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FISCAL NOTE

No. 1
 Bill Version: HB 130
 (H) Publish Date: 2/22/91

STATE OF ALASKA
 1991 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Community & Regional Affairs
 Title: "An Act relating to immunity of a municipal ombudsman and staff..." BRU: Local Government Assistance
 Component: Training and Development
 Sponsor: Parnell et al
 Requestor: _____ COMPONENT SERIAL NO.

	6	7	2
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Remond Henderson Remond Henderson Phone: 465-4708
 Division: Administrative Services Director Date: 2/19/91
 Approved by Commissioner: (Edgar Blatchford) Edgar Blatchford
 Agency: Community & Regional Affairs Date: 2-17-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

University - Midtown, District 10

(907) 465-2647

State Capitol, Rm. 128

Juneau, AK 99801-1182

SPONSOR STATEMENT

I have introduced House Bill 130, "An Act relating to Municipal Ombudsman Immunity," to provide for a municipal ombudsman and staff to have in the same fashion, immunity that is currently granted to the state ombudsman in Alaska.

It will ensure that a municipal ombudsman can carry out their duties as prescribed by law without reservation. The potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

CSHB 130 (JUD)am would provide citizens who wish to report matters to a municipal ombudsman, or witnesses coming before an ombudsman, the confidentiality to which they are entitled. It would also restrict the immunity to only apply to an office of a municipal ombudsman that is established by ordinance or charter and requires compliance with specified ombudsman duties.

The American Bar Association has adopted a resolution with model ombudsman ordinance statutes that include similar provisions. The courts have ruled valid the statutes protecting the ombudsman.

Immunity for the Ombudsman office is supported by the Municipality of Anchorage Assembly as stated in the resolution unanimously approved on March 5, 1991. The Anchorage Municipal Ombudsman office was established not only by city ordinance, but is also part of the city charter which guarantees the right to the assistance of a municipal ombudsman in dealing with grievances and abuses.



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HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

University - Midtown, District 10

(907) 465-2647
State Capitol, Rm. 128
Juneau, AK 99801-1182

SECTIONAL ANALYSIS

Section 1. AS 09.65 is amended by adding a new section.

Sec. 09.65.075.

(a) A civil action cannot be brought against the municipal ombudsman and staff, for anything they have done in performing their duties, as prescribed by ordinance or charter.

This does not apply if the act, statement, or omission constituted a gross negligence, or reckless or intentional misconduct.

(b) The municipal ombudsman or member of staff may not testify in court regarding the exercise of official duties of the ombudsman except as may be necessary to carry out responsibilities of the ombudsman by ordinance or charter.



State of Alaska
ombudsman

Duncan C. Fowler

Reply to:

- P.O. Box 102636
Anchorage, AK 99510-2636
(907) 277-8848
(800) 478-2624
- P.O. Box WO
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970
- P.O. Box 74358
Fairbanks, AK 99707-4358
(907) 452-4001
(800) 478-3257

May 14, 1991

Senator Rick Halford, Chairman
Senate Judiciary Committee
Post Office Box V
Juneau, Alaska 99811-3100

RE: CSHB-130(JUD)Am
Municipal Ombudsmen

Dear Senator Halford:

You asked me for comments about the concept of granting municipal ombudsmen the privilege not to testify in court proceedings and immunity from civil suit.

CSHB-130(JUD)Am started its legislative "career" as a sister bill to SB-120. I support the bill. It supports the ombudsman concept. I believe it will help local government ombudsmen provide better legislative oversight of municipal programs.

The House hearing process improved HB-130 by ensuring the municipal ombudsman office would be established by ordinance or charter and must meet certain standards. It also lists the responsibilities of the ombudsman which must be adopted by local law before the provisions of the bill become effective locally. It incorporated criticisms offered by the Anchorage administration.

This bill has been supported by a wide variety of Alaskans. The Anchorage Assembly and the Alaska Municipal League have formally gone on record supporting the bill. Of special interest to me was the support provided by the Anchorage School Superintendent and School Board. I note that just this past fall Anchorage voters placed the school district under the municipal ombudsman's jurisdiction. I was pleased to see the school board's quick support for the municipal ombudsman office.

The concepts of immunity from suit and the privilege of not testifying in judicial actions is reflected in all of the model ombudsman legislation. The Harvard Journal on Legislation, The American Bar Association and the International Bar Association, in resolutions or model acts, all recommend such provisions for legislative ombudsmen.

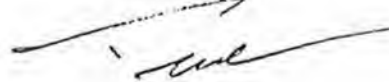
There are many parallels between an ombudsman and a mediator, but ombudsmen are officers of governmental legislative bodies, many mediators are private practitioners. And, I find it of interest that according to the recent American Bar Association study *Legislation on Dispute Resolution*, over 40 states have granted some or all of these privileges to mediators. I have enclosed a marked and

highlighted excerpt of the study which speaks to these issues. (If you would like to have the entire study, let me know.) It directly relates to your concerns about HB130/SB120.

Again, I do support the passage of CSHB-130(JUD)Am. It will not affect my office as it applies only to local governments. I do see it as good public policy to encourage local governments to take responsibility for the provision of local services. This bill does encourage that by providing reasonable protections to a local ombudsman office.

Please let me know if you have any questions.

Sincerely,



Duncan C. Fowler
Ombudsman

DCF:pjc
Enclosure



3-14-91
Copies

April 30, 1991

Position Paper

CS HB 130 (Judiciary) am - Immunity of Municipal Ombudsman

The Alaska Municipal League, which represents 125 local governments and their citizens throughout the State of Alaska, supports CS HB 130 (Judiciary) am. This legislation would grant immunity from civil action and privilege not to testify about certain matters to a municipal ombudsman and the staff of the ombudsman's office.

Under the provisions of the bill, which are consistent with model legislation on ombudsmen, no civil action could be brought against either a municipal ombudsman or the ombudsman's staff for anything done, said, or omitted in performing the duties of the office as established by ordinance or charter, except in cases of gross negligence or reckless or intentional misconduct. In addition, they could not testify in court regarding a matter involving their official duties except as necessary to carry out the responsibilities of the office. The protection would apply only when the ordinance or charter establishing the office of ombudsman included specific provisions.

If enacted, HB 130 would not only afford protection to municipal ombudsmen and their staffs that is comparable to the protection granted to the state ombudsman's office, it would also help to ensure confidentiality for citizens seeking assistance from a municipal ombudsman comparable to the protection they would have if they sought assistance from the state ombudsman. HB 130 would correct the inequity that currently exists between citizens of municipalities that contract with the office of the state ombudsman for services and those that have established their own locally funded ombudsman's office.

AML supports the House Judiciary CS for HB 130, as amended.

**Municipality
of
Anchorage**



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4433
TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL MANAGER

April 3, 1992

Senator Rick Halford, Chairman
Senate Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

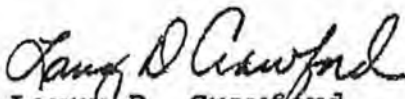
Re: HB 130, Municipal Ombudsman Immunity

Dear Senator Halford:

Attached is the Administration's position paper opposing HB 130, Municipal Ombudsman Immunity. Please provide copies of our position to the members of your committee for the hearing on this bill April 7th.

If you have any questions, please feel free to contact me.

Very truly yours,


Larry D. Crawford
Municipal Manager

Attachment

MUNICIPALITY OF ANCHORAGE
1992 LEGISLATIVE PROGRAM

LEGISLATIVE ISSUES

TITLE: HB 130 and SB 120, Municipal Ombudsman's Immunity

The Municipality of Anchorage opposes HB 130 and SB 120 which would provide for Ombudsman immunity. While at first glance this legislation may seem attractive, we believe it suffers from several serious defects. As to SB 120, the blanket immunity granted to Municipal Ombudsman and their staff would go far beyond the traditional forms of immunity for governmental activities which are entitled to immunity under AS 9.65.070. It appears that HB 130 is the preferred version at this time; however, even this version represents a poor policy choice.

The proposed HB 130 would affirmatively prohibit an Ombudsman or his/her staff from testifying in court except as may be necessary to carry out responsibilities established by ordinance or charter. This prohibition would apparently prohibit testimony in criminal trials and in actions against a municipality arising out of gross negligence, recklessness or even intentional misconduct of Ombudsmen or their staff. The search for truth in criminal proceedings should not be ham-strung by this kind of restriction.

Similarly, the intent to subject an Ombudsman or his/her staff to responsibility for conduct which constitutes gross negligence or recklessness or intentional misconduct in subsection (a) of the proposed AS 9.65.075 is frustrated by the prohibition on testimony in subsection (b) of that section. Unless a provision of a municipal charter or ordinance requires the Ombudsman to testify in criminal matters, or cases arising out of the actions of the Ombudsman or his/her staff, the language regarding gross negligence or reckless or intentional misconduct is without effect.

The proposed legislation in effect grants to the Ombudsman an unlimited license to defame others. There is no assurance that individuals criticized, even wrongly, by the Ombudsman will have the opportunity to reply to such criticism. No real protection is afforded to an individual who might be defamed by the inaccurate

(more)

HB 130, and SB 120 Municipal Ombudsman's Immunity
Continued

assertions of the Ombudsman.

Finally, the argument that "the state has such a law, therefore we should have one also" is not convincing. The majority of the states do not have similar legislation. Only the states of Alaska, Hawaii and Nebraska grant similar immunity to their Ombudsman. There are no public officials who should be outside of the civil law, be that officials of the state or its political subdivisions.

Contact: Richard L. McVeigh, Municipal Attorney
Phone: 343-4545

20) LIABILITY/QUALIFICATIONS

State

MAR 12 1991

- a) California
- b) Colorado
- c) Florida
- d) Illinois
- e) Iowa
- f) Louisiana
- g) Maine
- h) Michigan
- i) Minnesota
- j) New Hampshire
- k) New York
- l) North Carolina
- m) Ohio
- n) Oklahoma
- o) Oregon
- p) Texas
- q) Virginia
- r) Wisconsin

To	Rep. Farrell / Beley	From	Mike Mills
Co.	House	Co.	MOA Ombudsman
Dept.		Phone #	343-4461
Fax #	463-5661	Fax #	343-4780

Family Law Act Sec. 4607 (1980)
Dispute Resolution Act
 Sec. 13-22-301 (1983; amended 1988)
ADR Act of 1987 Sec. 44.1011 to 44.108
 (amended 1990)
Dispute Resolution Act (1987)
 Sec. 679.1 (1985)
 Sec. 9:351
 4 Sec. 18 (1989)
Dispute Resolution Program Act
 Sec. 27.15(51) (1988)
 Sec. 494.01 (1984)
 Sec. 572.31 (1986)
 Chap. 268 (1989)
Dispute Resolution Act Art. 21-A
 Sec. 849(a)
 Art. 43(B), Sec. 1-539.10
 Sec. 179.01 (1989)
Dispute Resolution Act 12 Sec. 1801 to
1813 (1983; amended 1985; rules &
procedures adopted, 1986)
 Sec. 36.100 to 210 (1989)
Alternative Methods of Dispute
Resolution Act Tit. 7, Sec. 154.001 to
154.022 Civil Practice and Remedies
 (1987)
Confidentiality in Mediation Act Sec.
8.01-581.21 to 8.01-581.23 (1988)
Child Custody, Placement, and
Visitation (Wisconsin Act 355) (1987)
 Sec. 665.42 to 665.68 (1985)

21) PROPERTY

State

Statute

- a) California
- b) Colorado
- c) Hawaii
- d) Maine
- e) North Dakota

Chapter 22 (1989)
 Sec. 32-1-1006 (1989)
 Sec. 514(A)-121 to 514(A)-127 (1984)
 Sec. 519-2 (1975)
 Sec. 171-6(9) (1962)
 Sec. 182-3 (1965)
 Sec. 205-5.1(a) (1983)
 Chapter 40 (1989)
 Sec. 26.1-22-11 (1983; amended 1987)

Cal. Judicial Immunity Provision = Cal. Code of Civil Pro. Sect 1141.30

20) LIABILITY/QUALIFICATIONS

<u>State</u>	<u>Statute</u>
a) California	<u>Family Law Act Sec. 4607 (1980)</u>
b) Colorado	<u>Dispute Resolution Act</u> Sec. 13-22-301 (1983; amended 1988)
c) Florida	<u>ADR Act of 1987 Sec. 44.1011 to 44.10</u> (amended 1990)
d) Illinois	<u>Dispute Resolution Act (1987)</u>
e) Iowa	Sec. 679.1 (1985)
f) Louisiana	Sec. 9:351
g) Maine	4 Sec. 18 (1989)
h) Michigan	<u>Dispute Resolution Program Act</u> Sec. 27.15(51) (1988)
i) Minnesota	Sec. 494.01 (1984) Sec. 572.31 (1986)
j) New Hampshire	Chap. 268 (1989)
k) New York	<u>Dispute Resolution Act Art. 21-A</u> Sec. 849(a)
l) North Carolina	Art. 43(B), Sec. 1-539.10
m) Ohio	Sec. 179.01 (1989)
n) Oklahoma	<u>Dispute Resolution Act 12 Sec. 1801 to</u> 1813 (1983; amended 1985; rules & procedures adopted, 1986)
o) Oregon	Sec. 36.100 to 210 (1989)
p) Texas	<u>Alternative Methods of Dispute</u> <u>Resolution Act Tit. 7, Sec. 154.001 t</u> 154.073 Civil Practice and Remedies (1987)
q) Virginia	<u>Confidentiality in Mediation Act Sec.</u> 8.01-581.21 to 8.01-581.23 (1988)
r) Wisconsin	<u>Child Custody, Placement, and</u> <u>Visitation (Wisconsin Act 355) (1987)</u> Sec. 665.42 to 665.68 (1985)

21) PROPERTY

<u>State</u>	<u>Statute</u>
a) California	Chapter 22 (1989)
b) Colorado	Sec. 32-1-1606 (1989)
c) Hawaii	Sec. 514(A)-121 to 514(A)-127 (1984) Sec. 519-2 (1975) Sec. 171-6(9) (1962) Sec. 182-3 (1965) Sec. 205-5.1(a) (1983)
d) Maine	Chapter 40 (1989)
e) North Dakota	Sec. 25.1-22-11 (1983; amended 1987)

Cal. - Judicial Immunity Provision: Cal. Code of
Civil Pro.
Sect 1141.30

ALASKA STATUTES

LEGISLATURE

Chapter 55. Office of the Ombudsman.

Sec. 24.55.240. Judicial review. A proceeding or decision of the ombudsman may be reviewed in superior court only to determine if it is contrary to the provisions of this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.250. Immunity of the ombudsman. A civil action may not be brought against the ombudsman or a member of the ombudsman's staff for anything done, said or omitted in performing the ombudsman's duties or responsibilities under this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.260. Ombudsman's privilege not to testify. The ombudsman and the staff of the ombudsman may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter. (§ 1 ch 32 SLA 1975)

*state ombudsmen
lang. identical
except for "municipal"
... "established by
ordinance or charter"*

ALASKA STATUTES

Article 4. Older Alaskans Commission.

Sec. 44.21.231. Office of the long term care ombudsman.

(a) The office of the long term care ombudsman is established in the commission.

(b) The ombudsman shall be hired by the commission. A member of the commission who has a financial interest in a long term care facility in the state, or who has any other conflict of interest, may not participate in the hiring of the ombudsman. The ombudsman is a full-time position in the classified service.

(c) The ombudsman may not have a financial interest in a long term care facility in the state. The commission shall adopt regulations to ensure that the ombudsman, and employees and volunteers of the office, do not have a conflict of interest or an appearance of a conflict of interest. (§ 2 ch 106 SLA 1988)

Sec. 44.21.235. Confidentiality. (a) Records obtained or maintained by the ombudsman are confidential, are not subject to inspection or copying under AS 09.25.110 — 09.25.120 and, except as provided in (b) of this section, may be disclosed only at the discretion of the ombudsman.

(b) The identity of a complainant or an older Alaskan on whose behalf of the by cc

See good from the c (b) relative good

Leaves question slightly open on being required to testify

1989 AMENDMENTS

A bill to be entitled

An act relating to alternative dispute resolution; amending s. 44.101, F.S.; deleting authorization for the appropriation of revenues or the levying of a service charge, pursuant to a valid public purpose, to fund certain conciliation services; amending s. 44.302, F.S.; requiring assignment of certain disputes involving child custody, visitation, and child support to existing mediation programs; amending s. 44.303, F.S.; providing a cap on arbitrator's fees; directing the Supreme Court to encourage the use of voluntary arbitrators; providing that volunteer arbitrators shall be reimbursed for expenses; providing for discretionary rather than mandatory assessment of costs under certain circumstances; amending s. 44.304, F.S.; providing exceptions to disputes which may be referred to voluntary binding arbitration; creating s. 44.307, F.S.; providing that mediators and arbitrators shall have certain immunity; creating s. 44.308, F.S.; providing for funding mediation and arbitration services; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 44.101, Florida Statutes, is amended to read:

44.101 Family Mediation ~~or conciliation~~ services.

(1) A county may establish a family mediation ~~or conciliation~~ service to assist parties in resolving any controversy involving the family.

(2) The court on its own motion or on motion of a party may refer the parties to this service.

(3) Notwithstanding the provisions of s. 119.14, all oral or written communications in mediation or conciliation proceedings are exempt from the requirements of chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless the both parties agree otherwise. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(4) A family mediation ~~or conciliation~~ service is hereby declared to serve a valid public purpose. The board of county commissioners may support such a service by appropriating moneys from county revenues or by levying a service charge of no more than \$2 on any circuit court proceeding.

(5) The provisions of this section shall be liberally construed in order to carry out effectively the purposes of this section.

Section 2. Subsection (1) of section 44.302, Florida Statutes, is amended to read:

44.302 Court-ordered mediation.

(1) Except as provided by rules promulgated by the Supreme Court, a court;

(a) May refer all or any portion of a contested civil action filed in a circuit court in which there is a dispute as to any issue; or-

(b) ~~May refer all or any portion of any contested divination filed in county court in which there is a dispute as to any issue.~~

(c) May refer all issues relating to custody, visitation, or child support with the exception of those cases where there is any history of domestic violence in mediation, if an appropriate mediation program has been established in the circuit or county over which the court has jurisdiction,

Section 3. Subsections (2) and (5) of section 44.303, Florida Statutes, are amended to read:

44.303 Court-ordered, nonbinding arbitration.--

(2) Arbitrators shall be selected and compensated in accordance with rules adopted by the Supreme Court. ~~Compensation for arbitrators shall not exceed \$200 per day. The Supreme Court shall encourage the use of voluntary arbitrators whenever possible. Volunteer arbitrators shall be entitled to be reimbursed pursuant to s. 112.061 for all actual expenses necessitated by service as an arbitrator. Arbitrators shall be compensated by a fee of not more than \$75 per day plus 20 cents per mile for each mile of travel necessitated by service as an arbitrator.~~

(5) The party having filed for a trial de novo ~~may~~ shall be assessed the arbitration costs, court costs, and other reasonable costs of the party, including attorney's fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing if the judgment upon the trial de novo is not more favorable than the arbitration decision. ~~The court may waive an assessment of costs required upon a finding that the imposition of costs would create a substantial economic handicap or would not be in the interest of justice.~~

Section 4. Subsection (12) is added to section 44.304, Florida Statutes, to read:

44.304 Voluntary binding arbitration.--

(12) This section shall not apply to any dispute involving child custody, visitation, or child support, or to any dispute which involves the rights of a third party not a party to the arbitration.

