INTEGRATED

+

NONINTEGRATED

BAR ASSOC.

#11

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

RONALD L. KULL, EXECUTIVE DIRECTOR
WILLIAM GARRISON, BAR COUNSEL

March 2, 1979

Richard A. Bradley
Legislative Counsel
Legislative Affairs Agency
Pouch Y
Juneau, AK 99811

Dear Mr. Bradley:

I have your letter of February 28th concerning questions on bar organizations.

The following states have intergrated bars: Alabama, Alaska, Arizona, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming, as well as the District of Columbia.

In states not having integrated bars, admission and discipline functions generally are handled directly by the Supreme Court, through specific boards and commissions set up for this purpose. In a few cases, discipline is handled directly by the Attorney General's Office.

The third question in your letter obviously calls for some conclusions on my part which might or might not be self serving. During my career, I have worked for a voluntary bar association, in Kansas, and two integrated bars, here and in Idaho. In a voluntary bar situation you obviously have much more of a "social club" atmosphere. That is, a lawyer is free either to join or not to join. It naturally follows this must force the voluntary bar organization to do a better job for its members; otherwise, they will not pay their dues. On the other hand, in a voluntary bar state the discipline and admissions functions may or may not be effective. Again, the voluntary bar has no discipline authority other than to withhold membership. In my experience, it was the general rule that errant lawyers in a voluntary bar association state did not belong to the bar association in the first place, so the association literally had no disciplinary function other than a possible public centure. Naturally, the whole burden of expense on disciplinary and admissions enforcement in a voluntary bar state ordinarly will

fall directly on the tax payer since this must be a state function. In an integrated bar state, although we are to a degree subsidized for admission and discipline, still the bar spends roughly twice this amount on these functions and of course funds of the Alaska Bar Assocation are not derived from tax revenue. Also, in an integrated bar state, the bar does have much more control over the activities of lawyers admitted to practice in that particular state. The mandatory membership also provides a better revenue base for other eleemsynary activites such as delivery of legal services, professional and public education and other worthwhile functions.

While the answers to questions one and two posed in your letter are entirely factual you may take the third section as my own view entirely and not in any way a pronouncement by the Alaska Bar Association.

If I can be of further assistance to you please contact me.

Thank you for your interest.

Sincerely yours,

Ronald L. Kull
Executive Director

RLK/wj

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 15, 1979

SUBJECT: Bar Association structure
[Work Order No. 6673]

TO: Representative Charles H. Parr

FROM: Richard A. Bradley, Legislative Counsel

Your work order request asked three questions:

(1) Which states do not have integrated bar associations.

(2) For those states, where does the disciplinary and admissions authority lie.

(3) What are the pros and cons of an integrated bar.

I requested answers to the first two questions from the Alaska Bar since there did not seem to be ready answer to them in Juneau. The executive director of the bar advises:

(1) The following states have an integrated bar: Alabama, Alaska, Arizona, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The District of Columbia also has an integrated bar.

(2) The admission and discipline function are generally handled through the Supreme Court in states without an integrated bar. The Court typically establishes a board or commission for this purpose. In a few cases, discipline might be handled directly through an Attorney General's office. [He offered no citations to statutes or rules for this conclusion, but it is undoubtedly accurate].

Some clear regional patterns appear in this listing. Kansas and Colorado (and Hawaii) are the only states west of the Mississippi River that are not integrated. Arkansas and Tennessee are the only states of the Old South (the Confederacy) that are not integrated. No states of the Northwest Territory and only New Hampshire and Rhode Island in New England are integrated.

Having noted this phenomenon, I am somewhat reluctant to interpret it. But I would not be surprised if the integrated bar movement occurred after the development of relatively strong urban bar associations in the East and Midwest. Very likely these associations, which by definition are voluntary associations, may have addressed the professional needs of the bar in those areas. And the admission and discipline functions, which are relatively recent developments in American bar history, were then allowed to go to supreme courts. As you may know, the integrated bar in Alaska grew out of a perceived arbitrariness in discipline by the judiciary, and an almost undoubted arbitrariness in the admissions policy of the Attorney General.

As for your third question, the pros and cons of an integrated bar, the answers are more subjective, must necessarily be viewed as my own and derived from my experiences.*

(1) My view is that the organized (integrated) bar in Alaska is the most responsible and responsive professional regulatory board in Alaska. The other professions have not been as involved in progressive and responsible professional discipline; it is likely that no other profession in Alaska gives its examination for admission to the profession with the thoroughness and the sophistication that the Bar does. On the other hand, the fact of the rapidly increasing membership in the bar is perhaps the best indication that the examination is not utilized by the Board as a device for the exclusion of members -- practices other professions have been accused of.

