# HB

# 127

<TARGET><BILL>HB 127</BILL><SUBJECT>HB 127</SUBJECT><COMM>HSTA28</COMM></TARGET>

# HOUSE COMMITTEE REPORT

(7)

**Date Referred to Committee: February 18, 2013** **FURTHER REFERRALS: Judiciary**

**Date of Committee Action:** 03-06-2014

**The STATE AFFAIRS Committee considered:** **HB 127**

**HOUSE BILL NO. 127**

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

**HB 127 OMBUDSMAN**

**Recommends it be replaced with [ ] HCS *or* [X] CS for** HB127 (STA)

***For Senate Bills with new title: [ ] Technical Title / [ ] New Title: HCR_____*** **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

***List of Abbrev for Depts.:***
**ADM**
**CED**
**COR**
**CRT**
**EED**
**DEC**
**DFG**
**GOV**
**DHS**
**LWF**
**LAW**
**LEG**
**MVA**
**DNR**
**DPS**
**REV**
**DOT**
**UA**

***NEW* FISCAL NOTES**

*FN# is assigned by Chief Clerk's Office

| *FN# | List by Dept(s): | Fiscal | Indet. | Zero |
|---|---|---|---|---|
| | DOC | | | X |
| | DOA | | X | |
| | DOA | X | | |
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***PREVIOUS* FISCAL NOTES**

| FN# | List by Dept(s): | Fiscal | Indet. | Zero |
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| Signing with recommendations | Printed Last Name | DP | DNP | NR | AM |
|---|---|---|---|---|---|
| | Gatts | | | X | |
| | Keller | | | | X |
| | Kreiss-Tomkins | | | | X |
| | Hughes | | | | X |
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| Chair: | LYNN | X | | | |
| Chair: | | | | | |

HOUSE STATE AFFAIRS COMMITTEE PACKET

February 25, 2014

1

**HB 127**

*Ombudsman*

**Previously Heard on 3/22 & 3/26/2013**
**Please bring the bill packet from those meetings to Committee**

2

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# Bill Previously Heard
# Additional Documents *for*
# **HB 127**

HB 127 was put into a HSTA subcommittee last year for further work. The CS is a result of the work of that subcommittee.

**HSTA Subcommittee Members:**

1. Representative Wes Keller
2. Representative Lynn Gattis
3. Representative Jonathan Kreiss-Tomkins

**Additional Documents:**

- CS for HB 127 Version G
- Sectional to Version G
- Ombudsman Comments to subcommittee work session on 2/6/2014
- Amendment R.1 (Gattis)
- Amendment R.4 (Blank)
- (3) Updated Fiscal Notes

28-LS0088\G
Gardner
2/13/14

**CS FOR HOUSE BILL NO. 127( )**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

**BY**

**Offered:**
**Referred:**

**Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract or grant and over instrumentalities of the state; and amending Rules 501 and 503, Alaska Rules of Evidence."**

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

*** Section 1.** AS 24.55.060 is amended to read:

**Sec. 24.55.060. Compensation.** The ombudsman is entitled to receive an annual salary equal to **a** step **in** [A,] Range 26 on the salary schedule set out in AS 39.27.011(a) [FOR JUNEAU].

*** Sec. 2.** AS 24.55.070 is amended by adding a new subsection to read:

(d) Notwithstanding (c) of this section, staff appointed by the ombudsman may be employed under a personal services contract as provided by AS 24.10.060(f).

*** Sec. 3.** AS 24.55.160 is amended by adding a new subsection to read:

(c) Disclosure by an agency to the ombudsman under this chapter of a communication that is subject to the attorney-client privilege, or attorney work-product privilege, does not waive the privilege as to any other person.

*** Sec. 4.** AS 24.55.260 is repealed and reenacted to read:

**Sec. 24.55.260. Ombudsman's privilege not to testify or disclose documents.** (a) The ombudsman and staff of the ombudsman may not testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions of this chapter.

(b) The records of the ombudsman and staff of the ombudsman, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public in accordance with AS 24.55.200, are not subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as the ombudsman determines may be necessary to enforce the provisions of this chapter. Disclosure by the ombudsman is subject to the restrictions on disclosure in AS 24.55.160 - 24.55.190.

*** Sec. 5.** AS 24.55.275 is amended to read:

**Sec. 24.55.275. Contract procedures.** The ombudsman shall adopt by regulation **procurement** procedures **that are appropriate for the office of the ombudsman and that are similar to those adopted by the legislative council under AS 36.30.020, as they may be amended from time to time. The procedures shall** [CONSISTENT WITH AS 36.30 TO] be followed by the office of the ombudsman in contracting for **professional and other** services**, supplies, construction, and office**

space. However, competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do [THE PROCEDURE FOR REQUESTS FOR PROPOSALS DOES] not apply to contracts for investigations under AS 24.55.100 [, AND THE OFFICE OF THE OMBUDSMAN SHALL COMPLY WITH THE FIVE PERCENT PREFERENCE UNDER AS 36.30.321(a)].

* Sec. 6. AS 24.55.330(2) is amended to read:

(2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, instrumentality, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, instrumentality, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches, or a person under a contract with a state agency or a person who has been awarded a grant from a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 - 47.14.050, to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900 to the extent that the facility or treatment center accepts placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit; it also includes an officer, employee, or member of an "agency" acting or purporting to act in the exercise of official duties, but does not include the governor, the lieutenant governor, a member of the legislature, the victims' advocate, the staff of the office of victims' rights, a justice of the supreme court, a judge of the court of appeals, a superior court judge, a district court judge, a magistrate, a member of a city council or borough assembly, an elected city or borough mayor, or a member of an elected school board;

* Sec. 7. AS 36.90 is amended by adding a new section to read:

**Sec. 36.90.310. Ombudsman's jurisdiction.** A contract between the state and a person providing a service in AS 24.55.330(2) shall include a provision that the person is subject to the jurisdiction of the office of the ombudsman as provided in

AS 24.55.

* **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) The change made to AS 24.55.160(c), added by sec. 3 of this Act, has the effect of changing Rules 501 and 503, Alaska Rules of Evidence, by clarifying that disclosure by an agency to the ombudsman under AS 24.55 of a communication that is subject to the attorney-client privilege or attorney work-product privilege does not waive the privilege as to any other person and that the ombudsman has a privilege not to testify or disclose documents as provided under AS 24.55.260, added by sec. 4 of this Act, and may not be made to disclose a communication provided by an agency to the ombudsman that is subject to the attorney-client privilege or attorney work-product privilege.

(b) The change made by sec. 4 of this Act has the effect of changing Rule 501, Alaska Rules of Evidence, by clarifying that the ombudsman and the staff of the ombudsman have a privilege not to testify or disclose or produce records in a judicial or administrative proceeding, except as provided under AS 24.55.160 - 24.55.200.

* **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 6 and 7 of this Act apply to contracts or grants entered into after January 1, 2015.

* **Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 24.55.160(c), added by sec. 3 of this Act, takes effect only if sec. 8(a) of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Section 4 of this Act takes effect only if sec. 8(b) of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

# ALASKA STATE LEGISLATURE

*Interim:*
**600 East Railroad Avenue**
**Wasilla, Alaska 99654**
**Phone (907) 373-1842**
**Fax: (907) 373-4729**

*Session:*
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**Juneau, Alaska 99801-1182**
**Phone: (907) 465-2186**
**Fax: (907) 465-3818**

## REPRESENTATIVE WES KELLER
## DISTRICT 7

## SECTIONAL

To: Members of the Alaska Legislature

Date: February 20, 2014

Re: Sectional of CS for House Bill 127 (28-LS088\G

CS for House Bill 127 is broken into 10 sections:

**Section 1:** Permits the ombudsman to receive step increases while in office.
**Section 2:** Permits employees of the ombudsman to be hired under personal service contracts.
**Section 3:** Maintains privacy under attorney client privilege.
**Section 4:** Exempts the ombudsman and staff from being forced to testify in either a judicial or administrative hearing regarding matters involving official duty work.
**Section 5:** Brings procurement language in compliance with standard Legislative procurement code including future changes as they develop.
**Section 6:** "Instrumentality" is added to the list of agencies that can be investigated by the Ombudsman which includes any statutorily established "instrumentality of the state." Additionally, persons who hold contracts with the state to provide adult and minor inmate services, or mental health treatment can be investigated by the ombudsman.
**Section 7:** Notice to contract services in section 6 will be included in the contract language for those services.
**Section 8:** Addresses an amendment to Court Rules 501 and 503 of the right not to be forced to testify in the case of attorney-client privilege as indicated in Section 4 of the bill.
**Section 9:** Effective date
**Section 10:** Required language for legislative vote on indirect court rule amendment. Necessary for implementing Section 3 and 4

***Please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.***

E-Mail: **Representative.Wes.Keller@akleg.gov**
*Call Juneau Toll free: (800) 468-2186*
*Website: www.akrepublicans.org/keller/*

State of Alaska
Ombudsman

# Ombudsman's Comments for the Subcommittee Work Session on HB 127, February 7, 2014



***Delete Section 4 of HB 127.***

Section 4 would have amended AS 24.55.160(b) to remove communications between an agency and the ombudsman during an investigation from the scope of public records requests. This would be similar to the existing confidentiality provision for the ombudsman's preliminary report provided to an agency, and the amendment was intended to encourage candor in communication with the ombudsman. However, the ombudsman has concluded that this section is unnecessary for the following reasons:

- The ombudsman can use its own regulations to allow designation of more correspondence as preliminary opinions or recommendations subject to AS 24.55.180; thus the communications containing critical opinions, even when informally stated in e-mail, will be confidential until the agency has had a chance to respond.
- The ombudsman's records, including communications received from an agency during an investigation, will be expressly protected by the proposed amendment to AS 24.55.260 (ombudsman's privilege not to testify) in Section 10 of HB 127.
- Although some communications between the ombudsman and an agency may eventually be released pursuant to a public records request made to the agency in question, the ombudsman has concluded that creating a new exception to the Alaska Public Records Act, particularly for the executive branch agencies that comprise most of the ombudsman's investigative work, is likely to create delays and confusion in agency responses to legitimate public requests, without providing a benefit that outweighs those costs.

***Delete Sections 6 – 9 of HB 127***

These sections proposed a new category of informal report for ombudsman complaints that required investigation and resulted in suggestions to the agency, but that did not merit the resources usually committed to the typical ombudsman's reports published under AS 24.55.190. Section 7 of the bill proposed a new section (proposed AS 24.55.185) creating the category of informal report, and Section 6, 8, and 9 were amendments necessary to harmonize AS 24.55.180 and AS 24.55.190 with the proposed new section.

A report under AS 24.55.190, and a public report under AS 24.55.200, can only be issued by the ombudsman, which inevitably creates a bottleneck. Further, the investigative reports issued by the ombudsman under AS 24.55.190 have become detailed and formal, which means that the office's resources only allow for a dozen or so such reports per year. That is a tiny fraction of the jurisdictional complaints actually investigated by the ombudsman's staff. Since the 1980's, the office has had a practice closing these smaller investigations as "assists" or "discontinued," often featuring an assistant ombudsman sending a closing letter with suggestions to an agency. This practice is expedient, but it has problems. First, the closing letter is not confidential, no matter how pointed the "suggestion," because the closing letter is neither a preliminary finding, which would be confidential under AS 24.55.180, nor a "report" issued personally by the ombudsman, which would be confidential under AS 24.55.190. Further, unlike reports made by the ombudsman under AS 24.55.190, there is no clear statutory path to allow the ombudsman to publish the results, which makes it more difficult for the ombudsman to illustrate what the office has done. In short, the staff closing letters – although they often contain detailed investigation and criticisms – do not have the protections offered by AS 24.55.180 and AS 24.55.190, nor the route to eventual publication provided by AS 24.55.200.

The ombudsman believes that the proposed legislation is one way to bring office practice out of a statutory grey area. However, section 7 of the bill is admittedly cumbersome. The ombudsman instead proposes withdrawing Sections 6-9 and adopting new regulations that will serve the same purpose:

- When the ombudsman's staff offers an agency criticism and suggestions, these will no longer be offered in closing letters. Instead, such content will be categorized as a consultation or preliminary opinion issued pursuant to AS 24.55.180, and the agency will be offered a set time to respond.

- After the agency has responded, or failed to do so, the ombudsman's staff will submit to the ombudsman a summary of the investigation and any response by the agency. The ombudsman will issue a summary to the agency under AS 24.55.190, and may publish the summary under AS 24.55.200. These summaries will still require the ombudsman's personal approval, but should proceed more quickly than the full-scale, highly formalized reports that are the usual work product under AS 24.55.190.



***Update Section 11 of HB 127 to account for statutory change in 2013***

This section amends AS 24.55.275 (Contract procedures). The Legislature updated and renumbered much of the state procurement code last year, including a change to AS 24.55.275 that took place after HB 127 was introduced. As a result, HB 127 now refers to a non-existent provision. The last sentence of the section currently reads:

> However, **competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do** [THE PROCEDURE FOR REQUEST FOR

PROSPOSALS DOES] not apply to contracts for investigations under AS 24.55.100, and the office of the ombudsman shall comply with AS 36.30.170(b).

Due to changes to the procurement code made by SB 12 in 2013 (effective June 27, 2013), HB 127 needs to be updated to be consistent with current organization of the procurement code.

However, **competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do** [THE PROCEDURE FOR REQUEST FOR PROSPOSALS DOES] not apply to contracts for investigations under AS 24.55.100, and the office of the ombudsman shall comply with [AS 36.30.170(b)] **the five percent preference under AS 36.30.321(a)**.

***Considering Section 12 of HB 127: changes to jurisdiction over certain state contractors***

Please note that there is already a proposed committee amendment to this section (28-LS0088\R.1 (3/20/13)), which provides that service providers are included regardless of whether they provide the specified services pursuant to a grant or a contract. For Section 12 to function as intended, the inclusion of grantees is necessary, at least for service providers working with the Department of Health and Social Services.

Roughly speaking, the section covers three types of service providers:

- adult halfway houses and private-sector prisons;
- residential facilities (other than individual foster homes) with placement of juveniles in state custody, especially those adjudicated and placed in the custody of the Division of Juvenile Justice;
- "gatekeeper" services whose staff determine eligibility for a state program/benefit.

Of these three categories, the ombudsman considers the first the most important, because inmates (even in a halfway house) are very much in the state's power, but oversight appears to be limited to the Department of Corrections and the contractor's own management. Short of a potentially costly lawsuit, we have found little oversight external to DOC.

There has already been considerable opposition to including juvenile facilities within the ombudsman's jurisdiction. The ombudsman believes that juveniles held by the Division of Juvenile Justice in institutions paid for by the Division of Juvenile Justice, and their parents, should be able to access the ombudsman no less than adult inmates. However, the Department of Health and Social Services has offered evidence of existing oversight mechanisms that are more extensive than those for adult facilities. Hopefully, this list of involved entities corresponds to a lesser need for the ombudsman's jurisdiction. The ombudsman is therefore willing to discuss dropping this category, if necessary to allow the rest of the bill to proceed.

***Edit Section 13 of HB 127***

Change "contract between the state and a person providing a service in AS 24.55.330(2)" to "contract between the state and a person providing a service **listed** in AS 24.55.330(2)…."

***Additional Comments***

There was some discussion of adding to the grounds for an ombudsman's investigation, which are listed in AS 24.55.150. As grounds for investigation of an administrative act already include broad terms such as unreasonable, unfair, oppressive, abuse of discretion, and otherwise erroneous, the ombudsman believes that the existing ombudsman standards for investigation provide a sufficient umbrella to cover complaints that are jurisdictional for ombudsman review under AS 24.55.

* * *

There was also discussion of deleting Section 1 of HB 127, relating to the Alaska Bar Association, but accomplishing the same goal by adding "instrumentality" to the list of state or municipal bodies included in the ombudsman's jurisdiction. AS 24.55.330(2) (definition of "agency" for purposes of the ombudsman's jurisdiction) would be amended as follows:

> (2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, **instrumentality**, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, **instrumentality**, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches; it also includes an officer, employee, or member of an "agency" acting or purporting to act in the exercise of official duties, but does not include the governor, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the court of appeals, a superior court judge, district court judge, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board;

The ombudsman does not oppose the change. At this point, the ombudsman is unaware of any instrumentalities of the state, other than the Alaska Bar Association, that dispute the ombudsman's jurisdiction.

* * *

Representative Keller has suggested changes to the Ombudsman Act that would require the ombudsman to make quarterly reports to the Legislature giving specific information on both closed and pending complaints. In the interests of making it clear that the ombudsman may provide the legislature with reports on the office's activities more often than the annual report

specified in AS 24.55.230, the ombudsman suggests amending AS 24.55.230 by adding a new subsection:

> (b) The ombudsman may submit supplemental reports as the ombudsman finds necessary to inform the public, the executive branch, or the legislature of the ombudsman's activities under this chapter. Supplemental reports may include the number, description, and disposition of closed complaints, distribution of complaints by geographic region or election districts, and the number of complaints filed against individual agencies. No supplemental report will include a complainant's identifying information, unless the complainant expressly agrees to the inclusion. If the ombudsman reasonably believes that the description of a complaint or its geographic origin will lead to identification of a complainant, the ombudsman will redact the report as necessary to protect the complainant's confidentiality, unless the complainant waives confidentiality for purposes of the ombudsman's report.

28-LS0088\R.4
Gardner
3/25/13

# AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 1, lines 10 - 12:

Delete **"relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract;"**

Page 5, lines 4 - 27:

Delete all material.

Renumber the following bill sections accordingly.

Page 6, lines 12 - 15:

Delete all material.

Renumber the following bill section accordingly.

Page 6, line 19:

Delete "sec. 14(a)"

Insert "sec. 12(a)"

Page 6, line 21:

Delete "sec. 14(b)"

Insert "sec. 12(b)"

28-LS0088\R.5
Gardner
3/25/13

# AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GATTIS

TO: HB 127

Page 1, line 1, following "**is**":

Insert "**not**"

Page 2, lines 3 - 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 5, line 20, following "judge,":

Insert "**the Alaska Bar Association.**"

Page 5, line 31:

Delete "sec. 5"

Insert "sec. 4"

Page 6, line 5:

Delete "sec. 10"

Insert "sec. 9"

Page 6, line 8:

Delete "sec. 10"

Insert "sec. 9"

Page 6, line 14:

Delete "Sections 12 and 13"

Insert "Sections 11 and 12"

Page 6, line 18:

Delete "sec. 5"

Insert "sec. 4"

Page 6, line 19:

Delete "sec. 14(a)"

Insert "sec. 13(a)"

Page 6, line 21:

Delete "Section 10"

Insert "Section 9"

Delete "sec. 14(b)"

Insert "sec. 13(b)"

# Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number:
() Publish Date:

Identifier: HB127-DOA-OPA-01-21-14
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House State Affairs

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

| | FY2015 Appropriation Requested | Included in Governor's FY2015 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY 2015** | **FY 2015** | **FY 2016** | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** |
| Personal Services | | | | | | | |
| Travel | | | | | | | |
| Services | | | 25.0 | 25.0 | 25.0 | 25.0 | 25.0 |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants & Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **Total Operating** | **0.0** | **0.0** | **25.0** | **25.0** | **25.0** | **25.0** | **25.0** |
| **Fund Source (Operating Only)** | | | | | | | |
| 1004 Gen Fund | | | 25.0 | 25.0 | 25.0 | 25.0 | 25.0 |
| **Total** | **0.0** | **0.0** | **25.0** | **25.0** | **25.0** | **25.0** | **25.0** |
| **Positions** | | | | | | | |
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |
| **Change in Revenues** | | | | | | | |

**Estimated SUPPLEMENTAL (FY2014) cost:** 0.0 *(separate supplemental appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**Estimated CAPITAL (FY2015) cost:** 0.0 *(separate capital appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No.
If yes, by what date are the regulations to be adopted, amended or repealed?

**Why this fiscal note differs from previous version:**

Updated for 2nd session to accurately reflect FY2015 and out year costs.


Prepared By: Richard Allen, Director — Phone: (907)269-3504
Division: Office of Public Advocacy — Date: 09/13/2013 11:25 PM
Approved By: Curtis Thayer, Acting Commissioner — Date: 01/10/14
Agency: Department of Administration

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. HB 127

## Analysis

This bill places the Alaska Bar Association under the jurisdiction of the Ombudsman's Office. The bill also purports to prevent the waiver of the attorney-client privilege if such information is provided to the Ombudsman's office and to prevent further disclosure by the Ombudsman's office.

This bill would likely make attorney responses to bar grievances subject to disclosure to the Ombudsman's office should that office conduct an investigation into the Bar Association's action on a grievance filed against an attorney. This would prevent attorneys from fully responding to bar grievances due to the risk that client confidences would be revealed to a third-party in violation of Alaska Code of Professional Conduct.

The failure to respond fully to bar grievances is likely to result in additional expenses surrounding litigation of proper response to bar grievances and increased acceptance of grievances for investigation. The Office of Public Advocacy anticipates increased litigation with the passage of the bill, and would need to hire someone on a flat fee basis to litigate as necessary. Estimated costs: $25,000.00/year.

# Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number:
() Publish Date:

Identifier: HB127-DOA-PDA-01-21-14
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House State Affairs

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

| | FY2015 Appropriation Requested | Included in Governor's FY2015 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY 2015** | **FY 2015** | **FY 2016** | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** |
| Personal Services | *** | | *** | *** | *** | *** | *** |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants & Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **Total Operating** | *** | **0.0** | *** | *** | *** | *** | *** |

**Fund Source (Operating Only)**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| None | | | | | | | |
| **Total** | *** | **0.0** | *** | *** | *** | *** | *** |

**Positions**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Change in Revenues** | | | | | | | |

**Estimated SUPPLEMENTAL (FY2014) cost:** 0.0 *(separate supplemental appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**Estimated CAPITAL (FY2015) cost:** 0.0 *(separate capital appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

**Why this fiscal note differs from previous version:**

Updated for 2nd session to accurately reflect FY2015 and out year costs.

| | | | |
|---|---|---|---|
| Prepared By: | Quinlan Steiner | Phone: | (907)334-4414 |
| Division: | Public Defender Agency | Date: | 09/17/2013 12:00 AM |
| Approved By: | Curtis Thayer, Acting Commissioner | Date: | 01/10/14 |
| Agency: | Department of Administration | | |

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. HB 127

## Analysis

This bill places the Alaska Bar Association under the jurisdiction of the Ombudsman's Office. The bill also purports to prevent the waiver of the attorney-client privilege if such information is provided to the Ombudsman's office and to prevent further disclosure by the Ombudsman's office.

This bill would likely make attorney responses to bar grievances subject to disclosure to the Ombudsman's office should that office conduct an investigation into the Bar Association's action on a grievance filed against an attorney. This would prevent attorneys from fully responding to bar grievances due to the risk that client confidences would be revealed to a third-party in violation of Alaska Code of Professional Conduct.

The failure to respond fully to bar grievances is likely to result in additional expenses surrounding litigation of proper response to bar grievances and increased acceptance of grievances for investigation. The Agency cannot predict the fiscal impact of this legislation and, therefore, submits and indeterminate fiscal note.

# Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number:
() Publish Date:

Identifier: HB127-DOC-OC-01-21-14
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House State Affairs

Department: Department of Corrections
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 694

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

| | FY2015 Appropriation Requested | Included in Governor's FY2015 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY 2015** | **FY 2015** | **FY 2016** | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** |
| Personal Services | | | | | | | |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants & Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **Total Operating** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **Fund Source (Operating Only)** | | | | | | | |
| None | | | | | | | |
| **Total** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **Positions** | | | | | | | |
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |
| **Change in Revenues** | | | | | | | |

**Estimated SUPPLEMENTAL (FY2014) cost:** 0.0 *(separate supplemental appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**Estimated CAPITAL (FY2015) cost:** 0.0 *(separate capital appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

**Why this fiscal note differs from previous version:**

Updated for 2nd session to accurately reflect FY2015 and out year costs.


Prepared By: April Wilkerson, Director — Phone: (907)465-4641
Division: Department of Corrections - Administrative Services — Date: 10/04/2013 08:52 AM
Approved By: Leslie Houston, Deputy Commissioner — Date: 10/04/13
Agency: Department of Corrections

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. HB 127

## Analysis

This bill amends AS 24.55.330(2) to expand the Ombudsman's jurisdiction to entities that contract with the Department of Corrections to provide prison, halfway house, or other residential type services. As a state agency, the Department of Corrections currently works with the Ombudsman to resolve complaints and the inclusion of these contractors would not require a substantial adjustment to current practices. Therefore, passage of this legislation would not result in additional costs to the Department.

**Sec. 24.55.010. Office of the ombudsman**.

There is created in the legislative branch of the state the office of the ombudsman.

**Sec. 24.55.020. Appointment of the ombudsman.**

(a) A candidate for appointment as the ombudsman shall be nominated by the ombudsman selection committee composed of three members of the senate appointed by the president of the senate and three members of the house of representatives appointed by the speaker of the house. One member of the minority party caucus in each house shall be appointed to the selection committee.

(b) The ombudsman selection committee shall examine persons to serve as ombudsman regarding their qualifications and ability and shall place the name of the person selected in nomination. The appointment is effective if the nomination is approved by a roll call vote of two-thirds of the members of the legislature in joint session and approved by the governor. However, the governor may veto the appointment and return it, with a statement of objections, to the legislature. Upon receipt of a veto message the legislature shall meet immediately in joint session and reconsider approval of the vetoed appointment. The vetoed appointment becomes effective by an affirmative vote of two-thirds of the membership of the legislature in joint session. The vote on the appointment and on reconsideration of a vetoed appointment shall be entered in the journals of both houses.

(c) The appointment of the ombudsman becomes effective if, while the legislature is in session, the governor neither approves nor vetoes it within 15 days, Sundays excepted, after its delivery to the governor. If the legislature is not in session and the governor neither approves nor vetoes the appointment within 20 days, Sundays excepted, after its delivery to the governor, the appointment becomes effective.

**Sec. 24.55.030. Qualifications; prohibition against political activity.**

(a) A person may not serve as ombudsman

(1) within one year of the last day on which the person served as a member of the legislature;

(2) while the person is a candidate for or holds any other national, state, or municipal office; nor may the ombudsman become a candidate for national, state, or municipal office until one year has elapsed from the date the ombudsman vacates the office of ombudsman;

(3) while the person is engaged in any other occupation for which the person receives compensation;

(4) unless the person is at least 21 years of age and is a qualified voter who has been a resident of the state for at least three years.

(b) It is essential that the nonpartisan nature, integrity, and impartiality of the ombudsman's functions and services be maintained. The ombudsman and members of the staff of the ombudsman may not join, support, or otherwise participate in a partisan political organization, faction, or activity, including but not limited to the making of political contributions. However, this subsection does not restrict the ombudsman or members of the staff of the ombudsman from expressing private opinion, registering as to party, or voting.

**Sec. 24.55.040. Term of office.**

(a) The term of office of the ombudsman is five years. An ombudsman may be reappointed but may not serve for more than three terms.

(b) If the term of an ombudsman expires without the appointment of a successor under this chapter, the incumbent ombudsman may continue in office until a successor is appointed. If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the person appointed as acting ombudsman under AS 24.55.070 (a) serves until a new ombudsman is appointed for a full term.

**Sec. 24.55.050. Removal.**

The legislature, by a concurrent resolution adopted by a roll call vote of two-thirds of the members in each house entered in the journal, may remove or suspend the ombudsman from office, but only for neglect of duty, misconduct, or disability.

**Sec. 24.55.060. Compensation**. See Section 1 of CSHB 127( ) 28-LS088 \G

The ombudsman is entitled to receive an annual salary equal to Step A, Range 26 on the salary schedule set out in AS 39.27.011 (a) for Juneau.

**Sec. 24.55.070. Staff and delegation.** See Section 2 of CSHB 127( ) 28-LS088 \G

(a) The ombudsman shall appoint a person to serve as acting ombudsman in the absence of the ombudsman. The ombudsman shall also appoint assistants and clerical personnel necessary to carry out the provisions of this chapter.

(b) The ombudsman may delegate to the assistants any of the ombudsman's duties except those specified in AS 24.55.190 and 24.55.200; however, during the ombudsman's absence from the principal business offices, the ombudsman may delegate the duties specified in AS 24.55.190 and 24.55.200 to the acting ombudsman for the duration of the absence. The duties specified in AS 24.55.190 and 24.55.200 shall be performed by the acting ombudsman when serving under AS 24.55.040(b).

(c) The ombudsman and the staff appointed by the ombudsman are in the exempt service under AS 39.25.110 and are not subject to the employment policies under AS 24.10 or AS 24.20.

**Sec. 24.55.080. Office facilities and administration.**

(a) Subject to restrictions and limitations imposed by the executive director of the Legislative Affairs Agency, the administrative facilities and services of the Legislative Affairs Agency, including computer, data processing, and teleconference facilities, may be made available to the ombudsman to be used in the management of the office of the ombudsman and to carry out the purposes of this chapter.

(b) The salary and benefits of the ombudsman and the permanent staff of the ombudsman shall be paid through the same procedures used for payment of the salaries and benefits of other permanent legislative employees.

(c) The ombudsman shall submit a budget for each fiscal year to the Alaska Legislative Council and the council shall annually submit an estimated budget to the governor for information purposes in the

preparation of the executive budget. After reviewing and approving, with or without modifications, the budget submitted by the ombudsman, the council shall submit the approved budget to the finance committees of the legislature.

