

98 / HJ AK BAR ASSN SUNSET REVIEW FILE NO. 9

iplinary agency in the United States."

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

Which brings us to the root of the matter. Almost all complaints against lawyers come from the group that's least likely to report serious offenses: clients. Their complaints most frequently involve fee disputes in minor cases (car accidents, divorces, etc.) that are handled by neighborhood practitioners. And, of course, clients never report lawyers who help them commit perjury, cheat on their income taxes, etc. So, by and larg

grievance committees don't hear of important violations of the law by big-time lawyers.

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

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

Guess who needed Nytol last night.



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

Use only as directed.



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

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

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

of the states, more money is being spent for professional staffs and record-keeping.

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

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



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

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

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

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

A lawyer for a prominent firm was caught stealing the firm's money, but nobody reported him to the grievance committee. He was subsequently appointed to a high post in the city government. When Mayor Edward Koch learned of the man's crime, he took an unprecedented action. He thrust the city government into the grievance system as a third party, registering a complaint with the committee. The complaint was not against the lawyer himself,

but against the senior partner of his firm, for failing to report the matter.

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

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

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

❖ For information on reprints of this article, see page 256 ❖



Snow's Plan

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

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

—Continued by Robert B. Gable

The Alaska BAR RAG

Volume 3, Number 4

Dignitas. Semper Dignitas

April No Frills Edition 1980

\$1.00

Anchorage to Host 1980 Bar Convention

Resolution Packed Annual Meeting

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

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

Dynamite Program

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

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



Sixteen Seek Three Positions on Appellate Court

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

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

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

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

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

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

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

Karen Hunt, running for a second term on the Board of Governors, won a decisive victory in the first run of the balloting with a total of 247 votes to her next closest competitor, Jerry Wades' 166 votes. Vince Vitale placed third with 139 votes in the election for

the two Anchorage seats on the Board of Governors. Hunt, Wade and Vitale face a run-off election for these two posts. In the statewide contest Bill Bryson received a total of 239 votes. He too faces a run-off election against Ken Jensen who placed second in the statewide contest with a total of 200 votes.

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

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

INSIDE

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

Scholarships Awarded

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

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

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

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

Resolutions Received So Far

Number 1

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

Number 2

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

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

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

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

Number 3

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

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

Number 4

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

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

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

Federal Court Orders in the Matter of Transcript Rates

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

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

ORDER

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

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

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

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

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

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

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

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

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

JAMES A. VON DER HEYDT, Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

In re Amendment to General Rule 30

ORDER

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

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

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

JAMES A. VON DER HEYDT, Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

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

ORDER

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

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

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

JAMES A. VON DER HEYDT, Chief Judge

The Bar Rag
Thanks
its Advertisers

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

IMMIGRATION

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

KEITH W. BELL
BURTON, CRANE & BELL
1810 Bank of California Center
Seattle, Washington 98104
(206) 623-2668

OFFICE SPACE FOR RENT TO ATTORNEYS:

Six (6) Offices for Attorney & Secretary w/basic furniture.

Use of conference room & library.

Close to State Courts - \$1.00 sq.ft.

CALL: Ken McCaskey - 279-7431

Robison and McCaskey ★ 921 West Sixth Avenue

Anchorage, AK 99501 ★ 279-7431

DON TAYLOR & ASSOCIATES

Certified Public Accountants

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

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

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

The BRC-TBR package offers the BAR applicant:

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

BRC video lectures in Anchorage on required California law.

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

All BRC and TBR lectures available on tape cassette.

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

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

In Anchorage contact Holly Ploeg, 279-2526

The Lay of the Land Re: Sunset

by Randall P. Burns

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

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

Only integrated bars created wholly or in part by legislation can be subject to sunset laws. Twelve (12) states have both integrated bars and

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

Alaabama, which went through

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

Alaska Sunset Update

On April 28, 1980, the House Judi-

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

What Other States are Doing Under Sunset Legislation

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

Civil Rule 81

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

(a) Who May Practice.

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

(2) Other Attorneys—Courts. A member in good standing of the bar of a court of the United States, or of the highest court of any state or any territory or insular possession of the United States, who is not a member of the Alaska Bar Association, or an active member of the Alaska Bar Association who does not meet the requirements of paragraph (1) above, who is not otherwise disqualified from engaging in the

practice of law in this state, may be permitted, upon motion, to appear and participate in a particular action or proceeding in a court of this state. The motion, and notice of hearing, if any, shall be served on the executive director [SECRETARY] of the Alaska Bar Association, the State Department of Revenue and, unless the court directs otherwise by an order pursuant to Rule 5(c) of these Rules, on each of the parties to the action or proceeding. With his motion, the applicant must file with the court the following:

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

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

[c] A certificate of the presiding judge or clerk of the court where he has been admitted to practice, executed not earlier than 60 days prior to the filing of the motion, showing that he has been so admitted in such court, that he

is in good standing therein and that his professional character appears to be good.

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

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

Proposed Amendment Rule 14

Proposed Amendment to Rule 14, Alaska Bar Rules.

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

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

Anchorage Bar Association Luncheons

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

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

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

**Don't Support
Our Non-
Advertisers**

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

Guest Editorial

by Karen Hunt

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

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

Accountability

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

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

Best Interests of the Public

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

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

Politicization a Threat

On the other hand, politicizing the legal profession by putting licensing and discipline under an executive branch appointed board which is sub-

ject to political influences of the ruling majority is likewise a threat to the public interest. The filing of unpopular lawsuits on behalf of minorities or minority viewpoints must never be discouraged by permitting political pressure to be applied to the lawyer representing such clients or viewpoints. A Molly Hooch case must be permitted without fear of political reprisals on the lawyers that file and prosecute the case. An injunction which stops pipeline construction for three years must never result in licensing problems or disciplinary threats against the attorney handling the case.

Potential for Abuse

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

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

Letters to the Editor

Dear Editor:

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

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

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

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

Sincerely,
Frank Flavin
Ombudsman

Dear Harry:

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

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

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

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

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

INSIDE/ OUTSIDE Observations & Comments by Karen L. Hunt

Proposed New Code of Ethics

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

STAFF

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

Contributing Editors

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

Ace Reporters

Kathleen Harrington
Judith Bazeley

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

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

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

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

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

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

Pilot Program: Lawyer Referral Service

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

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

FBA Aids in Firm Economics

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

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

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

Disbarment

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

CLE Tour to China to Be Organized

by Ken Wallack

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

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

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

Acupuncture

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

Peking University

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

Legal Tour

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

ANCHORAGE

(With Apologies to Carl Sandburg)

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

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

by Harry Branson

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

Chinese Legal System

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

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

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

Tour Costs

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

If anyone believes they might be interested in such a trip please fill out the form below and send it to me. Feel

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

CLE Tour to China

I am interested in the CLE Tour to China.

Name _____
Mailing address _____
Firm _____
Names & relation _____
of others who _____
might accompany _____
you _____
Special Information _____
(handicaps, _____
minors, etc) _____

Suggestions for _____
legal activities _____
or additional cities _____

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

NITA of the North

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

The NITA Method

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

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

Faculty

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

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

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

[continued on page 8]

NITA

(continued from page 5)
The Cost

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

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

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

the end of July, at which time the balance for tuition and room and board will be due.

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

Persons seeking further information about the program should write or call:
Frank D. Rothschild
Perkins, Coie, Stone, Olsen & Williams
420 L Street, Suite 301
Anchorage, Alaska 99501
(907) 279-8561

TVBA Minutes

April 4, 1980

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

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

plentitudes of palaver produced a paucity of prophylactic palliatives the present board preferred status quo preservation prestigious supremes press for preservation of integration. Pointlessness prevailing in the p.m. and the secretary being out of P's, the meeting ended.