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* You should know that I have been somewhat active in bar activities and that I served one term on the Board of Governors of the Alaska Bar, from 1973 to 1976.

(2) Integrated bars and voluntary bars do not compare well. It is essentially meaningless to talk of discipline or admission responsibilities for voluntary bars; rather, an attorney in the state (who was admitted by the Supreme Court) will likely be admitted to membership in voluntary bars if he pays his dues. And, he can resign or fail to renew membership as he pleases.

Thus, voluntary bars are viewed as "social clubs." Since the organization will fail if no one joins it, it may be viewed as doing a better job for its members.

But the success of such organizations should not mask the fact that they have none of the difficult and unpleasant responsibilities of admissions and discipline. They may "expel" members but that fact does not deprive the expelled member of his status as an attorney. Thus, it is usually noted that errant attorneys do not join or belong to a voluntary association.

(3) The expense of discipline and admissions will fall directly on the taxpayer in a voluntary association state since this will be a state function. While the Alaska Bar receives some funds from the Court System for discipline (or has in the past few years), the larger burden falls on the bar member who now pays $170 for annual dues and $10 for an annual client security fund payment.

By comparison note that physicians pay, in effect, an annual fee of $50. AS 08.64.315(6). Their examination and admission processes are also either more perfunctory or the cost is absorbed by the state since those fees are lower than those imposed for lawyers. See AS 08.64.315.

(4) It is sometimes stated that the funds to support admissions and discipline of the Alaska Bar are not derived from tax revenue. In my view this statement is both true and false.

It is false mainly because the legislature (or the Court under the typical court integration of a bar) requires the payment of the dues for continued membership in the association and membership must be maintained in the association to practice law. The membership fee is accordingly clearly a tax or license fee levied under the police power.

It may be true because there is no reason to assume that a legislatively set annual fee for lawyers will exceed that for other professions. If that assumption is indulged and if the level of service is maintained, tax revenues will be required to support admissions and discipline if the fees are set, for example, at the level charged physicians.

(5) The letter of Ron Kull, executive director of the bar, on which I rely for a portion of this memorandum, is enclosed for your information.

If I can assist further, please advise.

RAB:nem

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

file copy

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

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

May 26, 1980

SUBJECT: Alaska Bar Association
(CSHB 984)

TO: Representative Charles H. Parr
Chairman, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

The bill requested is enclosed.

I wish to call your attention to certain provisions of the bill which have been prepared in accordance with your request.

The amendment to AS 08.08.100 has been included as requested. The changes that were made beyond those requested by the committee conform the provisions to present statutory style. AS 08.08.090 was repealed as inconsistent with the amendment to AS 08.08.100.

Note, however, that there are some problems.

The present status may be briefly summarized. AS 08.08.100 provides that the regulations adopted by the board are not subject to the Administrative Procedure Act.

Alaska Bar Rule 62, adopted by the Supreme Court at the request of the board, provides that "bylaws and regulations for the governance of the Alaska Bar" may be adopted by the board "in accordance with this Rule." These provisions may be viewed as generally consistent with one another.

Alaska Bar Rule 62 is a briefly stated procedures section. While it does not contain all the details of the APA, essential due process will be granted to the extent that it is followed.

But the amendment putting the Board of Governors procedure for the adoption of regulations under the APA is inconsistent with Bar Rule 62.

I have added a temporary law section and amended the title to alert the legislature that its amendment to AS 08.08.100 constitutes an amendment to Alaska Supreme Court Bar Rule 62. Acknowledging that effect should also comply with the requirements of Article IV, sec. 15 of the state Constitution as interpreted by the Supreme Court -- that any amendment to court rules be specifically recognized as such by the legislature. Leege v. Martin, 379 P.2d 447 (Alaska 1963).

And finally, we are uncertain whether the legislature may amend rules of court regulating the Bar. This result occurs because the authority of the legislature over rules in Article IV, sec. 15 is limited to "rules of practice and procedure in civil and criminal cases in all courts" [compare Uniform Rule of the Legislature 38(e)] and perhaps to "rules governing the administration of all courts." Whatever the limits of those rules, it is generally agreed that the rules governing the practice of law are not included within their boundaries.

RAB:ljb

Enclosure

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

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 undefinable. 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 New York
Court of Appeals

1 No. 482
In the Matter of
Harry G. Gordon,
Appellant,
Committee on Character and
Ftness,
Respondent.

OPINION

(482).John Cary Sims, Washington,D.C., for appellant, pro hac vice.

