, Alaska 99501

I have examined the statement of financial position of the Alaska Bar Association General Fund, at December 31, 1979 and the related statements of income and changes in accumulated income for the year then ended. My examination was made in accordance with generally accepted auditing standards, and, accordingly included such tests of the accounting records and other such tests as I considered necessary in the circumstances.

The financial statements of the Alaska Bar Association for the year ended December 31, 1978, presented herewith, were examined by other auditors whose report dated February 1, 1979 expressed an unqualified opinion on those statements.

In my opinion, the 1979 financial statements referred to above present fairly the financial position of the Alaska Bar Association and its results of operations for the year then ended in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Sincerely,

R. Stewart McDonald

R. Stewart McDonald
Certified Public Accountant

RSM/ss

Attachments

Alaska Bar Association General Fund
Statement of Financial Position
At December 31, 1979 and 1978

ASSETS	1979		1978	
Cash on hand and in checking account		$ 44,436		27,527
Cash in savings accounts		60,952		113,398
Accounts receivable		890		11,872
Prepaid expenses		9,669		2,120
Fixed assets	33,832		31,624	
Less allowance for accumulated depreciation	(19,273)	14,559	(15,334)	16,290
Total assets		$130,506		171,207

LIABILITIES AND ACCUMULATED INCOME				
Liabilities				
Accounts payable	14,069		2,302	
Notes payable	-0-		10,000	
Revenues collected in advance	94,500	$108,569	97,659	109,961
Accumulated income				
Reserve for working capital	13,577		13,577	
Unappropriated	8,360	21,937	47,669	61,246
Total liabilities and accumulated income		$130,506		171,207

See accompanying notes to financial statements.

Alaska Bar Association General Fund
Statement of Changes in Accumulated Income
For the years ended December 31, 1979 and 1978

	Reserves for Working Capital	Unappropriated	Total
Balance at January 1, 1978	$13,577	68,789	82,366
Net loss for the year ended Dec. 31, 1978	-	(21,120)	(21,120)
Balance at December 31, 1978	13,577	47,669	61,246
Net loss for the year ended Dec. 31, 1979	-	(39,309)	(39,309)
Balance at December 31, 1979	$13,577	8,360	21,937

See accompanying notes to financial statements.

Alaska Bar Association General Fund
Statement of Revenues and Expenses
For the years ended December 31, 1979 and 1978

	1979	1978
Revenues	$425,242	351,367
Expenses		
Bar admission	32,610	29,875
Board of Governors	40,570	34,217
Grievances	107,482	74,351
Administration	161,992	142,689
Continuing legal education	33,151	16,196
Other expenses	88,746	75,159
Total expenses	464,551	372,487
Net loss	$(39,309)	(21,120)

See accompanying notes to financial statements.

Alaska Bar Association General Fund
Notes to Financial Statements
December 31, 1979 and 1978

1. Summary of significant accounting policies:

   a) The Association's accounting records are maintained on the accrual method. Receipts of membership dues and other fees are recognized as revenue in the period to which they apply. Expenses are recognized in the period in which they are incurred.

   b) Library and equipment: Contributions of books are recorded at their estimated fair market value at time of receipt, and other items are recorded at cost. Depreciation expense is computed by the straight-line method over the estimated useful life of the assets.

   c) Income taxes: The Association is exempt from income taxes as an instrumentality of the State of Alaska.

2. Reserve for working capital:

   a) The reserve was created by the Board of Governors as a segregation of the General Fund Balance. The fund is not restricted to any specific purpose.

Alaska Bar Association General Fund
Statement of Changes in Cash
For the years ended December 31, 1977 through 1979

	1977	1978	1979
Cash balance at beginning of year	$113,675	139,460	140,925
Cash collections			
Dues, fees and other income	278,406	348,804	436,224
Changes in prepaid income	12,299	30,749	(3,159)
Note payable	-	10,000	-
Total cash collections	290,705	389,553	433,065
Cash disbursements			
Operating expenses before depreciation	261,359	379,697	456,394
Purchase of fixed assets	2,016	7,839	2,208
Payoff of notes	1,545	552	10,000
Total cash disbursements	264,920	388,088	468,602
Net increase (decrease) of cash	25,785	1,465	(35,537)
Cash balance at end of year	139,460	140,925	105,388
Cash on hand represented by income attributable to future year	63,459	97,567	94,500
Cash surplus	$ 76,001	43,358	10,888

See accompanying notes to financial statements.

Alaska Bar Association
Analysis of Revenue and Expenses
For the years ended December 31, 1979 and 1978

December 31, 1979	Referral	Admissions	Grievances	Education	Convention	Other	Total
Revenues							
Direct	$ 3,475	38,760	50,400	50,694	52,970	211,478	
Interest						9.587	
Other						7,878	
Total revenue	3,475	38,760	50,400	50,694	52,970	228,943	425,242
Expenses							
Direct	14,777	32,610	107,482	33,151	52,816	-	
Board of Governors						40,571	
Administrative						161,992	
Legislative auditing						10,444	
Newsletters						6,586	
Contractual services (insurance)						3,212	
Committies						910	
Total expenses	14,777	32,610	107,482	33,151	52,816	223,715	464,551
Net income (loss)	$(11,302)	6,150	(57,082)	17,543	154	5,228	(39.309)

****

December 31, 1978							
Revenues							
Direct	$ 3,125	48,686	54,620	11,687	29,701	191,266	
Interest						7,443	
Other						4,839	
Total revenue	3,125	48,686	54,620	11,687	29,701	203,548	351,367
Expenses							
Direct	12,200	29,875	74,351	16,196	30,738	-	
Board of Governors						34,217	
Administrative						142,689	
Legislative auditing						8,762	
Newsletters						10,885	
Contractual services (insurance)						11,642	
Committies						932	
Total expenses	12,200	29,875	74,351	16,196	30,738	209,127	372,487
Net income (loss)	$(9,075)	18,811	(19,731)	(4,509)	(1,037)	(5,579)	(21,120)

See accompanying notes to financial statements.

R. stewart mcdonald

certified public accountant

401 E. northern lights boulevard
suite 205
anchorage, alaska 99503 (907) 277-6651

January 25, 1980

Board of Directors
Alaska Bar Association
Anchorage, Alaska 99501

I have examined the statement of financial position of the Alaska Bar Association Client Security Fund, Alaska Bar Foundation and Alaska Bar Insurance Trust at December 31, 1979. My examination was made in accordance with generally accepted auditing standards, and, accordingly included such tests of the accounting records and other such tests as I considered necessary in the circumstances.

The financial statements of the Alaska Bar Association for the year ended December 31, 1978, presented herewith, were examined by other auditors whose report dated February 1, 1979 expressed an unqualified opinion on those statements.

In my opinion, the 1979 financial statements referred to above present fairly the financial position of the Alaska Bar Association and its results of operations for the year then ended in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Sincerely,

R. Stewart McDonald

R. Stewart McDonald
Certified Public Accountant

RSM/ss

Attachments

Alaska Bar Association
Client Security Fund
Statement of Financial Position
At December 31, 1979 and 1978

ASSETS		1979		1978
Cash in savings		$45,361		33,044
ACCUMULATED INCOME				
Client security fund				
Balance, January 1,	33,044		21,014	
Gross revenues from dues for the year ended December 31,	12,317	$45,361	12,030	33,044

See accompanying notes to financial statements.

Alaska Bar Foundation
Statement of Financial Position
At December 31, 1979 and 1978

ASSETS		1979		1978
Cash in bank		$6,319		6,102
LIABILITIES and ACCUMULATED INCOME				
Accounts payable, Alaska Bar Association		$ 263		263
George F. Booney Fund				
Balance at January 1,	5,739		5,407	
Interest income	317		332	
Balance at December 31,		6,056		5,379
Total liabilities and accumulated income		$,319		6,102

See accompanying notes to financial statements.

Alaska Bar Association
Insurance Trust Fund
Statement of Financial Position
At December 31, 1979 and 1978

ASSETS	1979	1978
Cash	$ 3,971	4,706
LIABILITIES		
Insurance premiums paid in advance	$ 3,971	3,297
Administrative fees due to General Fund	-	1,409
Total liabilities	$ 3,971	4,706
Revenue	$15,912	16,380
Insurance premium paid	15,912	16,380
Net revenue over expense	$ -0-	-0-

See accompanying notes to financial statements.

Alaska Bar Association Trust Fund
Notes to Financial Statements
For the year ended December 31, 1978

1. Organization:

The Trust Fund was organized March 11, 1976 pursuant to a trust indenture entered into by the Alaska Bar Association and its members. Operations began April 1, 1976.

The purpose of the Trust is to provide and maintain a broad range of health and welfare benefits for the Association's members, their employees and families through insurance policies issued by licensed insurance carriers. These benefits were available to the Association's members through the Association's Group Insurance Fund prior to the organization of the Trust Fund.

2. Significant Accounting Policies:

The following is a summary of the Trust Fund's significant accounting policies:

Insurance Premiums

Insurance premiums are recognized as revenuse at the time the premiums are due and payable to the insurance carriers. Amounts received from subscribers in excess of amounts immediately due and payable to the carriers are deferred until the premium due date.

Administrative Fees

Administrative fees collected from subscribers are recognized as income when collected. At the time the fees are collected an expense is recorded to recognize the administrative support provided by the Alaska Bar Association.

Income Taxes

The Alaska Bar Association Trust Fund is subject to income taxation as a complex trust as defined by the Internal Revenue Code. A provision for income taxes will be provided should the Trust have taxable income in the future.

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

Anchorage phone: 277-7548
Anchorage address:
1016 W. 6th, Suite 201
Anchorage, Alaska 99501

To: Billy Berrier, Legislative Affairs

From: Peggy Berck, House Judiciary Committee

Date: October 17 1979

Re: Requests for Legal Opinions

I. Background.

In late July, 1979, the House Judiciary Committee was informed by the Speaker of the House that the House Judiciary Committee would be the committee of referral in the House regarding the 1980 sunset review of the Alaska Bar Association. Advance notice of this intended referral was provided in order that Committee staff might have sufficient time to collect the data necessary for this review.

In early September, 1979, the House Judiciary Committee informed the Alaska Bar Association of the Committee's role in the sunset review of the association and of the Committee's intent to request information from the association. (A copy of this letter is attached.)

On September 17, the Alaska Bar Association responded to the Committee. In essence, the association stated that it was not a state agency subject to sunset review. However, the association did state that it would provide non-confidential information to the Committee. I plan to submit the Committee's first series of informational requests the week of October 22. Should the association fail to cooperate, I shall immediately inform you of such fact. (A copy of the association's letter is attached.)

II Requests for Legal Opinions.

First, the House Judiciary Committee seeks a legal opinion regarding the Alaska Bar Association's position in this matter. This legal opinion should include, but not be limited to, the following issues:

1. Is the Alaska Bar Association a state agency subject to sunset review?

2. If the Alaska Bar Association is construed not to be a state agency, what authority does the House Judiciary Committee have to investigate the Alaska Bar Association?

3. Are the House Judiciary Committee and the State Auditor limited to obtaining non-confidential information from the Alaska Bar Association?

4. If the Alaska Bar Association is construed not to be a state agency, is the legislature empowered to repeal the Alaska Integrated Bar Act without affording the association the extensive review that is required in a sunset termination.?

To assist the preparation of this legal opinion I have collected the following materials: all memoranda filed in the ombudsman case and the briefs filed in the Horwitz appeal.Those materials are included with this request.

Second, the House Judiciary Committee seeks a legal opinion regarding the authority of the legislature to regulate the practice of law outside the court room. The Committee is aware of the fact that the Alaska Supreme Court contends that it has the ultimate power to govern the practice of law as a part of its inherrant power to control officers of the court. However, the Committee desires to explore whether or not the Supreme Court's power is limited to regulating legal practices of a litigation nature. This issue was explored in an article by John Havelock in the recent issue of the Bar Rag and a copy is attached for your information.

III. Sugested Deadlines for Opinions Requested.

First Opinion Request: no later than Nov. 6, 1979.

Second Opinion Request: no later than Nov. 15, 1979.

Thank you for your cooperation in this matter. If I can be of any further assistance to you please contact me at my Anchorage Office.

By Louis Nizer, Member

Why Crooked Lawyers Go Free

"A grievance system that moves in secret, then winds up disciplining a minuscule percent of those whose conduct is complained about, can be neither effective nor credible." Here's what must be done

If your lawyer mishandles your case, charges an exorbitant fee, or steals your money, what can you do about it? Short of suing for malpractice, you must take your complaint to a grievance committee made up of other lawyers. What are your chances of getting a fair hearing? According to all available statistics, they are so slim that you would be wasting your time. For example:

• In Pennsylvania, of the 9971 complaints filed against lawyers from 1973 through 1978, only one percent—120—resulted in public punishment. The attitude of Pennsylvania grievance authorities is reflected in the form letter all complainants receive. It says that "nearly all lawyers are reputable and sincere"; that the complaint "may drastically affect the lawyer's ability to earn a living"; that he will "inevitably suffer from the accusation," even if he's innocent; and that complainants "should not expect to be given detailed reasons for the final disposition" of their charges.

• In New York City, of the 2721 complaints disposed of by the city bar's grievance committee in 1978, only 20 brought public punishment.

• In Texas, of the 8550 complaints filed against lawyers from 1975 through 1977, fewer than three percent resulted in any disciplinary action at all, and only one percent—77 cases resulted in public punishment.

Figures like these are causing a growing demand that the bar's grievance committee system of dis-

ciplining itself be abolished and handed over to outside regulators. Lawyers, however, insist this is unnecessary because they are now cleaning up the mess by themselves. Are they?

For the answer, it's first necessary to penetrate the almost total secrecy with which they've surrounded their peer-review work. Fortunately, during the 1970s the profession allowed the public to get two peeks behind this screen.

Silverman's Bomb. In 1975, a panel headed by Wall Street lawyer Leon Silverman investigated the workings of the grievance committee of the Association of the Bar of the City of New York. This committee, responsible for policing 35,000 New York City lawyers, has often been cited as one of the country's best peer-review groups. But Silverman's report landed on it like a bomb. Two of the report's findings:

Although almost all complaints handled came from clients, the committee showed a distinct tendency to take the word of a lawyer over that of a client, even when the lawyer's record contained a long list of previous complaints. The report cited case after case in which serious complaints—theft of client funds, neglect of client cases, excessive fees, incompetence, bribery—were dismissed without any investigation at all, or with merely a phone call to the accused lawyer to ask him whether the complaint was true. One typical case concerned a lawyer charged with falsifying documents, withholding client funds and lying about his fee. The lawyer had a long history of similar complaints, which had produced two official warnings and one formal charge of misconduct. Nevertheless, without even investigating the complaint, the committee dismissed it as a "fee dispute."

Secrecy was another problem. In New York (as in almost all states) it is illegal to give out any information about a complaint against a lawyer—even the fact that there *is* a complaint—unless the lawyer has been found guilty by the courts. This meant that almost everything the committee did was kept secret from the press, the public and the rest of the bar.

From 1974 to 1975, the committee received 2428 complaints. Of these, the public learned about only four: two that produced public suspensions and two that produced disbarments. About 2300 complaints were secretly dismissed, and about 100 resulted in secret reprimands.

"It is little wonder," concluded the Silverman report, "that some attorneys do not feel impelled to be responsible to the disciplinary system. A system that moves in secret, then winds up disciplining a minuscule percent of those whose conduct is complained about, can be neither effective nor credible."

Paper Tiger. Are things any better in the rest of the country? In 1970 the results of a three-year nationwide study of lawyer discipline were published by a special panel of the American Bar Association (ABA)

ciplining itself be abolished and handed over to outside regulators. Lawyers, however, insist this is unnecessary because they are now cleaning up the mess by themselves. Are they?

For the answer, it's first necessary to penetrate the almost total secrecy with which they've surrounded their peer-review work. Fortunately, during the 1970s the profession allowed the public to get two peeks behind this screen.

Silverman's Bomb. In 1975, a panel headed by Wall Street lawyer Leon Silverman investigated the workings of the grievance committee of the Association of the Bar of the City of New York. This committee, responsible for policing 35,000 New York City lawyers, has often been cited as one of the country's best peer-review groups. But Silverman's report landed on it like a bomb. Two of the report's findings:

Although almost all complaints handled came from clients, the committee showed a distinct tendency to take the word of a lawyer over that of a client, even when the lawyer's record contained a long list of previous complaints. The report cited case after case in which serious complaints—theft of client funds, neglect of client cases, excessive fees, incompetence, bribery—were dismissed without any investigation at all, or with merely a phone call to the accused lawyer to ask him whether the complaint was true. One typical case concerned a lawyer charged with falsifying documents, withholding client funds and lying about his fee. The lawyer had a long history of similar complaints, which had produced two official warnings and one formal charge of misconduct. Nevertheless, without even investigating the complaint, the committee dismissed it as a "fee dispute."

Secrecy was another problem. In New York (as in almost all states) it is illegal to give out any information about a complaint against a lawyer—even the fact that there *is* a complaint—unless the lawyer has been found guilty by the courts. This meant that almost everything the committee did was kept secret from the press, the public and the rest of the bar.

From 1974 to 1975, the committee received 2428 complaints. Of these, the public learned about only four: two that produced public suspensions and two that produced disbarments. About 2300 complaints were secretly dismissed, and about 100 resulted in secret reprimands.

"It is little wonder," concluded the Silverman report, "that some attorneys do not feel impelled to be responsible to the disciplinary system. A system that moves in secret, then winds up disciplining a minuscule percent of those whose conduct is complained about, can be neither effective nor credible."

Paper Tiger. Are things any better in the rest of the country? In 1970 the results of a three-year nationwide study of lawyer discipline were published by a special panel of the American Bar Association (ABA)

chaired by former Supreme Court Justice Tom C. Clark. Here is how the Clark report summed up its findings: "This committee must report the existence of a scandalous situation. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility."

Nationally, the Clark panel found, the grievance system was an impoverished antique, operated by volunteer lawyers in their spare time, usually without adequate clerical help or records, always in secret. Indeed, the panel singled out the New York committee—which at least kept records and had a paid staff—for special praise. One witness said that in small communities, where lawyers were all on a first-name basis, discipline was "virtually impossible."

Another witness called the discipline system a "paper tiger." Case after case was cited of misconduct that either went unpunished or produced a secret slap on the offender's wrist. Lawyers with long strings of complaints against them were repeatedly let off as "first offenders" simply because the committee had no record of the previous complaints. In some jurisdictions, even the rare lawyer who was disbarred was allowed more appeals than a man convicted of murder, and frequently the final disbarment was issued so quietly that the lawyer could stay in practice merely by moving to another jurisdiction. (The Clark panel found so many disbarred lawyers still practicing that it recommended establishment of a "national discipline data bank" to keep track of them.)

Whistling in the Dark. Of the 50 reforms recommended by the Clark panel, one in particular put the finger on the real reason for the system's near-total failure. It involved this question: Who is in the best position to blow the whistle on crooked lawyers?

"Lawyers and judges," concluded the Clark committee, "are far better equipped than laymen to recognize violations of professional standards. However, relatively few complaints are submitted to disciplinary agencies by members of the profession. This fact has been cited as a major problem by nearly every disci-

Drive them up the wall with Impact One—AMF Voit's top-of-the-line racquetball racquet. And to improve your game even further, we'll send you a Rollout® Bleu racquetball and our booklet Racquetball for Winners® for $2.00. Send a check or money order with your name and address to: Ad Dept., AMF Voit, Santa Ana, CA 92704.

AMF
We make weekends

plinary agency in the United States."

One witness said lawyers contributed "about one percent" of the complaints his committee received. As for judges, the state chairman of another committee said he could count "on one hand" the complaints his group had received from the bench during an eight-year period.

Which brings us to the root of the matter. Almost all complaints against lawyers come from the group that's least likely to report serious offenses: clients. Their complaints most frequently involve fee disputes in minor cases (car accidents, divorces, etc.) that are handled by neighborhood practitioners. And, of course, clients never report lawyers who help them commit perjury, cheat on their income taxes, etc. So, by and large, grievance committees don't hear of important violations of the law by big-time lawyers.

Clearly, the profession is not disciplining itself. Lawyers are leaving it to outsiders—non-professionals—to select their cases for them; in the process, they're catching only little fish. And they are letting even these small fish off either with no punishment or with a secret and toothless warning not to do it again.

In recent years, a long series of bribery, corruption, cover-up and misconduct scandals has spread to distinguished corporate lawyers and law firms all over the United States. None of these scandals came out of the grievance committees (they all originated in federal agencies, newspapers or criminal courts), and only a

Guess who needed Nytol last night.

On those occasional nights when you have trouble sleeping Nytol can help make you drowsy so you can Z-Z-Z-Z-Z-Z.

Use only as directed.

NEW FORMULA

Nytol

FOR SAFE RESTFUL SLEEP

few of the most outrageous resulted in public discipline. For all these reasons, demands are growing to junk self-regulation as a total failure.

New Ball Game? But the profession insists this is unnecessary. Says John McNulty, a Minneapolis lawyer who heads the ABA's Committee on Professional Discipline, "It's a whole new ball game today. There's no comparison between what we have now and what we had when the Clark report came out."

What's the basis of this claim? Some of the more important Clark recommendations have been adopted by a few states. Five states, for instance, have relaxed secrecy requirements. Twenty states now allow laymen to sit on disciplinary boards. And in at least three-quarters of the states, more money is being spent for professional staffs and record-keeping.

But most jurisdictions have accomplished little else. For the past four years, the most extreme penalty, disbarment, has run at a steady rate of only about 175 a year (for the nation's 450,000 lawyers), and virtually every jurisdiction in the country has ignored what some observers see as the single most important reform suggested by the Clark panel: the imposition of discipline on lawyers and judges who observe misconduct by a lawyer but fail to report it.

For nearly a decade the ABA's official Code of Professional Responsibility has held that lawyers should be subject to discipline if they don't report misconduct by other

Tegrin® just took more of the heartbreak out of psoriasis.

Introducing new Tegrin Lotion. The psoriasis medicine that's as pleasant to use as skin lotion.

lawyers. But when asked how many grievance boards had ever enforced the rule, McNulty said he didn't know of any.

How, then, can the grievance machinery be changed? The most obvious answer is to abolish the grievance-committee system and bring in outside regulators. But that probably would not solve the problem. Lawyers and judges are the only ones who really know what's happening inside their club, and their cooperation in exposing it is essential. How can they be forced to cooperate? A remarkable case now before the New York grievance committee may provide a solution.

A lawyer for a prominent firm was caught stealing the firm's money, but not only reported him to the grievance committee. He was subsequently appointed to a high post in the city government. When Mayor Edward Koch learned of the man's crime, he took an unprecedented action. He thrust the city government into the grievance system as a third party, registering a complaint with the committee. The complaint was not against the lawyer himself, but against the senior partner of the firm, for failing to report the matter.

The case shows that, if the peers themselves won't put the finger on the rotten apples in their barrel, outsiders may be able to force them to do it. And the outsider can be *anyone* interested in cleaning up the profession, including government agencies, citizens' groups and even individuals.

Of course, the mere injection of outsiders won't do the trick by itself. It's also essential to speed up the profession's turtle-slow efforts to reform the grievance-hearing process. The three most urgently needed reforms are to wipe out unnecessary secrecy, put more laymen on the hearing panels and provide the system with enough money for professional investigating and prosecuting staffs.

There's nothing sacred about the legal profession's private system of justice. If lawyers don't try to make it work, there are others who can, and in all probability will.

For information on reprints of this article, see page 256

Smart Plan

A POLICEMAN WITH SIX with ten children works from midnight to 8 a.m. He was asked how he could sleep on Saturday, with his brood and their friends home from school.

His answer: "Simple. Before going in the house, I open the garage, pull out the lawn mower, hedge clipper, a rake and a few baskets. I then go in and have breakfast. By the time I have finished—*no kids*. In fact, it's nothing short of a miracle if you see one of them before suppertime."

—Contributed by Robert B. Gibb

Margaret W. Berck
Pouch V
Juneau, Ak. 99811

Non-Profit Organization
U.S. Postage Paid
Bulk Mail
Permit
No. 401
Anchorage, Alaska

The Alaska BAR RAG

Volume 3, Number 4 | Dignitas, Semper Dignitas | April No Frills Edition 1980 | $1.00

Anchorage to Host 1980 Bar Convention

Resolution Packed Annual Meeting

Fortunately, members of the Alaska Bar Association strung-out by the enervating sunset review process in Juneau, and hung-up over the internal financial difficulties and philosophical differences within the association can look to its annual meeting next month as a time when they can try to get their collective heads together. Certainly, nobody ever more urgently needed three days of intensive introspection than the bar.

Although no one views this as a "drying out" period, the many important and varied issues facing the association requires that its members gather together at the wall. Regardless of each member's individual thoughts concerning sunset, the association's court suit with the legislature over the confidentiality of bar records, board meetings outside the state, or the need for a dues increase (to name a few of the major concerns), each of those issues deserves deliberation, debate and a denouement. However, and despite whatever form the eventual resolution of these professional matters takes, most members will continue to practice law (or its state-defined equivalent). In recognition of this fact, the board has therefore also planned a two-day CLE seminar regarding new trends in each of the 10 substantive law areas. The presentations are an hour long, with time allowed for discussion and questions and will also include a review of recent Supreme Court decisions with specific attention to insurance matters.

Dynamite Program

Finally, of course, numerous R & R events have been scheduled. An impressive series of luncheon speakers have accepted invitations to address the bar. Chief Justice Rabinowitz will speak on the "State of the Court"; Senator **Arliss Sturgulewski** will discuss the sunset review process from her perspective as well as the legislature's perception of the legal community in Alaska; and American Bar Association President-Elect **Wm. Reece Smith** will address a number of professional matters of real local interest (specialization, advertising, pre-paid legal services and the Kutak Commission report) from his national perspective on these profession-wide issues. The bar's annual dinner/dance will feature various presentations, a bit of the past, colorful history of the bar from the Historians Committee, some pre-dance entertainment by the "Statutory Grapes" (who do not own Legal Pizza), and then the dance itself with dance music to suit all tastes.

Various other recreations are scheduled, including a Friday Dinner-in-the-Homes program for bar members visiting Anchorage. This event, organized and sponsored by the Anchorage Bar Association, will match Anchorage attorneys and their families with visiting attorneys and their families for dinners in private homes.

Further, **Peter Partnow** and other attorney runners have planned and organized a "fun run." Sponsored by the Alaska Bar Association, and entitled the "Last Annual Mixed Road Race," all attorneys, their spouses and children who are interested in participating in the team, 10-mile run should look for further information from the bar office. The run will not be limited to bar members, but will be advertised city-wide and, coming after the Nordstrom Women's Race and the Mayor's Race should draw a large crowd of crazed runners.

Programs and registration information will be mailed on or about May 9th.

Remember—the Annual Meeting is June 12-14, 1980. Please make plans now to attend this informative and *very* important meeting. All members were previously sent registration cards from the Anchorage Sheraton Hotel, but reservations can be made directly with the Sheraton. Once again, clear your calendars and plan to attend. Your Association sincerely needs both your interest and support in this, a transition year for the Alaska Bar Association.

Sixteen Seek Three Positions on Appellate Court

Ten attorneys and six Superior Court Judges have applied for positions on the new three-member Intermediate Court of Appeals. The applicants will be interviewed by the Alaska Judicial Council on June 19, 1980. Prior to that, members of the Alaska Bar will have an opportunity to respond to a poll by the Judicial Council on the subject of the candidates qualifications for the office. As a result of agreements reached between the Alaska Bar Association and the Judicial Council, the poll will use the double envelope security system, tabulation of votes will be by judicial district, and the results will be made public prior to the council's recommendations being forwarded to the Governor for his selection. The Judicial Council's recommendations must be acted upon by the Governor within 45 days.

Applicants for the new appellate judgeships are: **Alexander Bryner**, U.S. Attorney-Anchorage; **Susan Burke**, Assistant AG-Juneau; **Robert Coats**, Assistant AG-Fairbanks; Superior Court Judge **James Hanson**-Kenai; **Daniel Hickey**, Chief Prosecutor-Juneau; **Thomas Keever**, attorney-Fairbanks; Superior Court Judge **Roy Madsen**-Kodiak; **Charles Merriner**, Assistant DA-Anchorage; **Peter Michalski**, Assistant AG-Anchorage; Presiding Superior Court Judge **Ralph Moody**-Anchorage; **Robert Opland**, attorney-Anchorage; **A. Lee Peterson**, attorney-Anchorage; Superior Court Judge **Thomas E. Schulz**-Ketchikan; Superior Court Judge **James Singleton**-Anchorage; **D. Ralph Stemp**, attorney-Anchorage; and Superior Court Judge **Warren Taylor**-Fairbanks.

For a closer look at the candidates and their qualifications see Judicial Sweepstakes Scratch Sheet on pages 8 and 9.

Five Attorneys Face Run-off for BOG Position—Hunt, Bryson Lead Pack

Karen Hunt, running for a second term on the Board of Governors, won a decisive victory in the first run of the balloting with a total of 247 votes to her next closest competitor, **Jerry Wades'** 166 votes. **Vince Vitale** placed third with 139 votes in the election for the two Anchorage seats on the Board of Governors. Hunt, Wade and Vitale face a run-off election for these two posts. In the statewide contest **Bill Bryson** received a total of 239 votes. He too faces a run-off election against **Ken Jensen** who placed second in the statewide contest with a total of 200 votes.

In the Alaska Legal Services' Board of Governors race, **Max Gruenberg**, an attorney in private practice in Anchorage who presently serves as Chairman of the Board of the Alaska Legal Services Corporation, won the first round of his re-election bid with 219 votes. Second place finisher, **Connie Cipe** of Anchorage received 141 votes. Gruenberg and Cipe face a run-off election.

Donna Willard was selected as delegate to the American Bar Association in a race which netted her 327 votes to **Ken Jacobus'** 288 votes.

INSIDE

China Redux 5
Doom II 7
Scratch Sheet 8,9
Lies 13,14
Convention Schedule 15

Scholarships Awarded

The Alaska Bar Association announces the award of five $1,000 scholarships for the study of law. The Chief Justice George Boney memorial scholarship has been awarded to William Lee Estelle, a native Alaskan from Palmer who is in his senior year at the University of Alaska, Anchorage. He has been accepted for law study at Duke University and the University of Washington. The John Manders memorial scholarship has been awarded to Joel DeVore, Anchorage, an 18-year resident of Alaska who is enrolled at the University of Oregon, School of Law. The three remaining scholarships have been awarded to Thomas Wagner, former school teacher in Nulato, Minto, Hughes and Aleknagik who is presently studying law at the University of Wisconsin Law School; Lance Nelson, a 12-year resident of Fairbanks and a December 1979 graduate of Brigham Young University who has been accepted for law study at the University of Puget Sound and Barbara Craver, a librarian with the University of Alaska, Juneau who has been accepted for law study at Willamette University and Lewis and Clark Law School.

The successful recipients were selected on the basis of their Alaskan residency, their present intent to practice law in Alaska upon graduation from law school, their admission to an accredited law school, their need and merit. With an eye toward encouraging Alaskans statewide to consider law as a profession, this year's awards attempted to promote geographic diversity as well.

In the first year of what is expected to be an annual scholarship program, the ABA Committee on Legal Educational Opportunities raised money for the program through the earnings from the Boney memorial scholarship fund, a contribution from the John Manders Foundation, contributions from individual lawyers and contributions from the Ketchikan, Juneau and Tanana Valley bar associations.

The scholarship awards will be presented to the successful candidates during the final banquet of the Alaska Bar Association's annual convention on June 14th.

IMMIGRATION

Keith W. Bell of the Alaska and Washington State bars announces his availability to lawyers for consultations and referrals in US Immigration and Nationality Matters re: applications for non-immigrant and immigrant visas, admissions to United States, adjustment of status to permanent residents, deportation hearings, and other proceedings before the US Immigration Service

KEITH W. BELL
BURTON, CRANE & BELL
1830 Bank of California Center
Seattle, Washington 98164
(206) 623-1660

Resolutions Received So Far

Number 1

Be it resolved that the Board of Governors of the Alaska Bar Association shall hold no Board Meetings out of the State of Alaska.

Number 2

Be it resolved that Article IV, Section 1 of the bylaws of the Alaska Bar Association shall be amended to read as follows:

a) The annual membership fee for active members is two hundred fifty ($250.00) of which $10.00 is allocated to the Client Security Fund.

b) The annual membership fee for judicial members is two hundred and ten dollars ($210.00) of which $10.00 is allocated to the Client Security Fund.

c) The annual membership fee for an inactive member is seventy-five dollars ($75.00).

Number 3

Be it resolved that, should state funds become unavailable to the association, Article IV, Section 1 (a) of the bylaws of the Alaska Bar Association shall be amended to read as follows:

The annual membership fee for active members is three hundred and ten dollars ($310.00) of which $10.00 is allocated to the Client Security Fund.

Number 4

Be it resolved that Article IV, Section 1 of the bylaws of the Alaska Bar Association shall be amended by adding new Sections (g) and (h) which shall read as follows:

g) If in any one year the association experiences unprojected expenses, such as unexpected litigation, or a cost of living increase of over 10 percent, the Board of Governors may authorize a one-time special assessment for that year; provided, the assessment shall be no more than $20.00; provided further that the assessment shall not be against persons admitted to practice in that year; and provided further that such assessment shall not be cited as justification for a dues increase.

h) A special assessment shall include time limits for payment and shall be subject to the same enforcement proceedings as the collection of annual dues.

The Bar Rag Thanks its Advertisers

IBM MAG I TYPEWRITER FOR SALE
Call & Make an Offer - 279-7431

Federal Court Orders in the Matter of Transcript Rates

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In the Matter of Transcript Rates Established in the District of Alaska)

ORDER

IT APPEARING that the Judicial Conference of the United States, at its meeting on March 5-7, 1980, established new ceilings per page for transcript rates and that, under 28 U.S.C. Section 753(f), actual rates in the District of Alaska are established by the court,

IT IS THEREFORE ORDERED that the following rates per page are now established as the transcript rates in the District of Alaska

	Original	First Copy to Each Party	Each Add'l Copy to the Same Party
ORDINARY TRANSCRIPT	$2.00	$ .50	$ .25
EXPEDITED TRANSCRIPT	$2.50	$ .50	$ .25
DAILY TRANSCRIPT	$3.00	$ .50	$ .25
HOURLY TRANSCRIPT	$3.50	$ .50	$ .25

An ordinary transcript is defined as a transcript to be delivered within thirty (30) calendar days after receipt of an order.

An expedited transcript is defined as a transcript to be delivered within seven (7) calendar days after receipt of an order.

A daily transcript is defined as a transcript to be delivered following adjournment and prior to the normal opening hour of the court on the following morning whether or not it actually be a court day.

A hourly transcript is defined as a transcript of proceedings ordered under unusual circumstances to be delivered within two (2) hours.

The foregoing established transcript rates are hereby certified to the Director of the Administrative Office of the United States Courts and are effective from and after the date of this order.

DATED this 19th day of March, 1980, at Anchorage, Alaska.