King Arthur

April 11, 1980

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

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

Alliterative minutes were deemed "piss poor" by the president. The first committee report was given by Ron South, Chairman of Law Day for the year of our Lord one thousand nine hundred eighty and several years heretofore and hereafter. In a burst of organizational optimism, he passed out a brilliantly conceived (if insulating) contract whereby all members of Local 235 of Barristers and bartenders agree to attend the event in order to be regaled with the first-hand account of the loss of virginity of Charles Cole, Esq. during territorial days. Judge Blair pointed out that no date was specified in the elaborate contract, and this set the tenor for the rest of the meeting. Pat Aloia somehow took volunteers for tour guides for a courthouse tour. Ralph Beistline suggested inmates be used, and the response was over-

whelming. Only three members of the bar have not volunteered to spend the afternoon and evening of Thursday, May first, showing second graders and new members of the bar where the law library is and how to find the lifesavers in Harry Davis' desk drawer.

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

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

By executive fiat,

King Arthur

(continued on page 11)

CPT

WORD PROCESSING SYSTEMS



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

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

afltr

AMERICAN FAMILY LAW TAX REPORT presents...

BASIC FAMILY LAW TAX COURSE

For Lawyers and Mediators
Saturday, May 24, 1980

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

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

California Family Law Report, and a full-time specialist in family law and appellate practice.

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

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

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

Seminar Leader: Stephen Adams, San Francisco, Editor & Publisher of American Family Law Tax Report and

To register, please complete the form below. For further information contact AFLTR at (415) 421-1100

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

MY CHECK FOR \$50.00 REGISTRATION FEE IS ATTACHED.

Make check payable to AFLTR/CFLR, Inc. and send to:
AFLTR/CFLR BASIC FAMILY LAW TAX COURSE
Box 2377, San Francisco, CA 94116
(415) 421-1100

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

afltr

Bar Faces Shortfall

by Pat Kennedy
Financial Crisis

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

Inherent Problems

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

Double Bind

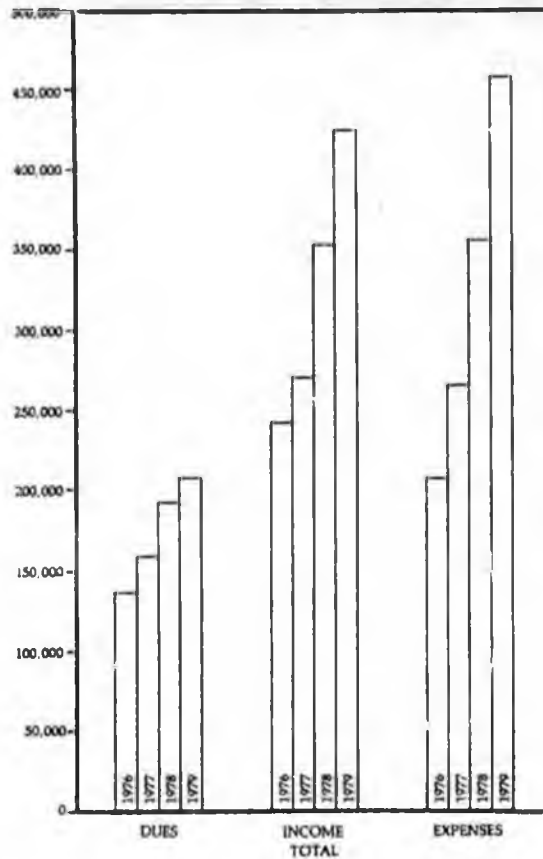
This year it is projected that the cash shortfall will be ever worse. We are caught in a double bind; projected income, such as new membership fees and income from the Hawaii C.L.E. is less than expected, while costs, somewhat because of inflation, are averaging more than expected.