Robert Abrams,Attorney-General(Daniel M. Cohen of counsel) respondent pro se pursuant to Exec. Law §71.

COOKE, Ch. J.:

Appellant, a resident of North Carolina, mounts this challenge to the constitutionality of CPLR 9406 (subd 2). That rule provides that a person may not be admitted as a member of the bar of this State unless he furnishes proof "that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice".[1] Among other infirmities, it is

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[1] In addition to those who are actual residents of New York, section 464 of the Judiciary Law provides that a person otherwise eligible for certification by the Board of Law Examiners for admission to the bar shall be considered to be an actual resident and citizen of the state during any period of time in which he is employed full time within the state of New York.

claimed that the rule is violative of the privileges and immunities clause of article IV of the Federal Constitution.[2] We agree with that contention.

A graduate of the University of Virginia Law School and member of the bars of Virginia and North Carolina, appellant was employed as in-house counsel to Western Electric Company in New York City. After working in New York for over two years, appellant qualified for, took and passed the New York State Bar Examination in July, 1977.[3] Before he was notified of the results of the examination, however, appellant was unexpectedly transferred to North Carolina by his employer, where he presently resides.

Apparently under the dual impression that his prior New York residence qualified him for admission to the bar[4] and that, by virtue of his employment, he was engaged in the practice of law in New York, appellant filed an application for admission to practice with the Committee on Character and Fitness of the First Department (Judiciary Law, §90, subd 1; CPLR 9402; 22 NYCRR 520.9).[5] In view of appellant's North Carolina residence, the Committee deferred action on his application. Appellant thereupon challenged the residency requirement by petitioning the Appellate Division for admission without certification of the Committee on Character and Fitness (CPLR 9404). The Appellate Division denied the application, holding CPLR 9406 (subd 2) constitu-

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[2]"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" (US Const, art IV, §2, cl 1).

[3]At the time this controversy arose, eligibility to take the bar examination, like eligibility for admission to bar, was premised, at least in part, upon the residency of the applicant (22 NYCRR 520.2 [a][3]).

[4]Actually, appellant was required to satisfy two six-month durational residency requirements: one to take the bar examination (22 NYCRR 520.2[a][3]; the other to satisfy the admission requirements of CPLR 9406 (subd 2).

[5]In addition to meeting two durational residency requirements (fn 4, supra), three other conditions must be satisfied. Unless waived, the applicant must pass an examination conducted, semiannually, of the State Board of Law Examiners. Second, the applicant must possess the requisite character and fitness consistent with that required of an attorney. To assist in this evaluation, the applicant must furnish the Committee on Character and Fitness with affidavits attesting to his good moral character, fill out a detailed questionnaire and undergo a personal interview with a Committee member. Finally, the applicant must swear that he will support the Federal and State Constitutions (see, generally, Law Students Research Council v Wadmond, 401 US 154, 156-157).

tional (67 AD2d 215). Although appellant relies upon a number of constitutional provisions in support of his claim that the residence requirement for admission to the bar is unconstitutional, [6] it is necessary only to address the claim that the rule denies nonresidents the same privileges and immunities accorded residents.

The principal purpose of the privileges and immunities clause, like the commerce clause, [7] is to eliminate protectionist burdens placed upon individuals engaged in trade or commerce by confining the power of a state to apply its laws exclusively to nonresidents (Paul v Virginia, 75 US 168, 180; Tribe, American Constitutional Law, §6-32, at p 406). In essence, the clause prevents a state from discriminating against nonresidents merely to further its own parochial interests or those of its residents [8] (Hicklin v Orbeck, 437 US 518; Mullaney v Anderson, 342 US 415; Toomer v Witsell, 334 US 385). While

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[6] It is asserted that CPLR 9406 (subd 2) denies appellant equal protection and due process of law (US Const, amdt 14). Although unnecessary to pass upon these claims, we note that similar challenges to six-month durational residency requirements have been rejected in the past (Matter of Tang, 39 AD2d 357, app dsmd 35 NY2d 857; Tang v Appellate Div., 373 F Supp 800, affd 487 F2d 138, cert den 416 US 906; Wilson v Wilson, 416 F Supp 984, affd 430 US 925; Suffi ng v Bondurant, 339 F Supp 257, affd sub nom Rose v Bondurant, 409 US 1020).