JAMES A. VON DER HEYDT, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re Amendment to General Rule 30)

ORDER

IT IS ORDERED:

THAT General Rule 30 of this court be amended to add the following:

Full duties to hear and determine all administrative appeals from the U.S. Department of Health, Education and Welfare are hereby delegated and referred to the United States Magistrates at Anchorage and Fairbanks, Alaska.

DATED at Anchorage, Alaska, this third day of March, 1980.

JAMES A. VON DER HEYDT, Chief Judge

IN THE UNITED STATES DISTRCT COURT
FOR THE DISTRICT OF ALASKA

In the Matter of an Amendment of the General, Admiralty, Bankruptcy and Criminal Rules of the United States District Court for the District of Alaska)

ORDER

IT IS ORDERED that the order of March 3, 1980 amending Rule 30 of this Court by adding the following:

Full duties to hear and determine all administrative appeals from the U.S. Department of Health, Education and Welfare are hereby delegated and referred to the United States Magistrates at Anchorage and Fairbanks, Alaska, is hereby set aside and vacated.

DATED this 21st day of March, 1980, at Anchorage, Alaska.

JAMES A. VON DER HEYDT, Chief Judge

OFFICE SPACE FOR RENT TO ATTORNEYS:
Six (6) Offices for Attorney & Secretary w/basic furniture,
Use of conference room & library,
Close to State Courts - $1.00 sq.ft.
CALL: Ken McCaskey - 279-7431
Robison and McCaskey ★ 921 West Sixth Avenue
Anchorage, AK 99501 ★ 279-7431

DON TAYLOR & ASSOCIATES
Certified Public Accountants

Tax Planning and Return Preparation
Accounting and Consultation Services
Audited and Non-Audited Financial Statements
Accounting System Design

Calais Building I, 3201 C Street, Suite 707, Anchorage, Alaska, 907-278-9502

The Bar Review of Alaska - TBR is proud to announce its affiliation with BRC of California.

The BRC-TBR package offers the BAR applicant:

Complete and updated outlines on all subjects tested on the Alaska Bar exam.

BRC video lectures in Anchorage on required California law.

Live TBR lectures in Juneau and Anchorage by specialists in each field of Alaska law.

All BRC and TBR lectures available on tape cassette.

Practice exams in all subjects tested on the Alaska Bar exam.

The Bar Review-TBR
P.O. Box 1312
Juneau, Alaska 99802

In Anchorage contact Holly Ploog, 279-2526

The Lay of the Land Re: Sunset

by Randall P. Burns

Editor's note: Mr. Bays Shoaf, formerly of the North Carolina Bar Association, has sent the Alaska Bar Association a summary of some recently completed research regarding sunset review of bar associations. Part of the following is based on his research, entitled "Application of Sunset Laws to State Bars."

A *true* sunset law is one that provides for periodic review and possible automatic termination of an agency. A date is established for termination and unless there is positive legislation continuing the agency, in present or altered form, the agency goes out of existence.

Only integrated bars created wholly or in part by legislation can be subject to sunset laws. Twelve (12) states have both integrated bars and sunset laws: Alabama, Alaska, Louisiana, New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia and Vermont. Sunset laws now specifically apply to some state bar functions in six (6) of those states (see chart below). In addition, the non-integrated state of Maine has applied its sunset provisions to the board of law examiners. Alabama (integrated) and Indiana (non-integrated) have review statutes, but they are not true sunset laws in that they do not provide for automatic termination. The sunset laws in each of the states impose very similar duties as regards what the bar association or court "agencies" must provide to the legislature concerning sunset review. Generally, the laws require each entity to demonstrate the public's interest and need in its continued existence, to describe its powers, duties and functions; to provide a financial statement; and to describe those functions that in its own view need change or modification.

Alabama, which went through sunset review in 1978, and survived, believes the process to have substantially improved its relationship with the legislature. Similar to Alaska's position, the North Carolina State Bar has refused to turn over attorney grievance records to the North Carolina Sunset Commission, and has presented the question to the Supreme Court "for guidance." Florida is currently going through sunset hearings. According to Stan Spring of the Florida bar, the review committee's report is due out any day. Inasmuch as the Florida legislature is due out at the end of May, things are heating up. One of the anticipated recommendations of the committee is to propose an amendment to a 1957 constitutional provision that gives Florida Supreme Court exclusive jurisdiction over the legal profession, substituting—of course—the legislature.

Alaska Sunset Update

On April 28, 1980, the House Judiciary Committee unveiled a "working *draft*" of a committee substitute for HB 984 which it originally introduced on March 31st. The draft substitute, according to committee members and counsel Margaret Berck, is not intended to be responsive to the public testimony it received in early April, but generally was expected, at this point in time, only to contain those items the committee originally desired to see included in the bill and which Dick Bradley (of Legislative Affairs) had changed when he drafted it for formal enrollment. Major among the items returned to the bill is the provision subjecting the bar to APA procedures. The bill still leaves the bar as a voluntary agency of the state, and has yet to put back ABA law school accreditation for admission. The working draft has further "refined" the definition of the practice of law. President-elect Bart Rozell reports that mark-up sessions will be held during the next two weeks.

What Other States are Doing Under Sunset Legislation

STATE	AGENCIES AFFECTED	TERMINATE DATE	TYPE OF LAW	EVALUATION ENTITY
ALABAMA	1) Board of Commissioners of Alabama State Bar. 2) Board of Bar Examiners.	October 1, 1978; every four (4) years thereafter Went through 1978 sunset review "relatively" unscathed.	Quasi-sunset (i.e., mandatory review but agencies terminate *only* upon action of both houses of legislature).	Select joint legislative committee review agencies; review includes public hearings. Makes recommendation to full legislature.
ALASKA	Board of Governors of the Alaska Bar Association.	July 1, 1980; every four (4) years thereafter	True-sunset (i.e., automatic termination without legislation to continue).	A committee of reference of each house of the legislature; review includes association and public testimony. Legislative Audit Division issues a report; a report with a summary of the findings and recommendations is then issued by each committee.
INDIANA	1) Clerk of Supreme and Appellate Courts 2) Reporter of Supreme and Appellate Courts 3) Supreme Court 4) Court of Appeals	June 30, 1982; every ten (10) years thereafter	Quasi-sunset. The four agencies are not abolished and do not terminate, but are subject to evaluation and possible restructuring.	A joint standing evaluation committee reviews the four agencies', reports recommendations of the governor, legislative audits, and reports its findings and recommendations to the legislative council.
MAINE	1) Board of Examiners	June 30, 1983	True sunset	The Joint Standing Committee on Performance Audits evaluates the board's report and conducts its own analysis: submits report and recommendation to legislature.
NORTH CAROLINA	1) North Carolina State Bar 2) Board of Law Examiners	July 1, 1979 (has been extended).	True sunset	The Governmental Evaluation Commission conducts a performance evaluation and submits reports to the General Assembly, along with its recommendations. Public testimony is taken re: the report issued by the commission.
OREGON	1) Oregon State Bar	1981; generally every eight (8) years	True sunset	Joint interim committee reviews the bar's report, holds public hearings. Recommendations are submitted to the Legislative Assembly not later than 18 months prior to termination date of the bar.
TENNESSEE	1) Board of Law Examiners	June 30, 1985; every six (6) years	True sunset	Joint subcommittees of both houses form an "evaluation committee" which holds public hearings and receives public testimony, as well as from the board. Recommendations are then sent to the legislature.

Civil Rule 81

In response to comments by the Supreme Court, the Board of Governors now proposes amendments to Civil Rule 81 as follows:

(a) Who May Practice.

(1) Members of the Alaska Bar Association. Subject to the provisions of paragraph (2) of this subdivision, [ONLY] *no* attorneys [WHO ARE] *other than active* members of the Alaska Bar Association *who reside within this state or who continuously maintain within this state an office in which the practice of law is conducted* shall be entitled to practice in the courts of this state.

(2) Other Attorneys—*Courts.* A member in good standing of the bar of a court of the United States, or of the highest court of any state or any territory or insular possession of the United States, who is not a member of the Alaska Bar Association, or an *active member of the Alaska Bar Association who does not meet the requirements of paragraph (1) above,* who is not otherwise disqualified from engaging in the practice of law in this state, may be permitted, upon motion, to appear and participate in a particular action or proceeding in a court of this state. The motion, and notice of hearing, if any, shall be served on the executive *director* [SECRETARY] of the Alaska Bar Association, the State Department of Revenue and, unless the court directs otherwise by an order pursuant to Rule 5(c) of these Rules, on each of the parties to the action or proceeding. With his motion, the applicant must file with the court the following:

[a] The name, address and telephone number of a member of the Alaska Bar Association with whom the applicant will be associated, who maintains an office in the judicial district where the action or proceeding is pending and who is authorized to practice in the courts of this state.

[b] A written consent to the motion, signed by such member of the Alaska Bar Association.

[c] A certificate of the presiding judge or clerk of the court where he has been admitted to practice, executed not earlier than 60 days prior to the filing of the motion, showing that he has been so admitted in such court, that he is in good standing therein and that his professional character appears to be good.

An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.

The remaining sections of Civil Rule 81 remain as currently written.

Proposed Amendment Rule 14

Proposed Amendment to Rule 14, Alaska Bar Rules.

Rule 14(a)(7), Alaska Bar Rules, is amended to read as follows:

(7) In his discretion, prosecute complaints and appeals, in the prosecution of which he shall act in a separate, adversary capacity, and not as counsel for the board, so that he shall have the power to advocate discipline other than that recommended or ordered by a Hearing Committee or by the board, as the case may be.

Anchorage Bar Association Luncheons

Tuesday, May 6th—Walt Baldwin will speak on the Anchorage Bar Association Insurance program.

May 12th—Julius Brecht, Director of Banking and Security Division will speak on financial institutions and security law.

May 19th—Mike Walti, Executive Director, Center for Parents and Children will speak on what the center can do to assist attorneys.

Don't Support Our Non-Advertisers

Sunset Review: What's Best for Lawyers & The Public?

Guest Editorial

by Karen Hunt

The House Judiciary Committee is currently formulating its proposed legislation after taking public testimony on the Bar Association.

The Committee members are wrestling with the central issue of public concern about delivery of legal services and committee concern about the accountability of the BA.

Accountability

This writer's personal viewpoint is that the BA should continue to function under the present system where it is a creature of the legislature because of the Integrated Bar Act and at the same time is regulated by the Supreme Court through admissions and discipline rules adopted by the court. The present system needs to be strengthened, however, by either amendments to the Bar Act or to the court rules (or both) to require more accountability to the public in the areas of admissions and discipline. Such accountability can be achieved by (1) giving quarterly disciplinary reports to the court and to the chairman of the House Judiciary Committee; (2) giving biannual admissions reports to the same entities following each bar exam; and (3) giving the annual audit of Association funds to both entities. Consideration should also be given to giving an over-all annual report on the status of the Association not only to the court and the chairmen of House Judiciary, but to the membership as well. Some of these reports are now given to the court. Given that the Association does receive state funds for discipline, a requirement by the legislature that the BA be accountable for such monies does not appear to be an unreasonable request.

Accountability, however, is only one side of the concern which both the public and the profession have about sunset review. An independent legal profession must be maintained both for the sake of the profession and for the best interests of the public.

Best Interests of the Public

As presently structured, the BA is not totally controlled by either the court or the legislature—and that is exactly where the profession should be—suspended between both branches of government, but accountable to both. The reasons are simple, but go directly to the heart of the issue of delivery of competent legal services to the public.

If the legal profession were solely under the control of the court, the independence of the profession to criticize the court and to work actively to change procedures, judicial attitudes, etc. could be severely curtailed. A recent example of lawyers' independence working for the best interests of the public is the bar response and objection to mandatory appointment of all private attorneys to represent conflict criminal defendants regardless of competency considerations. Another example in Anchorage is the trial bar's head-on collision with the Supreme Court Calendaring Committee on procedures to try to solve the backlog and trailing problems. Although the threat of court-appointed-licensing-and-disciplinary-boards interference with lawyer's independence seems remote because of present court personalities, nonetheless, the chilling effect of potential interference must not be ignored.

Politicization a Threat

On the other hand, politicizing the legal profession by putting licensing and discipline under an executive branch appointed board which is subject to political influences of the ruling majority is likewise a threat to the public interest. The filing of unpopular lawsuits on behalf of minorities or minority viewpoints must never be discouraged by permitting political pressure to be applied to the lawyer representing such clients or viewpoints. A *Molly Hooch* case must be permitted without fear of political reprisals on the lawyers that file and prosecute the case. An injunction which stops pipeline construction for three years must never result in licensing problems or disciplinary threats against the attorney handling the case.

Potential for Abuse

In discussion with some lawyers, the above concerns have been dismissed on grounds that it can never happen in Alaska. The question is not whether it will happen, but instead the question is whether the potential is created because of the structure of the legal profession in this state. The public interest is best served by avoiding the potential rather than by depending on the goodwill of those in power.

The independence of the BA is established; the accountability of it is open for scrutiny. The true interest of the public and the profession will be served best by demands for accountability; and not by insistence upon dependency and control.

Letters to the Editor

Dear Editor:

The second interview question posed to the Board of Governor's candidates in the March *Bar Rag* needs clarification. This question states:

"2. In light of the ombudsman's recent criticism and the possibility that the integrated bar may soon become a victim of Sunset Legislation, how do you assess the job that the present Board of Governors has been doing and what new directions, programs or policies would you recommend?"

Our contact with the bar to date has been a recitation of complaints that we have the duty to investigate. There is a legal dispute between our office and the bar as to our jurisdiction to investigate these complaints.

Before the legislature I clearly indicated that I am in no position to judge how well or badly the association is conducting its affairs since we have not gained access to the information necessary to conclude these investigations.

Sincerely,
Frank Flavin
Ombudsman

Dear Harry:

I recently distributed a policy memorandum to the Clerk's Office employees that could have an impact on the bar. In an effort to keep the bar aware of this change I would appreciate it if you would publish the following in the next issue of the *Bar Rag*.

Effectively immediately, and to the extent possible, the Clerk's Office will screen new civil case filings to eliminate the improper filing of cases in two categories. First, pursuant to Rule 76, Rules of Civil Procedure, we will no longer accept new actions that are being filed on any outdated form (i.e. old small claims forms or any other outdated form that may have been issued by the Court at some time in the past). Second, pursuant to A.S. 22.20.040, all corporate plaintiffs must be represented by an attorney. If an individual attempts to file an action on behalf of a corporation without the required legal representation this filing must be rejected.

Every reasonable effort will be expended to identify as many of these categories of cases as possible at the time of filing to avoid the considerable waste of time and expense that will be required to send these matters back for refiling when they are identified at a later time. Your cooperation in this matter will be greatly appreciated.

If you have any questions regarding the information above please do not hesitate to call me.

Sincerely,
T. S. Moninski, II
Assistant Area Court Administrator

INSIDE/ OUTSIDE

Observations & Comments

by Karen L. Hunt

Proposed New Code of Ethics

The disclosure of the drafted Rules of Professional Conduct as disclosed during the ABA's mid-year convention in Chicago will be voted on by the House of Delegates in 1981. The proposed Rules have raised controversy. The most questioned provisions are those requiring radical changes in the nature of corporate and business disclosures in the relations between attorneys and their clients. The drafted rules require corporate counsel to blow the whistle on conduct by business officials they consider legally harmful to the corporation. If necessary, the lawyers would have an obligation to report such conduct directly to the Board of Directors or shareholders.

In other provisions, attorneys would be required under the new rules to disclose to the Court instances in which clients involved in civil matters knowingly committed perjury. This is an example of the proposed rules which alter judicial theories of confidentiality between the lawyer and the client. In Chicago, Robert Kutak, Chairman of the Special Commission to evaluate professional standards stated that the provisions altering the confidentiality rules are included "because we believe that the right of confidentiality, while very strong is not absolute, and that there can be cases where the rights of others have a priority."

Another controversial provision is one requiring mandatory *pro bono* which must be reported annually to the appropriate regulatory authority. This proposed rule was substituted for an earlier draft which would have required a mandatory 40-hour per year *pro bono* service for every lawyer in the country.

As noted in an earlier column, the Association of Trial Lawyers of America, allegedly deeply critical of the proposed new ABA Code, has set up its own commission. As a result of the ATLA Commission, some legal observers foresee a State-By-State battle between ATLA and the ABA over which set of rules will be adopted.

Pilot Program: Lawyer Referral Service

The ABA Board of Governors has approved $78,987.00 to fund a 18-month pilot project by the Louisville Bar Association to test new methods of promoting Lawyer Referral Services and providing legal information to the public through them. The Louisville Bar will also provide project funding.

The pilot project developed in response to a growing public desire for legal information, will expand LRS advertising campaigns, implement information services such as TEL-LAW and the appointment of an LRS staff attorney to give callers immediate assistance in identifying whether they have a legal problem and, if possible, to help them solve it during their first call to the LRS.

FBA Aids in Firm Economics

The Florida Bar Association has allocated $20,000 to hire a full-time staff consultant on the gimmick of office hurdles, including time keeping, billing, managing nonlawyer employees, and use of libraries and accounting and scheduling systems aimed particularly at the sole practitioners and small firms to assist in malpractice loss prevention. The service is designed to give advice on fine points of law office economics, including profitability, liquidity and budget control also.

In response to an inquiry as to interest in such a program, 800 attorneys responded. The bar then sent a questionnaire asking about the firm's administrative practices. Several law firms were chosen as test groups, with law office managers acting as volunteer consultants during the test session.

The program, designed to get underway by August, is expected to fund an additional $74,000 in startup costs from program fees and from possible contributions from an insurance company which has shown interest in the risk-management potential of the program. The fee schedule for the services are predicted to be $35 per hour for individual consultants and $40 for half-day and $50 for full day for law firms.

Disbarment

In December, 1979, the New Jersey Supreme Court ruled that attorneys who steal their clients' money have no business being in the legal profession. The Court ordered disbarment of a lawyer who had reportedly failed for nearly two years to return $23,000 to a client from the sale of the client's house. The case apparently approaches a *"per se"* rule for lawyers who misappropriate client's funds.

STAFF

Harry Branson..... Editor in Chief
William T. Ford..... Managing Editor
Rand Dawson..... Advertising Director

Contributing Editors

John Havelock — **Wayne Anthony Ross**
Deirdre Ford — **Russ Arnett**
Karen Hunt — **Robert A. Rehbock**
Donna Willard — **Tom Schulz**

Ace Reporters

Kathleen Harrington — **Judith Bazeley**

Copyright 1980 by the Bar Rag. Contents of the Bar Rag may not be reproduced in any manner, in whole or in part, without written permission from the Bar Rag.

The Bar Rag is published monthly. Mail received at Box 3576, Anchorage, AK 99510.

The Bar Rag is available to non-lawyers by subscription for $10 a year, or may be purchased from the Alaska Bar Association office, 360 "K" Street, Anchorage, AK 99501 for $1.00 a copy. Display and classified advertising rates are available. Call Sharon Naughton, advertising representative, at 272-8662.

CLE Tour to China to Be Organized

by Ken Wallack

I read Judge Blair's account of his trip to China in the September, 1979 issue of the *Bar Rag* with great interest because as some of you might know my wife Tandy and I also visited China last summer.

Our trip was somewhat different than the Blairs', however. We had traveled to Hong Kong without any arrangements for a tour into China. After a number of inquiries with the China Travel Service and some private tour companies, we were able to join a group of American doctors and their wives who were scheduled for a medical tour of China. Apparently the DC 10 problems had prevented one couple from making the trip and we were able to take their place.

The physicians were from various parts of the United States including California, Louisiana, Michigan, Arkansas, Maryland, and Massachusetts. They included general practitioners, surgeons, an obstetrician, a dermatologist, and a psychiatrist. The psychiatrist also had a law degree and the group also included another lawyer who was from Louisiana.

Acupuncture

Our tour took us to Guangshou (Canton), Shanghai, Nanjing (Nanking), and Beijing (Peking). In addition to visiting the many tourist attractions we toured urban and rural medical facilities. We witnessed three operations in which only acupuncture anesthesia was used. It was a remarkable thing to watch an operation (in this case a thyroidectomy) while the patient was fully conscious and watching us. Then at the end of the 90-minute procedure, the patient sat up, waved at us, and then walked off the table. We also visited an acupuncture therapy clinic, and a clinic where toes were transplanted to replace thumbs and forefingers lost in industrial and traffic accidents.

Peking University

While in China I spoke with our guides and the China Travel Service about the possibility of arranging a legal tour for interested attorneys. I was told that such tours had been arranged in the past and that given enough lead time one could be arranged. In fact a special visit to Peking University was arranged so that Tandy and I and the other attorney from Louisiana could meet with a member of the law faculty. Professor Yang, through our interpreter, spoke of the new criminal code being enacted in China, the Chinese legal system, the work on the new civil code, and the proposed system of Economic Courts to resolve contractual disputes between state owned enterprises. He also spoke of the effects of the cultural revolution on China's legal system and Peking University, and his own experience in being sent to work on a wheat farm in Northern China.

Legal Tour

This fall I presented a proposal for organizing a legal tour to China to the CLE committee of the Bar Association. My proposal was then presented at the December meeting of the Board of Governors. The Board of Governors approved the proposal in principal for CLE credit, the amount and nature of which to be determined later. The proposed tour would take place during the summer of 1981. I would expect it to be approximately three weeks long including four to five days in Hong Kong. I would expect the China portion of the trip to include visits to Guangzhou, Shanghai, Sian, Hangzhou (Hangchou) or Nanjing, and Beijing. The tour would originate from and return to Anchorage.

Potential legal aspects of the tour in Hong Kong would include meetings with a representative of our Alaska State Asian Office, representatives of American law firms in Hong Kong on the nature of their practices with an accent on American trade with Hong Kong and China, and speakers from the Hong Kong legal community on the barrister-soliciter system.

Chinese Legal System

Potential legal aspects of the tour in China would include viewing sessions of community or commune arbitration committees in resolving small civil disputes, sitting in on a people's court trial, a tour of a Chinese prison, meetings with law faculty, attorneys, and/or judges to discuss the Chinese legal system, and meetings with government officials as to Sino-American and particularly Sino-Alaskan trade.

I would expect the tour group would be limited to 30 people including wives and guests, but if the response is strong enough other groups of 25 to 30 could also be scheduled for other times during the summer.

A firm itinerary for the Hong Kong portion should be available well in advance. Other than a commitment on which cities in China would be visited and for how long, no specific itinerary will probably be available until the tour would actually arrive in that city. At least this was my experience on the medical tour. However we found that the guides and the China Travel Service did try to fulfill all requests and to take us wherever we wanted even if this required some last minute schedule shuffling.

Tour Costs

A rough estimate on the cost of such a tour is $4,500.00-$5,000.00 including airfare, hotels, tours and most meals. Hopefully this estimate will prove to be a high one. Having received the Board of Governor's approval for CLE credit for such a tour, I am now making my formal inquiries with the airlines, the China Travel Service, and with tour operators in Hong Kong. I hope to have more specific information in the relatively near future.

If anyone believes they might be interested in such a trip please fill out the form below and send it to me. Feel free to suggest legal activities or additional cities you might be interested in.

It should be noted that there are certain restrictions on minors or handicapped persons entering China. If anyone has a handicap or thinks they might bring a person with a handicap or who will be under the age of 21, please advise me well in advance.

CLE Tour to China

I am interested in the CLE Tour to China.

Name _____

Mailing address _____

_____

Firm _____

Names & relation _____

of others who _____

might accompany _____

you _____

Special Information _____

(handicaps, _____

minors, etc) _____

_____

_____

_____

Suggestions for _____

legal activities _____

or additional cities _____

_____

_____

_____

Mail to:

Kenneth L. Wallack
JOHNSON, CHRISTENSON & ASSOCIATES
1007 West 3rd Ave., Suite 300
Anchorage, Alaska 99501

ANCHORAGE

(With Apologies to Carl Sandburg)

Air Crossroads for the World,
Fast Food Chain Record Setter, Marker Up of Prices,
Player with Barges and Arctic Toy Train Handler,
Bland, sleeping, comatose,
City of the big Nothing:

They tell me you are boring and I believe them, for I have read your newspapers.
And they tell me you are wicked and I believe that too, for I have been to your churches and heard the sermons.
And they tell me you are unnecessary and my reply is: Can you imagine trying to cram this many people into Seward?
And having answered I turn once more to those who sneer at this my city, and I give them back their sneer and say to them:
Come, show me another city so passionless and dull, so proud to have survived without a single reason for being here.
Flinging yawns back across the inlet, rolling snores along the Chugach and out into the vast nothingness that eventually coalesces into Fairbanks;
Inert as the statue of Captain Cook blankly contemplating the not-so-distant shore no bridge will ever span,
Flabby,
Empty-handed,
Horizontal,
Drifting,
Snoozing, dreaming, waiting,
Waiting for tomorrows indistinguishable from today,
Waiting until someone with compassion pulls the plug,
Waiting and listening to a slow, rhythmic beat.
Under the wrist is the pulse that sounds from the inlet,
Sloshing back and forth, and back again,
Carrying the waste products of this, my city,
Sloshing!
Sloshing a lullaby to a dozing, never to waken giant. Empty-handed, horizontal, comatose, proud to be Air Crossroads, Fast Food Chain Record Setter, Player with Barges and Arctic Toy Train Handler.

by Harry Branson

NITA of the North

Responding to the judiciary's call for the development of an adequately trained and professionally responsible civil and criminal trial bar, the Alaska Bar Association and the National Institute for Trial Advocacy are jointly sponsoring an intensive nine-day trial advocacy program for Alaska attorneys. It will be conducted at the Alyeska Resort in Girdwood, Alaska, from August 16 through August 24, 1980.

The NITA Method

The NITA teaching method is primarily based on the concept of learning by doing. During class sessions student-lawyers will perform as trial counsel in all the various phases of a trial, from *voir dire* to closing argument. Performances are critiqued by faculty immediately after they are given and most performances are videotaped for further in-depth review and critique. While the NITA course is primarily focused on teaching advocacy skills and courtroom presence, it is also an excellent learning tool in legal problem-solving, developing and carrying out a theory of the case, and basic questioning techniques which are essential even if you don't try cases regularly.

The first seven days of classroom sessions cover jury selection, basic and advanced direct and cross examination, exhibits and demonstrative evidence, impeachment, adverse examination, expert witnesses, opening statements, and closing arguments. The faculty will also give several lectures and demonstrations throughout the week. During the final two days, each participant will team up with one other to conduct a full civil or criminal jury trial. NITA juries are generally six in number and are composed of people drawn from the local community.

Faculty

The enrollment for NITA of the North will be limited to two sections of 24 student-lawyers. Faculty for each section consists of a team leader, trial judge, and three experienced trial attorneys. The faculty for this session will be one of the most outstanding ever assembled for a NITA program.

Heading one team will be Professor **James W. Jeans**. Professor Jeans teaches at the University of Missouri Law School and maintains a "lawyer's lawyer" trial practice. He is the author of *Trial Advocacy*, a West publication. The judge for the Jeans section will be the Honorable **James M. Fitzgerald**, United States District Court Judge in Anchorage. His faculty team will include **William R. ("Billy Roy") Wilson**, of Little Rock, Arkansas; Professor **John Strait**, University of Puget Sound Law School; and Professor **James McElhaney**, Case Western Law School, Cleveland, Ohio. Many of you may know of Professor McElhaney through his "Trial Notebook" series found in the ABA publication *Litigation*. He will be giving a series of lectures on select topics of evidence and advocacy throughout the session.

Heading the other team will be **Barbara Caulfield**, former Director of the Hastings Center for Trial and Appellate Advocacy, who was recently appointed academic dean at Hastings College of the Law in San Francisco. Joining her will be **Howard Janssen**, Assistant District Attorney in charge of the Berkeley, California office; **Paul Bardacke** of Sutin, Thayer & Brown, Albuquerque, New Mexico; and **Jo-Anne Wolfson**, a nationally renowned criminal defense lawyer from Chicago, Illinois. The Honorable **Warren Wolfson**, Judge of the Circuit Court in Cook County, Illinois, will serve as trial judge for the Caulfield section. The Wolfsons are a remarkable couple who alone are well worth the price of admission.

[continued on page 8]

NITA

[continued from page 5]

The Cost

The NITA experience requires a major commitment from its participants in time, energy and money. The case materials must be read and thoroughly digested before the session begins, for once it does begin, the pace closely proximates that of an actual trial. Besides being a lovely location with fine accommodations, the primary reason Alyeska was selected as our program site was simply to isolate participants from the day-to-day distractions of their practice. We will require that all participants stay in Girdwood throughout the program. If you intend to bring family along, do not plan on having much free time to share with them.

Tuition for the program will be $700.00, with room and board (twin occupancy plus three meals per day) costing an additional $300.00 per person. Roommate requests will be honored and single room occupancy can be arranged for an additional price. A limited number of partial scholarships will be available for those applicants demonstrating special needs. Bus service to and from Anchorage will be provided for those who require it. If any of you or your friends own living accommodations in Girdwood and would like to contribute much-needed space for our faculty, support staff and scholarship participants, please notify me as soon as possible.

Applications will be sent to each bar member in the next state-wide mailing. To insure a place in the program, a $300.00 deposit made out to the Alaska Bar Association must be enclosed along with your application. It is anticipated that enrollment will close no later than July 15, 1980, although a wait list will be established. Course materials and program scheduling will be mailed to all participants by the end of July, at which time the balance for tuition and room and board will be due.

While the NITA program cannot magically (instantly) convert a beginning advocate into a courtroom superstar, it does instill confidence in the attorney's own ability to act as trial counsel and substantially increases the attorney's competence to carry on a trial. Graduates uniformly consider NITA to be their most rewarding and meaningful professional experience. It is well worth the cost.

Persons seeking further information about the program should write or call:

Frank D. Rothschild
Perkins, Coie, Stone, Olsen & Williams
420 L Street, Suite 301
Anchorage, Alaska 99501
(907) 279-8561

TVBA Minutes

April 4, 1980

Minutes of the
April 4, 1980 Meeting
of the Tanana Valley Bar Association

President Jon Link called the meeting to order at 12:20 p.m. President Donna Ward was the only guest. The minutes were mumbled and President Link introduced President Ward to give a president's report about the present situation as viewed by the present Board of Governors. President Donna presented the present perplexing panoply of pandemonium produced by the poll presented by the present Judicial Council; the puny and pusillanimous impression made by malpractice prevention insurance; improved printing of presentable envelopes; the prime powwow of legal publicans; who will be prevailed upon to prance to the statutory grape; the prime publication of the bar; and that preponderating pressing problem produced by Alaska's pewee parliament which is preparing to pre-empt our place in the sun (set) plentitudes of palaver produced a paucity of prophylactic palliatives the present board preferred status quo preservation prestidigitous supremes press for preservation of integration. Pointlessness prevailing in the p.m. and the secretary being out of P's, the meeting ended.

King Arthur

April 11, 1980

Minutes of the
April 11, 1980 Meeting
of the Tanana Valley Bar Association

The meeting was called to order early by an austere and auspicious Jon Link. Two or three guests were announced as being seated on the far side of the room, but the persons announcing same spoke in a soft, feminine voice (note the sexist overtones) and the syllable so uttered were inundated by the cacophony stemming from the dice game and/or barroom brawl being conducted at the center table. Those guests shall wherefore, and forever more, remain anonymous.

Alliterative minutes were deemed "piss poor" by the president. The first committee report was given by Ron Smith, Chairman of Law Day for the year of our Lord one thousand nine hundred eighty and several years heretofore and hereafter. In a burst of organizational optimism, he passed out a brilliantly conceived (if insulating) contract whereby all members of Local 235 of Barristers and bartenders agree to attend the event in order to be regaled with the first-hand account of the loss of virginity of Charles Cole, Esq. during territorial days. Judge Blair pointed out that no date was specified in the elaborate contract, and this set the tenor for the rest of the meeting. Pat Aloia somehow took volunteers for tour guides for a courthouse tour. Ralph Beistline suggested inmates be used, and the response was overwhelming. Only three members of the bar have not volunteered to spend the afternoon and evening of Thursday, May first, showing second graders and new members of the bar where the law library is and how to find the lifesavers in Harry Davis' desk drawer.

The library report was punctuated with an instruction to our president that, had he been in the library, he would have realized that the system changed about five years ago. The treasurer reported an extortive attempt by the Alaska Bar Education Fund and several of his children. Only the children have been successful. Bob Groseclose moved and Ralph Beistline seconded that we give $401 to the state bar in order to show the Anchorage bar their relative status. The motion was concentially tabled in order to find out who would be taking advantage of the scholarship and whether there was any pride at all in the Anchorage bar that we might offend. The legislative report was actually brief for the first time in history. It covered Workmen's Compensation, sunset of the bar, and mental health for all concerned. There was a brief discussion of California Penal Code, Section 673.1, which requires permission by a social service agency before any punishment of a physical nature can be administered to any child.

It was moved by Dick Madson, seconded by Andy Kleinfeld, that we oppose the proposed bar rule requiring adults and massive document accumulation with respect to administration of attorney's trust accounts. The motion passed unanimously. The president ran from the room screaming "we're adjourned." It was so early that almost no one paid their lunch bill, and the fire doors were clogged with escaping unpaid customers.

By executive fiat,

King Arthur

[continued on page 11]

CPT

WORD PROCESSING SYSTEMS

We Have The Finest
Word Processing Systems
Available. Call Us, And
We Will Prove It!

Arctic Office Machine & Furniture Co.
2400 Spenard Rd.
Anchorage, Alaska 99503
Phone 277-3527

AMERICAN FAMILY LAW TAX REPORT
presents. . .
BASIC FAMILY LAW TAX COURSE
For Lawyers and Mediators
Saturday, May 24, 1980

WESTWARD HILTON
Third and E Street
Anchorage Alaska
1:00 - 5:00 p.m.

This program examines tax aspects of divorce, emphasizing alimony, child support, property division, division of retirement benefits, deductibility of attorneys' fees. We have designed this program not only for family law attorneys and judges, but also for those mediating family law disputes touching on property and support issues. The parties to divorce are often completely unaware of the tax aspects of these issues, and rely entirely on their mediators and counselors not only for consciousness raising but also for working solutions to family law tax problems, such as timing of the decree, whether joint returns should be filed, or the special family law problems of joint custody.

Seminar Leader: Stephen Adams, San Francisco, Editor & Publisher of American Family Law Tax Report and California Family Law Report, and a full-time specialist in family law and appellate practice.

We have reserved a block of rooms at special rates of Single $48.00 Double $58.00.

Reservations must be made directly with the hotel prior to May 2, 1980.

Enrollment is limited. Registration fee $50.00 (including materials). Refund upon receipt of cancellation 48-hours in advance of program.

To register, please complete the form below. For further information contact AFLTR at (415) [illegible]

Please register me for the:
BASIC FAMILY LAW TAX COURSE May 24, 1980
Westward Hilton
Anchorage, Alaska

MY CHECK FOR $50.00 REGISTRATION FEE IS ATTACHED.