**Sec. 24.55.090. Procedure.**

(a) The ombudsman shall, by regulations adopted under AS 44.62 (Administrative Procedure Act), establish procedures for receiving and processing complaints, conducting investigations, reporting findings, and ensuring that confidential information obtained by the ombudsman in the course of an investigation will not be improperly disclosed.

(b) The ombudsman may not charge fees for the submission or investigation of complaints.

**Sec. 24.55.100. Jurisdiction**.

(a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.

(b) The ombudsman may exercise the ombudsman's powers without regard to the finality of an administrative act.

**Sec. 24.55.110. Investigation of complaints.**

The ombudsman shall investigate any complaint that is an appropriate subject for investigation under AS 24.55.150 , unless the ombudsman reasonably believes that

(1) there is presently available an adequate remedy for the grievance stated in the complaint;

(2) the complaint relates to a matter that is outside the jurisdiction of the ombudsman;

(3) the complaint relates to an administrative act of which the complainant has had knowledge for an unreasonable length of time before the complaint was submitted;

(4) the complainant does not have a sufficient personal interest in the subject matter of the complaint;

(5) the complaint is trivial or made in bad faith;

(6) the resources of the ombudsman's office are insufficient for adequate investigation.

**Sec. 24.55.120. Investigation on the ombudsman's motion.**

The ombudsman may investigate the administrative act of an agency on the ombudsman's own motion if the ombudsman reasonably believes that it is an appropriate subject for investigation under AS 24.55.150 .

**Sec. 24.55.130. Notice to complainant.**

(a) If the ombudsman decides not to investigate a complaint, the ombudsman shall inform the complainant of that decision and shall state the reasons.

(b) If the ombudsman decides to investigate a complaint, the ombudsman shall notify the complainant of the decision.

(c) Notice given under this section may be oral but the ombudsman shall state in writing the reasons for not investigating a complaint if requested by the complainant.

**Sec. 24.55.140. Notice to the agency**.

If the ombudsman decides to investigate a complaint, the ombudsman shall notify the agency of the intention to investigate unless the ombudsman believes that advance notice will unduly hinder the investigation or make it ineffectual. Notice given under this section may be oral or written, at the discretion of the ombudsman.

**Sec. 24.55.150. Appropriate subjects for investigation.**

(a) An appropriate subject for investigation by the ombudsman is an administrative act of an agency that the ombudsman has reason to believe might be

(1) contrary to law;

(2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;

(3) based on a mistake of fact;

(4) based on improper or irrelevant grounds;

(5) unsupported by an adequate statement of reasons;

(6) performed in an inefficient or discourteous manner; or

(7) otherwise erroneous.

(b) The ombudsman may investigate to find an appropriate remedy.

**Sec. 24.55.160. Investigation procedures.** See Section 3 of CSHB 127( ) 28-LS088 \G

(a) In an investigation, the ombudsman may

(1) make inquiries and obtain information considered necessary;

(2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;

(3) hold private hearings; and

(4) notwithstanding other provisions of law, have access at all times to records of every state agency, including confidential records, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.

(b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency.

**Sec. 24.55.170. Powers**.

(a) Subject to the privileges that witnesses have in the courts of this state, the ombudsman may compel by subpoena, at a specified time and place, the

(1) appearance and sworn testimony of a person who the ombudsman reasonably believes may be able to give information relating to a matter under investigation; and

(2) production by a person of a record or object that the ombudsman reasonably believes may relate to the matter under investigation.

(b) If a person refuses to comply with a subpoena issued under (a) of this section, the superior court may, on application of the ombudsman, compel obedience by proceedings for contempt in the same manner as in the case of disobedience to the requirements of a subpoena issued by the court or refusal to testify in the court.

**Sec. 24.55.180. Consultation.**

Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person. The ombudsman may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person.

**Sec. 24.55.190. Procedure after investigation.**

(a) The ombudsman shall report the opinion and recommendations of the ombudsman to an agency if the ombudsman finds, after investigation, that

(1) a matter should be further considered by the agency;

(2) an administrative act should be modified or cancelled;

(3) a statute or regulation on which an administrative act is based should be altered;

(4) reasons should be given for an administrative act;

(5) any other action should be taken by the agency;

(6) there are no grounds for action by the agency; or

(7) the agency's act was arbitrary or capricious, constituted an abuse of discretion, or was otherwise erroneous or not in accordance with the law.

(b) The ombudsman may request the agency to notify the ombudsman, within a specified time, of any action taken on the recommendations.

(c) The report provided under (a) of this section is confidential and may not be disclosed to the public by the agency. The ombudsman may disclose the report under AS 24.55.200 only after providing notice that the investigation has been concluded

(1) to the agency; and

(2) if the investigation was conducted in response to a complaint, to the complainant under AS 24.55.210 .

**Sec. 24.55.200. Publication of recommendations.**

Within a reasonable amount of time after the ombudsman reports the opinion and recommendations to an agency the ombudsman may present the opinion and recommendations to the governor, the legislature, a grand jury, the public or any of these. The ombudsman shall include with the opinion any reply made by the agency.

**Sec. 24.55.210. Notice to the complainant**.

After a reasonable time has elapsed, the ombudsman shall notify the complainant of the actions taken by the ombudsman and by the agency.

**Sec. 24.55.220. Misconduct by agency personnel**.

If the ombudsman believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of the officer's or employee's official duties, the ombudsman shall refer the matter

to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency.

**Sec. 24.55.230. Annual report.**

The ombudsman shall submit to the public an annual report of the ombudsman's activities under this chapter and notify the legislature that the report is available.

**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.

**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.

**Sec. 24.55.260. Ombudsman's privilege not to testify.** See Section 4 of CSHB 127( ) 28-LS088 \G

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.

**Sec. 24.55.270. Letters to or from ombudsman**.

A letter to the ombudsman from a person held in custody by an agency shall be forwarded immediately, unopened, to the ombudsman. A letter from the ombudsman to a person held in custody by an agency shall be delivered immediately, unopened, to the person.

**Sec. 24.55.275. Contract procedures**. See Section 5 of CSHB 127( ) 28-LS088 \G

The ombudsman shall adopt by regulation procedures consistent with AS 36.30 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS »24.55.100«, and the office of the ombudsman shall comply with the five percent preference under AS 36.30.321 (a).

**Sec. 24.55.280. Time for judicial review of agency action.**

This chapter in no way extends the time limit in which judicial review of agency action must be sought.

**Sec. 24.55.290. Penalty.**

A person who wilfully hinders the lawful actions of the ombudsman or the staff of the ombudsman, or who wilfully refuses to comply with their lawful demands, or who wilfully violates AS 24.55.270 , is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000.

**Sec. 24.55.300. Administrative Procedure Act.**

The administrative acts of the ombudsman are not subject to the provisions of AS 44.62 (Administrative Procedure Act), except as provided in AS 24.55.090 .

**Sec. 24.55.320. Municipalities and school districts.**

A municipality or school district may elect to become subject to the jurisdiction of the ombudsman appointed under this chapter. If a municipality or school district so elects, it shall notify the ombudsman of that election and shall thereafter be considered an agency for the purposes of this chapter. If a municipality or school district subjects itself to the jurisdiction of the ombudsman, the municipality or school district shall pay its pro rata share of the cost of the operation of the office of the ombudsman based on the number of complaints or the case load emanating from that municipality or school district, as prescribed by the ombudsman. If a municipality or school district elects to remove itself from the jurisdiction of the ombudsman, it shall notify the ombudsman of that election and shall not thereafter be considered an agency for the purposes of this chapter. A municipality that elects to become subject to the jurisdiction of the ombudsman or to remove itself from that jurisdiction must do so by ordinance. A school district that elects to become subject to the jurisdiction of the ombudsman or to remove itself from that jurisdiction must do so by resolution.

**Sec. 24.55.330. Definitions.** See Section 6 of CSHB 127( ) 28-LS088 \G

In this chapter,

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

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

(3) "record" means a document, paper, memorandum, book, letter, file, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card, or other item developed or received under law or in connection with the transaction of official business, but does not include an attorney's work product, material that is confidential as a privileged communication between an attorney and client under rules adopted by the supreme court, or confidential oil and gas geological and geophysical data.

**CS FOR HOUSE BILL NO. 127(STA)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

**BY THE HOUSE STATE AFFAIRS COMMITTEE**

**Offered:**
**Referred:**

**Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; relating to investigation by the ombudsman on the legislature's motion or by the ombudsman's motion; relating to notice by the ombudsman to a complainant; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract or grant and over instrumentalities of the state; and amending Rules 501 and 503, Alaska Rules of Evidence."**

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

* **Section 1.** AS 24.55.060 is amended to read:

**Sec. 24.55.060. Compensation.** The ombudsman is entitled to receive an annual salary equal to **a** step **in** [A,] Range 26 on the salary schedule set out in AS 39.27.011(a) [FOR JUNEAU].

* **Sec. 2.** AS 24.55.070 is amended by adding a new subsection to read:

(d) Notwithstanding (c) of this section, staff appointed by the ombudsman may be employed under a personal services contract as provided by AS 24.10.060(f).

* **Sec. 3.** AS 24.55.120 is amended to read:

**Sec. 24.55.120. Investigation on the ombudsman's motion.** The ombudsman may investigate the administrative act of an agency **if the chair of the Administrative Regulation Review Committee requests an investigation on behalf of the legislature or** on the ombudsman's own motion if the ombudsman reasonably believes that it is an appropriate subject for investigation under AS 24.55.150.

* **Sec. 4.** AS 24.55.130(a) is amended to read:

(a) If the ombudsman decides not to investigate a complaint, the ombudsman shall inform the complainant of that decision and shall state the reasons. **If the complainant consents to disclosure, the ombudsman shall disclose the name of the complainant and the fact that the ombudsman has declined to review the complaint to the chair of the Administrative Regulation Review Committee.**

* **Sec. 5.** AS 24.55.130(c) is amended to read:

(c) Notice given under this section may be oral**,** but the ombudsman shall state in writing the reasons for not investigating a complaint **to the chair of the Administrative Regulation Review Committee, if requested by the chair, or to the complainant,** if requested by the complainant.

* **Sec. 6.** AS 24.55.160(a) is amended to read:

(a) In an investigation, the ombudsman may

(1) make inquiries and obtain information considered necessary;

(2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;

(3) hold private hearings; and

(4) notwithstanding other provisions of law, have access at all times to records of every [STATE] agency, including confidential records, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.

* **Sec. 7.** AS 24.55.160 is amended by adding a new subsection to read:

(c) Disclosure by an agency to the ombudsman under this chapter of a communication that is subject to the attorney-client privilege, or attorney work-product privilege, does not waive the privilege as to any other person. The ombudsman may not disclose a privileged communication provided under this subsection.

* **Sec. 8.** AS 24.55.260 is repealed and reenacted to read:

**Sec. 24.55.260. Ombudsman's privilege not to testify or disclose documents.** (a) The ombudsman and staff of the ombudsman may not testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions of this chapter.

(b) The records of the ombudsman and staff of the ombudsman, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public in accordance with AS 24.55.200, are not subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as the ombudsman determines may be necessary to enforce the provisions of this chapter. Disclosure by the ombudsman is subject to the restrictions on disclosure in AS 24.55.160 - 24.55.190.

* **Sec. 9.** AS 24.55.275 is amended to read:

**Sec. 24.55.275. Contract procedures.** The ombudsman shall adopt by regulation **procurement** procedures **that are appropriate for the office of the ombudsman and that are similar to those adopted by the legislative council under AS 36.30.020, as they may be amended from time to time. The procedures shall** [CONSISTENT WITH AS 36.30 TO] be followed by the office of the ombudsman in

contracting for **professional and other** services**, supplies, construction, and office space**. However, **competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do** [THE PROCEDURE FOR REQUESTS FOR PROPOSALS DOES] not apply to contracts for investigations under AS 24.55.100 [, AND THE OFFICE OF THE OMBUDSMAN SHALL COMPLY WITH THE FIVE PERCENT PREFERENCE UNDER AS 36.30.321(a)].

* **Sec. 10.** AS 24.55.330(2) is amended to read:

(2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, **instrumentality,** council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, **instrumentality,** council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches**, or a person under a contract with a state agency or a person who has been awarded a grant from a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 - 47.14.050, or to determine eligibility for a state program or benefit**; it also includes an officer, employee, or member of an "agency" acting or purporting to act in the exercise of official duties, but does not include the governor, the lieutenant governor, a member of the legislature, the victims' advocate, the staff of the office of victims' rights, a justice of the supreme court, a judge of the court of appeals, a superior court judge, a district court judge, a magistrate, a member of a city council or borough assembly, an elected city or borough mayor, or a member of an elected school board;

* **Sec. 11.** AS 36.90 is amended by adding a new section to read:

**Sec. 36.90.310. Ombudsman's jurisdiction.** A contract between the state and a person providing a service in AS 24.55.330(2) shall include a provision that the person is subject to the jurisdiction of the office of the ombudsman as provided in AS 24.55.

* **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

INDIRECT COURT RULE AMENDMENTS. (a) The change made to AS 24.55.160(c), added by sec. 7 of this Act, has the effect of changing Rules 501 and 503, Alaska Rules of Evidence, by clarifying that disclosure by an agency to the ombudsman under AS 24.55 of a communication that is subject to the attorney-client privilege or attorney work-product privilege does not waive the privilege as to any other person and that the ombudsman has a privilege not to testify or disclose documents as provided under AS 24.55.260, added by sec. 8 of this Act, and may not be made to disclose a communication provided by an agency to the ombudsman that is subject to the attorney-client privilege or attorney work-product privilege.

(b) The change made by sec. 8 of this Act has the effect of changing Rule 501, Alaska Rules of Evidence, by clarifying that the ombudsman and the staff of the ombudsman have a privilege not to testify or disclose or produce records in a judicial or administrative proceeding, except as provided under AS 24.55.160 - 24.55.200.

*** Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 10 and 11 of this Act apply to contracts or grants entered into after January 1, 2015.

*** Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. (a) AS 24.55.160(c), added by sec. 7 of this Act, takes effect only if sec. 12(a) of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) Section 8 of this Act takes effect only if sec. 12(b) of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

2/25/14

# Bill Previously Heard
# Late Additional Documents *for*
# HB 127

HB 127 was put into a HSTA subcommittee last year for further work. The CS is a result of the work of that subcommittee.

**HSTA Subcommittee Members:**

1. Representative Wes Keller
2. Representative Lynn Gattis
3. Representative Jonathan Kreiss-Tomkins

**Additional Documents: (these came in AFTER bill packet was put together)**

- Alaska Bar Association - OPPOSES (13 page document including cover)
- Alaska Mental Health Board - Kate Burkhart - OPPOSES (4 pages)
- North Star Behavioral Health – Laura McKenzie – OPPOSES (4 pages)
- Providence Health & Services Alaska – OPPOSES (1 page)

ALASKA BAR ASSOCIATION

ONE HUNDRED YEARS 1896 1996

ALASKA BAR ASSOCIATION

By fax

**DATE:** February 24, 2014

**DELIVER TO:** House State Affairs Committee
Rep. Bob Lynn 907-465-4316
Rep. Wes Keller 907-465-3818
Rep. Lynn Gattis 907-465-4586
Rep. Shelley Hughes c/o Rep. Lance Pruitt
907-465-4565
Rep. Doug Isaacson 907-465-2197
Rep. Charisse Millette 907-465-2069
Rep. Jonathan Kreiss- Tomkins
907-465-2652

**YOUR FAX NO:** 278-8536

**SENT BY:** Gail Welt, Executive Assistant
For Bar Counsel Stephen J. Van goor

**RE:** Committee Substitute for House Bill No. 127

IF YOU EXPERIENCE ANY PROBLEMS RECEIVING THIS FAX, PLEASE CALL Gail at (907) 272-7469. THANK YOU

G:\Ds\gw\Fax Cover.doc

P. O. Box 100279 • Anchorage, Alaska 99510-0279
907-272-7469 • Fax 907-272-2932 • http://www.alaskabar.org

# ALASKA BAR ASSOCIATION

February 24, 2014

Rep. Bob Lynn, Chair,
House State Affairs Committee
State Capitol, Room 108
Juneau, AK 99801-1182

Rep. Wes Keller, Vice-Chair
House State Affairs Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Rep. Lynn Gattis, Member
House State Affairs Committee
State Capitol, Room 420
Juneau, AK 99801-1182

Rep. Shelley Hughes, Member
House State Affairs Committee
State Capitol, Room 409
Juneau, AK 99801-1182

Rep. Doug Isaacson, Member
House State Affairs Committee
State Capitol, Room 13
Juneau, AK 99801-1182

Rep. Charisse Millett, Member
House State Affairs Committee
State Capitol, Room 403
Juneau, AK 99801-1182

Rep. Jonathan Kreiss-Tomkins,
Member
House State Affairs Committee
State Capitol, Room 426
Juneau, AK 99801-1182

RE: Committee Substitute for House Bill No. 127

Dear Rep. Lynn and members of the Committee:

I'm writing regarding Section 6 of Committee Substitute for House Bill No. 127 that would add the word "instrumentality" to the definition of "agency" for the purpose of AS 24.55.330(2) and Sections 3 and 8 regarding indirect court rule amendments to Alaska Rules of Evidence 501 and 503 regarding attorney/client privilege.

Section 6

Since the Alaska Bar Association is an instrumentality of the state under AS 08.08.010, the amendment would make the Bar Association subject to ombudsman investigations.

While I can't speak for other instrumentalities of the state, I can advise the Committee that if this section is adopted, the Bar Association would be unable to comply with an ombudsman request for review of confidential lawyer grievance files.

Article IV, Section 1 of the Alaska Constitution invests the judicial power of the state of Alaska in the Alaska Supreme Court. Pursuant to that inherent authority, the Court has adopted the Rules of Disciplinary Enforcement in the Alaska Bar Rules which bind the Bar Association in the investigation and prosecution of lawyer misconduct. Legal Services Director Doug Gardner's March 21, 2013 memo to the Committee confirms the Supreme Court's authority. Document 09.

Under Bar Rule 22(b), grievance investigations are confidential prior to the initiation of formal proceedings. However, under this same rule, a respondent lawyer may waive confidentiality of a grievance filed against the lawyer in writing. Document 16. In addition, Bar Rule 21(c) lists seven exceptions to the confidentiality requirements. Document 16. Finally, the Supreme Court may issue an order directing public disclosure of a disciplinary matter on a showing of good cause.

If there is no waiver by the respondent lawyer, no exception under Bar Rule 21(a), or no order of the Supreme Court, the Bar Association could not respond to an ombudsman request to review a grievance file. If the ombudsman initiates any type of enforcement action, the Bar Association would be bound to bring that enforcement action to the Supreme Court since only the Supreme Court has the authority to determine the application of the Bar Rules on lawyer grievance confidentiality.

The attorney grievance process is already subject to strict supervision by the Disciplinary Board of the Bar Association as well as the Supreme Court. If a complainant is dissatisfied with a grievance intake decision, the complainant may ask for review by the Board Discipline Liaison under Bar Rule 22(a). Document 16. If the complainant is still dissatisfied, the complaint may file an original application for review by the Alaska Supreme Court. *Anderson v. Alaska Bar Association,* 91 P.3d 271 (Alaska 2004). Document 09. If a complaint is dissatisfied with a decision to dismiss a grievance following investigation, the Bar Rule 25 provides for review by an area hearing division member. Copy attached.

In her February 26, 2013 memo to the Committee, the ombudsman found eleven (11) complaints against the Bar Association from December 1999 through February 2013. Document 04. Of those, she reported that two (2) were declined as premature, one (1) was resolved, one (1) was declined due to a lack of merit on its face, and seven (7) were declined due to a jurisdiction dispute. Of the seven (7), six (6) complaints alleged that the Bar Association had failed to adequately investigate a complaint about attorney competence—generally complaints by criminal defendants about the court-appointed counsel and the seventh complaint involved a client's effort to collect a fee arbitration award.

In essentially the same period from January 2000 to December 2012, the Bar Association processed 3079 grievance matters. The 6 complaints about the Bar Association's investigation amounted to .2 of 1%

of the grievances processed. The present grievance investigation process is working.

Finally, Representative Gattis suggested an amendment to House Bill 127 on March 24 2013 that would add the Alaska Bar Association to the list of officials exempted under Section 6. Document 23. Adding "Alaska Bar Association" after the word "judge" on Page 3, line 26 of the Committee Substitute for House Bill 127 would answer the ombudsman's question regarding jurisdiction and avoid the problems I've expressed in this letter.

Sections 3 and 8

Section 8 of the Committee Substitute advises that the change to Section 3 has the effect of changing Alaska Rules of Evidence 501 and 503 regarding attorney-client privilege. Essentially, there would be no waiver of privilege or work product if that information was disclosed to the ombudsman.

As it applies to Bar Association investigations, this amendment would create significant problems for lawyers responding to grievances and leave clients with no recourse if privileged information is disclosed.

Alaska Rule of Professional Conduct 1.6(b)(5) permits a lawyer to make reasonably necessary disclosures of client confidences and secrets in order to respond to a client's allegation of misconduct. Copy attached. This isn't a blank check to reveal anything that the lawyer wants to reveal. The lawyer is ethically bound only to disclose information reasonably necessary to respond to the complaint. However, if that information is reviewed outside of the grievance process by a person or agency not bound by the Rules of Professional Conduct, that protection will be lost.

Public defenders and public advocates are mostly likely to be affected by this since they need to disclose details of their representations in defending ineffective assistance allegations. If they know that a nonlawyer outside the grievance process may have access to client information, they would understandably be reluctant to disclose information that may harm the client in ongoing proceedings or appeals.

Section 8 is apparently designed to prevent this from happening, but, since the ombudsman and the ombudsman's staff are not lawyers to my knowledge, there would be no recourse for the client if the information was disclosed.

Consequently, Sections 3 and 8 of the Committee Substitute would not protect clients complaining about their lawyers in the lawyer grievance process.

Conclusion

The Bar Association requests an addition to the Committee Substitute for House Bill 127 on page 3, line 26, that adds the words "Alaska Bar Association" after the word "judge." This would exclude the Bar Association from the ombudsman's jurisdiction.

Thank you for the opportunity to present the Bar Association's position on this proposed legislation.

If there is any further information I may provide, please let me know.

Sincerely,

ALASKA BAR ASSOCIATION

Stephen J. Van Goor
Bar Counsel

Encl.

cc: Michael Moberly, President
Deborah O'Regan, Executive Director

**Alaska Bar Rule 25. Appeals; Review of Bar Counsel Determinations.**

(a) Interlocutory Appeal. Only upon the conditions and subject to the Rules of Procedure set forth in Part IV of the Alaska Rules of Appellate Procedure may parties petition the Court for review of an interlocutory order, recommendation, or decision of

(1) any member of any Area Division;

(2) a Hearing Committee or a single member thereof; or

(3) the Board or a single member thereof.

(b) Admonition Not Appealable. A Respondent cannot appeal the imposition of a written private admonition. In accordance with Rule 22(d), (s)he may request initiation of formal proceedings before a Hearing Committee within 30 days of receipt of the admonition.

(c) Appeal by Complainant from Bar Counsel's Decision to Dismiss. A Complainant may appeal the decision of the Bar Counsel to dismiss a complaint within 15 days of receipt of notice of the dismissal. The Director will appoint a member of an Area Division of the appropriate area of jurisdiction to review the Complainant's appeal. The appointed Area Division member may reverse the decision of Bar Counsel, affirm the decision, or request additional investigation. This Division member will be disqualified from any future consideration of the matter should formal proceedings be initiated.

(d) Review of Bar Counsel's Decision to File Formal Petition. A decision by Bar Counsel to initiate formal proceedings before a Hearing Committee will be reviewed by the Board Discipline Liaison prior to the filing of a formal petition. The Board Discipline Liaison will, within 20 days, approve, modify, or disapprove the filing of a petition, or order further investigation.

(e) Appeal by Bar Counsel. Bar Counsel may appeal the decision made under Section (d) of this Rule within 10 days following receipt of the Board Discipline Liaison's decision. The Director will designate an Area Division Member to hear this appeal. The decision of the Area Division Member will be final.

(f) Appeal of Hearing Committee Findings, Conclusions, and Recommendation. Within 10 days of service of the Hearing Committee's report to the Board, as set forth in Rule 22(1), the Respondent or Bar Counsel may appeal the findings of fact, conclusions of law, or recommendation by filing with the Board, and serving upon opposing party, a notice of appeal. Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (l) of Rule 22.

(g) Respondent Appeal from Board Recommendation or Order. Respondent may appeal from a recommendation or order of the Board made under Rule 22(n) by filing a notice of appeal with the Court within 10 days of service of the Board's recommendation or order. Part II of the Rules of Appellate Procedure will govern appeals filed under this Rule.

(h) Bar Counsel Petition for Hearing of a Board Recommendation or Order. Bar Counsel may petition from a recommendation or order of the Board made under Rule 22(n) by filing a petition for hearing with the Court within 10 days of service of the Board's recommendation or order. Part III of the Rules of Appellate Procedure will govern petitions filed under this Rule.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 17 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 962 effective July 15, 1989; and by SCO 1082 effective January 15, 1992)

**Alaska Rule of Professional Conduct 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain:

(A) death;

(B) substantial bodily harm; or

(C) wrongful execution or incarceration of another;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer must act competently to safeguard a client's confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. When transmitting a communication that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.

(SCO 1123 effective July 15, 1993; amended by SCO 1332 effective January 15, 1999; and rescinded and repromulgated by SCO 1680 effective April 15, 2009)

**ALASKA COMMENT**

The Court decided to continue Alaska's amendment to this rule to tie the lawyer's confidentiality obligation to a "confidence" or "secret" of the client. The Committee concluded the language used in Model Rule 1.6 ("information" relating to representation of a client) was excessively broad. The terms "confidence" and "secret" are defined in the amended rule in substantively the same way as those terms were defined in DR 4-101(A) of the ABA Model Code of Professional Responsibility. The Committee expects that court decisions interpreting "confidence" and "secret" under DR 4-101(A) will be persuasive authority for interpreting the amended Alaska rule.

The final sentence of paragraph (a) has been added to require that a lawyer approach any decision about disclosing confidences or secrets of a client from the standpoint that the information is generally protected from disclosure.

In paragraph (b)(1)(C), the court included an additional limited exception to the normal rule requiring lawyers to preserve the confidences and secrets of their clients. This provision is modeled on the similar Massachusetts rule; its core purpose is to permit a lawyer to reveal confidential information in the specific situation in which that information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution.

The lawyer's decision to disclose information under this rule is governed by objectively reasonable standards (*see* Rule 9.1(m) and (n)) and by all the facts and circumstances of which the lawyer is aware or reasonably should be aware at the time the decision is made.

Paragraph (c) is taken from the commentary to the ABA version of the rules. The Committee created paragraph (c) because the Committee concluded that standards of professional conduct subject to enforcement through disciplinary proceedings should be stated in the text of the Rules rather than in commentary.

**COMMENT**

[1] This Rule governs the disclosure by a lawyer confidences and secrets of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal confidences and secrets of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal a client's confidences and secrets. See Rule 9.1(g) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and to ascertain what conduct is legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in the

Rules of Professional Conduct. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality also applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all client secrets. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. A determination that disclosure of client information is permitted by the crime-fraud exception to the ethics rule does not necessarily lead to the same result under the crime-fraud exception to the attorney-client privilege. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing confidences and secrets of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other confidences and secrets of a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidences and secrets of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of

the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose client confidences and secrets to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. To the extent practicable, a lawyer should use hypothetical facts when seeking this legal advice.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity or other misconduct has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges misconduct, so the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, when a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidences and secrets appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal confidences and secrets of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the lawyer should ask the tribunal to limit access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

**Disclosures Otherwise Required or Authorized**

[15] Paragraph (b) permits but does not require the disclosure of confidences and secrets of a client to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[16] In various circumstances, a lawyer is permitted or required to disclose client confidences and secrets. See, for example, Rules 2.3, 3.3, and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes or augments Rule 1.6 is a matter of interpretation beyond the scope of these Rules.

[17] The attorney-client privilege is defined differently in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

**Withdrawal**

[18] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences and secrets, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[19] The duty of safeguarding communications described in Rule 1.6(c) does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the

Advisory Board on Alcoholism and Drug Abuse

abada amhb

Alaska Mental Health Board

**ALASKA MENTAL HEALTH BOARD**
**ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE**
431 NORTH FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 465-8920

**The Alaska Mental Health Board and the Advisory Board on Alcoholism and Drug Abuse oppose the expansion of ombudsman jurisdiction to include private, non-governmental health care providers.**

SB 72, proposed at the request of the Alaska Ombudsman, seeks to extend ombudsman authority and jurisdiction to patient complaints from certain private, non-governmental health care providers. The Alaska Mental Health Board (AMHB) and the Advisory Board on Alcoholism and Drug Abuse (ABADA) believe this to be contrary to good public policy, possibly impairing the ability of patients to have complaints and grievances addressed in a timely and effective manner.

The U.S. Ombudsman Association defines the jurisdiction of governmental ombudsmen as being over "complaints about government actions."[1] Under SB 72, the Alaska Ombudsman seeks to broaden jurisdiction to include non-governmental actions – by "a person under a contract . . . with a state agency to provide a juvenile detention facility, treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services." (SB 72 at page 5). Not only is authority over private non-profit organizations and businesses outside of the recommended scope of practice for governmental ombudsmen, it is based on a misconception of the services rendered by residential health care providers and how they are regulated.

Given that there are well-utilized ways for patients and their parents/guardians to have complaints addressed, and the lack of evidence that the Alaska Ombudsman is better-suited to resolve these issues, AMHB and ABADA recommend that this entire clause (lines 11-14 at page 5) be removed.