[7] Many have recognized the "mutually reinforcing relationship" between the privileges and immunities and the commerce clauses (Hicklin v Orbeck, 437 US 518, 531; Toomer v Witsell, 334 US 385, 407-409 [Frankfurter, J., concurring]; Tribe, American Constitutional Law, §6-32, at p 404). The manifest distinction between the two is that the privileges and immunities clause is an affirmative grant of rights to individuals whereas the commerce clause has been read to limit the power of the individual states to restrict the free flow of goods and services across state lines (see City of Philadelphia v New Jersey, 437 US 617, 621-622).

[8] At one time, the privileges and immunities clause was thought to recognize what, within the philosphical terminology of the day, were termed "natural rights" (see Corfield v Coryell, 6 Fed Cas 546 [No. 3230]). Under this earlier theory, the purpose of the clause was to guarantee every citizen a group of fundamental rights which no state could transgress (see Calder v Bull, 3 US 386, 388). With the passage of time, however, it has become settled that the clause does not import that a citizen carries with him a set of well defined privileges and immunities no matter where he may travel. Rather, the clause is meant "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy" (Toomer v Witsell, 334 US 385, 395).

the precise reach of the clause must await further clarification, it is settled that a state may not premise an individual's right to engage in his chosen occupation within its borders solely on residence. Thus, the clause has been consistently interpreted to prevent a state from imposing discriminatory burdens on nonresidents, whether by means of artificial trade barriers in the form of unequal licensing fees (Toomer v Witsell, supra), taxes imposed on out-of-state vendors (Ward v Maryland, 79 US 418), or employment preferences granted only to residents (Hicklin v Orbeck, supra).

This is not to say, of course, that the privileges and immunities clause forbids a state from ever differentiating between residents and nonresidents. Matters which directly implicate its sovereignty, such as voting (Dunn v Blumstein, 405 US 330) or entitlement to public office (Chimento v Stark, 414 US 802), furnish ready examples of areas in which a state may constitutionally condition eligibility upon residence. Moreover, where the disparate treatment does not implicate "those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity", there is no requirement that the state treat resident and nonresident alike [9] (Baldwin v Montana Fish & Game Comm., 436 US 371, 383). But those areas exempt from privileges and immunities protection are narrow and do not embrace the grant of a license to practice law.

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[9] As noted, the breadth of the privileges and immunities clause is presently unclear. In any event, there are certain rights deemed fundamental for privileges and immunities purposes which severely limit the power of the state to discriminate against nonresidents. In addition to the right to engage in one's chosen occupation, these fundamental rights include the right to own and alienate property within the state (Blake v McClung, 172 US 239), the right to equal treatment in the courts (Canadian Northern Ry. v Eggen, 253 US 553) and the right to seek services available in the state (Doe v Bolton, 410 US 179). A nonresident wishing to exercise at least these rights in a foreign state is entitled to the same privileges and immunities a resident of that state receives.

No extended discussion is necessary to demonstrate that the right to pursue one's chosen occupation free from discriminatory interference is the very essence of the personal freedom that the privileges and immunities clause was intended to secure (Hicklin v Orbeck, supra, at pp 524-525; Ward v Maryland, supra, at p 430). It is now beyond dispute that the practice of law, despite its historical antecedents as a learned profession somehow above that of the common trades, is but a species of those commercial activities within the ambit of the clause (cf. Bates v State Bar of Arizona, 433 US 350, 371-372; Goldfarb v Virginia State Bar, 421 US 773, 788). From the standpoint of both the public and the legal profession itself, the practice of law is analogous to any other occupation in which an independent agent acts on behalf of a principal.

Nor can it be maintained that CPLR 9406 (subd 2) works no invidious discrimination against nonresidents. An attorney admitted to practice in one state who desires to practice in New York must often give up an established practice and residence, move to New York and forfeit the right to engage in his or her chosen occupation for at least six months and often appreciably longer. One who desires to engage in a multistate practice, concentrating on a particular area of expertise, is effectively foreclosed from doing so by the requirements of CPLR 9406 (subd 2). Those attorneys now employed by large corporations, currently comprising more than ten percent of the legal profession (Barrister, Spr 1979, p 43), whose duties entail frequent interstate relocation are similarly penalized by the operation of the rule.[10] The disparity of treatment between residents of the State and nonresidents is manifest: given two equally qualified candidates who have passed

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[10] These considerations, together with an often unstated feeling that durational residency requirements constitute protectionist trade barriers for the economic protection of local interests, have given rise to numerous calls to nationalize admission to the bar (e g., Smith, Time for a National Practice of Law Act, 64 ABAJ 557; Brakel & Lon, Regulating the Multistate Practice of Law, 50 Wash L Rev 699; Note, 56 Cornell L Rev 831).

the bar examination (or, for that matter, meet the other requirements for admission on motion) and possess the requisite character and fitness, the rule would deny one admission based solely upon residence.