Make checks payable to AFLTR/CFLR, Inc. and send to
AFLTR/CFLR BASIC FAMILY LAW TAX COURSE
Box 2377, San Francisco, CA 94126
(415) 421-1700

Name _____ Firm _____
Street _____ City _____
State _____ Zip _____ Telephone _____
Signature _____

Bar Faces Shortfall

by Pat Kennedy

Financial Crisis

The Bar Association is currently facing a financial crisis. The net loss last year (1979) was over $39,000. This was a result of several factors: a drop in membership and therefore in expected income; inflation expanding overhead and transportation costs; the unexpected costs of litigation in the Ombudsman suit, the F.T.C. questionnaire defense preparation, and the legislative audit litigation; and some expanded personnel costs.

Inherent Problems

The graphs and charts printed with this article indicate some of the inherent problems in the Association's financial picture. Graph 1 shows that while income, including dues, keeps growing at a steady pace, expenses began outdistancing income in 1978 and continued into 1979 in a greater amount. Graph 2 shows the distribution of expenses for 1979. Note that discipline is second only to administration in cost. Graph 3 shows the income distribution for 1979. Dues supply half the income for the Association, with the discipline income from the court system equivalent to C.L.E. fees and convention (Hawaii and annual) income. Graph 4 shows what a dollar of membership dues must cover. Note that discipline per se costs more than the Board of Governors or general administration. Charts 5 and 6 show some of these figures specifically. Note the 374% in discipline costs since 1976 and the 371% in travel and per diem for the board since 1976. The discipline costs have risen because of added personnel; the board costs have risen because of the rise in air fare and the addition of both the Hawaii meeting and sending officers to such events as ABA and Western Regional conventions and workshops.

Double Bind

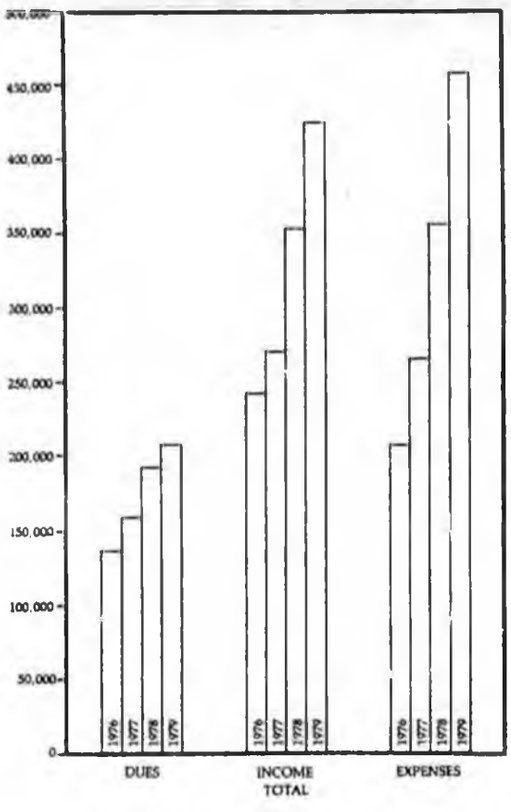
This year it is projected that the cash shortfall will be ever worse. We are caught in a double bind; projected income, such as new membership fees and income from the Hawaii C.L.E. is less than expected, while costs, somewhat because of inflation, are averaging more than expected.

Extra Funds for Discipline

The question is what to do about the expected loss. The board, at its last meeting, voted to make Lawyer Referral more self-sufficient, to abandon the *UCLA Law Review* (although that is up for reconsideration) and to ask the court system to more closely fund the full cost of discipline (a requested increase of between $70,000 and $90,000 depending on what is considered). The extra funds for discipline alone would relieve the financial problem. However, the chances of such an event happening, given the state of the legislature's feelings about the Association and the court system budget, are limited.

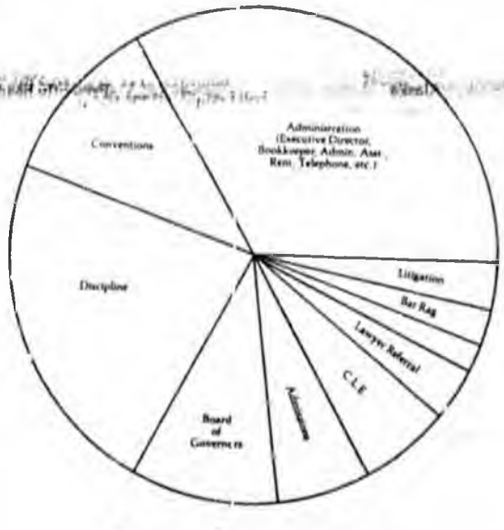
Raise Dues

The Association must then either raise dues or cut services, or both. There has not been a raise in dues since 1974. Several alternative proposals to raise dues will be presented at the annual meeting. In addition, a questionnaire will be sent in the near future to members asking which non-self-supporting services should be cut. If you have any questions about the current fiscal state of the Association in regard to this matter, please call Randall Burns at 272-7469 or Pat Kennedy at



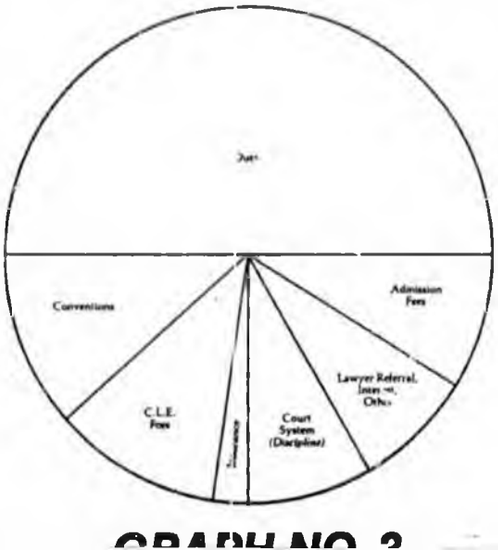
GRAPH NO. 1

Distribution of Expenses for 1979



GRAPH NO. 2

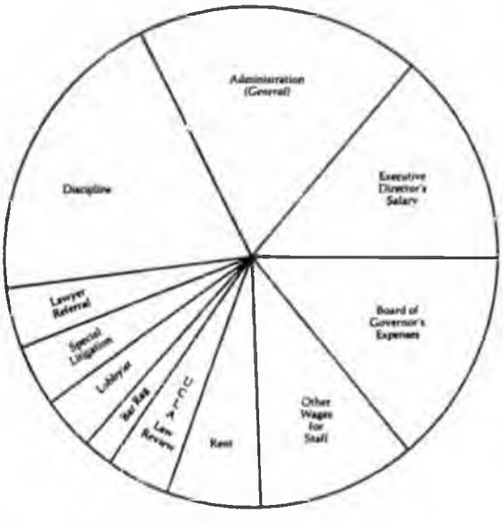
Income Distribution for 1979



GRAPH NO. 3

Distribution of Membership Dollar*

***Excludes Portions of Services Not Paid from Dues**



GRAPH NO. 4

Expenses

Date	Amount	% Increase - 1 Yr. (1978 to 1979)	% Increase - 1970 (1976 to 1979)
Administration			
1976	95,840	0	0
1977	106,505	11	11
1978	142,689	34	49
1979	161,992	13.5	69
Admissions			
1976	33,079	0	0
1977	32,164	-3	-3
1978	29,875	-7	-10
1979	32,610	9	-1
Discipline			
1976	22,660	0	0
1977	69,405	106.3	106.3
1978	74,351	7	228
1979	107,482	44.6	374
Board of Governors: Travel and Per Diem			
1976	8,608	0	0
1977	11,838	37.5	37.5
1978	30,980	161.7	260
1979	40,571	31	371

CHART NO. 5

Date	Total	% Increase: 1 Yr.	% Increase: 1976
Dues			
1976	143,993	0	0
1977	166,294	15.5	15.5
1978	191,266	15	32
1979	211,478	10.6	46.9
Income			
1976	240,635	0	0
1977	283,375	17.8	17.8
1978	351,367	24	46
1979	425,242	21	76.7
Expenses			
1976	211,590	0	0
1977	269,988	27.6	27.6
1978	372,487	38	76
1979	464,551	25	120
	Surplus or [Loss]		
1976	29,045		
1977	13,387		
1978	[21,120]		
1979	[39,309]		
TOTAL	[17,997]		
Membership			
1976	1,031	0	0
1977	1,214	17.7	17.7
1978	1,362	12.2	32
1979	1,460	7.2	41.6

CHART NO. 6

Judicial Sweepstakes

CANDIDATES	AGE/YRS IN ALASKA	BAR ADMISSIONS & PROFESSIONAL AFFILIATIONS	CRIMINAL PROSECUTION EXPERIENCE	CRIMINAL DEFENSE EXPERIENCE
Alex Bryner	36/11	Alaska California American	2½ years	3½ years in Private Practice and as a Public Defender
Susan Burke	34/9	Alaska California	N[illegible]	1½ years as a Public Defender
Robert Coats	37/12	Alask TVBA	10% during 1½ years as Ass't AG	7 years as a Public Defender
James Hanson	45/18	Alaska North Dakota	None	During 1¼ years in Private Practice spent 30% on Criminal Defense Work
Daniel Hickey	33/9	Alaska	2 years Ass't DA Juneau; 5 years as Chief Prosecutor - *(Administrator and Supervisor over 8 District Attorney's Offices)*	None
Thomas Keever	40/10½	State Bar - Texas Alaska Bar American Bar American Trial Law Assn Alaska Academy Trial Lawyers	3 years	10 years as Private Practitioner
Judge Roy Madsen	57/44	Oregon Bar Alaska Bar American Judiciary Society National Assn Trial Lawyers	5 years Prosecutor 11 years City Attorney with 10% Criminal cases	35% Private Practice over a 15-year period devoted to Criminal Defense Work
Charles Merriner	37/10	Colorado Alaska Anchorage Bar	6 years Prosecutor	None
Peter Michalski	34/8	Minnesota Alaska American Bar Assn National District Attorneys' Assn	1973-77 Asst DA Presently heads Office of Special Prosecutions	None
Judge Ralph Moody	64/35	Alabama Alaska American Bar Assn	Attorney General City Attorney 5 years Asst U.S. Attorney	10 years
Robert Opland	52/41	Alaska	7 years	Very limited exposure while engaged in private practice
Lee Petersen	49/12	Alaska, New York and Utah Bars; American Bar Assn; Federal Bar Assn; American Trial Lawyers Assn; Anchorage Bar	3 years part-time City Attorney *(misdemeanors)*; 6½ years Ass't. U.S. Attorney *(felony)*	20-25% of time during 13 years of private practice
Judge Thomas Schulz	43/29	American Bar Assn; National Council Juvenile and Family Court Judges; American Judges Assn; Alaska Bar; American Trial Lawyers Assn.	2½ years Ass't DA in Fairbanks and Juneau; City Prosecutor in Juneau	8½ years as Public Defender and Private Practitioner; 1st Public Defender in Juneau
Judge James Singleton	41/15	California (Inactive) Alaska American Bar Assn Phi Delta Phi	None	None
Ralph Stemp	35/9	Missouri Alaska	None	None
Judge Warren Taylor	54/54	Alaska TVBA	District Attorney in Fairbanks, 2 years	7 years. 50% of private practice criminal

Scratch Sheet

TRIAL EXPERIENCE AS ADVOCATE	APPELLATE EXPERIENCE AS ADVOCATE	JUDICIAL EXPERIENCE	OTHER QUALIFICATIONS
Tried Cases in State Courts and U.S. District Court as Defense Attorney and Prosecutor for 6 years. Minimal Civil Advocacy	Argued Appeals before Alaska Supreme Court, 9th Circuit Court of Appeals and U.S. Supreme Court	District Court Judge State of Alaska 2½ years	Law Clerk for Alaska Supreme Court 2 years.
2 years	1½ years	None	Attorney, Alaska Court System 1971-1975; Staff Counsel, Alaska Court System 1975-1979; Deputy Director of Services, Alaska Court System, 1977-1979
Criminal: 7 years as Asst Public Defender; 1½ years Asst AG	10% Public Defender Work Devoted to Appeals	None	Law Clerk for Justice Rabinowitz 1¼ years
1½ years in Private Practice - 70% Civil, 30% Criminal. A portion of this time spent in trial.	None	15 years. *5½ years District Court; 9½ years Superior Court* U.S. Commissioner; U.S. Magistrate. Sat on approximately 6 Supreme Court Appeals.	Served on Supreme Court Committee on Juvenile Rules. Served on Judicial Council Committee on Judicial Discipline and Removal.
1972-1973—2 to 3 trials as Asst AG; 1973-1975 Undetermined number of Court and Jury trials while Asst DA	10-12 Appeals before Supreme Court while Asst AG 1972-1973; Undetermined number of Appeals while Asst DA 1973-1975	None	Furnishes Legal Services to Criminal Justice Agencies including Dept Public Safety and Division of Corrections
10 years Civil/Criminal Trial Experience as Private Practitioner	Periodic Appellate Experience for 15 years	1 Month	
60% of General Practice from 1960-1975 devoted to Civil Trial Work; 35% devoted to Criminal Trial Practice	Less than 5% of Practice Devoted to Appeals	5 years Superior Court	
No Civil Trial Experience. All Trial Experience in Criminal Prosecution	40% Criminal Appellate Experience Including Argument Before U.S. Supreme Court	None	Editor, U. of Colorado Law Review Order of the Coif
1 year Civil Trial Experience in addition to Criminal Prosecutions	In Charge of ⅓ of Criminal Appeal Briefs for the State; Filed 1st Consumer Protection Action in State v. Alaska Sleeping Bag Co. Wrote State Brief in U.S. Death Penalty Case	None	Primary focus of work in Office of Special Prosecutions and Appeals is Appellate
5 years prosecution; 10 years Civil and Criminal Trial Experience as an Advocate	Approximately 16 years of periodic Appellate experience in both Private and Public Practice of Law. Admitted to Practice before 9th Circuit Court of Appeals, U.S. Supreme Court.	18 years Superior Court. 10 years as Presiding Judge.	Attorney General State Senator Territorial Senator Senate Majority Leader Chairman, Judicial Qualification Commission Lt. Colonel, U.S. Army Chairman, Alaska Legislative Council
After 7 years as a Prosecutor - approximately 15 years Civil Trial experience in private practice.	Periodic Appellate Work in Private Practice	3½ years District Court Magistrate; Deputy U.S. Commissioner during Territorial days.	Practiced Law in Cordova; lived in Mary's Igloo, Teller, Kananak, Dillingham, Fairbanks.
Over 100 trials - many preliminary hearings; Grand Jury proceedings, suppression of evidence hearings; habeas corpus hearings	Alaska Supreme Court - over 25 briefs and hearings; Ninth Circuit Court of Appeals - 25; other courts - over 15	None	Practice for last two years mostly restricted to appellate work for other attorneys.
Trial Experience in Private Practice, primarily Criminal and Personal Injury Plaintiffs and Defense Work with some Domestic Relations. Total of 8½ years Criminal and 7 years Civil Trial Experience.	Periodic Appellate experience throughout practice as Attorney	9 years (*2½ years District Court 7½ years Superior Court*) Sat on several Supreme Court hearings.	Faculty Advisor National Trial Judges College, Reno, Nevada. Past President Judges Assn, Alaska. Career and long-time interest in criminal law. Chairman, Sentencing Guidelines Committee.
5 years Civil Trial Experience as an Advocate.	5 years Appellate Experience	10 years. Sat on Several Supreme Court Hearings.	Teaches at Trial Judges College, Nevada. Member of Committee on Minority Sentencing, Chairman, Advisory Committee, Criminal Justice System - University of Alaska, Anchorage.
Periodic exposure to Trial Work during 3 years Private Practice primarily devoted to Commercial, Contract and Aviation Law	Some Appellate Work during Private Practice	None	LLM University of Michigan Law Review, Washington U. Corporate Attorney 1974-77. Served on Alaska Bar Assn Grievance and Criminal Law Committees. Three years Asst AG in Juneau.
7 years General Practice; 20% Civil Trial Work in Private Practice	5% Appellate Work while in Private Practice.	15 years Superior Court; Sat in on a couple of Supreme Court cases.	Judicial Qualifications Commission, Supreme Court Policy Advisory Committee, Presiding Judge Fairbanks - 5 years, Faculty Advisor National Trial Judges College, Reno, Nevada, Presumptive Sentencing Committee.

Alaska Bar Association

Ethics Committee Opinion No. 79-4

Summary

The Ethics Committee has been asked 1) whether it is proper for the Alaska Legal Services Corporation (ALSC) Board of Directors to review client eligibility determinations for legal services clients, and 2) does a conflict of interest exist where a board member or his firm represents an opponent of an ALSC client in the same litigation.

It is our conclusion that the review of client eligibility information by the ALSC board is not prohibited by any ethical principle unless the information is protected by the attorney-client privilege. Whether the information is protected by the attorney-client privilege depends on the facts in each particular case. As a general proposition, absence unusual factual circumstances, it would not appear that the attorney-client privilege ordinarily applies.

We also conclude that members of the ALSC Board of Directors and members of their firms can represent parties adverse to clients represented by ALSC staff lawyers provided requisite consideration is given to the conflict of interest provisions of the Model Code of Professional Responsibility to assure independent professional advice and judgment to each client.

Issue No. 1

The first issue presented for consideration is whether it is proper for the Alaska Legal Services Corporation Board of Directors to review client eligibility determinations for legal services clients.

Outside of the legal services context, eligibility [illegible] publicly funded programs is subject to internal review by the program administration and directors. This is true even in a program where eligibility depends upon income (or available assets) being below a certain threshold level. In most cases, the fact that an individual is represented by Alaska Legal Services is a matter of public knowledge and record. The fact of representation carries the implication that the client is eligible for such representation. In other words, the basic fact of eligibility is not ordinarily confidential.

There is nevertheless some authority for the proposition that specific information relating to client eligibility for representation by ALSC may be protected by the attorney-client privilege. The ALSC Board of Directors is made up of both lawyers and lay persons. The attorney-client relationship between a staff attorney and his client extends to other attorneys on the staff, but it does not extend to attorney or non-attorney members of the organization's governing body. See ABA Formal Opinion 324, ABA Informal Opinion 1208, and California Bar Association Opinion 358. In an Informal Opinion, the California Bar Association found that client financial data, including documents related to income and assets, may not be disclosed to the Board of Directors of a legal aid foundation by a staff attorney (Informal Opinion 358). That opinion is based in part on a California Supreme Court decision that financial eligibility information given by a client to a public defender agency is protected by the attorney-client privilege. *People v. Canfield*, 10 Cal.3rd 699, 527 P.2d 633 (1974). It should be noted however, that in some districts the Alaska Court System, in determining eligibility for representation in criminal cases by the public defendant, examines potential clients on the question of eligibility in open court. Under such a procedure all the factual details are made available not only to the court and to the agency that may provide legal services, but also to any member of the general public who wishes to listen in. While we do not express approval for this procedure, its employment by the court system in Alaska would seem to indicate that there is no present authority for the proposition that eligibility information is inherently privileged.[1]

Rule 503 of the Alaska Rules of Evidence provides that the lawyer-client privilege extends to communications "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmition of the communication." Communications protected by the privilege include not only those directly to the lawyer, but also those to the lawyer's representatives. The commentary to the rule provides that the definition of "client" extends to a person consulting a lawyer preliminarily with a view to retaining him, even though actual employment did not result. In other words, there is authority for the proposition that communications to ALSC staff, including nonlawyers, may be privileged whether or not the client is determined to be eligible for representation by legal services. Nevertheless, there are factors indicating that communications concerning eligibility are administrative or ministerial in nature and are not necessarily covered by the attorney-client privilege.

It does not appear that determinations of client eligibility by ALSC are necessarily, or even usually, made based on privileged attorney-client communication. ALSC intake procedures are regularly conducted by nonattorneys for the preliminary purpose of determining eligibility for legal representation. If the potential client is found to be ineligible, ALSC declines to take the case and in most cases the applicant never meets with an ALSC attorney to discuss the substance of the matter upon which he was seeking representation. The potential client is aware that eligibility must be shown before Alaska Legal Services can undertake representation. Moreover, it cannot be assumed that a potential client has any expectation that eligibility information is protected from review by the corporation, and the persons or boards within ALSC which it designates to make internal reviews of eligibility determinations.[2] The client may have an expectation that eligibility information will be kept confidential from the general public, but that is not a question here. The Board of Directors can review client eligibility information without disclosing that information publicly.

In some cases information having a bearing on client eligibility may be disclosed as part of a privileged communication between lawyer and client. In those cases, each of which must be considered on its facts, disclosure of the privileged information to the Board of Directors would be prohibited. The possibility of such an occurrence, however, does not mean that eligibility information generally is privileged from disclosure or review by the Board of Directors.

As a matter of public policy it is desirable for ALSC to be able to review how its client eligibility standards are applied by its staff. The particular entities to conduct the review should be established by ALSC and the National Legal Services Corporation according to their own policies and regulations. It is assumed for purposes of this opinion that ALSC has determined that its Board of Directors is an appropriate entity to review eligibility determinations, absent an ethical prohibition applicable to such a procedure. It should be noted that if client eligibility information is subject to the attorney-client privilege, its disclosure would be prohibited not only to the legal services Board of Directors, but also the executive director of Alaska Legal Services (who is not currently an attorney) and to the parent national corporation, the very person and entity ultimately charged with administering the operations of ALSC, including the application of prescribed eligibility standards for expenditure of federal (and state) funds. If it were determined that the attorney-client privilege precluded review of eligibility determinations by the Board of Directors, it would also appear to preclude review by virtually everyone except the very staff person whose action was supposed to be the subject for review.

In balancing the competing considerations, it appears that while client eligibility information should generally be kept confidential, its disclosure to the ALSC Board of Directors, so that it may review questions of client eligibility, constitutes a reasonable use of that information to insure compliance by ALSC with its own governing statutes, regulations and policies. It cannot be assumed that clients reasonably expect that the information they provide to ALSC to demonstrate eligibility for services cannot be reviewed by ALSC's own board in accordance with the corporation's established procedures. Any doubt about the client's expectations can be eliminated by advising the client that eligibility is subject to review. In situations where information relating to client eligibility is protected by the attorney-client privilege, disclosure of the particular information involved by a staff attorney to the Board of Directors, or anyone not a party to the direct attorney-client relationship, is prohibited. This prohibition, however, is strictly limited by the parameters of the privilege and does not extend to other eligibility information not protected by the privilege.

Issue No. 2

The [illegible]ation has also been asked whether [illegible] conflict of interest exists where a member of the ALSC board or his firm represents an opponent of an ALSC client in the same litigation.

There is conflicting authority on the propriety of legal services board members or their firm representing parties adverse to clients represented by legal services staff attorneys. Some authorities have concluded that such representation may be improper. E.g., *Estep v. Johnson*, 383 F.Supp. 1323 (D. Conn. 1976). See also New Jersey Bar Opinion 126, 91 N.J. 257 (1968); ABA Informal Opinions 1369 and 1395. Other authorities suggest that where the board restricts its activities to the formulation of broad policies and guidelines and refrains from involvement with individual cases, board members can appropriately represent such parties providing requisite consideration is given to conflict of interest provisions of the Code of Professional Responsibility. See, e.g., 44 Florida B.J. 407 (1970). ABA Formal Opinion 345 (July 12, 1979) considers the competing authorities and concurs with the latter conclusion. The principles set forth in that opinion are persuasive and should govern in Alaska.

ABA Formal Opinion 345 states:

"The committee, upon due reflection, has concluded that these provisions [D.R. 5-101(a) and D.R. 5-105 relating to the exercise of independent judgment by an attorney] would not be violated necessarily by the representation by the board member or his firm of a client involved in litigation with a program client. The program staff lawyers are the lawyers for the client. Accordingly, the lawyer-board member does not have a lawyer-client relationship with the program client so the problem is not one of a lawyer representing clients with conflicting interests....

"Having said all this, the committee does not concur that there is no problem in a board member's representation of a client adverse to a program client. Depending upon the nature of the case, the circumstances of the clients or otherwise, one counsel or the other may feel unexpectedly self-restrained from representation of the client in the fullest sense. From the client's side it should not be overlooked that clients in the poverty group, particularly, may tend to be submissive and to acquiesce in the representation—feeling that they have no choice, but at the same time feeling concerned that they may not be getting independent representation. The real possibility of an appearance of impropriety, even though no real actual impropriety may exist, is also troubling to the committee.

"Accordingly, it is important that the board and clients on both sides be made aware of the board member's role and the fact that he or a lawyer in his firm is representing a client opposing a program client. The clients and counsel on both sides must feel comfortable that in the particular circumstances neither client will be deprived of independent and uninhibited representation. Lawyers on both sides must be sensitive and alert to these possibilities and, if, in the course of the representation, it becomes apparent that independent representation is not being afforded on both sides or one or the other of the clients perceives that it is not afforded, no matter what the reality, then the lawyers should assist in change of counsel for one or both clients....

"Because of the extreme value of having active practitioners who are litigators themselves (or who have partners who are) serve as board members, the committee does not wish to raise artificial barriers to their participation on program boards by forcing them to choose between service on a board and representation of their clients. It should be noted that in some smaller communities it is impossible to secure qualified lawyer-members for boards who would not be involved from time to time representing clients opposing persons represented by program staff lawyers. Recognizing the need for qualified lawyer-board members, program staff lawyers should not seek unfairly to gain advantage for their clients by disqualification of the board member or his firm. To the extent that the program can make available to its clients competent volunteer legal counsel in these situations, program clients can be offered an alternative. On the other side, a board member should be sensitive to the possible problems posed by such relationships and should be quick to disqualify himself and his firm in proper cases.

"On balance, the committee concludes that the compelling need for resources, not the least of which is strong interest in legal services and participation on program boards by active practitioners, to provide legal services for the indigent outweighs the risk of any possible appearances of impropriety in those cases where adequate representation is provided by board members (or members of their firms) for one side and program staff attorneys for the other. The committee is confident that there will be no actual impropriety provided the strictures contained in this opinion are followed conscientiously."

As noted in the ABA opinion, in a state with a small population such as Alaska, the need to obtain qualified lawyer members for boards, particularly from smaller communities, indicates that on balance board members should not automatically be disqualified from representing parties adverse to clients of legal services. On the other hand, the propriety of undertaking or continuing such representation is not absolute. It should be obvious that a board member cannot consider client

[continued on page 11]

[1] The Alaska Supreme Court has cautioned that requiring a legal aid client to prove his eligibility in court may be undesirable, before the merits of his case are heard, because "this may involve a showing that several attorneys refused to handle the case because it was too weak." *Dimmick v. Watts*, 490 P.2d 483, 486 (1971). It should also be noted, however, that in *Dimmick* the Supreme Court also found that "Eligibility determinations by Legal Services attorneys are reviewed by the Alaska Legal Service Corporation Board of Trustees." 490 P.2d at 487. The court also declined to decide the difficult question of who has standing to challenge the eligibility of a particular Legal Services client.

[2] As a matter of policy it would seem to be desirable to advise potential clients that the question of financial eligibility is subject to review and to explain review procedures to the client. The review procedures established by ALSC are not a subject for consideration here. It is assumed for purposes of this opinion that client eligibility may be reviewed by the Board of Directors, but the exact procedure and the persons or entities who should be involved are determined by ALSC according to its own policies and regulations.

[continued from page 10]

Bar Opinion Summary

eligibility in a case where he represents an adverse party. It would also seem to be improper for the board to set the salaries of individual staff attorneys where a staff attorney may simultaneously be involved in litigation adverse to a board member. Other potential conflicts of interest must also be recognized, but the mere fact of representation of a party adverse to a client represented by ALSC does not disqualify an attorney from board membership.

Conclusion

The committee concludes that members of the ALSC Board of Directors may review the eligibility of ALSC clients provided that no disclosure is made to them of information protected by the attorney-client privilege. The committee also concludes that an ALSC board member or his firm may represent an opponent of an ALSC client in the same litigation provided that ethical considerations governing conflicts of interest and the need for a lawyer to exercise independent professional judgment are observed in particular cases.

ABA Formal Opinion 324 emphasizes that an attorney has a duty to exercise professional judgment solely on behalf of the client. E.C. 5-24 warns that:

"Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves....The responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer."

Opinion 324 concludes that the functions of the Board of Directors of a legal aid organization should be limited to formulating broad goals and policies, including the establishment of guidelines delineating categories or kinds of clients and cases the staff attorneys may represent.

"Once the attorney has accepted a client or case of the nature and type sanctioned by board policy, the board must take special precautions not to interfere with its attorney's independent professional judgment in the handling of the matter." (Formal Opinion 324, p. 7).

ABA Formal Opinion 334 states that:

"There should be no interference with the lawyer/client relationship by the directors of a legal aid society after a case has been assigned to a staff lawyer and...the board should set broad guidelines respecting the categories or kinds of cases that may be undertaken, rather than act on a case by case, client by client basis." (Opinion 334, p. 5).

Nothing in these admonitions indicates that the legal services corporation, through its Board of Directors or by some other procedure, may not review the question of client eligibility in particular cases (again, assuming no privileged communications will be revealed). Such a review merely seeks to determine whether general eligibility standards previously established are properly being applied. In Formal Opinion 334, the American Bar Association found that the Board of Directors at a legal aid office may require staff attorneys to disclose information that is reasonably required for a legitimate purpose, such as determining whether the board's policies are being carried out. The review process should not involve interference with decisions and judgments by staff attorneys on how a case is handled as opposed to the more basic question of the client's eligibility for representation by ALSC.

In some cases the question of compliance with eligibility guidelines may involve decisions based upon professional judgment and interpretation of eligibility guidelines rather than simple application of financial or other guidelines. In those cases it may be inappropriate for the ALSC Board of Directors to attempt to alter a decision by staff attorneys to undertake representation in a particular case. Nevertheless, this would not appear to preclude a review of how eligibility standards have been applied so that the board can assess whether its policies generally need clarification or revision, nor would it appear to preclude a determination by the board, where appropriate, that under any reasonable interpretation, its eligibility standard have not been complied with.

Support Our Advertisers

TVBA

[continued from page 6]

April 18, 1980

Minutes of the
April 18, 1980 Meeting
of the Tanana Valley Bar Association

The meeting was called to order, and President Link recognized Clark Gruening and Steve Cowper as sort of guests, and introduced Julius Brecht, director of the State of Alaska, Department of Commerce and Economic Development, Division of Banking, Securities, Small Loans & Corporations.

The minutes were dull. There were no exciting announcements. President Link appointed a resolutions committee to consider any resolutions that the TVBA might want published in the *Bar Rag* for consideration at the June convention. The committee consisted of Chairman Dave Call, Jim DeWitt and Will Schendel.

Julius Brecht then took over and educated us on the department of State of Alaska with the longest name. He prefaced his remarks with praise for a brilliant and witty secretary and a question about the elephant's head being in one time zone or other and why Juneauites do or don't want to change their clocks. Apparently, we have federal banks, state banks, federal savings and loans, federal mutual savings banks, federal credit unions, finance companies and premium finance companies. The important thing we learned was that disintermediation was very prevalent and is now somewhat less so—probably due to a lack of funds to disintermediate. Also, HR 4986, also known as PL96221, is a big deal. Be sure to bring your money next week for the Law Day.

Meeting adjourned.

King Arthur

DAYLY, MARTIN & FAY, INC. OF ALASKA
d/b/a THE CLARY INSURANCE AGENCY

Clary Insurance Agency

Specialists in Lawyer's Legal Liability
Representing: National Union Fire Ins. Co.
- Fourth Year Alaskan (Stability)
- Broad Coverages
- Competitive 1980 Premium Rates
- Full Underwriting Authority

Call us before buying Brand "X"

THE CLARY INSURANCE AGENCY
Your Full Service Insurance Agency

A Division of Dayly, Martin & Fay International

803 West Fifth, Anchorage (907) 276-5454
with offices in Kenai and Seward

V.I.P.
RESEARCH
ASSOCIATES

"EXPERIENCED"
"PROFESSIONAL"*"THOROUGH"

Research Services
* limited Asset checks
* full Asset checks
* research, skip-tracing

"When you need to know," call...274-9935

*full range of professional research services for attorneys and businessmen alike.
*Short of time or in a rush, let us do the work.

GEMINI
Reporting Services

ANNOUNCES THE OPENING OF ITS
SECOND OFFICE

310 "K" STREET, SUITE 409
ON
MAY 20, 1980

*****

Full court reporting services, including daily and rush copy
ACS certified transcription service
Hearings and arbitrations a specialty
Three large conference rooms, two locations

*****

"QUALITY SERVICE AT A REASONABLE PRICE"

Main Office
943 West Sixth, Suite 210
277-8591

277-8591

History of Court System Facilities 1970-1980

As of January 1980, the Alaska Court System maintains court facilities in fifty-four (54) locations across the state. These facilities range in size and suitability from multimillion dollar court complexes, as in Anchorage, Fairbanks and Juneau, to facilities in rural locations consisting of a magistrate's living room, as in the villages of Hoonah, Tanana and Unalakleet.

At these locations the Court System uses approximately three hundred ninety-five thousand (395,000) net usable square feet of space. The specialized space needs range from courtrooms used for Supreme Court appellate hearings to computer installations requiring close-tolerance temperature and humidity controls to automobile facilities.

In 1970, the Court System operated out of 26 locations using approximately one hundred sixty-nine thousand (169,000) net usable square feet of space.

The buildings occupied by the Court System can be categorized as follows:

1. **State-Owned Buildings** procured by A. ka State Housing Authority (ASHA) bonding. Fourteen buildings (12 of which were built since 1970) are of this type and they provide space not only for the Court System but for other state agencies as well:

(Pre-1970)

a. Old Anchorage Court Building: built 1964; cost $2,500,000; 64,170 gross sq. ft.

b. New Anchorage Court Building: built 1974; cost $7,812,000; 157,861 gross sq. ft.

c. Anchorage Parking Garage: built 1975; cost $1,224,700; 68,370 gross sq. ft.

d. Delta Junction Combined Facility: remodeled in 1977 to provide 1,760 net usable sq. ft. of space to the Court System: 1977 valuation $173,781.

(Pre-1970)

e. Fairbanks Court and Office Building: built 1964; cost $3,100,000; 75,790 gross sq. ft.

f. Fort Yukon Combined Facility: built 1972; cost $251,400; 3,472 gross sq. ft.

g. Glennallen Combined Facility: built 1976; cost $1,495,000; 12,040 gross sq. ft.

h. Juneau Court and Office Building: built 1975; cost $5,665,245; 77,000 gross sq. ft.

i. Kenai Court and Office Building: built 1974; cost $1,781,687; 26,232 gross sq. ft.

j. Ketchikan Court and Office Building: built 1973; cost $2,750,000; 74,590 gross sq. ft.

(Pre-1970)

k. Kodiak Court and Office Building: built 1968, cost $461,400; 13,440 gross sq. ft.

l. Sitka Court and Office Building: built 1976; cost $1,880,000; 25,954 gross sq. ft.

m. Tok Combined Facility: built 1973; cost $194,800; 3,528 gross sq. ft.

n. Valdez Court and Office Building: built 1975, cost $1,350,000; 16,065 gross sq. ft.

