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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII

CONCLUSION

For the foregoing reasons, plaintiffs seek the following:

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

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

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

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

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

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

Respectfully submitted this 15th day of January, 1979.

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Attorneys for Appellants/
Cross-Appellees

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THE SUPREME COURT OF THE STATE OF ALASKA

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

File No. 4310/4311

BRIEF OF APPELLEE/CROSS-APPELLANT
THE ALASKA BAR ASSOCIATION

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON

By _____
John M. Conway

By _____
Patrick B. Gilmore

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

ROBERT D. BACON
Clerk, Supreme Court

_____
Deputy Clerk

SUBJECT INDEX

TABLE OF AUTHORITIES

SESSION LAWS

STATUTORY PROVISIONS

ALASKA STATUTES

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

(3) concerning annual and special meetings;

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

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

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

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

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

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

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

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

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

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

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

(d) This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

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

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

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

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

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

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

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

RULES

Alaska Rule of Appellate Procedure 5:

Judgments From Which Appeal May Be Taken.

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

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

Attorney's Fees.

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

ATTORNEY'S FEES IN AVERAGE CASES

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

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

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

SESSION LAWS

Chapter 48 SLA 1966

AN ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States Constitution:

14th Amendment, Section 1:

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

Alaska Constitution:

Art. I, Section 2:

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

Art. I, Section 7:

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

CROSS-APPEAL

JURISDICTIONAL STATEMENT

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE

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

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

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

This cross-appeal followed.

STATEMENT OF FACTS

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

ARGUMENT

I

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

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

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

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

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

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

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

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

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

ANSWER TO DIRECT APPEAL

STATEMENT OF CASE

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

ARGUMENT

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

PLAINTIFFS HAVE NOT BEEN DEPRIVED OF DUE PROCESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 6th day of March, 1979.

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

By _____
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IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Appellants/Cross-Appellees,

vs.

THE ALASKA BAR ASSOCIATION,

Appellee/Cross-Appellant.

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

APPELLANTS' REPLY BRIEF/ CROSS-APPELLEES' OPPOSITION BRIEF

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

Robert D. Bacon
Clerk of the Court

Nadya Baddeley
Deputy Clerk of the Court

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I.

ARGUMENT IN REPLY ON PLAINTIFFS' APPEAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Conclusion.

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

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

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

II.

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

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

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

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

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

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

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

Transcript, 9-10.

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

supra, 535 P.2d at 1417.

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully Submitted this 27th day of March, 1979.

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

BY: Michael J. Frank

Attorneys for Appelants/
Cross-Appellees

PRINTED BY KEN WRAY'S PRINT SHOP, INC. ANCHORAGE, ALASKA

FILED IN OPEN COURT
Date: 9/11/78 [illegible]

John M. Conway, Esq.
ATKINSON, CONWAY, YOUNG, BELL & GAGNON
Attorneys for Defendant
1007 West Third Avenue, Suite 303
Anchorage, Alaska 99501

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

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

Plaintiffs,

vs.

THE ALASKA BAR ASSOCIATION,

Defendant.

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

No. 3AN-78-1198 Civ.

JUDGMENT

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

AUG 7 1978

LAW OFFICES
ATKINSON, CONWAY YOUNG, BELL & GAGNON, INC.
1007 WEST THIRD AVE.
ANCHORAGE, ALASKA
TELEPHONE 279-5563

AUG 30 '78

13[illegible]

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

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

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

Mark C. Rowland
Judge of the Superior Court

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

Deputy Clerk

Service Acknowledged this 7 day of AUGUST, 19 78

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

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
1007 WEST THIRD AVE.
ANCHORAGE, ALASKA
TELEPHONE 279-5563

ABA

BAR RULE

7-HB85

#5

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M February 21, 1980

TO: Members of the House Judiciary Committee

FROM: Charles H. Parr, Chairman

SUBJECT: Options for Bar Association Sunset Review

It appears to me that there are a number of options for the Committee in dealing with the Sunset Review of the Bar Association. I have listed these very sketchily and hope that they may serve as a framework for our discussions.

limited period; & modify

1 - Continue the existing situation in which the Supreme Court has final authority and delegate to the Bar Association the responsibility for admissions, discipline, and rule proposal.