Where the state imposes a wide-ranging restriction which significantly impairs the efforts of nonresidents to earn a livelihood, the discriminatory action must surmount two distinct hurdles. First the governmental interest claimed to justify the discrimination must be carefully examined to determine whether that interest is substantial, that is, whether "non-citizens constitute a peculiar source of the evil at which the statute is aimed" (Toomer v Witsell, supra, at p 398). Assuming that nonresidents do indeed present a problem with which the state may legitimately address, the inquiry then focuses upon whether the means adopted to achieve that goal are narrowly drawn and are the least restrictive alternatives available (Hicklin v Orbeck, supra, at p 528).

It is undisputed that New York has a constitutionally permissible interest to assure that those admitted to the bar possess knowledge of the law as well as the character and fitness requisite for an attorney (Judiciary Law, §90; Law Students Research Council v Wadmond, 401 US 154, 159; Schware v Board of Bar Examiners, 353 US 232, 239). But appellant has not been excluded from membership in the bar due to any challenge to his knowledge of the law of this State or to his good character. Rather, the exclusion is based solely upon his residence in North Carolina -- a criterion which serves no purpose other than to deny persons the right to pursue their professional career objectives because of parochial interests.

There is nothing in the record to indicate that an influx of nonresident practitioners would create, or even threaten to create, a particular evil which the State would be competent to address. No valid reason is profferred as to why admission to practice law before

the courts of this State must be made dependent upon residency. Indeed, aside from an oblique reference to the purported "dangers" said to be inherent in the licensing of nonresident lawyers, the State is at a complete loss to justify the blanket discrimination against nonresidents arising from the operation of CPLR 9406 (subd 2). Nevertheless, some have attempted to identify reasons supporting residency requirements for admission to the bar (see Note, 92 Harv L Rev 1461, 1480). On the whole, however, these justifications serve only administrative convenience and thus are not closely tailored to serve a legitimate State interest (cf. Sonsa v Iowa, 419 US 393, 406).

The rationale most often used to uphold residency requirements is the need of bar admission authorities to observe and evaluate the applicant's character (cf., e.g., Lipman v Van Zandt, 329 F Supp 391, 402; Webster v Wofford, 321 F Supp 1259, 1262; Note, 71 Mich L Rev 838, 850-852). But in this State, the applicant himself, in submitting his application for admission, is available to the Committee on Character and Fitness and is personally interviewed by one of its members. In some cases, nonresidents are permitted to furnish affidavits attesting to the applicant's character and fitness to practice law. Nor may the discrimination visited upon nonresidents be justified upon the ground that only resident attorneys will be amenable to the supervision of our courts (67 AD2d 215, 217; Matter of Tang, 37 AD2d 357, 360, app dsmd 35 N.2d 851). To be sure, the State has a legitimate interest in controlling the attorneys who appear in its courts. Again, however, there are alternatives which are less restrictive than denial of admission to practice which would further this interest. For example, nothing prevents the State from enacting legislation requiring nonresident attorneys to appoint an agent for the service of process within the State (cf. Hess v Pawloski, 274 US 352; Doherty & Co. v Goodman, 294 US 623). Moreover, remedies currently available to

safeguard against abuses by resident attorneys -- contempt, disciplinary proceedings and malpractice actions --could be applied with equal force against mis reant nonresident attorneys.

That the State has an obligation to ensure the competency and rectitude of its counselor-at-law is a proposition with which none may quarrel (In re Griffiths, 413 US 717). This obligation, however, may not be fulfilled at the expense of constitutionally protected rights (see Konigsberg v State Bar, 366 US 36). By denying otherwise qualified applicants their right to practice their chosen occupation based solely on their state of residence, CPLR 9406 (subd 2) works an unconstitutional discrimination against nonresidents. Any interest the State may have in regulating nonresident attorneys is ill served by the onerous burden imposed by the rule. A number of less drastic, and constitutionally permissible, alternatives are readily available to protect the interest of the State in supervising those who practice in its courts (see, e.g., Note, 92 Harv L Rev 1487-1489, supra).

Accordingly, the order of the Appellate Division should be reversed, without costs, and the matter remitted to the Appellate Division, First Department, for further proceedings on petitioner's application for admission to the bar.

* * * * * * * * * * * * * * *

Order reversed, without costs, and matter remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein. Opinion by Cooke, Ch.J. All concur.