2. **State-Owned Buildings** procured by direct legislative appropriation:

a. Kotzebue Court and Office Building: built 1973; cost $328,000; 4,330 gross sq. ft.

*b. Presently the Kotzebue Court System Addition is near completion; cost $298,000; 1,100 gross sq. ft. This remodeling project will provide for a much needed enlarged clerks' area, magistrate's office, judge's chambers and jury deliberation room.

c. Cold Bay Trailer Facility: built 1974; 1977 valuation $18,957; 400 net usable sq. ft.

3. **Modular Criminal Justice Facilities.** During 1973-1975, the Court System in cooperation with the Law Enforcement Assistance Administration (LEAA) and the state's Criminal Justice Planning Agency (CJPA) oversaw the placement of 13 modular facilities in 13 communities throughout Alaska. These modular units have about 840 gross sq. ft. of area providing for a small hearing area, office space for a magistrate, office space for local police or State Troopers, and two small holding cells. The Court System occupies about 400 sq. ft. of space in each of these facilities. The average cost of each of these units was approximately $34,000 including transportation and installation costs. Each community owns the facility and leases space to the Court System. Previously there had been no adequate space available for judicial functions in the following communities.

a. Angoon; built 1975
b. Aniak; built 1974
c. Emmonak; built 1973
*d. Galena; built 1975. The Court System no longer leases the modular facility from the City of Galena. The Galena Police Department expanded to such an extent as to make it difficult for the magistrate to conduct judicial business in such close quarters. The Court System presently operates in a privately owned building built to the Court System's specifications. (See section 5)
e. Gambell; built 1975
f. Hooper Bay; built 1974
g. Kiana; built 1973
h. Mekoryuk; built 1975
i. Noorvik; built 1974
j. Point Hope; built 1974
k. St. Mary's; built 1973
l. Savoonga; built 1974
m. Selawik; built 1973

4. **Municipality or Borough-Owned Buildings** providing to the Court System available space on a lease basis. Most of these facilities provide minimal space needs for a magistrate court. A notable exception is the Bethel Court facility built by the City of Bethel to the Court System's specifications and provides for all Superior Court functions and a permanent Superior Court Judge.

a. Bethel Court Facility: built 1977; 4,437 net usable sq. ft.

b. Craig Court Facility: In 1972 the Court System entered into an agreement with the State Troopers for the use of 100 sq. ft. in a trailer owned by the Department of Public Safety. In 1979 the Court System leased 144 sq. ft. of office space from the City of Craig. This office is adjacent to a large council chambers providing space for court proceedings on an as-needed basis.

c. Healy Court Facility: In 1974 the Court System leased 336 sq. ft. of office and hearing room space from the Tri-Valley Volunteer Fire Department in Healy. This same lease continues.

d. Kake Court Facility: In 1972 the Court System leased 288 sq. ft. of office space from a private owner. In 1974 the Court System began its present lease with the City of Kake for 150 sq. ft. of office space and an adjacent council chambers providing space for court proceedings on an as-needed basis.

e. Mt. Village Court Facility: In 1976 the Court System leased 368 sq. ft. of office and hearing room space from the City of Mt. Village. This same lease continues.

f. Naknek Court Facility: In 1970 the Court System leased 1,152 sq. ft. of office and court space from the Bristol Bay Borough. This lease continues.

(Pre-1970)

g. Seward Court Facility: In 1966 the Court System leased 1,500 sq. ft. of office and courtroom space from the City of Seward in the Seward State Court Building and City Hall.

(Pre-1970)

h. Skagway Court Facility: In 1969 the Court System leased 117 sq. ft. of office space adjacent to a council chambers providing courtroom space

[continued on page 13]

EXAMINER of QUESTIONED DOCUMENTS (Court Qualified)

HANDWRITING IDENTIFICATION
FORGERY DETECTION
TYPEWRITING IDENTIFICATION
ALTERATIONS, ERASURES & ADDITIONS
ELECTRO-STATIC DETECTION APPARATUS—Indented Writing (The only one in the Northwest owned by a private document examiner)
907-277-0120
Records Call for your convenience
Member
Independent Association of Questioned Document Examiners, Inc.
World Association of Document Examiners

Leonard F. Schultz
3344 Mount Vernon Ct.
Anchorage, Alaska 99507

Bankruptcy Panel Trustees Needed

The Administrative Office of the United States Courts seeks qualified applicants to serve as panel trustees in Chapter 7 Liquidation Cases for the bankruptcy court serving the District of Alaska.

Candidates are especially needed to serve in Anchorage, Fairbanks, Ketchikan, Juneau, and Nome.

For further information and application forms, please contact Mrs. Margaret Gingras, Clerk of the Bankruptcy Court, United States Courthouse, 701 C Street, Box 47, Anchorage, AK 99513. Telephone: 276-1273. Or write to: The Bankruptcy Division, Administrative Office of the United States Courts, Washington, D.C. 20544.

AD-GILE court reporters
BOX 8994
ANCHORAGE, ALASKA 99508
PHONE 333-4594

M. JANE PETTIGREW
Attorney at Law
Practice Limited to Bankruptcy
Referrals Welcome
835 D Street, Suite 106
Anchorage, Alaska 99501
(907) 276-4959

Did you know that SECURITY TITLE now has sale guarantees

For further information

Call Bill McCampbell
or Carole Bangs
276-0909

711 "H" STREET
ANCHORAGE, AK 99501

Court System Facilities

(continued from page 12)

on an as-needed basis. This lease continues.

i. Tununak Court Facility: In 1977 the Court System leased 288 sq. ft. of space in the City of Tununak's Central Office Building. This lease continues.

j. Yakutat Court Facility: In 1976 the Court System leased 800 sq. ft. of office and courtroom space. This lease continues.

5. Privately-Owned Buildings built to Alaska Court System specifications and leased under negotiation and bidding procedures as defined by Alaska Statutes and the Purchasing Regulations of the Alaska Court System in cooperation with the Department of Administration.

a. In February of 1972, the Court System leased 324 sq. ft. of space from the City of Barrow. But because the City of Barrow needed the space the Court System had to seek new space within the year. In October 1973 the Court System leased approximately 1,200 sq. ft. from a private owner until 1978. Barrow Court Facility: In 1978 the Court System began leasing approximately 2,800 sq. ft. of space for a facility that would provide for full Superior Court functions. This same lease continues.

b. Dillingham Court Facility: In 1967 an ASHA Combined Facility was built in Dillingham for $142,400; 2,380 gross sq. ft. The Court System occupied 821 sq. ft. of minimal office and courtroom space until November 1978 when the village corporation (Choggiung Limited) built a building of 3,633 net usable sq. ft. This building provides for all the functions of the Superior Court.

c. Galena Court Facility: In December 1977 the Court System began leasing 1,067 sq. ft. of net usable space from a private owner. This space provides for a minimal Superior Court facility: i.e., 12-person jury, courtroom jury deliberation room, judge's chambers, magistrate's chambers and clerks' area. This same lease continues. Before 1977, the Court System occupied space in a Modular Criminal Justice Facility. The expansion of the Galena Police Department required the Court System to seek other, more appropriate space.

d. Haines Court Facility: The Court System has maintained a lease with a private owner for 700 sq. ft. of court and office space in Haines.

e. Homer Court Facility: In December 1976 the Court System leased 2,743 sq. ft. of net usable space built to specifications and providing for all Superior Court functions. This same lease continues. Before 1976 the Court System operated with 1,599 sq. ft. of office space.

f. Palmer Court Facility: In February 1975 the Court System began leasing 4,817 sq. ft. of net usable space providing for all Superior Court functions. This same lease continues. Before 1974 the Court System leased approximately 900 sq. ft. from a private owner.

g. Petersburg Court Facility: In 1973 the Court System increased the leased space from 1,155 sq. ft. to 1,426 sq. ft. of net usable space for a courtroom and magistrate's office. This same lease continues.

6. U.S. Government Leases:

(Pre-1970)

a. Nome Court Facility: Since before 1970 the Court System has been leasing 4,795 sq. ft. of space in the old Federal Courthouse, Post Office and Jail Building. This same lease continues and this facility provides for full Superior Court functions.

(Pre-1970)

b. Cordova Court Facility: Since before 1970 the Court System has been leasing 1,150 sq. ft. of space in the U.S. Post Office Building in Cordova. This same lease continues and this facility provides for full District Court functions.

(Pre-1970)

c. Wrangell Court Facility: Since before 1970 the Court System has been leasing 1,500 sq. ft. of space in the Main Post Office Building in Wrangell. This facility provides for full District Court functions and this same lease continues.

Editor's Note: We promised you this story in the February issue. We failed. But better late than never?

Voice Analysis

by Mike McHenry

The last few years have produced a range of developments in the field of voice stress analysis. This area has, through rapid growth and marketing, generated equipment and circumstances warranting mixed acceptance of this lie detection technique.

The equipment presently available can be rated from genuine scientific instrumentation to mere gadgetry. Examples of inferior and misleading devices are found in the pages of many in-flight airline publications. They include desk models and even a wristwatch which purport to reveal lies. These items are, in my view, worthless. Such "stress detectors" evaluate usually only subaudible changes in voice amplitude, with the results displayed in varying banks of multi-colored lights or upon a dial. Instruction manuals suggest that when the lights change from green to red the truth probably isn't being told. In fact, there are many possible reasons for seeing red lights or a "10" on a dial. This was convincingly proven at the International Society of Stress Analysts' Annual Seminar in 1978, at Chicago.

Using the same type of components and circuitry contained in the popular "businessman's" voice analyzer which is advertised in airline magazines at a cost of $1,500.00, an I.S.S.A. member went to the nearby Radio Shack store and assembled a similar device for approximately $22.00 worth of parts. The high priced model and the copy were placed side by side before the audience. By employing forced changes in voice amplitude the two light panels changed simultaneously and equally. No lies were told, only manipulation of the voice was done. The demonstration proved convincingly the scientific worthlessness, but applaudable marketing, that characterizes these inept devices. Because over 10,000 of them have reportedly been sold, these "voice analyzers" have had an impact on the overall credibility of lie detection by voice analysis. The manufacturer has been invited by the society to present his product for evaluation, but has declined.

Price Cutting

Shortly after voice stress analysis equipment became available, competing examiners were appearing everywhere. Undercutting prices was a routine practice. The manufacturer of one instrument offered a three-day training course while another told me less preparation was needed. At a trade exposition in Los Angeles, a salesman said that by reading their instruction booklet I would be qualified to administer lie detection exams. With unqualified examiners and their tests proliferating, the abuses and errors expanded. Countless numbers of honest persons were denied employment or fired because they failed a lie detector test. It took approximately five years for the complaints to reach various state legislatures, who responded by defining the qualifications of examiners, standards for approved instruments or a ban on voice analysis testing altogether. The legitimacy of the technique continues to recover from these excesses.

No voice analysis instrument is worthwhile if it does not prepare a permanent chart of responses. Without such a record the moment of reply is lost. An examiner would have to later ask, "How many red lights were there?" Voice analyzers that do not evaluate and chart the micro-muscle tremor phenomena are also worthless.

Briefly, the micro-muscle tremor is a bodily activity ongoing in conscious humans. It is associated with active brain waves of eight to 16 cycles per second (Beta state). This "activity" in our muscles is not visible, but it is nature's way of keeping us prepared for the next "event." It slows when asleep and when under hypnosis. Since the voice box is a muscular structure, it too "vibrates" at the Beta rate when we speak. During a guilt reaction or other stressful circumstance, the body involuntarily causes the micro-muscle tremor's detectable presence to dissipate. Genuine voice analyzers such as a Mark II or Dektor PSE prepare permanent records of the changes in this phenomenon's presence upon our speech, plus charting other meaningful components in the voice. These changes are evaluated by an examiner who compares charted answers to relevant and irrelevant or control questions during a structured test. This forms the basis for determining the presence of a guilt reaction during a lie detection test.

LEGAL PIZZA
"Real East Coast Pizza"
LEGAL PIZZA
Sandwiches
Minestroni
Pizza
Salads
Beer and Wine
3 30 HST
Spring Hours OPEN
Lunch Time: 10:30-2:30
Dinner Time: 4:30-Till 12 p.m.
Free downtown delivery Mon - Sat
Call ahead: 276-0533

Williams Stenotype Reporting
Formerly Cummins Stenotype Reporting
NANCY K. WILLIAMS
• Certified Shorthand Reporter
• Registered Professional Reporter
• Certificate of Proficiency
• Quality Work
P.O. Box 5025, North Pole, AK 99705
in the Fairbanks vicinity
(907) 377-2174

World Wide Travel, Inc.
"For Miles of Smiles"
DON WILLIAMS
VICE PRESIDENT
P.O. BOX 2305
4011 ARCTIC BLVD.
ANCHORAGE, ALASKA
277-9571

Al's Detective Agency
(907) 456-7274
• Licensed and Bonded
• Statewide Service
• 7 Years Experience in Criminal Investigations
Specializing in: • Criminal Investigations • Missing Persons • Skip Tracing • Divorce • Child Custody • Background Checks • Insurance Fraud • Property Recovery
1919 Lathrop St. Suite 206 D-41
Fairbanks, Alaska 99701

E'Dal Investigations
P. O. Box 1162
Soldotna, Alaska 99669
(907) 262-5256

MEMBER
Evidence Photographers International Council
FORENSIC PHOTOGRAPHY
EVIDENCE PHOTOGRAPHY FOR CIVIL LITIGATION
Legal Photo Service
PHONE: (907) 279-8222

INFORMATION SERVICES
(907) 456-8205
LEGAL INVESTIGATION STATEWIDE
Eleven years' experience in on-scene investigation and trial preparation
529 Fifth Avenue
Suite 2
Fairbanks, Alaska 99701

PHONE 276-2237
ATTORNEY'S PROCESS SERVICE INC.
P.O. BOX 205
ANCHORAGE, ALASKA 99510
ROGER A. KANCHUK
PRESIDENT
MARIA L. SNYDER
VICE-PRESIDENT

ALASKA STATUTES
Including
Topical General Index
and
1979 Cumulative Supplement
The publishers of your Alaska Code have made every effort to assure highest quality in the finished work. All the editorial expertise acquired during more than eighty years of state code and general law book publishing has been incorporated in the code to assure you reliable, easy-to-use volumes.
MICHIE BOBBS-MERRILL
For customer service contact your regional sales representative:
Ms. Tina Alexanderson
P.O. Box 682
Boise, Idaho 83701
(208) 336-3630

Serving All Alaska
• VIDEOTAPE
• DAILY & RUSH COPY
• COURT TRANSCRIPTS
• CONVENTIONS
• HEARINGS
• DEPOSITIONS
R & R COURT REPORTERS
810 N St., Anchorage..... 277-0572
509 W. 3rd Ave., Anchorage..... 274-9322 or 274-7841
1007 W. 3rd Ave., 3rd Floor, Anchorage..... 272-7515
Fairbanks..... 452-3589

Voice

[continued from page 13]

Comparison Studies

Many studies have been completed to compare the reliability of the PSE/Mark II vs. the polygraph. In Florida, tape recordings were made during the administration of 1,048 polygraph tests. Analysis of the tapes resulted in just three examiner calls being different. Who is wrong? In Tennessee, tests were given to 100 criminal suspects with the Mark II voice analyzer. Using information from confessions, convictions or acquittals, the voice analysis calls were correct 100%.

The American Polygraph Association understandably disagrees with the reliability attributed to genuine voice stress analyzers. As part of its campaign to discredit the PSE it often cites the "Kubis Report." This study was commissioned by the U.S. Army to compare PSE and polygraph. APA proponents note the finding that PSE was accurate only 32%, less than random chance. However, they do not tell us that the same study found polygraph accurate only 55% of the time. The U.S. Army has not accepted or endorsed this study.

Lie detection testing by voice analysis, using high standard equipment, will be reliably indicative of truth or deception nine times out of 10. The reason for good charts is truthfulness. The presence of significant responses may or may not initially be a guilt reaction indicative of deception. A trained examiner will evaluate whether an accused person is reacting deceptively to his alleged deed or whether the suspect is reacting to fear that another, irrelevant, wrongdoing may be discovered during testing. For this reason, I have advised some clients not to submit to a polygraph examination administered by law enforcement authorities. The test subjects can't safely disclose their previous undetected wrongdoing to the police examiner. Without being able to "come clean" and not worry about past events, the examinee is mentally attempting to exercise deception. This mental effort on an outside issue will carry over to the relevant issue, causing chart problems which may cause the police examiner to believe a lie has been told, in spite of one's innocence.

Sometimes, persons have lived with an issue for so long that they are psychologically contaminated by its personal significance. They can't separate its impact from their personal conduct and end up with stressful answers. Thus, doctors and nurses may be poor subjects for questions about drugs. Also, police officers often are poor test subjects since they daily live to and uphold a stricter code of conduct. Only lengthy interviews before testing, detailed chart analysis and subsequently refined questioning can yield a fair opinion.

The Dektor PSE is able to evaluate narrative remarks, beyond a straight "yes or no" reply. This can give insight to answers recorded during depositions, statements or jury selection proceedings. The standards for identifying stress are more relaxed, but one fact is unchanged, the likely reason for good patterns is truthfulness.

Mike McHenry is an Anchorage-based private investigator and a member of the International Society of Stress Analysts. Other members of I.S.S.A. within Alaska are Leonard F. Schultz and Donald Miller.

LEO Annual Report

I am pleased to report that in its first year of existence, the LEO Committee has planned and implemented a scholarship program for the Alaska Bar Association. All of the procedural details such as preparing scholarship and financial applications, announcing the program through statewide newspapers, the Alaska Federation of Natives' annual convention, the nonprofit arms of the native regional corporations, the WICHE fund and statewide minority civic and political organizations have happened. The applications have been available for distribution statewide through the court system, the bar office and our committee members. We have raised almost $6,000 from the earnings on the Boney scholarship fund, the John Manders Foundation, individual members of the bar and the generosity of the Ketchikan, Juneau and Tanana Valley bar associations.

Forty-five Alaskans applied for the scholarships: 28 males and 17 females; 20 presently enrolled in law school and 25 first-year applicants; 16 from Anchorage, 10 from southcentral, nine from rural Alaska, five from southeast and five from Fairbanks. A subcommittee narrowed the field to 14 applicants on the basis of their Alaskan residency, their present intent to practice law in Alaska upon graduation from law school, their admission to an accredited law school, their demonstrated ability to do academic work and their need. With an eye toward encouraging Alaskans statewide to consider law as a profession, this year's awards attempted to promote geographic diversity as well.

We narrowed the field to five applicants who would each receive $1,000.00, and we designated specific recipients for the Chief Justice George Boney and John Manders memorial scholarships. The successful applicants will be introduced to the ABA members during the final banquet of the annual convention in June.

The LEO Committee is definitely excited to see the fruits of our hard work because we started with nothing just a year ago. I do confess at some disappointment that less than 10 percent of the bar contributed to the fund by making a voluntary contribution when they returned their annual dues statement. Perhaps now that the bar sees that the program is viable we can expect greater support from the members next year.

The scholarship program was our major project this year but we did address some of the other responsibilities assigned to us. We continued to monitor the pass-fail rate of ethnic minorities taking the Alaska bar exam and we inquired into the California bar study of racial and cultural bias in its bar exam. This year Alaska bar applicants were asked to volunteer information about their ethnic background by sending a separate form directly to me. Only 30 percent of the applicants for the February 1980 exam returned this form to me. As a result, we are still forced to rely on street gossip to identify the minorities who are taking the bar. Based on our recommendation, I understand that the Board of Governors and the bar counsel are presently studying possible methods of securing this information without suggesting a bias on the part of the association.

Although the ABA received a generous amount of criticism from the legislature this year during the sunset review, our committee's written and oral testimony was well received. In fact, the House Judiciary Committee in its report on the ABA applauded our efforts to maintain information on minorities admitted to the bar and encouraged us to find an accurate method of doing so.

For the first time, we offered individual review and advice to unsuccessful candidates for the bar exam. Twenty-five percent of those who failed the July 1979 exam took advantage of our offer. Keeping in mind the small sample, we noted repeatedly a flaw in the written answers: an inability to express one's legal knowledge in written form in terms of organization, analysis of the facts and legal principles involved, and discussion of each issue separate from the other issues involved in the question. In short, the problem centers more on the lack of writing ability than on the lack of legal knowledge. I further understand that only one-third of the successful candidates pass the written exam. We suggested that this difficulty be initially addressed by requesting that the bar review courses place additional emphasis and time on writing and analyzing practice exams. As a second point, I understand the Board of Governors has accepted our recommendation and taken steps to inform unsuccessful candidates that they may purchase a copy of their own answers and that they may compare their answers with a sample of passing answers in the custody of the local magistrate, district court judge or Board of Governor member.

The LEO Committee also acted as a clearinghouse for other scholarships available for Alaskans. Approximately 25 Alaskans who applied for the APA scholarships were also invited to apply for the Joe Rudd Memorial scholarship and all ABA scholarship applicants received information about the John Manders' scholarships.

It has been a productive year for our Committee and a definite pleasure to work on projects that have such a happy ending as the scholarship program.

Sincerely,
Carolyn E. Jones, Chair
Legal Educational Opportunities Committee

Folk Instructions

by Jim Bendell

LADIES AND GENTLEMEN OF THE JURY:

It now becomes the duty of the Court to instruct you as to the law in this case.

* * *

Unless and until reasonable doubt of his sanity appears, the law presumes that the defendant was sane at the time of the alleged criminal acts charged in the indictment.

But, whenever, from all the evidence in the case, you have a reasonable doubt as to the defendant's sanity at the time of the alleged criminal acts, then you shall return a verdict of not guilty by reason of insanity.

Of course, after doing so, you may wish to consider taking your daughters out of the jurisdiction.

* * *

Out of court statements of the defendant are to be viewed with caution.

The same goes for his in-court statements.

* * *

In the crime charged in this complaint, the doing of the act is punishable as a crime. The intent with which the act is committed is immaterial to guilt. That is, being acquitted means never having to say you're sorry.

* * *

During the course of this trial there may have been occasions where I've rolled my eyes, gasped, sighed, wheezed, and giggled. These acts should in no way be interpreted as expressing my views on any of the evidence presented and you should therefore disregard them.

(Wink)

* * *

The word "unlawfully" means contrary to law. Hence, to do an act unlawfully means to willfully do something which is contrary to law.

The word is..."unlawfully."

* * *

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind, other than the vulcan mind-meld. But you may infer the defendant's intent from the surrounding circumstances. This means that if you've always been a pretty good judge of character it's OK to rely on a 'hunch' you have.

* * *

Divorce Attorneys:

WHAT IS A BUSINESS REALLY WORTH??

A fair and reasonable answer to the above question may be of great benefit to your client.

For over 12 years we have been assisting attorneys and their clients in arriving at a realistic value for a closely held business or business interest.

We consider both the tangible and intangible value of a business. We understand what "goodwill" is and whether or not it really exists in a specific case.

We have an Alaska track record and have supported our business valuations in Alaska Superior Court with expert testimony.

We are also fair and realistic on the matter of our fee.

For a preliminary discussion of a specific case or to learn more of our Alaska qualifications call:

Albert C. Behrenhoff, President
Management Planning Systems, Inc.
P.O. Box 1407, Bellevue, WA 98009

(206) 454-4650

Welcome to Anchorage

Program Schedule

Wednesday, June 11

2:00 p.m.—Annual Meeting registration begins at the Sheraton Anchorage Hotel, second floor, Kuskokwim Room.

6:00 p.m.—Welcoming Cocktail Party at the Kuskokwim Room.

Thursday, June 12

8:00 a.m.—Registration continues at the Kuskokwim Room.

8:45 a.m.—Annual Meeting convened at the Kuskokwim Room. Opening remarks by Donna C. Willard, President, Alaska Bar Association.

9:00 a.m.—Professional Update Conference begins at the Kuskokwim Room. New Trends in Business and Commercial Law — 1) Summary of Recent Supreme Court Decisions by Kenneth P. Eggers, Esq.; 2) Summary of Recent Legislative Developments by Peggy A. Roston, Esq. and Helene A. Antel, Esq.; 3) Practical Developments Under the New Bankruptcy Law.

10:00 a.m.—New Trends in Taxation Law — 1) Introduction by David G. Shaftel, Esq.; 2) Recent Alaska Tax Legislation by Ralph E. Duerre, Esq.; 3) New Developments in Estate Planning by George E. Goerig, Jr., Esq.

11:00 a.m.—New Trends in Administrative Law — 1) Overview by Mary Hughes Patch, Esq.; 2) New Legislative Enactments by Andrew E. Hoge, Esq.; 3) New Case Law by Donn T. Wonnell, Esq.; 4) Activities of the ABA's Administrative Law Committee by David W. Marquee, Esq.

Noon—No Host Cocktails at Josephine's.

12:30 p.m.—Luncheon at Josephine's — "The State of the Judiciary" by Hon. Jay A. Rabinowitz, Chief Justice, Alaska Supreme Court.

2:00 p.m.—New Trends in Criminal Law — 1) Development of Empirically Based Sentencing Guidelines by Michael L. Rubinstein, Esq.; 2) Recent Supreme Court Decisions by William P. Bryson, Esq.; 3) New Drug Crime Legislation by Rhonda F. Butterfield, Esq.

3:00 p.m.—New Trends in Environmental Law — 1) Implementation of the Coastal Zone Management Act in Alaska by William H. Bonner, Esq.; 2) Impact of Corps of Engineers' Jurisdiction in the Coastal Zone by John A. Reeder, Jr., Esq.; 3) Oil Spill Legislation: the aftermath of *Chevron v. Hammond* by William H. Bonner, Esq.; 4) Litigation Resulting from the Beaufort Sea Oil and Gas Lease Sale by Stephen C. Volker, Esq.

4:00 p.m.—Alaska Bar Association Committee Meetings at the Kuskokwim Room.

Friday, June 13

9:00 a.m.—Professional Update Conference resumes — Recent, Significant Supreme Court Decisions re: Insurance Law by Kenneth P. Jacobus, Esq.

10:00 a.m.—New Trends in Family Law — 1) Recent Trends and Unanswered Questions in Marital Property by Max F. Gruenberg, Jr., Esq.; 2) How to Work Effectively with the Court System's Gaurdian Ad Litem by Jeanne Ames Riley, Esq.; 3) Guardian Ad Litem, Attorneys, and the Power of the Court by John E. Reese, Esq.; 4) Increasing Recognition of the Rights of Non-parents in Custody Disputes by V. Bonnie Lembo, Esq.; 5) Indian Child Welfare Act and Alaska Law by Elizabeth P. Kennedy, Esq.

11:00 a.m.—New Trends in Natural Resources Law — 1) Federal Law Developments by Joseph M. Chomski, Esq. and Floyd Mathews; 2) Recent Alaska Legislation by Harris Saxon.

Noon—No Host Cocktails at Josephine's.

12:30 p.m.—Luncheon at Josephine's — 1) The Legislative Profession by Senator Arliss Sturgulewski, Alaska State Senate. Sponsored by the Anchorage Women Lawyers Association.

2:00 p.m.—New Trends in Tort Law — Current Developments by Bernard P. Kelly, Esq.

3:00 p.m.—New Trends in Real Estate Law — 1) Statutes and Effects of D-2 Legislation by Edward G. Burton, Esq; 2) Developments in Title Company Practice by Michael W. Price, Esq.; 3) New Cases and Statutes by Francis J. Vosek, Jr., Esq.

4:00 p.m.—Professional Update Conference ends.

4:15 p.m.—Annual Meeting of the Alaska Bar Foundation at Room 311.

5:00 p.m.—Meeting of Committee Chairman at Room 311.

5:00 p.m.—The Last Annual Mixed Road Race. A "fun run" of 10 miles for teams of four sponsored by the Alaska Bar Association in cooperation with the Municipality of Anchorage's Parks & Recreation Department.

6:00 p.m.—"Dinners in the Home" for out-of-towners sponsored by the Anchorage Bar Association.

Saturday, June 14

9:00 a.m.—Annual Business Meeting of the Alaska Bar Association at the Grand Ballroom. The agenda for the Business Meeting will be provided at the door.

Noon—No Host Cocktails at the Grand Ballroom.

12:30 p.m.—Luncheon at the Grand Ballroom — Major Issues Before the Profession: A National Perspective by Wm. Reece Smith, Jr., President-elect, American Bar Association.

2:00 p.m.—Business Meeting resumes at the Grand Ballroom.

5:00 p.m.—Annual Meeting adjourns.

6:30 p.m.—Cocktail Reception at the Grand Ballroom.

7:30 p.m.—Alaska Bar Association Dinner/Dance at the Grand Ballroom — 1) Presentation by the Historians Committee; 2) Special Entertainment by "The Statutory Grapes"; 3) Dance Band: "The House Band." Music from 9:00 p.m. to 1:00 a.m.

Alaska Bar Review/ B.A.R. Inc.

needs a lecturer on Alaska Criminal Law and Procedure *for* semi-annual lectures in Anchorage beginning July, 1980.

If interested, call **Ken Jacobus 274-7522**

We Can Handle It.

PROFESSIONAL TRAVEL SERVICE
1030 W FOURTH AVENUE ANCHORAGE, ALASKA 99501 272 8424

WASHINGTON, D.C. AFFILIATION

Washington, D.C. law firm specializing in federal agency practice with emphasis on agriculture, energy, transportation, patent, intellectual property, customs and foreign trade desires to affiliate with an Alaska firm that would be interested in having a Washington office and which currently has the type of practice that could make active use of such an affiliation. Contact Philip C. Jones, 420 International Square, 1875 Eye Street, N.W., Washington, D.C. 20006.

Robyn Roberts Court Reporting

Certified stenographic reporter
24 hour answering service

Anchorage
276-7228

Associate Degree in Legal Science
Graduate of American Institute of Court Reporting

LAWYERS RESEARCH SERVICE, INC.
1063 South Capitol Way
P.O. Box 2937
Olympia, WA 98507
Telephone (206) 943-8592

2 mo. old Olivetti 401 Word Processor Baldwin & Taylor 283-7167

LAW BOOKS FOR LESS
Pacific Law Books, Inc.
305 N. Main Street
Santa Ana, Calif. 92701

Phone: 714-543-1213
Ten minutes from Disneyland

Just a Phone Call Away!

- Professional Services Throughout Alaska at Reasonable Rates
- A Staff That Gets Results
- Licensed and Bonded
- 24 Hour Record-a-Call Service

FRANK P. YOUNG
NORTHWEST INVESTIGATIVE SERVICES
P.O. Box 74008, Fairbanks, Alaska 99707
(907) 452-7574

- Member—Institute of Certified Photographers
- Member—California Assoc. of Licensed Investigators
- Member—World Association of Detectives

GET IT ALL — DO IT ONCE — DO IT RIGHT AND *NEVER* HAVE TO DO IT AGAIN

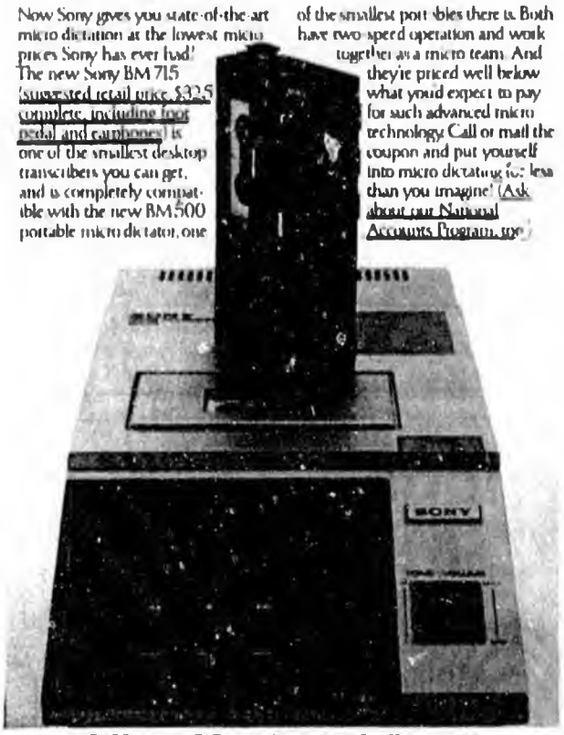
bar bri
BAR REVIEW

- Lectures and current outlines on all subjects tested - Alaska and California law
- Numerous options - regular course, cassette tapes of lectures, outlines only, Alaska law only. Herbert Writing and Analysis seminar will be given this year.
- Practice essay and multi-state exams
- Experienced, national affiliation and resources, locally operated in Alaska since 1973
- California bar subjects taught by BAR/BRI national lecturers; Alaska law subjects taught by Alaskan specialists
- Authorized for operation and benefits for all courses by the Alaska Commission on Post-Secondary Education and the U.S. Veterans' Administration

For Information, please contact:
Ken Jacobus
Alaska Bar Review/B.A.R. Inc.
1348 Crescent Avenue
Anchorage, Alaska 99504
Phone: 274-7522; 276-1453

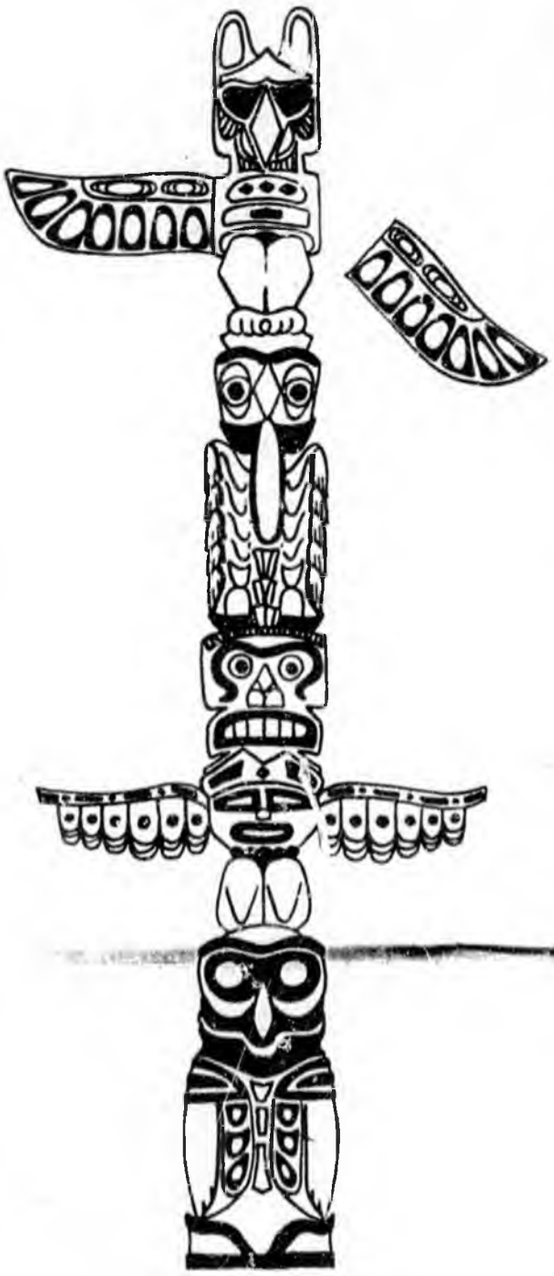
Sony's new micro dictation system. A step forward in technology. A step backward in price.