Extra Funds for Discipline

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

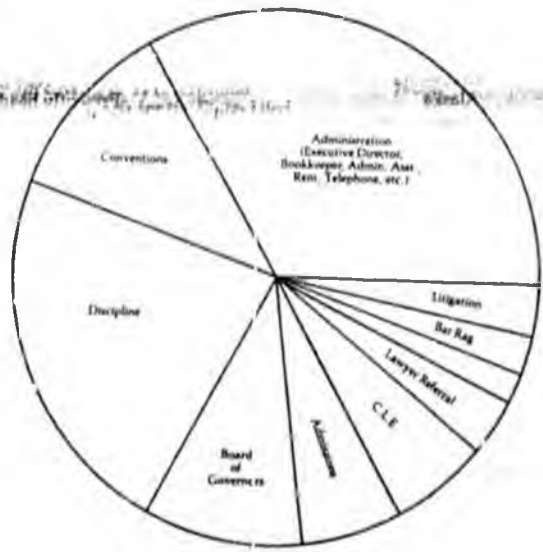
Raise Dues

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



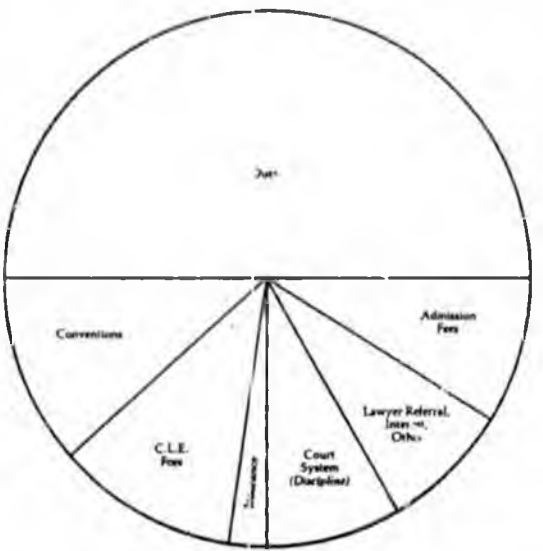
GRAPH NO. 1

Distribution of Expenses for 1979



GRAPH NO. 2

Income Distribution for 1979



GRAPH NO. 3

Distribution of Membership Dollar*

*Excludes Portions of Services Not Paid from Dues



GRAPH NO. 4

Expenses

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

CHART NO. 5

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

CHART NO. 6

Judicial Sweepstakes

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

Scratch Sheet

| TRIAL EXPERIENCE AS ADVOCATE | APPELLATE EXPERIENCE AS ADVOCATE | JUDICIAL EXPERIENCE | OTHER QUALIFICATIONS |
|--|---|--|--|
| Tried Cases in State Courts and U.S. District Court as Defense Attorney and Prosecutor for 6 years. Minimal Civil Advocacy | Argued Appeals before Alaska Supreme Court, 9th Circuit Court of Appeals and U.S. Supreme Court | District Court Judge State of Alaska 2 1/2 years | Law Clerk for Alaska Supreme Court 2 years. |
| 2 years | 1 1/2 years | None | Attorney, Alaska Court System 1971-1975; Staff Counsel, Alaska Court System 1975-1979; Deputy Director of Services, Alaska Court System, 1977-1979 |
| Criminal: 7 years as Asst Public Defender; 1 1/2 years Asst AG | 10% Public Defender Work Devoted to Appeals | None | Law Clerk for Justice Rabinowitz 1 1/2 years |
| 1 1/2 years in Private Practice - 70% Civil, 30% Criminal. A portion of this time spent in trial. | None | 15 years. 5 1/2 years District Court; 9 1/2 years Superior Court U.S. Commissioner; U.S. Magistrate. Sat on approximately 6 Supreme Court Appeals. | Served on Supreme Court Committee on Juvenile Rules. Served on Judicial Council Committee on Judicial Discipline and Removal. |
| 1972-1973—2 to 3 trials as Asst AG; 1973-1975 Undetermined number of Court and Jury trials while Asst DA | 10-12 Appeals before Supreme Court while Asst AG 1972-1973; Undetermined number of Appeals while Asst DA 1973-1975 | None | Furnishes Legal Services to Criminal Justice Agencies including Dept Public Safety and Division of Corrections |
| 10 years Civil/Criminal Trial Experience as Private Practitioner | Periodic Appellate Experience for 15 years. | 1 Month | |
| 60% of General Practice from 1960-1975 devoted to Civil Trial Work; 35% devoted to Criminal Trial Practice | Less than 5% of Practice Devoted to Appeals | 5 years Superior Court | |
| No Civil Trial Experience. All Trial Experience in Criminal Prosecution | 40% Criminal Appellate Experience Including Argument Before U.S. Supreme Court | None | Editor, U. of Colorado Law Review Order of the Goli |
| 1 year Civil Trial Experience in addition to Criminal Prosecutions | In Charge of 1/2 of Criminal Appeal Briefs for the State; Filed 1st Consumer Protection Action in State v. Alaska Sleeping Bag Co. Wrote State Brief in U.S. Death Penalty Case | None | Primary focus of work in Office of Special Prosecutions and Appeals is Appellate |
| 5 years prosecution; 10 years Civil and Criminal Trial Experience as an Advocate | Approximately 16 years of periodic Appellate experience in both Private and Public Practice of Law. Admitted to Practice before 9th Circuit Court of Appeals, U.S. Supreme Court. | 18 years Superior Court. 10 years as Presiding Judge. | Attorney General State Senator Territorial Senator Senate Majority Leader Chairman, Judicial Qualification Commission Lt. Colonel, U.S. Army Chairman, Alaska Legislative Council |
| After 7 years as a Prosecutor - approximately 15 years Civil Trial experience in private practice. | Periodic Appellate Work in Private Practice | 3 1/2 years District Court Magistrate; Deputy U.S. Commissioner during Territorial days. | Practiced Law in Cordova; lived in Mary's Igloo, Teller, Kananak, Dillingham, Fairbanks. |
| Over 100 trials - many preliminary hearings; Grand Jury proceedings, suppression of evidence hearings; habeas corpus hearings | Alaska Supreme Court - over 25 briefs and hearings; Ninth Circuit Court of Appeals - 25; other courts - over 15 | None | Practice for last two years mostly restricted to appellate work for other attorneys. |
| Trial Experience in Private Practice, primarily Criminal and Personal Injury Plaintiffs and Defense Work with some Domestic Relations. Total of 8 1/2 years Criminal and 7 years Civil Trial Experience. | Periodic Appellate experience throughout practice as Attorney | 9 years (2 1/2 years District Court 7 1/2 years Superior Court) Sat on several Supreme Court hearings. | Faculty Advisor National Trial Judges College, Reno, Nevada Past President Judges Assn, Alaska. Career and long-time interest in criminal law. Chairman, Sentencing Guidelines Committee. |
| 5 years Civil Trial Experience as an Advocate. | 5 years Appellate Experience | 10 years. Sat on Several Supreme Court Hearings. | Teaches at Trial Judges College, Nevada. Member of Committee on Minority Sentencing, Chairman, Advisory Committee, Criminal Justice System - University of Alaska, Anchorage. |
| Periodic exposure to Trial Work during 3 years Private Practice primarily devoted to Commercial, Contract and Aviation Law | Some Appellate Work during Private Practice | None | LLM University of Michigan Law Review, Washington U. Corporate Attorney 1974-77. Served on Alaska Bar Assn Grievance and Criminal Law Committees. Three years Asst AG in Juneau. |
| 7 years General Practice; 20% Civil Trial Work in Private Practice | 5% Appellate Work while in Private Practice. | 15 years Superior Court; Sat in on a couple of Supreme Court cases. | Judicial Qualifications Commission, Supreme Court Policy Advisory Committee, Presiding Judge Fairbanks - 5 years. Faculty Advisor National Trial Judges College, Reno, Nevada, Presumptive Sentencing Committee. |

Alaska Bar Association

Ethics Committee

Opinion No. 79-4

Summary

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

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

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

Issue No. 1

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

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

There is nevertheless some authority for the proposition that specific information relating to client eligibility for representation by ALSC may be protected by the attorney-client privilege. The ALSC Board of Directors is made up of both lawyers and lay persons. The attorney-client relationship between a staff attorney and his client extends to other attorneys on the staff, but it does not extend to attorney or non-attorney members of the organization's governing body. See ABA Formal Opinion 324, ABA Informal Opinion 1208, and California Bar Association Opinion 358. In an Informal Opinion, the California Bar Association found that client financial data, including documents related to income and assets, may not be disclosed to the Board of Directors of a legal aid foundation by a staff attorney (Informal Opinion 358). That opinion is based in part on a California Supreme Court decision that financial eligibility information given by a client to a public defender agency is protected by the attorney-client privilege. *People v. Canfield*, 10 Cal.3d 699, 527 P.2d 633 (1974). It should be noted however, that in some districts the Alaska Court System, in determining eligibility for representation in criminal cases by the public defender, examines potential clients on the question of eligibility in open court. Under such a procedure all the factual details are made available not only to the court and to the agency that may provide legal services, but

also to any member of the general public who wishes to listen in. While we do not express approval for this procedure, its employment by the court system in Alaska would seem to indicate that there is no present authority for the proposition that eligibility information is inherently privileged.¹

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

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

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

As a matter of public policy it is desirable for ALSC to be able to review how its client eligibility standards are applied by its staff. The particular en-

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

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

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

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

Issue No. 2

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

There is conflicting authority on the propriety of legal services board members or their firm representing parties adverse to clients represented by legal services staff attorneys. Some authorities have concluded that such representation may be improper. E.g., *Estep v. Johnson*, 383 F.Supp. 1323 (D. Conn. 1974). See also *New Jersey Bar Opinion 126*, 91 N.J. 257 (1968); ABA Informal Opinions 1369 and 1395. Other authorities suggest that where the board restricts its activities to the formulation of broad policies and guidelines and refrains from involvement with individual cases, board members can appropriately represent such parties providing requisite consideration is given to conflict of interest provisions of the Code of Professional Responsibility. See, e.g., 44 Florida B.J. 407 (1970), ABA Formal Opinion 345 (July 12, 1979) considers the competing authorities and concurs with the latter conclusion. The principles set forth in that opinion are persuasive and should govern in Alaska.

ABA Formal Opinion 345 states:

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

does not have a lawyer-client relationship with the program client so the problem is not one of a lawyer representing clients with conflicting interests....

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

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

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

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

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

[continued on page 11]

[continued from page 10]

Bar Opinion Summary

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

Conclusion

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

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

"Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves....The responsibility of

the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer."

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

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

ABA Formal Opinion 334 states that:

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

Nothing in these admonitions indicates that the legal services corporation, through its Board of Directors or by some other procedure, may not review the question of client eligibility in particular cases (again, assuming no privileged communications will be revealed). Such a review merely seeks to determine whether general eligibility standards previously established are properly being applied. In Formal Opinion 334, the American Bar Association found that the Board of

Directors at a legal aid office may require staff attorneys to disclose information that is reasonably required for a legitimate purpose, such as determining whether the board's policies are being carried out. The review process should not involve interference with decisions and judgments by staff attorneys on how a case is handled as opposed to the more basic question of the client's eligibility for representation by ALSC.