Section 5. Section 44.307, Florida Statutes, is created to read:

44.307 Immunity for arbitrators and mediators.--An arbitrator appointed pursuant to s. 44.303 or s. 44.304 or a mediator appointed pursuant to s. 44.302 shall have judicial immunity in the same manner and to the same extent as a judge.

Section 6. Section 44.308, Florida Statutes, is created to read:

44.308 Funding of mediation and arbitration.--The board of county commissioners may support mediation and arbitration services by appropriating moneys from county revenues or by levying a service charge of no more than \$2 on any county court civil proceeding.

Section 7. This act shall take effect January 1, 1990.

CODING: words stricken are deletions; words underlined are additions.

Torts § 216, *Creditors' Rights and Remedies* § 73, *Guardianship and Conservatorship* § 138; *Miller & Starr, Cal Real Estate 2d* § 4:60; *Witkin Summary (9th ed) Agency and Employment* § 472.

CHAPTER 1

General Provisions

Definitions.

- 1281.1. Immunity of arbitrator from civil liability
 1281.2. Reference to portion of title or of any other law.

Miller & Starr, Cal Real Estate 2d § 33:2; *Cal Practice (Rev) Ch 23 Arbitration*; *Witkin Summary (9th ed) Actions* § 13, *Prov Rem* § 71, *PWT* § 320; *Witkin Summary (9th ed) Equity*

1280. [Definitions.] As used in this

(a) "Agreement" includes but is not limited to agreements providing for valuations, appraisals and similar proceedings and arbitrations between employers and employees or between their respective representa-

(b) "Award" includes but is not limited to an award made pursuant to an agreement in writing.

(c) "Controversy" means any question between parties to an agreement in which such question is one of law or of fact.

(d) "Neutral arbitrator" means an arbitrator who is (1) selected jointly by the parties to the arbitration or by the arbitrators selected by the parties to the arbitration; or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

(e) "Party to the arbitration" means a party to the arbitration agreement:

(1) Who seeks to arbitrate a controversy pursuant to the agreement;

(2) Against whom such arbitration is sought pursuant to the agreement; or

(3) Who is made a party to such arbitration by order of the neutral arbitrator upon the party's application, upon the application of any other party to the arbitration or upon the neutral arbitrator's own determination.

(f) "Written agreement" shall be deemed to include a written agreement which has been extended or renewed by an oral or

implied agreement. [1961 ch 461 § 2; former § 1280 repealed 1961 ch 461 § 1.] *Cal Jur 3d Actions* § 19, *Landlord and Tenant* § 113; *Miller & Starr, Cal Real Estate 2d* §§ 1:48, 33:1, 33:3, 33:5, 33:6, 33:21, 33:30; *Cal Practice (Rev) § 23:57*; *Witkin Procedure (3d) Attorneys* § 179; *Witkin Summary (9th ed) Contracts* § 262, *Equity* §§ 41, 42, 46, 47.

§ 1280.1. (Operative until January 1, 1996) Immunity of arbitrator from civil liability. An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract.

The immunity afforded by this section shall supplement, and not supplant, any otherwise applicable common law or statutory immunity.

This section shall remain in effect only until January 1, 1996, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1996, deletes or extends that date. Amended Stats 1990 ch 817 § 2 (SB 951), operative until January 1, 1996. *Cal Jur 3d (Rev) Arbitration and Award* §§ 44, 93, 107; *Miller & Starr, Cal Real Estate 2d* §§ 4:60, 33:21; *Witkin Summary (9th ed) Torts* § 322, *Equity* § 39.

§ 1280.2. [Reference to portion of title or of any other law.] Whenever reference is made in this title to any portion of the title or of any other law of this State, the reference applies to all amendments and additions thereto now or hereafter made. [1961 ch 461 § 2.]

CHAPTER 2

Enforcement of Arbitration Agreements

§ 1281. Requisites and validity.

§ 1281.2. Order to arbitrate. Determination of other issues.

Post-It [®] brand fax transmittal memo 7671		# of pages	1
To	Rep. Farrell / Beckley		
From	Mike Mills		
Co.	House	Co.	MOA Ombudsman
Copied		Phone #	343-4461
	463-5661	Fax #	343-4780

Submitted by: Assembly Members
Evans, Flynn
Prepared by: Ombudsman
For reading: March 5, 1991

ANCHORAGE, ALASKA
AR NO. 91-45

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A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING STATE LEGISLATION TO PROVIDE MUNICIPAL OMBUDSMEN AND STAFF IMMUNITY AND PRIVILEGE NOT TO TESTIFY

WHEREAS, legislation has been introduced before the Alaska State Legislature in both the House and Senate to provide a municipal ombudsman and staff immunity from civil action and privilege not to testify about certain matters; and

WHEREAS, these two provisions are in the state statute which established the state ombudsman; and

WHEREAS, citizens seeking assistance from a municipal ombudsman should be afforded the same rights to confidentiality as if they sought assistance from the state ombudsman who also serves, under contract, a number of local communities; and

WHEREAS, these provisions may only be established by state statute rather than by local ordinance; and

WHEREAS, these provisions are consistent with the American Bar Association's Model Statute on Ombudsmen and the United States Association of Ombudsmen guidelines; and

WHEREAS, the legislation is in harmony with the Anchorage Municipal Charter and the Alaska State Constitution and will further enhance the benefits that citizens of this municipality have come to appreciate by having an ombudsman within their local government.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

That this body endorses legislation providing municipal ombudsmen and staff immunity and privilege not to testify, and urges passage by the Seventeenth Alaska State Legislature.

PASSED AND APPROVED by the Anchorage Assembly this 5th day of March, 1991.

Jim Kusitz

Chair

ATTEST:

Lizine Ferguson

Municipal Clerk
Deputy

UNANIMOUSLY APPROVED ON MARCH 5, 1991

Post-It brand fax transmittal memo 7/6/1		# of pages = 19	
To	Sen. Collins / Marverne	From	Mike Mills
Co.	note: hand copy in mail	Co.	MOA Ombudsman
Dept.	FAX 465-4779	Phone #	343-4461
		Fax #	343-4780

Position Paper

AN ACT TO PROVIDE MUNICIPAL OMBUDSMEN IMMUNITY AND PRIVILEGE NOT TO TESTIFY (SECTION 09.65.075)

A. Confidentiality / Privilege Not To Testify

The ability for an ombudsman to effectively investigate complaints depends primarily on the ability to determine the facts surrounding the issue. Common among nearly all ombudsman offices is their authority to access essentially all information within their jurisdiction. Along with this power comes the requirement to protect information received which is confidential or privileged by law. Similarly, in an effort to ensure that an ombudsman is provided the most factual information possible from complainants or witnesses, their confidentiality is protected.

In order for an ombudsman to guarantee that these confidentiality laws are not violated and that citizens can continue to enjoy their right to speak freely to their ombudsmen, it is necessary to establish the privilege for an ombudsman and their staff not to testify in court regarding matters involving an ombudsman's official duties.

There is precedence for establishing this privilege not to testify for ombudsmen both on a national and international level. The State of Alaska specifically restricts the Ombudsman from testifying (Sec. 24.55.260); and the State of Nebraska prevents the Ombudsman from being required to testify or produce evidence (Sec. 81-8,253).

Common among nearly every classical ombudsman office is the provision to protect the confidentiality of certain individuals and information. The inclusion of specific language within a statute provides further clarification that an ombudsman should not be required to divulge information, or the identity of a complainant or a witness, which was received with the expectation of privacy. Case law is supportive of this protection at the state level, with Alaska contributing toward the courts' respect for the provisions contained within ombudsman statutes. Notwithstanding the limitations of states' statutes, the U. S. federal courts have exhibited considerable efforts in respecting the confidentiality provisions of state ombudsmen.

B. Immunity From Civil Action

The structure of the classic ombudsman is designed to ensure that the ombudsman be provided the freedom to investigate any act or failure to act by an agency, official, or public employee with only specific exceptions. One of the essential provisions which the American Bar Association recommended in its 1969 Resolution promoting the establishment of ombudsmen within state and local governments was to provide immunity for ombudsmen and their staff from civil liability on account of official actions. Apparently the potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

The Immunity provision has been previously established at the local level as exemplified in the Charter of the City of Detroit (Sec. 4-315). The majority of classic ombudsman offices at state, provincial and national levels are provided protection from civil suits according to survey results from the International Ombudsman Institute. Many of these offices are protected from criminal suits as well; Hawaii and Puerto Rico among them. The Hawaii State Ombudsman also has jurisdiction over local governmental units.

SUMMARY

The proposed amendments essentially allow duly established municipal ombudsmen the same protection from civil suits, and the privilege not to testify, as afforded our State Ombudsman. The benefits of these provisions within the Alaska State Ombudsman Statute have already reached certain local governments in this State by virtue of their contracting with the State Ombudsman for ombudsman services (i.e. Juneau). It would be consistent to include similar provisions as proposed for municipal ombudsmen.

Passage will ensure that municipal ombudsmen in this State carry out their duties as prescribed by law without reservation; and provide citizens who wish to report matters to an Ombudsman, or witnesses coming before an Ombudsman, the confidentiality to which they are entitled.

The appendices, including model statutes from the American Bar Association and the Harvard Journal on Legislation, provide significant justification for passage of this legislation.

Prepared by:
Michael P. Mills
Municipal Ombudsman, Anchorage
(Past President, U. S. Association of Ombudsmen)

Appendix

- A. University of Miami Law Review (Spring 1975)
American Bar Association Model Ombudsman Statute for State Governments
Q. Section 17. Ombudsman's Immunities and C. Section 3. Definitions
Comment by Bernard Frank, Chairman, Ombudsman Committee, ABA.
- B. American Bar Association Model Ombudsman Statute *Background Summary*
Ombudsman Committee Chairman Bernard Frank.
- C. American Bar Association Resolution (1969),
Dealing with Establishment of an Ombudsman
- D. Harvard Journal on Legislation (June 1965)
A State Statute to Create the Office of Ombudsman
Sections 603, 604 & 605, and Comment.
- E. International Bar Association, Ombudsman Committee Letter (November 1978)
Chairman Bernard Frank to MOA Ombudsman, Karla L. Forsythe
Necessity of State Statute for Municipal Ombudsman Protection.
- F. Anchorage Municipal Attorney Memorandum (July 1990)
Lack of Privilege Not to Testify.
- G. Alaska Statute: *Sec. 24.55.240-260, Office of The Ombudsman*
- H. Alaska Statute: *Sec. 44.21.231, 235 & 236, Long Term Care Ombudsman*
- I. International Ombudsman Institute Report (July 1986)
Court Cases of Special Interest to the Ombudsman Institution
(Excerpts from United States court cases)

STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK*

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I. INTRODUCTION

Year after year, Ombudsman proposals have been introduced in a majority of the state legislatures in the United States.¹ Legislation has been passed for state-wide Ombudsmen in Hawaii, Nebraska, Iowa, and Alaska.² The word "Ombudsman," Swedish in origin, means ...

1975]

STATE OMBUDSMAN LEGISLATION

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ABA
MODEL
STATUTE

Q. Section 17. Ombudsman's Immunities

- (a) NO PROCEEDING, CONCLUSION, RECOMMENDATION, OR REPORT OF THE OMBUDSMAN OR MEMBER OF HIS STAFF SHALL BE REVIEWABLE IN ANY COURT;
- (b) THE OMBUDSMAN AND HIS STAFF SHALL HAVE THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITIES AS A JUDGE OF THIS STATE.
- (c) THE OMBUDSMAN AND HIS STAFF SHALL NOT BE COMPELLED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THIS ACT.

COMMENT. (a) Sub-section (a) precludes judicial review of the Ombudsman's work, unless, of course, he has violated the Act.

(b) This sub-section avoids litigation and harassment by an uncooperative agency, but does not preclude

*8. HAWAII REV. STAT. §§ 96-13, -16 (1968).

UNIVERSITY OF MIAMI LAW REVIEW (Vol. XXIX)

prosecution for serious misconduct, or removal from office (§ 8(a)).

(c) This sub-section acts with § 11(h) to protect the secrecy and confidentiality of information obtained—in order to instill public confidence in his work; it also prevents unnecessary interruptions of his work to testify, while allowing him to proceed in court whenever necessary (§ 11(i)).

Section 17(a) precludes judicial review of the proceedings, conclusions, recommendations, or reports of the Ombudsman or members of his staff. Judicial review is likewise forbidden in the Nebraska statute and the Hawaii statute except if in Hawaii the Ombudsman contravenes the provisions of the statute.⁷⁹ The Iowa law is silent on the subject. It would seem to be implicit in the ABA Model Statute and the Nebraska statute that if the Ombudsman violates the Ombudsman statute his actions are subject to court review.

Section 17(b) further provides that the Ombudsman and staff shall have the same immunities from civil and criminal liabilities as a judge of the state. Somewhat similar language is used in the Hawaii statute except staff are omitted.⁸⁰ Iowa provides for no civil action except removal from office under Iowa law against the Citizens' Aide or his staff unless an act or omission is actuated by malice or is grossly negligent.⁸¹ There is no provision in the Nebraska statute with respect to immunity from civil and criminal liabilities.

Section 17(c) specifically gives the Ombudsman and his staff immunity from being compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except such testimony or evidence that might be necessary to enforce the Act. Somewhat similar language is used in the Nebraska statute as to both judicial or administrative proceedings and in the Hawaii and Iowa statutes as to court proceedings.⁸² As written, the Ombudsman and his staff may voluntarily testify, but cannot be compelled to do so at least in the state courts. It is the inability to compel the Ombudsman and his staff to testify in the state courts which protects the confidentiality of the information obtained by the Ombudsman. Application of the privileged communication immunity by statute to the activities of the Ombudsman is important to the Ombudsman office. However, it is submitted that the state Ombudsman and his staff can be compelled to testify in the federal courts^{82a}—a problem which would have to be

79. NEB. REV. STAT. § 81-8.253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968)

80. HAWAII REV. STAT. § 96-17 (1968).

81. IOWA CODE ANN. § 601G.20 (Supp. 1974).

82. NEB. REV. STAT. § 81-8.253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968); IOWA CODE ANN. § 601G.20 (Supp. 1974).

82a. Raymond A. Cornell, Deputy Citizen's Aide for Corrections, Iowa, was subpoenaed to

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STATE OMBUDSMAN LEGISLATION

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resolved by appropriate federal legislation.⁸³ That a complaint-handling official appointed by, responsible to, and serving at the pleasure of the executive has no immunity at all, is one of the reasons the use of the term "Ombudsman" should be confined to those coming within the definition given at the outset of this article.

C. Section 3. Definitions

AS USED IN THIS ACT,

(a) "AGENCY" MEANS ANY DEPARTMENT, ORGANIZATION, BOARD, COMMISSION, COUNCIL, INSTITUTION OR OTHER GOVERNMENTAL ENTITY OF

[NAME OF STATE], AND ANY OFFICIAL, OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT BY REASON OF HIS CONNECTION WITH

[NAME OF STATE], EXCEPT:

(1) ANY COURT, OR JUDGE AND APPURTENANT JUDICIAL STAFF;

(2) THE LEGISLATURE, ITS MEMBERS, ITS COMMITTEES, ITS STAFF AND ITS EMPLOYEES;

(3) THE GOVERNOR AND HIS PERSONAL STAFF;

[(4) (ALTERNATE A) ANY POLITICAL SUBDIVISION OF THE STATE;]

[(4) (ALTERNATE B) MAYORS, COUNCIL MEMBERS, AND JUDGES OF ANY POLITICAL SUBDIVISION AND THEIR PERSONAL STAFFS,]

(5) ANY MULTI-STATE GOVERNMENTAL ENTITY.

(b) AN "ACT OF AN AGENCY" MEANS ANY ACTION, DECISION, FAILURE TO ACT, OMISSION, RULE OR REGULATION, INTERPRETATION, RECOMMENDATION, POLICY, PRACTICE OR PROCEDURE OF ANY AGENCY.

(c) "PERSON" MEANS ANY INDIVIDUAL, AGGREGATE OF INDIVIDUALS, CORPORATION, PARTNERSHIP, OR UNINCORPORATED ASSOCIATION.

COMMENT.

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4. Local government exclusion from or inclusion in the Ombudsman's jurisdiction is left to the decision of the legislature. If political subdivisions are to be excluded (as in Nebraska), appropriate language is recommended in the ABA Model Statute. If local government is to come within the jurisdiction of the Ombudsman, then the ABA Model Statute recommends that the phrase "and local" be included in the legislative purpose (section one) and further that consideration be given to exclude in the section three definition of "agency" certain local officials. Both Iowa and Hawaii have jurisdiction over

19. IOWA CODE ANN. § 601C.1-2(a) (Supp. 1974); NEB. REV. STAT. § 31-3,340 (1) (Supp. 1969).

20. HAWAII REV. STAT. § 96-112X(1) (Supp. 1974).

21. HAWAII REV. STAT. § 96-112X(2) (1968); IOWA CODE ANN. § 601C.1-2(b) (Supp. 1974).

22. NEB. REV. STAT. § 31-3,340(1)(d) (Supp. 1969).

23. HAWAII REV. STAT. § 96-112X(1) (Supp. 1974).

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local government, but only the Hawaii law makes provision (by a 1974 amendment) for an exclusion for mayors and councils of the various counties.²⁴

It is appropriate to discuss at this point several problems in connection with local government. It is obvious that omitting local government from the jurisdiction of the state Ombudsman does not prevent the creation of the office by a political subdivision of the state. On the other hand, the comment to section one does raise the question (originally posed by Professor L. Harold Levinson, a member of the Ombudsman Committee) whether inclusion of local government will be interpreted as preempting to the state jurisdiction over both state and local agencies to prevent a local government from establishing its own local Ombudsman. The ABA Model Statute does not address this point, but this writer believes that the question must be answered in the affirmative. The problem of immunities of the local Ombudsman discussed hereafter under section 17 points to the desirability of state legislation covering the subject of local government. Either a state should give its Ombudsman jurisdiction over both local and state agencies or a state should have several statutes, one permitting local government to establish a local Ombudsman under the detailed provisions of a state statute and the other establishing a state Ombudsman without local jurisdiction.²⁵

Another possible alternative suggested by Professor Levinson is to have a statute provide for a state-wide Ombudsman without local jurisdiction but to give enabling authority for any local government to establish a local Ombudsman with essentially the same attributes and powers, subject to some variations.²⁶

5. It is made clear in the ABA Model Statute and the three state statutes that multi-state government entities are exempt from the jurisdiction of the Ombudsman.²⁷ However, the language of the ABA Model Statute and the Hawaii statute is preferable, because of its simplicity, to the language of the Nebraska and Iowa statutes, the latter stating, "any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

6. The ABA Model Statute like Iowa does not specify an exclusion for federal agencies because it was deemed superfluous in view of constitutional limitations. However, the Hawaii and Nebraska statutes do contain such an explicit exclusion.²⁸

24. HAWAII REV. STAT. § 90-12A(7)(8) (Supp. 1974).

25. For example, the Georgia legislature passed in 1974, H. B. 85 amending the Atlanta City Charter providing for an Ombudsman. On opinion of the City Attorney to the effect that the state law was improper, the City Council passed its own Ombudsman ordinance.