2 - Same as No. 1 above except that no State funds will be made available to the Bar Association and it would be made clear to the Supreme Court that such funds should not be included in its budget.

3 - De-integrate the Bar Association, which would then become purely a private organization. Make the Supreme Court directly responsible for admissions and discipline.

4 - Establish a Board of Legal Practice similar to the existing boards for other professions. Make this board responsible for admissions and discipline. Under this option the Bar Association would be a private organization and would carry out any other functions it might choose.

5 - Do away with mandatory membership in the Bar Association, leaving other things as they are.

6 - extension, but with law changes - keep on short lease of 1-2 yrs.

CHP:vc

Alaska State Legislature

House of Representatives

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

M E M O R A N D U M

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#2 Judicators + Barristers

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Martin, Anderson

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Dan Bart.

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Fred 6. Malone Phillips. Brown
2 yr extension +
com. amend the integrated Bar act.

CHP:vc

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 31, 1980

SUBJECT: The practice of law in Alaska
(Work Order Number 8357)

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

FROM: Richard A. Bradley
Legislative Counsel

We have delivered to you the bill responding to your request for a bill disestablishing the integrated bar in Alaska.

Since it was delivered to you, an omission from the bill has come to our attention which should be corrected in any committee substitute requested.

In a series of places in the statutes, the law requires that certain things be done by a "member of the Alaska Bar Association." This phrase has historically been synonymous with "admitted to the practice of law in Alaska" but the bill requested will change that.

Accordingly, I proposed to add amendments to these sections in a committee substitute:

(1) AS 09.43.200;

(2) AS 18.85.060;

(3) AS 41.17.130; and

(4) AS 41.17.140.

Several sections already contain the appropriate language and would not be changed. See, AS 24.20.075, AS 42.06.060, and AS 47.37.080.

These sections turned up in a quick computer search. Others may exist and we will seek to identify them if a committee substitute is requested.

RAB:ljb

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M March 29, 1980

SUBJECT: The practice of law in Alaska
(Work Order No. 8357)

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

FROM: Richard A. Bradley
Legislative Counsel

A bill responsive to the request of the committee is enclosed. Because the matters involved in the bill are complex, I have prepared this memorandum to offer observations to the committee on what it has requested and what I have delivered to you.

I chose not to follow the format of your request, a suggested repeal and reenactment of AS 08.08; rather, I have amended existing law where possible to reflect the changes made in AS 08.08.

The request of the committee directs that a bill be prepared abolishing the integration or unification of the Alaska Bar Association. The request then confers extensive police powers on the governing board of the resulting voluntary association.

I am concerned with the allocation of substantial police powers to a voluntary association. In my view, the mixed character of the resulting Alaska Bar Association offers the substantial possibility that what results will be found by the courts to be unconstitutional.

The bill imposes the responsibility of a public agency on a voluntary association. It is required to act in the same manner that a public agency would act. These safeguards cloud, in my judgment, the otherwise clear prohibition of the grant of police powers to a private, voluntary organization.

And I must confess, in candor, to the committee that the co-mingling of public responsibilities on a voluntary association has made difficult the task of drafting the bill before you. I will seek to identify the issues that have concerned me in the following analyses:

Section 10. The only change requested in this section is the substitution of "agency" for "instrumentality". The change is essentially semantic; I recognize, however, as does the committee, that "agency" is the customary word used to describe a unit of government. The change should help resolve the apparent concern of the committee which I discuss subsequent in this memorandum. For added emphasis, a subsection (b) is added to the section in place of the section requested by the committee as sec. 150.

Section 20. The provision is repealed and reenacted and the essential change is from a law requiring membership of all attorneys admitted to practice to a voluntary association.

Section 30. The provisions of sec. 30 are unchanged and the section does not appear within this draft.

Section 40(a). The only change in (a) is the deletion of any authority to the board regarding regulations. To my knowledge the bar has not adopted any regulations since statehood. What other regulatory agencies adopt as regulations, it proposes to to the Supreme Court as bar rules; by definition, "bar rules" are not administrative regulations.

The board has adopted by-laws regarding its internal procedures, particularly on the responsibilities of officers of the board and procedures for their election.