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

TVBA

[continued from page 6]

April 18, 1980

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

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

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


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

Meeting adjourned.

King Arthur



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



Specialists in Lawyer's Legal Liability
 Representing: National Union Fire Ins. Co.

- Fourth Year Alaskan (Stability)
- Broad Coverages
- Competitive 1980 Premium Rates
- Full Underwriting Authority

Call us before buying Brand "X"

THE CLARY INSURANCE AGENCY
 Your Full Service Insurance Agency

A Division of Dayly, Martin & Fay International

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

REMINI
Reporting Services

ANNOUNCES THE OPENING OF ITS SECOND OFFICE


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

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

"QUALITY SERVICE AT A REASONABLE PRICE"

Main Office
 943 West Sixth, Suite 210
 277-8591

277-8591



V.I.P.
RESEARCH ASSOCIATES
"EXPERIENCED"
"PROFESSIONAL" * "THOROUGH"

Research Services

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

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

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

History of Court System Facilities 1970-1980

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

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

In 1970, the Court System operated out of 26 locations using approximately one hundred thirty-nine thousand (139,000) net usable square feet of space.

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

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

(Pre-1970)

- a. Old Anchorage Court Building: built 1964; cost \$2,500,000; 64,170 gross sq. ft.
- b. New Anchorage Court Building: built 1974; cost \$7,812,000; 157,861 gross sq. ft.
- c. Anchorage Parking Garage: built 1975; cost \$1,224,700; 68,370 gross sq. ft.

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

(Pre-1970)

- e. Fairbanks Court and Office Building: built 1964; cost \$3,100,000; 75,790 gross sq. ft.
- f. Fort Yukon Combined Facility: built 1972; cost \$251,400; 3,472 gross sq. ft.
- g. Glennallen Combined Facility: built 1976; cost \$1,495,000; 12,040 gross sq. ft.
- h. Juneau Court and Office Building: built 1975; cost \$5,665,245; 77,000 gross sq. ft.
- i. Kenai Court and Office Building: built 1974; cost \$1,781,687; 26,232 gross sq. ft.
- j. Ketchikan Court and Office Building: built 1973; cost \$2,750,000; 74,590 gross sq. ft.

(Pre-1970)

- k. Kodiak Court and Office Building: built 1968, cost \$461,400; 13,440 gross sq. ft.
 - l. Sitka Court and Office Building: built 1976; cost \$1,880,000; 25,954 gross sq. ft.
 - m. Tok Combined Facility: built 1973; cost \$194,800; 3,528 gross sq. ft.
 - n. Valdez Court and Office Building: built 1975; cost \$1,350,000; 16,065 gross sq. ft.
2. State-Owned Buildings procured by direct legislative appropriation:
- a. Kotzebue Court and Office Building: built 1973; cost \$328,000; 4,330 gross sq. ft.

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

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

3. Modular Criminal Justice Facilities. During 1973-1975, the Court System

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

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

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

Court functions and a permanent Superior Court Judge.

- a. Bethel Court Facility: built 1977; 4,437 net usable sq. ft.
- b. Craig Court Facility: In 1972 the Court System entered into an agreement with the State Troopers for the use of 100 sq. ft. in a trailer owned by the Department of Public Safety. In 1979 the Court System leased 144 sq. ft. of office space from the City of Craig. This office is adjacent to a large council chambers providing space for court proceedings on an as-needed basis.

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

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

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

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

(Pre-1970)

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

(Pre-1970)

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

[continued on page 13]

EXAMINER of QUESTIONED DOCUMENTS (Court Qualified)

HANDWRITING IDENTIFICATION
 FORGERY DETECTION
 TYPEWRITING IDENTIFICATION
 ALTERATIONS, ERASURES & ADDITIONS
 ELECTRO-STATIC DETECTION APPARATUS—
 Indented Writing (The only one in the
 Northwest owned by a private document
 examiner)
 907-277-0120



Leonard F. Schultz

Records Call for your convenience
 Member
 Independent Association of Questioned Document
 Examiners, Inc.
 World Association of Document Examiners

3344 Mount Vernon Ct.
 Anchorage, Alaska 99507

Bankruptcy Panel Trustees Needed

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

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

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

AD - GILE court reporters

BOX 8994
 ANCHORAGE, ALASKA 99508
 PHONE 333-4594

M. JANE PETTIGREW
 Attorney at Law

Practice Limited to Bankruptcy
 Referrals Welcome

835 D Street, Suite 106
 Anchorage, Alaska 99501
 (907) 276-4959

Did you know
 that
SECURITY TITLE
 now has sale guarantees

For further information

Call Bill McCampbell
 or Carole Bangs

276-0909



711 "H" STREET
 ANCHORAGE, AK 99501

Court System Facilities

(continued from page 12)

on an as-needed basis. This lease continues.

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

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

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

a. In February of 1972, the Court System leased 324 sq. ft. of space from the City of Barrow. But because the City of Barrow needed the space the Court System had to seek new space within the year. In October 1973 the Court System leased approximately 1,200 sq. ft. from a private owner until 1978.

b. Barrow Court Facility: In 1978 the Court System began leasing approximately 2,300 sq. ft. of space for a facility that would provide for full Superior Court functions. This same lease continues.

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

c. Galena Court Facility: In December 1977 the Court System began leasing 1,067 sq. ft. of net usable space from a private owner. This space provides for a minimal Superior Court

facility; i.e., 12-person jury, courtroom jury deliberation room, judge chambers, magistrate's chambers and clerks' area. This same lease continues. Before 1977, the Court System occupied space in a Modular Criminal Justice Facility. The expansion of the Galena Police Department required the Court System to seek other, more appropriate space.

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

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

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

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

6. U.S. Government Leases:
(Pre-1970)

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

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

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

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

Voice Analysis

by Mike McHenry

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

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

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

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

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

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

LEGAL PIZZA

"Real East Coast Pizza"

LEGAL PIZZA
Sandwiches
Minestrone
Pizza
Salads
Beer and Wine

Spring Hours OPEN
Lunch Time: 10:30-2:30
Dinner Time: 4:30-Till 12 p.m.
Free downtown delivery
Call ahead: 276-0533

Williams Stenographic Reporting
Formerly Cummins Stenographic Reporting

NANCY K. WILLIAMS
• Certified Shorthand Reporter
• Registered Professional Reporter
• Certificate of Proficiency
• Quality Work

P.O. Box 5025, North Pole, AK 99705
in the Fairbanks vicinity
(907) 377-2174

World Wide Travel, Inc.
"For Miles of Smiles"

DON WILLIAMS
VICE PRESIDENT
P.O. BOX 2305
4011 ARCTIC BLVD.
ANCHORAGE, ALASKA 277-9571

Al's Detective Agency
(907) 456-7274

- Licensed and Bonded
- Statewide Service
- 7 Years Experience in Criminal Investigations

Specialize in: • Criminal Investigations • Missing Persons • Ship Tracing • Divorce • Child Custody • Background Checks • Insurance Fraud • Property Recovery

1818 Lathrop St. Fairbanks, Alaska 99701 Suite 206 D 41

FORENSIC PHOTOGRAPHY

EVIDENCE PHOTOGRAPHY INTERNATIONAL COUNCIL

EVIDENCE PHOTOGRAPHY FOR CIVIL LITIGATION

Legal Photo Service
PHONE: (907) 279-8222

INFORMATION SERVICES
(907) 456-8205

LEGAL INVESTIGATION STATEWIDE
Eleven years' experience in on-scene investigation and trial preparation
529 Fifth Avenue Suite 2
Fairbanks, Alaska 99701

PHONE 276-2237

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

Fal Investigations
P.O. Box 1162
Seldovia, Alaska 99569
(907) 262-5258

ALASKA STATUTES

Including
Topical General Index
and
1979 Cumulative Supplement

The publishers of your Alaska Code have made every effort to assure highest quality in the printed work. All the editorial expertise acquired during more than eighty years of state code and general law book publishing has been incorporated in the code to assure you reliable, easy-to-use volumes.