**Residential Treatment Facilities Provide Health Care Services**

Based on both the supporting documents provided with these bills and meetings with Alaska Ombudsman staff, we believe there is **a fundamental misconception** about the nature of services provided by residential behavioral health care providers. The Alaska Ombudsman characterizes these facilities as being similar to detention or penal institutions and the services as being involuntary. Neither characterization is accurate.

Residential psychiatric and behavioral health services are not punishment – they are health care. The providers of these health care services are private businesses and non-profit organizations. They provide health care services reimbursed by Medicaid (and other insurance), services which

[1] U.S. Ombudsman Association Governmental Ombudsman Standards, Preamble at page 1.

the ombudsman expressly exempted from the intent of the bill in the analysis provided with the bill.

The health care organizations that serve youth in the custody of the Office of Children's Services (OCS) or Division of Juvenile Justice (DJJ) provide a wide array of health care services to support the psychiatric and/or substance use disorder treatment and recovery process. These health care services include psychiatric services, clinical therapy services for individuals and families, medication, diet, wellness services, and other services to promote healing and recovery. In addition to psychiatrists and clinical therapists, these health care organizations often have neurologists, general practitioners, nurses, and dieticians on staff.

These health care services are provided in a residential setting – not a detention facility. None of these health care organizations are locked facilities from which youth cannot leave. (Of course, should a young person leave, providers and OCS/DJJ work quickly to find the youth and return him or her to a safe setting.) Youth are admitted to treatment with parent or guardian consent. State regulation and the standards of care require that the youth be engaged, with their parents and other guardians, in the treatment planning and evaluation process.

**Existing Oversight and Procedures for Patient Complaints**

When a youth is in the custody of OCS or DJJ, there is a court which has ordered such custody and is monitoring that custody. The youth is represented by a *guardian ad litem*, a court appointed special advocate, or a lawyer (and sometimes a combination of these). The parents are represented by lawyers, as well. This means that the parents and youth have the ability to file a motion for hearing at any time during the cause of action.

When a youth is admitted to residential treatment, it is pursuant to a court order, after which the courts hold status hearings at least every 90 days. The parents and youth, through their representatives, can request more frequent regular hearings or *ad hoc* hearings whenever there is a need to review or change a treatment decision. Medication decisions are also reviewed by the court.

All of Alaska's behavioral health providers are subject to three layers of oversight, all of which require formal grievance and complaint procedures (see attached chart). The Department of Health and Social Services (DHSS) exercises oversight – and has the authority to enforce recommendations when made – through the licensing process as well as through the funding process. All of the residential health care providers targeted by the bill are Medicaid service providers and therefore subject to oversight from the Centers for Medicare and Medicaid Services (CMS). Like DHSS, CMS – as a federal agency – has the power to enforce recommendations for improvements to standards of care and policies and procedures. All of these health care providers are required to be accredited by a nationally recognized health care organization, such as the Joint Commission and Commission on Accreditation of Rehabilitation Facilities. These accrediting organizations also have authority to enforce recommendations for improvements to care.

It is important to note that the Courts, the Department of Health and Social Services, the Centers for Medicare and Medicaid Services, and the accrediting organizations all have authority to investigate complaints, recommend resolutions and improvements to policy and standards of care, and enforce those recommendations. The Alaska Ombudsman lacks the authority to enforce recommendations. This means that, while an additional layer of government oversight is created through this bill, there is no real value to youth and their families, health care providers, or the behavioral health system as a whole.

**Lack of Capacity, Expertise**

The Alaska Ombudsman currently has jurisdiction over the Division of Juvenile Justice and the Office of Children's Services. This results in jurisdiction over complaints relating to placement, contact with division staff and customer service, decisions related to supports and services provided to youth and families, etc. The ombudsman seeks jurisdiction over health care and treatment decisions, which are already subject to judicial oversight. Even if these decisions were not subject to judicial oversight, the Alaska Ombudsman lacks the capacity and clinical expertise to resolve complaints related to medication, treatment modality, treatment milieu, and treatment goals.

The Alaska Ombudsman has provided a zero fiscal note and indicated that additional staff would not be necessary to address complaints from the identified youth and families. This reflects a lack of understanding of the possible number of youth and families making complaints and the complexity of those complaints. In FY12, 81 youth in state custody received Medicaid-reimbursed residential psychiatric treatment services, 364 youth in state custody received Medicaid-reimbursed short term residential treatment services, and 91 youth in state custody received Medicaid-reimbursed inpatient psychiatric hospital services. Hundreds of youth and families are served by these health care providers. There are hundreds more children and youth in therapeutic foster care (discussed below).To carefully evaluate and investigate these complaints – of which there would be many – will require dedicated staff. It would be a disservice to the Office of the Ombudsman and the potential complainants to expect these to be absorbed into existing staff caseloads. Additional staffing should be considered in the fiscal implications of this bill.

Given that the Alaska Ombudsman already has jurisdiction over all the aspects of placement and monitoring of youth in state custody through its existing authority over DHSS, all that remains outside of that scope are complaints about clinical services provided by the health care organizations. Complaints about psychiatric medication, treatment modalities, and clinical outcomes all fall outside the current capacity and expertise of the Alaska Ombudsman and her staff. To adequately evaluate and investigate these complaints will require not only additional investigative staff, but also access to experts in child psychiatry, suicide, neuropsychology, addiction, brain injury, fetal alcohol spectrum disorder, developmental disability, and adolescent health **at a minimum.** These expert consultations are expensive and often not available except from the health care organizations the Alaska Ombudsman seeks to investigate (and so an outside – possibly out-of-state – expert would be required). The cost of these expert consultations should be included in the fiscal implications of this bill.

AMHB and ABADA also have concerns that the avenue of an ombudsman investigation will actually delay resolution of patient/client complaints. The Alaska Ombudsman has stated that the intention is to investigate complaints absent notice to the executive agency involved. A thorough ombudsman investigation can take days or weeks (or longer). In some cases, where the youth is receiving inpatient hospital services, the hospital stay is less than a week. Thus, the youth is discharged before the complaint is resolved. Even when recommendations are made, the health care provider can choose whether or not to accept the Alaska Ombudsman's recommendations. DHSS would not have notice of the complaint, and so would not have taken action to resolve the problem. So, the youth or family member has pursued resolution of the problem down the one avenue that results in a lack of enforcement, and has spent time that could have been used seeking resolution from one of the avenues that could result in a reasonably quick decision – the Court System or DHSS.

**Unintended Consequences**

As drafted, SB 72 would provide ombudsman jurisdiction over complaints about therapeutic foster parents. These foster parents provide highly skilled care and supervision, based on and coordinated with the foster child's behavioral health treatment plan. These foster parents are clearly "a person under a contract with a state agency . . . to provide a . . . residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services." Foster parents are already subject to oversight by DHSS, through licensing and child protection services, and by the courts through the Child in Need of Aid proceedings. Complaints related to placement, services, and level of care are already within the Alaska Ombudsman's purview through jurisdiction over DHSS. Complaints about therapeutic services and daily living issues are subject to judicial review. To add another layer of oversight of foster parents, especially one that cannot guarantee a result due to lack of enforcement powers, adds little value to the system.

**It is for all of these reasons that AMHB and ABADA recommend that the entire clause related to ombudsman jurisdiction over health care providers (section 12) be removed from the bill.**

North Star
Behavioral Health

Senator John Coghill
State Capitol Room 119
Juneau AK, 99801

Representative Bob Lynn
State Capitol Room 108
Juneau AK, 99801

Dear Senator Coghill and Representative Bob Lynn,

Please accept this statement as North Star Behavioral Health's opposition to section 12 of HB 127 and SB 72 which gives the Ombudsman's Office new authority and oversight of treatment facilities, or residential treatment programs accepting placement of juveniles committed to the custody of the Department of Health and Social Services. North Star has been in business for over 28 years, and provides behavioral health treatment for children and adolescents at both our acute hospital, and residential treatment facilities. North Star is committed to providing the children in our care and the employees who care for them a safe environment that complies with, or exceeds all local, state and federal requirements.

North Star program(s) are licensed by the State of Alaska, and accredited by the Joint Commission on Accreditation of Health Care Organizations and the Centers for Medicaid and Medicare Services. Monitoring is also conducted by external organizations such as the Disability Law Center, State of Alaska Office of Children's services, and State of Alaska Division of Juvenile Justice. Additionally inherent with treating children, each patient has one or more of the following who monitor and participate in the care provided to patients: parents, family, Guardian Ad Litem(s), OCS social workers, external treatment providers and school personnel. One can surmise from reviewing all interested and involved parties that multiple levels of monitoring and or investigation is already in place.

The new oversight authority granted to the Ombudsman in section 12 of HB 127 is unnecessary, redundant, and an inefficient use of resources given the onerous regulations and oversight already provided to health care facilities.

Thank you,

M. Andrew Mayo, PhD
CEO North Star Behavioral Health

NorthStar
Behavioral Health

January 29, 2014

Ray – the following is a list of agencies with current oversight of North Star Behavioral Health operations and facilities:

- Center for Medicaid and Medicare Services
- Joint Commission on Accreditation of Health Care Organizations.
- Disability Law Center
- U.S. Department of Health & Human Services - Office for Civil Rights
- US Equal Employment and Opportunity Commission
- Department of Labor (State and Federal)
- OSHA (State and Federal
- State of Alaska Department of Health and Social Services Health Facilities Licensing & Certification
- State of Alaska Office of Children's Services
- State of Alaska Division of Juvenile Justice
- State of Alaska Division of Behavioral Health
- Tricare
- State and Municipal Fire Marshal
- State of Alaska Dept. of Environmental Conservation

Please feel free to contact me if you need any additional information.

Laura McKenzie, LCSW

Director of Quality Improvement and Risk Management
North Star Behavioral Health
2530 DeBarr Rd.
Anchorage, AK 99645

907-264-3551

laura.mckenzie@uhsinc.com

NorthStar
Behavioral Health

February 11, 2014

Ray – the following is the additional information regarding agencies with current oversight of North Star Behavioral Health operations and facilities:

- Center for Medicaid and Medicare Services –
  - Has ultimate oversight and authority of both Acute and RTC.
  - Surveys generally involve an MD and a RN who are looking at Psychiatric Hospital regulations.
  - Will come for periodic, unannounced surveys and validation surveys after Joint Commission (usually 10% of all surveys in a calendar year.)
  - Will also survey as part of complaint investigations. Can ask the State Licensing staff to survey on their behalf.
- Joint Commission on Accreditation of Health Care Organizations. –
  - Private accreditation body with oversight of both Acute and RTC.
  - JC accreditation required by Federal Govt. and most insurance companies.
  - Unannounced surveys every 3 years.
  - Typically have 3 surveyors (plus a Life Safety Engineer to check for fire code violations) and last 4 days.
  - Will also survey and investigate due to complaints.
- Disability Law Center –
  - Periodic monitoring and investigation with oversight of both Acute and RTC.
  - Will conduct a "Monitoring" visit annually where they are on sight and observing care.
  - Will also conduct investigations (on site and record review) when complaints are received.
- U.S. Department of Health & Human Services - Office for Civil Rights –
  - Responds and investigates in response to HIPAA complaints for both Acute and RTC.
- US Equal Employment and Opportunity Commission –
  - Investigates and responds to employee complaints regarding workplace policies, events and decisions.
- Department of Labor (State and Federal) – Similar purpose as the EEOC.
- OSHA (State and Federal) –
  - Investigate based on employee complaints at both Acute and RTC.
- State of Alaska Department of Health and Social Services Health Facilities Licensing & Certification –
  - Entity responsible for Acute Hospital licensing.
  - Investigate/survey (onsite and record review) for complaints on behalf of self, and at the request of CMS.

- State of Alaska Department of Health and Social Services Residential Facilities Licensing & Certification –
    - Entity responsible for RTC licensing.
    - Full survey every year. Will review every chart and HR file, interview every resident, and look over all policies.
    - Surveys last about four days and are the most comprehensive of all types of surveys.
    - State RTC annual surveys involve at least four State of AK Departments and up to 8 surveyors.
    - Survey for not only State regulations, but CMS (federal) regulations as well.
- State of Alaska Office of Children's Services
    - Accompany State representatives on annual survey to ensure care being provided to state custody children is adequate.
- State of Alaska Division of Juvenile Justice
    - Accompany State representatives on annual survey to ensure care being provided to DJJ custody children is adequate.
- State of Alaska Division of Behavioral Health
    - Accompany State representatives on annual survey to ensure care being provided meets standards for Medicaid billing regulations.
- Tricare
    - No regulatory enforcement capacity, but they control Tricare Funding and so have to approve facilities to be eligible for reimbursement.
    - Are very active with review of records (Acute and RTC) to ensure documentation shows evidence of active care.
- State and Municipal Fire Marshal –
    - Annual inspections at all facilities to ensure compliance with Fire Codes.
- State of Alaska Dept. of Environmental Conservation
    - Oversight of dietary services (Acute and RTC), and the water system at the Palmer RTC.
    - Will conduct annual onsite surveys for compliance with regulations.

Please feel free to contact me if you need any additional information.

Laura McKenzie, LCSW
Director of Quality Improvement and Risk Management
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Providence Health & Services Alaska
3760 Piper Street
Anchorage, Alaska 99508

PROVIDENCE
Health & Services
Alaska

February 24, 2014

The Honorable Bob Lynn, Chairman
State Affairs Committee
Alaska State House of Representatives
State Capitol, Room 108
Juneau, AK 99801

Dear Representative Lynn:

On behalf of Providence Health & Services Alaska, I write today to express opposition to the provision in House Bill 127 that seeks to extend ombudsman authority and jurisdiction to patient complaints from certain private, non-governmental health care providers. As has been pointed out to the committee by the Alaska Mental Health Board and the Advisory Board on Alcoholism and Drug Abuse, there is a fundamental misconception about the nature of services provided by residential behavioral health care providers. We concur with that observation.

Providence serves between 350 and 400 patients a month in our Psychiatric Emergency Department. In addition, we care for over 784 patients per year in our inpatient Behavioral Health Units. We incorporate multiple treatment modalities in which clients learn healthy patterns of living through constant exposure to role models and strict expectations. We are a voluntary, general hospital unit serving adults and adolescents. We provide a therapeutic environment that is physically secure and emotionally safe. Family members are included in the treatment of our patients and may visit at any time during their stay.

All behavioral health providers in Alaska are subject to three layers of oversight which require formal grievance and complaint procedures. We believe with the policies and procedures we have in place, coupled with the required oversight already in position, additional oversight as outlined in House Bill 127 is unnecessary and will take away valuable patient care time, replacing it with potentially labor-intensive processes.

Thank you.

Sincerely,

Laurie Herman

Laurie Herman, Director
Government Relations

ASHNHA
ALASKA STATE HOSPITAL &
NURSING HOME ASSOCIATION

February 24, 2014

Representative Bob Lynn
Alaska State Capitol, Room 108
Juneau, AK 99801

Dear Rep. Lynn,

House Bill 127, relating to the Ombudsman statutes, is currently before the House State Affairs committee. ASHNHA members have concerns about the bill that I wanted to bring to your attention.

The current version of the bill expands the Ombudsman's jurisdiction to complaints about private health care providers providing certain psychiatric services to juveniles in state custody. The current language refers to a "…treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services." A proposed amendment would change that language to residential psychiatric treatment centers and residential child care facilities. We oppose this section of the current bill and the proposed amendment.

Residential psychiatric treatment centers provide important health care services for juveniles in state custody. Within the existing federal and state regulatory framework, there are numerous ways for juveniles, their families and their advocates to have their concerns heard and addressed. Multiple agencies have oversight over these health care providers, including the Centers for Medicare and Medicaid Services, the Joint Commission, the Disability Law Center, the State of Alaska Department of Health & Social Services Health Facilities and Residential Facilities Licensing and Certification, the State of Alaska Office of Children's Services, the State of Alaska Divisions of Juvenile Justice and Behavioral Health, and facility-specific internal complaint/grievance procedures.

There are more than sufficient protections in place to ensure that juveniles under treatment and their families/guardians have appropriate access to grievance and complaint procedures. At a time when so much of the health care debate focuses on cost, adding yet another administrative burden runs counter to the goal of reducing the rate of health care cost growth.

Finally, we are concerned about the potential implications of extending the jurisdiction of the Ombudsman to health care services provided in the private sector. If the Ombudsman's jurisdiction extends to behavioral health care for juveniles in DHSS custody, it is a small step toward extending that jurisdiction to other facets of health care as well. Expanding the jurisdiction of the Ombudsman to private health care facilities is a significant expansion of authority.

Thank you for your consideration. I am available to answer any questions you might have.

Sincerely,

Karen Perdue
President/CEO

North Star
Behavioral Health

Hello – My name is Laura McKenzie and I am a Licensed Clinical Social Worker. I work as the Director of Quality Improvement and Risk Management, and Compliance Officer for North Star Behavioral Health.

Mr. Chairman and the Committee – thank you for this opportunity to provide testimony regarding North Star Behavioral Health's opposition to section 12 of HB 127 which gives the Ombudsman's Office new authority and oversight of treatment facilities, or residential programs accepting placement of juveniles in the custody of the Department of Health and Social Services.

I would like to start by stating that North Star has been in business for over 28 years, and provides voluntary behavioral health treatment exclusively for children and adolescents at both our acute hospital, and residential treatment facilities. We welcome external oversight and community agency involvement in our facilities, and fully support our residents having access to grievance procedures.

We view their feedback as an important tool in our performance improvement efforts, and take our responsibilities for their treatment seriously. North Star is committed to providing the children in our facilities and the employees who care for them, a safe environment that complies with, or exceeds all local, state and federal requirements.

North Star program(s) are licensed by the State of Alaska, the Center for Medicaid and Medicare Services and accredited by the Joint Commission on Accreditation of Health Care Organizations. Monitoring is also conducted by external organizations such as the Disability Law Center, State of Alaska Office of Children's Services, Division of Behavioral Health, and the Division of Juvenile Justice. Additionally inherent with treating children, each resident has one or more of the following who monitor and participate in care: parents, family, Guardian Ad Litem(s), OCS social workers, external community treatment providers and school personnel. One can surmise from reviewing all involved parties that multiple levels of monitoring and/or investigation are already in place.

As part of the requirements for licensure and operation we must have a grievance procedure that is resident friendly, efficient, and responsive to concerns. We maintain a vigorous program that is written into policy and shared at multiple points. Information about this process is given to every resident and parent upon admission as part of the intake paperwork, and is also in the parent or resident handbook. Additionally, we have this information posted on every unit, and groups regarding rights and grievance procedures are held with the residents. We have a designated Patient Advocate who is responsible for responding to grievances. We have installed locked boxes on each unit so that residents can submit concerns directly to the Advocate. Additionally, we provide the contact information for State of AK Facilities Licensing, Disability Law Center, and the Joint Commission to all employees as part of orientation, it is printed in the resident and parent handbook and it is posted on our website. Complaints are investigated

and a written response is given within 7 days of receipt (often more quickly.) Concerns are then reviewed each month for trends and opportunities to improve by the Quality Council and Medical Executive Committee and quarterly by our Governing Board. Additional review of the complaint data is done by external agencies during annual, tri-annual and unannounced regulatory surveys.

A complaint received last month from a patient stated: "wake up time is too early on the weekends." This is a typical complaint we receive and clearly would not rise to the level necessitating investigation and response by an external agency. Another point not to be dismissed is the inherent benefit of having an internal advocate who can investigate and work with the clinical team to address concerns, thus preventing triangulation and preserving the therapeutic alliance between patient and treatment team. Also not to be overlooked is that all residents are admitted to North Star on a voluntary basis and with the consent of their parent who can discharge their child at any time.

As you can see, a patient receiving treatment at North Star Behavioral Health already has the participation of up to ten separate agencies and entities. It is questionable, how the addition of the Ombudsman will add value especially when compared to other settings without such external involvement. HB 127 is unnecessary, redundant, and an inefficient use of resources given the onerous regulations and oversight already provided to health care facilities. I am willing to answer any questions that the committee may have.

Thank you

## Nancy Manly

**From:** Nancy Manly
**Sent:** Tuesday, February 25, 2014 10:32 AM
**To:** Jeremiah Campbell
**Subject:** Morning Minutes - HSTA Committee 2-25-2014

This morning the House State Affairs Committee heard and held HB 127 Ombudsman.

Nancy Manly, Chief of Staff and
House State Affairs Committee Aide *for*
**Representative Bob Lynn**
**House District 23**
907-465-2794 Fax: 907-465-4316

AMENDMENT

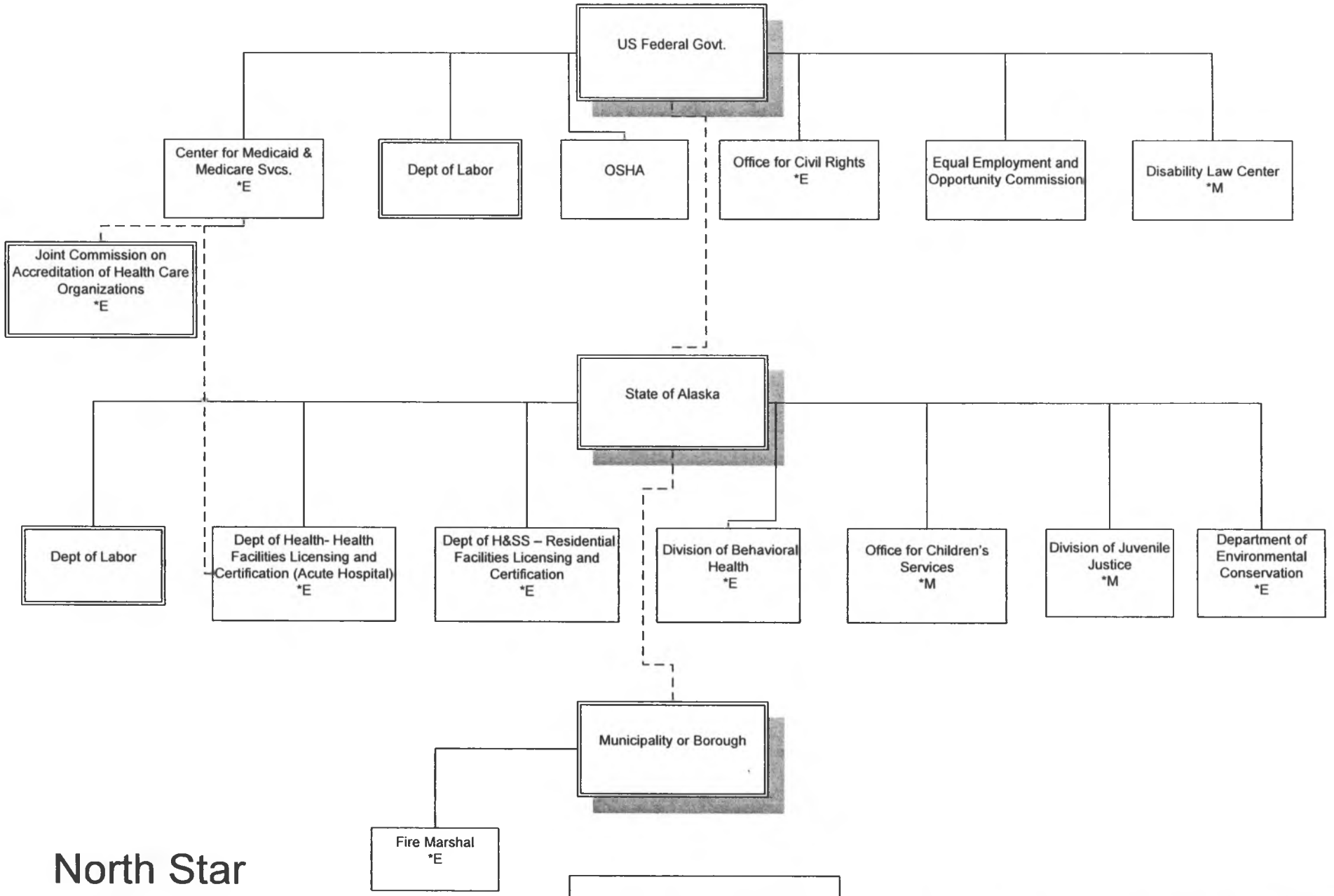
Gatti's
By Representative Isaacson

Offered in the House

To: CSHB ~~122~~ 127

Version 28-LS0088\G

Page 3, Line 17 after "47.14.050," delete all material through the word "Services" on page 3, line 20.




# North Star Regulatory Body Authority Chart

**Sec. 47.32.900. Definitions.** In this chapter,

(1) "ambulatory surgical center" means a facility that

(A) is not a part of a hospital or a physician's general medical practice; and

(B) operates primarily for the purpose of providing surgical services to patients who do not require hospitalization;

(2) "assisted living home"

(A) means a residential facility that serves three or more adults who are not related to the owner by blood or marriage, or that receives state or federal payment for services regardless of the number of adults served; the department shall consider a facility to be an assisted living home if the facility

(i) provides housing and food services to its residents;

(ii) offers to provide or obtain for its residents assistance with activities of daily living;

(iii) offers personal assistance as defined in AS 47.33.990; or

(iv) provides or offers any combination of these services;

(B) does not include

(i) a correctional facility;

(ii) an emergency shelter;

(iii) a program licensed under AS 47.10.310 for runaway minors;

(iv) a type of entity listed in AS 47.32.010(b)(5), (8), (9), (10), (11), or (12);

(3) "child placement agency" means an agency that arranges for placement of a child

(A) in a foster home, residential child care facility, or adoptive home; or

(B) for guardianship purposes;

(4) "commissioner" means the commissioner of health and social services;

(5) "department" means the Department of Health and Social Services;

(6) "entity" means an entity listed in AS 47.32.010(b);

(7) "foster home" means a place where the adult head of household provides 24-hour care on a continuing basis to one or more children who are apart from their parents;

(8) "free-standing birth center" means a facility that is not a part of a hospital and that provides a birth service to maternal clients;

(9) "frontier extended stay clinic" means a rural health clinic that is authorized to provide 24-hour care to one or more individuals;
(10) "home health agency" means a public agency or private organization, or a subdivision of a public agency or private organization, that primarily engages in providing skilled nursing services in combination with physical therapy, occupational therapy, speech therapy, or services provided by a home health aide to an individual in the individual's home, an assisted living home, or another residential setting; in this paragraph,
(A) "public agency" means an agency operated by the state or a local government;
(B) "subdivision" means a component of a multi-function facility or home health agency, such as the home health care division of a hospital or the division of a public agency, that independently meets the requirements for licensure as a home health agency;
(11) "hospice" or "agency providing hospice services or operating hospice programs" means a program that provides hospice services;
(12) "hospice services" means a range of interdisciplinary palliative and supportive services
(A) provided in a home or at an inpatient facility to persons who are terminally ill and to those persons' families in order to meet their physical, psychological, social, emotional, and spiritual needs; and
(B) based on hospice philosophy; for purposes of this subparagraph, "hospice philosophy" means a philosophy that is life affirming, recognizes dying as a normal process of living, focuses on maintaining the quality of remaining life, neither hastens nor postpones death, strengthens the client's role in making informed decisions about care, and stresses the delivery of services in the least restrictive setting possible and with the least amount of technology necessary by volunteers and professionals who are trained to help a client with the physical, social, psychological, spiritual, and emotional issues related to terminal illness so that the client can feel better prepared for the death that is to come;
(13) "hospital" means a public or private institution or establishment devoted primarily to providing diagnosis, treatment, or care over a continuous period of 24 hours each day for two or more unrelated individuals suffering from illness, physical

or mental disease, injury or deformity, or any other condition for which medical or surgical services would be appropriate; "hospital" does not include a frontier extended stay clinic;

(14) "intermediate care facility for individuals with an intellectual disability or related condition" has the meaning given in 42 C.F.R. 440.150;

(15) "licensed entity" means an entity that has a license issued under this chapter;

(16) "maternity home" means a place of residence the primary function of which is to give care, with or without compensation, to pregnant individuals, regardless of age, or that provides care, as needed, to mothers and their newborn infants;

(17) "nursing facility" means a facility that is primarily engaged in providing skilled nursing care or rehabilitative services and related services for those who, because of their mental or physical condition, require care and services above the level of room and board; "nursing facility" does not include a facility that is primarily for the care and treatment of mental diseases;

**(18) "residential child care facility" means a place, staffed by employees, where one or more children who are apart from their parents receive 24-hour care on a continuing basis;**

**(19) "residential psychiatric treatment center" means a secure or semi-secure facility, or an inpatient program in another facility, that provides, under the direction of a physician, psychiatric diagnostic, evaluation, and treatment services on a 24-hour-a-day basis to children with severe emotional or behavioral disorders;**

(20) "runaway shelter" means a facility housing a runaway child;

(21) "rural health clinic"

(A) means a facility or clinic that is authorized to provide health care services and is located in a rural area;

(B) includes a frontier extended stay clinic;

(C) does not include a rehabilitation agency or a facility primarily for the care and treatment of mental diseases.

**HB 127 – Ombudsman**

Bill Previously Heard

Previously Heard on 3/22/2013 & 3/26/2013 and 2/25/2014.
Please bring the bill packet from those meetings to Committee.

HB 127 Mail list

Recipients:

1. Jackie.Schulz@akleg.gov Chief Clerks office
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# *Juneau Youth Services, Inc.*

907.789.7610
907.789.2106 Fax

P.O. Box 32839
Juneau, AK 99803


March 30, 2013

Representative Bob Lynn
State Capitol Room #108
Juneau, AK 99801

Re: HB 127

Dear Representative Lynn,

On behalf of Juneau Youth Services, I am writing to express our opposition to the proposed amendment to AS 24.55.330(2) under Section 12 of House Bill127. The amendment would extend the Ombudsman's oversight jurisdiction to residential treatment programs providing services to juveniles in the custody of the Department of Health and Social Services. This oversight function is unnecessary and duplicative of other oversight efforts.