26. Letters from Professor L. Harold Levinson to Bernard Frank, Oct. 20, 1973, and Jan. 11, 1974.



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You will find attached a Model Ombudsman Statute for State Governments (pages 1-15), the American Bar Association resolution on the Ombudsman (page 16), and a recommended bibliography on the Ombudsman (pages 17-19).

The Ombudsman Committee, Section of Administrative Law, American Bar Association, concluded several years ago that a uniform State Ombudsman Act was not needed in this country but that a Model Ombudsman Statute would serve a very useful purpose.

At the request of the Ombudsman Committee, Yale Legislative Services undertook to prepare a Model Ombudsman Statute for State Governments. Edward G. Grossman, a student at Yale University Law School, acted as project co-ordinator and prepared a first draft of a Model Ombudsman Statute for State Governments. The Model Statute as prepared by Yale Legislative Services was reviewed by a special committee of the Ombudsman Committee and the comments of the committee members are reflected in the final draft of the Model Statute attached hereto. The Model Statute draws heavily on Professor Walter Gellhorn's Unofficial Model Ombudsman Statute. Professor Gellhorn, who is a member of the special committee, gave his consent to the use of his Unofficial Model Ombudsman Statute as a base to prepare the Model Ombudsman Statute for State Governments.

The Model Ombudsman Statute for State Governments meets the twelve (12) essentials of an Ombudsman Statute set forth in the resolution adopted by the House of Delegates of the American Bar Association in 1969 as recommended by the Ombudsman Committee then headed by Professor Kenneth Culp Davis and amended in 1971.

This Model Ombudsman Statute for State Governments is issued by the Ombudsman Committee, Section of Administrative Law, American Bar Association, but represents a joint work product of the Yale Legislative Services and the Ombudsman Committee, Section of Administrative Law, American Bar Association. The bibliography was prepared by Mr. Grossman.

The Ombudsman Committee extends its appreciation to Yale Legislative Services and to Edward G. Grossman.

Bernard Frank, Chairman
Ombudsman Committee
Section of Administrative Law
American Bar Association
931 Hamilton Mall
Allentown, Pennsylvania 18105

American Bar Association Resolution

The following Resolution dealing with the establishment of an Ombudsman was adopted by the American Bar Association at the Midyear Meeting of the House of Delegates in 1959:

Be it Resolved, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an ombudsman or ombudsmen for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.

4. That establishment of a Federal government-wide ombudsman program should await findings based upon the experimentation recommended.

Be it Further Resolved, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

A State Statute to Create The Office of Ombudsman

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*Harvard Journal on Legislation**SECTION 603. Judicial review.*

No proceeding or decision of the Ombudsman may be reviewed in any court, unless it contravenes the provisions of this Act.

SECTION 604. Immunity of the Ombudsman.

The Ombudsman has the same immunities from civil and criminal liability as a judge of this state.

SECTION 605. Ombudsman's privilege not to testify.

The Ombudsman and his staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this Act.

COMMENT

SECTION 603. Judicial Review.

This section prevents an agency or official from securing judicial review of the Ombudsman's recommendations. Since the Ombudsman has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. However, since the institution is new in this country, one cannot be certain how the law will develop. This provision is included to guarantee that the Ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions.

SECTION 604. Immunity of the Ombudsman.

The Ombudsman is given the immunities from civil and criminal prosecution that are enjoyed by a state judge. The most significant of these is immunity from liability for defamation arising out of statements made in the exercise of his duties.

SECTION 605. Ombudsman's privilege not to testify.

The purpose of this section is to encourage people to cooperate with the Ombudsman, without fear that he will divulge information disclosed to him in confidence. This section also protects the Ombudsman and his staff from the embarrassment and interruption of having to testify in regard to cases they have investigated. However, since the Ombudsman may need recourse to the courts to perform his duties under this act, this privilege is not withheld from him. Its most likely use is to enforce his subpoena power under section 403. He may also testify in regard to the penalty for obstruction under section 607.

International Bar Association

Ombudsman Committee

Chairman
Bernard Frank (USA)

Vice Chairman
Alex B. Weir (Canada)

November 17, 1978

Ms. Karla L. Forsythe
Ombudsperson
Municipality of Anchorage
Office of the Ombudsman
Pouch 6-650
Anchorage, Alaska 99502

Dear Ms. Forsythe:

Thank you for the copy of the letter to Peter Freeman. You raised two points:

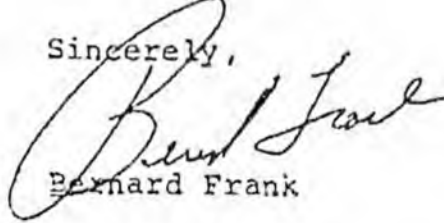
1. Confidentiality of communications between complainants and your office. This problem, please note pages 439 to 441 inclusive from my article on "State Ombudsman Legislation in the United States", Section 17, pages 13-14, of the Model Ombudsman Statute, and pages 47-48 of my article on the Nebraska Public Counsel. This problem was discussed at one of the workshops at the Dayton conference. The problem with local government is that the only item on the subject is a local ordinance and then the immunity extends only in those courts which are subject to the jurisdiction of the local governments. You will not have immunity in the state courts and certainly not in the federal courts. However, if I were you I would do what I could on the local level and you will note there are sections on immunity in the Flint Charter, page 20, and the Detroit Charter, Section 4-315. The state statute might be necessary to protect you in the state courts but this would, of course, not preclude being subpoenaed for a federal court. Your only hope there would be to have a federal statute to cover this subject. There remains a great deal of work in this particular area. I would suggest that you write to William P. Angrick, II, Office of the Citizens' Aide, 515 East Twelfth Street, Des Moines, Iowa, 50319, because his office has been involved in several cases involving freedom from subpoena in a federal court. The early part of this year, a Federal Judge upheld the confidentiality of the Iowa Ombudsman records on the basis that there was no federal interest involved and the state policy should prevail as reflected in the Statute granting immunity.

Ms. Karla L. Forsythe
Page 2
November 17, 1978

2. With respect to provisions containing non-retaliation sections, I would refer you to page 44 of the Nebraska article, Section 13(e) of the Model Statute, and page 432 of the University of Miami article. Offhand, I found only a section on this in the Nebraska statute.

If you wish to discuss this further, please contact me.

Sincerely,



Handwritten signature of Bernard Frank in cursive script.

Bernard Frank

BF:dc

Enclosures

~~CONFIDENTIAL~~
Communication
Attorney/Client

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

RECEIVED

JUL 12 1990

DATE: July 6, 1990

TO: Michael Mills, Ombudsman

FROM: Kevin Finnigan, Assistant Municipal Attorney

THRU: James E. Ramsey, Deputy Municipal Attorney

THRU: Richard D. Kibby, Municipal Attorney

SUBJECT: MOA v. Robert H. Stafford
Superior Court Case No. 3AN-89-7337 Civil

Office of the Ombudsman

KF
JR

You have asked whether AMC 2.60.120(C) provides authority to exempt the Ombudsman from honoring a subpoena to testify at a trial.

SHORT ANSWER

AMC 2.60.120(C) does not provide a recognizable privilege exempting the Ombudsman from honoring a subpoena and testifying at trial.

FACTS

Mr. Stafford has advised the Ombudsman and his assistant that he would be issuing them a subpoena to appear and testify at his upcoming trial. Mr. Stafford had previously filed a complaint with the Ombudsman's office concerning alleged improprieties by an employee at the Parks and Recreation Department. The Ombudsman's office made an initial inquiry into the matter but did not investigate the matter because of pending litigation.

DISCUSSION

AMC 2.60.070(C) states:

The Ombudsman shall protect the confidentiality of complainants or witnesses coming before them except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties.

The above provision does not provide a privilege from honoring a subpoena or testifying in court. Instead, AMC 2.60.070(C) prohibits the Ombudsman from voluntarily disclosing information

Michael Mills, Ombudsman
July 6, 1990
Page 2

obtained from complainants and witnesses except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties. The State Ombudsman is afforded protections not given to the Municipal Ombudsman. AS 24.55.260 states that "the ombudsman and the staff of the ombudsman's office may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter." Based on AS 24.55.260, the State Ombudsman may refuse to testify as a witness. Alaska Rule of Court 501 recognizes certain privileges from testifying in court. Among those recognized are privileges provided in enactments of the Alaska Legislature. Alaska Rule of Court 501 thus would recognize the privilege of the State Ombudsman pursuant AS 24.55.260 from testifying as provided by state law. No such protection is recognized for the Municipal Ombudsman.

Please contact this office if we may be of further assistance.

KF:ld
M/MILLS1

CHAPTER 601G

CITIZENS' AIDE

- 601G.1 Definitions.
- 601G.2 Office established.
- 601G.3 Appointment — vacancy.
- 601G.4 Citizen of United States and resident of Iowa.
- 601G.5 Term — removal.
- 601G.6 Deputy — assistant for penal agencies.
- 601G.7 Prohibited activities.
- 601G.8 Closed files.
- 601G.9 Powers.
- 601G.10 No charge for services.
- 601G.11 Subjects for investigations.
- 601G.12 Complaints investigated.
- 601G.13 No investigation — notice to complainant.
- 601G.14 Institutionalized complainants.
- 601G.15 Reports critical of agency or officer.
- 601G.16 Recommendations to agency.
- 601G.17 Publication of conclusions.
- 601G.18 Report to general assembly.
- 601G.19 Disciplinary action recommended.
- 601G.20 Immunities.
- 601G.21 Witnesses.
- 601G.22 Penalties.
- 601G.23 Citation.

601G.1 Definitions.

As used in this chapter:

1. "Person" means an individual, aggregate of individuals, corporation, partnership, or unincorporated association.
2. "Agency" means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of official duties, but it does not include:
 - a. Any court or judge or appurtenant judicial staff.
 - b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.
 - c. The governor of Iowa or the governor's personal staff.
 - d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state.
3. "Officer" means any officer of an agency.
4. "Employee" means any employee of an agency.
5. "Administrative action" means any policy or action taken by an agency or failure to act pursuant to law.

[C73, 75, 77, 79, 81, §601G.1]

601G.2 Office established.

The office of citizens' aide is established.

[C73, 75, 77, 79, 81, §601G.2]

601G.3 Appointment — vacancy.

The citizens' aide shall be appointed by the legislative council with the approval and confirmation of a constitutional majority of the senate and with the approval and confirmation of a constitutional majority of the house of representatives. The legislative council shall fill a vacancy in this office in the same manner as the original appointment. If the appointment or vacancy occurs while the general assembly is not in session, such appointment shall be reported to the senate and the house of representatives within thirty days of their convening at their next regular session for approval and confirmation.

The citizens' aide shall employ and supervise all employees under the citizens' aide's direction in such positions and at such salaries as shall be authorized by the legislative council. The legislative council shall hear and act upon appeals of aggrieved employees of the office of the citizens' aide.

[C73, 75, 77, 79, 81, §601G.3]

601G.4 Citizen of United States and resident of Iowa.

The citizens' aide shall be a citizen of the United States and a resident of the state of Iowa, and shall be qualified to analyze problems of law, administration and public policy.

[C73, 75, 77, 79, 81, §601G.4]

601G.5 Term — removal.

The citizens' aide shall hold office for four years from the first day in July of the year of approval by the senate and the house of representatives, and until a successor is appointed by the legislative council, unless the citizens' aide can no longer perform the official duties, or is removed from office. The citizens' aide may at any time be removed from office by constitutional majority vote of the two houses of the general assembly or as provided by chapter 66. If a vacancy occurs in the office of citizens' aide, the deputy citizens' aide shall act as citizens' aide until the vacancy is filled by the legislative council.

[C73, 75, 77, 79, 81, §601G.5]

601G.6 Deputy — assistant for penal agencies.

The citizens' aide shall designate one of the members of the staff as the deputy citizens' aide, with authority to act as citizens' aide when the citizens' aide is absent from the state or becomes disabled. The citizens' aide may delegate to members of the staff any of the citizens' aide's authority or duties except the duty of formally making recommendations to agencies or reports to the governor or the general assembly.

The citizens' aide shall appoint an assistant who shall be primarily responsible for investigating complaints relating to penal or correctional agencies.

[C73, 75, 77, 79, 81, §601G.6]

84 Acts, ch 1046, §1

601G.7 Prohibited activities.

Neither the citizens' aide nor any member of the staff shall:

1. Hold another public office of trust or profit under the laws of this state other than the office of notary public.
2. Engage in other employment for remuneration with an agency against which a complaint may be filed under this chapter or that could create a conflict of interest or interfere in the performance of the person's duties under this chapter.
3. Knowingly engage in or maintain any business transactions with persons employed by agencies against whom complaints may be made under the provisions of this chapter.
4. Be actively involved in partisan affairs.
[C73, 75, 77, 79, 81, §601G.7]
84 Acts, ch 1046, §2

601G.8 Closed files.

The citizens' aide may maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the citizens' aide, except that the general assembly, any standing committee of the general assembly or the governor may require disclosure of any matter and shall have complete access to the records and files of the citizens' aide. The citizens' aide may conduct private hearings.
[C73, 75, 77, 79, 81, §601G.8]

601G.9 Powers.

The citizens' aide may:

1. Investigate, on complaint or on the citizens' aide's own motion, any administrative action of any agency, without regard to the finality of the administrative action, except that the citizens' aide shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency. A communication or receipt of information made pursuant to the powers prescribed in this chapter shall not be considered an ex parte communication as described in the provisions of section 17A.17.
2. Prescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made; and, subject to the requirements of this chapter, determine the form, frequency, and distribution of the conclusions and recommendations of the citizens' aide.
3. Request and receive from each agency assistance and information as necessary in the performance of the duties of the office. The citizens' aide may examine the records and documents of any agency unless its custodian demonstrates that the examination would violate federal law or result in the denial of federal funds to the agency. If the document sought is required by law to be kept confidential, the agency may refuse access until the citizens' aide demonstrates that the document is relevant or material to an investigation authorized under subsection 1. If the citizens' aide is provided access to the confidential document, the citizens' aide is subject to the same policies and penalties regarding the confidentiality of the document as an employee of the agency. The citizens' aide may enter and inspect premises within any agency's control.
4. Issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence relevant to a matter under inquiry. The citizens' aide, deputies, and assistants of the citizens' aide may administer oaths to persons giving tes-

timony before them. If a witness either fails or refuses to obey a subpoena issued by the citizens' aide, the citizens' aide may petition the district court having jurisdiction for an order directing obedience to the subpoena. If the court finds that the subpoena should be obeyed, it shall enter an order requiring obedience to the subpoena, and refusal to obey the court order is subject to punishment for contempt.

[C73, 75, 77, 79, 81, §601G.9; 82 Acts, ch 1026, §1]

601G.10 No charge for services.

No monetary or other charge shall be levied upon any person as a prerequisite to presentation of a complaint to the citizens' aide.

[C73, 75, 77, 79, 81, §601G.10]

601G.11 Subjects for investigations.

An appropriate subject for investigation by the office of the citizens' aide is an administrative action that might be:

1. Contrary to law or regulation.
2. Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though in accordance with law.
3. Based on a mistake of law or arbitrary in ascertainties of fact.
4. Based on improper motivation or irrelevant consideration.
5. Unaccompanied by an adequate statement of reasons. The citizens' aide may also be concerned with strengthening procedures and practices which lessen the risk that objectionable administrative actions will occur.

[C73, 75, 77, 79, 81, §601G.11]

601G.12 Complaints investigated.

The citizens' aide may receive a complaint from any source concerning an administrative action. The citizens' aide shall conduct a suitable investigation into the administrative actions complained of unless the citizens' aide finds substantiating facts that:

1. The complainant has available another remedy or channel of complaint which the complainant could reasonably be expected to use.
2. The grievance pertains to a matter outside the citizens' aide power.
3. The complainant has no substantive or procedural interest which is directly affected by the matter complained about.
4. The complaint is trivial, frivolous, vexatious, or not made in good faith.
5. Other complaints are more worthy of attention.
6. The citizens' aide resources are insufficient for adequate investigation.
7. The complaint has been delayed too long to justify present examination of its merit.

The citizens' aide may decline to investigate a complaint, but shall not be prohibited from inquiring into the matter complained about or into related problems at some future time.

[C73, 75, 77, 79, 81, §601G.12]

601G.13 No investigation — notice to complainant.

If the citizens' aide decides not to investigate, the complainant shall be informed of the reasons for the decision. If the citizens' aide decides to investigate, the complainant and the agency shall be notified of the decision. After completing consideration of a com-

plaint, whether or not it has been investigated, the citizens' aide shall without delay inform the complainant of the fact, and if appropriate, shall inform the administrative agency involved. The citizens' aide shall on request of the complainant, and as appropriate, report the status of the investigation to the complainant.

[C73, 75, 77, 79, 81, §601G.13; 82 Acts, ch 1026, §2]

601G.14 Institutionalized complainants.

A letter to the citizens' aide from a person in a correctional institution, a hospital, or other institution under the control of an administrative agency shall be immediately forwarded, unopened to the citizens' aide by the institution where the writer of the letter is a resident. A letter from the citizens' aide to such a person shall be immediately delivered, unopened to the person.

[C73, 75, 77, 79, 81, §601G.14]

601G.15 Reports critical of agency or officer.

Before announcing a conclusion or recommendation that criticizes an agency or any officer or employee, the citizens' aide shall consult with that agency officer or employee, and shall attach to every report sent or made under the provisions of this chapter a copy of any unedited comments made by or on behalf of the officer, employee, or agency.

[C73, 75, 77, 79, 81, §601G.15]

601G.16 Recommendations to agency.

If, having considered a complaint and whatever material the citizens' aide deems pertinent, the citizens' aide finds substantiating facts that:

1. A matter should be further considered by the agency;
2. An administrative action should be modified or canceled;
3. A rule on which an administrative action is based should be altered;
4. Reasons should be given for an administrative action; or
5. Any other action should be taken by the agency, the citizens' aide shall state the recommendations to the agency. If the citizens' aide requests, the agency shall, within twenty working days notify the citizens' aide of any action taken on the recommendations or the reasons for not complying with them.

If the citizens' aide believes that an administrative action has occurred because of laws of which results are unfair or otherwise objectionable, the citizens' aide shall notify the general assembly concerning desirable statutory change.

[C73, 75, 77, 79, 81, §601G.16]

601G.17 Publication of conclusions.

The citizens' aide may publish the conclusions, recommendations, and suggestions and transmit them to the governor, the general assembly or any of its committees. When publishing an opinion adverse to an administrative agency or official the citizens' aide shall, unless excused by the agency or official affected, include with the opinion any unedited reply made by the agency.

Any conclusions, recommendations, and suggestions so published may at the same time be made available to the news media or others who may be concerned.

[C73, 75, 77, 79, 81, §601G.17]

601G.18 Report to general assembly.

The citizens' aide shall by April 1 of each year submit an economically designed and reproduced report to the general assembly and to the governor concerning the exercise of the citizens' aide functions during the preceding calendar year. In discussing matters with which the citizens' aide has been concerned, the citizens' aide shall not identify specific persons if to do so would cause needless hardship. If the annual report criticizes a named agency or official, it shall also include unedited replies made by the agency or official to the criticism, unless excused by the agency or official affected.