MICHIE BOBBS-MERRILL

For customer service contact your regional sales representative:
Ms. Tina Alexanderson
P.O. Box 682
Boise, Idaho 83701
(208) 336-3630

Serving All Alaska

- VIDEOTAPE
- DAILY & RUSH COPY
- COURT TRANSCRIPTS
- CONVENTIONS
- HEARINGS
- DEPOSITIONS

R & R COURT REPORTERS

810 N St., Anchorage..... 277-0572
509 W. 3rd Ave., Anchorage..... 274-9322 or 274-7841
1007 W. 3rd Ave., 3rd Floor, Anchorage..... 272-7515
Fairbanks..... 452-3589

Voice

(continued from page 13)

Comparison Studies

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

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

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

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

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

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

LEO Annual Report

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

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

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

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

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

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

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

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

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

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

Folk Instructions

by Jim Bendell

LADIES AND GENTLEMEN OF THE JURY:

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

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

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

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

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

The same goes for his in-court statements.

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

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

(Wink)

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

The word is... "unlawfully."

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

Divorce Attorneys:

WHAT IS A BUSINESS REALLY WORTH??

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

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

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

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

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

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

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

(206) 454-4650

NOW
the **DOWNTOWN DELI**



DELIVERS!

- lunch meetings
- special occasions

276-7116

Welcome to Anchorage

Program Schedule

Wednesday, June 11

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

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

Thursday, June 12

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

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

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

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

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

Noon—No Host Cocktails at Josephine's.

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

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

3:00 p.m.—New Trends in Environmental Law — 1) Implementation of the Coastal Zone Management Act in Alaska by William H. Bonner, Esq.; 2) Impact of Corps of Engineers' Jurisdiction in the Coastal Zone by John A.

Reeder, Jr., Esq.; 3) Oil Spill Legislation: the aftermath of *Chevron v. Hammond* by William H. Bonner, Esq.; 4) Litigation Resulting from the Beaufort Sea Oil and Gas Lease Sale by Stephen C. Volker, Esq.

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

Friday, June 13

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

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

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

Noon—No Host Cocktails at Josephine's.

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

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

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

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

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

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

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

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

Saturday, June 14

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

Noon—No Host Cocktails at the Grand Ballroom.

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

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

5:00 p.m.—Annual Meeting adjourns.

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

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

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

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

If interested, call Ken Jacobus 274-7522

We Can Handle It.



PROFESSIONAL TRAVEL SERVICE
1030 W FOURTH AVE. ANCHORAGE, ALASKA 99501 272-8424

WASHINGTON, D.C. AFFILIATION

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

Robyn Roberts Court Reporting

Certified stenographic reporter
24 hour answering service

Anchorage

276-7228

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



Just a Phone Call Away!

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

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



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

LAWYERS RESEARCH SERVICE, INC.
1063 South Capitol Way
P.O. Box 2837
Olympia, WA 98507
Telephone (206) 943-8592

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

LAW BOOKS FOR LESS
Pacific Law Books, Inc.
305 N. Main Street
Santa Ana, Calif. 92701
Phone: 714-543-1213
Ten minutes from Disneyland

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

barbri
BAR REVIEW

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

For Information, please contact:

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

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

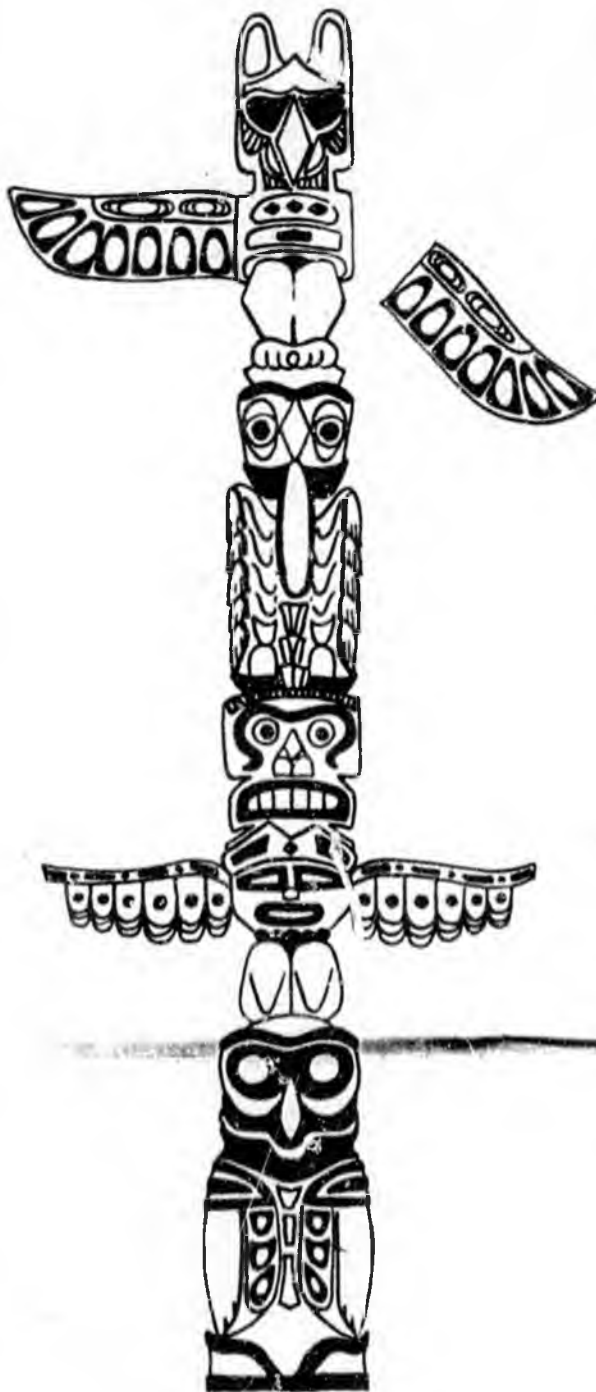
Now Sony gives you state-of-the-art micro dictation at the lowest micro prices Sony has ever had! The new Sony BM 715 (suggested retail price \$325 complete, including foot pedal and earphones) is one of the smallest desktop transcribers you can get, and is completely compatible with the new BM 500 portable micro dictator, one

of the smallest portables there is. Both have two-speed operation and work together as a micro team. And they're priced well below what you'd expect to pay for such advanced micro technology. Call or mail the coupon and put yourself into micro dictating for less than you imagine! (Ask about our National Accounts Program, too.)



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

**WE SOLVE ALL KINDS OF
CONSTRUCTION
CLAIMS CASES!**



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

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

wagner · hohns · inglis · inc.

3043 Foothill Blvd. La Crescenta, California 91214
213 248 2823

New Orleans, La.
504-624-5349

Kansas City, Mo.
816-931-2240

Mount Holly, N.J.
809-261-0100



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

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

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

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

STATE OF ALASKA, OFFICE OF)
THE OMBUDSMAN,)

Plaintiff,)

vs.)

DONNA C. WILLARD, President,)
Alaska Bar Association,)

Defendant.)