As a behavioral health grantee for the state, Juneau Youth Services is required to become nationally accredited by June 30, 2015. We are preparing to receive accreditation through the Council on Accreditation. This is a very rigorous process that requires organizations to meet national standards for administration and service delivery; our residential programs need to meet or exceed these national standards.

In addition, our organization receives the following reviews and oversight:

- Annual licensing reviews through the Division of Public Health for all of our residential programs to ensure compliance with the state's residential child care center regulations
- On-site reviews through the state Office of Children's Services for residential programs
- On-site reviews through the state Division of Behavioral Health
- On-site reviews through the state Division of Juvenile Justice
- Medicaid audits to ensure compliance with state Medicaid regulations
- Review through the Disability Law Center as a "Protection and Advocacy" (P&A) agency with authority established through the U.S. Congress
- Reviews through the federal Administration for Children and Families for our runaway and homeless youth programs

In conclusion, residential treatment in Alaska is already heavily regulated; the proposed Ombudsman oversight under HB 127 is redundant and an unnecessary use of state resources.

Sincerely,

Walter Majoros

Walter Majoros
Executive Director


March 11, 2013

**AMERICAN CIVIL LIBERTIES UNION OF ALASKA**
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG



The Honorable Bob Lynn, Chair
The Honorable Wes Keller, Vice-Chair
House State Affairs Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
*via email:* Rep.Bob.Lynn@akleg.gov
Rep.Wes.Keller@akleg.gov

**Re: House Bill 127 – ACLU Review**
***Availability of Public Records***

Chair Lynn, Vice-Chair Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 127, a bill relating to the State Ombudsman.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with our opinions and concerns regarding the proposed legislation, in particular ensuring that our government is representative of the people and that public records are appropriately available for review.

We would be happy to work with you or the Committee to answer any questions you might have.

**State Reports and Communications Should be Available as Public Records When Possible**

The government of the state of Alaska belongs to its citizens, not to its bureaucrats, executives, or legislators. Having the ability to monitor the conduct of individual state agencies or officials – such as the Ombudsman – and to ensure that state agencies and officials are providing appropriate services to the citizens is vitally important.

The ACLU of Alaska's initial concern with HB 127 lies in Sections 4 and 6 which, respectively, completely exempt investigatory communications and preliminary opinions from public disclosure. While there may be specific reasons for managing records, for example while an investigation is pending, or where privacy or attorney professional requirements so mandate, a blanket prohibition on disclosure is too broad.

**Conclusion**

We hope that the State Affairs Committee will consider our comments on HB 127.

Please feel free to contact the undersigned should you require any additional information. And, we are happy to answer informally any questions that Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
*Executive Director*
ACLU of Alaska

cc: Representative Lynn Gattis, Rep.Lynn.Gattis@akleg.gov
Representative Shelley Hughes, Rep.Shelley.Hughes@akleg.gov
Representative Doug Isaacson, Rep.Doug.Isaacson@akleg.gov
Representative Charisse Millett, Rep.Charisse.Millett@akleg.gov
Representative Jonathan Kreiss-Tompkins, Rep.Jonathan.Kreiss-Tomkins@akleg.gov

**Patty Krueger**

| | |
|---|---|
| **From:** | Jeffrey Mittman <JMittman@akclu.org> |
| **Sent:** | Monday, March 11, 2013 7:00 PM |
| **To:** | Rep. Bob Lynn; Rep. Wes Keller |
| **Cc:** | Rep. Lynn Gattis; Rep. Shelley Hughes; Rep. Doug Isaacson; Rep. Charisse Millett; Rep. Jonathan Kreiss-Tomkins; Patty Krueger |
| **Subject:** | House Bill 127 - Availability of Necessary Public Records |
| **Attachments:** | Lynn & Keller.HB 127.ACLU Review.2013-03-11.pdf |

**Chair Lynn, Vice-Chair Keller:**

**Attached is written testimony regarding House Bill 127, Relating to the State Ombudsman.**

**The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with information highlighting the blanket prohibitions on availability of public records.**

**We would be happy to work with you or the Committee to answer any questions you might have.**

**Thank you,**

**Jeffrey Mittman**

Direct dial: (907) 263-2002

Cell: (907) 230-0665


Jeffrey A. Mittman

Executive Director

ACLU of Alaska

1057 W. Fireweed Lane, Suite 207

Anchorage, AK 99503-1760

(907) 258-0044, ext. 2002

(907) 258-0288 (fax)

28-LS0088\R.1
Gardner
3/20/13

# AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 1, line 12:

Following "**contract**"

Insert "**or grant**"

Page 5, lines 10 - 15:

Delete "**, or a person under a contract with a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile detention facility, treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit**"

Insert "**, or a person under a contract with a state agency or a person who has been awarded a grant from a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 - 47.14.050, to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900 to the extent that the facility or treatment center accepts placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit**"

Page 6, line 14, following "into":

Insert "or grants awarded"

3-22-13

Dept of Corrections want to be notified by Ombudsman Office if they are investigating a Contractor

28-LS0088\R.4
Gardner
3/25/13

# AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 1, lines 10 - 12:

Delete "**relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract;**"

Page 5, lines 4 - 27:

Delete all material.

Renumber the following bill sections accordingly.

Page 6, lines 12 - 15:

Delete all material.

Renumber the following bill section accordingly.

Page 6, line 19:

Delete "sec. 14(a)"

Insert "sec. 12(a)"

Page 6, line 21:

Delete "sec. 14(b)"

Insert "sec. 12(b)"

28-LS0088\R.5
Gardner
3/25/13

# AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GATTIS

TO: HB 127

Page 1, line 1, following "**is**":

Insert "**not**"

Page 2, lines 3 - 4:

Delete all material.

Renumber the following bill sections accordingly.

Page 5, line 20, following "judge,":

Insert "**the Alaska Bar Association,**"

Page 5, line 31:

Delete "sec. 5"

Insert "sec. 4"

Page 6, line 5:

Delete "sec. 10"

Insert "sec. 9"

Page 6, line 8:

Delete "sec. 10"

Insert "sec. 9"

Gattis proposes to offer amendment R.5 on Sec. 1 "Not"

Page 6, line 14:

Delete "Sections 12 and 13"

Insert "Sections 11 and 12"

Page 6, line 18:

Delete "sec. 5"

Insert "sec. 4"

Page 6, line 19:

Delete "sec. 14(a)"

Insert "sec. 13(a)"

Page 6, line 21:

Delete "Section 10"

Insert "Section 9"

Delete "sec. 14(b)"

Insert "sec. 13(b)"

# Additional Documents
# *for*
# HB 127

2nd Hearing – HSTA Committee Meeting 3-26-2013

- Amendment: R.1 (attached with this amendment is the 3/19/2013 letter from the Ombudsman office explaining why this is needed)
- Letter dated 3/15/2013 from Ombudsman Linda Lord-Jenkins responding to concerns from our last meeting regarding the Alaska Bar Association
- Legal Memo: Is the Alaska Bar Association an Agency for the purposes of 24.55
- Legislative Research on the freezing of Ombudsman salary step-increases and how it came about
- Email from Ombudsman office responding to Rep. Isaacson's questions on the Ombudsman salary as it compares to other legislative agencies.
- Letter Opposing: North Star Behavioral Health System
- Fiscal Note: DOA Office of Public Advocacy Services (Updated)
- Fiscal Note: DOC Administration and Support (New)
- Alaska Bar Rule 21 and 22

Depending on the will of the committee with regards to Sections 1, 12 and 13 there may be other amendments offered.

# AMENDMENT

OFFERED IN THE HOUSE

TO: HB 127

Page 1, line 12:

Following "**contract**"

Insert "**or grant**"

Page 5, lines 10 - 15:

Delete "**, or a person under a contract with a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile detention facility, treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit**"

Insert "**, or a person under a contract with a state agency or a person who has been awarded a grant from a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 - 47.14.050, to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900 to the extent that the facility or treatment center accepts placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit**"

Page 6, line 14, following "into":

Insert "or grants awarded"

State of Alaska
Ombudsman

Reply to:

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(800) 478-4970
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March 19, 2013

The Honorable Rep. Bob Lynn, Chair
Alaska House State Affairs Committee
State Capitol, Room 108
Juneau, Alaska 99801

Re: Section 12 of HB 127 (Ombudsman Act Amendments)

Dear Representative Lynn:

The Office of the Ombudsman has asked that the Alaska Legislature determine whether the ombudsman should have jurisdiction over contractors performing certain types of state services. Section 12 of HB 127 proposes to amend the definition of "agency" for purposes of the ombudsman's jurisdiction, to include:

> **a person under a contract with a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile detention facility, treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit;**

As noted in our FAQs for HB 127, the reference to juvenile facilities is intended to encompass facilities that receive placement of youth who are in custody as juvenile delinquents. The Department of Health and Social Services (DHSS) has indicated that the terms "treatment facility" and "residential treatment program" are possibly too broad, and would include therapeutic foster homes, which was not our intent. Our office has therefore prepared a proposed amendment to the § 12, in an effort to clarify the type of entity that we believe should be included in the ombudsman's jurisdiction. We are asking for jurisdiction over juvenile facilities that are less restrictive than locked facilities such as the state-owned McLaughlin Youth Center, but more restrictive than a community placement such as a foster home. Although these facilities

are far more treatment-oriented than an adult halfway house, the Office of the Ombudsman believes that they fill a similar niche in the juvenile justice system.

Also, it appears that overall, DHSS uses grants at least as often as contracts in retaining private service providers, and our office is thus asking that section 12 be amended to specifically refer to grants as well as contracts. (The Department of Corrections has generally used contracts for custodial facilities, so this change has little effect on the issue of adult correctional facilities).

Below is a table showing the language currently offered in section 12 of HB 127 and the changes our office respectfully suggests:

| **HB 127** | **Proposed substitute language** |
|---|---|
| *Section 12 amends AS 24.55.330(2) to include as an "agency":*<br><br>A person under contract with a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile detention facility, treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit | A person **operating** under a contract with or **a grant from** a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, [TO PROVIDE A JUVENILE DETENTION FACILITY, TREATMENT FACILITY, OR RESIDENTIAL TREATMENT PROGRAM ACCEPTING PLACEMENT OF JUVENILES COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,] **to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 – AS 47.14.050, to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900 to the extent that the facility or treatment center accepts placement of juveniles committed to the custody of the Department of Health and Social Services,** or to determine eligibility for a state program or benefit |
| *Section 15 sets an effective date for section 12:*<br><br>The uncodified law of the State of Alaska is amended by adding a new section to read:<br><br>APPLICABILITY. Sections 12 and 13 of this Act apply to contracts entered into after January 1, 2015. | The uncodified law of the State of Alaska is amended by adding a new section to read:<br><br>APPLICABILITY. Sections 12 and 13 of this Act apply to contracts **and grants** entered into after January 1, 2015. |

Although our office has discussed juvenile facilities primarily in the context of juvenile justice, DHSS places youth who are adjudicated as Children in Need of Aid (CINA) in the same residential child care facilities. Both categories of youth are in state custody and are being placed in the same facilities, so it does not seem useful to address one category and not the other; as a result, the legislation refers to juveniles in the custody of the Department of Health and Social Services rather than drawing a line based on which division of DHSS has custody.

Sincerely,

Beth Ledbetter For

Linda Lord-Jenkins
State of Alaska Ombudsman

Cc: Representative Wes Keller, Chair
House Judiciary Committee

State of Alaska
Ombudsman

Reply to:

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March 15, 2013

The Honorable Rep. Bob Lynn, Chair
Alaska House State Affairs Committee
State Capitol, Room 108
Juneau, Alaska 99801

Re: HB 127 (Ombudsman Act Amendments)

Dear Representative Lynn:

This letter responds to concerns raised in the March 12th State Affairs Committee regarding the Alaska Office of the Ombudsman and the Alaska Bar Association. As you are aware, section 1 of HB 127, as currently drafted, states that the Bar Association is an "agency" for purposes of the ombudsman's jurisdiction over state agencies. Among other objections, the Bar Association cited Alaska Bar Rules 21 and 22 as preventing the Alaska Bar Association from providing records to the Office of the Ombudsman under AS 24.55.160. The committee requested that the Office of the Ombudsman suggest language to address the apparent conflict.

Alaska Bar Rule 21(c) restricts access to the Bar Counsel's attorney discipline files: "All files maintained by Bar Counsel and staff will be confidential Bar Counsel's Files. All files maintained by Bar Counsel and staff will be confidential and are not to be reviewed by any person other than Bar Counsel or Area Division members appointed for purposes of review or appeal under these Rules." The rule then list seven exceptions to non-disclosure, such as access by the Alaska Judicial Council for information about attorney applicants for a judicial vacancy. Alaska Bar Rule 22, setting forth the procedure for a grievance against an attorney, contains subsection (b), which reads in part: "Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings subject to Bar Rule 21(c). It will be regarded as contempt of court to breach this confidentiality in any way."

The Ombudsman Act, however, generally overrides confidentiality provisions, as stated in AS 24.55.160(a):

> (a) In an investigation, the ombudsman may
> (1) make inquiries and obtain information considered necessary;
> (2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;
> (3) hold private hearings; and
> (4) *notwithstanding other provisions of law, have access at all times to records of every state agency, including confidential records*, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants. [Emphasis added]

Assuming for the sake of argument that AS 24.55.160 does not already override such a confidentiality provision in a court rule, the legislative response would usually be to amend the court rule by a two-thirds majority in both houses of the Legislature (as is already being done regarding sections 5 and 10 of HB 127). However, upon consultation with Legislative Legal Services Director Doug Gardner, we concluded that the Bar Rule provisions appear different than the other Alaska Rules of Court; a difference that led Mr. Gardner to recommend against proposing language that would alter or attempt to override Bar Rules 21 and 22.

The Alaska Constitution, Article IV, § 15, specifically gives the Alaska Supreme Court the power to make court rules, coupled with a mechanism for the Legislature to change the rules:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

However, the Alaska Supreme Court regards the Bar Rules as originating, not in Article IV, § 15, but in Article IV, § 1, which provides:

> The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

In *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162 (Alaska 1991), the Alaska Supreme Court categorized the court's authority to set the Bar Rules as originating in section one of Article IV, not section 15:

> [I]n exercise of our inherent power, we have adopted rules that govern beyond the "administration . . . practice and procedure" limitations of article IV, section 15, most notably the Alaska Bar Rules and the Code of Professional Responsibility

See also *In re MacKay*, 416 P.2d 823 (Alaska 1964), in which the court declared that Bar Rules pertaining to attorney discipline superseded the preexisting statute regarding disciplinary

procedure. In *In re Stephenson*, 511 P.2d 136 (Alaska 1973), the court held that the Bar Rule requirements for admission to practice prevailed over a statute, and that the court's authority to set rules for admission to practice originated in Article IV, § 1 as an "inherent power" of the court.

Despite the fact that the Bar Rules are published as part of the Alaska Rules of Court, which contain the procedural and administrative rules provided for in Article IV, § 15, the court has treated the Bar Rules as a special category not controlled by § 15. If the court's authority over the Bar Rules is based in Article IV, § 1, instead of Article IV, § 15, then even a two-thirds majority of the legislature may lack the constitutional basis to alter a Bar Rule. While the answer to that question is not absolutely certain, I must concur in the assessment informally provided by Legislative Legal Services, which is that a legislative amendment of a Bar Rule is likely to lead to a legal challenge based on a separation of powers issue, and the legislative branch is not likely to prevail.

For the above reasons, our office does not believe we can offer viable language to amend Alaska Bar Rules 21 and 22. The Legislature still has the option of deciding that the Bar Association is an agency for purposes of the Ombudsman Act; however, the ombudsman's ability to investigate complaints related to grievances against attorneys and attorney discipline would be severely limited by the Bar Association's adherence to Bar Rules 21 and 22. We would still be able to make inquiries regarding the timeliness and courtesy of the Bar's responses to grievances brought against attorneys, but it would be impractical to investigate more substantive issues. Given that the majority of the complaints our office has received regarding the Bar Association have related to the Bar's handling of grievances against attorneys, we would not be able to substantively address many of the complaints received by our office.

The Office of the Ombudsman continues to believe that this jurisdictional question is for the Legislature to resolve, and we request clarification one way or other. We are offering our analysis of the pros and cons of ombudsman jurisdiction over the Bar Association, but we do not take a position for or against jurisdiction in this area.

Sincerely,

Beth Ludwig For

Linda Lord-jenkins
State of Alaska Ombudsman

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** March 21, 2013

**SUBJECT:** Alaska Bar Association; Agency of the State (HB 127)
(Work Order No. 28-LS0088\R)

**TO:** Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Nancy Manly

**FROM:** Doug Gardner
Director

QUESTION PRESENTED: For purposes of the Ombudsman Act, is the Alaska Bar Association (Bar) an agency and, if so, does the Ombudsman have the authority to investigate the administrative acts of the Bar under AS 24.55.100?[1]

SHORT ANSWER: The Bar is an agency for purposes of the Ombudsman Act and under the test articulated by the Alaska Supreme Court in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986).[2] However, even if

---

[1] AS 24.55.100(a) provides:

(a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.

[2] The following are the factors the Alaska Supreme Court identified in *CFAB* that the court considers in the context in which the question is presented, to determine whether an entity is a state agency (each factor with a brief answer is provided below):

- Does language of the statute creating the entity expressly locate the entity within a state department? No. AS 08.08.010 appears to create the Bar as an "instrumentality of the state" that is outside the legislative, executive, or judicial branches of government.
- Are appointments to the board of directors of the entity made by the governor, and are other state officials statutorily on the board? Yes, the governor appoints three of the twelve member board.
- Is the entity required to report to the governor and the legislature? Yes. AS 08.08.085 requires an annual report to the legislature.
- Is the entity subject to audit by the legislative budget and audit division? Yes, since AS 08.03.010 provides for a sunset date, the legislative budget and audit division is required to audit the Bar under AS 44.66.050 and AS 24.20.271.

the Bar is an agency, it is questionable whether the Ombudsman may exercise jurisdiction over the Bar regarding matters within the inherent authority of the Supreme Court under article IV, sec. 1.[3]

DISCUSSION

AS 24.55.330(2) provides:

> (2) "agency" includes ***a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government***, and ***a department, office, institution, corporation, authority, organization, commission, committee, council, or board*** of a municipality ***or*** of the ***state government independent of the executive, legislative, and judicial branches***; it also includes an officer, employee, or member of an "agency" acting or purporting to act in the exercise of official duties, but does not include the governor, the lieutenant governor, a member of the legislature, the victims' advocate, the staff of the office of victims' rights, a justice of the supreme court, a judge of the court of appeals, a superior court judge, a district court judge, a magistrate, a member of a city council or borough assembly, an elected city or borough mayor, or a member of an elected school board; [Emphasis added.]

Section 1 of HB 127 by specifically listing the Bar may clarify that the Bar is an "agency," but in my view the Bar already falls under the existing definition.[4]

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- Can the legislature dissolve the entity, or must the entity request legislative approval prior to dissolution? Yes, and the legislature has provided a sunset date in AS 08.03.010.
- To what degree is the entity funded each year by the legislature? No substantial funding.
- Can the entity dispose of its own funds without legislative approval? The Bar is doing so currently, however if the Bar is an agency, it is my view that under article IX, sec. 7, and AS 37.05.146, that money received by the Bar must be deposited into the general fund of the state subject to legislative appropriation.
- Is the entity clearly performing a governmental function? Regulation of most other occupations falls under the auspices of a board or commission as provided by AS 08.08, and the Bar's function is to regulate the profession of practicing law.

[3] Those matters may include such things as standards of admission and the regulation to the practice of law.

[4] I note, the Alaska Supreme Court in *Sullivan v. Alaska Bar Ass'n*, 551 P.2d 531 (Alaska 1976) described the Bar as the "administrative arm" of the Alaska Supreme Court regarding attorney admission, licensing, and discipline. As an "administrative arm" of

Even if the Bar is an agency for purposes of the Ombudsman Act it is not clear that the Ombudsman has the jurisdiction to investigate all of the acts of the Bar.

The Alaska Supreme Court has stated that its authority to regulate and govern the practice of law comes from the court's exercise of its inherent judicial power and jurisdiction in article IV, sec. 1 of the Alaska Constitution.[5] *See e.g. Citizens for Tort Reform, v. McAlpine,* 810 P.2d 162 (Alaska 1991); *In re MacKay,* 416 P.2d 823 (Alaska 1964); *In re Stephenson*, 511 P.2d 136 (Alaska 1973). In the *Stephenson* case, the court held that requirements in the Bar Rules regarding the admission to practice law prevailed over the Alaska Statutes, due to the court's exclusive and inherent authority.

Therefore, even if the Bar is an agency as defined by AS 24.55.330(2), if the Ombudsman attempts to assert jurisdiction under AS 24.55.100 over matters that are committed to the Supreme Court under the constitution the court is likely to rely on article IV, sec. 1, and severely limit the jurisdiction of the Ombudsman with regard to those matters.

DDG:med
13-090.med

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the supreme court, it would be a logical conclusion that the Bar is engaging in administrative acts, which fall within the definition of "administrative acts" in the Ombudsman Act in AS 24.55.330(1).

[5] SECTION 1. Judicial Power and Jurisdiction. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

# LEGISLATIVE RESEARCH SERVICES

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## Research Brief

TO: Representative Bob Lynn
FROM: Susan Haymes, Legislative Analyst
DATE: March 20, 2013
RE: The Ombudsman's Salary
*LRS Report 13.322*

***You asked why the salary for the state ombudsman was set in statute as a Range 26A in 1987.***

In 1975, Alaska lawmakers created the Office of the Ombudsman and established the annual salary for that position to be equal to that of a superior court judge (ch 32 SLA 1975). In 1987, legislation was introduced (SB 139) to standardize the salary schedule and benefits for legislative employees. As originally introduced, SB 139 did not include any reference to the ombudsman's salary, but did include language specifying that the law did not apply to employees in the Office of the Ombudsman.[1]

In the one Senate Finance Committee hearing held on SB 139, Senator Richard Eliason testified that SB 139 was introduced as a result of the state's financial situation, and the intent was to make legislative pay consistent with the State salary schedule.[2] In this way, further staff salary adjustments, if necessary, could be made in a more consistent and fair way. No specific discussion of the ombudsman's salary occurred during the hearing.[3] Senate Bill 139 passed the Senate as introduced.

The bill was referred to the House Finance Committee where a committee substitute was introduced, which reduced the ombudsman's salary to a Range 26A. According to minutes from the one House Finance Committee hearing held on the committee substitute, the only mention of the ombudsman's salary was at the outset when Representative Mark Boyer noted that the main difference between the House and Senate versions of the bill was "the lowering of the Ombudsman's salary."[4] Clearly, the Legislature meant to reduce the ombudsman's salary and at the same time link it to the Executive branch salary schedule, rather than the Judicial branch schedule. Given the state's financial distress at the time, it appears most likely that the ombudsman's salary was reduced as part of a general effort at the time to address the financial situation as well the effort to standardize salaries of exempt employees.

We hope this is helpful. If you have questions or need additional information, please let us know.

---

[1] Memorandum from Teresa Cramer, Legislative Counsel, to Senator Richard Eliason, "Subject Analysis of SB 139," February 19, 1987. The memorandum is located in the bill file for SB 139 in the Legislative Library.

[2] In 1987, the State was in a recession and salary reductions and layoffs were being considered across state government. In addition, in 1983, the National Conference of State Legislatures had conducted a study of the Alaska Legislature's hiring and staffing procedures and recommended that the Legislature, among other things, adopt a consistent and unified salary schedule. Memorandum from Senator Arliss Sturgulewski to Representative Jack Fuller, May 30, 1983.

[3] The minutes from the February 24, 1987, Senate Finance Committee hearing can be viewed at *www.legis.state.ak.us/basis/folio.asp*.

[4] The minutes from the May 2, 1987, House Finance Committee hearing can be viewed at *www.legis.state.ak.us/basis/folio.asp*. Senate Bill 139 was also considered in the House Rules Committee on May 4, 1987. The bill file does not include any mention of the ombudsman's salary.

**Nancy Manly**

**From:** Beth Leibowitz
**Sent:** Tuesday, March 19, 2013 3:20 PM
**To:** Rep. Doug Isaacson
**Cc:** David Talerico; Skiff Lobaugh; Linda Lord-Jenkins; Nancy Manly
**Subject:** ombudsman salary questions

Dear Representative Isaacson:

In response to your questions regarding the ombudsman's salary as it compares to heads of other legislative agencies, I spoke with Skiff Lobaugh, the Human Resources Manager for Legislative Personnel. Mr. Lobaugh indicated that the Legislative Council determines the salary of executive director for the Legislative Affairs Agency. The Legislative Budget and Audit Committee determines the salaries for the directors of the Legislative Finance Division and the Division of Legislative Audit. The Legislative Council and the Legislative Budget and Audit Committee each have the discretion to grant step increases, and have previously done so.

The Office of Victims' Rights is headed by the Victims' Rights Advocate, whose salary is set by AS 24.65.060, which currently reads: "The victims' advocate is entitled to receive an annual salary of Range 26 on the salary schedule set out in AS 39.27.011(a) for Juneau."

Mr. Lobaugh will be available to answer questions for the House State Affairs Committee on Thursday morning.

In the executive branch, the current statutory provision regarding executive department heads provides:

> Sec. 39.20.080. Salary of executive department head and deputy.
> (a) The monthly salary of the head of each principal executive department of the state shall be in accordance with AS 39.23.
> (b) The monthly salary of a deputy head of a principal executive department of the state is equal to a step in Range 28 of the salary schedule in AS 39.27.011.
> (c) Except as provided by a general law applicable to all officers of the state, the compensation of the head of each principal executive department of the state may not be reduced during the executive's tenure in office.

The salaries of commissioners are set pursuant to recommendations from the State Officer's Compensation Commission, as provided by AS 39.23. See http://doa.alaska.gov/dop/socc/. Commissioners thus do not appear to receive step increases as such, as the mechanism for increasing their salaries is through recommendations by the State Officer's Compensation Commission. However, deputy commissioners receive a salary equal "a step in Range 28," which appears to leave room for variation within Range 28.

As of 2011, department commissioners received an annual salary of $135,000. The State Officers' Compensation Commssion has not recommended an increase to department commissioners' salaries since 2011.

I believe the ombudsman's annual salary is $95,316, although Skiff Lobaugh is the authoritative source for personnel and salary issues.

North Star
Behavioral Health System

2530 DeBarr Road • Anchorage, Alaska 99508
(907) 258-7575 • Fax (907) 277-7844
1-800-478-7575

March 19th, 2013

Senator John Coghill
State Capitol Room 119
Juneau AK, 99801

Representative Bob Lynn
State Capitol Room 108
Juneau AK, 99801

Dear Senator Coghill and Representative Bob Lynn,

Please accept this statement as North Star Behavioral Health's opposition to section 12 of HB 127 and SB 72 which gives the Ombudsman's Office new authority and oversight of treatment facilities, or residential treatment programs accepting placement of juveniles committed to the custody of the Department of Health and Social Services. North Star has been in business for over 28 years, and provides behavioral health treatment for children and adolescents at both our acute hospital, and residential treatment facilities. North Star is committed to providing the children in our care and the employees who care for them a safe environment that complies with, or exceeds all local, state and federal requirements.

North Star program(s) are licensed by the State of Alaska, and accredited by the Joint Commission on Accreditation of Health Care Organizations and the Centers for Medicaid and Medicare Services. Monitoring is also conducted by external organizations such as the Disability Law Center, State of Alaska Office of Children's services, and State of Alaska Division of Juvenile Justice. Additionally inherent with treating children, each patient has one or more of the following who monitor and participate in the care provided to patients: parents, family, Guardian Ad Litem(s), OCS social workers, external treatment providers and school personnel. One can surmise from reviewing all interested and involved parties that multiple levels of monitoring and or investigation is already in place.

HB 127 is unnecessary, redundant, and an inefficient use of resources given the onerous regulations and oversight already provided to health care facilities.

Thank you

M. Andrew Mayo, PhD
CEO North Star Behavioral Health

# Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: HB 127
Fiscal Note Number:
() Publish Date:

Identifier: HB127-DOA-OPA-3-15-13.xls
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House State Affairs

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

| | FY2014 Appropriation Requested | Included in Governor's FY2014 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY 2014** | **FY 2014** | **FY 2015** | **FY 2016** | **FY 2017** | **FY 2018** | **FY 2019** |
| Personal Services | *** | *** | *** | *** | *** | *** | *** |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants & Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **Total Operating** | *** | *** | *** | *** | *** | *** | *** |
| **Fund Source (Operating Only)** | | | | | | | |
| None | | | | | | | |
| **Total** | *** | *** | *** | *** | *** | *** | *** |
| **Positions** | | | | | | | |
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |
| **Change in Revenues** | | | | | | | |

**Estimated SUPPLEMENTAL (FY2013) cost:** 0.0

**Estimated CAPITAL (FY2014) cost:** 0.0

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

**Why this fiscal note differs from previous version:**

Not applicable, initial version


Prepared By: Richard Allen, Director — Phone: (907)269-3504
Division: Office of Public Advocacy — Date: 03/15/2013 03:15 PM
Approved By: Curtis Thayer, Deputy Commissioner — Date: 03/15/13
Department of Administration

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. HB127

## Analysis

This bill places the Alaska Bar Association under the jurisdiction of the Ombudsman's Office. The bill also purports to prevent the waiver of the attorney-client privilege if such information is provided to the Ombudsman's office and to prevent further disclosure by the Ombudsman's office.