[C73, 75, 77, 79, 81, §601G.18; 82 Acts, ch 1026, §3]

601G.19 Disciplinary action recommended.

If the citizens' aide believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, the citizens' aide shall refer the matter to the appropriate authorities.

[C73, 75, 77, 79, 81, §601G.19]

601G.20 Immunities.

No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the citizens' aide or any member of the staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties except as may be necessary to enforce the provisions of this chapter.

[C73, 75, 77, 79, 81, §601G.20]

601G.21 Witnesses.

A person required by the citizens' aide to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in district courts of this state. Officers and employees of an agency shall not be entitled to such fees and allowances. A person who, with or without service of compulsory process, provides oral or documentary information requested by the citizens' aide shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

[C73, 75, 77, 79, 81, §601G.21]

601G.22 Penalties.

A person who willfully obstructs or hinders the lawful actions of the citizens' aide or the citizens' aide's staff, or who willfully misleads or attempts to mislead the citizens' aide in the citizens' aide's inquiries, shall be guilty of a simple misdemeanor.

[C73, 75, 77, 79, 81, §601G.22]

601G.23 Citation.

This chapter shall be known and may be cited as the "Iowa Citizens' Aide Act".

[C73, 75, 77, 79, 81, §601G.23]

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES
July 24, 1966

UNITED STATES - ALASKA

"Kimberly Shinn v. Charles Dexter, et al."
4FA -81-1736-Civ. (Alaska S.C.) Order June 8, 1982

OMBUDSMAN OFFICES - CONFIDENTIALITY*

The plaintiff sought to compel the testimony of a staff member of the Office of Ombudsman for Alaska at trial. The Office of Ombudsman had investigated a complaint which related to the plaintiff's present legal action. The Office of Ombudsman brought a Motion to Strike the staff member's name from the Witness List and a Protective Order barring the production of Witnesses or documents from the office of Ombudsman. The Ombudsman's motion was based primarily on the confidentiality provisions of the statute: AS 24.55.160(b) "The Ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before him except insofar as disclosures may be necessary to enable him to carry out his duties and to support his recommendations."; and on AS 24.58.260 "The Ombudsman and his staff may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be

necessary to enforce the provisions of this chapter." The Superior Court granted the Order striking the staff member's name from the Witness List and a Protective Order barring the production of Witnesses and/or documents from the Ombudsman Office was entered

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES
July 24, 1986

UNITED STATES - IOWA

"Kelly v. Brewer"

RC Civil No. 73-177-2, order filed April 28, 1975

IOWA CITIZENS' AIDE* U.S. FEDERAL COURT SUBPOENA* OMBUDSMAN -
CONFIDENTIALITY*

The Iowa Citizens' Aide (Ombudsman) Mr. Thomas R. Mayer was served with a Federal Court subpoena. Mr. Mayer has tried to resist attempts to have his Ombudsman office used as a means of discovery for litigation. The only possible solution to the present dilemma facing State Ombudsmen in the United States would be Federal legislation granting immunity from Federal subpoena. The court ruling requiring a member of the Ombudsman's staff to testify in court was not appealed since an accord was worked out between the plaintiff's counsel and the Ombudsman's counsel enabling the testimony to be given "in camera" if the subpoena was withdrawn.

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UNITED STATES - IOWA

"Remmers et al. v. Brewer"

U.S. District Court, Southern District of Iowa, Judgment delivered
January 4, 1978 36 pages

CITIZEN'S AIDE FOR CORRECTION* U.S. FEDERAL COURT SUBPOENA* OMBUDSMAN -
CONFIDENTIALITY*

A prison ombudsman was subpoenaed to testify in United States District Court regarding Remmers v. Brewer. Litigation was to determine the status of a prison religion. The state was trying to prove no such religion existed, and the prison ombudsman's testimony was to provide proof through information gathered in the course of his duties. The Citizen's Aide objected, based on Iowa Code which stated that information gathered by the prison ombudsman was confidential. He wished to protect the confidentiality, credibility, and physical safety of the prison ombudsman and other staff while in the prisons. On November 29, 1977 a magistrate granted the motion to quash, because no serious federal interest overrode his statutory immunity from subpoena. The state's interest in protecting the confidentiality of the Ombudsman outweighed the defendant's need for the prison ombudsman's testimony. An appeal to the District Court was dismissed because "the state interest in the efficient operation of its administrative agencies as embodied in the Citizen's Aide concept would clearly be adversely affected by compelling Cornell (the prison ombudsman) to testify."

UNITED STATES -ALASKA

"Patricia v State of Alaska (Department of Health and Social Services, et al.)"

1985 Annual Report of Alaska Ombudsman, App. F 6pages, 161-167

Ombudsman-Non-Compellibility* Ombudsman Statute, A.S., §24.55.260*

The Ombudsman for the State of Alaska sought to quash a subpoena which had been issued requiring an employee of his office to provide a deposition, and for a further order enforcing the privilege of the Alaska Statute and barring any production of witnesses from The Office of the Ombudsman in the action. An employee of The Office of the Ombudsman, in the course of his employment, had investigated a complaint by the plaintiff against the State of Alaska, Department of Health and Social Services. The complainant had alleged that the department's hiring, practises contravened the State Personnel Act and Personnel Rules. The employee had completed the investigation and drafted a report which was issued to Ms. Williams and signed by the Ombudsman, Frank Flavin. Ms. Williams ultimately filed an action against The Department of Health and sought through the subpoena, information obtained during the course of the investigation. The Court reviewed the provisions of -The Ombudsman Act- regarding the confidentiality of the Ombudsman and the protection afforded him and members of his staff from testifying in respect to matters coming to their attention during the course of their investigation and concluded that the privilege was such that it should be recognized and accordingly ordered that the subpoena be quashed and a protective order issued. In coming to this conclusion, the Court viewed the privilege necessary in order to protect the confidentiality of information obtained by the Ombudsman, encourage co-operation on an investigation, and keep the Ombudsman out of vexatious litigation. In addition, the Court held that the plaintiff would have to establish the special need for the information. Finally, it concluded that the adverse impact in compelling testimony would be substantial. For all the above reasons the Court recognized the privilege from testifying and quashed the subpoena.

UNITED STATES -HAWAII

"Jake Lapin v. William C. Plowden, Jr., and Joshua C. Agsalud Re: Civil No. 84-0143, order filed April 10, 1984"

U.S. Federal Court Subpoena*

The State Ombudsman, Herman S. Doi, was served with a Federal Court subpoena which was issued at the request of a Plaintiff in a civil suit. A motion to quash the subpoena was filed to resist the attempt to have the Ombudsman testify and produce records in court pursuant to the subpoena. The motion was based on the premise that court may quash or modify the subpoena if it is unreasonable and oppressive. The memorandum in support of the motion cited section 96-9(b), Hawaii Revised Statutes (HRS), the Ombudsman is required to maintain secrecy in respect to all matters and identities of complainants and witnesses - section 96-17, HRS, the Ombudsman and his staff shall not testify in any court- and that the court should decide the issue by balancing State and Federal interest under Rule 501, Federal Rules of Evidence. Hawaii's interest, to protect the statutory privilege granted the Ombudsman, an officer of the legislature, prevailed and the subpoena was quashed by the magistrate hearing the motion. Plaintiff appealed the decision of the magistrate by filing a "Motion to Set Aside the Magistrate's Order Granting Motion to Quash Subpoena Duces Tecum", which motion was denied on the grounds of mootness because the court dismissed the case for Plaintiff's lack of standing.

VICKI M. YOUNG
Editor of Court Decisions

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ARBITRAL IMMUNITY

Arbitration has been an important dispute settlement aid to courts in the United States since the nineteenth century. Recognized as an effective adjudicatory process, it is only natural that arbitration and litigation be accorded some safeguards. One important safeguard, which is the topic of this *Letter*, is that of arbitral immunity.¹ The doctrine of arbitral immunity, which stems from the doctrine of judicial immunity, applies to both the arbitrators and the arbitral institutions that sponsor and administer the arbitration process.

Judicial Immunity

The doctrine of judicial immunity is based on public policy grounds to ensure the finality of court decisions as well as the independence of the judiciary. The origins of this doctrine can be traced as far back as the early seventeenth century to two English cases, *Floyd v. Barker*² and *The Marshalsea*.³ Almost 250 years later, it was applied by an early American court in *Pratt v. Gardner*,⁴ in which the court concluded that:

Where the subject matter and the person are within the jurisdiction of the court, the judge [is immune. While his judgment may be reversed or affirmed,] he himself can be liable only to an impeachment for corruption or other misconduct, if there be any.⁵

The United States Supreme Court, in *Randall v. Brigham*,⁶ stated that:

it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial

1. This *Letter* updates and expands two earlier *Lawyers' Arbitration Letters* on immunity: No. 10, May 15, 1962, *Personal Liability of Arbitrators*, and Vol. 7, No. 1, March 1983, *Immunity and the Arbitration Process*.

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2. 77 Eng. Rep. 1305 (1607).

3. 77 Eng. Rep. 1027 (1612).

4. 2 Cushing 68 (Mass. 1848).

5. *Id.* at 70-71.

6. 74 U.S. 285 (1868).

act done within their jurisdiction. . . . This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement.⁷

Four years later, in *Bradley v. Fisher*,⁸ the Court reiterated its position that judges are not liable in civil actions for their judicial acts, "even when such acts are in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly."⁹ More specifically, the Court held:

a general principle of the highest importance to the proper administration of justice [is] that a judicial officer, in exercising the authority vested in him, be free to act upon his own convictions, without apprehension of personal consequences to himself.¹⁰

Extension of Immunity

More recently, the Court reaffirmed the doctrine of judicial immunity in *Stump v. Sparkman*,¹¹ stating that a "judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."¹² Moreover, the Court,

taking a narrow view of the judicial act limitation on immunity, stated that an act is judicial when it is one normally performed by a judge and the parties have dealt with the judge in his judicial capacity.

Courts started to recognize over a century ago that arbitrators serve in a "quasi-judicial" capacity. In *Burchell v. Marsh*,¹³ the Supreme Court stated that "arbitrators are judges chosen by the parties. . . ."¹⁴ Indeed, an "arbitrator acts in a quasi-judicial capacity,"¹⁵ and while they are not "e nomine judges, [arbitrators] are judicial officers and bound by the same rules as govern those officers."¹⁶ Because courts have extended quasi-judicial immunity to those performing quasi-judicial acts, quasi-judicial immunity has also been extended to arbitrators.

*Jones v. Brown*¹⁷ was one of the earliest cases in which judicial immunity was extended to arbitrators. *Jones* involved an action by an arbitrator who sued to collect his fee. The losing party in the arbitration filed a cross-claim for damages, alleging conspiracy and fraud among the arbitrators. The court, noting that review by a court of the arbitration award does not divest the arbitrators of their judicial functions, and relying in part on the doctrine of immunity as enunciated in *Pratt*, dismissed the allegations.

Four years later, a Massachusetts court, in *Hoosack Tunnel, Dock and Elevator Co. v. O'Brien*,¹⁸ followed suit. The *Hoosack Tunnel* court determined that a court-

7. *Id.*

8. 80 U.S. 335 (1872).

9. *Id.* at 351.

10. *Id.* at 347.

11. 435 U.S. 349 (1978).

12. *Id.* at 359.

13. 58 U.S. 344 (1855).

14. *Id.* at 349.

15. *American Eagle Fire Insurance Co. v. New Jersey Insurance Co.*, 240 N.Y. 398, 405, 148 N.E. 562 (1925).

16. *Babylon Milk and Cream Co., Inc. v. Horvitz*, 151 N.Y.S.2d 221, 224 (1956); *aff'd mem.*, 165 N.Y.S.2d 717 (2d Dept. 1957).

17. 54 Iowa 74, 6 N.E. 106 (1880).

18. 137 Mass. 424 (1884).

appointed arbitrator was not civilly liable for his actions while exercising his arbitral duties. It reasoned that an arbitrator is a quasi-judicial officer when exercising his judicial functions. Furthermore,

[t]here is as much reason in this case for protecting and insuring [the arbitrator] his impartiality, independence and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and . . . the same immunity extends to him.¹⁹

Early arbitral immunity cases involved commercial arbitrators. This changed in 1956 when a New York court, following the Massachusetts and Iowa courts, dismissed an action against an arbitrator and extended the doctrine of arbitral immunity to include labor arbitrators. *Babylon Milk and Cream Co., Inc. v. Horvitz*²⁰ involved an allegation of collusion in the making of the award. The unsuccessful party also sought to recover damages from the arbitrator, the union, its representatives, and its attorney. The court found that dismissal of the action against the arbitrator was warranted. It noted that:

It is well established that judicial officers cannot be subjected to civil liability by an unsuccessful litigant [and that there is] no reason to distinguish between a judge and an arbitrator. . . . The analogy is clear, and considering the favor in which arbitration is held by the courts in this state, the same rule of immunity should apply to arbitrators as applies to the judiciary, inasmuch as the same reasons of public policy are applicable. If arbitrators are

to be distinguished from jurists in this respect, a blow would be dealt to the cause of arbitration which is unwarranted.²¹

In accordance with its findings, the court held that the arbitrator could not be sued for alleged misconduct in the arbitration proceeding.²²

Another immunity-related issue that has arisen in the context of labor arbitration is the arbitrator-umpire's status as a fiduciary in arbitration under the Employee Retirement Income Security Act of 1974 (ERISA)²³ and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).²⁴ Under these acts, individuals who exercise certain powers are fiduciaries. Whether an arbitrator may be held liable as a fiduciary under these acts was the issue addressed in *International Union, United Auto Workers v. Greyhound Lines, Inc.*²⁵

The United Auto Workers (UAW) and Greyhound entered into a pension trust agreement that was to be jointly administered by three representatives from each side. The agreement provided that, in the event a board vote should result in a dead-

21. *Id.* at 224.

22. For additional cases involving the extension of arbitral immunity to labor arbitrators, see *Hill v. Aro*, 263 F. Supp. 342 (N.D. Ohio 1957) (arbitrator held immune from liability for actions performed in his arbitral capacity); *Cahn v. ILGWU*, 311 F.2d 113 (3d Cir. 1965) (action against arbitrator alleging conspiracy with union in violation of the Sherman Antitrust Act was dismissed); *Calzarano v. Liebowitz*, 550 F. Supp. 1389 (S.D.N.Y. 1982) (complaint against arbitrator for damages on the ground that the award violated the "cruel and unusual punishment" proscription of the Eighth Amendment to the U.S. Constitution was dismissed).

23. 29 U.S.C. § 1001 *et seq.*

24. Pub. L. No. 96-364, 94 Stat. 1208 (1980).

25. 701 F.2d 1181 (6th Cir. 1983).

19. *Id.* at 426.

20. *Supra* note 16.

lock, an arbitrator would be selected to resolve the dispute. A dispute arose over proposed benefit increases and the matter was submitted to arbitration. The arbitrator found in favor of the UAW and issued an opinion and award implementing their proposal. A dispute arose over whether the bonding requirement for fiduciaries under ERISA was complied with. The court held that the requirement was inapplicable because the arbitrator was not a fiduciary and enforced the award. Greyhound appealed.

The appellate court affirmed. It analyzed the policy of arbitral immunity and concluded that the arbitrator was entitled to immunity because he had no interest in the outcome of the proposed benefit plan and that, in breaking the deadlock at issue, his purpose was functionally comparable to that of a judge.²⁶ The court also found that Congress had not intended to weaken the firmly established principle of arbitral immunity when it enacted ERISA. Specifically,

[o]ur construction of the principle of arbitral immunity leads us to conclude that ERISA was not intended to abrogate this common law immunity. . . .

[W]e do not believe that ERISA was intended to abolish arbitral immunity in the absence of Congress having specifically so provided such an abrogation in the legislative record. . . .

[Moreover, although the arbitrator] performed functions that arguably come within the definition of a fiduciary, we conclude that he would be entitled to immunity from liability for damages, in any event, for those acts committed while performing in his official capacity as an arbitrator.²⁷

26. See discussion on *Butz v. Economou*, *infra*, for more information on the "functional comparability" standard.
27. *Supra* note 25, at 1187.

When Given

A question that frequently arises is under what circumstances it is appropriate to accord an individual the protections of arbitral immunity. The standard used for determining when the appropriate circumstances exist is dependent on the "functional comparability" of an individual's role to that of a judge. This standard was addressed in the Supreme Court decision of *Butz v. Economou*.²⁸

Butz involved the issue of personal immunity of federal officials in the Executive Branch from claims arising from their violations of citizens' constitutional rights. The Court noted that judges have absolute immunity "not because of their particular location within the Government but because of the special nature of their responsibilities."²⁹ Consequently, immunity is granted to individuals when it can be shown that "the functional comparability of their judgments to those of . . . judge[s]" exists.³⁰ Thus, under *Butz*, the nature of one's responsibilities is the determining factor of when arbitral immunity is accorded, not the professional source of the individual making the decisions.

Even with the "functional comparability" standard in mind, decisions to grant or deny immunity are still decided on a case-by-case basis. However, the effect of *Butz* is really a restatement by the Supreme Court of the criteria used by the earlier courts to determine whether, and when, the doctrine of arbitral immunity should be extended. This is particularly evident in cases involving individuals who are sometimes designated as "quasi-arbitrators."

For example, in *Lundgren v. Freeman*,³¹ immunity was extended to architects be-

28. 438 U.S. 478 (1978).

29. *Id.* at 511.

30. *Id.* at 512.

31. 307 F.2d 104 (9th Cir. 1962).

cause they were acting as quasi-arbitrators. James Lundgren entered into a series of written contracts with a school district to construct a school, shop, swimming pool and bathhouse. Almost two years later, a month after Lundgren had notified the architectural firm of Freeman, Hayslip and Tuft that the school and shop were about ready for final acceptance, the school district notified Lundgren that it was terminating Lundgren's employment because of total breach. This was done on the advice of the architects. Lundgren sued the school district, and his claim was later submitted to arbitration. He also sued the architects, but that claim was never submitted to arbitration. Instead, the court granted the architects' motion for summary judgment, finding that the architects were acting as quasi-arbitrators and were immune from suit because they were expressly authorized by Lundgren to interfere with the contracts. Lundgren appealed.

The appellate court found that the contracts between the school district and Lundgren provided for the architects' duties as both agents for the school district and quasi-arbitrators. The court stated that, as agents for the school district, the architects were not liable for their decisions because the appropriate remedy is an action against the school district, which Lundgren had elected to file. As for their role as quasi-arbitrators, the court concluded that immunity was warranted because:

[i]f their decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide. It is for this reason that architects, acting as quasi-arbitrators, have been held immune from suit. . . . An architect acts as a "quasi-arbiter" within this rule when, using the contract as a guideline, he resolves dis-

putes between owner and contractor.³²

In *Wasyf, Inc. v. First Boston Corp.*,³³ an appraiser, who was asked to resolve an asset evaluation of general and limited partnership interests in connection with an option to purchase those interests, was held entitled to immunity. Wasyf and Edward Smolarski entered into option agreements with John Moller regarding the option to purchase Wasyf's and Smolarski's general and limited partnership interests in USA Petroleum Company. The option agreements provided for the manner in which the fair market value of the assets would be determined. Specifically, three independent appraisers would establish the value if the parties could not agree, with the optionor and the optionee each choosing one appraiser and the third chosen by the other two appraisers.