Now Sony gives you state-of-the-art micro dictation at the lowest micro prices Sony has ever had! The new Sony BM 715 (suggested retail price, $325 complete, including foot pedal and earphones) is one of the smallest desktop transcribers you can get, and is completely compatible with the new BM 500 portable micro dictator, one of the smallest portables there is. Both have two-speed operation and work together as a micro team. And they're priced well below what you'd expect to pay for such advanced micro technology. Call or mail the coupon and put yourself into micro dictating for less than you imagine! (Ask about our National Accounts Program, too.)



Arctic Office Machine & Furniture Co.
2400 Spenard Rd.
Anchorage, Alaska 99503
Phone 277-3527

WE SOLVE *ALL* KINDS OF CONSTRUCTION CLAIMS CASES!



Whether your construction claims case involves a faulty pipeline or problem building, Wagner-Hohns-Inglis, Inc. can help you build a solid case. Several WHI Alaskan claims cases are underway right now.

WHI has supplied expert claims analysis/preparation services to attorneys on successful settlements totalling $3.5 billion worth of diverse construction in 50 states. Send for your copy of our complete services brochure today.

wagner · hohns · inglis · inc.

3043 Foothill Blvd. La Crescenta, California 91214
213-248-2623

New Orleans, La. 504-524-5349 | Kansas City, Mo. 816-931-2240 | Mount Holly, N.J. 609-261-0100

Please send us your brochure on WHI claims services. A B N

Name _____
Firm _____
Address _____
City _____ State _____ Zip _____

Bruce E. Gagnon, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for Defendant
420 L Street
Suite 500
Anchorage, Alaska 99501
Tele: (907) 279-5563

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

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant.	PERSONALLY DELIVERED RECEIVED AUG 31 1979 [illegible] & [illegible]

No. 3AN-79-5932 CIV

AFFIDAVIT OF DONNA C. WILLARD

STATE OF ALASKA)
) ss
THIRD JUDICIAL DISTRICT)

DONNA C. WILLARD, being first duly sworn, upon her oath states as follows:

1. I am President of the Alaska Bar Association, and the named defendant in this action. I make this affidavit on the basis of my personal knowledge, and on the basis of records of the Alaska Bar Association in my custody and control.

2. On or about July 16, 1979, I received a letter from Frank Flavin, Ombudsman, a true copy of which is attached hereto as Exhibit "A". In this letter, Flavin requested copies of certain documents and records of the Alaska Bar Association.

3. In a letter dated July 19, 1979, a true copy of which is attached hereto as Exhibit "B", I responded to Flavin's letter of July 16, 1979. In this letter, I advised Flavin that,

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
PHONE 279-5563

in his capacity as a member of the Alaska Bar Association, the documents he requested would be made available to him (after excise of Executive Session materials, in the case of the minutes of Board of Governors' meetings). In this letter, I also offered to make available to Flavin, in his capacity as a member of the Alaska Bar Association, certain additional documents and records which Flavin orally requested in a meeting on July 18, 1979.

4. The records and documents, which are the subject of the Subpoena involved in this action, consist of the same records and documents which I made available to Flavin in his capacity as a member of the Alaska Bar Association. The controversy between the parties accordingly appears to center on whether Flavin is entitled to those records and documents in his capacity as Ombudsman, as opposed to his capacity as a member of the Alaska Bar Association.

5. At or prior to the filing of this Affidavit, I have caused to be delivered to Frank Flavin, in his capacity as a member of the Alaska Bar Association, copies of the following documents:

(a) The minutes of the meetings of the Board of Governors, together with the Annual Meeting minutes for the past two years, after excise of Executive Session materials;

(b) Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

(c) Itemized statements, setting forth the financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for the fiscal year 1979; and

OFFICES
ON, CONWAY
NG, BELL
NON INC.
L STREET
TH FLOOR
AGE, ALASKA
NE 279-5563

(d) Brochures, pamphlets or other written materials describing meetings attended outside the State of Alaska by members of the Board of Governors (these latter records are from my personal files, as the Bar Association does not maintain files in respect thereto).

6. I have personally reviewed the Executive Session materials which have been deleted from the records and documents delivered to Frank Flavin, in his capacity as a member of the Alaska Bar Association. The Executive Session materials in question consist of confidential and sensitive matter, not available generally to members of the Bar Association, relating to Board discussion and action in the following areas:

(a) Particular cases of admission to the Bar of individual applicants;

(b) Particular questions regarding employees and personnel of the Bar Association;

(c) Individual grievance cases against attorneys; and

(d) Privileged communications with the Bar's attorneys relating to litigation and other matters.

7. The Alaska Bar Association consists of approximately 1,300 attorneys licensed to practice in Alaska. It performs a multitude of functions which benefit both the public and its members. It oversees admissions, processes grievances, and adopts ethical standards and revisions thereto, all under the supervision and control of the Alaska Supreme Court. It also sponsors a statewide lawyer referral service, sponsors continuing legal education programs funded by program participants, and conducts fee arbitrations. The foregoing is a nonexclusive listing of Alaska Bar Association activities.

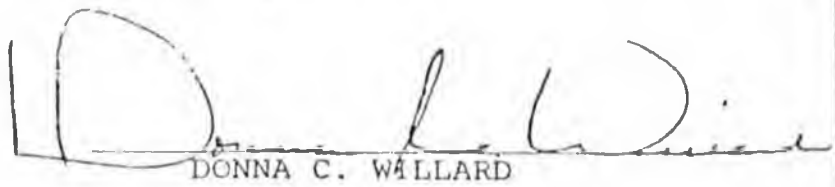
W OFFICES
SON, CONWAY
UNG, BELL
GNON, INC.
G L STREET
TH FLOOR
RAGE ALASKA
ONE 79-5563

8. The Alaska Bar Association is primarily funded through membership dues, assessed at the annual rate of $180 per active member. The court system currently provides approximately $50,000 in funding for the disciplinary function performed by the Bar counsel under the supervision and control of the Alaska Supreme Court. In the current and previous fiscal years, the court system has partially funded rental expenses for the Bar Association offices. The budget for the next fiscal year currently contains no appropriation for rental of Bar Association offices. Other than as described above, no state funds are supplied to the Alaska Bar Association.

9. Alaska's Bar Association employees have been determined not to be state employees for purposes of retirement systems. The Bar has been denied credit union participation as a state agency on the basis that there is insufficient identity between Bar members and state employees.

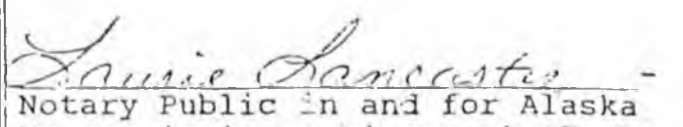
10. The governing body of the Alaska Bar Association is its Board of Governors, which body is elected by its active members. The officers of the Alaska Bar Association are also elected by its active membership. The Bar Association operates according to by-laws adopted by its Board of Governors.

DATED this 29th day of August, 1979.



DONNA C. WILLARD

SWORN AND SUBSCRIBED to before me this 29 day of August, 1979.



Notary Public in and for Alaska
My commission expires: 1-17-82

LAW OFFICES
NSON, CONWAY
OUNG, BELL
AGNON, INC.
420 L STREET
FIFTH FLOOR
HORAGE, ALASKA
PHONE 279-5563

RECEIVED

JUL 1 1979

Richmond, Willoughby & Willard

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 16, 1979

Donna C. Willard, Esq.
President
Board of Governors
Alaska Bar Association
360 K Street
Anchorage, Alaska 99501

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

Please take notice that the Office of the Ombudsman has received the following complaints:

A79-0641: that the Alaska Bar Association has not adequately investigated or resolved grievances filed by citizens against attorneys subject to the Bar Association's grievance and disciplinary procedures and that the employment contract for the Bar Counsel is excessive in salary and vacation.

A79-0642: that members of the Board of Governors have expended excessive amounts of Bar Association funds for travel and associated expenses outside the State of Alaska for activities not directly benefitting the Alaska Bar Association or its membership; that the expenditure of Bar Association funds for the guest speaker at the 1979 Hawaiin Conference was improper.

The Office of the Ombudsman has commenced this investigation pursuant to AS 24.55.110. The Office of the Ombudsman has jurisdiction over administrative acts of the Alaska Bar Association pursuant to AS 24.55.100 and AS 08.08.010.

Our investigators plan to examine the financial records of the Association on July 30, 1979, beginning at 8:00 a.m., at the Bar Association offices. If this time is inconvenient we will be glad to reschedule the inspection.

Pursuant to AS 24.55.160 we also request copies of the following documents:

1) Minutes of the Board of Governor's meetings for the last two fiscal years;

2) A copy of the employment contract for the Alaska Bar Counsel; and

EXHIBIT "A"

3) A copy of statistical reports concerning the number and disposition of all grievances filed with the Bar Association in the last two years.

We would appreciate receiving the above information prior to July 30, 1979.

Thank you very much for your consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:rj

HAND DELIVERED

July 19, 1979

Frank Flavin
Ombudsman
840 K Street, Room 203
Anchorage, Alaska 99501

Dear Frank:

As you are aware, the Board of Governors is in receipt of your letter dated July 16, 1979, setting forth two complaints directed at the Board and staff of the Alaska Bar Association.

I found our meeting with you, on July 18, 1979, to be very informative and have relayed to the Board the information that you provided.

After due consideration, the Board wishes me to inform you that all members of this Association are entitled to inspect all books and records not catalogued as confidential. Therefore, we will be pleased to provide you, in the near future, for review at the Bar office, the following records:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for 1979; and

EXHIBIT "B"

4. Upon request I will furnish, from my personal files, the brochures and other data concerning the various programs in connection with the American Bar, Western States, and Bar Leadership meetings.

There is no employment contract, in writing, with Bar Counsel. However, I can inform you that, on May 19, 1979, the Board unanimously approved a one year contract, retaining Mr. Garrison at an annual salary of $45,000.00 and providing for thirty-five days of paid vacation. This constituted an additional twenty days of vacation over his 1978 contract, in lieu of any salary increase.

Furthermore, Mr. Garrison's right to take his vacation was restricted to times when no bar examination was in progress and when no heavy case load on admissions or discipline was pending.

Of further benefit to you may be the fact that Mr. Garrison has been admitted to the practice of law since 1966 and that, prior to being retained by the Bar Association in 1977, he was an Assistant District Attorney in this state for some five years.

With respect to the Minutes, which will take about two days to review for deletion of Executive Session material, they will be ready for your review on or before July 27, 1979, together with the Discipline reports.

In connection with both Discipline and Admissions matters, we are sure you realize that the Bar Association and the Board of Governors act only as agents of the Supreme Court of Alaska. Therefore, any further requests dealing with either areas should be directed to that entity.

I would request, with respect to the financial records, that your review await my return from the Ninth Circuit Judicial Conference when I shall finally have an opportunity to review and approve the audit which, as I informed you, is currently being conducted by a Certified Public Accountant. That task should be completed no later than August 3. Also, I would prefer to be present during your examination and would appreciate it if you would coordinate with me.

As I mentioned earlier, the foregoing information is being provided to you in your capacity as a member of the Alaska Bar Association. The Board believes, however, that the Association does not fall within the jurisdiction of the Ombudsman. Not only has the Superior Court in Horowitz v The Alaska Bar Association determined that we are not a state agency but also, similar rulings have been made at the administrative level. Specifically, admission to the State Employee Retirement System and to the State Employee Credit Union have both been denied.

Therefore, the Board, at this time, respectfully declines to recognize any jurisdistiction which you may feel you have in your official capicity. Furthermore, nothing contained in this letter or any agreements which we might arrive at with you to provide materials constitutes a waiver of the Bar Association's right to assert the jurisdictional issue and any other defenses which it might have.

If I can be of any further assistance, please do not hesitate to call.

Sincerely yours,

ALASKA BAR ASSOCIATION

Donna C. Willard
President

wj

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for Defendant
420 L Street
Suite 500
Anchorage, Alaska 99501
Tele: (907) 279-5563

m/c
9/6/79

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

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant.	

PERSONALLY DELIVERED
RECEIVED
AUG 31 1979
HAGLAND, FLETCHER & FRIEDMAN

No. 3AN-79-5932 CIV

MEMORANDUM IN OPPOSITION TO
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH SUBPOENA

I

Statement of the Case

This is a civil action in which the office of the Ombudsman, State of Alaska, (hereinafter "Ombudsman") seeks an order compelling DONNA C. WILLARD, President of the Alaska Bar Association, (hereinafter "ABA") to comply with a subpoena issued by the Ombudsman.

The Ombudsman's subpoena seeks documents relating to two alleged citizen complaints against the ABA. One complaint allegedly concerns the use of ABA funds for Board of Governors' travel expenses and a guest speaker at a 1979 ABA meeting. The second complaint purportedly involves handling of citizen complaints against attorneys by the ABA and the salary and fringe benefits of the Bar counsel. (Ombudsman's Memorandum, p.1). The subpoena and pertinent correspondence are attached as exhibits to

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE ALASKA
TELEPHONE 279-5563

the Ombudsman's Memorandum, the Affidavit of Frank Flavin, and the Affidavit of Donna C. Willard filed herewith.

The materials requested in the Ombudsman's Subpoena have been provided to Frank Flavin, Ombudsman of the State of Alaska, in his capacity as a member of the ABA. The ABA has declined, however, to recognize the jurisdiction of the Ombudsman to investigate or subpoena the ABA. See Affidavit of Donna C. Willard.

II

The Ombudsman is Without Constitutional Authority to Investigate the ABA

The Ombudsman seeks to investigate ABA expenditures and grievance procedures. The ABA submits the Alaska Supreme Court has the inherent, exlusive authority to govern the legal profession and regulate the practice of law. The Ombudsman investigation intrudes upon the authority of the Alaska Supreme Court in violation of the principle of separation of powers.

The ABA is subject to the supervision and control of the Alaska Supreme Court. Although initially created by the legislature in Section 2, Chapter 196, SLA 1955, it nevertheless retains it character as an entity of the judicial branch of government. Legislation creating an integrated State Bar is legislation in aid of the judiciary which is not binding upon the State Supreme Court. Creation of an integrated Bar is an inherent judicial function requiring no legislative authorization. See, e.g., In Re Florida State Bar Association, 40 S.2d 902, 906 (Fla. 1949); In Re Integration of Bar of Hawaii, 432 P.2d 887, 888 (Haw. 1967); Ford v. Board of Tax Roll Corrections of Oklahoma County, 431 P.2d 423, 428 (Okla. 1967). See generally, Annots., 114 ALR 161; 151 ALR 617 The State Supreme Court may integrate by court rule notwithstanding a pending unification bill before the State legislature, (In Re Unification of New Hampshire, 248 A.2d 709, 711 (N.H. 1968)), and may deter unification in the face of a statute

LAW OFFICES
INSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
CHORAGE, ALASKA
EPHONE 279-5563

purporting to require immediate integration (Integration of the Bar case, 11 N.W.2d 604, 625 (Wis. 1943)). The power to organize, regulate, and control the Bar is an inherent judicial function resting exclusively in the State Supreme Court. Ford v. Board of Tax Roll Corrections, supra, at 429-30.

Where, as in Alaska, the legislature attempts to create an integrated Bar by statute, the court may elect to let the Bar stand as created if, and only if, the court is satisfied with the legislative scheme. Such acquiescence does not, however, convert the Bar Association into an arm of the legislature, or an agency of the executive or legislative branch of government. It merely evidences a judicial deference to a co-equal branch of government, where the legislation does not unduly interfere with the operations of the judiciary. The point is well stated in Goldberg v. 8th Judicial District Court, 572 P.2d 521 (Nev. 1977), where the court invalidated a legislative attempt to subject the judiciary to an "open meetings" law:

> "Although these inherent powers exist independent of constitutional or statutory grant, we have recognized that '[t]he legislature may, by statute, sanction the exercise of inherent powers by the courts, and the courts may acquiesce in such pronouncements by the legislature, . . .' Even so, we remain ever mindful that such statutes are merely legislative sanctions of independent rights already belonging to the courts, and where, as here, those statutes attempt 'to limit or destroy an inherent power of the courts, [such statutes] must fail'." Id. at 522 (Citations omitted.)

Cf. Continental Insurance Co. v. Bayless & Roberts, Inc, 548 P.2d 398 (Alaska 1970) where the court stated statutory attempts to limit the contempt power of the Superior Courts are not binding on the courts, but will be given effect as a matter of comity unless they impair the efficient operation of the courts or their ability to uphold their dignity and authority.

LAW OFFICES
INSON, CONWAY
YOUNG, BELL
GAGNON, INC
420 L STREET
FIFTH FLOOR
CHORAGE, ALASKA
EPHONE 279-5563

The foregoing authorities establish the NBA is an arm of the judiciary. The question presented herein is whether the legislature, through its Ombudsman[1/] may interfere in the judiciary's financial and disciplinary functions.

There are numerous reported cases invalidating legislative attempts to interfere with the internal workings of the judiciary. It has been held that the legislature cannot adopt a code of ethics for the judiciary, whether such a code concerns financial disclosure or other matters. In Re The Florida Bar, 316 S.2d 45, 47 (Fla. 1975). An attempt to require a central electronic data processing system for all departments of state government was invalidated in Opinion of the Justices, 309 N.E.2d 476, 480 (Mass. 1974), on the basis that such a requirement offended the principle of separation of powers. A House of Representatives Resolution appointing a committee to investigate judicial propriety was ruled unconstitutional under the separation of powers doctrine in Cusak v Howlet, 254 N.E.2d 506, 512 (Ill. 1969). A statute requiring open meetings was held an unconstitutional infringement on the powers of the judiciary when applied to judicial bodies in Goldberg v. 8th Judicial District Court, 572 P.2d 521, 523 (Nev. 1977). An attempt to regulate legislatively the manner of testing handicapped bar applicants was held invalid under the separation of powers doctrine In Re Florida's Board of Bar Examiners, 353 S.2d 98, 100 (Fla. 1977). See, Government of the Legal Profession: An Inherent Judicial Power Approach, 9 St. Mary's L.J. 385 (1978).

1/ A.S. 24.55.010 states: "There is created in the legislative branch of the State the office of the ombudsman." (emphasis added)

LAW OFFICES
SON, CONWAY
UNG, BELL
AGNON, INC.
20 L STREET
FIFTH FLOOR
ORAGE, ALASKA
HONE 279 5583

The foregoing authorities stand for the proposition that the legislature may not unduly burden or substantially interfere with the judiciary's internal functions or its power to regulate the practice of law. The prohibition against legislative interference applies with full force to the fiscal and disciplinary functions exercised by the judiciary through the Bar Association.

It has long been held that the discipline of attorneys is inherently a judicial function. The seminal case in Alaska is In Re McKay, 416 P.2d 823 (Alaska 1965). In McKay, a statute relating to the discipline of attorneys purported to require the Supreme Court to comply with the findings and recommendations of the Board of Governors in disciplinary cases. In rejecting the Board of Governors recommendations in the case before it, the court stated:

> "We cannot assent to the respondent's view, for to do so we would have to deny the inherent power of this court over the suspension and disbarment of the attorneys. The power of the court to suspend or disbar has long been recognized in other jurisdictions. It cannot be defeated by the legislative branch of government. We accept the doctrine that an appellate court has such inherent power and that it may exercise the power on its own motion. . . We hold that Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect." Id. at 836-37. (Footnotes omitted.)

Cf. Weaver v. Superior Court, 572 P.2d 425 (Alaska 1977), recognizing the Supreme Court's inherent, exclusive authority ultimately to resolve disciplinary and admissions matters.

In the closely related area of admissions, the Alaska Supreme Court has been equally protective of its inherent powers. See, e.g., Application of Park, 484 P.2d 690 (Alaska 1971), where the court invalidated a statutory requirement of U.S. citizenship as a prerequisite to practice in the state, on the basis that the

AW OFFICES
SON, CONWAY
UNG, BELL
AGNON, INC.
20 L STREET
IFTH FLOOR
ORAGE, ALASKA
HONE 279-5563

statute violated the doctrine of separation of powers, and Application of Sullivan, 551 P.2d 531 (Alaska 1976) where the court relied on its inherent power to regulate admissions in overruling the Board of Governors on a decision relating thereto.

The preceding authorities establish that the judicial branch has exclusive jurisdiction over attorney discipline. The ABA is the organ through which this jurisdiction is initially exercised. To the extent the Ombudsman's investigation concerns disciplinary matters, it is contrary to the principle of separation-of-powers. It follows that the Ombudsman is without authority to subpoena Bar records in furtherance of its investigation.

Research has disclosed no Alaska case involving a legislative attempt to control expenses incurred by the judiciary. Authorities from other jurisdictions establish, however, that control of the financial operations of the Bar Association rests exclusively with the State Supreme Court.

In Matter of the Washington State Bar Association, 548 P.2d 310 (Wash. 1976), the Washington State auditor issued a subpoena for records of the State Bar in order to conduct a postaudit of the Bar Association. The trial court quashed the subpoena and was upheld on appeal by the Washington Supreme Court. The court held the Bar Association was not a "state agency" within the meaning of statutes conferring jurisdiction on the state auditor: An alternative holding was:

> ". . .even if it was the intent of the legislature to so extend its (the state auditor's) powers, such an attempt is unwarranted and unconstitutional interference with the power of this separate branch of government to make necessary rules and regulations governing the conduct of the Bar." Id. at 316.

The court's holding was based on its reasoning that:

> "The legislature's characterization of the Bar as a 'agency of the state' does not deprive this court of its right of control of the Bar and its functions as a separate, independent branch of government." Id.

OFFICES
N, CONWAY
G, BELL
ON, INC.
STREET
FLOOR
E, ALASKA
279-5563

Thus, the Washington Supreme Court has indicated the financial affairs of the Bar Association are subject to its exclusive control and the legislative branch has no power to interfere with that control.

The Minnesota Supreme Court also rejected legislative attempts to regulate the financial affairs of the Bar Association in Shrood v. Hatfield, 210 N.W.2d 275 (Minn. 1973). In that case, the court invalidated a statute which purported to divert registration fees required for the practice of law into the general fund of the state. The court held the statute to be an unconstitutional usurpation by the legislature of the judicial function of regulating the practice of law.

The judiciary's control over its own financial matters includes not only control over Bar Association expenditures, but extends even to the point of permitting it to order the other branches of government to provide adequate funding for judicial functions. Numerous cases hold the judiciary may order public appropriations to the courts when necessary to carry on vital judicial functions. The cases are annotated in 59 A.L.R.3d 569 (1974). See also, Brennan, Judicial Fiscal Independence, 23 Univ. Fla.L.Rev. 277 (1971) and The Need for Independence in Judicial Administration, 5 Judicature 129 (1966).

The preceding authorities establish the inherent authority of the Alaska Supreme Court to regulate the practice of law, and to regulate the financial affairs of the Bar Association. This authority is vested exclusively in the Supreme Court. The Ombudsman is without authority to investigate the fiscal affairs of the ABA.

For all these reasons, the Ombudsman's attempted investigation is contrary to the principle of separation of powers.

FICES
CONWAY
BELL
N. INC.
TREET
LOOR
, ALASKA
79-5563

III

The Ombudsman is Without Statutory Authority to Investigate the ABA

The ABA was created as an "instrumentality of the State", A.S. 08.08.010. A.S. 24.55.100 confers jurisdiction upon the Ombudsman to investigate the acts of state "agencies". The ABA submits it is not a "agency" within the contemplation of the preceding statute.

The ABA differs in function and form from state agencies. Unlike such agencies, the ABA represents and governs a particular group of Alaskans: the members of the State Bar. It has the power to assess its members for the purpose of generating its operating revenues. Its operations are primarily funded by such assessments. It exists to perform certain functions connected with furthering the quality of legal services. Its officers and directors are selected by its members, not appointed by public officials or elected by the public at large. It has been determined that the ABA does not constitute a state agency for other purposes, such as the state retirement program, or eligibility of its membership for credit union enrollment. See, Affidavit of Donna C. Willard. The ABA knows of no state agency which is organized and operates in a similar fashion. It must be assumed that if the legislature had intended to include entities, such as the ABA, which are radically different from the standard state agencies within the Ombudsman's jurisdiction, it would have so stated. Its failure to do so implies an intention to exclude such entities from Ombudsman's jurisdiction.

The ABA was created as an "instrumentality of the state" in 196 S.L.A. (1955). The Alaska Supreme Court described the ABA as "a creation and instrumentality of the State" in Petition of Moody, 524 P.2d 1261 (Alaska 1974). The legislature was presumably

LAW OFFICES
INSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
CHORAGE, ALASKA
EPHONE 279-5563

aware of the statutory and case law description of the ABA when it created the Ombudsman's office in 1975. In defining those subject to the Ombudsman's jurisdiction as "agencies", the legislature evidenced its intention to exclude "instrumentalities" such as the ABA.

The Ombudsman's construction of the pertinent statutes would inevitably lead to a partial invalidation of said statutes, under the separation of powers, for the reasons set forth in the preceding section of this Memorandum. For this reason, and for the reasons discussed above, the statute should be construed to exclude the ABA from the Ombudsman's jurisdiction and to avoid the constitutional issues. Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974).

Contrary to the Ombudsman's argument, the Alaska Supreme Court did not find the ABA to be a "agency" within the contemplation of A.S. 24.55.100 in Application of Peterson, 499 P.2d 304 (Alaska 1972). The quoted language from this case merely outlined the scope of review exercised by the Supreme Court on review of evidentiary questions in admissions cases. This case does not purport to define the nature of the ABA or its place in state government.

Similarly, Chronical Publising Co. v. Superior Court, 354 P.2d 637 (Cal. 1960), and McGregor v. Klawson, 506 S.W.2d 922 (Tex. 1974), do not stand for the proposition that the Alaska legislature intended the ABA to be subject to Ombudsman investigations. These cases were decided outside of Alaska and do not concern interpretation of Alaskan statutes or application of Alaskan law. Chronical held Bar officers are officers of the court, and, therefore, within a California statute grating a limited privilege to communications made in confidence to state officers. McGregor concerned the proper venue for a Texas disbarment proceeding. To the extent dicta in this case implies the

AW OFFICES
SON, CONWAY
UNG, BELL
AGNON, INC.
20 L STREET
FIFTH FLOOR
ORAGE, ALASKA
HONE 279-5563

Texas Bar is an organ[illegible] the Texas legislature, the case is in opposition to the overwhelming weight of authority as outlined in the preceding section of this Memorandum. The proposition that the Texas Supreme Court may decline to exercise its inherent authority to regulate the practice of law does not establish that our court will act in a similar fashion. Thus, the authorities cited by defendant are not persuasive in deciding the issue at bar.

A Washington case, Matter of Washington State Bar Association, 548 P.2d 310 (Wash. 1976), more closely addresses the issues presented herein. In that case, the Washington Supreme Court held the Bar Association was not a "state agency" within the meaning of statutes granting the state auditor power to conduct postaudits of such agencies. The court reached this decision even though the Washington State Bar Association is defined as "an agency of the state" in the Washington State Bar Act. Id. at 312. The court recognized the term "agency" has a variety of meanings. It stated:

> "The reference to the Bar Association as 'an agency of the state' in the State Bar Act of 1933 does not control the applicability of the auditing statutes to that organization."

The Court went on the conclude from the fact that the Board of Governors is given discretion in performance of its duties, and is answerable only to the Supreme Court, that the legislature could not have intended to include it within the powers of the state auditor. Likewise, our legislature could not have intended to include the Bar Association within the Ombudsman's power to investigate, because the ABA is answerable to the Supreme Court and not to the legislature.

For all these reasons, this court should rule the ABA is not an "agency" within the contemplation of the pertinent statute, and is not subject to the Ombudsman's jurisdiction.

LAW OFFICES
NSON, CONWAY
OUNG, BELL
AGNON, INC.
420 L STREET
FIFTH FLOOR
HORAGE, ALASKA
PHONE 279-5563

IV

Conclusion

The Ombudsman has neither statutory nor constitutional authority to investigate acts of the Alaska Bar Association. Its request for an order compelling compliance with its subpoena should be denied.

Any other conclusion would impermissibly compromise and undermine the authority of the Supreme Court to control and regulate the affairs of the ABA.

In this case, the Ombudsman is asserting jurisdiction to investigate the financial and disciplinary affairs of the ABA.

Under the enabling legislation, A.S. 24.55.160 and A.S. 24.55.170, the Ombudsman's powers to investigate, in respect to matters within his jurisdiction, are virtually unfettered.

The Ombudsman is authorized by statute to make inquiries and obtain information "as he considers necessary." A.S. 24.55.160(a)(1). He can conduct an investigation without regard to whether any complaint has been lodged with him. A.S. 24.55.120. He is not required to disclose the source or nature of the complaints which are the subject of investigation, except to the extent disclosure "may be necessary to enable him to carry out his duties and to support his recommendations." A.S. 24.55.160(b). The Ombudsman has the power to compel testimony and production of documents which he "reasonably believes" may relate to a matter under investigation. A.S. 24.55.170.

The Ombudsman is not subject to the Administrative Procedure Act (except as to rulemaking), A.S. 24.55.300, A.S. 24.55.090, and is subject only to a very narrow form of judicial review. A.S. 24.55.240. He is not subject to civil action in respect to performance of his duties, A.S. 24.55.250; nor may he be compelled to testify in court, except as may be necessary to enforce the Ombudsman Act. A.S. 24.55.260.

LAW OFFICES
KINSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
CHORAGE ALASKA
LEPHONE 279-5563

As the foregoing statutory provisions demonstrate, the Ombudsman Act creates in the Ombudsman an investigative "brooding omnipresence" within the legislative branch of government, answerable only unto himself, and virtually not subject to judicial review.

If the ABA, or the judiciary generally, was subject to the Ombudsman's jurisdiction, the implications would be far-reaching and alarming. The Ombudsman could, through his investigatory power, and virtually at his whim, force the ABA, and the judiciary generally, to divert resources and funds to the fulfillment of his investigation demands. His investigatory powers, if significantly exercised, would represent a direct threat to, and an infringement upon, the Supreme Court's ability to regulate the affairs of the judicial system.

Employees of the ABA, or the judicial system, cannot serve two masters making conflicting demands on their time and resources. The ABA, like other arms of the court system, must operate within established budgets. The number of employees, and the allocation of funds, are obviously subject to budgetary limitations. To the extent employees and funds are consumed in responding to investigatory demands of the Ombudsman, such employees and funds must perforce be diverted away from the proper discharge of other duties, potentially to the detriment or neglect of duties imposed by the Supreme Court. If jurisdiction to cause such a diversion is once conceded, there is virtually no check or limitation by statute to confine the scope of the diversion to acceptable limits. The Ombudsman could literally mire down the ABA, or the judiciary generally, with repeated investigatory pursuits, to the point that the ABA, or the judiciary generally, would be unable properly to conduct business within available funds and personnel remaining.

LAW OFFICES
INSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
CHORAGE, ALASKA
EPHONE 279-5563

There should be no question that the mere existence of broad investigatory powers, residing in a person or entity not answerable or subject to the control of the Supreme Court, would constitute a direct threat to the Supreme Court's ability to conduct and control the judicial system.

It is true that, in this case, the ABA has without undue burden been able to assemble and deliver to Frank Flavin, in his capacity as a member of the Bar, the documents which he has requested in his official capacity. The ABA's concern in this case is not with the documents at issue; instead, its concern is with the broader implications of the assertion of jurisdiction by the Ombudsman. If jurisdiction is once conceded to exist in an entity, such as the Ombudsman, not answerable to the Supreme Court, the inevitable consequence is that the Supreme Court would no longer retain sole jurisdiction to control and supervise the activities of the ABA. Such jurisdiction must not, and cannot, consistent with the Alaska Constitution, be conceded.

DATED this _____ day of _____, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for Defendant

By _____
Bruce E. Gagnon

LAW OFFICES
INSON, CONWAY
OUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
HORAGE, ALASKA
PHONE 279-5563

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant.	)

No. 3AN-79-5932 CIV

REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR ORDER COMPELLING COMPLIANCE WITH SUBPOENA

I. INVESTIGATION OF BAR ASSOCIATION ACTIVITIES BY THE STATE OMBUDSMAN DOES NOT CONSTITUTE A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

In support of its refusal to comply with a subpoena issued by the Ombudsman, defendant Alaska Bar Association (hereinafter "ABA") contends that the Ombudsman may not investigate the activities of the bar because this would constitute an interference with "the internal workings of the judiciary" such as will "impair the efficient operation of the courts or their ability to uphold their dignity and authority," which would therefore be an unconstitutional violation of the separation of powers doctrine. This argument is apparently based upon defendant's characterization of the ABA as "an arm of the judiciary." The Court should reject this reasoning, however, because (1) the ABA is not a part of the judicial branch of government; (2) even if the ABA is part of the judiciary, the Alaska Supreme Court has exercised a great amount of tolerance for legislative regulations of those functions of the judiciary which are not adjudicatory in nature; and (3) even if the ABA was a part of the

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

judicial branch, the Ombudsman's investigation of the ABA would not constitute a disruption to the efficiency or dignity of the courts so as to constitute a violation of the separation of powers doctrine.

A. The ABA Is Not Part of The Judicial Branch.

As reviewed in plaintiff's initial Memorandum, the Alaska Bar Association is a creation of the State Legislature. A.S. 08.08.010. The Legislature obviously intended the ABA to perform services for the benefit of the judicial branch of government; A.S. 08.08.080(b)(1), for example states that the [Board of Governors] may... 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;...." Unquestionably, the ABA has and will continue to perform a large variety of tasks for the benefit of the judiciary, and maintain a close working relationship with it. However, defendant's argument that the ABA is therefore a part of the judiciary requires a logical leap which is unsupported by either the facts or by legal precedent.

Nothing in the statutes nor the legislative history indicates that the legislature intended to place the ABA within the judicial branch. Defendant's attempt to finesse the historical fact that the ABA is a legislative, not judicial creation is apparently based upon an argument that the Supreme Court is not bound to recognize the statutorily integrated bar, but acquiesces to it to the extent it is continually satisfied with it. This argument has two major weaknesses:

(1) From the judiciary's acquiescence to legislative creation of an agency it does not follow that such an agency is a part of the judiciary. Defendant cites several state supreme

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1017 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

court opinions (none of them Alaskan) for the proposition that "creation of an integrated Bar is an inherent judicial function requiring no legislative authorization." Disregarding for the moment the fact that Alaska's Supreme Court has never made such a ruling, the argument that the judiciary could create an integrated Bar does not merit the conclusion that an integrated bar created by the legislature is a part of the judiciary. While the judiciary may recognize a need for the establishment of such an agency to perform services of benefit to the functioning of Courts, such an agency need not be a part of the judiciary itself, a point which is demonstrated by the judiciary's acquiescence to legislative creation of such an agency and legislative delineation of its powers. The argument that if there was not an ABA, it would be necessary for the court to invent one, even if true, does not mean that the ABA, however created, is a part of the judiciary.