Decided November 13, 1979

Random Potshots

"Can the Supreme Court Define the 'Practice of Law'"

by John Havelock

On receiving his 25 year membership award at a September Bar lunch, **Verne Martin** recalled the circumstances of his first case. A dozen or so lawyers, the entire Anchorage Bar of the day, made a point of being on hand to congratulate Martin on his h umiliation bv a lav practitioner.

Willkey Jefferson, already a "living legend" 25 years ago, still enlarges his career. At perhaps its high point, Jefferson cost the Anchorage borough hundreds of thousands of dollers in legal defense expenses and costs of interest and bond sales disrupted by litigation. One might fairly ask "if the Bar couldn't put Willkey out of business, what is it doing asking the Supreme Court to adopt a definition of the "practice of law" reaching conduct far beyond Mr. Jefferson't busy practice?

Unfazed By Cannon

The Bar Association was evidently unfazed by Canon Three of the ABA Code of Professional Responsibility which recites, "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."

Perhaps the adoption of AS 08.08. 230 brought this knotty task to the fore. There the legislature, while going out of its way to announce that its actions were founded on "the legislature's inherent power," criminalized the unlicensed practice of law "as that term is defined in the Alaska Bar Rules..." It may be that there is no prohibition on unauthorized practice until such a definition is promulgated. Take note Willkey imitators but first consult a lawyer.

Draft Ruminations

The Board of Governors approved a draft rule at the end of March of this year, a draft upon which the Supreme Court still ruminates.

It is not without its difficulties. One of the problems is that the same section of statute which calls for a definition excludes from the definition "the use of paralegal personnel as defined by the rules of the Alaska Supreme Court." How does one define the principle without also defining the exception?

The legislative action places in confusing juxtaposition two "inherent" powers. It makes sense that the power of courts should include, without specific constitutional recitation, the power to control who may appear in courts, the conduct of parties and their representatives therein and closely related conduct outside the court having a major impact on the judicial forum. But, absent specific legislative authorization, what stretch of imagination and power allows the court to control the modalities used in transactional counseling?

Fiduciary Flimflam

There is a public interest in the control of various classes of fiduciary conduct. The giving of legal advice and the preparation of documents having legal effect may be activities which the legislature has a legitimate interest in controlling in the interest of consumer protection at least to the point where First Amendment rights take over. But does the court have a legislative power over such transactional management? It seems unlikely.

Claiming The World

Arguendo, the court may have an inherent interest in controlling the management of disputes which may clearly be heading for the courts. But of the sea of law which envelopes virtually all transactional activity in the modern era, pre-litigation disputes are but a small fraction. To claim an interest in the management of all transactions which could become disputes which could come to court is to claim a legislative power covering the entire world of human affairs.

Court claims to regulate the rendering of advice beyond the context of litigation are on soft ground. Is the ground firmed up by a delegation under "the legislature's inherent power?" The Court itself would probably say no. At least it said that in the Sabre Jet case when the court disclaimed power granted by the legislature to license liquor dealers.

Turf Tussles

With the integrated bar now under intensive review and lawyers' turf claims challenged on several fronts, the court today may be reluctant to move into an arena where it could end up with a legislatively bloodied nose. No inside knowledge is claimed, but it does not surprise this observer that the definition of the practice of law has been sitting in the Justices' in-basket for some time.

BOG Meets for Four Days in September

The Board of Governors of th Alaska Bar Association met in Anch orage, Alaska on September 6, 7, 8 and 9, 1979. In addition to handlin five bar examination matters anc recommending to the Supreme Cour disciplinary action in a matter be fore it as the Disciplinary Board. the Board also heard reports from **Nancy Gordon**, CLE Committee; **Carolyn Jones**, Legal Education Opportunities Committee and **Mike Rubinstein**, Executive Director of the Judicial Council.

The following actions were taken by the Board. Special committees on Specialization and Prepaid Legal Services were established to report to the Board in March, 1980 and report to the membership in June, 1980 at the Annual Meeting. A standing insurance committee was established and assigned the task of monitoring the Bar endorsed Professional Malpractice program and the Bar sponsored group health and life programs.

The proposal of **Bill Erwin** and **Joe Kalamarides** to prepare and write a Workmen's Compensation manual for members of the Alaska Bar Association was tentatively accepted by the Board. The Board considered budgeting $5,000 in 1980 to pay for secretarial and manuscript preparation. Erwin and Kalamarides agreed to present a CLE program at which the manual would be distributed. They also agreed to present a CLE program at which the manual would be distributed. They agreed to present a budget to the Board in December.

The Board approved a line item budget procedure and determined that the budget for each year would be considered at the December meeting. By unanimous vote, the Board decided to publish for membership response an amendment to the By-laws of the association which would provide for the election of a Treasurer. In the interim, **Pat Kennedy** was selected to act as Fiscal Responsibility Officer until the Annual Meeting in 1980.