Moller exercised his option, but appraisers had to be selected because the parties could not agree upon a price. First Boston Corporation was chosen as the third appraiser, and resolved those asset valuations on which there was no agreement. Wasyf and Smolarski subsequently filed suit against First Boston, alleging breach of contract, gross negligence, and willful misconduct in First Boston's preparation of an appraisal report. The court granted First Boston's motion for summary judgment, holding that it was entitled to arbitral immunity but denied First Boston's motion for sanctions. Both parties appealed.

The appellate court noted at the outset that the contracts at issue involve commerce and that the question of arbitrability is controlled by federal law—namely, the Federal Arbitration Act. It stated that the Act establishes that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The court

32. *Id.* at 117.

33. 513 F.2d 1579 (9th Cir. 1975).

stated further that: (1) the Act does not define "arbitration"; (2) state law is preempted only to the extent necessary to protect the aims of the Act; and (3) California's arbitration statute which governs because of the parties' choice of law clause, defines "agreement" in the context of agreements to arbitrate. In Cal. Civ. Proc. Code § 1280(a), "agreement" includes "agreements providing for valuations, [and] appraisals."³⁴ Because the definition did not conflict with the Act's purpose, and in fact seemed to promote the federal policy favoring arbitration agreements, the court held that the option agreements "called for 'arbitration.'"³⁵

As for the immunity issue, the court noted the

functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners. . . . Because federal policy encourages arbitration and arbitrators are essential in furthering that policy, it is appropriate that immunity be extended to arbitrators for acts within the scope of their duties and within their jurisdiction. . . . Since the contracts in question provided a means of "arbitration," [and because] First Boston acted within the scope of its duties and [there was no challenge to] First Boston's authority to have resolved the disputed valuations,³⁶

the court affirmed the lower court's holding that First Boston is entitled to arbitral immunity.

The granting of immunity to third persons connected to the judicial process was recently extended to a psychologist acting

as a mediator in *Howard v. Drapkin*.³⁷ Vickie Howard initiated an action involving a family law matter in which she sought to have her ex-husband's custody and visitation rights terminated. Prior to the court hearing, she and her ex-husband entered into a stipulation that provided that Robin Drapkin, as an independent psychologist, would evaluate Howard and her family and render non-binding findings and recommendations. The stipulation was later signed by the court and converted into an order. Howard subsequently filed an action against Drapkin, alleging that Drapkin acted improperly during the evaluation, failed to include certain information in her report, and failed to disclose her prior professional relationship with Howard's ex-husband, as well as her personal relationship with the wife of a partner in the law firm representing him in the custody proceedings.

The court was asked

to go beyond California's apparently heretofore limited application of the "persons connected with the judicial processes" analysis and apply common law quasi-judicial immunity like the federal courts have applied it—to people connected with the judicial process who are not "public officials," arbitrators or referees, such as (1) mediators, guardians ad litem, therapists, receivers, bankruptcy trustees and other persons appointed by the courts for their expertise and (2) persons whose work product comes into the judicial process to be used by the court even though they were not court-appointed, such as social workers and probation department employees . . . [and to extend immunity] even further to a third category of people

34. *Id.* at 1582; quoting Cal. Civ. Proc. Code § 1280(a)(West 1982).

35. *Id.*

36. *Id.*

37. 271 Cal. Rptr. 893 (Cal. App. 2d Dist. 1990).

—those persons involved in alternative methods of dispute resolution, such as mediators and “neutral fact-finders,” who function apart from the courts, as did [Drapkin] in the instant case.”

The court found persuasive support in the federal case law regarding such an extension of immunity. In deciding whether an extension of immunity was appropriate in this case, it reviewed Drapkin’s role in the child custody dispute. The court noted that a “psychologist who is mediating a child custody dispute, whether by court appointment or not, is not an advocate for either parent, even if paid by them.”³⁸ It further noted that the job of mediators, conciliators, and evaluators was much like that of judges because it involves impartiality and neutrality. Thus, the court concluded that they are entitled “to the same immunity given others who function as neutrals in an attempt to resolve disputes.”³⁹ It reasoned that:

those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions, (2) making recommendations to the court, or (3) privately attempting to settle disputes, such as [Drapkin] here.⁴⁰

Based on its finding, the court held that:

absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the mak-

ing of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation, or other similar resolution of pending disputes.⁴¹

Because Drapkin was “clearly engaged in [the] latter activity,”⁴² the court ruled that she was entitled to the protection of immunity.

It would appear from the case law that any third party asked to render a determination on a disputed issue between two other parties may be entitled to arbitral immunity. Not everyone, however, is conferred immunity. Much depends upon the facts in each case and the nature of the responsibilities of the third party. For example, in *Gammel v. Ernst & Ernst*,⁴³ immunity was not conferred upon the auditors in an action by a stockholder for damages resulting from the auditors’ alleged negligence and fraud in connection with the examination and audit of a corporation’s books.

The court stated that a person selected to make a binding judicial determination performs the functions of either an arbitrator or quasi-arbitrator and, therefore, is clothed in immunity.

It reviewed a number of decisions of English courts wherein the courts “applied its protective features to a class designated as ‘quasi-arbitrators.’”⁴⁴ The court found that, in those cases

immunity was held dependent upon some contractual provision which called for the exercise of independent judgment or discretion by a person acting as an arbitrator and which

38. *Id.* at 899.

39. *Id.* at 902.

40. *Id.*

41. *Id.* at 902-903.

42. *Id.* at 903.

43. *Id.*

44. 245 Minn. 249, 72 N.W.2d 364 (1955).

45. 72 N.W.2d at 368.

made his determinations binding upon the parties selecting him. But in the absence of such contractual provisions, or where the agreement does not call for the exercise of judicial authority, ordinarily the person selected to perform skilled or professional services is not immune from charges of negligence . . ."

After reviewing Ernst & Ernst's contract of employment, the court determined that the contract did not clothe "them with judicial immunity as quasi-arbitrators."⁴⁶ The court found that the contract provided merely that the auditors were to make an examination and audit of the corporation's books. Because they did not acquire the status of arbitrators or quasi-arbitrators, they could not claim immunity from suit on that basis.

More recently, in *Coopers & Lybrand v. Superior Court*,⁴⁷ auditors were denied arbitral immunity because it was unclear whether the parties' agreement for a binding audit reflected a clear intent to arbitrate.

The issue before the court was whether an agreement for a binding audit was included within the definition of an agreement to arbitrate under the state statutory scheme so as to confer arbitral immunity upon the auditors. After reviewing the provisions of California's current arbitration statute, as well as its legislative history, the court concluded that agreements to arbitrate include "independent examinations by way of valuations, appraisals and similar proceedings, such as audits."⁴⁸ As for the requirement that a controversy exist, the court noted that "controversy" is

broadly defined as any question arising between parties to an agreement. From this, the court concluded that the requirement is met when "parties contractually have agreed to resort to a third party to resolve a particular issue."⁴⁹ It also found that "[b]ecause the parties to an arbitration may dispense with a formal hearing and the taking of evidence, the absence of such elements does not impair the status of a proceeding as an arbitration."⁵⁰

As for the extension of immunity, the court reviewed the legislative purpose for the enactment of a provision in the state arbitration statute that extended to arbitrators the same broad immunity enjoyed by judges. It explained that:

the statute had the further effect of cloaking arbitrators in independent examinations with the immunity of other arbitrators . . . [such that] full arbitral immunity [is conferred] upon arbitrators in appraisals, valuations and similar proceedings, such as audits, irrespective of the arbitrator's particular role in a given situation. . . . Thus, arbitral immunity attaches not because of the professional credentials of the arbitrator, nor because of the ethical canons of the profession to which the arbitrator may belong. Rather, arbitral immunity attaches simply by virtue of the fact that a proceeding is deemed to be an arbitration.⁵¹

In this case, however, the court found that the parties' agreement was ambiguous with respect to whether it was an agreement "for a formal arbitration within the ambit of the [California Civil Procedure] Code, or for

46. *Id.*

47. *Id.*

48. 212 Cal. App. 3d 524, 260 Cal. Rptr. 713 (1989).

49. 260 Cal. Rptr. at 719.

50. *Id.*; see Cal. Civ. Proc. Code § 1280(c).

51. *Id.*

52. *Id.* at 720-721.

a mere binding audit."⁵³ Further, the court noted that at the time of the audit, neither party to the agreement for the binding audit viewed the event as a submission to arbitration. Based on these findings, the court concluded that it could not say as a matter of law that the parties' agreement constituted an agreement to arbitrate, thereby denying the auditors' claim that they were immune from suit.

1) Arbitral Process

A reading of the case law discloses that the doctrine of arbitral immunity includes the arbitral process, much like the expansion of the doctrine of judicial immunity to include the administrative workings of the courts. For example, in *Corbin v. Washington Fire & Marine Ins. Co.*,⁵⁴ the issue before the court was whether evidence given in an arbitration, although allegedly libelous, was unqualifiedly privileged. The court held that the immunity was absolute, ruling that testimony given at the arbitration proceeding was protected. It stated that the principle of absolute immunity was "essential to the maintenance of arbitration," for if:

arbitration is to be safely utilized as an effective means of resolving controversy, the absolute immunity attaching to its proceedings must extend beyond the arbitrators themselves; it must extend to all "indispensable" proceedings. . . . To urge that the immunity should be limited to the arbitrators would be similar to arguing that judicial immunity should go no further than the judge.⁵⁵

53. *Id.* at 722.

54. 1278 F. Supp. 393 (D.S.C. 1968), *aff'd*, 398 F.2d 543 (4th Cir. 1968).

55. 1278 F. Supp. at 398.

2) Arbitral Institutions

A review of pertinent court decisions indicates that the doctrine of arbitral immunity is absolute when it closes the door to collateral attacks for civil liability of arbitrators and arbitral institutions.⁵⁶ One decision in which immunity was granted to both the arbitrator and the arbitration agency is *Rubenstein v. Otterbourg*.⁵⁷

Samuel Rubenstein was a party to an arbitration. At the onset of the hearings, he requested that the Chairman of the three-member panel of arbitrators disqualify himself. The request was denied and the administrative agency, the American Arbitration Association (AAA), refused to resign the arbitrator. An award was rendered and Rubenstein successfully moved to vacate it on the ground of alleged misconduct based on the AAA's refusal to intervene. Rubenstein then filed a second action to recover legal fees incurred during the vacated proceedings. The arbitrator and the AAA moved for summary judgment on the ground that the cause of action was without merit.

The court granted the motion. It found that the arbitrator was entitled to arbitral immunity, and rejected Rubenstein's attempt to distinguish this case from the *Sabylon Milk and Cream Co.* case, deeming it a distinction without a difference. As for the AAA, the court concluded that it, too, "cannot be held liable for [the arbitrator's] actions."⁵⁸ It reasoned that:

bodies such as the [American Arbitration] Association are recognized by the

56. Note that immunity may also be specifically accorded to an arbitral institution pursuant to a statutory provision. See *Griffin v. American Arbitration Association*, 455 N.W.2d 322 (Mich. Ct. App. 1990).

57. 357 N.Y.S.2d 62 (N.Y. Civ. Ct. 1973).

58. *Id.* at 63.

law. . . . They perform with respect to arbitrator's functions similar to those performed by the Judicial Conference, the Administrative Boards and the Appellate Division with respect to judges. They are in effect quasi-judicial organizations; and an expanding umbrella of immunity is . . . extended over them."

Another example wherein a court extended arbitral immunity to an arbitral association is *Corey v. New York Stock Exchange*.⁵⁹ George Corey invested in the stock market under the guidance of a friend who was an account executive with Merrill Lynch, Pierce, Fenner & Smith. His friend suffered a stroke but returned to work and continued to handle Corey's account. He subsequently retired because of medical reasons and Corey's account was transferred to another Merrill Lynch employee. Corey's stock portfolio declined in value and he was forced to liquidate it. Pursuant to the brokerage contract Corey signed when he opened his account, which provided for arbitration under the auspices of the New York Stock Exchange (NYSE), Corey initiated arbitration proceedings against Merrill Lynch. The dispute was whether the brokerage firm should be liable for permitting a stockbroker to continue advising clients while incapacitated. Specifically, Corey alleged that his loss "resulted directly from [his friend's] impaired judgment as a result of the stroke and from Merrill Lynch's negligence in allowing him] to return to work before he was capable of intelligently advising customers."⁶⁰ After two hearings before an NYSE panel, an award was rendered dismissing Corey's claims and assessing costs against him.

59. *Id.* at 63-64.

60. 691 F.2d 1205 (1982).

61. *Id.* at 1208.

Instead of appealing the decision, Corey filed an action against Merrill Lynch, claiming that it conspired with the NYSE to deprive him of a fair hearing. The action was dismissed, and Corey filed an action against the NYSE, alleging wrongdoing in the selection of the arbitrators and in the administration of the arbitration hearings. This action was also dismissed and Corey appealed. Agreeing with the lower court's findings and conclusions, the appellate court affirmed the order dismissing the action.

The court found without merit Corey's argument that the NYSE was liable for any alleged wrongdoing by the arbitrators. It further concluded that arbitrators and arbitration-sponsoring agencies are immune from civil liability for arbitrators' acts arising out of contractually agreed upon arbitration proceedings. Specifically, the court pointed out that the extension of "immunity to arbitrators and the boards which sponsor arbitration finds support in the case law, the policies behind the doctrines of judicial and quasi-judicial immunity and policies unique to contractually agreed upon arbitration proceedings."⁶² It stated that:

arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants. . . . Because federal policy encourages arbitration and arbitrators are essential actors in furtherance of that policy, it is appropriate that immunity be extended to arbitrators for acts within their jurisdiction. . . . [W]e believe that arbitral immunity is essential to the maintenance of arbitration by contractual agreement as a viable alternative to the

62. *Id.* at 1209.

judicial process for the settlement of controversies. . . .⁶³

The court went on to conclude that the extension of immunity to "encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators [would be] illusory."⁶⁴

To date, *Baar v. Tigerman*⁶⁵ appears to be the only commercial case in which an arbitrator and the administrative organization were denied arbitral immunity. This case is an exception, however, and not the rule. *Baar* involved an action against an arbitrator and the administrative agency for breach of contract and negligence because the arbitrator rendered a late award. The hearings had proceeded for more than three years and, after it was closed, an award was supposed to have been rendered within 30 days. The parties agreed to a two-month extension, but the arbitrator still failed to render his award. Objections were filed in writing, to rescind the arbitrator's authority to rule on the case. In addition, an action was filed against the arbitrator and the administrative agency, but it was dismissed on the ground of arbitral immunity. The order dismissing the action was reversed on appeal.

The appellate court held that an arbitrator who breaches his contract to render a timely award is not entitled to arbitral immunity. It further noted that arbitral immunity does not extend to private arbitration associations for actions that are administrative rather than discretionary. The court reasoned that an arbitrator ceases to be judgelike in his actions if he fails to render a timely award. Because the immunity that would protect the sponsor-

ing organization extends from the arbitrator, it concluded that the sponsoring organization cannot claim immunity when the arbitrator has been denied immunity.

Following *Baar*, because of the need to counteract its potentially harmful effects, S.B. 1001 was proposed in California to give arbitrators the same immunity from civil liability accorded to judicial officers when acting in the capacity of arbitrators under statute or contract.⁶⁶ The purpose of the bill was to codify case law extending judicial immunity to arbitrators and to abrogate the *Baar* ruling.⁶⁷ Specifically, proponents of the bill argued that the

limitation of arbitral immunity recognized by *Baar* will have a 'chilling effect' on the utility of arbitration by:

(a) Making it more difficult to find individuals willing to serve as arbitrators.

(b) Placing unfair burdens on arbitrators, especially in complex commercial cases, to render thoughtful and correct decisions (e.g., the arbitrator may become more concerned with rendering a timely decision rather than a well thought out decision).

(c) Fostering the proliferation of lawsuits against arbitrators by those dissatisfied with the award.⁶⁸

The bill was ultimately passed by the Senate and Assembly without a dissenting

63. *Id.* at 1211.

64. *Id.*

65. 189 Cal. Rptr. 834 (Ct. App. 1983).

66. The bill, which was introduced by Senator Ralph Dills, was sponsored by the State Bar Conference of Delegates and drafted by the San Francisco Bar Association.

67. From commentary on S.B. 1001 by Chairman Bill Lockyer, Senate Committee on Judiciary (1985-86 Regular Session) and Chairman Elinu M. Harris, Assembly Committee on Judiciary (1985).

68. *Id.*, Harris at 2-3 (1985).

vote.⁶⁹ It is codified in California Civ. Proc. Code § 1280.1. On September 12, 1990, S.B. 1951 was signed into law, extending the repeal date of Section 1280.1 from January 1, 1991, to January 1, 1996.⁷⁰ Note that this law supplements, and does not supplant, common law immunity.

Again, the ruling in *Baar* is an overruled exception, not the rule. More recently, in fact, a federal court has reaffirmed the policy of extending arbitral immunity to encompass the administrative organization. In *Austern v. The Chicago Board Options Exchange, Inc.*,⁷¹ the court held that an action could not be maintained against the Chicago Board Options Exchange (CBOE) for mental anguish and expenses arising from defending a motion to confirm an arbitration award.

Esther Austern and her husband were parties to a limited partnership agreement with Fried Trading Company. A dispute arose and Fried filed a petition with the CBOE for arbitration pursuant to their agreement. The matter was accepted by the CBOE. The Austerns subsequently withdrew their appearance, answer, and counterclaim in the arbitration upon learning that Fried was a differently configured entity from the company with which they expected to arbitrate. Arbitration proceeded and an award was rendered in favor of Fried. Fried moved to confirm and the Austerns opposed. Confirmation was denied on the ground that the Austerns were not given adequate notice of the hearings. The Austerns then filed an action against the CBOE for damages for mental

anguish and for expenses incurred in defending against Fried's confirmation petition.

The CBOE argued that it was protected from suit under the quasi-judicial immunity doctrine, and the court agreed. The court noted that the doctrine of arbitral immunity arose from policy considerations underlying judicial immunity—namely, to protect the "integrity of the decision-making process from the fear of reprisals by dissatisfied litigants."⁷² Immunity, the court continued, was "extended to arbitrators [because of] the functional comparability of the arbitrators' decision-making process and judgments to those of judges...."⁷³

The court also stated that a second policy reason for the extension of immunity was to develop and maintain a pool of qualified individuals willing to act as arbitrators.

Because notice of the proceeding is "integrally related to the process of arbitration," the court rejected the Austerns' argument that mailing notice of the hearing was a ministerial and not a quasi-judicial act.⁷⁴ It also ruled that the Austerns had already received the appropriate relief that was sought when they successfully defeated the confirmation of the award because such defeat is the result of the corrective review provided for in the FAA. Consequently, the Austerns' complaint was dismissed on the ground of arbitral immunity. The Austerns appealed.

The appellate court stated that the central question on appeal was "whether a commercial organization sponsoring a contractually agreed upon arbitration is immune from civil liability for improperly noticing the arbitration hearing and improperly selecting the arbitration panel."⁷⁵ It concluded in the affirmative and declined

69. S.B. No. 1001—Dills, Senate Weekly History, California Legislature at Sacramento, 1985-86 Regular Session (Friday, September 13, 1985).

70. This was also introduced by Senator Ralph Dills.

71. 716 F. Supp. 121 (S.D.N.Y. 1989); *aff'd*, 898 F.2d 882 (2d Cir. 1990).