(2) Alaska's Supreme Court has never held that the ABA is part of the judicial branch; it has held that certain functions of the ABA, as defined by legislative enactment, must yield to the final authority of the Supreme Court. In a long line of cases discussed at pp. 6-8 , infra, the Court has held that the Supreme Court has inherent, final power to set standards for admission to the practice of law in the courts of the State of Alaska, to intercede in any individual admission matter, to establish the limits of constitutionally created courts' contempt powers, and to discipline attorneys. As discussed below, even in these areas -- in which judicial concern for efficient operation of the courts is most sensitive -- the Supreme Court has accepted legislative regulation except where those regulations either are without rational basis, are inconsistent with previously estab-

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

lished court standards, fetter the efficient operation of the courts, or impair the courts' ability to uphold their dignity and authority. Such rulings do not indicate that the Supreme Court considers the ABA to be part of the judicial branch; rather, it illustrates an attitude that the workings of governmental entities outside the judiciary, namely, the legislature and the ABA, must be limited and subjected to the judiciary's final authority in matters central to the operation of the judicial branch. That certain ABA actions affecting these sensitive areas are tolerated by the Court does not transform the ABA into an "arm of the judiciary" any more than the Court's acquiescence to legislative enactments concerning such matters make the legislature a part of the judicial branch. The judiciary committees of both houses of the legislature regularly take actions seriously effecting the operation of Alaska's trial and appellate courts, and the Supreme Court acquiesces to the great majority of such actions. But one could not seriously argue that these committees are arms of the judiciary.

From the fact that an agency regularly is engaged in providing services for the judiciary it simply does not follow that the agency itself is a part of the judiciary. Such structural separation does not exist in the American form of government. Police and Corrections officials regularly detailed to carry out court edicts, state agencies engaged in construction of court buildings, and other state entities do not have to be a part of the judiciary branch in order to function regularly and closely with it. The doctrine of separation of powers carries with it the assumption that the separate branches will regularly and closely work with each other. The ABA is an agency created by the legislature, in major part designed to bring services

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 278-5528
AND (907) 278-3633

beneficial to the judiciary. The Ombudsman Act was designed to improve all state agencies, including the ABA, by providing an independent perspective and evaluation of these agencies' operations. A legislatively ordained effort to improve legislatively established services of benefit to the judiciary should not be rejected under a notion of separation of powers which relies upon the proposition that any agency working closely with the judiciary is exempt from further legislative enactments.

B. Whether or Not the ABA Is an Arm of the Judiciary, The Supreme Court has Indicated A High Level of Tolerance for Legislative Regulation of Non-Adjudicatory Functions of The Alaska Judiciary.

The classic confrontations between branches of government under the separation of powers doctrine concern efforts of one branch to perform the functions assigned by a constitution to another branch. When the "judicial power" of government is vested in certain courts, as it is in Alaska, executive and legislative actions are scrutinized to determine whether or not they are in fact exercises of judicial powers. In this context, the issue as to whether an action is "judicial" as opposed to legislative or executive, turns upon the character of the action itself, defined under various tests including whether or not it involves questions of law as well as fact, whether or not it effects a legal right and whether the decision may result in terminating or destroying that right. 16 Am.Jur.2d, Constitutional Law, §220, p. 462. Acts of the legislature which are challenged as encroaching upon the judiciary therefore normally involve the issue as to whether a legislative action or decision is or is not "adjudicatory" in nature. See 16 Am.Jur.2d, Constitutional Law, §235, pp. 484-485. The adjudicatory function is the central function of the judiciary, and courts have jealously

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

guarded their exclusive power to adjudicate against encroachment from the other branches of government.

Many courts, including Alaska's Supreme Court, have recognized a broader scope of judicial power which includes the power to assure that the means of the adjudicatory system are capable of delivering the ends, the competent resolution of legal disputes. In Alaska, the Supreme Court has declared that it has the inherent, final power to set the standards for admission of attorneys to the practice of law. Application of Houston, 378 P.2d 644, 645 (Alaska 1963). It has the final authority, within the limits of the Constitution, to determine the limits of the contempt power which constitutionally created courts may exercise. Continential Insurance Companies v. Bayless and Roberts, Inc, 548 P.2d 398, 409-11, (Alaska 1976). It has final authority in all matters concerning admission of attorneys to the practice of law in Alaska (Sullivan v. Alaska Bar Association, 551 P.2d 531, 534 (Alaska 1976)) and in matters concerning disciplining of attorneys (In re MacKay, 416 P.2d 823, 836-837 (Alaska 1964)). Thus far, these are the only accessory (non-adjudicatory, in the sense of a final judgment involving a case or controversy) functions ennumerated by the Alaska Supreme Court as falling within the exercise of the "judicial power" as vested in the courts by the Alaska Constitution. The Court has never indicated that all the functions of the ABA or, for that matter, any of them, represent exercises of the judicial power. If it were to do so, clearly these functions would be recognized as being of the "accessory to proper adjudication" type rather than as central, adjudicatory functions themselves.

This distinction is significant because the Court has tolerated past legislative efforts to regulate those accessory

EDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
NCHORAGE, AK 99501
(907) 279-5528
AND (907) 276-3633

functions over which the Court has declared its final authority. In Houston, supra, at 645, the court stated that

> "...we recognize that the legislature may enact laws governing admission to practice law but hold that it may not require this court to admit on standards other than those accepted or established by the court."

In Application of Brewer, 430 P.2d 150, 152 (Alaska 1967), the Court elaborated upon the limits in its tolerance for legislative regulation:

> "Whether or not we accept legislative standards or rules for admission to the practice of law depends upon whether they have a rational connection with one's fitness to practice law in Alaska. We will hold that there is such a rational connection if application of the legislative standards has a reasonable tendency to determine whether an applicant has sufficient knowledge of law in Alaska to hold himself out to the public that he is adequately prepared to assume efficiently the obligations and responsibilities commencerate with representing persons in legal matters." (Emphasis added.)

The court upheld the legislatively established standard for admission as not being unreasonable. Later, in Application of Steelman, 448 P.2d 817, 819 (Alaska 1969), the Court clarified its Brewer holding:

> "By this holding we did not intend to imply that legislative standards similar to and superimposed upon standards already established by the court would be accepted merely because they might have some relevancy to an applicant's fitness to practice law. The authority and responsibility for establishing clear and unambiguous standards for admission rests in this court and where the court has already established a standard it will not accept a legislative attempt to modify that standard which creates confusion and inconsistency without adding substantively to the standard." (Emphasis added.)

EDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 279-3633

See also Application of Park, 484 P.2d 690, 691-692 (Alaska 1971). In Continental Insurance Company, supra the statutory limitations upon the contempt powers of the courts were challenged. The court concluded that since the supreme and superior courts had been created by the Alaska State Constitution and not by legislative enactment, legislation endeavoring to limit the contempt powers of these courts were not binding. Nevertheless, the court stated:

> "...statutory enactments, which reasonably regulate the contempt power, as representing the opinion of a co-equal branch of the government, should be given effect as a matter of comity unless they fetter the efficient operation of the courts or impair their ability to uphold their dignity and authority." Continental Insurance Cos., supra at 411. (Emphasis added.)

The court then accepted the statutorily established contempt standards:

> "We recognize that the trial bench must have suitable powers to deal with such recalcitrance. Remedies are afforded under the applicable rules and statutes. But if these provisions are inadequate, we shall not hesitate to approve suitable remedies drawn from the reservoir of the court's inherent power. That inherent power, however, must be exercised sparingly, and then only when it is necessary to preserve the dignity, authority and efficiency of the court so that parties are assured of fair and effective resolution of their disputes." Continental Insurance Cos., supra at 411. (Emphasis added.)

The precedent for legislative regulation of the accessory as opposed to adjudicatory exercises of judicial power is therefore not only well-recognized; such regulation is to be adhered to as a matter of "comity" unless it has no rational basis, conflicts with pre-existing court rules, or impairs the efficient operation or dignity of the courts. As discussed infra at pp. 11-14, an

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 200
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

Ombudsman's investigation would have none of these effects.

The Court's acceptance of legislative regulation of accessory judicial functions is in keeping with the "blending" of powers of separate branches in American government. See 16 Am.Jur.2d, Constitutional Law, §214 pp. 455-457. The "overlapping" of powers often is the result of the recognition by one branch that another branch is better equipped to deal with "gray areas" existing between the respective powers. The Alaska Supreme Court's willingness to allow legislatively enacted standards relating to admittance and disciplining of attorneys can probably best be explained in these terms.

Furthermore, constitutional sources of "blending" or sharing of powers exist; e.g., a governor may veto legislation. In fact, in exercising the type of judicial power which is the subject of the instant case, the powers of the judiciary are limited by those of the legislature. Art. IV, Sec. 15 of the Alaska Constitution provides:

> Rule-Making Power. The Supreme Court shall make and promugate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Perhaps the most striking illustration of the Supreme Court's reluctance to declare regulation of its accessory functions to be "off limits" to the legislature is found in the Court's opinion in Continental Insurance Cos., supra. In discussing the legislature's power to delimit the contempt powers of Alaskan courts, the court stated, at p. 410:

> "We agree with the California court that enactments endeavoring to restrict the court's contempt powers are entitled

LAND, FLEISCHER
& FRIEDMAN
TTORNEYS AT LAW
SUITE 400
WEST 6TH AVENUE
HORAGE, AK 99501
(907) 279-5528
(907) 278-3633

> to respect as an opinion of a coordinate branch of the government but are not binding on the court. An exception to this rule pertains to courts created by legislative enactment. There the legislature does have the power to limit this court's exercise of contempt procedures. In Alaska, unlike the federal system applicable to United States district courts and courts of appeal, the supreme and superior courts were created by the Alaska State Constitution and not by legislative enactment." (Emphasis added.)

The court cited Art. IV, Sec. 1 of the Alaska Constitution, which states:

> The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature.

The court's "inherent and final authority" to deal with diciplinary matters, which is itself qualified to the extent that a large amount of legislative intrusion is tolerated, is therefore limited only to those courts which were created by the Constitution. If the legislature, and not the supreme court, has the final and supreme authority over accessory functions such as establishing contempt procedures as far as they relate to district and magistrate courts, then surely legislative enactments which affect the ABA do not constitute an encroachment upon the judiciary by the legislature. The ABA, like the district and magistrate courts, is not established by the Constitution. Moreover, whereas the "courts established by the legislature" are at least mentioned in the judicial article of the Constitution, there is no mention whatsoever of an ABA to be established by any authority.

In short, the Alaska Supreme Court has never exhibited any great resistance to legislative regulation of those accessory functions which are designed to assure effective resolution of litigation. It has declared its own final authority over such matters only in the context of the two courts specifically

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 276-3633

established by the Constitution and, even in this context, it will acquiesce to legislative regulation unless it is unreasonable, inconsistent with existing rules, or disruptive.

C. The Ombudsman Act, As Applicable to The ABA, Will Not Disrupt the Dignity, Authority, Nor Efficiency of Any Court.

The Ombudsman Act (A.S. 24.55.010 et seq.) establishes an Ombudsman whose powers are limited to investigation of complaint regarding the administrative acts of agencies (A.S. 24.55.110), investigations under his own motion (A.S. 24.55.120), subpoena powers to aid such investigations (A.S. 24.55.170), the rendering and reporting of his opinion and recommendations to the concerned agency (A.S. 24.55.190) and later, to the governor, legislature, grand jury, the public, or any of these (A.S. 24.55.200). Under A.S. 24.55.220,

> If the ombudsman believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of his official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency. (Emphasis added.)

Finally, the Ombudsman shall submit to the legislature and the public an annual report of his activities (A.S. 24.55.230.)

The Act therefore provides no authority for the Ombudsman to attempt any regulation of accessory judicial functions such as civil rules, handling of disciplinary proceeding, expenditures of funds, or the like. To this extent, the Act as applied to such functions is far less an encroachment upon the judiciary than were those legislative enactments, tolerated by the Supreme Court, governing rules of admission to the practice of law and the limiting of contempt powers of courts. Indeed, the Ombudsman's powers are basically informational only, being limited to investi-

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

gation and reporting. Clearly, the legislative purpose of the Ombudsman Act was to assist state agencies by performing such independent investigation and supplying such independent perspective to the workings of the agency as will assist it in better performing its role. If the Ombudsman's investigation of the ABA resulted in his opinion that something other than the status quo should be considered by the agency, then A.S. 24.55.190 requires that this opinion and recommendations first be made available to the ABA. If the ombudsman believes that there has been a breach of duty or misconduct by an officer or employee of the ABA, A.S. 24.55.220 requires him to refer the matter to the chief executive officer of the ABA or, when appropriate to the grand jury or "another appropriate official or agency." Under appropriate circumstances, misconduct by ABA personnel could be reported to the Supreme Court under this authority.

In short, while the Ombudsman may investigate and make recommendations, any corrective action must be dictated by either higher authorities within the agency itself or by the entity to whom the agency is responsible. The Ombudsman's actions themselves represent no exertion of authority over the agency.

Defendant argues that the Ombudsman could, through his investigatory power "force the ABA, and the judiciary generally, to divert resources and funds to the fulfillment of his investigation demands," and that "if jurisdiction to cause such a diversion is once conceded, there is virtuely no check or limitation by statute to confine the scope of the diversion to acceptable limits." In fact, there are statutory limits. A.S. 24.55.330 defines "agency" as referred to as being subject to investigation under the Act:

HEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

> "..."agency"...does not include a... justice of the supreme court, judge of the superior or district court, magistrate ...."

More importantly, defendant fails to spell out how an investigation of the ABA would disrupt the "internal workings of the judiciary" in any significant way. The "floodgates" argument made by defendant ABA may be characterized as the typical reaction of a state agency to the prospect of an independent state office investigating individual complaints regarding the agency. It is the same type of reaction one would expect from agencies of the executive branches of government, which regularly are required to comply with in depth investigations by legislative committees or by legislatively established auditors or ombudsmen. Though such agencies could as easily as defendant herein argue that the burdens imposed upon the agency by such investigations constitute an encroachment upon the executive branch by the legislature, plaintiff is unaware of any case holding that such investigations violate the separation of powers doctrine. Clearly, a holding that an Ombudsman's investigation of the ABA was an unconstitutional encroachment on the judiciary would be difficult to distinguish were executive agencies to litigate the ability of the Ombudsman or the Budget and Audit committees from investigating their activities.

Separation of powers has never meant isolation of the branch of government from one another. The overlapping of powers in those areas not central to the respective adjudicatory, legislative, or executive functions has been the result of a recognition of benefits resulting to government and the citizenry it was intended to serve. The office of the Ombudsman is perhaps one of the best examples of the benefit of interaction between

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

two branches of government. By establishing and funding the Ombudsman, the legislature has provided a means for the executive branch of government to better evaluate its performance and consider alternatives. If the ABA were considered to be a part of the judicial branch, there is no reasons why the judiciary should not also take advantage of such independent evaluations and recommendations.

II. THE OMBUDSMAN HAS THE STATUTORY AUTHORITY TO INVESTIGATE THE ABA.

Defendant argues that since the ABA was created as an "instrumentality of the State" under A.S. 08.08.010 (which does not refer to the ABA specifically as a "agency") the legislature did not intend the Ombudsman Act to apply to the ABA. Defendant further purports that particular facets of the ABA are such as to render it "radically different from the standard state agencies" such that, if the legislature intended to subject it to the jurisdiction of the Ombudsman, it would have specifically so stated.

These arguments ignore the statutory definition of "agency" contained in A.S. 24.55.330(2) of the Ombudsman Act. In pertinent part, this states that

> "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality or in the executive, legislative or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality or of the state government independent of the executive, legislative and judicial branches....

The clear message to be gleaned from this definition is that the legislature intended the Ombudsman Act to apply to every conceivable form of state government organization. That their

DLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
16 WEST 6TH AVENUE
CHORAGE, AK 99501
(907) 279-5528
D (907) 276-3603

seemingly exhaustive listing of the types of entities it meant to refer to by "agency" did not include the word "instrumentality" is not significant. Indeed, "instrumentality" is practically synonymous with a number of the terms referred to in the legislative definition, including "office", "institution", and "organization". To make sure that every conceivable organization created to serve state government was included under the Act, those "agencies" which do not fall strictly within either the executive, legislative or judicial branches were explicitly mentioned.

The better judicial construction of such an all-inclusive definition is that every conceivable organization with some direct connection to state government is included under the Ombudsman Act unless it is specifically excluded. The statutory definition of "agency" in fact does specifically exclude a number of state officials, e.g., all judges and magistrates; it does not, however, exclude the ABA.

The particular characteristics of the ABA discussed by defendant do not really render it so "radically different" from other state agencies, offices, institutions, corporations, authorities, or organizations, etc. as to result in an assumption that the legislature meant to exclude it from Ombudsman Act coverage. Like the ABA, a small municipal government represents only a particular group of Alaskans financed almost wholly by these "members." Like the ABA, the Board of Medical Examiners governs a particular group of Alaskans, and exists to perform certain functions connected with furthering the quality of medical services.

Even if the characteristics of the ABA noted by defendant were unique to it, defendant does not demonstrate that these qualities are such that we may presume that the legislature would conclude that the Ombudsman Act should not apply to it. There

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

are doubtless a number of state agencies possessing varying qualities of uniqueness in their makeup, functions, funding, or the like which nevertheless come within the definition of "agency" under the Act.

That the ABA does not constitute a state agency for other purposes such as the state retirement program or elegibility of ABA membership for credit union enrollment, should not be a basis for this Court's concluding that it is not an "agency" under the Ombudsman Act. Defendant has not enlightened the Court as to the definition of "agency" under those programs. At any rate, a state agency's interpretation hardly constitutes the type of precedent upon which judicial construction should lie.

The Ombudsman legislation clearly intended to include any conceivable type of organization which is "of state government." That the ABA is "of the State" is explicit not only in the legislation but also in the Alaska Supreme Court opinion in Petition of Moody, 524 P.2d 1261 (Alaska 1974). In that case, a law clerk in the court system challenged certain by-laws of the ABA, partly upon grounds that they denied him equal protection as guaranteed by the Alaska and United States Constitutions. The Court found that equal protection had not been violated, but what is significant here is that the Court did not even question that the ABA's by-laws constituted state action. Petition of Moody, supra at 1268-69.

III. CONCLUSION.

An investigation of the ABA by the State Ombudsman would not constitute a violation of the separation of powers because the ABA is not a part of the judicial branch of government, but only performs certain functions for the benefit of that branch. Even if it were to be considered an "arm of the judiciary", the ABA

HEDLAND FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-1528
AND (907) 276-3033

deals only with the functions which are accessory to the central adjudicatory duties and powers of the courts. The Alaska Supreme Court has exhibited broad toleration for legislative regulation of such functions. Investigation of the ABA by the Ombudsman would not result in the level of disruption to judicial efficiency or dignity which would exceed the limits of the Supreme Court's tolerance for legislative activities in court-related areas.

The ABA was created by the legislature as "an instrumentality of the State," and the Supreme Court has assumed that the actions of the ABA are the actions of the State. The language of the Ombudsman Act provides the broadest possible coverage of the various entities and organizations of the State of Alaska, and ennumerate the specfic exclusions. The ABA is not excluded and is an "agency" subject to investigation by the Ombudsman.

DATED this 6th day of September, 1979, at Anchorage, Alaska.

HEDLAND, FLEISCHER & FRIEDMAN

Attorneys for the Office of the Ombudsman

By: _____
Saul R. Friedman

By: James T. Brennan
James T. Brennan

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

In the matter of)
)
Ombudsman Complaint)
No. A79-0641, A79-0642)
)

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

The Board of Governors will meet on September 6, 1979 to consider the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5583

file copy

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, v. THE ALASKA BAR ASSOCIATION, Appellee/Cross-Appellant.	File Nos. 4310/4311 O P I N I O N [No. 2059 - April 4, 1980]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Mark C. Rowland, Judge.

Appearances: Michael J. Frank, Richard Brown, and Gregory M. O'Leary, Anchorage, for Appellants/Cross-Appellees. John M. Conway and Patrick B. Gilmore, Atkinson, Conway, Young, Bell & Gagnon, Anchorage, for Appellee/Cross-Appellant.

Before: Rabinowitz, Chief Justice, Connor, Boochever, and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating.]

CONNOR, Justice.
Dimond, Senior Justice, with whom Rabinowitz, Chief Justice joins, dissenting in part.
Rabinowitz, Chief Justice, dissenting in part.

At issue in this case is whether a meeting of the Board of Governors of the Alaska Bar Association held in Hawaii in 1978 was valid.

This is an appeal from an order of the Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, J., granting the Alaska Bar Association's (hereinafter ABA) motion for judgment on the pleadings pursuant to Alaska Rule of Civil Procedure 12(e) but denying ABA's motion for attorney's fees. The suit was brought against the ABA by ten members and two non-members seeking a declaration that a business meeting of the ABA Board of Governors held in Kauai, Hawaii in February, 1978,[1] was void because it violated their federal and state due process rights and Alaska's open meeting statute. Appellants challenge the Superior Court's rejection of their due process claims and the finding that the open meeting statute, as part of the Administrative Procedure Act, is not applicable to the ABA. The ABA has cross-appealed from the superior court's denial of its motion for an attorney's fee award. The superior court denied that award on the ground that the suit constituted public interest litigation.

The open meeting statute contained in Sections .310 and .312 of the Alaska Administrative Procedure Act, AS 44.62, requires that the meetings of a number of public agencies and entities be open to the public, that votes be recorded in a certain manner, that executive sessions be

---

1. The Board of Governors' meeting was held in conjunction with a continuing legal education program conducted in Kauai for the members of the ABA.

held in conformity with the act and limited to the discussion of certain enumerated subjects, and that reasonable public notice be given for all meetings required to be open under the act.[2]

---

2. AS 44.62.310 provides in full:

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 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;

The Alaska Bar Association concedes, for the

---

2. (Continued)

(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.

AS 44.62.312 states:

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.

purpose of this appeal, that the Hawaii meeting did not comply with the open meeting statute in a number of respects.[3] The question presented is simply whether the ABA is exempt from the open meeting statute, as part of the Administrative Procedure Act, by reason of AS 08.08.100, which provides:

> "Administrative Procedure Act. 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 (AS 44.62)."

Appellants assert that this language meant only to exempt the ABA from the procedures prescribed by the Administrative Procedure Act for the adoption of bylaws and regulations. If the meaning of a statute is plain it should be enforced as it reads without judicial modification or construction. Poulin v. Zartman, 542 P.2d 251, 270 (Alaska 1975), reh., 548 P.2d 1299 (Alaska 1975); Application of Babcock, 387 P.2d 694, 696 n.6 (Alaska 1963); Sutherland, Statutes and Statutory Construction, § 45.02 at 4-5 (4th ed. 1973).

---

3. In answer to an interrogatory, the ABA admitted that public notice was not given, although notice was given in the Alaska Bar Brief and was sent to the officers of the ABA, the members of the Board of Governors, and to the presidents of local bar associations, as required by the ABA's bylaws. During the Hawaii meeting the Board of Governors held a number of executive sessions without following AS 44.62.310(b), and subjects were discussed which do not fall within AS 44.62.310(c) and (d).

The language of AS 08.08.100 is clear. It exempts the bylaws and regulations themselves, not merely their method of adoption, from the Administrative Procedure Act, both by naming that act and by referring to the chapter number, AS 44.62. There is nothing in this language which hints that the exemption should be any narrower in scope.

Other statutory provisions empower the ABA to adopt "reasonable bylaws and regulations, and other reasonable provisions concerning annual and special meetings" and "all other matters affecting in any way the organization and functioning of the Alaska Bar." AS 08.08.080(a)(3), (a)(6) and (b)(2). The Hawaii meeting was convened in accordance with the bylaws adopted by the ABA.[4] Thus, if these provisions are applied in accordance with the plain meaning of AS 08.08.100, the Hawaii meeting was lawful.

---

4. Article V, Section 8, of the ABA's bylaws provides in relevant part:

> "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."

Alternatively, appellants argue that despite AS 08.08.100, the ABA is subject to the open meeting statute. They contend that because the open meeting statute was repealed and re-enacted in 1966, it is no longer part of the Administrative Procedure Act, and that it is a new, independent enactment, operating upon all subjects within its scope.[5] But the legislature did not remove the open meeting statute from chapter 62 of title 44, which is denominated the Administrative Procedure Act,[6] and there is no other indication that the legislature intended to do so. To the contrary, the fact that the legislature repealed the original statute and replaced it with another which was given the same statutory numeration is ample evidence that the legislature intended to merely amend the statute.

Moreover, the interpretation contended for by appellants would mean that the legislature's action in 1966 amounted to an implied repeal of AS 08.08.100, a result which we should be reluctant to reach in the absence of an

---

5. The ABA's exemption from the Administrative Procedure Act as to "rules" adopted by the Board of Governors of the ABA was created in 1960. Ch. 178, § 3, SLA 1960. In 1976 the exemption was changed to "by-laws and regulations." Ch. 181, § 1, SLA 1976.

6. AS 44.62.650 states:

> "This chapter may be cited as the Administrative Procedure Act."

irreconcilable conflict between the two statutes. Peters v. State, 531 P.2d 1263, 1268 (Alaska 1975). Cutting against this argument is the legislature's action in 1976, ten years after the re-enactment of the open meeting statute, broadening the exemption of AS 08.08.100 from merely "rules" to "by-laws and regulations." Ch. 181, § 8, SLA 1976.[7]

We hold that the Board of Governors' meeting in question was not subject to the requirements of AS 44.62.310. It follows that the meeting was valid. The superior court ruled correctly on this question.

Appellants also claim that by reason of the meeting being held in Hawaii, they were denied due process of law. We will take cognizance of a due process claim only where there is an alleged deprivation of a sufficient liberty or property interest to warrant constitutional protection. Herscher v. State Dept. of Commerce, 568 P.2d 996, 1002 (Alaska 1977); Nichols v. Eckert, 504 P.2d 1359, 1362 (Alaska 1963). On the record we do not think that a

---

7. It is noteworthy that in 1978 the legislature, in exempting the Alaska Housing Finance Corporation from the Administrative Procedure Act, expressly did not exempt it from the open meeting statute. AS 18.56.088, Ch. 167, § 5, SLA 1978. Therefore, it is reasonable to conclude that when the legislature acted concerning the ABA in 1976, it consciously granted the ABA a broad exemption from AS 44.62.

cognizable deprivation of property or liberty has been made out. We find no merit in this contention.

As to appellee's cross-appeal, we find no abuse of discretion by the superior court in denying appellee an award of attorney's fees, because the case was brought in the public interest, under Civil Rule 82. Gilbert v. State, 522 P.2d 1131, 1136 (Alaska 1974).

AFFIRMED.

DIMOND, Senior Justice, with whom Rabinowitz, Chief Justice, joins, dissenting in part.

AS 08.08.100 provides:

> Administrative Procedure Act. 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 (AS 44.62).

The effect of the majority opinion is to hold that this statute plainly[1] exempts from the Administrative Procedure Act not only the Alaska Bar Association's method of adopting bylaws and regulations, but also any act of the Alaska Bar which happens to be authorized by bylaw or regulation, including violation of the open meeting act, AS 44.62.310. With this, I disagree.

---

1. The majority relies on Poulin v. Zartman, 542 P.2d 251, 270 (Alaska 1975), for the proposition that a statute whose meaning is plain is not subject to judicial construction. But in Poulin the court also said that the plain meaning rule applies if the legislative language is "'so unambiguous as to leave no doubt as to the meaning or scope of the result dictated.'" 542 P.2d at 270. I do not find any plain legislative intent to exempt the Alaska Bar from the open meeting act, AS 44.62.310-.312.

The main impact[2] of the Act on state agency regulations is to provide a detailed and comprehensive procedure for their adoption, promulgation, amendment and repeal,[3] and for judicial[4] and legislative[5] review. If the bylaws[6] and regulations of the Alaska Bar were subject to the Act, they would be subject to the procedural requirements of the Act with respect to their adoption and other handling, because that is the principal relevance of the Act to such bylaws and regulations. The effect of AS 08.08.100 making these by-

---

2. There is a substantive, rather than merely procedural, aspect of the Act as it relates to regulations. AS 44.62.030 provides:

> Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

However, this section has no relevance to the controversy in this case.

3. AS 44.62.040 - .290.

4. AS 44.62.300.

5. AS 44.62.320.

6. I would hold that "bylaws" fall generally in the category of regulations, since they are "[r]egulations . . . [or] rules . . . adopted by an association . . . for its government." Black's Law Dictionary at 182 (5th ed. 1979).

laws and regulations "not subject to the Administrative Procedure Act (AS 44.62)" (emphasis added), is that they are not subject to the procedural aspects of the Act, i.e., their method of adoption is not governed by the Administrative Procedure Act, but rather by action of the Alaska Bar Association or its Board of Governors under the Alaska Integrated Bar Act.[7]

The majority errs, I believe, in concluding from the fact the Alaska Bar's bylaws and regulations are exempt from the Administrative Procedure Act that the Alaska Bar, as an agency, is exempt from the Administrative Procedure Act, including its open meeting requirements. AS 44.62.310-.312, the open meeting statute, is a portion of the Administrative Procedure Act. It does not deal at all with the procedural aspects of the adoption of regulations, and purports by its terms to encompass the activites of legislative-created agencies such as the Alaska Bar Association and its Board of Governors. It follows that the Association and Board are subject to the Administrative

---

7. AS 08.08.080(b)(2) provides in part that the Board of Governors of the Alaska Bar Association may "adopt reasonable bylaws and regulations consistent with the Alaska Bar Rules." AS 08.08.090 provides:

> Power of the bar to make or change bylaws and regulations. Any bylaw or regulation adopted by the Board of Governors may be modified or rescinded, or a new bylaw or regulation may be adopted, by a vote of the active members of the association under bylaws and regulations to be prescribed by the Board of Governors.

Procedure Act to this extent. Article 6 of Title 44, chapter 62 (AS 44.62.310 - .312), requires meetings of a broad range of governmental agencies of the state and its political subdivisions to be open to the public. AS 44.62.310 provides in part:

> 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 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.

This comprehensive statute includes meetings of the Board of Governors of the Alaska Bar Association not exempted

under AS 44.62.310(c) and 44.62.310(d).[8] This is so because the legislature created the Alaska Bar Association and its Board of Governors, and expressly provided that the Association was created as an "instrumentality of the state." AS 08.08.010. Furthermore, the Alaska Bar is "supported . . . in

---

8. AS 44.62.310(c) provides:

> 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.

AS 44.62.310(d) provides:

> 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.

part by public money or authorized to spend public money" as that term is used in defining the scope of the open meeting statute, AS 44.62.310(a). First, the Alaska Court System provides a portion of the Alaska Bar's income for various purposes. The Alaska Court System in turn is supported by legislative appropriations. Second, the Board is empowered by the legislature to "fix the annual membership fees for active and inactive members," AS 08.08.080(b)(4), and to adopt reasonable provisions "concerning the collection, deposit, and disbursement of membership and admission fees, penalties, and all other funds." AS 08.08.080(a)(4). There can be little question that the mandatory annual dues paid to the Association by its members to support the Association constitute "public money" as that term is used in AS 44.62.310(a). As was stated by a Louisiana appellate court,

> [R]evenues raised through exercise of such governmental powers by an agency created by the legislature and pursuant to legislative authorization constitute state funds no less than revenues deposited in the State Treasury . . . .

State Licensing Board of Constractors v. State Civil Service Commission, 110 So.2d 847, 851 (La. App. 1959), aff'd, 123 So.2d 76 (La. 1960).

I conclude that the public meeting portion of the Administrative Procedure Act is applicable to the Board of

Governors of the Alaska Bar Association.

The Alaska Bar Associaton admits that its Hawaii meeting did not comply with the open meeting statute in a number of respects. These are listed in note 3 of the court's opinion. It is my opinion that there is another way in which the meeting did not comply with the requirements of the statute. That is the fact that the meeting was held in Hawaii and not in Alaska. I believe it is fair to presume that when the Alaska legislature required meetings to be "open to the public," it contemplated that the "public" should consist principally of people residing in Alaska. It would follow from this that Alaska residents should not be expected to travel outside the state in order to take advantage of their right to be present at a meeting of an Alaska governmental agency. In my opinion, the public meeting statute was violated by the fact that the Board of Governors met in Hawaii and not in Alaska.

With respect to the cross-appeal regarding denial of attorney's fees to the Alaska Bar, I concur in the court's holding.

RABINOWITZ, Chief Justice, dissenting in part.

I concur in Senior Justice Dimond's dissent. In addition to the grounds advanced by Justice Dimond, I wish to note a further point of disagreement with the majority opinion. More particularly, I have concluded that even if the Alaska Bar Association's meeting was exempt from the Administrative Procedure Act, holding the meeting in Hawaii violated Article IX, Sec. 6 of the Alaska Constitution, which provides:

> Public Purpose. 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.

We have stated that the "public purpose" concept in this provision is not capable of precise definition. Wright v. City of Palmer, 468 P.2d 326, 330 (Alaska 1970); Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245, 251 (Alaska 1966); DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962). Under even the broadest of definitions, however, I have difficulty finding any legitimate public purpose in locating the meeting in Hawaii. The use of the dues mandatorily paid by ABA members, which I agree with Justice Dimond constitute public monies, to hold the meeting outside Alaska seems to me to be clearly prohibited by Article IX, Sec. 6 of the Alaska Constitution.

This same principle is subsumed within the broader

constitutional guarantee of substantive due process of which appellants argue they have been deprived. Substantive due process is denied when the actions of a public agency are arbitrary and bear no reasonable relationship to a legitimate governmental purpose. Concerned Citizens of Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974). While one challenging government action bears a heavy burden of proof under this standard, I am persuaded it has been met here. The ABA has not offered any legitimate reasons for holding the meeting in Hawaii.

The ABA alleges appellants have not shown that they were deprived of any cognizable liberty or property interest by the actions of the Board of Governors, since no issues directly affecting the appellants' livelihood were resolved at the meeting, and since none of the appellants have indicated that they attempted to attend the meeting in Hawaii or would have attended the meeting even if it had been held in Alaska. There remains the fact, however, that property of appellants in the form of mandatory dues money was spent by a public agency in an apparent arbitrary manner. This, in my opinion, is probably sufficient to establish a violation of substantive due process under the standard noted herein.

DRAFT COMMITTEE REPORT ON ALASKA BAR ASSOCIATION

In compliance with AS 44.66.010 - 060 and referral by the Speaker of the House on January 15, 1980, the House Judiciary Committee has conducted a review of the Alaska Bar Association. By letter of July 31, 1979 the Speaker had notified the Committee of the forthcoming referral, thereby permitting advance work to be done during the interim between legislative sessions.

The Alaska Bar Association has taken the position "that it is not a State agency, and that it is not subject to the Sunset review process." The Association refused the Legislative Auditor access to all of its records; therefore, no performance audit has been conducted.