PERSONALLY DELIVERED
RECEIVED

AUG 31 1979

HUGH B. FROSTEN
& FRIEDMAN

No. 3AN-79-5932 CIV

AFFIDAVIT OF DONNA C. WILLARD

STATE OF ALASKA)

THIRD JUDICIAL DISTRICT)

) ss

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Individual grievance cases against attorneys;
and

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

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

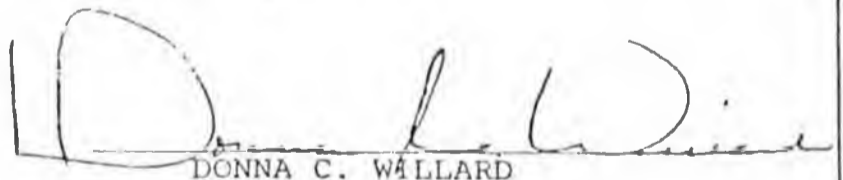
LAW OFFICES
SON, CONWAY
JUNG, BELL
IGNON, INC.
301 L STREET
SITKA, ALASKA
PHONE 79-5563

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

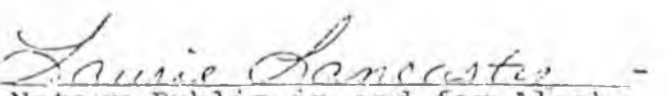
9. Alaska's Bar Association employees have been determined not to be state employees for purposes of retirement systems. The Bar has been denied credit union participation as a state agency on the basis that there is insufficient identity between Bar members and state employees.

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

DATED this 29th day of August, 1979.


DONNA C. WILLARD

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


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

RECEIVED

JUL 1 1979



Ombudsman ^{Richmond, Willoughby & Willard}

State of Alaska

Frank Flavin

Reply to:

July 16, 1979

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

Pouch W3
Juneau, Alaska 99811
(907) 465-4970

P.O. Box 74358
Fairbanks, Alaska 99767
(907) 452-4001

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

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

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

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

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

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

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

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

- 1) Minutes of the Board of Governor's meetings for the last two fiscal years;
- 2) A copy of the employment contract for the Alaska Bar Counsel; and

EXHIBIT "A"

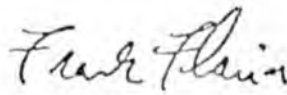
Donna C. Willard
July 16, 1979
Page 2

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

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

Thank you very much for your consideration in this matter.

Sincerely,



Frank Flavin
Ombudsman

FF:rj

HAND DELIVERED

July 19, 1979

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

Dear Frank:

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

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

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

1. The Minutes of the meetings of the Board of Governors, together with the Annual Meeting Minutes, for the past two years, after excise of Executive Session materials;
2. Statistical reports concerning the number and disposition of all grievances filed with the Bar Association for the past two years;
3. The financial records of the Association with respect to the 1979 Hawaii Mid-Winter CLE meeting and Board of Governors' travel and per diem expenses for 1979; and

EXHIBIT "B"

Frank Flavin
July 19, 1979
Page 2

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

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

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

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

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

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

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

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

Frank Flavin
July 19, 1979
Page 3

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

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

Sincerely yours,

ALASKA BAR ASSOCIATION

Donna C. Willard
President

wj

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

m/c
9/6/79

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

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

PERSONALLY DELIVERED
RECEIVED
AUG 31 1979
HAROLD J. FLEISCHER
& FRIEDMAN

No. 3AN-79-5932 CIV

MEMORANDUM IN OPPOSITION TO
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH SUBPOENA

I

Statement of the Case

This is a civil action in which the office of the Ombudsman, State of Alaska, (hereinafter "Ombudsman") seeks an order compelling DONNA C. WILLARD, President of the Alaska Bar Association, (hereinafter "ABA") to comply with a subpoena issued by the Ombudsman.

The Ombudsman's subpoena seeks documents relating to two alleged citizen complaints against the ABA. One complaint allegedly concerns the use of ABA funds for Board of Governors' travel expenses and a guest speaker at a 1979 ABA meeting. The second complaint purportedly involves handling of citizen complaints against attorneys by the ABA and the salary and fringe benefits of the Bar counsel. (Ombudsman's Memorandum, p.1). The subpoena and pertinent correspondence are attached as exhibits to

the Ombudsman's Memorandum, the Affidavit of Frank Flavin, and the Affidavit of Donna C. Willard filed herewith.

The materials requested in the Ombudsman's Subpoena have been provided to Frank Flavin, Ombudsman of the State of Alaska, in his capacity as a member of the ABA. The ABA has declined, however, to recognize the jurisdiction of the Ombudsman to investigate or subpoena the ABA. See Affidavit of Donna C. Willard.

II

The Ombudsman is Without Constitutional Authority to Investigate the ABA

The Ombudsman seeks to investigate ABA expenditures and grievance procedures. The ABA submits the Alaska Supreme Court has the inherent, exclusive authority to govern the legal profession and regulate the practice of law. The Ombudsman investigation intrudes upon the authority of the Alaska Supreme Court in violation of the principle of separation of powers.

The ABA is subject to the supervision and control of the Alaska Supreme Court. Although initially created by the legislature in Section 2, Chapter 196, SLA 1955, it nevertheless retains its character as an entity of the judicial branch of government. Legislation creating an integrated State Bar is legislation in aid of the judiciary which is not binding upon the State Supreme Court. Creation of an integrated Bar is an inherent judicial function requiring no legislative authorization. See, e.g., In Re Florida State Bar Association, 40 S.2d 902, 906 (Fla. 1949); In Re Integration of Bar of Hawaii, 432 P.2d 887, 888 (Haw. 1967); Ford v. Board of Tax Roll Corrections of Oklahoma County, 431 P.2d 423, 428 (Okla. 1967). See generally, Annots., 114 ALR 161; 151 ALR 617. The State Supreme Court may integrate by court rule notwithstanding a pending unification bill before the State legislature, (In Re Unification of New Hampshire, 248 A.2d 709, 711 (N.H. 1968)), and may deter unification in the face of a statute

purporting to require immediate integration (Integration of the Bar case, 11 N.W.2d 604, 625 (Wis. 1943)). The power to organize, regulate, and control the Bar is an inherent judicial function resting exclusively in the State Supreme Court. Ford v. Board of Tax Roll Corrections, supra, at 429-30.

Where, as in Alaska, the legislature attempts to create an integrated Bar by statute, the court may elect to let the Bar stand as created if, and only if, the court is satisfied with the legislative scheme. Such acquiescence does not, however, convert the Bar Association into an arm of the legislature, or an agency of the executive or legislative branch of government. It merely evidences a judicial deference to a co-equal branch of government, where the legislation does not unduly interfere with the operations of the judiciary. The point is well stated in Goldberg v. 8th Judicial District Court, 572 P.2d 521 (Nev. 1977), where the court invalidated a legislative attempt to subject the judiciary to an "open meetings" law:

"Although these inherent powers exist independent of constitutional or statutory grant, we have recognized that '[t]he legislature may, by statute, sanction the exercise of inherent powers by the courts, and the courts may acquiesce in such pronouncements by the legislature, . . .'. Even so, we remain ever mindful that such statutes are merely legislative sanctions of independent rights already belonging to the courts, and where, as here, those statutes attempt 'to limit or destroy an inherent power of the courts, [such statutes] must fail'." Id. at 522 (Citations omitted.)

Cf. Continental Insurance Co. v. Bayless & Roberts, Inc., 548 P.2d 398 (Alaska 1970) where the court stated statutory attempts to limit the contempt power of the Superior Courts are not binding on the courts, but will be given effect as a matter of comity unless they impair the efficient operation of the courts or their ability to uphold their dignity and authority.