Note that I propose no amendment to AS 08.08.100, a section which excludes the bar from the application of the Administrative Procedures Act and that I propose to repeal AS 08.08.090 as inconsistent with Alaska Bar Rule 62.

Section 40(b). This subsection is amended consistently with the committee's request. See, sec. 50.

Section 50(a). An amendment decreasing the attorney members of the board from nine to six and providing nonattorney members to be appointed by the governor and confirmed by the legislature is added.

Section 50(b). The section is amended to implement the provisions of sec. 50(a).

Section 50(c). This section establishes the procedure for the selection of members, both appointed and elected, over a three year period.

This provision must be read with sec. 23 of the bill which establishes a transitional period for the implementation of sec. 50.

Section 60. The apparent request of the committee was that the officers of the association not be selected at the associations annual convention.

Section 70(a). This amendment was not requested by the committee in its present format. Elections [except under sec. 60] have traditionally been held by mail. As such, it seems logical to call a special election by mail to fill vacancies in the elected positions on the board. Whatever delay results from the conduct of the election by mail ballot is insignificant and the result seems preferable.

Section 70(b). The language of this subsection is as requested by the committee.

Section 70(c). The language is as requested by the committee.

Section 75. This section is added to the chapter and responds to the what was sec. 70 in the committees request. The language of the section is essentially as it was requested by the committee.

The request of the committee asked that the language be amended to require notice to the public of board meetings as is required of other professions. I checked certain other professional codes, including AS 08.04, regarding accountants; AS 08.36, regarding dentists; AS 08.40, regarding architects, engineers and land surveyors; AS 08.34, relating to the

practice of medicine; and AS 08.68, relating to the practice of nursing, and found no similar provision. Notwithstanding this conclusion, the language of the committee's request is included in the bill.

Section 80. This section brings into focus my difficulty in determining what powers, particularly what police powers, are proper to a voluntary association.

Section 80(a). I added the reference to "this chapter" as requested by the committee.

Section 80(a)(1). I retained the provision regarding the "classification of membership." A voluntary association may well have levels of membership but they are typically not set out in statute. Because of the mixed status of the Alaska Bar, I retained the language.

Section 80(a)(4). I added the authority to establish fees to this subsection. The provision regarding investment, as requested by the committee, is also added. I deleted the reference to licensing fees because of my transfer of these responsibilities to the Supreme Court. See, sec. 20 of the bill, infra, which adds amendments to AS 22.05.

I omitted the draft sec. 80(a)(5) relating to the maintenance of a register of attorneys. The Supreme Court typically exercises this responsibility in states without an integrated bar. See, here also the provisions relating to the authority of the Supreme Court in sec. 18 of the bill.

I added (a)(7) [continuing legal education] and (a)(8) [specialization] in a format different from the request by the committee.

Section 80(b). The provision requested by the committee directing the board to make recommendations for amendments to this chapter as well as to law of a general nature are incorporated into sec. 85, the section dealing with the annual report of the board of governors.

Section 80(b)(1). The provision relating to "continuing legal education" is incorporated in sec. 80(a)(7) and is not repeated here.

Similarly, the "licensing" function is transferred to the Supreme Court and is not duplicated here.

Section 80(b)(4). The concept of fees for inactive members seems unnecessary to a voluntary association. Licensing fees as such are collected by the Supreme Court under the fees set by the legislature. See, sec. 22.05.180, added in this bill by sec. 20.

Section 85. This section reflects the elements contained within draft sec. 90.

Section 90. I do not believe the committee proposed to amend sec. 90. I propose to repeal it.

The section does very little other than provide that the active members of the association may amend the by-laws and regulations prescribed by the board of governors. This power has sometimes been exercised by the membership at the annual convention. The provision appears to be superceded by Alaska Bar Rule 62 which provides for "adoption of recommended rules, by-laws, and regulations."

Section 95. This provision defines the "practice of law" and contains the material proposed in draft sec. 140.

The language is minimally unchanged from the draft.

I offer no endorsement of its content; I consider it altogether inadequate as a definition of the practice of law. Several further comments may be made:

(1) For many, the practice of law is essentially undefinable. To a large extent, this premise concedes that large aspects of commercial activity exist in the shadow of the legal profession, but for historical, practical, or other reasons have been left unregulated or included in the regulation of other professions.