On November 7, 1979 the Committee requested information on 87 points; by letter of January 30, 1980 and a 71-page booklet, The Alaska Bar Association, February 1980, the Association answered of the questions posed. Some questions were not answered "for reasons of privacy and because of limitations on its own authority as regards the confidentiality of the Association's discipline and grievance files" and others because "the Association has not kept those records -- until very recently -- in a manner which would make the retrieval of those statistics feasible."

In addition to receiving testimony during interim hearings, the Committee held hearings in Juneau. Also, two teleconference hearings were held to obtain testimony from Anchorage, Fairbanks, Kodiak, Valdez, Ketchikan, Sitka and Nome. Written testimony was received from persons, and oral testimony from

. Witnesses included

president, president-elect, two former presidents, and three members of the present Board of Governors of the Association; the Ombudsman, and a number of attorneys.

The Alaska Supreme Court has delegated to the Association the responsibility for admissions and discipline, and by statute the Association may propose court rules or rule changes. All attorneys practicing in Alaska are required to be members of the Association, and to pay dues (now $180.00 per year). Statutory authority is AS 08.08.010 - 250, commonly called the Integrated Bar Act, and some members of the Bar seem to feel that authority also resides in the inherent power of the Alaska Supreme Court.

The Committee found that the Association is conducting a number of worthwhile activities. Unfortunately, it is not clear that most of these are benefiting the general public, as opposed to Association members. (If, as it claims, the Association is not a State agency, it would be under no obligation to benefit the general public.)

In some ways one of the most disturbing revelations was the extent to which attorneys form a closed corporation. The Association comprises all attorneys in the State, only its members may practice law, it is in charge of admissions to the Bar and of discipline of its members, it nominates the three attorneys who sit on the Judicial Council, which in turn sends judgeship nominees to the Governor, judges must themselves be attorneys, the Association furnishes nine members of the Board of Directors of Alaska Legal Services Corporation. Only in the disciplinary hearing and attorney

fee review committees is there any lay presence. There seems to be at present no provision for the exercise of supervisory responsibility by the elected representatives of the people.

When, after completion of testimony, the Committee began its deliberations, the diversity of opinion was clearly evident. Apparently no one believed that the Alaska Bar Association should be extended for the maximum four years. Some members wanted to treat attorneys like other professionals, with a board to handle admissions and discipline; others preferred to make the Supreme Court directly responsible for those functions; and a third group preferred a short extension together with appropriate statute changes. The last viewpoint was finally adopted.

In compliance with AS 44.66.050(d), the Committee finds that:

(1) The Alaska Bar Association is intended to address the need for admission and discipline of attorneys in the State.

(2) The objectives are to upgrade the Bar in terms of education, competence, and professionalism of its members, and to perform some services for the general public.

(3) There are no other programs having similar or conflicting objectives.

(4) The responsibilities could be turned over to the Supreme Court or to a professional board in the Division of

Occupational Licensing. The Committee has considered these alternatives but believes that they are not feasible at this time.

(5) The Association could not be eliminated unless some other agency were responsible for the functions.

(6) The extension of the Association for one year will permit time for a more thorough review and there is no duplication of other efforts.

(7) Information which would improve the performance of the Association is included in other portions of this report or in legislation to be introduced by the House Judiciary Committee.

The House Judiciary Committee finds that:

(1) The Alaska Bar Association should be extended until June 30, 1981.

(2) Statutory changes are needed in the public interest. The Committee will propose a bill incorporating these changes.

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

March 12, 1980

The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Pouch Y, State Capitol
Juneau, Alaska 99811

Dear Mr. Speaker:

In compliance with AS 44.66.010 - 060 and referral by the Speaker of the House on January 15, 1980, the House Judiciary Committee has conducted a review of the Alaska Bar Association. By letter of July 31, 1979, the Speaker had notified the Committee of the forthcoming referral, thereby permitting advance work to be done during the interim between legislative sessions.

The Alaska Bar Association has taken the position "that it is not a State agency, and that it is not subject to the Sunset review process." The Association refused the Legislative Auditor access to some of its records; therefore, no performance audit has been conducted.

On November 7, 1979 the Committee requested information on 87 points; by letter of January 30, 1980 and a 71-page booklet, The Alaska Bar Association, February 1980, the Association answered completely 73 of the 87 points. Another 13 points were addressed by the Alaska Bar Association, but were not answered completely because of stated lack of adequate or feasibly retrievable information. On one point, a request for a copy of the card index on discipline, the Alaska Bar Association refused to reply, stating that it could not release this confidential information to the House Judiciary Committee.

In addition to receiving testimony during interim hearings, the Committee held 2 hearings to receive public testimony in Juneau. Also, 2 teleconference hearings were held to obtain testimony from Anchorage, Fairbanks, Kodiak, Valdez, Ketchikan, Sitka and Nome. Written testimony was received from 6 persons and the Kenai Peninsula

Bar Association. Oral testimony was received from about 15 persons. Witnesses included the president, president-elect, two former presidents, and three members of the present Board of Governors of the Association; the Ombudsman, and a number of attorneys.

The Alaska Supreme Court has delegated to the Association the responsibility for admissions and discipline, and by statute the Association may propose court rules or rule changes. All attorneys practicing in Alaska are required to be members of the Association, and to pay dues (now $180.00 per year). Statutory authority is AS 08.08.010 - 250, commonly called the Integrated Bar Act, and some members of the Bar seem to feel that authority also resides in the inherent power of the Alaska Supreme Court.

The Committee found that the Association is conducting a number of worthwhile activities. Unfortunately, it is not clear that most of these are benefiting the general public, as opposed to Association members. (If, as it claims, the Association is not a State agency, it would be under no obligation to benefit the general public.)

In some ways one of the most disturbing revelations was the extent to which attorneys form a closed corporation. The Association comprises all attorneys in the State, only its members may practice law, it is in charge of admissions to the Bar and of discipline of its members, it nominates the three attorneys who sit on the Judicial Council, which in turn sends judgeship nominees to the Governor, judges must themselves be attorneys, and the Association furnishes nine members of the Board of Directors of Alaska Legal Services Corporation. Only in the disciplinary hearing and attorney fee review committees is there any lay presence. There seems to be at present no provision for the exercise of supervisory responsibility by the elected representatives of the people. The position of the Court System on the Alaska Bar Association sunset is included as an appendix to this report.

The Committee received more complaints and more testimony on the subject of Bar examinations than on any other subject related to the Alaska Bar Association. A major defect in the administration of the Alaska examination is that it is prepared and graded by persons who, while skilled attorneys, are amateurs in testing. Professionalism is needed in both the preparation and grading of the

examination to ensure that the examination will score persons only on relevant factors. The training of the preparers and graders should be financed by the income derived each year from the administration of the bar examination (about $16,000 anticipated in 1980, not including the costs of any litigation which may arise from the examination).

There appears to be no discrimination against women in the Alaska Bar Association. Alaska has one of the highest percentages of women lawyers in the United States and, specifically, the highest percentage of women on its Board of Governors. In fact, the president of the Alaska Bar Association is a woman.

Although no apparent preference for non-minorities is shown, there is a disparity in the numbers of minorities versus non-minorities in the Alaska Bar Association. Ethnic minorities are poorly represented in the Alaska Bar Association. Present membership from these ethnic groups is as follows:

Alaska Native	5
Black	4
Asian-American	2
Hispanic	1

To the best of our knowledge, 12 Native people have been admitted to the Alaska Bar since Statehood. The only reliable statistics available are those reflecting current membership. Because the problem of low representation of minorities in the Alaska Bar Association has not been addressed adequately in the past, reasons for this situation cannot be determined at this time.

The Judiciary Committee recognizes that the percentage of minorities failing the Alaska bar examination, compared with the percentage of non-minority persons failing, is disproportionately high. The Committee believes that this disparity may be caused in part by cultural factors.

The Committee does not believe that the Alaska Bar Association intends to discriminate against minorities. The Committee commends the Board of Governors' Legal Educational Opportunities Committee for its work in gathering statistics regarding minorities in the Alaska Bar Association. The Committee urges the Board of Governors to

continue this work so that accurate minority pass rates may be established.

The Committee urges the Board of Governors to develop a program which will speak to the statistics reflecting minority representation in the Alaska Bar Association and the apparently low percentage of minority and non-minority individuals who pass the bar examination.

The Committee urges the Board of Governors to be aware of the disparity in minority participation in the bar and to direct its Committee of Bar Examiners to continually scrutinize the preparation and grading of the examination for possible cultural biases.

The Committee urges the Board of Governors to look into establishing some other criteria for evaluating an individual's competency to practice law in the State.

When, after completion of testimony, the Committee began its deliberations, the diversity of opinion was clearly evident. Apparently no one believed that the Alaska Bar Association should be extended for the maximum four years. Some members wanted to treat attorneys like other professionals, with a board to handle admissions and discipline; others preferred to make the Supreme Court directly responsible for those functions; and a third group preferred a short extension together with appropriate statute changes. The last viewpoint was finally adopted.

Findings required by AS 44.66.050(d) follow:

(1) an identification of the problems or the needs that the programs and activities of the board, commission or agency are intended to address;

Finding: The Alaska Bar Association is intended to address the need for admission and discipline of attorneys in the State.

(2) a statement, to the extent practicable, of the objectives of the program of the board, commission, or agency program, and its anticipated accomplishments;

Finding: The objectives are to upgrade the Bar in terms of education, competence, and

professionalism of its members, and to perform some services for the general public.

(3) an identification of any other programs having similar, conflicting or duplicate objectives;

Finding: There are no other programs having similar or conflicting objectives.

(4) an assessment of alternative methods of achieving the purposes of the program;

Finding: The responsibilities could be turned over to the Supreme Court or to a professional board in the Division of Occupational Licensing. The Committee has considered these alternatives but believes that they are not feasible at this time.

(5) an assessment of the consequences of eliminating the board, commission or program and consolidating its activities with another program, or of funding it at a lower level;

Finding: The Association could not be eliminated unless some other agency were responsible for the functions.

(6) a justification for the recommended continuation or extension of the board, commission or program, and an explanation of the manner in which it avoids duplication of or conflict with other efforts;

Finding: The extension of the Association for one year will permit time for a more thorough review and there is no duplication of other efforts.

(7) any other information which, in the opinion of the committee, would improve the performance of the board, commission or agency with respect to its representation of and responsiveness to the public interest;

Finding: Information which would improve the performance of the Association is included in

other portions of this report or in legislation to be introduced by the House Judiciary Committee.

The House Judiciary Committee finds that:

(1) The Alaska Bar Association should be extended until June 30, 1981.

(2) Statutory changes are needed in the public interest. The Committee will propose a bill incorporating these changes.

Charles H. Parr, Chairman

Nels A. Anderson, Jr.

Ramona L. Barnes

Fred E. Brown

Thelma Buchholdt

Hugh Malone

Terry Martin

Patrick M. O'Connell

Randy Phillips

Alaska Court System

State of Alaska

303 "K" STREET
ANCHORAGE, ALASKA
99501

ARTHUR H. SNOWDEN II
ADMINISTRATIVE DIRECTOR

(907) 274-8611

March 4, 1980

Representative Charles H. Parr
Pouch V
Juneau, Alaska 99811

Dear Representative Parr:

You have asked that I comment on behalf of the Court System concerning the sunset legislation of the Alaska Bar Association currently pending before your committee.

I have conferred with the Supreme Court with regard to your request and they asked me to comment as follows.

The Court strongly supports continued existence of the Alaska Bar Association as an integrated bar. The Court further suggests that the Bar Association and the Legislative Audit Committee reach a reasonable accommodation of the current dispute.

The Court has not given me brief to comment further on the subject. I hope these comments will help the committee.

Cordially,

Arthur H. Snowden, II

Arthur H. Snowden, II
Administrative Director

AHS:cm

cc: Donna Willard, Esq.
President, Alaska Bar Association

Alaska Court System

State of Alaska

303 "K" STREET
ANCHORAGE, ALASKA
99501

ARTHUR H. SNOWDEN II
ADMINISTRATIVE DIRECTOR

(907) 274-8611

March 12, 1980

The Hon. Charles Parr, Chairman
House Judiciary Committee
Room 126, State Capitol Building
Juneau, Alaska 99811

Dear Representative Parr:

In my letter of March 4, 1980, with reference to the sunset of the Alaska Bar Association, I stated in the last sentence that the Court hopes that the Bar Association and the Legislative Budget and Audit Committee can reach a reasonable accommodation of their present dispute.

I wish to make it clear that in commenting on this subject, in no way did I intend to comment or convey any information on the merits of the controvery between the Legislative Budget and Audit Committee and the Alaska Bar Association before the Supreme Court.

Very truly yours,

Arthur H. Snowden II

Arthur H. Snowden II

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

March 12, 1980

The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature
Pouch Y, State Capitol
Juneau, Alaska 99811

Dear Mr. Speaker:

In compliance with AS 44.66.010 - 060 and referral by the Speaker of the House on January 15, 1980 the House Judiciary Committee has conducted a review of the Alaska Bar Association. By letter of July 31, 1979, the Speaker had notified the Committee of the forthcoming referral, thereby permitting advance work to be done during the interim between legislative sessions.

The Alaska Bar Association has taken the position "that it is not a State agency, and that it is not subject to the Sunset review process." The Association refused the Legislative Auditor access to some of its records; therefore, no performance audit has been conducted.

On November 7, 1979 the Committee requested information on 87 points; by letter of January 30, 1980 and a 71-page booklet, The Alaska Bar Association, February 1980, the Association answered completely 73 of the 87 points. Another 13 points were addressed by the Alaska Bar Association, but were not answered completely because of stated lack of adequate or feasibly retrievable information. On one point, a request for a copy of the card index on discipline, the Alaska Bar Association refused to reply, stating that it could not release this confidential information to the House Judiciary Committee.

In addition to receiving testimony during interim hearings, the Committee held 2 hearings to receive public testimony in Juneau. Also, 2 teleconference hearings were held to obtain testimony from Anchorage, Fairbanks, Kodiak, Valdez, Ketchikan, Sitka and Nome. Written testimony was received from 6 persons and the Kenai Peninsula

KENAI PENINSULA BAR ASSOCIATION
P. O. BOX 397
KENAI, ALASKA 99611
TELEPHONE 283-7564

February 19, 1980

Honorable Charles Parr
House of Representatives
House Judiciary Committee
State of Alaska
Pouch Y
Juneau, Alaska 99811

Dear Mr. Parr:

Enclosed please find a Resolution of the Kenai Peninsula Bar Association in which the Bar Association has voted that the legislature should "sunset" the Alaska Bar Association. The reasons for the association's action are enumerated in the attached Resolution.

I should point out that there was dissent in our local bar association with regard to whether or not the Alaska Bar Association should cease to exist. Thomas Wardell specifically wishes it to be known that he does not concur and would support the continuance of the Alaska Bar Association and would try to resolve any differences with the existing entity.

As President of the Kenai Peninsula Bar Association I feel that our relations with the Alaska Bar Association have been very good. I would lik to point out that the Alaska Bar Association has "reached out" to the Kenai Peninsula Bar Association to improve relations and services to our members here on the Kenai Peninsula. The following are examples of such efforts. Namely, I, the President, have been invited to attend each and every Board of Governors meeting; the opinions of our association have been sought on numerous issues which are before the Alaska Bar Association, representatives of the Alaska Bar Association including the President, the board members and, respectively, the bar counsel have volunteered to visit the Kenai Peninsula to address our members; the Alaska Bar Association has initiated a video tape program to allow Kenai attorneys to view Alaska Bar Association Continuing Legal Education seminars which are presented elsewhere in the state which has enabled our members to continue in their professional education without incurring the great costs of travel.

It is also my personal conviction that the many activities of the bar association such as bush justice, the publication of a legal newspaper, the extensive work by committees on changes in the substantive of law, the self regulation of professional ethics and fee arbitration are highly useful functions and benefit the populace of the State of Alaska.

I have personally viewed the fee arbitration process first hand. I was highly impressed by the degree of impartial objectivity on the part of the prosecutor and the fee arbitration panel and was personally very impressed by the quality of the legal opinion and decision which was issued.

It is my personal conviction that the legislature should carefully weigh whether or not problems within the Alaska Bar Association are real and if so, can they be corrected by some means other than to "sunset" the Alaska Bar Association.

The two areas that I am dissatisfied with are the bar exam admissions procedure with regard to review of marginal exam results. It has been the experience of some local bar applicants that the bar association will not grant a review of a paper which has a score of 69 where a score of 70 is mandatory to pass the exam. I believe that applicants should show a substantial ability to pass the Alaska Bar exam but I also believe that we do not need to "protect" the business of members of the bar from new admittees and I believe that fair procedures should be adopted by the Alaska Bar Association.

Another area of great consternation to many of the attorneys is the winter meetings in such places as Hawaii and Mexico. Holding these meetings in far off location bars the general members of the ba association from attending these important functions. Most young lawyers simply cannot afford to expend thousands of dollars on such an occasion.

I trust these comments will be of interest to you. Scheduled court appointments preclude me from appearing at the teleconference hearing before the House Judiciary Committee

Yours truly,

Roger E. Holl

ROGER E. HOLL
Attorney at Law

REH:aj

RESOLUTION

WHEREAS, the continued existence of the Alaska Bar Association is being considered by the Alaska State Legislature under the provisions of the "Sunset Law"; and

WHEREAS, this topic was discussed at length by the membership of the Kenai Peninsula Bar Association, consuming at least two weekly meetings; and

WHEREAS, the Kenai Peninsula Bar Association members agreed that the Alaska Bar Association has failed to adequately deliver to the members of the bar and to the members of the public the services that it was designed to render, as follows:

1. The dues collected from the membership are too high for the services rendered and are used ineffectively.

2. The Alaska Bar Association does not effectively or fairly administer the Alaska Bar Association admissions procedure.

3. The Alaska Bar Association does not effectively or efficiently examine disciplinary complaints.

4. The Alaska Bar Association fee arbitration procedure does not effectively resolve fee disputes.

5. The meetings of the Alaska Bar Association are often not accessible to the general membership in that some major meetings are held outside the State of Alaska

6. The cost of continuing legal education is becoming increasingly prohibitive in so far as those meetings which are held outside of the State of Alaska.

7. The funds allocated by the State of Alaska to the Alaska Bar Association could be used more effectively for other purposes.

8. The Alaska Supreme Court can and should handle the administration of services, the admissions procedure before the Courts of Alaska, the disciplinary complaints and other functions now handled by the Alaska Bar Association.

BE IT RESOLVED THEREFORE, for these and other reasons that the Legislature of the State of Alaska "sunset" the Alaska Bar Association and that the Alaska Supreme Court assume the functions of the Alaska Bar Association.

Thomas Wardell voted against this resolution and wishes that fact to be known.

DATED: At Kenai, Alaska this 19 day of February, 1980.

Roger E. Hall

Roger E. Hall, President
Kenai Peninsula Bar Association

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 31, 1980

SUBJECT: The practice of law in Alaska
(Work Order Number 8357)

TO: Representative Charles H. Parr
Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

We have delivered to you the bill responding to your request for a bill disestablishing the integrated bar in Alaska.

Since it was delivered to you, an omission from the bill has come to our attention which should be corrected in any committee substitute requested.

In a series of places in the statutes, the law requires that certain things be done by a "member of the Alaska Bar Association." This phrase has historically been synonymous with "admitted to the practice of law in Alaska" but the bill requested will change that.

Accordingly, I proposed to add amendments to these sections in a committee substitute:

(1) AS 09.43.200;

(2) AS 18.85.060;

(3) AS 41.17.130; and

(4) AS 41.17.140.

Several sections already contain the appropriate language and would not be changed. See, AS 24.20.075, AS 42.06.060, and AS 47.37.080.

These sections turned up in a quick computer search. Others may exist and we will seek to identify them if a committee substitute is requested.

RAB:ljb

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 29, 1980

SUBJECT: The practice of law in Alaska
(Work Order No. 8357)

TO: Representative Charles H. Parr
Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

A bill responsive to the request of the committee is enclosed. Because the matters involved in the bill are complex, I have prepared this memorandum to offer observations to the committee on what it has requested and what I have delivered to you.

I chose not to follow the format of your request, a suggested repeal and reenactment of AS 08.08; rather, I have amended existing law where possible to reflect the changes made in AS 08.08.

The request of the committee directs that a bill be prepared abolishing the integration or unification of the Alaska Bar Association. The request then confers extensive police powers on the governing board of the resulting voluntary association.

I am concerned with the allocation of substantial police powers to a voluntary association. In my view, the mixed character of the resulting Alaska Bar Association offers the substantial possibility that what results will be found by the courts to be unconstitutional.

The bill imposes the responsibility of a public agency on a voluntary association. It is required to act in the same manner that a public agency would act. These safeguards cloud, in my judgment, the otherwise clear prohibition of the grant of police powers to a private, voluntary organization.

And I must confess, in candor, to the committee that the co-mingling of public responsibilities on a voluntary association has made difficult the task of drafting the bill before you. I will seek to identify the issues that have concerned me in the following analyses:

Section 10. The only change requested in this section is the substitution of "agency" for "instrumentality". The change is essentially semantic; I recognize, however, as does the committee, that "agency" is the customary word used to describe a unit of government. The change should help resolve the apparent concern of the committee which I discuss subsequent in this memorandum. For added emphasis, a subsection (b) is added to the section in place of the section requested by the committee as sec. 150.

Section 20. The provision is repealed and reenacted and the essential change is from a law requiring membership of all attorneys admitted to practice to a voluntary association.

Section 30. The provisions of sec. 30 are unchanged and the section does not appear within this draft.

Section 40(a). The only change in (a) is the deletion of any authority to the board regarding regulations. To my knowledge the bar has not adopted any regulations since statehood. What other regulatory agencies adopt as regulations, it proposes to to the Supreme Court as bar rules; by definition, "bar rules" are not administrative regulations.

The board has adopted by-laws regarding its internal procedures, particularly on the responsibilities of officers of the board and procedures for their election.

Note that I propose no amendment to AS 08.08.100, a section which excludes the bar from the application of the Administrative Procedures Act and that I propose to repeal AS 08.08.090 as inconsistent with Alaska Bar Rule 62.

Section 40(b). This subsection is amended consistently with the committee's request. See, sec. 50.

Section 50(a). An amendment decreasing the attorney members of the board from nine to six and providing nonattorney members to be appointed by the governor and confirmed by the legislature is added.

Section 50(b). The section is amended to implement the provisions of sec. 50(a).

Section 50(c). This section establishes the procedure for the selection of members, both appointed and elected, over a three year period.

This provision must be read with sec. 23 of the bill which establishes a transitional period for the implementation of sec. 50.

Section 60. The apparent request of the committee was that the officers of the association not be selected at the associations annual convention.

Section 70(a). This amendment was not requested by the committee in its present format. Elections [except under sec. 60] have traditionally been held by mail. As such, it seems logical to call a special election by mail to fill vacancies in the elected positions on the board. Whatever delay results from the conduct of the election by mail ballot is insignificant and the result seems preferable.

Section 70(b). The language of this subsection is as requested by the committee.

Section 70(c). The language is as requested by the committee.

Section 75. This section is added to the chapter and responds to the what was sec. 70 in the committees request. The language of the section is essentially as it was requested by the committee.

The request of the committee asked that the language be amended to require notice to the public of board meetings as is required of other professions. I checked certain other professional codes, including AS 08.04, regarding accountants; AS 08.36, regarding dentists; AS 08.40, regarding architects, engineers and land surveyors; AS 08.34, relating to the

practice of medicine; and AS 08.68, relating to the practice of nursing, and found no similar provision. Notwithstanding this conclusion, the language of the committee's request is included in the bill.

Section 80. This section brings into focus my difficulty in determining what powers, particularly what police powers, are proper to a voluntary association.

Section 80(a). I added the reference to "this chapter" as requested by the committee.

Section 80(a)(1). I retained the provision regarding the "classification of membership." A voluntary association may well have levels of membership but they are typically not set out in statute. Because of the mixed status of the Alaska Bar, I retained the language.

Section 80(a)(4). I added the authority to establish fees to this subsection. The provision regarding investment, as requested by the committee, is also added. I deleted the reference to licensing fees because of my transfer of these responsibilities to the Supreme Court. See, sec. 20 of the bill, infra, which adds amendments to AS 22.05.

I omitted the draft sec. 80(a)(5) relating to the maintenance of a register of attorneys. The Supreme Court typically exercises this responsibility in states without an integrated bar. See, here also the provisions relating to the authority of the Supreme Court in sec. 18 of the bill.

I added (a)(7) [continuing legal education] and (a)(8) [specialization] in a format different from the request by the committee.

Section 80(b). The provision requested by the committee directing the board to make recommendations for amendments to this chapter as well as to law of a general nature are incorporated into sec. 85, the section dealing with the annual report of the board of governors.

Section 80(b)(1). The provision relating to "continuing legal education" is incorporated in sec. 80(a)(7) and is not repeated here.

Similarly, the "licensing" function is transferred to the Supreme Court and is not duplicated here.

Section 80(b)(4). The concept of fees for inactive members seems unnecessary to a voluntary association. Licensing fees as such are collected by the Supreme Court under the fees set by the legislature. See, sec. 22.05.180, added in this bill by sec. 20.

Section 85. This section reflects the elements contained within draft sec. 90.

Section 90. I do not believe the committee proposed to amend sec. 90. I propose to repeal it.

The section does very little other than provide that the active members of the association may amend the by-laws and regulations prescribed by the board of governors. This power has sometimes been exercised by the membership at the annual convention. The provision appears to be superceded by Alaska Bar Rule 62 which provides for "adoption of recommended rules, by-laws, and regulations."

Section 95. This provision defines the "practice of law" and contains the material proposed in draft sec. 140.

The language is minimally unchanged from the draft.

I offer no endorsement of its content; I consider it altogether inadequate as a definition of the practice of law. Several further comments may be made:

(1) For many, the practice of law is essentially indefinable. To a large extent, this premise concedes that large aspects of commercial activity exist in the shadow of the legal profession, but for historical, practical, or other reasons have been left unregulated or included in the regulation of other professions.

(2) Sec. 95(b) is a somewhat cynical statement suggesting that bankers, realtors, and others may practice law so long as they do not do it on a full-time basis. From a public policy perspective, the provision seems to suggest that incompetence will be implicitly permitted so long as it is not a full-time activity.

(3) The provisions of sec. 95 totally ignore paralegal activity; they also ignore the field of increasing economic importance occupied by individuals in narrow fields of expertise where assistance is offered to the public in obtaining licenses, permits, and the like.

(4) I offer no provisions to the committee which are better than those suggested in sec. 95. I am personally aware that the bar association locally, as well as the bar association nationally, has been concerned for some time with the practice of law and has not been able to come up with a better definition than that offered. I suggest it would be better to delete this provision than it would be to believe that it is comprehensive and effective.

Section 205. This section responds to sec. 170 of the committee's request.

This section and several other sections that follow it delete the requirement that applicants for admission to the Alaska Bar be a graduate of an accredited law school. These sections are contained within the draft identically to the committee's request. And, I offer no comment on their significance or implications.

Section 207. This section responds to sec. 180 of the committee's request and it is contained within the bill in the format requested by the committee.

Section 210. This section responds to sec. 150 of the committee's draft and is contained in the bill in the format requested by the committee.

Section 220. This section is repealed. The section is obsolete.

Section 230. This section responds to sec. 200 of the committee draft and is included within this bill in the format requested by the committee.

Section 18 of the bill adds a new article to AS 22.05. to deal with the responsibility of the Supreme Court over the annual license of attorneys and the maintenance of the register of licensed attorneys.

These sections are a substitute for sec. 120 and sec. 130 of the committee draft. I discussed my difficulty with Peggy Berck on the inclusion of the responsibilities to a voluntary association and suggested that the responsibilities be transferred to the Supreme Court. She agreed.

Section 45.50.495. The section cannot be fitted within the single subject requirement. It does not deal with the practice of law but rather with anti-trust activities of attorneys.

If the committee is concerned with the problem, I suggest repealing AS 45.50.481(1) in a separate bill.

Section 19 and section 20 amend Alaska Bar Rules in the format requested by the committee.

Section 21 repeals secs. 220, and 250.

Section 22 repeals sec. 3 of Alaska Bar Rule 2.

Section 23 is a transitional section which is designed to enable AS 08.08.050(c) added by sec. 5 by the bill to work.

Section 24 provides that the effective date of the act is January 1, 1981.

As noted, several sections of this bill amend Alaska Bar Rules. I wish to call to the committee's attention the question of whether the legislature may amend Alaska Bar Rules.

The source of the question is, of course, Article IV, sec. 15, of the Alaska Constitution, which provides:

> SECTION 15. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

The Supreme Court has had a number of opportunities to comment on the implications of this section, and it has

generally limited its comments to the judicial embellishment that the provision of the bill amending rules, either directly or indirectly, must be indentified in the bill and must be voted on separately. [It is for this reason that the fact of the Alaska Bar Rules amendment is noted in the bill title.]

We assumed that based on the logic of the Bradner v. Hammond decision, 553 P.2d 1 (1976), the Supreme Court will determine that the provisions of this section will constitute the outer limits of the authority of the legislature to amend rules of the Supreme Court. Since the Alaska Bar Rules may not fairly be described as either "rules governing the administration of all courts," or "rules governing practice and procedure in civil and criminal cases in all courts," we believe that conservative legal advice to the committee would suggest that the legislature is without the authority to amend the Alaska Bar Rules.

If we may assist further, please advise.

RAB:ljb

Enclosure

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 31, 1980

SUBJECT: The practice of law in Alaska
(Work Order Number 8357)

TO: Representative Charles H. Parr
Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

We have delivered to you the bill responding to your request for a bill disestablishing the integrated bar in Alaska.

Since it was delivered to you, an omission from the bill has come to our attention which should be corrected in any committee substitute requested.

In a series of places in the statutes, the law requires that certain things be done by a "member of the Alaska Bar Association." This phrase has historically been synonymous with "admitted to the practice of law in Alaska" but the bill requested will change that.

Accordingly, I proposed to add amendments to these sections in a committee substitute:

(1) AS 09.43.200;

(2) AS 18.85.060;

(3) AS 41.17.130; and

(4) AS 41.17.140.

Several sections already contain the appropriate language and would not be changed. See, AS 24.20.075, AS 42.06.060, and AS 47.37.080.

These sections turned up in a quick computer search. Others may exist and we will seek to identify them if a committee substitute is requested.

RAB:ljb

News-Miner 2/21/80

Sunset review questions need for bar association

By SUSAN FISHER
News-Miner Bureau

JUNEAU—While no witness has called for abolishing the Alaska Bar Association, there have been critical remarks raised during sunset review of the ABA.

Members of the House Judiciary Committee this afternoon will consider the testimony they have received the past few days.

Dominated by testimony from ABA active members in support of the association, the hearings netted a few critical remarks from some of its members.

Alaska has an integrated bar, meaning that all practicing lawyers must belong to the ABA and pay annual dues.

Kathryn Kolkhorst, who took leave as an assistant attorney general to testify as an individual, told legislators Thursday of her concerns and criticisms of the ABA-administered bar admissions test.

That same afternoon, State Ombudsman Frank Flavin outlined his office's difficulties in trying to handle ABA complaints directed to the ombudsman.

And in earlier testimony, legislators learned that while ABA is now trying to help Natives taking the bar admissions test, last year only two of 16 Natives passed the test.

Most of the earlier testimony had come from active ABA members participating in various committees and review projects.

The supporters cited the many different projects the ABA has undertaken as a public service, all done through volunteer efforts.

ABA receives $60,000 a year in state funds to handle attorney-judge discipline and grievance cases.

ABA's board of governors maintains it is not a state agency, and therefore not subject to sunset review, legislative audit or review by the ombudsman.

One member of the House Judiciary Committee expressed his own skepticism of the ABA. House Majority Leader Nels Anderson Jr., D-Dillingham, said he is not convinced the bar association should continue.

"It seems to me you have the fox guarding the henhouse all the way down," Anderson said. His reference is to the fact that the ABA administers the bar admissions test, decides lawyer ethics, and handles grievances and discipline.

Kolkhorst told the committee that the bar admissions test is composed 80 per cent of the California essay exam and multi-state questions, and 20 per cent essay on Alaskan law.

But the Alaskan lawyers who write the questions and the ABA members who serve as graders are not trained to do either, she said.

No point system is used on the Alaskan portion, there have been typographical and technical mistakes in the questions, and Kolkhorst has been told that graders do not abide by the analysis written by those preparing the questions.

Kolkhorst said the ABA earns $42,500 a year from applicants taking the test, yet spends only $26,000 in preparing and grading the tests.

The extra money, she suggested, should be used to train the lawyers writing the questions and grading them.

Kolkhorst attended law schools in Connecticut and Yale, but won admission on an appeal of her test before the Alaska Supreme Court, after twice failing it.

Flavin said the options the committee faces in deciding the sunset review are to continue the ABA in its present form, to de-integrate the association, or to continue ABA in some form of restructure.

"There's no public accountability" of the bar, Flavin testified.

The ombudsman received two major complaints about the ABA last year, one concerning the ABA's board of governors' meeting in Hawaii. Another involved the way the ABA handled a citizen's grievance against a lawyer.

Flavin took court action on the first matter to look at the board's expenses in the Hawaii meeting, but a judge upheld the ABA's position that it did not have to turn the records over to Flavin, since as a lawyer, Flavin could look at them as an individual member.

Some of the expenditures varied from those listed in bar association minutes, he said.

But Flavin did say that a de-integration of the bar probably would result in no greater protection for the public than at present.

Karen Hunt, an ABA governor, told the committee that many of the problems the bar association has had to deal with come from its tremendous growth.

Between January 1976 and this January, ABA membership shot up from 600 to more than 1,200, Hunt said.

A standing committee is now actively pursuing the problems of minorities who are failing the admissions test, she said, and the ABA does conduct a bar review exam.

List of pleadings attached to legal opinion requests addressed to Legislative Affairs Agency and Office of Attorney General.

I. General - my letter 9/5/79; Bar's response: 10/17/79

II. Ombudsman v. Donna C. Willard

4. Memorandum in Support
2. Exhibits attached to above - #A - #E
3. Memorandum in Opposition
4. Affidavit of Donna C. Willard 8/31/79
5. Reply Memorandum in Support of Application.

First: Review
Compile sunset requests
make requests for legal opinions
(include, authority of leg. to control practice of law outside the courtroom.

JUNEAU PLAN

second: make request.
discuss with J. Wilkerson

III. Hasoultz

Note: doesn't include notes re: repy brief

(pro) — ombudsman is case:

statute = creature of state legislature → instrumentality of the state

case = integrated bars perform public function: ie, police membership.

case = substantive evidence test - applied to bar as with other ~~agt~~ administrative agencies

statute by case: Bar is subject to A.P.A., but by legislature: eliminated from APA list. Query: can it by elimination not be an agency. Caselaw in California + texas so no go. [rejected argument + held state agencies]

(con) AK. sup court has inherrant powers (to regulate practice of law), hence ombudsman investigation intrudes on Sup. Ct, ∴ violation of separation of powers.

court can do by rule, not need legislature, to aid judiciary; yet in AK. leg can do away with, let court do it by rule then.