This bill would likely make attorney responses to bar grievances subject to disclosure to the Ombudsman's office should that office conduct an investigation into the Bar Association's action on a grievance filed against an attorney. This would prevent attorneys from fully responding to bar grievances due to the risk that client confidences would be revealed to a third-party in violation of Alaska Code of Professional Conduct.

The failure to respond fully to bar grievances is likely to result in additional expenses surrounding litigation of proper response to bar grievances and increased acceptance of grievances for investigation. The Office of Public Advocacy would need, on a case by case basis, to retain counsel to meet the ethical and legal demands of complying with and responding to additional Ombudsman's inquiries, investigations and hearings, and therefore submits an indeterminate fiscal note.

# Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: HB 127
Fiscal Note Number:
() Publish Date:

Identifier: HB127-DOC-OC-03-15-13
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House State Affairs

Department: Department of Corrections
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 694

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

| | FY2014 Appropriation Requested | Included in Governor's FY2014 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY 2014** | **FY 2014** | **FY 2015** | **FY 2016** | **FY 2017** | **FY 2018** | **FY 2019** |
| Personal Services | | | | | | | |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants & Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **Total Operating** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **Fund Source (Operating Only)** | | | | | | | |
| None | | | | | | | |
| **Total** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **Positions** | | | | | | | |
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |
| **Change in Revenues** | | | | | | | |

**Estimated SUPPLEMENTAL (FY2013) cost:** 0.0

**Estimated CAPITAL (FY2014) cost:** 0.0

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

**Why this fiscal note differs from previous version:**

This is the original version of the bill.

| | | | |
|---|---|---|---|
| Prepared By: | Kevin Worley, Director | Phone: | (907)465-4641 |
| Division | Department of Corrections - Administrative Services | Date: | 03/15/2013 12:00 AM |
| Approved By: | Leslie Houston, Deputy Commissioner | Date: | 03/15/13 |
| | Department of Corrections | | |

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. HB 127

## Analysis

This bill puts entities that contract with the Department of Corrections to provide prison, halfway house, or other residential type services under the jurisdiction of the State Ombudsman. As a state agency, the Department of Corrections currently works with the Ombudsman to resolve complaints. The addition of residential contract service entities to the jurisdiction of the Ombudsman would not require a substantial adjustment to current practices and, therefore, would not result in additional costs to the Department.

# 2012 - 2013 Alaska Bar Rules

## Part II. Rules of Disciplinary Enforcement

### Rule 21. Public Access to Disciplinary Proceedings.

(a) Discipline and Reinstatement Proceedings. After the filing of a petition for formal hearing, hearings held before either a Hearing Committee or the Board will be open to the public. This Rule will not be interpreted to allow public access to disability proceedings described in Rule 30.

(b) Deliberations. The deliberations of any adjudicative body will be kept confidential.

(c) Bar Counsel's Files. All files maintained by Bar Counsel and staff will be confidential and are not to be reviewed by any person other than Bar Counsel or Area Division members appointed for purposes of review or appeal under these Rules. This provision will not be interpreted to:

(1) preclude Bar Counsel from introducing into evidence any documents from his or her files;

(2) preclude Bar Counsel from providing the Board, the Court, or the public with statistical information compiled pursuant to Rule 11(e), provided that the name of the Respondent is kept confidential;

(3) deny a complainant information regarding the status or disposition of his or her grievance;

(4) deny the public facts regarding the stage of any proceeding or investigation concerning a Respondent's conviction of a crime;

(5) deny the Alaska Judicial Council confidential information about attorney applicants for judicial vacancies;

(6) preclude a court from reviewing in camera a confidential file upon a discovery request made pursuant to Criminal Rule 16(b)(7), and from exercising discretion as to whether to release relevant information from the file to counsel pursuant to Criminal Rule 16(d)(3); or

(7) prevent the Board Discipline Liaison from having access to any and all files maintained by Bar Counsel as necessary in the performance of the Liaison's duties.

(d) Director's File. The file maintained by the Director, acting in his or her capacity as clerk, will be open for public review.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 13 effective April 1, 1979; rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989; by SCO 963 effective July 15, 1989; by SCO 1043 effective January 15, 1991; and by SCO 1082 effective January 15, 1992)

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**Rule 22. Procedure.**

(a) Grievances. Grievances will be in writing, signed and verified by the Complainant, and contain a clear statement of the details of each act of alleged misconduct, including the approximate time and place of each. Grievances will be filed with Bar Counsel. Bar Counsel will review the grievance filed to determine whether it is properly completed and contains allegations that warrant investigation. Bar Counsel may require the Complainant to provide additional information and may request a voluntary verified response from the Respondent prior to accepting a grievance.

If Bar Counsel determines that the allegations contained in the grievance do not warrant an investigation, Bar Counsel will so notify the Complainant and Respondent in writing. Complainant may file a request for review of the determination within 30 days of the date of Bar Counsel's written notification. The request shall be reviewed by the Board Discipline Liaison, who may affirm Bar Counsel's decision not to accept the grievance for investigation or may direct that an investigation be opened as to one or more of the allegations in the grievance.

If a grievance is accepted for investigation, Bar Counsel will serve a copy of the grievance upon the Respondent for a response. Bar Counsel may require the Respondent to provide, within 20 days of service, verified full and fair disclosure in writing of all facts and circumstances pertaining to the alleged misconduct. Misrepresentation in a response to Bar Counsel will itself be grounds for discipline. Failure to answer within the prescribed time, or within such further time that may be granted in writing by Bar Counsel, will be deemed an admission to the allegations in the grievance.

For the purposes of this Rule, a grievance or response is "verified" if it is accompanied by a signed statement that the writing is true and correct to the best knowledge and belief of the writer.

(b) Confidentiality. Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings subject to Bar Rule 21(c). It will be regarded as contempt of court to breach this confidentiality in any way. It will not be regarded as a breach of confidentiality for a person so contacted to consult with an

attorney. A Respondent may waive confidentiality in writing and request disclosure of any information pertaining to the Respondent to any person or to the public.

(c) Dismissal Before Formal Proceedings. If after investigation it appears that there is no probable cause to believe that misconduct has occurred, Bar Counsel may dismiss the grievance.

(d) Imposition of Private Admonition or Reprimand. Upon a finding of misconduct, and with the approval of one Area Division member, Bar Counsel may impose a written private admonition upon a Respondent. A Respondent will not be entitled to appeal a private admonition by Bar Counsel but may demand, within 30 days of receipt of the admonition, that a formal proceeding be instituted against him or her before a Hearing Committee. If Respondent demands a formal proceeding, the admonition will be vacated and Bar Counsel will proceed under Section (e) of this Rule.

In the discretion of Bar Counsel, (s)he may refer a matter to the Board for approval and imposition of a reprimand by the Board, provided that the Respondent has, under Section (h) of this Rule, consented to the discipline before the Board.

(e) Formal Proceedings. Upon a finding of misconduct, and after seeking review in accordance with Rule 25(d), Bar Counsel may initiate discipline proceedings by filing with the Director a petition for formal hearing which specifically sets forth the charge(s) of misconduct. A copy of the petition will be served upon the Respondent.

Respondent will be required to file the original answer with the Director, and serve a copy upon Bar Counsel, within 20 days after the service of the petition for formal hearing. Should Respondent fail to timely answer, the charges will be deemed admitted without need of any further action by Bar Counsel.

Charges before a Hearing Committee will be presented by Bar Counsel. Bar Counsel will have the burden at any hearing of demonstrating by clear and convincing evidence that the Respondent has, by act or omission, committed misconduct as provided in Rule 15.

Bar Counsel may amend a petition for formal hearing at any time before an answer is filed. Bar Counsel may amend a petition for formal hearing after an answer is filed only by leave of the Hearing Committee or by written consent of the Respondent. Leave to amend will be freely given when justice requires. A Respondent will file an answer to an amended petition for formal hearing within the time remaining to file an answer to the original petition, or within 10 days after service of the amended petition, whichever is later.

(f) Assignment to Hearing Committee. In accordance with Rule 12(e), a petition for formal hearing will be assigned by the Director to a Hearing Committee after an answer is filed or after the expiration of the time for filing an answer, unless Respondent tenders conditional consent to a specific discipline. The notice of assignment to Hearing

Committee will indicate the names of the members of the Hearing Committee assigned to hear the matter and will advise Respondent that (s)he is entitled to

(1) be represented by counsel;

(2) examine and crossexamine witnesses;

(3) present evidence in his or her own behalf;

(4) have subpoenas issued in his or her behalf; and

(5) challenge peremptorily and for cause members of the Hearing Committee, as provided in Rule 12(h).

(g) Pre-Hearing Conference. A pre-hearing conference may be convened by the Chair of the Hearing Committee or the Director for stipulation as to matters of fact, simplification of issues, scheduling of pre-hearing motions, the establishment of a date for the formal hearing, and other similar matters which may be resolved prior to hearing.

(h) Discipline by Consent. Respondent may tender a conditional consent to a specific discipline contained in Rule 16. This conditional consent will be submitted to Bar Counsel for his or her approval. If accepted by Bar Counsel, (s)he will refer the conditional admission to the Board for its approval or rejection of the requested discipline.

The consenting Respondent will present to the Board an affidavit stating that (s)he desires to consent to the specific discipline and that

(1) his or her consent is freely and voluntarily given and is not the subject of any coercion or duress; and

(2) (s)he admits to the charges stated in the grievance.

Acceptance of the conditional consent by the Board will be subject to Court approval if the specific discipline to be imposed includes discipline provided in Rule 16(a) (1), (2), (3) and (4). Any conditional admission rejected by the Board or the Court will be withdrawn and Bar Counsel will proceed under Section (e) of this Rule. Any admission made by Respondent in a conditional consent rejected by the Board or the Court cannot be used against the Respondent in any subsequent proceeding.

If the Court or the Board rejects a conditional consent, the matter will be remanded to the Hearing Committee, if any, which was appointed to hear the petition. If no Hearing Committee has been appointed, the Director will appoint one in accordance with Section (f) of this Rule.

(i) Notice of Hearing. The Director will serve a notice of formal hearing upon Respondent, or his or her counsel, indicating the date and place of the formal hearing.

(j) Rules of Evidence. The rules of evidence applicable in administrative hearings will apply in all hearings before Hearing Committees. No new evidence shall be allowed by the Committee chair after the hearing without notice to the opposing party and an opportunity to respond.

(k) Motions, Findings, Conclusions, Recommendation. Hearing Committees may consider and rule on pre-hearing motions. On procedural motions, the Committee chair will rule; on dispositive or substantive motions, the full Hearing Committee will rule. The Hearing Committee may direct either or both parties to submit proposed findings of fact, conclusions of law, and a recommendation after the formal hearing, which will be filed within 10 days of the date of the request by the Committee.

(l) Report of Hearing Committee and Appeal. Within 30 days of the conclusion of a formal hearing, the Hearing Committee will submit its report to the Board in accordance with 12(i) (4), unless an extension of time is granted by the President of the Board. Within 10 days of service of the report, Bar Counsel or Respondent may appeal the Hearing Committee's findings of fact, conclusions of law, and recommendation and request oral argument before the Board, as provided in Rule 25(f). The Director will thereafter set the dates for submission of briefs and oral argument before the Board.

(m) Oral Argument. Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (1) of this Rule.

(n) Board Recommendation or Order. The Board will review the Hearing Committee report and record and enter an appropriate recommendation or order as provided in Rule 10(c) (4), (5), and (6). If the Board has recommended discipline as provided in Rule 16(a) (1), (2), (3) or (4), it will submit to the Court its findings of fact, conclusions of law, recommendation, and the record. The record will include a transcript of all proceedings before the Board as well as the Hearing Committee report.

(o) Notification of Disposition. The Director will promptly notify all parties of the Board's action.

(p) Appeal from Board Order or Recommendation. Bar Counsel or Respondent may appeal from an order or recommendation of the Board made under Section (n) of this Rule by filing a notice of appeal with the Court within 10 days of service of the Board's order or recommendation. Parts II and V of the Alaska Rules of Appellate Procedure will govern appeals filed under this Rule, except that for purposes of Appellate Rule 210(c)(2), excerpts of record must contain:

(1) the petition for formal hearing and answer and any amended petition or answer;

(2) the Hearing Committee report and any amended or supplemental report;

(3) all briefing and transcripts of proceedings before the Board and the Board's findings of fact, conclusions of law, and recommendation, and any amended or supplemental findings of fact, conclusions of law, and recommendation;

(4) all Hearing Committee or Board orders or rulings sought to be reviewed;

(5) if the grant or denial of a motion is at issue in the appeal, the motion, the transcript of any discussion of the motion, and briefs, memoranda, and relevant portions of documents filed in support of or in opposition to the motion; and

(6) specific portions of other documents in the record, including documentary exhibits, that are referred to in the brief and essential to the resolution of an issue on appeal.

(q) Record of Proceedings. A complete stenographic or electronic record of all proceedings before Hearing Committees and before the Board will be made and preserved. The Court shall furnish at its expense the necessary equipment, operator, and stenographic services for the preservation of the record of all such proceedings, and for the preparation of transcripts of all such proceedings.

(r) Review by Supreme Court. The Court will review findings of fact, conclusions of law, and recommendations of discipline made by the Board pursuant to Section (n) of this Rule. The Court will decide the grounds for discipline, pursuant to Rule 15; the type of discipline to be imposed, pursuant to Rule 16(a); and any requirements to be imposed, pursuant to Rule 16(c). When no appeal has been taken pursuant to Section (p) of this Rule, and if the Court determines that discipline different than that recommended by the Board may be warranted, the Court will so notify the parties and give them an opportunity to be heard.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 14 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 962 effective July 15, 1989; by SCO 963 effective July 15, 1989; by SCO 1048 effective nunc pro tunc September 12, 1990; by SCO 1153 effective July 15, 1994; by SCO 1454, effective October 15, 2003; and by SCO 1601 effective April 16, 2007)

## Nancy Manly

**From:** Ray Matiashowski <raym@kpunet.net>
**Sent:** Tuesday, March 12, 2013 5:31 PM
**To:** Nancy Manly
**Cc:** Ray Matiashowski
**Subject:** Ray Matiashowski Contact Info.

Hi Nancy:

I just got your voice message and thought I'd send a note to give you my contact info. This email address (raym@kpunet.net) is the best way to get me. My cell (360-471-5958) is my best phone contact.

I'll look forward to hearing from you regarding HB 127, or anything else for that matter.

Please send a quick note back to confirm that you got my email.

Thanks much.

RM
Ray Matiashowski
360-471-5958

## Nancy Manly

**To:** Beth Leibowitz
**Subject:** RE: HB 127
**Attachments:** 2012-2013 Alaska Bar Rules Rule 21 and Rule 22.pdf

Hi Beth: It got so busy after the HSTA meeting this morning this is the first chance I had to go thru my emails. No, it won't be brought back up on Thursday. We still need copies of Bar Rules 21, and 22 (I'm attaching what I found on the internet but need to know if this is the right ones.) Can we talk tomorrow and discuss what needs to be done before we reschedule the bill. Just got a call from Corrections this afternoon. They are okay with Section 12. That's good news.! Talk to you tomorrow.

Nancy Manly, Chief of Staff and
House State Affairs Committee Aide *for*
**Representative Bob Lynn**
**House District 23**
907-465-2794 Fax: 907-465-4316

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**From:** Beth Leibowitz
**Sent:** Tuesday, March 12, 2013 11:58 AM
**To:** Nancy Manly
**Subject:** HB 127

Nancy,

Am I correct that HB 127 is up for further discussion Thursday morning?

Regarding possible changes to the bill, is it preferable for me to forward the proposed language to your office?

FYI, regarding changes to the ombudsman's salary, the current gross annual salary for Range 26, step A is $95,316; Range 26, step B is $98,484. The change in gross salary is $3,168. The increase from Step B to Step C is $3,324 (bringing the gross annual salary to $101,808).

Again, thanks for your time.

Beth Leibowitz
465-5311

# State of Alaska Ombudsman

Reply to:

☒ P.O. Box 101140
Anchorage, AK 99510-1140
(907) 269-5290
(800) 478-2624
(FAX) 269-5291

☒ P.O. Box 113000
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970
(FAX) 465-3330

March 5, 2013

The Honorable Rep. Bob Lynn, Chair
Alaska House State Affairs Committee
State Capitol, Room 108
Juneau, Alaska 99801

Re: HB 127 (Amendments to the Alaska Ombudsman Act)

Dear Representative Lynn

The Office of the Ombudsman is asking the Alaska Legislature to enact a package of amendments to our enabling statutes. The Legislature enacted the Ombudsman Act (AS 24.55.010 – 24.55.340) in 1975. The ombudsman requested revisions to the statute after the first 10 years of operation, and legislation enacting those revisions passed in 1990. No major revisions have occurred since 1990. After another 20 years of ombudsman work, a number of issues have accumulated and the Ombudsman is asking that the Legislature consider amendments to allow the ombudsman's office to function more efficiently. The legislation provides the following improvements:

- Amends the Ombudsman's testimonial privilege to expressly include the privilege not to produce documents
- Extends confidentiality for agency personnel's communications with the ombudsman's office during an ombudsman investigation
- Clarifies the Ombudsman's procurement authority, and that the ombudsman is expressly allowed to adopt the legislative procurement procedures by reference in procurement regulations
- During an ombudsman investigation, allows executive branch agencies to provide the ombudsman with guidance the agency received from the Department of Law, without risking waiver of attorney-client privilege.
- Provides a mechanism for the Ombudsman's office to provide a confidential informal report to an agency when the Ombudsman believes that an informal suggestion is more appropriate than formal recommendations and a published report.
- Unfreezes the salary of the Ombudsman to allow step increases

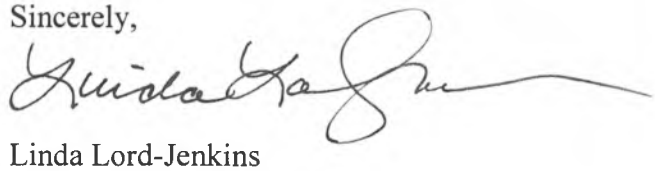
In addition, the ombudsman asks the Legislature to address the following questions regarding the office's jurisdiction:

- Whether the ombudsman should investigate complaints against the Alaska Bar Association
- Whether the ombudsman's jurisdiction should be expanded to private entities that provide jails or other detention/custodial facilities pursuant to a state contract
- Whether the ombudsman's jurisdiction should be expanded to private entities that, pursuant to a state contract, determine eligibility for a state program or benefit

As indicated in the fiscal note for HB 127, the ombudsman does not expect this legislation to require more staff for the office, or increased expenditures for equipment or facilities. The ombudsman anticipates a slight increase in personnel costs if the Ombudsman is allowed to receive a step increase; however, due to the overall lack of funds for merit increases in FY14, the Ombudsman does not expect to receive a step increase for the upcoming fiscal year and is therefore not requesting funds for that purpose. Any potential step increase in FY15 or later would be included in the budget for that year.

I thank you for your time and attention to this legislation. Please contact me at 269-6291 in Anchorage or 465-5579 in Juneau, or Assistant Ombudsman Beth Leibowitz in Juneau at 465-5311 with any questions or concerns you may have regarding HB 127.

Sincerely,



Linda Lord-Jenkins
State of Alaska Ombudsman

## INTRODUCTION TO PROPOSED AMENDMENTS TO THE OMBUDSMAN ACT (HB 127)

The Ombudsman Act (AS 24.55.010 – 24.55.340) was enacted in 1975. The ombudsman requested revisions to the statute after the first ten years of operation, and legislation enacting those revisions passed in 1990. After another twenty years of ombudsman work, a number of issues have accumulated and the Ombudsman is asking that the Legislature consider amendments that would allow the ombudsman's office to function more efficiently.

The Office of the Ombudsman, with considerable assistance from Legislative Legal Services, has prepared a bill draft addressing the areas in which the statute falls short of the current needs of the office.

### Sectional Analysis of HB 127

**Section 1**. The Alaska Bar Association was created in AS 08.08.010 as an "instrumentality of the state" in order to license and regulate attorneys. As the state boards licensing other professions are clearly state agencies, the Bar Association looks like a state agency when judged by its function. The Office of the Ombudsman believes that the Bar Assocation falls within the ombudsman's jurisdiction over the administrative acts of agencies, because the Ombudsman Act defines "agency" very broadly as including "a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches." See AS 24.55.330(2). The Bar Association, however, has consistently maintained that it is not a state agency for purposes of the Ombudsman Act.

The Bar Association's argument that it is not a state agency is partially supported by the Alaska Supreme Court's multi-factor test for determining whether an entity is a state agency. Upon applying the factors listed in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986), it is not clear whether or not the Bar Association is a state agency, because roughly half of the factors indicate that it is a state agency, while the others indicate that it is not. This jurisdictional question can be resolved by either litigation or legislative decision. The ombudsman considers litigation to be a poor use of both the ombudsman's resources and those of the Bar Association, and therefore asks that the Legislature settle this matter one way or the other.

The ombudsman does not necessarily advocate for inclusion of the Bar Association within the ombudsman's jurisdiction, but would like this long-standing issue resolved as efficiently as possible. (For additional discussion of the relevant case law and the history of this issue, see **Appendix A**).

**Section 2**. The purpose of this amendment is to allow the ombudsman to receive step increases. The ombudsman is now the only head of a legislative agency who cannot receive step increases. Previously, the salary of the Victims' Rights Advocate was also frozen at Step A, Range 26, but in 2012, the legislature revised compensation for the Victims' Rights Advocate (AS 24.65.060) to allow the Victims' Rights Advocate to receive step increases. This section would provide parity in the statutory salary provision for the ombudsman as compared to other legislative agency heads. Looking ahead, the change would allow the legislature some flexibility in setting the salary of a newly appointed ombudsman. Also, this section deletes the wording "for Juneau" from AS 24.55.060, so that the Ombudsman's salary will

be set based on the Ombudsman's actual location. Presently, the pay scale for legislative employees is the same for Juneau and Anchorage, but if that eventually changes to provide Juneau employees with a geographic differential then this amendment would avoid an unintentional windfall to an Anchorage-based ombudsman.

**Section 3**. The Office of the Ombudsman currently hires individuals, such as retired former ombudsman staff, under personal services contracts. The ombudsman has received an opinion from the legislative personnel office that this practice is permissible for the Office of the Ombudsman. However, the existing statutes are somewhat ambiguous, or at least difficult to interpret, and the Ombudsman would like any doubt on this subject removed.

**Section 4**. The ombudsman's opinions and recommendations as provided to an agency are made confidential in AS 24.55.180 and AS 24.55.190, so that an agency may consider and respond without public embarassment. The problem is that those measures are rendered futile if the emails and other communications between the ombudsman and the agency prior to the ombudsman's report are available for publication. During an investigation, the ombudsman's questions to agency staff and requests for records may reveal the nature of the allegations and the ombudsman's potential criticisms of the agency, often to the same extent as the ultimate report of opinions and recommendations. The amendment to AS 24.55.160(b) extends the confidentiality provided to the preliminary and final ombudsman reports to encompass the communications that lead up to those reports.

**Section 5**. Executive branch personnel sometimes provide the ombudsman with the opinions offered by an assistant attorney general. This is often in the agency's interest, because reliance on the advice of their attorney may explain conduct that otherwise appears to be without an adequate explanation. However, sharing this material with the ombudsman's office has the potential to create an unintentional waiver of privilege. This legislation aims to preserve an agency's ability to communicate frankly with the ombudsman without causing harm to the agency's ability to protect itself in litigation against non-state entities.

**Sections 6-9**. When the Office of the Ombudsman opened in 1975, nearly every closing letter was counted as an "investigation" issued by the Ombudsman under AS 24.55.190 ("The ombudsman shall report the opinion and recommendations of the ombudsman to an agency…."). Reports under AS 24.55.190 are a non-delegable duty of the Ombudsman, which means that the reports cannot be signed by an assistant ombudsman. Since 1975, the office has evolved to the point where the Ombudsman cannot, as a practical matter, review every closing letter. The office has developed a practice of staff discontinuing investigations with suggestions to an agency, in cases where there may be improvements that an agency can undertake but the issue is not significant enough to warrant the Ombudsman's resources for a full report under AS 24.55.190. The proposed changes, particularly a new AS 24.55.185, provide a clear statutory path for the ombudsman's staff to handle these "gray area" complaints. If this legislation is enacted, the ombudsman anticipates undertaking a regulations project to further define implementation of the "informal reports" provision.

Section 6 amends AS 24.55.180 to maintain the requirement that the ombudsman (or her staff) consult with an agency prior to issuing a critical opinion, whether formal or informal; however, for an informal opinion, the consultation be done via email or even verbally. The provision of a preliminary report –

usually a fairly cumbersome document sent to the director and/or commissioner – is reserved for investigations that are proceeding to an ombudsman's formal report issued under AS 24.55.190.

Section 7 outlines the process for the office of the ombudsman to provide an informal report to an agency.

Sections 8 and 9 make the necessary amendments to AS 24.55.190 to harmonize it with the new statute, AS 24.55.185.

**Section 10**. This section updates the ombudsman's testimonial privilege to match the privilege granted to the Office of Victims' Rights when that office was created in 2001. It removes any ambiguity regarding the protected status of the ombudsman's documents. It also clarifies that the privilege extends to administrative hearings as well as to court proceedings.

**Section 11**. The procurement statute, AS 24.55.275, contains language that matched a prior version of the executive branch procurement code (AS 36.30). The provisions of AS 36.30 have been comprehensively revised since then, and AS 24.55.275 is now a poor fit for the office of the ombudsman. The amendments bring the ombudsman's procurement procedures into line with the rest of the legislative branch, while still allowing for the ombudsman's relative autonomy.

**Sections 12-13**. Since enactment of the original Ombudsman Act in 1975, more services previously thought of as state government functions have been shifted from state agency employees to contractors. The proposed amendments expand the ombudsman's jurisdiction to encompass a portion of the contracted services. The intent is to provide the ombudsman with jurisdiction when a contractor performs services of the same custodial nature as those already performed by the Department of Corrections (and the Division of Juvenile Justice). In particular, an Alaska inmate should be able to complain to the ombudsman whether he is held in a facility owned by the Division of Institutions or in a contractor's facility that is absorbing the overflow from the Division of Institutions. According to the contracts DOC has entered into with private prisons, Alaska inmates are supposed to be able to access the same grievance process as they would while housed in a state facility; while the contracts only address DOC's internal grievance process, the extension of the ombudsman's jurisdiction is a logical corollary.

The ombudsman does not anticipate that this expansion in the ombudsman's jurisdiction would require more staff. First, the effective date of this provision is delayed until 2015. Second, some of these issues, in practice, already take up ombudsman staff time, including time spent referring the issue to the relevant department and then following up on the referral. For example, the ombudsman's staff received multiple serious complaints related to medical care at the Hudson, Colorado, contract facility, but many of these complaints proved unsupported. Because the ombudsman did not have direct access to Hudson personnel and records, these complaints were actually open longer than necessary.

The expansion of jurisdiction also encompasses contractors who have been authorized to determine eligibility for state programs, a task probably carried out by state agency personnel when the legislature created the Office of the Ombudsman. An example would be contractors who make eligibility determinations for the Alaska Temporary Assistance Program on behalf of the Division of Public

Assistance. An agency should not be able to use out-sourcing to avoid the ombudsman's review of how the agency provides or denies access to a state program.

**Sections 14 and 16**. Two sections of this bill (§ 5 and § 10) are indirect amendments of the court rules. Sections 14 and 16 state that the changes to the court rules are not effective without a two-thirds majority vote of each house of the legislature.

**Section 15**. The ombudsman's prospective jurisdiction over certain private contractors is delayed until 2015, to allow time for the ombudsman to work with affected agencies and their contractors and to avoid unjust surprise to contractors who have never had to consider the possibility of an ombudsman investigation.

## APPENDIX A

### The Ombudsman's jurisdiction and the Alaska Bar Association

*Why the Bar Association's status is unclear*

The Ombudsman Act gives an exceptionally broad definition of "agency" for purposes of the ombudsman's jurisdiction. *See* AS 24.55.330. However, the definition does not specifically include the phrase "instrumentality of the state," which is the term used to define the Bar Association in its enabling statute. *See* AS 08.08.010. Our office turned to the criteria adopted by the Alaska Supreme Court for answering whether an entity is a "state agency" for a given purpose. The criteria, as stated in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986) ("*CFAB*"), are:

- Language in the statute creating the entity, including whether it is expressly located within a department;
- Whether the Governor appoints the directors of the entity, and whether any commissioners or other state officials are statutorily appointed to the board;
- Whether the entity is required to report to the governor and/or the Legislature;
- Whether Legislative Audit audits or may audit the entity;
- Whether the Legislature can dissolve the entity, and, conversely, whether the entity must obtain legislative approval prior to dissolution;
- The degree to which funding is provided by the Legislature;
- Whether the entity can dispose of its own income or whether revenue must be deposited in the state's general fund;
- Whether the entity is clearly performing a government function.