72. 716 F. Supp. at 124.

73. *Id.*

74. *Id.*

75. 595 F.2d at 883.

to accept the Austerns' contention that the conduct of the CBOE fell outside the scope of arbitral immunity.

The court found persuasive case law reflecting the view that the "scope of quasi-judicial immunity is defined not by the identity of the actor but by the nature of the function performed, namely freeing the adjudicative process and those involved therein from harassment or intimidation."⁷⁵ Reviewing the "functional comparability" between an arbitrator's role in a contractually agreed upon arbitration proceeding to that of a judicial counterpart, the court found that other "Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity."⁷⁶ It agreed with the policy concerns stated by the appellate courts that arbitral immunity is "essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants."⁷⁷

The court rejected the Austerns' contention that the acts complained of were merely ministerial and outside of the decision-making process. It stated that the extension of arbitral immunity to include agencies sponsoring arbitration is a natural and necessary product of the policies underlying arbitral immunity because to do otherwise would render illusory the immunity extended to arbitrators. Moreover, the court reasoned, there would be little value to the whole arbitral procedure if one were to shift the liability to the sponsoring association. Accordingly, the CBOE, as the commercial sponsoring organization, was entitled to immunity for all functions that

are integrally related to the arbitral process.

The court also explained that the Austerns' choice of words to describe the acts complained of as ministerial or administrative, as opposed to discretionary, "mis[s]e[d] the mark, since the scope of arbitral immunity is defined by the functions it protects and serves."⁷⁸ It went on to explain that the acts at issue were "performed directly in the CBOE's management of contractually agreed upon arbitration [and] were sufficiently associated with the adjudicative phase of the arbitration to justify immunity."⁷⁹ The court reasoned further that "[r]educing the CBOE's immunity based on the arbitral deficiencies present here would merely serve to discourage its sponsorship of future arbitrations—a policy that is strongly encouraged by the Federal Arbitration Act."⁸⁰

Because the court was "unwilling to undermine this policy by parsing the arbitration process," it held that "arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process [and that] the CBOE is immune from liability in damages for its conduct in sponsoring the arbitration proceedings in question."⁸¹ The judgment of the lower court in dismissing the Austerns' complaint was affirmed.

Another example is *City of Milan v. Bruce A. Rankin & Associates*.⁸² The Milan Downtown Development Authority (DDA) contracted with Bruce A. Rankin & Associates for architectural, planning and financial consultation services. An arbitration provision was included in their contract. A dispute arose, and Rankin filed a claim

75. 898 F.2d at 883.

76. *Id.* at 885.

77. *Id.* at 886.

78. *Id.* (quoting from *Corey*, *supra* note 60, 691 F.2d at 1211).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 887.

83. Slip op., No. 96-39080-AZ (Mich. Cir. Ct. Sept. 17, 1990).

with the American Arbitration Association (AAA) against both the City of Milan and the DDA. The City filed its response with the AAA, alleging that it was not a party to the contract and had not agreed to arbitration. The AAA considered this as an "issue of arbitrability" and left it to the arbitrators for resolution. Arbitration was held and an award was rendered jointly and severally against the City and the DDA. An action was filed by the City against Rankin, the AAA, and the arbitrators, alleging that the arbitrators "exceeded their jurisdiction." The City also sought to enjoin enforcement of the award, as well as damages from each of the defendants.

The issue before the court was whether the AAA and the arbitrators enjoy "quasi-judicial" immunity from suit. It noted that the Uniform Arbitration Act (UAA), which was adopted in Michigan, does not contain any grant of immunity. The court did not find this to be a problem since many other states that have adopted the UAA also "have subscribed to such an immunity."⁸⁴ It found that arbitrability of a dispute is one for the court, not the arbitrators, to decide. In this instance, however, neither of the parties sought a determination by the court on the issue of arbitrability prior to the arbitration proceedings. Consequently, the matter was decided by the arbitrators. The court disagreed with the City's contention that immunity ought not to be extended in this case because the arbitrators exceeded their scope of authority by arbitrating a claim against

⁸⁴ *Id.* at 4.

someone who did not agree to arbitration. It found that an analogy to judicial immunity was appropriate in this case, noting that the

mere fact that a tribunal may subsequently be found to be without jurisdiction over a party does not necessarily strip the court of the cloak of immunity and render the judge liable to that party for damages for exercising such jurisdiction. [The court reasoned that t]his concept is even more compelling in the realm of arbitration because the protesting party has a means of resolving the "jurisdiction" question of arbitrability without being first required to go through a hearing on the merits.⁸⁵

In this instance, the City sued the AAA and the arbitrators for damages for making a decision on the arbitrability issue, even though it elected to forgo the pre-arbitration remedy of an application for a stay of the arbitration proceeding. The court concluded that the decision of the arbitrators on the arbitrability issue "was not so outside the scope of their authority as to subject them, or the [A]ssociation, to liability for damages for making the decision."⁸⁶ It reasoned that, "[g]iven the lack of a contrary judicial order, the arbitrators were in fact required to make the threshold determination of arbitrability."⁸⁷

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 6.

⁸⁷ *Id.*

HOWARD v. DRAPKIN

Cite as 271 Cal.Rptr. 893 (Cal.App. 2 Dist. 1990)

DISPOSITION

We reverse the judgment and direct the trial court to deny the writ of mandate and reinstate the revocation order.

The parties are to bear their own costs.

DEVICH, Acting P.J., and VOGEL, J., concur.



Vickie HOWARD, Plaintiff and Appellant,

v.

Robin DRAPKIN, Defendant and Respondent.

Civ. B041689.

Court of Appeal, Second District, Division 3.

July 31, 1990.

Mother brought action against psychologist who was hired by both parents to evaluate child's allegations that father had sexually abused child, for purposes of custody dispute, alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud. The Superior Court, Los Angeles County, Aurelio Munoz, J., dismissed action, and appeal was taken. The Court of Appeal, Croskey, J., held that: (1) psychologist was entitled to common-law immunity as quasi-judicial officer participating in judicial process, and (2) psychologist was entitled to statutory privilege for publication in judicial proceeding.

Affirmed.

Danielson, J., filed opinion concurring in part and dissenting in part.

1. Judges 4-36

"Judicial immunity" bars civil actions against judges for acts performed in exercise of their judicial functions, and applies to all judicial determinations, including those rendered in excess of judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be.

See publication Words and Phrases for other judicial constructions and definitions.

2. Judges 4-36

In order to determine whether individual has quasi-judicial immunity, court evaluates connection between individual's activity and judicial process rather than status of individual.

3. Judges 4-86

Nonjudicial persons who fulfill quasi-judicial functions intimately related to judicial process are entitled to absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with judicial process.

4. Arbitration 4-7

Judges 4-86

Absolute quasi-judicial immunity is extended to those neutral third-parties for their conduct in performing dispute resolution services which are connected to judicial process and involve either making of binding decisions, making of findings or recommendations to court or arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes.

5. Physicians and Surgeons 15(23)

Psychologist who was hired by parents to evaluate facts and circumstances surrounding child's accusation that father had sexually abused child, for purposes of custody dispute, was entitled to absolute quasi-judicial immunity from mother's action alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud; psychologist was engaged in evaluation for purpose of resolving pending dispute.

absurd, whether or traffic lane, partially gainst the curb. In the intoxicated driver away upon being police officer, posing enasa.

es on People v. Garpp.3d Supp. 1, 262 he proposition that vehicle movement. epartment of the su-Garcia's conviction of nder the Influence n.Codes, § 664). Gar-y the officers in the lane" (id. Supp. at 6, a freeway. Garcia, a in the driver's seat, art the engine. The vehicle roll 15 to 20 rectly concluded this ficient evidence that ehicle." (Id. Supp. at

As Garcia properly ovement" of the ve-et evidence that the riven." [Citation.] 355) 176 Cal.App.3d : 540].)" (People v. al.App.3d at Supp. 4,

vehicle movement in nactive of the distinct dity of respondent's ved the sufficiency of conviction of guilt for driving offense under vision (a) and Penal s clear such a convic-e the absence of direct e., movement) if there ntantial evidence of n. Wilson, supra, 176 9, 222 Cal.Rptr. 540.) nd Officer Brann sub-ably believed a misde-being committed in his respondent exercised ntrol over the vehicle within the meaning of vision (a).

6. Torts ¶16

Psychologist who was hired by parents to evaluate child's allegations that father had sexually abused child, for purposes of child custody dispute, was immune from mother's action alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud pursuant to statutory privilege for publication in judicial proceeding; alleged wrongful communications by psychologist were made in judicial proceeding, publications had connection to case, psychologist was invited, and ultimately court-approved participant, and communication was made to achieve objects of litigation. West's Ann.Cal.Civ.Code § 47, subd. 2.

Overland, Berke, Wesley, Glts, Randolph & Levanas and Michael I. Levanas, Los Angeles, for plaintiff and appellant.

Proskauer, Rose, Goetz & Mendelsohn and Steven G. Drapkin, Los Angeles, for defendant and respondent.

Gibson, Dunn & Crutcher, Richard Cherrick, Eileen Hale, Los Angeles, for amicus curiae on behalf of defendant and respondent.

CROSKY, Associate Justice.

Plaintiff Vickie Howard ("plaintiff") appeals from a dismissal entered after a demurrer to her second amended complaint was sustained without leave to amend. The instant case evolved from a family law matter in which child custody and visitation were in dispute (the "underlying action"). Defendant Robin Drapkin ("defendant"), a psychologist, performed an evaluation of plaintiff and her family and plaintiff now claims that defendant acted improperly in carrying out that task.

In this appeal we are asked to determine whether the alleged wrongful actions of which plaintiff complains were performed in such a context that defendant can claim

(1) common law immunity as a quasi-judicial officer participating in the judicial process or (2) statutory privilege under Civil Code section 47, subdivision (2) ("section 47(2)")¹ for a publication in a judicial proceeding. We conclude that defendant, acting in the capacity of a neutral third person engaged in efforts to effect a resolution of a family law dispute, is entitled to the protection of quasi-judicial immunity for the conduct of such dispute resolution services. We also find that the litigation privilege provided for in section 47(2) applies to the facts of this case. We therefore affirm the dismissal of plaintiff's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises in the context of a family law dispute over custody and visitation rights with respect to the minor son of the plaintiff and her former husband, Robert. The dispute was one of a series and involved charges of physical and sexual abuse. Plaintiff initiated family law proceedings in which she sought to have Robert's custody and visitation rights terminated. Prior to any court hearing, plaintiff and Robert entered into a stipulation which provided that the defendant, as an independent psychologist, would evaluate the facts and circumstances and render non-binding findings and recommendations. This stipulation was ultimately signed by the court and converted into an order.

Plaintiff's claims against defendant apparently arise from (1) a single six-hour session between plaintiff and defendant, conducted pursuant to the aforesaid stipulation, in which plaintiff alleges that defendant was abusive, (2) defendant's report which plaintiff claims was negligently prepared, included false statements and omitted crucial information and (3) defendant's alleged failure to disclose certain conflicts of interest and lack of expertise in child abuse matters. The pleading before us is plaintiff's second amended complaint in which she had pled causes of action for

1. Civil Code section 47, subdivision 2 provides in relevant part that with certain exceptions for dissolution of marriage proceedings, "A privi-

leged publication or broadcast is one made—
... (f) 2. In any ... (2) judicial proceeding...."

professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud.

In reviewing the sufficiency of the complaint we, of course, accept as true all of the properly pleaded allegations. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803, 167 Cal.Rptr. 407, 598 P.2d 60; *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828, 122 Cal.Rptr. 745, 537 P.2d 866. By her demurrer, defendant admits "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]" (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 487 P.2d 1241.) Plaintiff's complaint presents the following relevant allegations.

Defendant is a psychologist licensed by the State of California who was hired in that capacity in early February 1987 by plaintiff and Robert. She was hired to perform a family evaluation of plaintiff, Robert and their nine-year-old child. Such evaluation was necessary because the child had accused Robert of physical, emotional and sexual abuse. Defendant was to evaluate what contact Robert would have with the child, if any.

Because of the decision to retain defendant, plaintiff and Robert agreed to continue an order to show cause hearing which had been scheduled for February 26, 1987. It was further continued from time to time while the evaluation was progressing. The agreement to hire defendant was put into the form of a stipulation and was signed by plaintiff and Robert and by their respective attorneys in the underlying action. (It was entitled "STIPULATION AND ORDER FOR CHILD CUSTODY EVALUATION.") The family law judge had not required the stipulation, did not participate in drafting it and did not supervise defendant's work. Eventually, however, the "order" portion of the stipulation was signed by the court on August 12, 1987, approximately six months after the parties had signed it. Defendant's written report, made after her evaluation was finished, states that her evaluation began March 18, 1987 and ended September 3, 1987.

By the terms of the stipulation, defendant was authorized to provide written reports, but only to plaintiff and to Robert, not to the court. Plaintiff or Robert could call defendant to testify in the custody hearings but the court could not. Defendant was obligated to complete her evaluation, to prepare a written report and to participate in the proceedings or in a deposition only if her fees for such activity were paid in advance.

Plaintiff alleges that her final evaluation meeting with defendant was scheduled for the evening before the order to show cause hearing. Defendant represented to plaintiff that this meeting would only last an hour and a half. It lasted over six hours—from 5:30 p.m. to 11:50 p.m. For five of those six hours, defendant personally attacked plaintiff, screamed at her, ridiculed her, accused her of lying and fabricating evidence, threatened she would lose custody of her son if she persisted in believing his allegations about his father, and misrepresented that the child's doctors and other experts involved in the case did not believe the child had been abused. Plaintiff claims that defendant did this to induce plaintiff to abandon her belief that Robert had abused their child.

With respect to defendant's alleged non-disclosures, plaintiff asserts that defendant (1) failed to divulge her lack of expertise in the area of child and sexual abuse, (2) failed to disclose that she and Robert had a prior professional relationship in that they had spoken and participated together in professional seminars and (3) failed to disclose that she was a close personal friend of the wife of one of the partners in the law firm which represented Robert in the underlying action.

Plaintiff alleges that in defendant's written report, she neglected to state that a September 1979 hospital examination of the child resulted in the examining doctor (1) finding evidence of "irritation of [the child's] scrotum glans [sic], penis and shaft of penis" and (2) stating that "It seemed like somebody had been chomping on his penis." Besides omitting this and other material information in the written report, plaintiff claims that defendant failed to investigate certain other relevant matters.

as a quasi-judicial proceeding under Civil Code section 47(2) ("action by a judicial professional, defendant, actual third person entitled to the immunity for resolution ser-47(2) applies to therefore affirm complaint.

CEDURAL ID

next of a family and visitation minor son of the husband, Robert. a series and in- as! and sexual family law pro- right to have Rob- right's terminat- hearing, plaintiff stipulation which as an independ- evaluate the facts order non-binding ions. This stipu- ed by the court er.

defendant ap- single six-hour and defendant, : aforesaid stipu- alleges that defen- defendant's report negligently pre- oments and omit- d (3) defendant's certain conflicts expertise in child ing before us is ed complaint in es of action for east is one med- ical proceeding...."

Finally, plaintiff asserts that defendant acted with the intent to circumvent the judicial process and to cause plaintiff severe humiliation, mental anguish, and emotional and physical distress. Plaintiff claims that defendant's acts were willful, wanton, malicious and oppressive and she seeks both compensatory and punitive damages.

Defendant filed a general demurrer to the second amended complaint, contending that she has quasi-judicial, quasi-arbitral and/or arbitral immunity as well as immunity as an expert witness. She also claimed entitlement to the "judicial proceeding" or litigation privilege set out in section 47(2). In opposing the demurrer, plaintiff argued that defendant was not a quasi-judicial officer or an arbitrator, having been hired as a private evaluator, and that case law imposes an "interest of justice" limitation upon the section 47(2) privilege which would work in this case to defeat defendant's reliance on such defense. The trial court rejected plaintiff's arguments and sustained the demurrer without leave to amend. An order of dismissal was entered February 26, 1989.

ISSUE PRESENTED

This appeal raises the issue of the availability of (1) quasi-judicial immunity by rea-

2. We review this case in the context of both quasi-judicial immunity and statutory privilege out of a recognition that they are not coextensive. While on the facts here presented we will find that they both apply, the statutory privilege extends to bar liability for "communicative acts" but not conduct or "noncommunicative acts." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 211, 271 Cal.Rptr. 191, 793 P.2d 524); *Pacific Gas & Electric Co. v. Bear Stearns & Company* (1990) 50 Cal.3d 1118, 1132, fn. 12, 270 Cal.Rptr. 1, 791 P.2d 587.) No such limitation exists for common law quasi-judicial immunity. Here, however, any conduct in which defendant engaged was secondary to and intertwined with the alleged offensive and dishonest communicative acts. Nonetheless, due to the importance of this issue and the likelihood that future cases involving neutral third persons engaged in mediation, conciliation, evaluation or other similar dispute resolution efforts may not be so clear, we believe it necessary to base our decision on both grounds.

son of defendant's involvement as a neutral dispute-resolving participant in the judicial process and (2) the absolute privilege under the provisions of section 47(2), as a complete bar to plaintiff's actions.

DISCUSSION

Defendant asserts both of these grounds and we have concluded that both arguments are meritorious.² For the historical and policy reasons discussed below, we believe that absolute quasi-judicial immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts. As to defendant's second argument, the issue of section 47(2) privilege has, since the filing of the briefs herein, been resolved in defendant's favor by the Supreme Court's decision in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 266 Cal.Rptr. 686, 786 P.2d 865.

1. Common Law Immunity

a. Overview of Judicial Immunity

[1] The concept of judicial immunity is longstanding and absolute, with its roots in English common law. It bars civil actions against judges for acts performed in the exercise of their judicial functions³ and it

3. "Immunity exists for 'judicial' actions; those relating to a function normally performed by a judge and where the parties understood they were dealing with the judge in his official capacity. [Citations.] (*Olney v. Sacramento County Bar Assn.* (1989) 212 Cal.App.3d 807, 811, 260 Cal.Rptr. 242.) Thus, the line is drawn "between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the function: it protects and serves, not by the person to whom it attaches." (*Forrester v. White* (1986) 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555, 565.) Acts and decisions which are not judicial or adjudicative, i.e., acts and decisions performed and made by a judge which are administrative or legislative, "even though they may be essential to the very functioning of the courts, have not ... been regarded as judicial acts." (*Id.* at p. 228, 108 S.Ct. at p. 544.)

This does not mean that judges who make legislative or administrative types of decisions

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applies to all judicial determinations, includ-
ing those rendered in excess of the judge's
jurisdiction, no matter how erroneous or
even malicious or corrupt they may be.
(*Turpen v. Booth* (1880) 58 Cal. 65, 68;
Greene v. Zank (1984) 158 Cal.App.3d 497,
507, 204 Cal.Rptr. 770.) The judge is im-
mune unless "he has acted in the clear
absence of all jurisdiction. [Citations.]"
(*Greene, supra*, at p. 507, 204 Cal.Rptr.
770.) Beyond doubt, the doctrine of "civil
immunity of the judiciary in the perform-
ance of judicial functions is deeply rooted
in California law." (*Oppenheimer v. Ash-*
burn (1959) 173 Cal.App.2d 824, 630, 848
P.2d 931; see also, *Frost v. Goernaert*
(1988) 200 Cal.App.3d 1104, 1107, 246 Cal.
Rptr. 440; *Tagliavia v. County of Los*
Angeles (1980) 112 Cal.App.3d 759, 761, 169
Cal.Rptr. 487.)