The Board adopted a policy requiring support staff evaluation in December for annual merit raises. To effectuate the policy, merit raises will be considered in December, 1979, which raises, if any, will be effective July 1, 1979 for the remainder of 1980.

Several rule changes were forwarded to the Supreme Court for its consideration. These changes make all time periods for Committee appointments consistent. The Board also approved an Association By-law change establishing an adjunct membership available to lawyers employed in the State of Alaska by the Federal Government and in-house Counsel. Without taking the Bar Exam, such attorneys can apply for

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

To: Charlie Parr, Chairman, and Members of the House Judiciary Committee

From: Margaret W. Berck, Staff

Date: September 13, 1979

Subject: Integrated and Nonintegrated Bar Associations

I. INTRODUCTION

Mechanisms for regulating the legal profession vary from state to state. Thirty states, including the State of Alaska, and the District of Columbia have established integrated bar associations to fulfill certain of these regulatory responsibilities. In order to practice law in an integrated bar state, one must be a member of the bar association. This mandatory membership requirement vests an integrated bar association with certain admission, licensing, and disciplinary functions. The 20 remaining states have nonintegrated bar associations. In these states membership in the state bar association is voluntary and such associations serve primarily as social clubs. In nonintegrated states, the regulation of the legal profession is generally the responsibility of the supreme court. The court typically establishes a board or commission for this purpose. In a few nonintegrated states, the attorney general's office is responsible for the disciplinary function.

II. THE ALASKA BAR ASSOCIATION

The integrated status of the Alaska Bar Association was established in 1955 through the legislative enactment of the Alaska Integrated Bar Act.[1] Prior to the integration of the Alaska Bar Association, the judiciary was vested with the disciplinary function, while the attorney general was responsible for the admissions function. The Alaska Integrated Bar Act was introduced by Representative Kalamarides as a result of numerous complaints arising out of the then-existing disciplinary and admission practices. In 1955 the territorial legislature, concluding that such matters could be better handled by the lawyers themselves, established the integrated bar in Alaska.

Pursuant to Alaska statute, the Alaska Bar Association is governed by a nine-member Board of Governors. The Board of Governors serve without salary and are elected by the membership at large. As statute requires the Board of Governors to be elected from the membership, there are no lay persons on the board. Rules concerning admission, discipline, and definition of the practice of law must be embodied in the Alaska Bar Rules.[2] Although the Board of Governors is empowered to approve and recommend Alaska Bar Rules, the Alaska Supreme Court is vested with the authority to promulgate those rules. The Board of Governors may adopt bylaws and regulations consistent with the Alaska Bar Rules; however, such bylaws and regulations are specifically exempt from the requirements of the Administrative Procedure Act.

[1]See AS 08.08.010, et seq..

[2]To date no rule has been developed which would define the practice of law.

The scheme for adopting Bar Rules and bylaws and regulations consistent with those Bar Rules reflects the roles of the Alaska Bar Association and the Supreme Court in regulating the legal profession. In essence, the Supreme Court has the ultimate rule-making authority in admissions, licensing, and discipline. The Board of Governors conducts adjudicatory hearings, but is primarily relegated to recommending appropriate action to the Supreme Court.

III. SHOULD THE INTEGRATED STATUS OF THE ALASKA BAR ASSOCIATION BE CONTINUED

During the 1980 legislative session, the House Judiciary Committee is scheduled to conduct a sunset review of the Alaska Bar Association. Pursuant to the sunset statute, this committee is required to submit to the Speaker of the House a report specifying its findings and recommendations as to the continuance or termination of the Association. This report must be submitted no later than the 60th day of the legislative session. As a result of these responsibilities, preliminary consideration should be given to the advantages and disadvantages of both integrated and nonintegrated bar systems.

A. Cost Factor

The primary disadvantage of the nonintegrated bar system is that it requires the establishment of a state bureaucracy to provide for the admission, licensing and disciplining of those authorized to practice law in the state. Any increased taxpayer costs resulting from such a move must be carefully analyzed.

Other professions regulated by state agencies are subject to nominal annual licensing fees. For example, a physician is subject to a $50 fee, while lawyers, $180. The extent to which these nominal

fees defray the costs of regulating the profession is significant. If taxpayers support most of the costs of regulating all professions but for the legal profession, what justifies this differentiation. Furthermore, should it be determined that it is more expensive to regulate lawyers than doctors, the burden on the taxpayer can be reduced by increasing the license fees for lawyers.