(2) Sec. 95(b) is a somewhat cynical statement suggesting that bankers, realtors, and others may practice law so long as they do not do it on a full-time basis. From a public policy perspective, the provision seems to suggest that incompetence will be implicitly permitted so long as it is not a full-time activity.

(3) The provisions of sec. 95 totally ignore paralegal activity; they also ignore the field of increasing economic importance occupied by individuals in narrow fields of expertise where assistance is offered to the public in obtaining licenses, permits, and the like.

(4) I offer no provisions to the committee which are better than those suggested in sec. 95. I am personally aware that the bar association locally, as well as the bar association nationally, has been concerned for some time with the practice of law and has not been able to come up with a better definition than that offered. I suggest it would be better to delete this provision than it would be to believe that it is comprehensive and effective.

Section 205. This section responds to sec. 170 of the committee's request.

This section and several other sections that follow it delete the requirement that applicants for admission to the Alaska Bar be a graduate of an accredited law school. These sections are contained within the draft identically to the committee's request. And, I offer no comment on their significance or implications.

Section 207. This section responds to sec. 180 of the committee's request and it is contained within the bill in the format requested by the committee.

Section 210. This section responds to sec. 150 of the committee's draft and is contained in the bill in the format requested by the committee.

Section 220. This section is repealed. The section is obsolete.

Section 230. This section responds to sec. 200 of the committee draft and is included within this bill in the format requested by the committee.

Section 18 of the bill adds a new article to AS 22.05. to deal with the responsibility of the Supreme Court over the annual license of attorneys and the maintenance of the register of licensed attorneys.

These sections are a substitute for sec. 120 and sec. 130 of the committee draft. I discussed my difficulty with Peggy Berck on the inclusion of the responsibilities to a voluntary association and suggested that the responsibilities be transferred to the Supreme Court. She agreed.

Section 45.50.495. The section cannot be fitted within the single subject requirement. It does not deal with the practice of law but rather with anti-trust activities of attorneys.

If the committee is concerned with the problem, I suggest repealing AS 45.50.481(1) in a separate bill.

Section 19 and section 20 amend Alaska Bar Rules in the format requested by the committee.

Section 21 repeals secs. 220, and 250.

Section 22 repeals sec. 3 of Alaska Bar Rule 2.

Section 23 is a transitional section which is designed to enable AS 08.08.050(c) added by sec. 5 by the bill to work.

Section 24 provides that the effective date of the act is January 1, 1981.

As noted, several sections of this bill amend Alaska Bar Rules. I wish to call to the committee's attention the question of whether the legislature may amend Alaska Bar Rules.

The source of the question is, of course, Article IV, sec. 15, of the Alaska Constitution, which provides:

> SECTION 15. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

The Supreme Court has had a number of opportunities to comment on the implications of this section, and it has

generally limited its comments to the judicial embellishment that the provision of the bill amending rules, either directly or indirectly, must be indentified in the bill and must be voted on separately. [It is for this reason that the fact of the Alaska Bar Rules amendment is noted in the bill title.]

We assumed that based on the logic of the Bradner v. Hammond decision, 553 P.2d 1 (1976), the Supreme Court will determine that the provisions of this section will constitute the outer limits of the authority of the legislature to amend rules of the Supreme Court. Since the Alaska Bar Rules may not fairly be described as either "rules governing the administration of all courts," or "rules governing practice and procedure in civil and criminal cases in all courts," we believe that conservative legal advice to the committee would suggest that the legislature is without the authority to amend the Alaska Bar Rules.

If we may assist further, please advise.

RAB:ljb

Enclosure

WENDELL P. KAY
6914 Exmoor Drive
Mesa, Az. 85208

March 11, 1980

Dear Charles:

As one of the few lawyers around pre-dating the integrated bar, let me express an opinion on the bill to "sunset" the Bar and go back to a voluntary association. This is a really big step backward.

I practiced briefly in Illinois before integration, and in Alaska. A voluntary association is a pleasant social club run by a few insiders. It is nothing. Zero. I was one of the sponsors of the act integrating the bar in 1955 and there is no comparison. You may not like everything the association does, but it is a working, functioning, democratic group with much participation. Thanks.