Three of these factors are unequivocally on the "state agency" side of the scale: the Bar Association must report annually to the Legislature under AS 08.08.085; Legislative Audit audits the Bar Association; and its existence or dissolution depends on the Legislature. A fourth factor –performance of a governmental function – also makes the Bar Association look more like a state agency, because it is performing an occupational licensing and regulatory function, just like the boards regulating other occupations under Title 8 of the Alaska Statutes. The Alaska Supreme Court appears to have considered the Bar Association's function to be governmental, as of the court's decision in *Sullivan v. Alaska Bar Association*, 551 P.2d 531 (Alaska 1976): "The Bar Association, which was created by the State Legislature, acts as an *administrative arm of the judiciary* for the admission of lawyers to practice law before the courts of the State of Alaska" (Italics added).

On the other hand, the Bar Association does not receive legislative appropriations, and it disposes of its own income. Although three members of its Board of Governors are appointed by the Governor, nine members are elected by the attorney membership. The language creating the Bar Association refers to it as an "instrumentality of the state" but does not locate it within the executive branch, or even clearly place it within the judicial branch.

In short, the multi-factor test used by the Alaska courts offers support for both sides of the argument and does not clarify whether the Bar Association is a state agency for purposes of the ombudsman's office.

*History of jurisdictional dispute*

In 1983, then-Ombudsman Jack Chenoweth described the jurisidictional dispute over ombudsman investigations of the Alaska Bar Association:

> The issue of this office's jurisdiction over the Alaska Bar Association traces back to two complaints, A79-0641 and A79-0642, filed against the association in June, 1979. The two complaints were generally directed against the association's grievance procedures and charged financial and other irregularities involving members of the board of governors and employees of the association.
>
> The matters involved my predecessor, Frank Flavin, so I do not have direct understanding of past events to guide my response. I am advised that the bar association refused access of the ombudsman's office to certain files essential to the conduct of the investigation. The ombudsman sought enforcement of the subpoena in the superior court. Judge Moody denied the relief requested because Mr. Flavin was a member of the association and had access to the records independently of his official position. The argument whether the association was or was not subject to the ombudsman's jurisdiction was not resolved.

*See* March 31, 1983 letter from Ombudsman Jack Chenoweth to Rep. Jerry Ward. The Bar Association appeared to be on the verge of "sunsetting" without renewal in 1980, and the ombudsman discontinued the pending investigations. Eventually, legislation renewed the Bar Association. Apparently, one version of that legislation specifically included the Bar Association within the ombudsman's jurisdiction, but that wording did not make it into the enacted law. (Rep. Ward sponsored legislation during the 1983 session (HB 293) that would have expressly placed the Bar Association within the ombudsman's jurisdiction; but this provision did not pass).

Jack Chenoweth's position in 1983 actually states the ombudsman's current viewpoint quite adequately:

> The matter deserves clarification by legislation. Please understand that I am not committed to making the association subject to our jurisdiction. The legislature could as well conclude that the association was <u>not</u> subject to our jurisdiction. I have enough "business" from complainants dissatisfied with agencies, boards, commssions and other entities for which there is no jurisdictional challenge.

In 1993, then-Ombudsman Duncan Fowler drafted an office policy regarding complaints against the Bar Association, and stated the basic problem for our office: in order to assert what we believe is our statutory jurisdiction, we would expect to engage in prolonged litigation with the Bar Association, a commitment for which our office has often lacked resources. Ombudsman Policy & Procedure 6000 states in relevant part:

> This office believes that complaints alleging error or omission by the Alaska Bar Association are jurisdictional; the Bar Association's officers believe just as strongly that its activities are outside our jurisdiction.
>
> Complaints against the bar association should be called to the attention of the ombudsman promptly so that there can be a review of the matter.... The first case accepted against the bar association would require, as a prerequisite to resolution, this

> office to request that the court enforce a request, subpoena or deposition issued against a bar association officer; moreover, the case would almost surely have to be resolved by the state supreme court. We haven't the money now to retain attorneys to drive home our point. If there is a very strong case, I would try, so let me know what comes in. However, for the moment you may discretionarily decline. In your letter of decline, please explain that the history of the office leads to the conclusion that we would be unable to investigate the bar association without taking on a major court case.

If we do in fact have jurisdiction, this "wait for the big case" approach is a disservice to complainants. If the Legislature concludes that we do not have jurisdiction, then complaints against the Bar Association can be declined immediately, without discussion of whether a given complaint is the one that will be worth litigating.

*Number of Complaints Received Regarding the Bar Association*

Our current case management software tracks complaints received from December 1999 through the present date. Assistant Ombudsman Beth Leibowitz found 11 complaints against the Bar Association during that period, with results as follows:

Declined as premature: 2
(Complaint either not raised with Bar Association or Bar Association not given reasonable time to respond to the complainant)

Resolved: 1
(Complainant said he had not received paperwork to file a complaint about an attorney; the ombudsman investigator asked the Bar Association staff to send another packet).

Declined due to lack of merit on its face: 1

Declined due to jurisdictional dispute: 7

Out of the seven complaints declined due to lack of clarity over our jurisdiction, six complaints alleged that the Bar Association had failed to adequately investigate a complaint about attorney competence – these were generally complaints by criminal defendants regarding their court-appointed counsel. The seventh complaint involved a client's effort to collect on a fee arbitration award ordered by the Bar Association.

If our office had undisputed jurisdiction to investigate Bar Association complaints, the number of complaints in this category would probably rise gradually, as individuals realized that our office was reviewing these complaints.

*Problems and limitations on the ombudsman's exercise of jurisdiction*

We believe that many of the complaints regarding the Bar's response to grievances about attorneys would still be declined by the ombudsman due to lack of resources. This is because grievances alleging poor quality of representation would tend to become evaluations of whether the attorney met minimal standards of competence, and our office is not in a position to supply expertise on what are essentially attorney malpractice claims. This is especially so in the area of criminal defense – some of our staff are attorneys, but our previous practice has been in civil cases, not criminal defense or prosecution.

The other issue is that some of the Bar Association's functions are directly supervised by the Alaska Supreme Court. As our office does not have jurisdiction over judicial decisions, we are mindful that the line between the Bar Association's administrative decisions and the court's orders may not always be

completely clear. For example, attorney suspension or disbarment must be approved by the court. Although the Bar Association has a fairly elaborate administrative process for attorney discipline, the Bar Association by itself cannot suspend or disbar an attorney. *See* Alaska Bar Rule 16. Similarly, in *Sullivan v. Alaska Bar Association*, 551 P.2d 531 (Alaska 1976), the court concluded that even though admission procedures were "delegated" to the Bar Association, the court "ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar." The Bar Association had refused to waive the application deadline for an applicant who requested permission to sit for the bar exam at the last minute. The court did not require the applicant to exhaust appeals within the Bar Association, nor did the court offer any deference to the Bar Association's decision. The court ordered the Bar Association to allow the applicant to sit for the exam, based on the court's inherent authority over admission (licensing) of attorneys.

In other words, some complaints about Bar Association "administrative actions" may actually be decisions that should be made by the justices of the Alaska Supreme Court, and, as judicial decisions, are not within the ombudsman's jurisdiction regardless of the Bar Association's status.

# ALASKA BAR ASSOCIATION

March 7, 2013

Rep. Bob Lynn, Chair,
House State Affairs Committee
State Capitol, Room 108
Juneau, AK 99801-1182

Rep. Wes Keller, Vice-Chair
House State Affairs Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Rep. Lynn Gattis, Member
House State Affairs Committee
State Capitol, Room 420
Juneau, AK 99801-1182

Rep. Shelley Hughes, Member
House State Affairs Committee
State Capitol, Room 409
Juneau, AK 99801-1182

Rep. Doug Issacson, Member
House State Affairs Committee
State Capitol, Room 13
Juneau, AK 99801-1182

Rep. Charisse Millett, Member
House State Affairs Committee
State Capitol, Room 403
Juneau, AK 99801-1182

Rep. Jonathan Kreiss-Tomkins,
Member
House State Affairs Committee
State Capitol, Room 426
Juneau, AK 99801-1182

RE: House Bill No. 127

Dear Rep. Lynn and members of the Committee:

I'm writing regarding Section 1 of House Bill No. 127 that would add a section to AS 08.08.010 making the Alaska Bar Association an "agency" for the purposes of Ombudsman's investigations under AS 24.55.

Respectfully, this portion of House Bill No. 127 should be removed for three reasons:

(1) The Legislature classified the Alaska Bar Association as an "instrumentality" of the state in 1955 when AS 08.08.010 was enacted. As such, it is not an "agency" of the executive, legislative, or judicial branch of state government;

(2) The disciplinary responsibilities of the Alaska Bar Association are strictly supervised by operation of the Alaska Bar Rules, adopted by the Alaska Supreme Court, and by the Court itself. If a complainant is dissatisfied with a grievance decision, the complainant may ask for review by the Board Discipline Liaison. Alaska Bar Rule 22(a). If the complainant is still dissatisfied, the complaint may file an original application for review by the Alaska Supreme Court. *Anderson v. Alaska Bar Association,* 91 P.3d 271 (Alaska 2004); and,

P.O. Box 100279 • Anchorage, Alaska 99510-0279
907-272-7469 • Fax 907-272-2932 • http://www.alaskabar.org

(3) Because of the confidentiality provisions of Alaska Bar Rules 21 and 22, bar counsel's office would be unable to acknowledge the existence of a grievance much less provide access to bar counsel files unless the respondent attorney consented, an exception applied in Bar Rule 21, or disclosure was ordered by the Alaska Supreme Court.

For the Committee's convenience, I have attached a copy of the statute, rules, and case I've referenced.

If there is any further information I may provide, please let me know.

Sincerely,

ALASKA BAR ASSOCIATION

Deborah O'Regan
Executive Director

Encl.
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## Alaska Statutes

**08.08.010. Creation of Alaska Bar Association.**

There is created an instrumentality of the state known as the Alaska Bar Association, referred to in this chapter as the Alaska Bar. The Alaska Bar shall have a common seal, may sue and be sued, and may, for the purpose of carrying into effect and promoting the objects of the Alaska Bar, enter into contracts and acquire, hold, encumber, and dispose of real and personal property.

## Alaska Bar Rules

**Rule 21. Public Access to Disciplinary Proceedings.**

(a) Discipline and Reinstatement Proceedings. After the filing of a petition for formal hearing, hearings held before either a Hearing Committee or the Board will be open to the public. This Rule will not be interpreted to allow public access to disability proceedings described in Rule 30.

(b) Deliberations. The deliberations of any adjudicative body will be kept confidential.

(c) Bar Counsel's Files. All files maintained by Bar Counsel and staff will be confidential and are not to be reviewed by any person other than Bar Counsel or Area Division members appointed for purposes of review or appeal under these Rules. This provision will not be interpreted to:

(1) preclude Bar Counsel from introducing into evidence any documents from his or her files;

(2) preclude Bar Counsel from providing the Board, the Court, or the public with statistical information compiled pursuant to Rule 11(e), provided that the name of the Respondent is kept confidential;

(3) deny a complainant information regarding the status or disposition of his or her grievance;

(4) deny the public facts regarding the stage of any proceeding or investigation concerning a Respondent's conviction of a crime;

(5) deny the Alaska Judicial Council confidential information about attorney applicants for judicial vacancies;

(6) preclude a court from reviewing in camera a confidential file upon a discovery request made pursuant to Criminal Rule 16(b)(7), and from exercising discretion as to whether to release relevant information from the file to counsel pursuant to Criminal Rule 16(d)(3); or

(7) prevent the Board Discipline Liaison from having access to any and all files maintained by Bar Counsel as necessary in the performance of the Liaison's duties.

(d) Director's File. The file maintained by the Director, acting in his or her capacity as clerk, will be open for public review.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 13 effective April 1, 1979; rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989; by SCO 963 effective July 15, 1989; by SCO 1043 effective January 15, 1991; and by SCO 1082 effective January 15, 1992)

**Rule 22. Procedure.**

(a) Grievances. Grievances will be in writing, signed and verified by the Complainant, and contain a clear statement of the details of each act of alleged misconduct, including the approximate time and place of each. Grievances will be filed with Bar Counsel. Bar Counsel will review the grievance filed to determine whether it is properly completed and contains allegations that warrant investigation. Bar Counsel may require the Complainant to provide additional information and may request a voluntary verified response from the Respondent prior to accepting a grievance.

If Bar Counsel determines that the allegations contained in the grievance do not warrant an investigation, Bar Counsel will so notify the Complainant and Respondent in writing. Complainant may file a request for review of the determination within 30 days of the date of Bar Counsel's written notification. The request shall be reviewed by the Board Discipline Liaison, who may affirm Bar Counsel's decision not to accept the grievance for investigation or may direct that an investigation be opened as to one or more of the allegations in the grievance.

If a grievance is accepted for investigation, Bar Counsel will serve a copy of the grievance upon the Respondent for a response. Bar Counsel may require the Respondent to provide, within 20 days of service, verified full and fair disclosure in writing of all facts and circumstances pertaining to the alleged misconduct. Misrepresentation in a response to Bar Counsel will itself be grounds for discipline. Failure to answer within the prescribed time, or within such further time that may be granted in writing by Bar Counsel, will be deemed an admission to the allegations in the grievance.

For the purposes of this Rule, a grievance or response is "verified" if it is accompanied by a signed statement that the writing is true and correct to the best knowledge and belief of the writer.

(b) Confidentiality. Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings subject to Bar Rule 21(c). It will be regarded as contempt of court to breach this confidentiality in any way. It will not be regarded as a breach of confidentiality for a person so contacted to consult with an attorney. A Respondent may waive confidentiality in writing and request disclosure of any information pertaining to the Respondent to any person or to the public.

(c) Dismissal Before Formal Proceedings. If after investigation it appears that there is no probable cause to believe that misconduct has occurred, Bar Counsel may dismiss the grievance.

(d) Imposition of Private Admonition or Reprimand. Upon a finding of misconduct, and with the approval of one Area Division member, Bar Counsel may impose a written private admonition upon a Respondent. A Respondent will not be entitled to appeal a private admonition by Bar Counsel but may demand, within 30 days of receipt of the admonition, that a formal proceeding be instituted against him or her before a Hearing Committee. If Respondent demands a formal proceeding, the admonition will be vacated and Bar Counsel will proceed under Section (e) of this Rule.

In the discretion of Bar Counsel, (s)he may refer a matter to the Board for approval and imposition of a reprimand by the Board, provided that the Respondent has, under Section (h) of this Rule, consented to the discipline before the Board.

(e) Formal Proceedings. Upon a finding of misconduct, and after seeking review in accordance with Rule 25(d), Bar Counsel may initiate discipline proceedings by filing with the Director a petition for formal hearing which specifically sets forth the charge(s) of misconduct. A copy of the petition will be served upon the Respondent.

Respondent will be required to file the original answer with the Director, and serve a copy upon Bar Counsel, within 20 days after the service of the petition for formal hearing. Should Respondent fail to timely answer, the charges will be deemed admitted without need of any further action by Bar Counsel.

Charges before a Hearing Committee will be presented by Bar Counsel. Bar Counsel will have the burden at any hearing of demonstrating by clear and convincing evidence that the Respondent has, by act or omission, committed misconduct as provided in Rule 15.

Bar Counsel may amend a petition for formal hearing at any time before an answer is filed. Bar Counsel may amend a petition for formal hearing after an answer is filed only by leave of the Hearing Committee or by written consent of the Respondent. Leave to amend will be freely given when justice requires. A Respondent will file an answer to an amended petition for formal hearing within the time remaining to file an answer to the original petition, or within 10 days after service of the amended petition, whichever is later.

(f) Assignment to Hearing Committee. In accordance with Rule 12(e), a petition for formal hearing will be assigned by the Director to a Hearing Committee after an answer is filed or after the expiration of the time for filing an answer, unless Respondent tenders conditional consent to a specific discipline. The notice of assignment to Hearing Committee will indicate the names of the members of the Hearing Committee assigned to hear the matter and will advise Respondent that (s)he is entitled to

(1) be represented by counsel;

(2) examine and crossexamine witnesses;

(3) present evidence in his or her own behalf;

(4) have subpoenas issued in his or her behalf; and

(5) challenge peremptorily and for cause members of the Hearing Committee, as provided in Rule 12(h).

(g) Pre-Hearing Conference. A pre-hearing conference may be convened by the Chair of the Hearing Committee or the Director for stipulation as to matters of fact, simplification of issues, scheduling of pre-hearing motions, the establishment of a date for the formal hearing, and other similar matters which may be resolved prior to hearing.

(h) Discipline by Consent. Respondent may tender a conditional consent to a specific discipline contained in Rule 16. This conditional consent will be submitted to Bar Counsel for his or her approval. If accepted by Bar Counsel, (s)he will refer the conditional admission to the Board for its approval or rejection of the requested discipline.

The consenting Respondent will present to the Board an affidavit stating that (s)he desires to consent to the specific discipline and that

(1) his or her consent is freely and voluntarily given and is not the subject of any coercion or duress; and

(2) (s)he admits to the charges stated in the grievance.

Acceptance of the conditional consent by the Board will be subject to Court approval if the specific discipline to be imposed includes discipline provided in Rule 16(a) (1), (2), (3) and (4). Any conditional admission rejected by the Board or the Court will be withdrawn and Bar Counsel will proceed under Section (e) of this Rule. Any admission made by Respondent in a conditional consent rejected by the Board or the Court cannot be used against the Respondent in any subsequent proceeding.

If the Court or the Board rejects a conditional consent, the matter will be remanded to the Hearing Committee, if any, which was appointed to hear the petition. If no Hearing Committee has been appointed, the Director will appoint one in accordance with Section (f) of this Rule.

(i) Notice of Hearing. The Director will serve a notice of formal hearing upon Respondent, or his or her counsel, indicating the date and place of the formal hearing.

(j) Rules of Evidence. The rules of evidence applicable in administrative hearings will apply in all hearings before Hearing Committees. No new evidence shall be allowed by the Committee chair after the hearing without notice to the opposing party and an opportunity to respond.

(k) Motions, Findings, Conclusions, Recommendation. Hearing Committees may consider and rule on pre-hearing motions. On procedural motions, the Committee chair will rule; on dispositive or substantive motions, the full Hearing Committee will rule. The Hearing Committee may direct either or both parties to submit proposed findings of fact, conclusions of law, and a recommendation after the formal hearing, which will be filed within 10 days of the date of the request by the Committee.

(l) Report of Hearing Committee and Appeal. Within 30 days of the conclusion of a formal hearing, the Hearing Committee will submit its report to the Board in accordance with 12(i) (4), unless an extension of time is granted by the President of the Board. Within 10 days of service of the report, Bar Counsel or Respondent may appeal the Hearing Committee's findings of fact, conclusions of law, and recommendation and request oral argument before the Board, as provided in Rule 25(f). The Director will thereafter set the dates for submission of briefs and oral argument before the Board.

(m) Oral Argument. Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (1) of this Rule.

(n) Board Recommendation or Order. The Board will review the Hearing Committee report and record and enter an appropriate recommendation or order as provided in Rule 10(c) (4), (5), and (6). If the Board has recommended discipline as provided in Rule 16(a) (1), (2), (3) or (4), it will submit to the Court its findings of fact, conclusions of law, recommendation, and the record. The record will include a transcript of all proceedings before the Board as well as the Hearing Committee report.

(o) Notification of Disposition. The Director will promptly notify all parties of the Board's action.

(p) Appeal from Board Order or Recommendation. Bar Counsel or Respondent may appeal from an order or recommendation of the Board made under Section (n) of this Rule by filing a notice of appeal with the Court within 10 days of service of the Board's order or recommendation. Parts II

and V of the Alaska Rules of Appellate Procedure will govern appeals filed under this Rule, except that for purposes of Appellate Rule 210(c)(2), excerpts of record must contain:

(1) the petition for formal hearing and answer and any amended petition or answer;

(2) the Hearing Committee report and any amended or supplemental report;

(3) all briefing and transcripts of proceedings before the Board and the Board's findings of fact, conclusions of law, and recommendation, and any amended or supplemental findings of fact, conclusions of law, and recommendation;

(4) all Hearing Committee or Board orders or rulings sought to be reviewed;

(5) if the grant or denial of a motion is at issue in the appeal, the motion, the transcript of any discussion of the motion, and briefs, memoranda, and relevant portions of documents filed in support of or in opposition to the motion; and

(6) specific portions of other documents in the record, including documentary exhibits, that are referred to in the brief and essential to the resolution of an issue on appeal.

(q) Record of Proceedings. A complete stenographic or electronic record of all proceedings before Hearing Committees and before the Board will be made and preserved. The Court shall furnish at its expense the necessary equipment, operator, and stenographic services for the preservation of the record of all such proceedings, and for the preparation of transcripts of all such proceedings.

(r) Review by Supreme Court. The Court will review findings of fact, conclusions of law, and recommendations of discipline made by the Board pursuant to Section (n) of this Rule. The Court will decide the grounds for discipline, pursuant to Rule 15; the type of discipline to be imposed, pursuant to Rule 16(a); and any requirements to be imposed, pursuant to Rule 16(c). When no appeal has been taken pursuant to Section (p) of this Rule, and if the Court determines that discipline different than that recommended by the Board may be warranted, the Court will so notify the parties and give them an opportunity to be heard.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 14 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 962 effective July 15, 1989; by SCO 963 effective July 15, 1989; by SCO 1048 effective nunc pro tunc September 12, 1990; by SCO 1153 effective July 15, 1994; by SCO 1454, effective October 15, 2003; and by SCO 1601 effective April 16, 2007)

91 P.3d 271 (Mem)
Supreme Court of Alaska.

John A. ANDERSON, Appellant,
v.
ALASKA BAR ASSOCIATION, Appellee.

No. S–11215. | May 14, 2004.

*271 Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Morgan Christen, Judge.

**Attorneys and Law Firms**

John A. Anderson, pro se, Anchorage.

Mark Woelber, Assistant Bar Counsel, Alaska Bar Association, Anchorage, for Appellee.

Before: BRYNER, Chief Justice, MATTHEWS, EASTAUGH, FABE, and CARPENETI, Justices.

**Opinion**

***OPINION***

PER CURIAM.

Anderson filed a grievance with the Alaska Bar Association alleging various instances of attorney misconduct. After taking preliminary steps, Bar Counsel decided that a formal investigation was not warranted and so notified Anderson. When Anderson sought reconsideration, Bar Counsel forwarded the file to Board Discipline Liaison to review. Board Discipline Liaison concurred in Bar Counsel's decision not to open an investigation.

*272 Each of the above steps was authorized and taken pursuant to Bar Rule 22(a). What Anderson did next is not covered by any rule. He filed a "Notice of Appeal from Administrative Agency" with the superior court, seeking review of the decision not to open a formal investigation of the grievance that he had filed. On motion of the Bar Association the superior court dismissed the appeal. Anderson then appealed to this court, urging that we review the Bar Association's decision not to accept the grievance for investigation.

In an order dated February 24, 2004, we affirmed the order of the superior court on the ground that the superior court lacks jurisdiction to hear appeals from the Alaska Bar Association concerning lawyer disciplinary matters. But we also concluded that grievance-closing decisions under Bar Rule 22(a) may, upon timely request of a complainant, be reviewed by this court. We based this conclusion on the presumption of reviewability pertaining to all final administrative orders, and the inherent authority of this court to regulate the practice of law. We called for further briefing on the question whether Bar Counsel abused his discretion in determining that the allegations contained in the grievance did not warrant an investigation. [1]

The additional briefing is now complete. Based on our review of the parties' arguments and the record, we conclude that Bar Counsel did not abuse his discretion in declining to accept the grievance for investigation. This proceeding is therefore DISMISSED.

**Order**

1. The order of the superior court of August 23, 2003, dismissing this case is AFFIRMED because the superior court lacks jurisdiction to hear appeals from the Alaska Bar Association concerning lawyer disciplinary matters.

2. Although the Bar Rules do not provide for supreme court review of decisions of the board discipline liaison when the liaison affirms the decision of bar counsel not to accept a grievance for investigation under Bar Rule 22(a), such review is appropriate. All final administrative actions are presumed to be reviewable. *State, Dep't of Fish & Game v. Meyer,* 906 P.2d 1365, 1370 (Alaska 1995). A case-closing decision rejecting a grievance for investigation is a final administrative action by the Alaska Bar Association. *See id.* at 1370–72. As an adjunct of the judicial power vested in it by article IV, section 1 of the Alaska Constitution, this court has the inherent authority to regulate the practice of law which encompasses the power to discipline members of the Alaska Bar Association. *Citizens Coalition for Tort Reform, Inc. v. McAlpine,* 810 P.2d 162, 165 (Alaska 1991).

3. In light of the presumption of reviewability and the court's inherent authority, we conclude that grievance-closing decisions under Bar Rule 22(a) may, upon timely request of a complainant, be reviewed by this court. The standard of review should be deferential, namely, whether bar counsel abused his or her discretion in determining that the allegations contained in the grievance do not warrant an investigation.

 

*See Vick v. Board of Electrical Examiners*, 626 P.2d 90, 93 (Alaska 1981).

4. Appellant describes the substance of his grievance in his opening brief filed November 3, 2003. On or before March 25, 2004, the Alaska Bar Association shall file a brief in support of bar counsel's decision not to accept the grievance for investigation and the affirmance of that decision by board discipline liaison. If deemed necessary, the bar association may submit a confidential disciplinary file as an appeal record.

5. The appellant shall have twenty days after receipt of the bar association's brief within which to file a reply brief.

Entered at the direction of the full court.

Footnotes

1 The order of February 24, 2004, is appended to this opinion.

End of Document

State of Alaska
Ombudsman

# Frequently Asked Questions for House Bill 127

## Contents

## Overview of HB 127

### *Why is the ombudsman requesting this legislation?*

The Ombudsman Act, AS 24.55.010 – 24.55.340, was enacted in 1975. The Legislature made substantive changes to the statute in 1990. The ombudsman requested revisions to the statute after the first 10 years of operation, and legislation enacting those revisions passed in 1990. After another 20 years of ombudsman work, a number of issues have accumulated and our office is asking that the Legislature consider amendments that would allow the ombudsman's office to function more efficiently.

### *What are the "housekeeping" provisions in this legislation?*

HB 127 makes changes in the Ombudsman Act in the areas of confidentiality; procurement; procedure for investigative reports; and the hiring of retired state employees on contract with the ombudsman's office. It also unfreezes the ombudsman's salary to allow step increases.

The changes in the area of confidentiality do represent policy choices for the Legislature, as the ombudsman is asking that certain executive branch documents be exempted from the Public Records Act, and the ombudsman is asking for a provision specifically to protect state agencies that share attorney-client privileged material with the ombudsman's office.

### *What policy decisions regarding the ombudsman's jurisdiction does HB 127 contain?*

The ombudsman asks the Legislature to consider two jurisdictional issues for our office. The first issue is whether the Office of the Ombudsman has jurisdiction to investigate administrative actions of the Alaska Bar Association. The history of this jurisdictional problem is described in detail in the appendix to the sectional analysis. Basically, the ombudsman believes the definition of "agency" in AS 24.55.330 encompasses the Alaska Bar Association, while the Bar Association has, both historically and currently, maintained that it is not a state agency for purposes of the Ombudsman Act. Analysis of the multi-factor test used by the Alaska Supreme Court to determine whether an entity is a state agency show that the factors are roughly split, providing support for the arguments of both the Office of the Ombudsman and the Alaska Bar Association. The ombudsman respectfully requests that the Legislature settle this issue one way or the other.

The second jurisdictional issue is a proposal to extend the ombudsman's jurisdiction to encompass certain types of contractors providing services on behalf of a state agency. The ombudsman is particularly concerned about contract providers of prisons and halfway houses, as these entities exercise great discretionary power in carrying out the functions of the Department of Corrections, but currently do not receive the same ombudsman oversight as does the Department of Corrections.

## Alaska Bar Association (§ 1)

***Why is the ombudsman specifically asking for jurisdiction over the Alaska Bar Association?***

Because the Bar Association maintains that it is not subject to the ombudsman's jurisdiction, our office will eventually be obliged to settle this dispute through either litigation or legislation. Litigation is not an efficient use of the ombudsman's resources. In the meantime, however, we do not have a clear answer to offer individuals who contact our office with complaints against the Bar Association. If the Legislature wishes the ombudsman to investigate complaints regarding administrative actions of the Bar Association, then expressly including the Bar Association within our jurisdiction will allow us to respond to those complainants' concerns. If the Legislature does not consider the Bar Association an appropriate subject for the ombudsman's investigations, then having the issue resolved definitively will allow us to at least respond with a clear "no" to requests for investigation of the Bar Association.

Our office's primary interest is in settling this jurisdictional question. HB 127 presents the issue affirmatively, by providing for inclusion of the Bar Association within our jurisdiction, but our office is asking the Legislature to make this policy decision rather than lobbying for a particular result.

## Ombudsman's salary (§ 2)

***The ombudsman is requesting that the ombudsman's statutory salary be amended to allow for step increases. What is the history of the "freeze" on the ombudsman's compensation?***

As enacted in 1975, the Ombudsman Act set the ombudsman's salary as equal to that of a superior court judge. In 1987, the statute, AS 24.55.060, was amended to set the ombudsman's compensation as "an annual salary equal to Step A, Range 26 on the salary schedule set out in AS 39.27.011(a) for Juneau." This provision appeared in HCS SB 139(Fin). SB 139 dealt generally with legislative employees, and the reduction in the ombudsman's pay was added to the bill in the House Finance Committee. Review of the committee minutes does not provide an explanation for the change, other than it occurred during a period when the Legislature was cutting salaries for most legislative branch employees, as well as eliminating positions. The ombudsman's salary could be reduced only by a specific amendment to AS 24.55.060, and we speculate that the change to AS 24.55.060 was part of a pattern of reductions in personnel costs accomplished through both pay cuts and layoffs. *See* House Finance Committee Minutes, April 24, 1987, and May 2, 1987. That said, there is insufficient material available to be sure of the motivations behind the change.