The foregoing authorities establish the ABA is an arm of the judiciary. The question presented herein is whether the legislature, through its Ombudsman^{1/} may interfere in the judiciary's financial and disciplinary functions.

There are numerous reported cases invalidating legislative attempts to interfere with the [internal workings of the judiciary.] It has been held that the legislature cannot adopt a code of ethics for the judiciary, whether such a code concerns financial disclosure or other matters. In Re The Florida Bar, 316 S.2d 45, 47 (Fla. 1975). An attempt to require a central electronic data processing system for all departments of state government was invalidated in Opinion of the Justices, 309 N.E.2d 476, 480 (Mass. 1974), on the basis that such a requirement offended the principle of separation of powers. A House of Representatives Resolution appointing a committee to investigate judicial propriety was ruled unconstitutional under the separation of powers doctrine in Cusak v Howlet, 254 N.E.2d 506, 512 (Ill. 1969). A statute requiring open meetings was held an unconstitutional infringement on the powers of the judiciary when applied to judicial bodies in Goldberg v. 8th Judicial District Court, 572 P.2d 521, 523 (Nev. 1977). An attempt to regulate legislatively the manner of testing handicapped bar applicants was held invalid under the separation of powers doctrine In Re Florida's Board of Bar Examiners, 353 S.2d 98, 100 (Fla. 1977). See, Government of the Legal Profession: An Inherent Judicial Power Approach, 9 St. Mary's L.J. 385 (1978).

^{1/} A.S. 24.55.010 states: "There is created in the legislative branch of the State the office of the ombudsman." (emphasis added)

The foregoing authorities stand for the proposition that the legislature may not unduly burden or substantially interfere with the judiciary's internal functions or its power to regulate the practice of law. The prohibition against legislative interference applies with full force to the fiscal and disciplinary functions exercised by the judiciary through the Bar Association.

It has long been held that the discipline of attorneys is inherently a judicial function. The seminal case in Alaska is In Re McKay, 416 P.2d 823 (Alaska 1965). In McKay, a statute relating to the discipline of attorneys purported to require the Supreme Court to comply with the findings and recommendations of the Board of Governors in disciplinary cases. In rejecting the Board of Governors recommendations in the case before it, the court stated:

"We cannot assent to the respondent's view, for to do so we would have to deny the inherent power of this court over the suspension and disbarment of the attorneys. The power of the court to suspend or disbar has long been recognized in other jurisdictions. It cannot be defeated by the legislative branch of government. We accept the doctrine that an appellate court has such inherent power and that it may exercise the power on its own motion. . . We hold that Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect." Id. at 836-37. (Footnotes omitted.)

Cf. Weaver v. Superior Court, 572 P.2d 425 (Alaska 1977), recognizing the Supreme Court's inherent, exclusive authority ultimately to resolve disciplinary and admissions matters.

In the closely related area of admissions, the Alaska Supreme Court has been equally protective of its inherent powers. See, e.g., Application of Park, 484 P.2d 690 (Alaska 1971), where the court invalidated a statutory requirement of U.S. citizenship as a prerequisite to practice in the state, on the basis that the

statute violated the doctrine of separation of powers, and Application of Sullivan, 551 P.2d 531 (Alaska 1976) where the court relied on its inherent power to regulate admissions in overruling the Board of Governors on a decision relating thereto.

The preceding authorities establish that the judicial branch has exclusive jurisdiction over attorney discipline. The ABA is the organ through which this jurisdiction is initially exercised. To the extent the Ombudsman's investigation concerns disciplinary matters, it is contrary to the principle of separation-of-powers. It follows that the Ombudsman is without authority to subpoena Bar records in furtherance of its investigation.

Research has disclosed no Alaska case involving a legislative attempt to control expenses incurred by the judiciary. Authorities from other jurisdictions establish, however, that control of the financial operations of the Bar Association rests exclusively with the State Supreme Court.

In Matter of the Washington State Bar Association, 548 P.2d 310 (Wash. 1976), the Washington State auditor issued a subpoena for records of the State Bar in order to conduct a postaudit of the Bar Association. The trial court quashed the subpoena and was upheld on appeal by the Washington Supreme Court. The court held the Bar Association was not a "state agency" within the meaning of statutes conferring jurisdiction on the state auditor. An alternative holding was:

"...even if it was the intent of the legislature to so extend its (the state auditor's) powers, such an attempt is unwarranted and unconstitutional interference with the power of this separate branch of government to make necessary rules and regulations governing the conduct of the Bar." Id. at 316.

The court's holding was based on its reasoning that:

"The legislature's characterization of the Bar as a 'agency of the state' does not deprive this court of its right of control of the Bar and its functions as a separate, independent branch of government." Id.

OFFICES
N. CONWAY
G. BELL
RON, INC.
STREET
FLOOR
SE. ALASKA
279-5563

Thus, the Washington Supreme Court has indicated the financial affairs of the Bar Association are subject to its exclusive control and the legislative branch has no power to interfere with that control.

The Minnesota Supreme Court also rejected legislative attempts to regulate the financial affairs of the Bar Association in Shrood v. Hatfield, 210 N.W.2d 275 (Minn. 1973). In that case, the court invalidated a statute which purported to divert registration fees required for the practice of law into the general fund of the state. The court held the statute to be an unconstitutional usurpation by the legislature of the judicial function of regulating the practice of law.

The judiciary's control over its own financial matters includes not only control over Bar Association expenditures, but extends even to the point of permitting it to order the other branches of government to provide adequate funding for judicial functions. Numerous cases hold the judiciary may order public appropriations to the courts when necessary to carry on vital judicial functions. The cases are annotated in 59 A.L.R.3d 569 (1974). See also, Brennan, Judicial Fiscal Independence, 23 Univ. Fla.L.Rev. 277 (1971) and The Need for Independence in Judicial Administration, 5 Judicature 129 (1966).

The preceding authorities establish the inherent authority of the Alaska Supreme Court to regulate the practice of law, and to regulate the financial affairs of the Bar Association. This authority is vested exclusively in the Supreme Court. The Ombudsman is without authority to investigate the fiscal affairs of the ABA.

For all these reasons, the Ombudsman's attempted investigation is contrary to the principle of separation of powers.

OFFICES
CONWAY
BELL
N. INC.
FIRST
FLOOR
ALASKA
907-5563

III

The Ombudsman is Without Statutory Authority to Investigate the ABA

The ABA was created as an "instrumentality of the State", A.S. 08.08.010. A.S. 24.55.100 confers jurisdiction upon the Ombudsman to investigate the acts of state "agencies". The ABA submits it is not a "agency" within the contemplation of the preceding statute.

The ABA differs in function and form from state agencies. Unlike such agencies, the ABA represents and governs a particular group of Alaskans: the members of the State Bar. It has the power to assess its members for the purpose of generating its operating revenues. Its operations are primarily funded by such assessments. It exists to perform certain functions connected with furthering the quality of legal services. Its officers and directors are selected by its members, not appointed by public officials or elected by the public at large. It has been determined that the ABA does not constitute a state agency for other purposes, such as the state retirement program, or eligibility of its membership for credit union enrollment. See, Affidavit of Donna C. Willard. The ABA knows of no state agency which is organized and operates in a similar fashion. It must be assumed that if the legislature had intended to include entities, such as the ABA, which are radically different from the standard state agencies within the Ombudsman's jurisdiction, it would have so stated. Its failure to do so implies an intention to exclude such entities from Ombudsman's jurisdiction.