Sincerely,

Wendell

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

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

March 5, 1980

Honorable Charles Parr
Chairman
House Judiciary Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Re: Alaska Bar Association
Sunset Review

Dear Chairman Parr,

Patrick Anderson, vice-chairman of the ABA Committee on Legal Educational Opportunities, and I offered testimony to the House Judiciary Committee by teleconference network with regard to the activities of our bar association committee. Since that hearing, our committee has met and asked that I convey the committee's feelings about its work and the related usefulness of the Alaska Bar Association:

1. Our committee has raised money from a private foundation Outside to be used for the association's scholarship program. The money was allocated to the association on the strength of a few phone calls and letters from me on behalf of the bar association. I am convinced that my having the name and authority of the Alaska Bar Association behind me was a determining factor in my successful efforts. I cannot imagine being as persuasive had I been callin, on behalf of the "Ad Hoc Committee of Some Alaska Lawyers Dedicated To Giving Scholarships to Alaskans." Nor can I imagine the private bar and local bar associations' contributions as forthcoming without the ABA's support.

2. Our committee has offered to provide an individual review of the bar exam for those candidates who fail the exam. We believe that this assistance will help the unsuccessful candidates understand why they failed and what techniques they can use to be more successful on their next exam.

3. As a result of our personal experiences with the review of these bar exams, we have concluded that the major cause of failure is the applicants' inability to organize their answers, to discuss the facts of their exam problem in terms of the relevant legal rules and to convey their legal knowledge in writing. This is most distressing when one realizes that these unsuccessful candidates have spent seven years in school, paid for and taken a bar review course and paid to take the exam. We are notifying the Board of Governors of our conclusions and will ask the Board of Governors to advise the organizations administering bar review courses that a greater emphasis be placed on sharpening writing skills and that additional time be allocated to writing practice exams.

4. We are in written contact with the State Bar of California to keep advised of their research with regard to the bar exam and its impact on ethnic minorities. The California research is extremely valuable to our committee's work because 80% of the Alaska bar exam is the same as the California bar exam and because we are benefiting from the California research at no cost to our association, its members or the taxpayers of this state. I believe the State Bar of California is more likely to respond to the requests of another bar association then it would to requests from a private group not within California.

5. The committee is committed to working jointly with the Alaska Federation of Natives, the U. of A. Criminal Justice Center, the Anchorage Native Caucus and the state R.E.A.A.s, to create a series of films designed to interest Alaskan Natives in the practice of law and related occupations.

6. We are developing and maintaining a list of law schools that are affirmatively interested in having minority students.

7. We are developing and maintaining a list of law school scholarships available to Alaska students.

8. The bar association office answers most inquiries about the work this committee does, distributes information to

the unsuccessful bar candidates about the work of this committee, distributes and collects scholarship applications, deposits and manages the scholarship funds raised by the committee, and provides secretarial assistance to us. As civic-minded as we believe ourselves to be, there is just so much time in each of our lives to take away from our job and our families. Without the bar association, these additional responsibilities would be an intolerable burden on this statewide committee.

In conclusion, I am sure that at some point in our lives each one of our committee members has been annoyed with the Alaska Bar Association. On balance, however, we believe that the Alaska Bar Association has more to offer its members and the people of Alaska by its continued existence than by its demise and we ask for the opportunity to continue our work within the association to change those practices with which we are dissatisfied.

Sincerely,

Carolyn E. Jones, Chair
Alaska Bar Association
Committee on Legal Educational
Opportunities

CEJ:tb

Oral Testimony

Donna Willard
Bart Bozell
Kathryn Kalkhorst
Frank Klevin
Karen Dunt
Gordon Evans
Joseph Seidhoff

Nels - Hop.?
Hugh - Kenai Bar Assn?

1. How many of the 87 points did the Bar Assn answer?

2. How many hearings in June on Bar Assn.

3. How much written testimony was taken?

4. How much oral testimony was taken?

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STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M March 29, 1980

SUBJECT: The practice of law in Alaska
(Work Order No. 8357)

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

FROM: Richard A. Bradley
Legislative Counsel

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