When the Legislature created the Office of Victims' Rights (OVR) in 2001, the head of the OVR, the Victims' Advocate, was provided with the same compensation as the ombudsman, i.e.

Step A, Range 26. However, in 2012, the Legislature amended the OVR statute, AS 24.65.060, to allow the victims' advocate to receive step increases within Range 26. (The current victims' advocate is recently appointed, and has not implemented a step increase yet.)

***How does the ombudsman's statutory compensation compare to compensation for other heads of legislative agencies?***

The ombudsman appears to be the only remaining head of a legislative agency whose salary is capped at a specific step on the pay scale.

The most similar legislative agency is the OVR. Under AS 24.65.060, the salary of the Victims' Advocate was set at Step A of Range 26; however, in 2012 the Legislature removed the reference to "Step A," making step increases available to the victims' advocate. That legislation, SB 135, was discussed in House Finance on April 12, 2012, including the following excerpt from the minutes of the House Finance Committee:

> Co-Chair Stoltze requested Vice-Chair Fairclough to share her contributions to the measure. Vice-Chair Fairclough replied that the Office of Victims' Rights (OVR) was reviewed and it was discovered that its pay scale was frozen at Step A. She related that it was difficult for someone to stay in an office and be stuck at a particular pay level, while other staff was advancing. She had proposed to Senator French's and Co-Chair Stoltze's offices that the restrictions on that particular level be lifted; the level would stay at a pay grade 26, but the change would allow OVR, based on the employee's number of years of service, to move across the states pay scale.
>
> Co-Chair Stoltze inquired if the changes to OVR arose from discussions by the Victims Advocate Selection Committee. Vice-Chair Fairclough responded that she had brought the suggestion to his attention.
>
> Co-Chair Stoltze observed that the discussions regarding OVR were conducted in executive sessions and that there probably was an issue with confidentiality regarding the specifics of the discussion. Vice-Chair Fairclough responded that earlier in the day, she had discussed the change to OVR with Senator French, who also had served on the Victims Advocate Selection Committee.
>
> Co-Chair Stoltze clarified for the record that the process to change the OVR pay scale did not arise arbitrarily, but that it had come from discussions during the selection process.

In other words, the Legislature recently made a policy choice to "unfreeze" the salary of the victims' advocate.

Our office also reviewed the statutory compensation provisions for the Executive Director of the Legislative Affairs Agency and the Fiscal Analyst heading the Legislative Finance Division. Under AS 24.20.250, the salary of the executive director of the Legislative Affairs Agency is set by the Legislative Council. There is no statutory cap on the salary. Similarly, under AS 24.20.221, the Fiscal Analyst's salary is determined by the Legislative Budget and Audit Committee; again, there is no cap on the salary.

In the Legislative Audit Division, the Legislative Auditor serves at the pleasure of the Legislature, and the statute does not define the auditor's compensation. *See* AS 24.20.251.

***What is the fiscal impact of allowing step increases for the ombudsman?***

For the upcoming fiscal year, the ombudsman does not propose any step increase, as the FY14 budget already disallows merit increases for the ombudsman's staff. If budgetary constraints allow, the ombudsman would probably propose a step increase (from Step A, Range 26, to Step B, Range 26) in the office's budget for FY15. This would add approximately $4,000 to the personnel costs for the Office of the Ombudsman for that year. A similar increase could be expected each year that the ombudsman received a step increase; however, such increases would be subject to funding constraints in each year's budget. The current ombudsman's final five-year term ends during FY18, and a new ombudsman's salary would return to Step A, unless the Legislature decided otherwise during the appointment process.

## Contract employees (§ 3)

***Section three of HB 127 deals with contract employees of the ombudsman; what concern is being addressed by this amendment?***

The Office of the Ombudsman currently hires individuals, such as retired former ombudsman staff, under personal services contracts. The ombudsman has received an opinion from the legislative personnel office that this practice is permissible for the Office of the Ombudsman. However, the existing statutes are somewhat ambiguous, or at least difficult to interpret, and the ombudsman would like any doubt on this subject removed.

AS 24.10.060(f), as enacted in 1998, provides the legislative branch with flexibility in hiring:

> An employee of the legislative branch of state government who is employed under a personal services contract is not entitled to membership in the public employees' retirement system (AS 39.35) for employment under the contract. The employee shall be compensated under the state salary schedule set out in

> AS 39.27.011(a). The employee is entitled to receive leave benefits and employee health coverage unless the personal services contract provides to the contrary.

The legislative history of AS 24.10.060(f) indicates that one of the major motivations for the bill was the Legislature's interest in hiring a retired law enforcement officer as the chief of legislative security, a seasonal position. Under the existing statutes, particularly AS 39.35.680(39), the Legislature could not retain the retiree as a temporary employee – the position was automatically deemed seasonal, and that categorization made it difficult for the retiree to accept the position without interfering with his receipt of retirement benefits. In 1998, the sponsor statement for the legislation (HB 467) stated in part:

> In the past we utilized "professional services" contracts to hire individuals for certain jobs to avoid the retirement problem. However, this solution has become less and less of an option because of IRS rules on contractor vs. employee relationships. Under the IRS guidelines the duties and responsibilities of the Chief of Security as well as our tour guides and laborers make them clearly an employee. Using a "personal services" contract clearly classifies the individuals as an employee in order to satisfy IRS requirements, and this bill eliminates the conflict with PERS requirements.

AS 24.10.060(f) allows employment under a personal services contract for any "employee of the legislative branch of state government." On its face, there is no apparent reason that the ombudsman should not utilize this provision. However, a portion of the ombudsman's statutes, dating from 1987, provides:

> The ombudsman and the staff appointed by the ombudsman are in the exempt service under AS 39.25.110 *and are not subject to the employment policies under AS 24.10 or AS 24.20.* [Italics added.]

In 1998, when the Legislature enacted AS 24.10.060(f), it left it unclear whether the Office of the Ombudsman could benefit from the new law, depending on whether "not subject to the employment policies under AS 24.10" is read as excluding the Office of the Ombudsman from all provisions of AS 24.10 or as merely a partial exclusion removing the ombudsman's staff from provisions such as AS 24.10.060(d) (employees of the Legislature on call for duty every day of the session).

This ambiguity also exists in the enabling statutes for the Office of Victims' Rights (OVR). The OVR statute, AS 24.65 borrowed heavily from the Ombudsman Act (AS 24.55), and AS 24.65.070(c) uses identical language: "The victims' advocate and the staff appointed by the victims' advocate are in the exempt service under AS 39.25.110 *and are not subject to the employment policies under AS 24.10 or AS 24.20.*" (Italics added).

Since 1998, the Office of the Ombudsman and OVR have assumed that AS 24.10.060(f) includes them, as both offices are part of the legislative branch of state government. The legislative personnel office has concurred in this practice. The OVR has had two employees hired under personal services contracts, one of whom was the first Victims' Advocate, and the second of

whom is currently an investigator for the OVR. The Office of the Ombudsman has hired three retirees using a personal services contract under AS 24.10.060(f); two of whom still work for the ombudsman.

HB 127 clarifies that the ombudsman may use the personal services contracts allowed under AS 24.10.060(f), and enjoy the same flexibility in hiring retirees as other legislative branch agencies. Because this issue also affects the OVR, the Legislature may wish to consider amending the OVR's statute, AS 24.65.060, in the same way.

## Confidentiality of communications with state agencies (§4)

### *Why is the ombudsman requesting confidentiality for communications with other agencies?*

Under the current Ombudsman Act provisions, AS 24.55.180 makes the ombudsman's preliminary investigative report sent to a state agency confidential:

> The ombudsman may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is *confidential and may not be disclosed to the public by the agency or person.*

The ombudsman also issues a final confidential investigative report to the agency under AS 24.55.190; again, the report is "confidential and may not be disclosed to the public by the agency." These confidentiality provisions were added to the Ombudsman Act in 1990, and legislative history indicates that they were designed to allow state agencies – usually executive branch offices – to receive and respond to criticism without premature public embarrassment. Publicity was intended to be the final step, taken only after the agency had been offered an opportunity to rebut the findings, and to remediate problems.

These provisions for confidentiality are relatively pointless if the correspondence between the agency and ombudsman, leading up to the investigative report, is a matter of public record. During investigation of a complaint, the ombudsman's staff communicates with agency personnel, often by email or letter. This correspondence frequently contains questions and responses that reveal the ombudsman's line of thought and eventual criticism of the agency. Such correspondence is retained by both the Office of the Ombudsman and the executive branch agency; however, while the records in the ombudsman's office are confidential pursuant to AS 24.55.160(b), there is no such protection of the same correspondence in the executive branch files.

Basically, it is not very useful to assure an agency that the ombudsman's preliminary findings will be confidential if all the correspondence leading up to those findings is available to be part of a blog on the Internet or an article in the daily newspaper. The ombudsman is therefore requesting an exception to the Public Records Act for an agency's communications with the ombudsman for purposes of investigation of a complaint.

***How will executive branch agencies handle a public records request when the requested records include communications with the ombudsman?***

First, any information that was already confidential under another provision of law, such as child protective services records, remains confidential. The agency from which the records have been requested is still responsible for maintaining confidentiality of such information, whether it is referenced in a communication to the ombudsman or not.

Second, an agency asked for public records is expected to have a process to redact confidential material prior to public disclosure; an agency can screen records for correspondence labeled "Ombudsman Complaint ###."

Third, HB 127 is permissive. It does not prevent an agency from releasing its communications with the ombudsman. It allows the agency to maintain the communications in confidence, but it does not penalize an agency for choosing to release the communications. (Of course, if the communication references records made confidential under another law, the agency is still responsible for redacting information that is confidential under that law).

Finally, this provision does not create a privilege in litigation. It removes the agency's communications with the ombudsman from casual disclosure, but it does not prevent appropriate discovery in litigation.

## Protection of state agencies' attorney-client privileged communications and attorney work product (§5)

***What is the purpose of the provision in HB 127 related to attorney-client privilege?***

The ombudsman has access to most confidential records of state agencies, but attorney-client privileged communications and attorney work product are specifically excluded. (The definition of "record" in AS 24.55.330 for purposes of the Ombudsman Act excludes these materials). However, agency officials have occasionally provided the ombudsman with attorney-client communications during the ombudsman's investigation of a complaint, usually to support the reasonableness of the agency's position on an issue. So far, this has not created problems for the state agencies that have shared this information, as the ombudsman maintains the confidentiality of the information. A review of case law on attorney-client privilege, however, raises the possibility of an inadvertent general waiver of privilege. For example, in the decision *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012), a private entity provided attorney-client privileged material to the U.S. Attorney pursuant to a confidentiality agreement, but the Ninth Circuit ruled that the privilege was generally waived and required discovery of the previously privileged material in a lawsuit between the entity and another business.

Alaska Rule of Evidence 503 codifies the attorney-client privilege, and Alaska Rule of Evidence 510 provides for waiver due to voluntary disclosure: [1]

> Rule 510. Waiver of Privilege by Voluntary Disclosure.
> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. *This rule does not apply if the disclosure is itself a privileged communication.* [Italics added]

The evidence rule leaves open the possibility of a statutory provision to preserve the privileged status of the material, and that is the intent of the proposed legislation. The ombudsman does not want the good faith cooperation it has received within state government to damage the state's ability to litigate or defend itself; therefore, the ombudsman has proposed this anti-waiver provision.

The type of provision proposed here has some precedent in the laws governing federal oversight of banks and other financial institutions. See 12 U.S.C. § 1785(j); 12 U.S.C. § 1828(x); 12 C.F.R. § 1070.48 (published in 77 Federal Register 39617-01, July 5, 2012).

There is a limit to the reach of this anti-waiver provision. In a federal court, federal evidence rules and federally-recognized privileges apply; a state statute regarding the scope of privilege is considered "procedural" and will not apply. See *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) (fatality review report privileged by state statute not privileged in federal court; disclosure ordered). For example, a "constitutional tort" lawsuit brought under 42 U.S.C. § 1983 in federal district court could lead, at least in theory, to discovery of privileged communications previously disclosed to the ombudsman.

### *How will the ombudsman prevent release of privileged information?*

The ombudsman is already required to protect confidential records received from a state agency, as AS 24.55.160(b) provides that "the ombudsman may not disclose a confidential record obtained from an agency." Attorney-client communications and attorney work product are plainly confidential under the existing statute and could not be included in a public ombudsman's report. However, if the proposed section is enacted, the ombudsman anticipates new regulations to clarify how our office will manage attorney-client privileged material and attorney work product. To some extent, this information is not any different than other confidential material received from agencies, which the ombudsman cannot disclose. However, if privileged material is relevant to a confidential investigative report or other communications to the agency, then the ombudsman will need regulations specifying how our office will label such material in the

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[1] *Cooper v. District Court*, 133 P.3d 692 (Alaska App. 2006), discusses waiver of privilege in the context of a failure to assert psychotherapist-patient privilege. More recently, in *Peterson v. State*, 280 P.3d 559 (Alaska 2012), the Alaska Supreme Court recognized a privilege for an employee's communications with union representatives representing the employee in a grievance; as a result, letters of the employee's attorney remained privileged despite having been shared with the union representatives.

report, to ensure that the agency is able to easily make redactions to preserve privilege if the report itself becomes subject to a subpoena.

## Informal ombudsman reports (§§ 6-9)

***Why is the ombudsman requesting an amendment providing for "informal" reports?***

The Ombudsman Act, as written in 1975, provides that the ombudsman "shall investigate" and at the end of an investigation, the Ombudsman "shall report" findings under AS 24.55.190. The report under AS 24.55.190 is a non-delegable duty of the ombudsman, so the ombudsman must personally issue each report under AS 24.55.190. This apparently worked for the first few years of the office's existence; however, the idea of an ombudsman's report evolved from a simple two page letter (as documented in our office's archived files) to a large formal document preceded by an equally formal preliminary report. The office's regulations, dating from the 1980's, indicate a formalized process for the ombudsman's reports. These reports are resource-intensive, and the the ombudsman is unlikely to issue more than a dozen per year. In contrast, the ombudsman received 1151 complaints in calendar year 2012. While many of these were declined as premature or otherwise inappropriate for investigation, more than 300 complaints received substantial investigative work without proceeding all the way to a report issued pursuant to AS 24.55.190.

The ombudsman's annual report categorizes such complaints as "discontinued – resolved or closed as "assists." These complaints often involve considerable investigation by the ombudsman's staff; however, these cases do not receive the resources devoted to full-scale ombudsman reports. There are multiple reasons for this. First, when the agency is able and willing to remedy the complaint, the ombudsman's resources may be better used elsewhere. Second, in cases where the complaint brought to our office lacks merit, but the investigation reveals a tangential issue with systemic implications, an informal suggestion is often more appropriate and more likely to be received positively by the agency.

The Ombudsman Act does provide the ombudsman with great discretion to develop procedures for investigation of complaints. See AS 24.55.090 (Ombudsman to promulgate regulations for receiving and processing complaints, conducting investigations, reporting findings). Most other state ombudsman's offices dispose of nearly all complaints informally, with published reports being the exception rather than the rule. The Office of the Ombudsman's existing regulations reflect this practical reality, in that they provide for informal resolution of a complaint and set priorities for choosing which complaints to investigate. Since at least the 1980's, the ombudsman's practice has included a "gray area" of complaints that receive substantial investigative time and include consultations with agency personnel before the complaint is discontinued as informally resolved or as lacking priority for investigation. Although the existing statute provides the ombudsman with considerable procedural discretion, our office would prefer to bring these "gray area" complaints within an express statutory process that acknowledges the resources spent on attempting to resolve such complaints, even when a formal ombudsman's report does not result at the end of day.

***What are examples of cases for which an informal report would be appropriate?***

The following are examples of ombudsman complaints that the ombudsman's staff investigated, but which the ombudsman discontinued after the office provided suggestions to the involved state agencies. These are the types of cases for which a statutory provision for an informal report would be efficient.

*Former employee encounters difficulties with COBRA coverage (Ombudsman complaint J2007-0436)*

The complainant, a former state employee, experienced difficulties with health benefits, due in part to a series of errors made by the AlaskaCare's third-party administrator. An assistant ombudsman investigated the events, and corresponded extensively with the Division of Retirement and Benefits (DRB). DRB found a solution that placed some of the cost of the mistake on the third-party provider, instead of entirely on the former state employee. Due to the agency's cooperation at that point, a more formal set of findings was unnecessary, and the office of the ombudsman discontinued investigation of this complaint without issuing a formal report. As a practical matter, however, the assistant ombudsman had informally consulted with the agency and offered an opinion that the agency needed to further consider the matter and that an administrative act needed to be modified (two of the grounds for issuing an ombudsman's report under AS 24.55.190(a)).

*Office of Childrens' Services responds to concerns regarding supervision of cases and timeliness of case planning for parents (Ombudsman complaint A2009-0709)*

A parent whose children had been in state custody complained about the Office of Children's Services (OCS). The ombudsman discontinued investigation of this complaint, primarily because the facts indicated that investigation could not provide any remedy for the complainant, whose parental rights were being terminated by the court. The ombudsman's staff did discover problems with the OCS caseworker's responsiveness – notably repeated failures to return phone calls within a reasonable time period, and a failure to update the parent's case plan, despite a request from the parent for an updated plan. The assistant ombudsman assigned to this case wrote to the region's Children's Services Manager, describing the problems in detail, and the regional manager responded acknowledging the problems and indicating steps the office was taking to improve supervision and monitoring of cases. The ombudsman did not believe that a more formal investigative report would accomplish any further improvement in administration of that office, and a formal report would not offer any remedy to the individual complainant. For these reasons, the Ombudsman closed the complaint so that the office's resources could be used elsewhere. Again, this is a situation where an assistant ombudsman essentially conducted an informal consultation with the agency regarding apparent problems, the agency responded, and additional production of a formal ombudsman's report under AS 24.55.190 would not have been an efficient use of our office's resources.

*Procedural improvements for the Child Support Services Division*
*(Ombudsman complaint J2011-0317)*

The complainant and the complainant's ex-partner had a child support case, and there was a factual dispute regarding which time periods they lived together (during which no support obligation would accrue). The complainant alleged that the Child Support Services Division had erred in concluding that her ex-partner had lived with her for a multi-year period. The ombudsman's staff pulled records from CSSD and corresponded extensively with CSSD's problem resolution manager. In this case, investigation did not result in any remedy for the complainant, because the facts, although murky, did not establish error on part of CSSD. However, the assistant ombudsman suggested an improvement in the process used by CSSD in resolving these disputes, and CSSD agreed to the suggestion.

As provided in regulation, CSSD may delete support arrears (or recoup an overpayment) after the non-custodial parent provides CSSD with at least three notarized witness statements to show that the non-custodial parent was in fact living with the custodial parent (child support does not accrue when the parents are living together). CSSD then sends a notice to the custodial parent, requesting rebuttal evidence. CSSD, however, had not been providing the custodial parent with a copy of the evidence submitted by the non-custodial parent. The assistant ombudsman suggested that the custodial parent should see the evidence he or she was supposed to rebut. CSSD agreed to this change.

### *What are the similarities and differences between a formal and informal report?*

Before issuing a report – whether formal or informal – the ombudsman must have reasonable grounds to conclude that one or more of the criteria listed in AS 24.55.190(a) applies to the situation, i.e. that

(1) a matter should be further considered by the agency;
(2) an administrative act should be modified or cancelled;
(3) a statute or regulation on which an administrative act is based should be altered;
(4) reasons should be given for an administrative act;
(5) any other action should be taken by the agency;
(6) there are no grounds for action by the agency; or
(7) the agency's act was arbitrary or capricious, constituted an abuse of discretion, or was otherwise erroneous or not in accordance with the law.

Section 6 of HB 127 provides that the Office of the Ombudsman will consult with an agency before giving a critical opinion or recommendation regardless of whether the opinion is formal or informal; however, HB 127 allows the consultation for an informal opinion to be verbal or done by email, and reserves the ombudsman's issuance of a "preliminary report" for a case in which the Ombudsman expects to issue a formal report under AS 24.55.190.

Section 7 of HB 127, in providing for an informal report, allows the ombudsman to delegate this function to the ombudsman's staff, subject to the ombudsman's supervision. A formal report

issued under AS 24.55.190 cannot be delegated, as it must be issued personally by the Ombudsman.

As outlined in section 7 of HB 127, an informal report – unlike the ombudsman's traditional formal reports – cannot be published in full. The legislation allows for disclosure of a summary of the investigation, after the agency has received notice of the planned disclosure with a copy of the summary. This provides the agency with an opportunity to object to the content of the summary before it is made public. The Office of the Ombudsman expects to promulgate regulations implementing these provisions, including a regulation indicating which agency personnel are to receive the summary, and stating the period of advance notice during which an agency may object to the content of the summary.

### *How will the ombudsman decide whether to issue a formal or informal report?*

The Office of the Ombudsman expects to promulgate regulations formalizing the criteria for an informal report – essentially a suggestion to the involved agency – versus the criteria for a formal ombudsman's report issued under AS 24.55.190. The public comment period for the draft regulations will provide an opportunity for feedback from the state agencies most frequently subject to Ombudsman investigations.

## Ombudsman's testimonial privilege and privilege not to produce documents (§ 10)

### *Why is the ombudsman requesting expansion of the existing testimonial privilege?*

The Ombudsman Act, as enacted in 1975, provides the ombudsman with the privilege to not be called to testify in court except when doing so is necessary to carry out the ombudsman's duties:

> **AS 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.

This provision is designed to keep the ombudsman and her staff on the job rather than being drawn into litigation peripheral to the office's mission. Further, knowledge acquired by the ombudsman during an investigation should be available to litigants from the primary sources – the complainant and/or the state agency personnel involved.

The current statute, however, is not explicit regarding protection of the ombudsman's records from subpoena – it states that the ombudsman "may not testify" but does not directly address a subpoena for production of documents. It also does not address whether the privilege applies to administrative hearings. HB 127 contains updated language clarifying that the ombudsman neither testifies nor produces documents to assist litigants, regardless of whether the proceedings are in court or before an administrative law judge. The revised language also makes clear that the

privilege applies regardless of whether the subpoena is for an actual appearance in court or for pretrial discovery.

It is worth noting that the 2001 statute for the Office of Victims' Rights (OVR) is based on the Ombudsman Act, but the OVR's testimonial privilege is considerably more detailed than the 1975 language used in the Ombudsman Act. The ombudsman is requesting updated language similar to that already provided for the OVR.

***How does the language in the ombudsman's existing privilege and in HB 127 differ from the testimonial privilege in the OVR statute?***

Below is a comparison of the testimonial privilege provisions for the Office of the Ombudsman and the Office of Victims' Rights:

| *Existing AS 24.55.260* | *AS 24.55.260 as reenacted by HB 127* | *OVR's testimonial privilege, as enacted in 2001* |
|---|---|---|
| **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.<br>*History* -<br>(Sec. 1 ch 32 SLA 1975) | **AS 24.55.260. Ombudsman's privilege not to testify or disclose documents.** (a) The ombudsman and staff of the ombudsman may not testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions of this chapter.<br>(b) the records of the ombudsman and staff of the ombudsman, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public in accordance with AS 24.55.200, are not subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as the ombudsman determines may be necessary to enforce the provisions of this chapter. Disclosure by the ombudsman is subject to the restrictions on disclosure in AS 24.55.160 – 24.55.190. | **24.65.200. Victims' advocate's privilege not to testify or produce documents or other evidence.** Except as may be necessary to enforce the provisions of this chapter, the determinations, conclusions, thought processes, discussions, records, reports, and recommendations of or information collected by the victims' advocate or staff of the victims' advocate are not admissible in a civil or criminal proceeding, and are not subject to questioning or disclosure by subpoena or discovery.<br>*History* -<br>(Sec. 19 ch 92 SLA 2001) |

The proposed change to the ombudsman's testimonial privilege in AS 24.55.260 clarifies that the privilege not to testify or produce documents extends to administrative hearings as well as

proceedings in court. The office of the ombudsman is more likely than the OVR to investigate issues that could later be of interest to parties in an administrative adjudication, so protection from being subpoenaed for an administrative hearing is more relevant to the ombudsman than to the OVR.

## Procurement by the ombudsman of services, supplies, office space (§ 11)

### *What is wrong with the current procurement statute (AS 24.55.275)?*

The existing statute reads as follows:

> **AS 24.55.275.** Contract procedures. The ombudsman shall adopt by regulation procedures consistent with AS 36.30 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100, and the office of the ombudsman shall comply with AS 36.30.170(b).

The first problem is that the statute authorizes procurement regulations only for "contracts for services," and begs the question of what the Office of the Ombudsman is supposed to do for any other type of procurement. Read literally, it requires that the ombudsman shall have regulations for procurement of services, but no regulations for any other type of procurement. The second problem is that the statute makes the Office of the Ombudsman the only legislative branch agency not following the legislative procurement policies. This is particularly bizarre when considering that many of the ombudsman's purchasing needs are already supplied through the Legislative Affairs Agency – this means that some of the purchases are done using the legislative procurement policies while others are done using an entirely separate set of regulations as mandated by the current AS 24.55.275.

The Office of the Ombudsman is an independent agency within the legislative branch, and not part of the Legislative Affairs Agency. The proposed legislation maintains the ombudsman's autonomy in procurement, while requiring published regulations governing that autonomy. However, HB 127 accomplishes two important goals for the Office of the Ombudsman: (1) it makes the regulations comprehensive instead of applying only to "contracts for services"; and (2) it aligns the ombudsman's procurement process with the rest of the legislative branch, as adapted to the specific needs of the ombudsman's office.

### *What procurements by the office of the ombudsman are affected?*

The Office of the Ombudsman is a small agency, with 11 employees statewide. The following is a list of procurements relevant to the office:

- Office space lease for the Anchorage office
- Case management software and updates for the software (last procured in 1999)
- Personal services contracts for investigators – already excluded from this section

- Office furniture and equipment – usually purchased from a vendor offering a standard state discount (office furniture), or from the same vendor as used by the Legislative Affairs Agency (postal meter). Within the last 10 years, the Ombudsman purchased copiers using the small procurement process – the Ombudsman asked for quotes from office supply stores and picked the one with best price.
- Small Office supplies such as paper, post-it notes and note pads, pens, etc. from Costco or an office supply store.

***Why does the current AS 24.55.275 read the way it does?***

AS 24.55.275 was enacted in 1982 as § 4 Ch 144 SLA 1982 (SCSCSHB156(Fin)amS). Section three of the legislation enacted AS 24.23, including the statement that "this chapter applies to contracts for services to be provided to a legislative agency." Section four provided for the ombudsman's office, and read as follows:

> The ombudsman shall adopt by regulation procedures consistent with AS 24.23 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100.

Section five enacted AS 36.98, Professional Services Contracts, for the executive branch. In short, AS 24.55.275 was part of a set of statutes governing professional services contracts. See SFIN Minutes May 17, 1982 (sectional analysis of bill):

> Sections 1 and 2 acknowledge that there is another procedure which may be used in letting state contracts – a new Chapter 36.98 is established by the SCS. This chapter deals with professional services contracts in executive branch agencies.
>
> Section 3 establishes procedures by which legislative professional services contracts are let. These procedures are similar to those of the executive branch….
>
> Section 4 deals with the Ombudsman and investigative contracts.

The ombudsman's procurement procedures for services were separate from, but consistent with, the other legislative agencies.

Then, in 1986, the Legislature repealed AS 24.23 and AS 36.98. The Legislature replaced the previous procurement code with AS 36.30, which included AS 36.30.020 (Legislative Council directed to adopt procurement procedures for the legislative branch). However, the Legislature did not repeal AS 24.55.275; instead, it replaced the reference to "AS 24.23" with "AS 36.30," tying the Office of the Ombudsman's regulations to the executive branch procurement provisions instead of the legislative branch procurement process as intended in 1982.

As far as our office can determine, AS 24.55.275 is a holdover from 1982 legislation pertaining to services/professional services contracts; the rest of that 1982 legislation has since been repealed.

*Note*: The 1990 amendment to AS 24.55.275 added the requirement that the office's procurements comply with AS 36.30.170(b) (Alaska bidder preference, Alaska products preference, and recycled products preference).

### *SB 12 also amends AS 24.55.275; how does this relate to HB 127?*

This session, SB 12 provides for reorganization of the Alaska Procurement Code, especially the bidder and product preferences. It includes an amendment to AS 24.55.275 changing "the office of the ombudsman shall comply with AS 36.30.170(b)" to "the office of the ombudsman shall comply with the five percent preference under AS 36.30.321(a)."

## Jurisdiction over certain privatized services (§§ 12, 13, 15)

### *Why is the ombudsman requesting jurisdiction over private contractors?*

When the Ombudsman Act was enacted in 1975, privatized services were rare, and the statute made no reference to contractors for state agencies. Now, some services that were historically performed by employees of state agencies – and thus within the ombudsman's oversight – are performed by organizations that have contracted with a state agency to carry out those functions. As a result, the Office of the Ombudsman has actually lost jurisdiction over some activities that would previously have been within the ombudsman's statutory mandate.

### *Would all state contracts be included?*

No. For example, the ombudsman has never had jurisdiction over construction contractors retained by the Department of Transportation, and is not requesting such an expansion of jurisdiction now. As another example, the Department of Health and Social Services has contracts with health care providers for the Medicaid program, and our office is not seeking jurisdiction over those health care providers. A blanket expansion of jurisdiction to "all" contractors is neither appropriate nor practical.