Costs resulting from the admission function of the Alaska Bar Association are absorbed by current application fees. Individuals seeking admission to the bar are required to pay $5 for the application form and a $250 examination fee. Should application fees be structured to absorb admission costs, no additional financial burden falls on the taxpayer.

Furthermore, it should be noted that the Alaska Bar Association is not completely independent of state financial resources. For many years the Alaska Bar Association was furnished with free office space, use of equipment and supplies provided by the court system. Several years ago, when the Bar Association was required to vacate those offices, moving expenses were provided by the court system. Currently office space for the Bar Association is being subsidized by the Department of Law at the rate of $10,000 per annum, raising a question of conflict of interest.[3]

Additionally, for the past several years state funds have been provided to defray the association's expenses for disciplinary proceedings. In 1978 the Bar Association received $58,600 from the state; in 1979, $36,700, and the Allocation for 1980 is $51,000.[4] This state

[3]This information was disclosed by Richard Barrier, Manager, Fiscal Operations and Deputy Administrator, Alaska Court System.

[4]The reason disbursements in 1979 were lower than the previous year, and also lower than the 1980 allocation, was because the court system overpaid the Bar Association by some $11,000 in 1978. It should be noted that the court system has never audited the Bar Association relative to these expenses.

funding comprises approximately one-half of the association's expenses for disciplinary proceedings.[5]

Obviously, a more detailed cost assessment is needed to determine the weight of this objection to the nonintegrated bar system. However, it appears that the existing state financial support combined with fixing appropriate license and admissions fees may eliminate this tax burden objection.

B. Legislative Authority

The Alaska Supreme Court contends that it has the inherent power to admit, discipline, and disbar Alaskan lawyers. The source of this power is never defined beyond the recitation that it is an exercise of the Supreme Court's inherent power and jurisdiction over attorneys as officers of the court. Under this theory it seems that the Alaska Supreme Court has permitted the delegation of certain of these responsibilities to the Alaska Bar Association. Shortly after the enactment of the Alaska Integrated Bar Act, the Supreme Court held that the act did not detract from its inherent powers to govern the practice of law in Alaska, but the act, on the contrary, merely adds helpful machinery. In upholding the validity of the act, the court noted various provisions deferring to its inherent authority. For example, it cited: that decisions of the Board of Governors are merely recommendatory; that the review of such decisions before the Supreme Court are not limited in scope; and that only final orders of the Supreme Court work disbarment or reinstatement.

In a subsequent decision, the Alaska Supreme Court held that one section of the act, which attempted to mandate that the Supreme Court give full accord to a recommendation of the Board of Governors, was an unconstitutional invasion of its inherent powers.

[5]Initial billings submitted to the court system to obtain these state funds contained the names of those individuals subject to ongoing disciplinary proceedings in violation of the confidentiality required by Bar Rule 31.

Although the Alaska legislature is empowered under the Alaska Constitution to prescribe the jurisdiction of the courts and to change the Rules of Court, such arguments most likely would not be persuasive in view of the Supreme Court's adamant posture on this issue. The Supreme Court has stated that the power of the courts to discipline attorneys has long been recognized and cannot be defeated by the legislative branch of government.

The Supreme Court's position has prompted the Alaska Bar Association to contend that it is not a state agency. This contention has been raised in two different lawsuits filed against the association. One suit alleges that the Bar Association conducted a meeting in violation of the public meeting law. The lower court found for the Bar Association and currently the matter is before the Alaska Supreme Court. The other suit arose out of an investigation by the Ombudsman pertaining to the adequacy of resolving citizen complaints against lawyers and the propriety of salary and fringe benefits for the Bar Counsel. The Bar Association's refusal to submit to the official jurisdiction of the Ombudsman has resulted in litigation presently pending before the Superior Court in Anchorage.

The Supreme Court's exclusive jurisdiction over Alaskan attorneys impacts the policy considerations before this committee. If the committee determines to sunset or de-integrate the Alaska Bar Association, without establishing any statutory mechanisms for admitting, licensing and disciplining attorneys, the Supreme Court would continue to bear the responsibilities for this regulation. Termination of the Alaska Bar Association would not de-regulate attorneys. On the other hand, should the committee determine to sunset or

de-integrate the Alaska Bar Association and establish statutory mechanisms for regulating attorneys, deference must be made to the Supreme Court's authority. Even should these statutory mechanisms not invade the Supreme Court's jurisdiction, nothing but good faith would require the Supreme Court to abide by them. It was in just such a context that 20 years ago the Supreme Court upheld the validity of the Integrated Bar Act and still abides by much of that act today.