The BA would be arm of judiciary only if est. by judiciary.

Can't interfere with judicial function — line of cases. AK. supreme court inherent power over disciplinary admin. functions.

statutory arguments — statute describing ombudsman's authority should be construed not to create constitutional problems. Johnston case. WBA not subject to state auditor.

if ombudsman given jurisd can disrupt judiciary by extensive investigation, allocation of time

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

MICHAEL J. FRANK
RICHARD BROWN
GREGORY M. O'LEARY

Michael J. Frank
Attorneys for Appellants/
Cross-Appellees
524 W. Sixth Ave., Suite 204
Anchorage, AK 99501
Telephone: (907) 272-9431

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

Robert A. Bacon
Clerk of the Court

Nadya Podlesny
Deputy Clerk of the Court

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES (QUOTED OR SUMMARIZED IN PERTINENT PART)	x
I. JURISDICTIONAL STATEMENT	1
II. STATEMENT OF ISSUES	2
III. STATEMENT OF THE CASE	3
IV. ALASKA'S OPEN MEETING ACT PROHIBITED THE ALASKA BAR ASSOCIATION FROM HOLDING A MEETING FINANCED WITH PUBLIC FUNDS IN HAWAII	6
A. On Its Face, the Open Meeting Act Applies to the ABA	9
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	9
1. The Open Meeting Act Is Not Part of the AAPA	10
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	13
C. The Legislative History of the Pertinent Statutes Demonstrates that the Open Meeting Act Applies to the ABA	16
D. Other Extrinsic Statutory Construction Rules Demonstrate that the Open Meeting Act Applies to the ABA	20
E. Comparison of the Open Meeting Act Requirements with the ABA's Conduct Demonstrates the Act Was Violated	22

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. 26

A. All Meeting Action Taken Is Void 26

B. Public Funds Spent on the Meeting Are Recoverable. 26

VI. THE ACTIONS IN HOLDING A BUSINESS MEETING IN HAWAII, AND WITHOUT PUBLIC NOTICE, VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS. 28

VII. CONCLUSION 35

TABLE OF AUTHORITIES

Cases — Page

Alaska State Housing Authority v. Dixon,
496 P.2d 649 (Alaska 1972). 14

Allied Veterans Council v. Klamath County,
544 P.2d 190 (Or. App. 1975). 11

Application of Babcock,
387 P.2d 694 (Alaska 1963). 7,8

Application of Peterson,
499 P.2d 304 (Alaska 1972). 14n.6

Bagley v. School District No. 1, Denver,
528 P.2d 1299 (Col. 1974) 22

Bigelow v. Howze,
291 So.2d 645 (Fla. App. 1974). 24

Board of Public Instruction of Broward County v. Doran,
224 So.2d 693 (Fla. 1969) 22

Bolling v. Sharpe,
347 U.S. 497 (1954) 30

Brewer v. Hawkins,
455 S.W.2d 864 (Ark. 1970). 27,33

California Motor Transport Company v. Trucking Unlimited,
404 U.S. 508 (1972) 31

Carter v. City of Nashua,
308 A.2d 847 (N.H. 1973). 22

Center for United Labor Action v. Consolidated Edison Company,
376 F. Supp. 699 (S.D.N.Y. 1974). 31

Chesapeake & Potomac Company of West Virginia v. State Tax Department,
239 S.E.2d 918 (W.Va. 1977) 11

City of Chicago ex rel. Cohen v. Keane,
357 N.E.2d 452 (Ill. 1976). 27

Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough,
527 P.2d 447 (Alaska 1974). 28

Coppock v. Patterson,
272 F. Supp. 16 (S.D. Miss. 1967) 30

In Re Cutshaw,
432 P.2d 474 (Ariz. App. 1967). 11

Dorrier v. Dark,
540 S.W.2d 658 aff'd on reconsid., 537 S.W.2d 888 (Tenn. 1976) 20

Gay Coalition v. Sullivan,
578 P.2d 951 (Alaska 1978). 30,31

Gordon v. Burgess Construction Company,
425 P.2d 602 (Alaska 1967). 16,21

Hafling v. Inland Boatmen's Union of the Pacific,
585 P.2d 870 (Alaska 1978). 9,15,16, 19,21

Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union Local 879 v. Thomas,
551 P.2d 942 (Alaska 1976). 16

In the Matter of the Estate of Hutchinson,
577 P.2d 1074 (Alaska 1978) 9

Israel-British Bank (London) Ltd. v. F.D.I.C.,
536 F.2d 509 (2d Cir. 1976) 9

Issakson v. Rickey,
550 P.2d 359 (Alaska 1976). 8

Jackson v. State,
541 P.2d 23 (Alaska 1975) 21

City of Jackson v. Mississippi State Building Commission,
350 So.2d 63 (Miss. 1977) 15

Jones v. East Windsor Regional Board of Education,
362 A.2d 1228 (Sup. Ct. N.J. 1976). 22

Kerby v. State ex rel. Frohmiller,
157 P.2d 698 (Ariz. 1945) 27,33,34

Laird v. Tatum,
408 U.S. 1 (1972) 31

Laman v. McCord,
432 S.W.2d 753 (Ark. 1968) 22

City of Lexington v. Davis,
221 S.W.2d 659 (Ky. App. 1949) 23

In Re Loakes Estate,
32 N.W.2d 10 (Mich. 1948) 11

Malpus v. Fortune,
311 F. Supp. 240 (N.D. Miss.) aff'd,
432 F.2d 916 (5th Cir. 1970) 31

City of Miami Beach v. Berns,
245 So.2d 38 (Fla. 1971) 22,24

Mobil Oil Corporation v. Local Boundary Commission,
518 P.2d 92 (Alaska 1974) 28

Monte Vista Lodge v. Guardian Life Insurance Company of America,
384 F.2d 126 (9th Cir. 1967). cert. den.
390 U.S. 950 (1968) 21

National Railroad Passenger Corporation v. National Association of Railroad Passengers,
414 U.S. 453 (1974) 7

News & Observer Publication Company v. Interim Board of Education for Wake City,
223 S.E.2d 580 (N.C. App. 1976) 22

Paradise Valley v. Acker,
411 P.2d 168 (Ariz. 1966) 23

Paulin v. Zartman,
542 P.2d 251 (1975), reh. 548 P.2d 1299
(Alaska 1976) 7

People v. Centr-O-Mart,
214 P.2d 378 (Cal. 1950) 15,34

People v. Savaiano,
359 N.E.2d 475 (Ill. 1977) 27,33

Preiser v. Rodriguez,
411 U.S. 475 (1973). 21

Quast v. Knutson,
150 N.W.2d 199 (Minn. 1967). 23

Red Lion Broadcasting Company v. F.C.C.,
395 U.S. 367 (1969). 31

Secretary of State v. Hanover Insurance Company,
411 P.2d 89 (Or. 1966) 27

State ex rel. O'Connell v. Egan,
371 P.2d 638 (Wash. 1962). 27

State Licensing Board of Contractors v. State Civil Service Commission,
110 So.2d 847 (La. App. 1959). 26n.7

State v. City of Anchorage,
513 P.2d 1104 (Alaska 1973). 7,8

State v. Kessler,
117 S.W. 85 (Mo. App. 1909). 24,32,33

State v. Rural High School District No. 3,
220 P.2d 164 (Kan. 1950) 23

Sullivan v. Credit River Township,
217 N.W.2d 502 (Minn. 1974). 22

Sullivan v. Green Manufacturing Company,
575 P.2d 811 (Ariz. App. 1977) 13

Thomas County Taxpayers Association v. Finney,
573 P.2d 1073 (Kan. 1978). 7

Thompson v. IDS Life Insurance Company,
549 P.2d 510 (Or. 1976). 21

United Mine Workers of America, District 12 v. Illinois State Bar Association,
389 U.S. 217 (1967). 30,31

United States v. Hardcastle,
10 Alaska 254 (1942) 7,8,13

University of Alaska v. National Aircraft Leasing, Ltd.,
536 P.2d 121 (Alaska 1975). 19

In Re Verplank,
329 F. Supp. 433 (C.D. Cal. 1971) 31

Volkswagen of America, Inc. v. United States,
340 F. Supp. 983 (Cust. Ct. 1972), aff'd
494 F.2d 703 (Ct. Cust. & Pat. App. 1974) . . 11

Warren v. Thomas,
568 P.2d 400 (Alaska 1977). 11

Constitutions, Statutes and Rules

United States Constitution,

1st Amendment 30,31

14th Amendment, Section 1 28

Alaska Constitution

Art. I, Section 2 3,30

Art. I, Section 5 15,30,31

Art. I, Section 6 30,31

Art. I, Section 7 28

Art. II, Section 6. 33

Art. II, Section 13 13

Art. IX, Section 6. 27,33

Alaska Statutes

A.S. 01.05.006. . . . . 10n.3

A.S. 01.05.031. . . . . 10n.3, 12n.4

A.S. 08.08.010. . . . . 4,20, 26n.7

A.S. 08.08.080. 16,21,29

A.S. 08.08.100. 9,13

A.S. 08.08.110. 20

A.S. 08.08.120(a) & (b) 20

A.S. 14.40.160. 19

A.S. 22.05.010. 1

A.S. 24.20.070. . . . . 10n.3

A.S. 37.10.090. 27

A.S. 39.20.140. . . . . 26n.8

A.S. 44.62. 10

A.S. 44.62.310. . . . . 2,6,7,8,9, 10,15,18, 19,22,23, 26,33,35

A.S. 44.62.312. . . . . 2,8,9,15, 22,24,33

A.S. 44.62.320. 15

A.S. 44.62.330. . . . . 14n.6

A.S. 44.62.640. 13,15

A.S. 44.62.650. . . . . 12n.4

Session Laws of Alaska

Chapter 196 SLA 1955. 14,17

Chapter 143 SLA 1959. . . . . 10,12, 13n.5,14, 17,18

Chapter 178 SLA 1960. 14,18

Chapter 48 SLA 1966 . . . . . 9n.2,10, 13,18

Chapter 78 SLA 1968 19

Chapter 7 SLA 1969. 19

Chapter 98 SLA 1972. 19

Chapter 100 SLA 1972 19

Chapter 181 SLA 1976 . . . . . 14n.6,20

Rules of Court

Appellate Rule 7(b). 4

Civil Rule 12(c) 3

Civil Rule 56. 3

Civil Rule 82. 2,4

Other Authorities

Declaration of Independence of the United States of America, July 4, 1776. 25

J. Sutherland, Statutes and Statutory Construction (4th Ed. 1973). 7,8,11, 13,15,16, 21

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

United States Constitution:

1st Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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 5:

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Art. I, Section 6:

> The right of the people peaceably to assemble and to petition the government shall never be abridged.

Art. I, Section 7:

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

Art. II, Section 13:

> Every bill shall be confined to one subject. . . . The subject of each bill shall be expressed in the title.

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 including 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 §§ 230-630 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 the 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... 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. 138-140.

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. * record check this in Juneau

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

---

[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.

---

[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. 01.05.037(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. 1967); 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. 23.29, 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-

---

[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 1-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 1290, 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, 411 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,

---

[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.

MICHAEL J. FRANK
RICHARD BROWN
GREGORY M. O'LEARY

Michael J. Frank

Attorneys for Appellants/
Cross-Appellees

PRINTED BY KEN WRAY'S PRINT SHOP, INC. ANCHORAGE, ALASKA

FILED IN OPEN COURT
Date: 9/4/78 Krusk man

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG, BELL & GAGNON
Attorneys for Defendant
1007 West Third Avenue, Suite 303
Anchorage, Alaska 99501

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.

AUG 7 1978

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 2, and Article 1, Section 7 of the Constitution of the State of Alaska, and the due process provisions of the United States Constitution, and

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
1007 WEST THIRD AVE.
ANCHORAGE, ALASKA
TELEPHONE 279-5563

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 attorneys

Deputy Clerk

Service Acknowledged this 7 day of AUGUST, 1978

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

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
1007 WEST THIRD AVE.
ANCHORAGE, ALASKA
TELEPHONE 279-5563

AUG 09 '78

filed Aug 22, 1979

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

APPLICATION FOR ORDER COMPELLING COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

Comes now the State of Alaska, Office of the Ombudsman, by and through its attorneys, Hedland, Fleischer & Friedman, and respectfully applies to this Court, pursuant to AS 24.55.170(b), AS 44.62.590 and Rule 45(g) of the Alaska Rules of Civil Procedure, for an Order compelling the compliance of Donna C. Willard, President of the Alaska Bar Association with the Office of the Ombudsman Subpoena for Production of Documents served on her on August 2, 1979.

This Application is supported by the Affidavit of Frank Flavin, Ombudsman and the Memorandum filed herewith.

DATED at Anchorage, Alaska, this 22 day of August, 1979.

HEDLAND, FLEISCHER & FRIEDMAN

Attorneys for the Office of the Ombudsman

By: _____
Saul R. Friedman

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 278-3633

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

AFFIDAVIT OF FRANK FLAVIN

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Frank Flavin, being first duly sworn upon oath, deposes and says:

1. That I am the Ombudsman of the State of Alaska, Office of the Ombudsman.

2. That on August 2, 1979, Padeen Moriarty, acting as Ombudsman because of my absence from the State of Alaska, executed a Subpoena for Production of Documents, a copy of which is attached hereto as Exhibit "A", page one.

3. That the official records of the Office of the Ombudsman, attached hereto as pages two and three of Exhibit "A", indicate that said Subpoena was personally served upon Donna C. Willard and was also served upon her through service on John R. Loaff at the Alaska Bar Association.

4. That on August 10, 1979, the Office of the Ombudsman received a Response to Subpoena for Production of Documents, a copy of which is attached hereto as Exhibit "B", contesting the

IEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
NCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

jurisdiction of the Office of the Ombudsman and further indicating that the Subpoena for Production of Documents requiring production on Monday, August 13, 1979 would not be complied with.

FRANK FLAVIN

SUBSCRIBED and SWORN to before me this 22 day of August, 1979.

NOTARY PUBLIC in and for Alaska
My Commission Expires: 10-12-81

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

OFFICE OF THE OMBUDSMAN

In the matter of)
)
) SUBPOENA FOR PRODUCTION OF DOCUMENTS
Ombudsman Complaint)
No. A79-0641, A79-0642

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials relating to grievances concerning attorneys;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for fiscal year 1979; and

4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79

Padeen Moriarty
Acting Ombudsman

EXHIBIT 'A'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on Donna C. Willard by delivering a copy thereof to ~~him~~ her

DATED: August 2, 1979

Catherine M. Collen

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on John R. LOAFF by delivering a copy thereof to ~~him~~ at Bar Association.

DATED: August 2, 1979

Catherine M. Allen

Received by: John R. Loaff

Date: 2 August 1979

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

PERSONALLY DELIVERED

In the matter of)
)
Ombudsman Complaint)
No. A79-0641, A79-0642)
)

RECEIVED
AUG 10 1979
HEDLAND, FLEISCHER
& FRIEDMAN

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

EXHIBIT 'B'

The Board of Governors will meet on September 6, 1979 to consider the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
INSON, CONWAY
OUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
HORAGE, ALASKA
PHONE 279-5563

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

ORDER SETTING HEARING ON APPLICATION FOR ORDER COMPELLING COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

TO: Donna C. Willard, President
Alaska Bar Association

Pursuant to the Application for Order Compelling Compliance with Office of the Ombudsman Subpoena and the supporting documents filed therewith, a hearing on said Application will be held before this Court in Courtroom "____" in the Alaska State Court Building at Anchorage, Alaska, on the ___ day of _____, 1979, at the hour of _____ o'clock __.m.

DATED at Anchorage, Alaska, this ____ day of August, 1979.

_____
Judge of the Superior Court

IEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN, Plaintiff, vs. DONNA C. WILLARD, President, Alaska Bar Association, Defendant	)

Civil Action No. 3AN-

ORDER COMPELLING COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

This matter having come before the Court upon the Application for Order Compelling Compliance with Office of the Ombudsman Subpoena, and the Court having considered said Application, the pleadings and file herein and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that Donna C. Willard, President, Alaska Bar Association, shall produce the documents requested in the Office of the Ombudsman Subpoena for Production of Documents at the office of the Alaska Bar Association on _____ ___, 1979, at _____ o'clock ___.m.

DATED at Anchorage, Alaska, this ____ day of _____ 1979.

_____
Judge of the Superior Court

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3633

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, OFFICE OF THE OMBUDSMAN,

Plaintiff,

vs.

DONNA C. WILLARD, President, Alaska Bar Association,

Defendant

Civil Action No. 3AN-

MEMORANDUM IN SUPPORT OF
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

Statement of Facts

On June 12, 1979, the Office of the Ombudsman received two complaints concerning the Alaska Bar Association (Bar). Given case numbers A79-0641 and A79-0642, the first complaint was directed towards the adequacy of the Bar's investigation and resolution of citizen grievances against attorneys and the propriety of the salary and fringe benefits of the Bar Counsel. The second complaint alleged an improper use of Bar funds for travel and associated expenses not directly benefiting the Bar and further alleged an improper expenditure of Bar funds for the guest speaker at the 1979 Hawaiian Conference.

By letter dated July 16, 1979, the Ombudsman, Frank Flavin, advised Donna C. Willard, President of the Board of Governors of the Bar of the complaints and that the Office of the Ombudsman had commenced an investigation pursuant to AS 24.55.110. A copy of that letter is attached hereto as Exhibit "A". Basically, Mr. Flavin afforded Donna C. Willard the opportunity to voluntarily

IEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 278-3033

cooperate with the investigation by providing copies of documents and by allowing an examination of the Bar's financial records.

By letter dated July 19, 1979, attached hereto as Exhibit "B", Donna C. Willard, while offering certain records to Mr. Flavin as a member of the Bar, further advised him that the Board of Governors "declines to recognize any jurisdiction" of the Office of the Ombudsman.

By letter dated July 31, 1979, a copy of which is attached as Exhibit "C", Frank Flavin reiterated the jurisdiction of his Office and further advised Donna C. Willard that any dealings with him in this matter were in his official capacity as Ombudsman and not individually as an attorney licensed to practice law in the State of Alaska.

On August 2, 1979, Donna C. Willard was personally served with a Subpoena for Production of Documents issued by Padeen Moriarty, Acting Ombudsman. A copy of the Subpoena is attached hereto as Exhibit "D".

On August 10, 1979, three days prior to the date for production of documents pursuant to the Subpoena, the Office of the Ombudsman received a Response to Subpoena for Production of Documents from Donna C. Willard. That document is attached hereto as Exhibit "E". The main thrust of that exhibit is contained in two unsupported, conclusory statements concerning the jurisdiction of the Ombudsman. Suffice it to say the response indicates that there would be no compliance with the Subpoena. While Donna C. Willard also asks that the Ombudsman defer action enforcing the Subpoena until after the September 6, 1979 meeting of the Board of Governors, Donna C. Willard in her letter of July 19, 1979 (Exhibit "B") advised the Ombudsman of the Board's position that there was no jurisdiction over the Bar. In view of

IEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
NCHORAGE, AK. 99501
(907) 279-5528
ND (907) 279-3533

the jurisdictional issue raised by the Bar and the Ombudsman's obligation to investigate complaints, the Ombudsman has sought an Order from the Court requiring compliance with the Subpoena.

The Office of the Ombudsman
Has Jurisdiction to Investigate
Acts of the Alaska Bar Association

The Office of the Ombudsman was established in July, 1975 and has since that time been heavily utilized by its citizenry. The Office of the Ombudsman has two responsibilities: (1) to receive complaints from the public and to investigate and act upon such complaints; and (2) to improve public administration. As an external critic of governmental operations, scrutiny by the Office of the Ombudsman is not always welcome.

In any event, AS 24.55.100 gives the Ombudsman "... jurisdiction to investigate the administrative acts of agencies". AS 24.55.150 sets forth those administrative acts which are appropriately the subject of investigation because they may be:

> "...(1) contrary to law;
>
> (2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;
>
> (3) based on a mistake of fact;
>
> (4) based on improper or irrelevant grounds;
>
> (5) unsupported by an adequate statement of reasons;
>
> (6) performed in an inefficient or discourteous manner; or
>
> (7) otherwise erroneous."

The term "administrative act" is defined in AS 24.55.330(1) as:

FIEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 276-5528
AND (907) 276-3833

"... an action, omission, decision, recommendation, practice, policy, or procedure of an agency, but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion;"

The definition of the term "agency", the issue raised by the Bar in this case, is defined in AS 24.55.330(2) to include:

"a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality, or in the executive, legislative, or judicial branches of state government, and a department, office, institution, corporation, authority, organization, commission, committee, council or board of a municipality or of the state government independent of the executive, legislative and judicial branches; it also includes an officer, employee or member of an 'agency' acting or purporting to act in the exercise of his official duties, but does not include the governor, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the superior or district court, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board;"

The extremely broad jurisdictional grant to the Ombudsman is certainly consistent with the legislative desire to provide, in the Office of the Ombudsman, an accessible and official clearinghouse for citizen complaints. The Bar fits one or more of the entities defined as "agency" in AS 24.55.330(2). First, it is a creature of the state legislature having been created by the legislature as "... an instrumentality of the state ..." AS 08.08.010. The legislature further established the Board of Governors and conferred upon it certain powers and duties. AS 08.08.030 and .080. Those powers relate in part to the holding of annual and special meetings, the collection and disbursement of funds and the organization and functioning of the Bar.

FEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528
AND (907) 276-3633

In essence, the legislature has charged the Bar with certain managerial functions relating to matters of public concern. That such functions are matters of public concern can hardly be contested. As the Court stated in In Re Paul, 17 Alaska Reports, 360 (D.C. Alaska, 1957):

> "For over 30 years there has been a constant growth in the system of integrated bars throughout the nation; in some states they have been created by statute, in some by court rule, but in all, the Bar of the state or other jurisdiction, has taken a leading role in policing their membership so that the standards of the lawyers would be kept at a high level in order that in their dealings with the public they would maintain proper comportment so as to protect the public interest and safeguard the general welfare of those with whom they dealt." Id. at 368.

The Court in Petition of Moody, 524 P.2d 1261 (Alaska 1974) also discussed the public benefits of an integrated bar stating that:

> "The disadvantages to an individual in such a system are believed to be outweighed by the advantages achieved by the profession as a whole, and by the public to whose benefit it is that the profession be governed effectively by an authoritative organization." Id. at 1266.

As far as the jurisdiction of the Office of the Ombudsman over the Bar is concerned, given the absence of any statutory exemption which explicitly or even implicitly contravenes the broad jurisdictional grant, an investigation by the Office of the Ombudsman of alleged administrative abuses by the Bar is clearly contemplated by the legislature. In the case of Application of Peterson, 499 P.2d 304 (Alaska, 1972), Peterson petitioned the Alaska Supreme Court for admission to the Alaska Bar Association alleging that the hearing afforded him by the Bar after he failed

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279 5528
AND (907) 276 3633

the January and September, 1967 bar examinations was inadequate and that the scoring system utilized was unfair. The Court held that the "substantial evidence test" was the appropriate standard of administrative review stating that "...we have consistently adhered to the substantial evidence test as the appropriate scope of review with regard to appeals from administrative agencies." Id. at 307 (Emphasis added).

The Court obviously considered the Bar to be an administrative agency when it stated that:

> "The legislature has expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Alaska Administrative Procedure Act, AS 44.62.010-650." Id. at 306.

However, the Court did not find that the Bar was an agency because it was subject to the A.P.A. but rather that it was an agency which was subject to that Act. The subsequent action of the legislature in deleting the Bar from the list of agencies subject to the Administrative Procedure Act cannot seriously be relied upon to support a conclusion that the legislature was therefore indicating that the Bar was not an agency. Such an analysis was rejected by the Court in Chronicle Publishing Company v. Superior Court, 354 P.2d 637 (Calif. 1960). In Chronicle, the publishing company served interrogatories on the State Bar of California seeking information as to complaints and disciplinary actions taken against Victor E. Cappa, an attorney who had filed a libel action against it. In considering whether or not the State Bar could claim a privilege based upon a section of the Code of Civil Procedure relating to testimony of a "public officer" the Court stated:

FEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 279-3633

"That the Legislature considered the State Bar as at least akin to a state public body or agency and hence its officers as 'public officers' is illustrated by the last paragraph of section 6001, where it appears that the Legislature felt the necessity of providing that laws prescribing procedures for state bodies, agencies, or classes, did not apply to the State Bar, thus indicating that the Legislature considered the State Bar in their category..." Id. at 645.

In McGregor v. Clawson, 506 S.W.2d 922 (Tex. 1974) the Court was faced with a question concerning the proper venue for a disbarment brought by the State Bar of Texas against McGregor, an attorney licensed in Texas. While the case turned on whether venue provisions in the State Bar Act prevailed over a more general civil rule, the Court did discuss the governmental status of the Bar.

"The State Bar Act is purely a creature of statute, prescribing the machinery and procedure by which the State Bar has been empowered to bring and maintain the disbarment suit in question. But for the statute, the State Bar and District Grievance Committee would have no existence." Id. at 928.

The Court went on to say that:

"The State Bar and its Grievance Committees exist solely by virtue of the exercise of the power of the State, acting through its legislative department. They are administrative agencies of the State. ... The Legislature could at any time terminate their existence and provide other and different means for handling of the matters now entrusted to them. They (the State Bar and Grievance Committee) are creatures of the State. An agency created by the State for the better ordering of government has no privileges, immunities or rights under the State and Federal constitutions which it may invoke in opposition to the will of its creator." Id. at 929.

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 279-3633

The Office of the Ombudsman
Properly Subpoenaed Donna C. Willard

AS 24.55.170(a)(1) confers upon the Office of the Ombudsman the power to issue subpoenas compelling production of documents. AS 24.55.170(b) further sets forth the procedures to be followed should the person subpoenaed refuse to comply. The Ombudsman has properly applied to this Court for an order compelling compliance.

Conclusion

For the reasons set forth above, this Court should make and enter its Order requiring Donna C. Willard to comply with the Office of the Ombudsman's Subpoena for Production of Documents.

DATED at Anchorage, Alaska, this 21st day of August, 1979.

HEDLAND, FLEISCHER & FRIEDMAN, P.C.

Attorneys for the Office of the Ombudsman

By: _____
Saul R. Friedman

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 279-5528
AND (907) 276-3633

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch W0
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 16, 1979

Donna C. Willard, Esq.
President
Board of Governors
Alaska Bar Association
360 K Street
Anchorage, Alaska 99501

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

Please take notice that the Office of the Ombudsman has received the following complaints:

A79-0641: that the Alaska Bar Association has not adequately investigated or resolved grievances filed by citizens against attorneys subject to the Bar Association's grievance and disciplinary procedures and that the employment contract for the Bar Counsel is excessive in salary and vacation.

A79-0642: that members of the Board of Governors have expended excessive amounts of Bar Association funds for travel and associated expenses outside the State of Alaska for activities not directly benefitting the Alaska Bar Association or its membership; that the expenditure of Bar Association funds for the guest speaker at the 1979 Hawaiin Conference was improper.

The Office of the Ombudsman has commenced this investigation pursuant to AS 24.55.110. The Office of the Ombudsman has jurisdiction over administrative acts of the Alaska Bar Association pursuant to AS 24.55.100 and AS 08.08.010.

Our investigators plan to examine the financial records of the Association on July 30, 1979, beginning at 8:00 a.m., at the Bar Association offices. If this time is inconvenient we will be glad to reschedule the inspection.

Pursuant to AS 24.55.100 we also request copies of the following documents:

1) Minutes of the Board of Governor's meetings for the last two fiscal years;

2) A copy of the employment contract for the Alaska Bar Counsel; and

EXHIBIT 'A'

3) A copy of statistical reports concerning the number and disposition of all grievances filed with the Bar Association in the last two years.

We would appreciate receiving the above information prior to July 30, 1979.

Thank you very much for your consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:rj

EXHIBIT 'A'

BOARD OF GOVERNORS

ALASKA BAR ASSOCIATION

P.O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

WILLIAM GARRISON, BAR COUNSEL

OFFICERS
DONNA C. WILLARD
PRESIDENT
ANCHORAGE

WILLIAM B. ROZELL
PRESIDENT ELECT
JUNEAU

JONATHAN H. LINK
VICE PRESIDENT
FAIRBANKS

EDWARD G. KING
SECRETARY
KETCHIKAN

BOARD MEMBERS
ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
ELIZABETH P. KENNEDY
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

HAND DELIVERED

July 19, 1979

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Frank Flavin
Ombudsman
840 K Street, Room 203
Anchorage, Alaska 99501

Dear Frank:

As you are aware, the Board of Governors is in receipt of your letter dated July 16, 1979, setting forth two complaints directed at the Board and staff of the Alaska Bar Association.

I found our meeting with you, on July 18, 1979, to be very informative and have relayed to the Board the information that you provided.

After due consideration, the Board wishes me to inform you that all members of this Association are entitled to inspect all books and records not catalogued as confidential. Therefore, we will be pleased to provide you, in the near future, for review at the Bar office, the following records:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for 1979; and

ANCHORAGE
OFFICE OF THE OMBUDSMAN

4. Upon request I will furnish, from my personal files, the brochures and other data concerning the various programs in connection with the American Bar, Western States, and Bar Leadership meetings.

There is no employment contract, in writing, with Bar Counsel. However, I can inform you that, on May 19, 1979, the Board unanimously approved a one year contract, retaining Mr. Garrison at an annual salary of $45,000.00 and providing for thirty-five days of paid vacation. This constituted an additional twenty days of vacation over his 1978 contract, in lieu of any salary increase.

Furthermore, Mr. Garrison's right to take his vacation was restricted to times when no bar examination was in progress and when no heavy case load on admissions or discipline was pending.

Of further benefit to you may be the fact that Mr. Garrison has been admitted to the practice of law since 1966 and that, prior to being retained by the Bar Association in 1977, he was an Assistant District Attorney in this state for some five years.

With respect to the Minutes, which will take about two days to review for deletion of Executive Session material, they will be ready for your review on or before July 27, 1979, together with the Discipline reports.

In connection with both Discipline and Admissions matters, we are sure you realize that the Bar Association and the Board of Governors act only as agents of the Supreme Court of Alaska. Therefore, any further requests dealing with either areas should be directed to that entity.

I would request, with respect to the financial records, that your review await my return from the Ninth Circuit Judicial Conference when I shall finally have an opportunity to review and approve the audit which, as I informed you, is currently being conducted by a Certified Public Accountant. That task should be completed no later than August 3. Also, I would prefer to be present during your examination and would appreciate it if you would coordinate with me.

As I mentioned earlier, the foregoing information is being provided to you in your capacity as a member of the Alaska Bar Association. The Board believes, however, that the Association does not fall within the jurisdiction of the Ombudsman. Not only has the Superior Court in Horowitz v The Alaska Bar Association determined that we are not a state agency but also, similar rulings have been made at the administrative level. Specifically, admission to the State Employee Retirement System and to the State Employee Credit Union have both been denied.

EXHIBIT 'B'

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Therefore, the Board, at this time, respectfully declines to recognize any jurisdistiction which you may feel you have in your official capicity. Furthermore, nothing contained in this letter or any agreements which we might arrive at with you to provide materials constitutes a waiver of the Bar Association's right to assert the jurisdictional issue and any other defenses which it might have.

If I can be of any further assistance, please do not hesitate to call.

Sincerely yours,

ALASKA BAR ASSOCIATION

Donna C. Willard
President

wj

EXHIBIT 'B'

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

July 31, 1979

Donna C. Willard, Esq.
President
Alaska Bar Association
P.O. Box 279
Anchorage, Alaska 99510

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

I have reviewed our statute and relevant court cases and feel strongly that the Alaska Bar Association is subject to the jurisdiction of the Office of the Ombudsman.

All previous and future contacts between myself or any other member of this office are within the scope of the authority and duties of the Office of the Ombudsman.

I am treating these complaints as any other complaints in this office. Consequently, they have been assigned to Paddy Moriarty, Deputy Ombudsman and Supervisor of the Anchorage office, for investigation. Any future contacts will be made by her.

I have reviewed the specific information given by our complainants. While we are interested in all Board of Governor's travel for the past two fiscal years, the complainants specifically mentioned Atlanta, San Diego, Chicago and Hawaii.

Thank you for your patience and consideration in this matter.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF:rj

OFFICE OF THE OMBUDSMAN

In the matter of)
)
) SUBPOENA FOR PRODUCTION OF DOCUMENTS
Ombudsman Complaint)
No. A79-0641, A79-0642

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials relating to grievances concerning attorneys;

2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;

3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for fiscal year 1979; and

4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79

Tadeen Moriarty
Acting Ombudsman

EXHIBIT 'D'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on Donna C. Willard by delivering a copy thereof to ~~him~~ her

DATED: August 2, 1979

Catherine M. Allen

EXHIBIT 'D'

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on John R. LOAFF by delivering a copy thereof to ~~him~~ at Bar Association.

DATED: August 2, 1979

Catherine M. Allen

Received by John R. Loaff

Date: 2 August 1979

EXHIBIT 'D'

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association
420 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 279-5563

RECEIVED
AUG 10 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

STATE OF ALASKA

OFFICE OF THE OMBUDSMAN

PERSONALLY DELIVERED

In the matter of Ombudsman Complaint No. A79-0641, A79-0642	)

RECEIVED
AUG 10 1979
HEDLAND, FLEISCHER & FRIEDMAN

RESPONSE TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DONNA C. WILLARD, President, Alaska Bar Association, responds to the subpoena directed to her under date of August 2, 1979 in the following manner:

1. The Alaska Ombudsman does not have jurisdiction to investigate the acts of the Alaska Bar Association.

2. To the extent, if any, that Alaska Statutes purport to confer jurisdiction on the Alaska Ombudsman to investigate acts of the Alaska Bar Association, such statutes are in conflict with the doctrine of separation of powers.

3. That Donna C. Willard will be absent from the State of Alaska on official business of the Alaska Bar Association from August 7, 1979 to August 16, 1979.

4. The President-Elect of the Alaska Bar Association is out of the State of Alaska on official business of the Alaska Bar Association until August 16, 1979.

5. The regularly employed bar counsel of the Alaska Bar Association is presently out of the State of Alaska.

6. Donna C. Willard has no authority to release information concerning the Alaska Bar Association without the prior approval of the Board of Governors of said association.

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 279-5563

Exhibit E

the Ombudsman subpoena. President Willard requests that all actions of the Ombudsman relating to enforcement of the subpoena be deferred until after the Board of Governors has had time to consider the subpoena and instruct Donna C. Willard as to the Board's response.

7. Category numbered 4 of the subpoena dated August 2, 1979 exists only in the form of personal, as opposed to official, records of Donna C. Willard.

DATED this 10th day of August, 1979.

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for the Board of Governors
of the Alaska Bar Association

By: _____
John M. Conway

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
PHONE 279-5563

Exhibit E

Page 2 out of 2