The ombudsman is requesting jurisdiction over entities that hold people in custody on behalf of the Department of Corrections or Department of Health and Social Services Division of Juvenile Justice. The ombudsman is also requesting jurisdiction over entities that are contracted with the state to determine eligibility for a state benefit program or programs, such as a vendor determining whether an individual qualifies for Temporary Assistance from the Division of Public Assistance.

In other words, the ombudsman is requesting jurisdiction over two types of core services that currently are performed by both state agencies and by contractors for those agencies. Both facilities that hold people in custody for the state and entities that act as gatekeepers for access to state benefits are wielding considerable power over individuals, power usually delegated by a

state agency. The ombudsman believes that affected individuals should be able to ask for ombudsman oversight regardless of whether that power is being wielded by a state employee or a private contractor.

***Why does the ombudsman believe this change in jurisdiction is important?***

The ombudsman believes that it is important that a citizen's recourse to the ombudsman not be severed because the state agency privatized its function. The ombudsman believes that this is crucial when the function that has been delegated to a contractor is to either (1) hold individuals in custody; or (2) control access to the benefits of a state program.

The primary example motivating the ombudsman's request for this jurisdictional change is a cluster of complaints received from Alaska inmates held in the Hudson, Colorado contract facility. These complaints alleged failure to provide care for major medical conditions. Because these complaints originated in the contract facility, ombudsman investigators could not directly interview the staff at the facility or require immediate delivery of the inmates' records. The Office of the Ombudsman asked the Department of Corrections (DOC) to follow up with its contractor and to then respond to the ombudsman. For several of the complaints, it took months for DOC to respond and provide medical records from Hudson. Fortunately, the most serious of these complaints proved unsupported. Because the ombudsman did not have direct access to Hudson personnel and records, these health/safety complaints could not be addressed efficiently. Further, these ultimately unsupported complaints were open and consuming staff time far longer than should have been necessary, due to the ombudsman's reliance on indirect access to the evidence.

The ombudsman notes that the Department of Corrections is moving inmates from Hudson, Colorado to the new Goose Creek Correctional Center; however, the state still has inmates at Hudson today. Also, DOC houses inmates in halfway houses around Alaska, and the ombudsman receives complaints regarding conditions at some of those facilities as well.

***Would this apply to private businesses with existing contracts?***

No. The legislation is designed to apply prospectively, with ombudsman jurisdiction made a required term of new contracts. An entity currently operating under a contract will not be "surprised" by an ombudsman investigation.

***When would this provision take effect?***

Section 15 of HB 127 provides for a delayed effective date. The ombudsman would only have jurisdiction over contractors (performing services listed in section 12) acting under contracts entered into after January 1, 2015.

***How will the ombudsman implement these changes in jurisdiction?***

Beginning in 2015, section 13 of HB 127 makes the ombudsman's jurisdiction a required term of any contract for a service listed in section 12 of HB 127, i.e. custodial/detention services and services to determine eligibility for a state program or benefit. As contracts are solicited or renewed, the ombudsman's jurisdictional mandate will gradually take effect.

Before 2015, the ombudsman expects to work with affected state agencies, primarily the Department of Corrections and the Department of Health and Social Services, to explain the ombudsman's role in regard to contract providers. As part of this process, the ombudsman anticipates promulgating regulations, and expects to receive substantial feedback on draft regulations from both state agencies and contract service providers.

***Will the ombudsman need more staff to handle the office's expanded jurisdiction?***

No, the ombudsman does not anticipate requesting additional positions due to this statutory change, at least not for several years. First, this expansion of jurisdiction will "ramp up" gradually, beginning in 2015. Second, complaints about contract services – especially private prison facilities and halfway houses – are already taking up existing staff resources. Our office cannot currently investigate these complaints directly, but we already spend substantial amounts of time referring such complaints back the state agency supervising the contract and then following up with that agency. This indirect review of complaints tends to be inefficient and actually take up more time than it would take to look directly at the complaint.

***Will this jurisdictional change be expensive for the executive branch agencies that contract for services covered by the amendment?***

That seems unlikely. The ombudsman does not anticipate a significant increase in contract costs due to this legislation. Further, the legislation does not require additional staff at any of the executive branch agencies affected.

# Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: HB 127
Fiscal Note Number:
() Publish Date:

Identifier: HB127-DOA-PDA-03-08-13
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House State Affairs

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

**Expenditures/Revenues**

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

| | FY2014 Appropriation Requested | Included in Governor's FY2014 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY 2014** | **FY 2014** | **FY 2015** | **FY 2016** | **FY 2017** | **FY 2018** | **FY 2019** |
| Personal Services | *** | | *** | *** | *** | *** | *** |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants & Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **Total Operating** | *** | **0.0** | *** | *** | *** | *** | *** |

**Fund Source (Operating Only)**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| None | | | | | | | |
| **Total** | *** | **0.0** | *** | *** | *** | *** | *** |

**Positions**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Change in Revenues** | | | | | | | |

**Estimated SUPPLEMENTAL (FY2013) cost:** 0.0

**Estimated CAPITAL (FY2014) cost:** 0.0

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

**Why this fiscal note differs from previous version:**

Not applicable, initial version


Prepared By: Quinlan Steiner Phone: (907)334-4414
Division: Public Defender Agency Date: 03/08/2013 12:35 AM
Approved By: Curtis Thayer, Deputy Commissioner Date: 03/08/13
Department of Administration

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. HB127

## Analysis

This bill places the Alaska Bar Association under the jurisdiction of the Ombudsman's Office. The bill also purports to prevent the waiver of the attorney-client privilege if such information is provided to the Ombudsman's office and to prevent further disclosure by the Ombudsman's office.

This bill would likely make attorney responses to bar grievances subject to disclosure to the Ombudsman's office should that office conduct an investigation into the Bar Association's action on a grievance filed against an attorney. This would prevent attorneys from fully responding to bar grievances due to the risk that client confidences would be revealed to a third-party in violation of Alaska Code of Professional Conduct.

The failure to respond fully to bar grievances is likely to result in additional expenses surrounding litigation of proper response to bar grievances and increased acceptance of grievances for investigation. The Agency cannot predict the fiscal impact of this legislation and, therefore, submits and indeterminate fiscal note.

# FISCAL NOTE

**STATE OF ALASKA**
**2013 LEGISLATIVE SESSION**

Bill Version **HB127**
Fiscal Note Number
() Publish Date

Identifier (file name) HB127-LEG-OMB-03-01-13
Title Amendments to the Ombudsman Act
Sponsor House Rules by Request of the Ombudsman
Requester House State Affairs

Dept. Affected Alaska Legislature
Appropriation Legislative Council
Allocation Ombudsman
OMB Component Number 790

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| | FY14 Appropriation Requested | Included in Governor's FY14 Request | Out-Year Cost Estimates | | | | |
|---|---|---|---|---|---|---|---|
| **OPERATING EXPENDITURES** | **FY14** | **FY14** | **FY15** | **FY16** | **FY17** | **FY18** | **FY19** |
| Personal Services | | | | | | | |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants, Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| **TOTAL OPERATING** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |

| **FUND SOURCE** | | (Thousands of Dollars) | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 1002 | Federal Receipts | | | | | | | |
| 1003 | GF Match | | | | | | | |
| 1004 | GF | | | | | | | |
| 1005 | GF/Prgm (DGF) | | | | | | | |
| 1037 | GF/MH (UGF) | | | | | | | |
| 1178 | temp code (UGF) | | | | | | | |
| **TOTAL** | | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |

| **POSITIONS** | | | | | | | |
|---|---|---|---|---|---|---|---|
| Full-time | | | | | | | |
| Part-time | | | | | | | |
| Temporary | | | | | | | |

| **CHANGE IN REVENUES** | | | | | | | |
|---|---|---|---|---|---|---|---|

**Estimated SUPPLEMENTAL (FY13) operating costs** _____ *(separate supplemental appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**Estimated CAPITAL (FY14) costs** _____ *(separate capital appropriation required)*
*(discuss reasons and fund source(s) in analysis section)*

**ASSOCIATED REGULATIONS**

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended, or repealed? 12/31/2013 Discuss details in analysis section.

**Why this fiscal note differs from previous version (If initial version, please note as such)**

Initial Version

Prepared by Beth Leibowitz, Assistant Ombudsman Phone 465-5311
Division Office of the Ombudsman Date/Time 3/5/13 8:00 AM
Approved by Linda Lord-Jenkins, Ombudsman Date 3/5/2013
Office of the Ombudsman

(Revised 1/15/2013 OMB)

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. HB127

## Analysis

HB 127 allows for the Ombudsman to receive step increases on the salary schedule set out in AS 39.27.011(a). By unlocking the position from step A, the Office of the Ombudsman would follow standard personnel policies regarding initial step placement and increases. Because the legislative agencies are restricting hiring and merit increases for FY14, the Ombudsman does not expect to implement any step increase in FY14, and thus no additional funds are requested for FY14. Any subsequent step increases will be handled through the normal personal services budgetary process for the Ombudsman's Office.

HB 127 will change the ombudsman's procedure for issuing investigative reports, and the ombudsman expects to revise the office's regulations in accordance with the statutory change. If all provisions of HB 127 are enacted, then the legislation will also necessitate new regulations specific to the handling of any attorney-client privileged material provided to the ombudsman by a state agency; reenactment of the ombudsman's procurement regulations; and new regulations implementing the ombudsman's jurisdiction over certain contractors performing services for state agencies.

HB127 also contemplates a limited expansion of the ombudsman's jurisdiction, to encompass certain types of contract service providers. This expansion would not be effective until 2015, so there is no additional appropriation for FY14. The ombudsman anticipates that existing staff are sufficient to absorb the modest anticipated increase in workload; therefore, the cost estimates are zero.

No other provisions of HB 127 should require an increased appropriation.


March 11, 2013

**AMERICAN CIVIL LIBERTIES UNION OF ALASKA**
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG



The Honorable Bob Lynn, Chair
The Honorable Wes Keller, Vice-Chair
House State Affairs Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
*via email:* Rep.Bob.Lynn@akleg.gov
Rep.Wes.Keller@akleg.gov

**Re: House Bill 127 – ACLU Review**
***Availability of Public Records***

Chair Lynn, Vice-Chair Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 127, a bill relating to the State Ombudsman.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with our opinions and concerns regarding the proposed legislation, in particular ensuring that our government is representative of the people and that public records are appropriately available for review.

We would be happy to work with you or the Committee to answer any questions you might have.

**State Reports and Communications Should be Available as Public Records When Possible**

The government of the state of Alaska belongs to its citizens, not to its bureaucrats, executives, or legislators. Having the ability to monitor the conduct of individual state agencies or officials – such as the Ombudsman – and to ensure that state agencies and officials are providing appropriate services to the citizens is vitally important.

The ACLU of Alaska's initial concern with HB 127 lies in Sections 4 and 6 which, respectively, completely exempt investigatory communications and preliminary opinions from public disclosure. While there may be specific reasons for managing records, for example while an investigation is pending, or where privacy or attorney professional requirements so mandate, a blanket prohibition on disclosure is too broad.

**Conclusion**

We hope that the State Affairs Committee will consider our comments on HB 127.

Please feel free to contact the undersigned should you require any additional information. And, we are happy to answer informally any questions that Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
*Executive Director*
ACLU of Alaska

cc: Representative Lynn Gattis, Rep.Lynn.Gattis@akleg.gov
Representative Shelley Hughes, Rep.Shelley.Hughes@akleg.gov
Representative Doug Isaacson, Rep.Doug.Isaacson@akleg.gov
Representative Charisse Millett, Rep.Charisse.Millett@akleg.gov
Representative Jonathan Kreiss-Tompkins, Rep.Jonathan.Kreiss-Tomkins@akleg.gov

**Patty Krueger**

| | |
|---|---|
| **From:** | Jeffrey Mittman <JMittman@akclu.org> |
| **Sent:** | Monday, March 11, 2013 7:00 PM |
| **To:** | Rep. Bob Lynn; Rep. Wes Keller |
| **Cc:** | Rep. Lynn Gattis; Rep. Shelley Hughes; Rep. Doug Isaacson; Rep. Charisse Millett; Rep. Jonathan Kreiss-Tomkins; Patty Krueger |
| **Subject:** | House Bill 127 - Availability of Necessary Public Records |
| **Attachments:** | Lynn & Keller.HB 127.ACLU Review.2013-03-11.pdf |

**Chair Lynn, Vice-Chair Keller:**

**Attached is written testimony regarding House Bill 127, Relating to the State Ombudsman.**

**The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with information highlighting the blanket prohibitions on availability of public records.**

**We would be happy to work with you or the Committee to answer any questions you might have.**

**Thank you,**

**Jeffrey Mittman**

Direct dial: (907) 263-2002

Cell: (907) 230-0665


Jeffrey A. Mittman

Executive Director

ACLU of Alaska

1057 W. Fireweed Lane, Suite 207

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(907) 258-0044, ext. 2002

(907) 258-0288 (fax)

# State of Alaska Ombudsman

Reply to:

☐ P.O. Box 101140
Anchorage, AK 99510-1140
(907) 269-5290
(800) 478-2624
(FAX) 269-5291

☒ P.O. Box 113000
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970
(FAX) 465-3330

March 5, 2013

Representative Bob Lynn
State Capitol Room 108
Juneau, Alaska 99801

Re: HB 127 (Amendments to the Alaska Ombudsman Act – Request for Hearing)

Dear Rep. Lynn:

HB 127 has been introduced by the House Rules Committee, at the ombudsman's request. The bill has been referred to the House State Affairs Committee, and I ask that it be scheduled for a hearing as soon as reasonably possible. Enclosed is a bill packet containing the following:

- Transmittal letter summarizing HB 127
- HB 127 (28-LS0088\R)
- Sectional analysis
- FAQs regarding the proposed legislation
- Fiscal note

If you have questions regarding the bill packet, please contact me at 269-6291 in Anchorage or 465-4479 in Juneau, or Assistant Ombudsman Beth Leibowitz at (907) 465-5311.

Thank you for your time and consideration.

Sincerely,

Linda Lord-Jenkins
State of Alaska Ombudsman

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** February 19, 2013

**SUBJECT:** Alaska Bar Association (Work Order No. 28-LS0487)

**TO:** Senator John Coghill
Attn: Rynnieva Moss

**FROM:** Hilary Martin
Legislative Counsel

You have asked two questions regarding the Alaska Bar Association: (1) is the way in which the Alaska Bar Association collects fees and spends money without going through the appropriations process legal; and (2) have there been any Alaska Supreme Court decisions addressing how the Alaska Bar Association conducts business, or placed limits on the Association's operations.

We have previously addressed similar questions in 2002 and 2007. I have enclosed copies of those memos with this memo. I agree with the conclusions of the previous memos.

**Current funding of the Alaska Bar Association**

The Alaska Bar Association (Bar) collects licensing and other fees, and apparently does not deposit those fees into the general fund. The fees are also apparently not appropriated to the Bar by the legislature. The Bar's method of collecting and dispersing funds appears to be unconstitutional.

Article IX, sec. 13, Constitution of the State of Alaska, states:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

AS 37.05.170 parallels this constitutional section by stating that payments may not be made from a fund unless there has been an appropriation:

> Payment may not be made and obligations may not be incurred against a fund unless the Department of Administration certifies that its records disclose that there is a sufficient unencumbered balance available in the fund and that an appropriation or expenditure authorization has been made for the purpose for which it is intended to incur the obligation.

In addition, art. IX, sec. 7, Constitution of the State of Alaska, states that "the proceeds of any state tax or license shall not be dedicated to any special purpose," and AS 37.05.146(a) requires program receipts are to be accounted within and appropriated from the general fund.[1]

The Bar is governed by the Board of Governors (Board).[2] While the Board is authorized to "establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds,"[3] this, in my opinion, does not establish a dedicated fund or otherwise authorize the Board to spend money without first receiving an appropriation.

The Bar could perhaps argue that they are not a state agency, and thus not subject to the appropriations process. However, this argument is undercut by AS 08.08.010, which states: "There is created an instrumentality of the state known as the Bar . . . ." Therefore, it seems likely that the Alaska Bar Association would be found to be a state agency and subject to the appropriations process.[4]

This issue could be rectified with an annual appropriation of the Board's program receipts back to the Board. This could be done in the same way that other licensing boards are appropriated through the operating budget.

**Court Cases**
You have asked whether there have been any Alaska Supreme Court cases addressing how the Bar conducts its business or that places limits on the Bar's operations.

Aside from cases regarding the Bar's practices regarding examination, admission to the bar, and attorney discipline, there was only one case I found dealing with the operations of the Bar.

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[1] The entire section reads:

> In AS 37.05.142 - 37.05.146 and AS 37.07.080, "program receipts" means fees, charges, income earned on assets, and other state money received by a state agency in connection with the performance of its functions. Unless otherwise provided in this section, program receipts are accounted for within, and appropriated from, the general fund of the state.

[2] AS 08.08.030.

[3] AS 08.08.080(c)(2).

[4] Please see the previous two memos enclosed for a more in-depth discussion of whether the Bar would be considered a state agency.

In *Horowitz v. Alaska Bar Association*, the Alaska Supreme Court held that the Alaska Bar Association was not subject to the open meetings statute.[5] The Bar was exempted from the Administrative Procedure Act by statute.[6] The open meeting statute was a part of the Administrative Procedure Act, and so the Court held that the open meetings statute did not apply to meetings of the Bar. Since that case, the legislature enacted AS 08.08.075, which states that "AS 44.62.310 - 44.62.319 (Open Meetings Act) shall apply to the meetings of the board. Members of the Alaska Bar and the public shall be given 30 days' notice of meetings of the board except for emergency meetings. Meetings of the board shall take place in the state."

If I may be of further assistance, please advise.

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[5] 609 P.2d 39, 42 (Alaska 1980).

[6] AS 08.08.100. The statute at the time read: "The bylaws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62). *Horowitz*, 609 P.2d at 41.

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**MEMORANDUM** April 23, 2007

**SUBJECT:** Alaska Bar Association Questions (Work Order No. 25-LS0879)

**TO:** Representative John Coghill, Jr.
Attn: Rynnieva Moss

**FROM:** Alpheus Bullard
Legislative Counsel

You requested a legal opinion as to three related questions, (1) whether the existence of the Alaska Bar Association ("bar association") prior to Alaskan statehood exempts the bar association from the Alaska constitutional prohibition against the dedication of sources of public revenue found in Art. IX, sec. 7, (2) whether the existence of the bar association prior to statehood places the bar association outside the constitutional appropriations framework, and (3) whether funds of the bar association, governed by the Alaska Supreme Court, could be subject to legislative appropriation. In a subsequent conversation with Ms. Moss of your staff, Ms. Moss explained that these questions related to an over-arching inquiry as to whether the bar association could be alternately funded through the Legislature's appropriations to the court system. Allow me to address these questions as a whole below.

**Background**

In enacting AS 08.08, the legislature re-established the "integrated bar" that the Territorial Legislature established in 1955.[1] An "integrated bar" means that attorneys must not only be admitted by a court to practice law, they must also meet a legislative requirement to be licensed, be members of the bar association, and pay bar dues. These licensing and bar membership requirements are within the legislature's police power to protect the public welfare. However, they do not supplant the court's inherent power to define what the practice of law is and to determine who is qualified to practice law.

Unlike other chapters in AS 08 where boards and commissions regulate the practice of the profession that they license, AS 08.08 does not give the bar association regulatory control of the practice of law. AS 08.08.210(b) provides that the practice of law shall be defined in the Alaska Bar Rules (these are rules adopted by the Alaska Supreme Court).

**Current funding of the bar association**

Currently, the operations of the bar association are "funded entirely by the membership through dues, admission fees, continuing legal education charges, lawyer referral fees,

[1] Alaska Integrated Bar Act, Chapter 196, Laws of Alaska, 1955.

convention fees, and interest income.[2]" The bar association receives and expends its membership fees and other sources of revenue without an appropriation by the legislature, a circumstance authorized by AS 08.08.080(c)(2).[3] The bar association has not received any state funding through appropriation except for per diem and travel expenses of the public members of the Board of Governors between 1981 and 1986.[4]

**Bar association funds are state revenue**

The funds which sustain the bar association are "state revenue." To characterize these funds as anything other than "a source of public revenue," would be to posit that the bar association is a private organization existing outside the state governmental framework. This is not a credible argument. The bar association is both a creature of statute (AS 08.08) and an organ of the court system subject to the Alaska Bar Rules promulgated by the Alaska Supreme Court.

**Bar association revenues as a dedicated fund**

The bar association was established by the Legislature of the Territory of Alaska in 1955. Whether the bar's current revenues are a dedicated fund is an academic detail, for nothing prohibits the legislature from dispensing with a dedicated fund. While the bar association's use of its member dues may be a "dedication for [a] special purpose[s][5]" which existed upon the date of the ratification of art. IX, sec. 7,[6] no dedication need necessarily be retained, all existing dedications at the time of the constitution's ratification were to "be left in effect [only] as long as the legislature [sees] fit to leave them there."[7]

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[2] Board of Governors of the Alaska Bar Association: Sunset Review, November 28, 2005, Audit Control No. 41-20040-06, at 14.

[3] AS 08.08.080(c)(2) provides "(c) Consistent with this chapter and the Alaska Bar Rules, the board may . . . (2) establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds;"

[4] Board of Governors of the Alaska Bar Association: Sunset Review, November 28, 2005, Audit Control No. 41-20040-06, at 35 (Response of Alaska Bar Association).

[5] Language from Art. IX, sec. 7, Dedicated Funds, which reads:

> The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

[6] The Alaska constitution was ratified on April 26, 1956.

[7] Convention Delegate Nerland quoted in Alaska Constitutional Convention Proceedings, part 4, Proceedings: January 17-25, 1956 p. 2415.

**Bar association funds as a trust**
The only argument that could be marshaled to prevent bar association funds from being deposited into the general fund and allocated back to the bar association is that these funds represent some sort of trust by implication. This would be a novel legal argument without an identifiable precedent, and it is my opinion that such an argument would not be raised.

**Funding the bar association through the legislature's budgetary appropriation to the Court System**
There is no constitutional or legal reason that the revenues of the bar association could not be deposited into the general fund and allocated back to the Court System to fund the operations of the bar association through the legislature's constitutional "power of the purse."

**Elephant in the room**
Regulation of the practice of law is an inherent judicial power vested with the Alaska Supreme Court. See Citizens Coalition v. McAlpine, 810 P.2d 162 (Alaska 1991) and Kelly v. Donohue, 907 P.2d 458 (Alaska 1996). In Citizens Coalition, the Alaska Supreme Court expressed its belief in its extensive rule-making authority arising out of the Alaska Constitution. The Court noted that "[o]ne inherent judicial power that we have exercised repeatedly is the power to regulate the practice of law in the state ...[i]n exercise of our inherent power, we have adopted rules that govern beyond the 'administration . . . practice and procedure' limitations of article IV, section 15, most notably the Alaska Bar Rules and the Code of Professional Responsibility." Id. at 165. It is possible that the court could, under its judicial power and jurisdiction found in art. IV, secs. 1 and 15 of the Alaska constitution, decide that the bar association as an element of the judicial system should be removed from statute and be placed under the control of the court system. It is not possible to know what would elicit such a judicial action, but legislative action that served to unduly affect the operations or activities of the bar association might be one such circumstance.

I hope that the above information is helpful. If you have any questions or if I can be of further assistance, please do not hesitate to contact me.

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**MEMORANDUM** February 14, 2002

**SUBJECT:** Alaska Bar Association (Work Order No.22-LS1430)

**TO:** Representative John Coghill
Attn: Rynnieva

**FROM:** Terri Lauterbach
Legislative Counsel

You have asked two questions:

(1) whether "the manner in which [the] Alaska Bar Association collects fees and spends money without going through the appropriations process [is] legal"; and

(2) whether there have been any Alaska Supreme Court decisions "addressing how the Alaska Bar Association conducts business and/or what limits have been placed on the . . . Bar Association's operations."

In my opinion, the Alaska Bar Association holds and spends its membership fees without an appropriation of the fees by the legislature because of political and historical factors related to the bar and the absence of litigation to challenge the situation and not because the situation is protected by a legal principle. I have not found a court decision on the extent to which the appropriation process should apply to the bar association, but there have been some other kinds of limits placed on the association's operations.

## DISCUSSION

### Question #1 - appropriation process.

As you know, the state constitution says that "no money shall be withdrawn from the treasury except in accordance with appropriations made by law" (Art. IX, sec. 13). AS 37.05.170 echoes this constitutional mandate by providing that payments may not be made from a fund unless there is an appropriation authorizing the payment. The constitution also provides that "the proceeds of any state tax or license shall not be dedicated to any special purpose" (Art. IX, sec. 7), and AS 37.05.146 says that money received by a state agency "in the connection with the performance of its functions" are in the general fund of the state. The money may be kept in a special account under AS 37.05.142 and, under AS 37.05.144, may be available for spending later by the same agency that collected the money, but only after an appropriation has returned the money to the agency for spending.

It appears to me that the situation currently existing with respect to the Alaska Bar Association violates all of the above constitutional and statutory principles. The association keeps the money it collects in connection with the performance of its functions, does not consider the money to be part of the general fund, dedicates the money for the use of the association, and spends the money without being authorized to do so by an appropriation.

As far as I can surmise, the only legal basis on which the Alaska Bar could operate the way it does without violating the constitutional and statutory principles cited above is if the bar is not a state agency or if this particular state agency has a legal exemption from the constitutional and statutory principles cited above.

There seem to me to be plenty of indicators that the Alaska Bar is a state agency. The statewide Alaska Bar Association did not even exist until it was created by a statute in 1955. (AS 08.08.010) Furthermore, AS 08.08.010 specifically provides that the Alaska Bar is "an instrumentality of the state." The powers of the Alaska Bar are determined by the state, derived from the power of the legislature to provide for the public welfare (Art. VII, sec. 5) and/or from the power of the Alaska Supreme Court to adopt rules "governing the administration of all courts" (Art. IV, sec. 15).[1] See AS 08 and the Alaska Bar Rules (which were adopted by the Alaska Supreme Court). Even the by-laws of the bar association recognize that the powers of the association come only from these sources. (Section 3, Bylaws of the Alaska Bar Association.) That the association's powers are state-derived (and not private powers) is also buttressed by the fact that the association's actions are evaluated under standards that are applicable to state activities (not private activities) in cases involving the privileges and immunities clause,[2] and in cases involving substantive due process and equal protection[3] under the federal constitution.

As to whether the Alaska Bar has a legal exemption not granted to other state agencies, one could point to AS 08.08.080(b)(2), which gives the Board of Governors the power to "collect, deposit, invest, and disburse membership and admission fees." However, it is well-settled that nothing in a statute can be construed to be an exception to a requirement set by the constitution, and the constitution, as mentioned above, prohibits dedication of almost every type of state revenue and requires an appropriation in order to remove

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[1] It is immaterial for purposes of this memo whether the Alaska Bar is legislatively-established or judicially-established and whether its power derives from statutes or court rules. The judiciary and its agencies are as bound by the constitutional and statutory restrictions pertaining to dedicated funds and appropriations as are any other state agencies.

[2] *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640 (Alaska 1980)

[3] *Application of Obermeyer*, 717 P.2d 382 (Alaska 1986)

money from the state treasury. Since our statutes provide that money collected by a state agency in the performance of its functions is part of the general fund (and the general fund is in the state treasury), it seems to me that the general language of AS 08.08.-080(b)(2) could be construed by a court (to avoid an unconstitutional result) as giving the Board of Governors the power to "collect [on behalf of the state], deposit [to the account of the Department of Revenue], invest [in the name of the state], and disburse [after an appropriation] membership dues and fees."

The fact that the Alaska Bar does not currently apply AS 08.08.080(b)(2) as I think that statute should be construed by a court is apparently based on three main factors: a stormy political history that has involved power struggles between the legislature, the court system, and the bar association[4] that may have left the legislature reluctant to venture into another area of disagreement with either the bar association or the court system; a currently existing consensus (apparently) under which the legislature has reached some sort of accommodation with the bar association with respect to the appropriations process and the bar's use of fees; and the absence of a willing private (public interest) litigant to test the situation in court.

**Question #2 - limit on the bar association.**

As for your second question, most limits on the bar association's activities come from the Alaska Bar Rules. These are rules adopted by the Alaska Supreme Court within its judicial power relating to the administration of justice. For instance, the court, not the bar association, is the final decision maker on questions involving admission to the bar and imposition of disciplinary sanctions on lawyers. However, I do know of at least one instance where the legislature has placed a limit on the association's activities. In 1981, the legislature enacted AS 08.08.075, apparently in response to a 1980 court opinion, *Horowitz v. Alaska Bar Ass'n*, 609 P. 2d 39 (Alaska 1980), that held that the association was not covered by the open meetings law merely because the association's rules and by-laws had been exempted by statute from AS 44.62. AS 08.08.075, enacted after this court decision, provides that AS 44.62 310 and 44.62.312 do apply to the meetings of the Board of Governors of the Alaska Bar (the bar association).

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I hope the above discussion and accompanying material is helpful to you as you consider your options. I could draft you a simple bill to stimulate discussion of this topic, if you wish. It could be along the lines of amending AS 08.08.080(b)(2) to read as mentioned above: "collect **on behalf of the state**, deposit **to the name of the Department of Revenue**, invest **in the name of the state**, and**, after an appropriation by the legislature,** disburse membership dues and fees."

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[4] See enclosed article, "A Revolt in the Ranks: The Great Alaska Court-Bar Fight," Alaska Law Review, June 1996, pages 1 - 32.

If you would like such a bill drafted, or if I can be of other assistance, please let me know at your earliest convenience.

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Enclosure