The rationale behind the doctrine is two-
fold. First, it "protect[s] the finality of
judgments [and] discourag[es] inappropri-
ate collateral attacks." (*Forrester v.*
White, supra, 484 U.S. 219, 225, 106 S.Ct.
538, 543.) Second, it "protect[s] judicial
independence by insulating judges from
vexatious actions prosecuted by disgrunt-
led litigants. [Citation.]" (*Ibid.*) With
respect to the latter reason, the immunity
is necessary in order to have an independ-
ent and impartial judiciary. The public is
best served when its judicial officers are
free from fear of personal consequences
for acts performed in their judicial capaci-
ty. (*Greene v. Zank, supra*, 158 Cal.
App.3d at p. 508, 204 Cal.Rptr. 770.) "If
judges are personally liable for erroneous
decisions, the resulting avalanche of suits,
most of them frivolous but vexatious,
would provide powerful incentives for
judges to avoid rendering decisions likely
to provoke such suits. [Citation.] The re-
sulting timidity would be hard to detect or
control, and it would manifestly detract
from independent and impartial adjudica-
tion." (*Forrester v. White, supra*, 484
U.S. 219, 226-227, 108 S.Ct. 538, 544.) "It

are not able to claim legislative immunity (*Sup-*
reme Court of Va. v. Consumers Union (1980)
446 U.S. 719, 721 et seq., 100 S.Ct. 1967, 1974 et
seq., 64 L.Ed.2d 641, 653 et seq.; *Forrester v.*
White, supra, 484 U.S. 219, 228, 108 S.Ct. 538,
544) or an immunity like that enjoyed by execu-

is a judge's duty to decide all cases within
his jurisdiction that are brought before
him, including controversial cases that
arouse the most intense feelings in the
litigants. His errors may be corrected on
appeal, but he should not have to fear that
unsatisfied litigants may hound him with
litigation charging malice or corruption.
Imposing such a burden on judges would
contribute not to principled and fearless
decision-making but to intimidation."
(*Pierson v. Ray* (1967) 386 U.S. 547, 554, 87
S.Ct. 1218, 1218, 18 L.Ed.2d 288, 294-295.)
"The justification for [judicial immunity]
is that it is impossible to know whether [a
person's claim against an official] is well
founded until the case has been tried, and
that to submit all officials, the innocent as
well as the guilty, to the burden of a trial
and to the inevitable danger of its outcome,
would dampen the ardor of all but the most
resolute, or the most irresponsible, in the
unflinching discharge of their duties."
(*Hardy v. Vial, supra*, 48 Cal.2d at pp.
582-588, 811 P.2d 494, quoting from *Gro-*
goire v. Biddle (2d Cir.1949) 177 F.2d 579,
581.) Thus, the protection must be abso-
lute, even to the malicious or corrupt judge.
The effect of judicial immunity is that the
action against the judicial officer must be
dismissed. (*Hardy, supra*, 48 Cal.2d at p.
584, 811 P.2d 494.)

b. Quasi-Judicial Immunity

Under the concept of "quasi-judicial im-
munity," California courts have extended
absolute judicial immunity to persons other
than judges if these persons act in a judi-
cial or quasi-judicial capacity. Thus, court
commissioners "acting either as a tempo-
rary judge or performing subordinate judi-
cial duties ordered by the appointing court"
have been granted quasi-judicial immunity.
(*Tagliavia v. County of Los Angeles, su-*
pra, 112 Cal.App.3d at p. 769, 169 Cal.Rptr.
467.) So also, quasi-judicial immunity from
civil suits for acts performed in the exer-

sive branch officials "when performing within
the scope of their power acts which require the
exercise of discretion or judgment. [Citations.]"
(*Hardy v. Vial* (1957) 48 Cal.2d 577, 582, 311
P.2d 494; accord *Forrester v. White, supra*, 484
U.S. 219, 230, 108 S.Ct. 538, 545).

class of their duties has been given to grand jurors (*Turpon v. Booth, supra*, 56 Cal. at p. 69); administrative law hearing officers (*Taylor v. Mitzel* (1978) 82 Cal.App.3d 865, 870-871, 147 Cal.Rptr. 323); arbitrators (*Baar v. Tigerman* (1983) 140 Cal.App.3d 979, 985, 211 Cal.Rptr. 426; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 534, 260 Cal.Rptr. 713)⁴; organizations sponsoring an arbitrator (*Olney v. Sacramento County Bar Assn., supra*, 212 Cal.App.3d at pp. 814-815, 260 Cal.Rptr. 842); and prosecutors (*Pearson v. Reed* (1935) 6 Cal.App.2d 277, 286-288, 44 P.2d 592). Additionally, the State Bar and the Committee of Bar Examiners, as arms of the Supreme Court, and their officials, as officers of the Supreme Court, have been afforded quasi-judicial immunity from civil suits for acts performed in the exercise of their duties. (*Greene v. Zank, supra*, 158 Cal.App.3d at p. 513, 204 Cal.Rptr. 770.) As with the reason for granting judicial immunity, quasi-judicial immunity is given to promote uninhibited and independent decisionmaking. (*Baar v. Tigerman, supra*, 140 Cal.App.3d at p. 982, 211 Cal.Rptr. 426.)

As noted above, courts look at the nature of the challenged act which a judge has performed to determine if it is truly judicial and therefore deserving of judicial immunity. So also, in determining whether a person is acting in a quasi-judicial fashion, the courts look at "the nature of the duty performed [to determine] whether it is a judicial act—not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers." (*Pearson v. Reed, supra*, 6 Cal.App.2d at pp. 286-287, 44 P.2d 592.) In *Pearson*, the court found that a prosecutor, in examining evidence submitted to him and in determining whether to prosecute a case against a defendant, is performing an

act that is judicial in nature, thus making him both a quasi-judicial officer and an executive branch officer. (*Ibid.*)

c. The Right to Quasi-Judicial Immunity Depends Upon a Connection to the Judicial Process

[2] Plaintiff seeks to establish that California's version of common law judicial and quasi-judicial immunity is applied only to public officials (judges, grand jurors, prosecutors, commissioners, etc.). If that were so, then arbitrators would not be protected by common law quasi-judicial immunity.⁵ We believe that in California, it is not so much one's status as a public official which has generally been the litmus test for judicial immunity but rather the above-referenced analysis of "functions normally performed by judges." (See fn. 2, *ante.*) It just so happens, that with the exception of arbitrators, and sometimes referees (*Park Plaza Ltd. v. Pietz* (1987) 193 Cal.App.3d 1414, 1418-1419, 289 Cal.Rptr. 51), such functions have usually been performed by public officials.

The case upon which plaintiff relies for her "public official" analysis is *White v. Towers* (1951) 37 Cal.2d 727, 235 P.2d 209, an action for malicious prosecution against an investigator for the State Fish and Game Commission who had the duty of enforcing laws regarding the protection of fish and game. That case does speak of "the immunity from civil liability with which the law surrounds officials directly connected with the judicial processes" (*Id.* at p. 730, 235 P.2d 209, emphasis added.) However, a reading of the court's opinion shows that the court was more interested in the "connected with the judicial process" portion of the abovequoted excerpt than with the fact that the defendant could be classified as an "official."

4. The Legislature made judicial immunity for arbitrators a statutory requirement by adding section 1280.1 to the Code of Civil Procedure. (Stats.1985, ch. 709, § 1, p. 2341.) However, by its own terms, section 1280.1 remains in effect only until January 1, 1991 unless a subsequent statute is enacted to delete or extend that date. § 1280.1.)

5. "Arbitration is the submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or by agreement of the parties." (*Stuckwell v. Equitable F. & M. Ins. Co.* (1933) 134 Cal.App. 534, 540, 25 P.2d 873, emphasis added.)

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(*Ibid.*)

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Co. (1933) 134 Cal.App.
emphasis added.)

In looking at the doctrine of immunity the *White* court said at pages 730-732, 236 P.2d 209: "The doctrine of immunity from liability for allegedly malicious acts has long been established with respect to numerous public officers. In the early case of *Bradley v. Fisher*, 13 Wall. (U.S.) 886 (20 L.Ed. 646), the doctrine was applied to judges of courts of record.... Since that time it has been recognized that the orderly administration of the affairs of government necessitates the inclusion of many officials within the cloak of immunity. Executive heads of administrative departments have been included [citations] as well as their deputies, who act in their stead [citations].

"The last cited cases, however indicative of the trend of judicial decision, do not furnish the persuasive reason for holding that the doctrine extends to peace officers. Rather, it is the line of cases which directly concerns the application of the doctrine to those connected with the judicial processes which is determinative herein. Thus, it has been held almost universally that public prosecutors are entitled to immunity. [Citations.] Similarly, grand jurors were early held to be protected against civil actions for alleged malicious prosecution. [Citation.] A review of the cases which have concerned the application of the doctrine to law enforcement officers shows that the great majority of the courts have ruled in favor of the officers." (Emphasis added.) The court then went on to cite California and federal cases involving law enforcement officers such as a building inspector charged with investigating an alleged violation of a building ordinance, a deputy fire marshal charged with investigating fires, and an assistant city engineer.

Thus, the *White* court focused on the importance to the judicial system of persons charged with the duty to investigate crimes and institute criminal proceedings. The court was impressed by their connection to the judicial processes rather than the fact that they could be classified as

public officials. In our judgment, that is the proper way to view the matter. We therefore reject plaintiff's efforts to place the emphasis on the status of defendant rather than upon the connection between the defendant's activity and the judicial process.

d. Policy Considerations Support the Approach of the Federal Cases to Quasi-Judicial Immunity

For their part, defendant and amicus ask this court to go beyond California's apparently heretofore limited application of the "persons connected with the judicial processes" analysis and apply common law quasi-judicial immunity like the federal courts have applied it—to people connected with the judicial process who are not "public officials," arbitrators or referees, such as (1) mediators, guardians ad litem, therapists, receivers, bankruptcy trustees and other persons appointed by the courts for their expertise and (2) persons whose work product comes into the judicial process to be used by the court even though they were not court-appointed, such as social workers and probation department employees. Defendant and amicus also argue that immunity should be extended even further to a third category of people—those persons involved in alternative methods of dispute resolution, such as mediators and "neutral fact-finders," who function apart from the courts, as did the defendant in the instant case.⁶

Such an extension of quasi-judicial immunity would find persuasive support in a number of federal cases. The federal courts have held that immunity applies to such court-appointed persons as a trust officer employed by the Oregon Department of Veterans Affairs which was acting (by court appointment) as the conservator of plaintiff's estranged husband (*Mosher v. Saalfeld* (9th Cir.1978) 589 F.2d 438, 442, cert. den. 442 U.S. 941, 99 S.Ct. 2888, 61 L.Ed.2d 811); a receiver appointed by a

6. We recognize that ultimately defendant's status in the underlying action was governed by a court order. However, in our view, that is not the crucial fact. For several months prior to when the court signed the "order" portion of the

"Stipulation and Order for Child Custody Evaluation," the defendant worked pursuant to the private agreement of plaintiff and Robert, albeit in the shadow of pending litigation, in order to effect a resolution of their dispute.

court to manage property of a marital estate during a dissolution of the marriage (*New Alaska Development Corp. v. Guetschow* (9th Cir.1989) 869 F.2d 1298, 1802-1808); a child protective services worker acting pursuant to a court order to take a child into custody (*Coverdell v. Dept. of Social & Health Services* (9th Cir.1987) 884 F.2d 768, 764-765); and guardians ad litem, psychologists and attorneys for children in child abuse actions (*Myers v. Morris* (8th Cir.1987) 810 F.2d 1437, 1465-1468, cert. den. 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58).

With respect to nonappointed persons whose work product comes into the judicial process, the courts have held that immunity was properly given to probation officers who prepare presentencing reports for the use by the courts (*Demoran v. Witt* (9th Cir.1986) 781 F.2d 165) and workers at the Michigan Department of Social Services and psychiatrists who were involved in terminating plaintiffs' parental rights (*Kurzawa v. Mueller* (6th Cir.1984) 732 F.2d 1456). The *Kurzawa* court stated that in order to protect the well-being of children, the defendants must be able to perform their jobs "without the worry of intimidation and harassment from dissatisfied parents." (*Id.* at p. 1458; see also, *In re Alicia T.* (1990) 221 Cal.App.3d —, 271 Cal.Rptr. 513, and *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 260 Cal.Rptr. 645 [following federal cases which recognize an absolute immunity for § 1983 claims against social workers who were acting within the scope of their employment in investigating allegations of child abuse and initiating dependency proceedings].)

These courts emphasized that the defendants served functions integral to the judicial process (*Demoran v. Witt, supra*, 781 F.2d at p. 157; *New Alaska Development*

Corp. v. Guetschow, supra, 869 F.2d at p. 1303; *Myers v. Morris, supra*, 810 F.2d at p. 1467; *Kurzawa v. Mueller, supra*, 732 F.2d at p. 1458) and acted as arms of the court (*New Alaska, supra*, at p. 1303, fn. 6; *Demoran, supra*, at p. 167).

For example, in *Myers v. Morris, supra*, 810 F.2d at p. 1467, the court said: "[T]he ... therapists, guardians and attorney were appointed to fulfill quasi-judicial responsibilities under court direction. The family court was required to determine whether the children in its custody were neglected and to secure appropriate placements. To perform these functions, the court exercised its statutory authority to seek the assistance of experts. [Citation.] The absolute immunity which is accorded persons acting as an integral part of the judicial process protects them from having to litigate the manner in which they performed their delegated functions." (Emphasis added.)

In *Hardy v. Vial, supra*, 48 Cal.2d 577, 311 P.2d 494, our Supreme Court recognized that California courts line up with federal decisions in other types of situations, such as immunity for executive public officers when they are performing non-ministerial acts, i.e., when they use their judgment or discretion in performing their jobs. (*Id.* at p. 582, 311 P.2d 494.) Also, as defendant points out, many California decisions which address the issue of immunity cite with frequency to federal decisions. (See e.g., *Haraff v. Vial, supra*, 48 Cal.2d 577, 311 P.2d 494; *White v. Towers, supra*, 87 Cal.2d 727, 235 P.2d 209; *Olney v. Sacramento County Bar Assn., supra*, 212 Cal.App.3d 807, 260 Cal.Rptr. 842; *Tagliavia v. County of Los Angeles, supra*, 112 Cal.App.3d 759, 169 Cal.Rptr. 467; *Taylor v. Mizel, supra*, 82 Cal.App.3d 665, 147 Cal.Rptr. 323.)⁷

7. Relying on *Greene v. Zank, supra*, 158 Cal. App.3d 497, 204 Cal.Rptr. 770, a civil rights action brought under 42 U.S.C. § 1983, against the State Bar of California, the Committee of Bar Examiners and their officials, plaintiff argues that there is a distinct difference between state and federal law in the area of judicial immunity, and that determination of which of the two bodies of law applies depends upon

whether the action is a state or a federal one." We disagree with this analysis of *Greene*.

The *Greene* court did hold at page 503 of its opinion that it would necessarily have to apply federal law in that case (i.e., federal law regarding both the elements of a prima facie § 1983 cause of action and the elements of judicial immunity), since the plaintiff's cause of action was based on federal civil rights legislation.

less-traditional alternative dispute resolution procedures are often less expensive and less stressful than seeing a case through its normal trial path. Like the more formal dispute resolution procedures, they are critical to the proper functioning of our increasingly congested trial courts.

We agree with defendant and amicus that the justification for giving judicial and quasi-judicial immunity to judges, commissioners, referees, court-appointed persons (such as psychologists, guardians ad litem and receivers), and nonappointed persons (such as those who prepare probation reports and handle child abuse cases) applies with equal force to these neutral persons who attempt to resolve disputes. Although they are not "law connected," as are judges, commissioners and court-appointed experts, neither are non-judicial arbitrators. (*Stockwell v. Equitable F. & M. Ins. Co.*, *supra*, 134 Cal.App. at p. 540, 25 P.2d 873.) Similarly, referees, although appointed by the courts, may or may not be employees or officers of the court and they may be paid by the parties. (*Park Plaza, Ltd. v. Pletz*, *supra*, 193 Cal.App.3d at p. 1419, 239 Cal.Rptr. 51.)⁹

Plaintiff notes that attorneys can be held liable to their clients for professional negligence because they have a specific duty to their clients. Using a "duty to the public" vs. "duty to a client" approach, plaintiff seeks to distinguish the federal "court appointment" cases from the instant case. She argues that "It is, among other things, the absence of a public responsibility, and the presence of a duty to private clients, which distinguishes the instant case from the various authorities defendant cited . . . for the proposition that court-appointed mental health professionals are immune from civil liability. . . . In each of the cases relied upon by the defendant, the psychologist or psychiatrist was either acting as an agent of the court pursuant to a court

appointment in order to provide an opinion to the court itself [citations] or was a government official who owed a direct duty to the public at large [citations] or was appointed by the court and had the responsibility of reporting to a governmental agency [citation]."

However, in reviewing the issue of immunity, we think that the focus is more correctly placed on a non-advocate vs. advocate analysis. Thus, while the criminal defense attorney who is paid with public funds has a duty to the public not to waste those funds, it is his or her job as an *advocate* for the defendant which makes him or her responsible and liable to the defendant and susceptible to a later civil action.

In contrast, the psychologist who is mediating a child custody dispute, whether by court appointment or not, is not an advocate for either parent, even if paid by them. (Cf. *Park Plaza, Ltd. v. Pletz*, *supra*, 193 Cal.App.8d at p. 1419, 239 Cal.Rptr. 51, where the court said that referees who are paid for by the parties in a law suit are not employees or independent contractors of those parties or of their attorneys.) The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. In a sense, those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions (such as referees acting pursuant to Code Civ. Proc., § 638, subd. (1), and arbitrators), (2) making recommendations to the court (such as referees acting under Code Civ. Proc., § 639 or mediators acting under Civ. Code, § 4607), or (3) privately attempting

present policy of actively encouraging alternative dispute resolution in order to relieve the burden on the judicial system." (*Id.* at p. 535, 260 Cal.Rptr. 713.) In the instant opinion, we recognize the necessity for immunity for other but similar alternative dispute resolution activities.

9. In *Coopers & Lybrand v. Superior Court*, *supra*, 212 Cal.App.3d 524, 260 Cal.Rptr. 713 this court discussed the 1985 legislation which had expanded immunity for arbitrators. We recognized that "The law . . . has come a long way from disfavoring arbitration so as not to encroach on the jurisdiction of the courts to the

to settle disputes, such as the defendant here.

[4.5] We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes. As the defendant was clearly engaged in this latter activity, she is entitled to the protection of such quasi-judicial immunity.

2. Statutory Privilege

The second ground for demurrer raised by defendant is based on the provisions of section 47(2). A recent decision of the Supreme Court (*Silberg v. Anderson, supra*, 50 Cal.3d 205, 266 Cal.Rptr. 638, 786 P.2d 865) mandates that in spite of the nature of the behavior which plaintiff's allegations attribute to defendant, the defendant is protected from the tort liability claimed by plaintiff.

a. Background of the Silberg Case

As in the instant case, the complaint in *Silberg* stemmed from an underlying dissolution of marriage action and its attendant custody and visitation issues. In that underlying action, the husband (who was later to be the plaintiff in the *Silberg* case) asked his attorney to obtain an agreement from his wife that all family members would submit to an evaluation and counseling by an independent psychologist for the purpose of determining appropriate custody and visitation orders for their children. Wife's attorney (the defendant in the *Silberg* case) recommended a psychologist (Robert Adler) who was ultimately selected by plaintiff and his wife.

After an "apparently adverse" result for the plaintiff, plaintiff sued his wife's attorney, contending that contrary to defendant's representations, the psychologist was not independent and neutral because he had had a preexisting and undisclosed

relationship with defendant. Plaintiff claimed that defendant used her influence with Dr. Adler to his wife's advantage in the evaluation of the family members and that due to defendant's influence, Adler produced a biased and inaccurate report. Husband sued the defendant-attorney for breach of contract, negligence and "intentional tort," which the Supreme Court said was apparently intentional infliction of emotional distress but might also be fraud.

The defendant-attorney generally demurred to the complaint, contending that section 47(2) made her statements during the family law matter privileged. The trial court sustained the demurrer without leave to amend and dismissed the action. The Court of Appeal reversed as to the cause of action for "intentional tort" and remanded the case, directing the trial court to allow the husband to amend that cause of action. The court concluded that section 47(2) did not apply if defendant's representations were made to obtain personal objectives or to gain an advantage for her client through deceit. The court held that in such a case, the statements could not have been made to promote the "interest of justice" and further hold that such a determination was one for the trier of fact.

The Supreme Court granted review to consider the question of whether the privilege set out in section 47(2) is subject to the "interest of justice" exception which some previous Court of Appeal decisions had recognized.

b. The Supreme Court's Silberg Analysis

(1) The Nature of the Section 47(2) Privilege

In discussing the privilege given by section 47(2), the *Silberg* court noted that (1) the privilege has been given application "to any communication, whether or not it amounts to a publication"; (2) it applies to all torts except malicious prosecution; (3) "it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is

provide an opinion [citations] or was a owed a direct duty [citations] or was and had the respon- a governmental

g the issue of in- the focus is more advocate vs. advo- the criminal de- paid with public public not to waste or her job as an dant which makes and liable to the ole to a later civil

logist who is medi- epute, whether by ot, is not an advo- en if paid by them.

Pitz, supra, 198 239 Cal.Rptr. 51, t referees who are a law suit are not nt contractors of r attorneys.) The as mediators, con- volves impartiali- is that of a judge, e; hence, there the same immuni- tion as neutrals in putes. In a sense, to a judge who is mandatory settle- ter whether they decisions (such as nt to Code Civ. nd arbitrators), (2) ns to the court; under Code Civ. acting under Civ. vately attempting

encouraging alterna- order to relieve the tem." (Id. at p. 535, e instant opinion, we immunity for other eute resolution activi-

made outside the courtroom and no function of the court or its officers is involved"; and (4) it applies "to all publications, irrespective of their maliciousness." (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 212, 216, 266 Cal.Rptr. 638, 786 P.2d 365.)

In setting out the "test" for application of the section 47(2) privilege, the *Silberg* court stated: "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have [sic] some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212, 266 Cal.Rptr. 638, 786 P.2d 365.)

With respect to the third element, the court stated: "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action. [Citations.] The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent. [Citations.]" (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 219-220, 266 Cal.Rptr. 638, 786 P.2d 365.)

10. One of the cases cited by the *Silberg* court was *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 235 Cal.Rptr. 692, a case from this division. In that case (which also stemmed from a dissolution of marriage matter), the plaintiff sued his former wife's accountant-witness, alleging that the accountant falsified a report which he had prepared and then used that report to give perjured testimony at trial.

The accountant had prepared, on behalf of the wife, a medical practice valuation of the husband's anesthesiology practice, in order to determine the value of its good will. The accountant stated he compared husband's practice to the goodwill of three similar practices he had also examined. In his complaint against the accountant, the husband alleged that the accountant (1) had made no valuation of his practice,

(2) *The "Interest of Justice" Factor*

The court addressed the above-mentioned line of Court of Appeal cases which had carved out an exception to the section 47(2) privilege. The exception was applied to communications which had not been made for the purpose of promoting the interest of justice. The court stated that the decision in which this test originated (*Bradley v. Hartford Acc. & Indem. Co.* (1978) 30 Cal.App.3d 818, 826, 106 Cal.Rptr. 718) took the third element of the test for application of section 47(2) (i.e., that the communication have been made to achieve the objects of the litigation) and read into it the additional requirement that the communication must have also been made for the purpose of promoting the "interest of justice." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 217, 266 Cal.Rptr. 638, 786 P.2d 365.)

The *Silberg* court rejected the "interest of justice" requirement, saying that endorsement of such a requirement "would be tantamount to the exclusion of all tortious publications from the privilege, because tortious conduct is invariably inimical to the interest of justice." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 218, 266 Cal.Rptr. 638, 786 P.2d 365.) The court stated that even though well-intentioned, the interest of justice requirement "is wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nevertheless been held privileged. [Citations.]" (*Ibid.*)¹⁰

(2) had made no such comparison because the three alleged anesthesiologists did not even exist in the State of California and (3) should have concluded that husband's practice had no good-will value because he worked on staff as part of a rotation group at a hospital and had no patients of his own.

The husband sued the accountant for abuse of process, intentional infliction of emotional distress and negligent infliction of emotional distress. This court held that section 47(2) immunized the accountant from liability. We stated that the defendant's "publications" in both his written report and his testimony at trial were privileged. *Carden* was cited several times by the *Silberg* court. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 215, 216, 218, 246 Cal.Rptr. 638, 786 P.2d 365.)

of Justice" Factor

d the above-mentioned legal cases which had been applied to the section 47(2) privilege. This option was applied to cases which had not been made promoting the interest of the plaintiff. It is stated that the decision originated (*Bradley Indem. Co.* (1973) 80 Cal.3d 100, 108 Cal.Rptr. 718) and that the application of the test for applicability (i.e., that the communication was made to achieve the object and read into it the intent that the communication had been made for the purpose of the "interest of justice" (*Silberg v. Anderson, supra*, 50 Cal.Rptr. 638, 786 P.2d

rejected the "interest of justice" requirement, saying that the exclusion of all tortious communications from the privilege, because it is invariably inimical to justice." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 213, 266 P.2d 365.) The court said: "The court is a well-intentioned, honest requirement "is wholeheartedly numerous cases in which communications or publications have nevertheless been made." (*Ibid.*)"

in a comparison because the plaintiffs did not even exist and (3) should have been worked on staff as part of the hospital and had no personal accountant for abuse of the privilege of emotional distress. That section 47(2) immunity from liability. We stated that "publications" in both his testimony at trial were cited several times by *Silberg v. Anderson, supra*, 50 Cal.3d at pp. 216, 218, 266 Cal.Rptr. 638,

c. Application of Silberg's Four-Part Test

[6] In her opening brief, plaintiff summarizes defendant's conduct as "failing to disclose her previous connections with one of the parties (i.e., an implied representation by defendant that she was acting in a professional manner by being independent), screaming at and otherwise psychologically abusing [plaintiff], negligently or deliberately misstating the facts she had learned about the case, negligently or deliberately failing to include in her report crucial facts which corroborated [the child's] complaints, and directly threatening [plaintiff] with the loss of custody of her son if [plaintiff] told anyone about defendant's acts of misconduct." All of the causes of action in plaintiff's second amended complaint allege tortious conduct. Thus, the four-part test for section 47(2) immunity which is set out in *Silberg v. Anderson, supra*, 50 Cal.3d at p. 212, 266 Cal.Rptr. 638, 786 P.2d 365.)

Plaintiff apparently concedes, as she must, the existence here of the second and the fourth elements of the section 47(2) test, i.e., that the communications were made by a participant in the litigation and that the publications have some connection or logical relation to the case. Defendant was an invited, and ultimately court-approved, participant in the dissolution matter and her communications were obviously related to a portion of the issues in the dissolution action—custody and visitation.

Although it seems that plaintiff should also concede the existence of the first element (that the defendant's alleged wrongful communications were made in a judicial or quasi-judicial proceeding), plaintiff argues in her reply brief that defendant's communications were "collateral" because they were not made during the course of and as a part of the judicial proceeding. That contention has no merit. The court in *Silberg* stated that the section 47(2) privilege applies "even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 212, 266 Cal.Rptr. 638, 786 P.2d 365.)

As for the third element, i.e. that the communication be made to achieve the objects of the litigation, we find that this element is clearly met. Defendant's alleged wrongful communications (whether express or implied and whether screamed or simply stated) were "not ... extraneous to the action" but rather had a "logical relation" to it. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 219-220, 266 Cal.Rptr. 638, 786 P.2d 365.) Defendant's acts were part of a process undertaken by the husband and wife to aid the court in its decision on an important matter in the dissolution. Defendant's "motives, morals, ethics or intent" are not in issue when asking whether her acts were in furtherance of the objects of the dissolution proceedings. (*Id.* at pp. 219-220, 266 Cal.Rptr. 638, 786 P.2d 365.) Thus, we conclude that section 47(2)'s privilege serves to protect defendant from her alleged wrongful conduct.

CONCLUSION

On the facts of this case, the defendant was entitled to common law immunity and statutory privilege. Thus, the trial court was correct in sustaining defendant's demurrer without leave to amend.

The absolute immunity and privilege to which defendant is entitled must protect her from suit. Such doctrines are not mere defenses to liability. (*Mitchell v. Forsyth* (1965) 472 U.S. 511, 525-526, 105 S.Ct. 2305, 2315, 55 L.Ed.2d 411, 424-425; *Hardy v. Vial, supra*, 48 Cal.2d at p. 584, 311 P.2d 494; *Silberg v. Anderson, supra*, 50 Cal.3d at p. 220, 266 Cal.Rptr. 638, 786 P.2d 365.) If such protection is to be meaningful it must be effective to prevent suits such as this one from going beyond demurrer. Avoiding the expense and burden of having to defend an action such as this one is precisely the goal which the principles of absolute immunity and privilege were intended to achieve. In order to best protect the ability of neutral third parties to aggressively mediate or resolve disputes, a dismissal at the very earliest stage of the proceedings is critical to the proper functioning and continued availability of these services.

DISPOSITION

The order of dismissal is affirmed. Costs on appeal to defendant.

KLEIN, P.J., concurs.

DANIELSON, Associate Justice, concurring and dissenting.

I concur in the result reached in the foregoing decision, but emphatically dissent and disassociate myself from the reasoning and the holding of the majority opinion which would create, by judicial legislation, a "quasi-judicial immunity" in persons whom it vaguely designates as "neutral third party participants in the judicial process."

In the first place, the majority simply designates those upon whom it would confer this newly-created quasi-judicial immunity as "neutral," and thereafter assumes that they are, in fact, neutral. Whether or not they are truly neutral presents a very substantial question of fact, one which would not have to be decided if this appeal were decided under existing law. The litigation privilege of Civil Code section 47, subdivision (2) (hereafter section 47(2)) provides a broad privilege which will protect participants in litigation from the consequences of their communications. Thus, the immunity which the majority would create serves no recognizable useful purpose.

The Majority's Holding is Judicial Legislation

The majority frankly and honestly acknowledges that defendant has asked this court to "go beyond" California's heretofore limited application of immunity and apply it to others (1) appointed by courts for their expertise, and (2) persons whose work product comes into the judicial process to be used by the court, even though they were not court appointed, such as social workers. The majority has granted that request. The majority holds "that absolute quasi-judicial immunity is properly extended to neutral third party participants in the judicial process." But who is doing the extending? The answer is: This court. However, the majority does not identify,

nor can they, their constitutional authority for "going beyond" the constitution and the laws of the State of California, and "extending" immunity to such third parties. By that act of "extending" they have created a new immunity, a new exemption from accountability, which has not existed in the laws of this state. To borrow the words of our Supreme Court in *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.8d 402, 416, 267 Cal.Rptr. 589, 787 P.2d 896, this is "nothing more than judicial legislation."

The People of California, in establishing our Constitution, wisely followed the example of the United States and separated governmental powers into three branches. It is well that we remember and honor that fact. The legislative power remains "vested in the California Legislature" (art. IV, § 1); the executive power remains "vested in the Governor"; (art. V, § 1); and the judicial power is "vested in the [Courts]." (Art. VI, § 1.) Our courts do not have jurisdiction to legislate and have no right either to create new causes of action nor to abolish those which are already established. Those are legislative functions. (*Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 726-727, 192 P.2d 916.)

The Majority's Holding is Gratuitous

The majority's creation of a new quasi-judicial immunity is wholly gratuitous. In deciding the central issue presented by this appeal the court could have, and should have, decided it on the basis of existing law. The litigation privilege of section 47(2) disposes of that issue fully, completely, and quickly; and that disposition is based upon law when was enacted by the people through their Legislature more than 100 years ago and which has been refined and interpreted many times by our courts. The majority did, in fact, utilize section 47(2) as an alternate basis for its decision, after first utilizing 18 pages of its opinion in its effort to justify and to create its new quasi-judicial immunity. The disposition under section 47(2) is correct and, standing alone, fully supports the result reached.

stitutional authority of California, and to such third party "pending" they have a new exemption which has not existed before. To borrow the Court in *Mutual Los Angeles* (1990) Cal.Rptr. 589, 787 giving more than judi-

cia, in establishing followed the exam- and separated gov- three branches. It er and honor that ver remains "vest- ialature" (art. IV; r remains "vested V, § 1); and the in the [Courts]." orts do not have and have no right es of action nor to e already estab- lative functions. Cal. Emp. Stab. '20, 726-727, 192

is *Gratuitous* of a new quasi-ju- : gratuitous. In presented by this ave, and should basis of existing tiege of section e fully, complete- at disposition is s enacted by the iature more than has been refined es by our courts. s, utilize section s for its decision. res of its opinion to create its new The disposition ect and, standing result reached.

This new judicial legislation is redundant and unnecessary.

Judicial Immunity Is Very limited In Scope

The majority opinion presents an extensive overview of judicial immunity. In studying that overview it must be noted and then remembered that judicial immunity, even for judges, is limited to those judicial acts which are adjudicatory in nature, i.e. decision making, dispositive, and the immunity does not otherwise extend to acts which simply happen to be done by judges. It is the *function* of adjudication of an issue, the decision making function, which requires and is the basis for judicial immunity. The decision of the United States Supreme Court in *Forrester v. White* (1982) 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555, is controlling on that point; and it provides no basis for extending such immunity to the non-adjudicatory actions of judges, nor of their adjuncts. A fortiori, judicial immunity should not extend to persons who are neither judges nor their adjuncts, but only third-party participants in litigation, i.e., witnesses.

It is important that this limitation be kept in mind, since the effect of the majority opinion is to extend judicial immunity, termed "quasi-judicial immunity," to persons who do not adjudicate but who are, at best, "neutral third-party participants in the judicial process."

The majority's scholarly review of judicial immunity contains no valid argument to justify extending such immunity to non-judicial persons who do not perform an adjudicatory function.

The Majority's Reasoning Does Not Support Its Holding

The majority discourse at length on their perceived need for creating their new quasi-judicial immunity. The examples they cite as demonstrating a need for such immunity do not support their conclusion. Where immunity is granted to the categories of persons which they mention, that immunity is based upon the function such person is performing at the particular time,

not on his or her calling or profession. As pointed out, above, judicial immunity extends to the person exercising a judicial function which is adjudicatory, decision-making, in nature. Even the act of a judge, in the performance of his duties as a judge, which is not adjudicatory in nature, is not clothed with judicial immunity. (*Forrester v. White, supra*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555.) The various categories of professionals referred to by the majority are granted immunity for their acts as adjuncts to a judge in aid of the judge's performing an adjudicatory act; they are the extension, so to speak, of the judge in those circumstances.

The Creation Of Immunity Is A Legislative Function

When it is necessary, or desirable, as a matter of public policy to extend judicial immunity to persons who would otherwise probably not enjoy it the Legislature has the power and the right to do so. Thus the Legislature has extended such immunity to arbitrators when acting in the capacity of arbitrators. The Legislature also has the constitutional power to provide for the appointment of persons other than judges to perform some judicial duties.

"The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." (Cal. Const., art. VI, § 22.)

In 1985 the Legislature granted judicial immunity to arbitrators by enacting Code of Civil Procedure section 1280.1, which provides, in part: "An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract." If there had been any need to extend judicial immunity to those encompassed in the new immunity created by the majority opinion the Legislature could have met that need by similar legislation at that time, or if such need now exists the Legislature is the correct branch of government, and has the power and the right to do so now.

Profound changes in our laws, such as the majority seek to make, should be

forged in the proven and legitimate crucible of the legislative process. There witnesses can be heard, pro and con the issue, and they are subject to questioning and probing, under the scrutiny of the press, which tests the interests of the witnesses as well as the merit and need for the proposed legislation. Debate and vote in two houses of the Legislature, and the requirement of approval by the Governor, also assure careful evaluation of the proposals. That is the procedure called for by our Constitution, and it is far better than legislation created in the relative secrecy of a judicial chamber.

The majority's discussion in support of its holding that judicial immunity should be extended to some broad, undefined, class is actually a series of arguments which might be used to support proposed legislation to create such an immunity. The reasoning might make a good law review article, but it has no place in a judicial decision. Laws should be created by legislation, not by litigation.

The Litigation Privilege Of Section 47(2) Does Not Create An Immunity

We must remember that Civil Code section 47, subdivision 2 creates a privilege for certain publications and broadcasts, commonly referred to as communications. The privilege is known as the "litigation privilege" and is absolute in tort actions, except for malicious prosecution suits. (*Silberg v. Anderson* (1990) 50 Cal3d 205, 214-217, 266 Cal.Rptr. 888, 788 P.2d 365.) However, section 47(2) does not confer immunity on any person or class of persons, it is limited to reaching and conferring a privilege on certain communications.

As pertinent to this discussion, section 47(2) provides, in part:

"A privileged publication ... is one made—

" ...

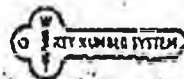
"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law...."

* Before BEST, Acting P.J., and STONE (Wm.A.)

CONCLUSION

The process of litigation is a search for truth and justice. To the extent we limit the power of the courts to reach out in search of evidence, in search of the truth, and to the extent we deny citizens the right to seek redress for their grievances, we limit and impair the judicial process. Courts, and legislatures, should be most careful before they absolve persons of accountability for their conduct.

The litigation privilege of section 47(2) is quite enough to provide all persons connected with litigation with protection from tort liability for their communications. There is no need, and there is no showing that it would be wise, to clothe them with an immunity greater than that afforded to judges.



Andy RODRIGUEZ, a Minor, etc. et al., Petitioners,

v.

The SUPERIOR COURT of Kern County, Respondent;

GLENBROOK LABORATORIES etc. Real Party in Interest.

No. F013111.

Court of Appeal, Fifth District.

Aug. 1, 1990.

Prior Report: Cal.App., 271 Cal.Rptr. 114.

ORDER DENYING PETITION FOR REHEARING

THE COURT: *

We recognize the problems of practical application for the trial courts created by a cause of action for strict liability based upon a failure to warn of a reasonably

and VARTABEDIAN, JJ.