The ABA was created as an "instrumentality of the state" in 196 S.L.A. (1955). The Alaska Supreme Court described the ABA as "a creation and instrumentality of the State" in Petition of Moody, 524 P.2d 1261 (Alaska 1974). The legislature was presumably

aware of the statutory and case law description of the ABA when it created the Ombudsman's office in 1975. In defining those subject to the Ombudsman's jurisdiction as "agencies", the legislature evidenced its intention to exclude "instrumentalities" such as the ABA.

The Ombudsman's construction of the pertinent statutes would inevitably lead to a partial invalidation of said statutes, under the separation of powers, for the reasons set forth in the preceding section of this Memorandum. For this reason, and for the reasons discussed above, the statute should be construed to exclude the ABA from the Ombudsman's jurisdiction and to avoid the constitutional issues. Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974).

Contrary to the Ombudsman's argument, the Alaska Supreme Court did not find the ABA to be a "agency" within the contemplation of A.S. 24.55.100 in Application of Peterson, 499 P.2d 304 (Alaska 1972). The quoted language from this case merely outlined the scope of review exercised by the Supreme Court on review of evidentiary questions in admissions cases. This case does not purport to define the nature of the ABA or its place in state government.

Similarly, Chronical Publising Co. v. Superior Court, 354 P.2d 637 (Cal. 1960), and McGregor v. Klawson, 506 S.W.2d 922 (Tex. 1974), do not stand for the proposition that the Alaska legislature intended the ABA to be subject to Ombudsman investigations. These cases were decided outside of Alaska and do not concern interpretation of Alaskan statutes or application of Alaskan law. Chronical held Bar officers are officers of the court, and, therefore, within a California statute granting a limited privilege to communications made in confidence to state officers. McGregor concerned the proper venue for a Texas disbarment proceeding. To the extent dicta in this case implies the

Texas Bar is an organ of the Texas legislature, the case is in opposition to the overwhelming weight of authority as outlined in the preceding section of this Memorandum. The proposition that the Texas Supreme Court may decline to exercise its inherent authority to regulate the practice of law does not establish that our court will act in a similar fashion. Thus, the authorities cited by defendant are not persuasive in deciding the issue at bar.

A Washington case, Matter of Washington State Bar Association, 548 P.2d 310 (Wash. 1976), more closely addresses the issues presented herein. In that case, the Washington Supreme Court held the Bar Association was not a "state agency" within the meaning of statutes granting the state auditor power to conduct postaudits of such agencies. The court reached this decision even though the Washington State Bar Association is defined as "an agency of the state" in the Washington State Bar Act. Id. at 312. The court recognized the term "agency" has a variety of meanings. It stated:

"The reference to the Bar Association as 'an agency of the state' in the State Bar Act of 1933 does not control the applicability of the auditing statutes to that organization."

The Court went on to conclude from the fact that the Board of Governors is given discretion in performance of its duties, and is answerable only to the Supreme Court, that the legislature could not have intended to include it within the powers of the state auditor. Likewise, our legislature could not have intended to include the Bar Association within the Ombudsman's power to investigate, because the ABA is answerable to the Supreme Court and not to the legislature.

For all these reasons, this court should rule the ABA is not an "agency" within the contemplation of the pertinent statute, and is not subject to the Ombudsman's jurisdiction.

IV

Conclusion

The Ombudsman has neither statutory nor constitutional authority to investigate acts of the Alaska Bar Association. Its request for an order compelling compliance with its subpoena should be denied.

Any other conclusion would impermissibly compromise and undermine the authority of the Supreme Court to control and regulate the affairs of the ABA.

In this case, the Ombudsman is asserting jurisdiction to investigate the financial and disciplinary affairs of the ABA.

Under the enabling legislation, A.S. 24.55.160 and A.S. 24.55.170, the Ombudsman's powers to investigate, in respect to matters within his jurisdiction, are virtually unfettered.

The Ombudsman is authorized by statute to make inquiries and obtain information "as he considers necessary." A.S. 24.55.160(a)(1). He can conduct an investigation without regard to whether any complaint has been lodged with him. A.S. 24.55.120. He is not required to disclose the source or nature of the complaints which are the subject of investigation, except to the extent disclosure "may be necessary to enable him to carry out his duties and to support his recommendations." A.S. 24.55.160(b). The Ombudsman has the power to compel testimony and production of documents which he "reasonably believes" may relate to a matter under investigation. A.S. 24.55.170.

The Ombudsman is not subject to the Administrative Procedure Act (except as to rulemaking), A.S. 24.55.300, A.S. 24.55.090, and is subject only to a very narrow form of judicial review. A.S. 24.55.240. He is not subject to civil action in respect to performance of his duties, A.S. 24.55.250; nor may he be compelled to testify in court, except as may be necessary to enforce the Ombudsman Act. A.S. 24.55.260.

As the foregoing statutory provisions demonstrate, the Ombudsman Act creates in the Ombudsman an investigative "brooding omnipresence" within the legislative branch of government, answerable only unto himself, and virtually not subject to judicial review.

If the ABA, or the judiciary generally, was subject to the Ombudsman's jurisdiction, the implications would be far-reaching and alarming. The Ombudsman could, through his investigatory power, and virtually at his whim, force the ABA, and the judiciary generally, to divert resources and funds to the fulfillment of his investigation demands. His investigatory powers, if significantly exercised, would represent a direct threat to, and an infringement upon, the Supreme Court's ability to regulate the affairs of the judicial system.

Employees of the ABA, or the judicial system, cannot serve two masters making conflicting demands on their time and resources. The ABA, like other arms of the court system, must operate within established budgets. The number of employees, and the allocation of funds, are obviously subject to budgetary limitations. To the extent employees and funds are consumed in responding to investigatory demands of the Ombudsman, such employees and funds must perforce be diverted away from the proper discharge of other duties, potentially to the detriment or neglect of duties imposed by the Supreme Court. If jurisdiction to cause such a diversion is once conceded, there is virtually no check or limitation by statute to confine the scope of the diversion to acceptable limits. The Ombudsman could literally mire down the ABA, or the judiciary generally, with repeated investigatory pursuits, to the point that the ABA, or the judiciary generally, would be unable properly to conduct business within available funds and personnel remaining.

There should be no question that the mere existence of broad investigatory powers, residing in a person or entity not answerable or subject to the control of the Supreme Court, would constitute a direct threat to the Supreme Court's ability to conduct and control the judicial system.

It is true that, in this case, the ABA has without undue burden been able to assemble and deliver to Frank Flavin, in his capacity as a member of the Bar, the documents which he has requested in his official capacity. The ABA's concern in this case is not with the documents at issue; instead, its concern is with the broader implications of the assertion of jurisdiction by the Ombudsman. If jurisdiction is once conceded to exist in an entity, such as the Ombudsman, not answerable to the Supreme Court, the inevitable consequence is that the Supreme Court would no longer retain sole jurisdiction to control and supervise the activities of the ABA. Such jurisdiction must not, and cannot, consistent with the Alaska Constitution, be conceded.

DATED this _____ day of _____, 1979..

ATKINSON, CONWAY, YOUNG,
BELL & GAGNON
Attorneys for Defendant

By _____
Bruce E. Gagnon

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

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

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

No. 3AN-79-5932 CIV

REPLY MEMORANDUM IN SUPPORT OF
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH SUBPOENA

I. INVESTIGATION OF BAR ASSOCIATION ACTIVITIES BY THE
STATE OMBUDSMAN DOES NOT CONSTITUTE A VIOLATION OF
THE SEPARATION OF POWERS DOCTRINE.

In support of its refusal to comply with a subpoena issued by the Ombudsman, defendant Alaska Bar Association (hereinafter "ABA") contends that the Ombudsman may not investigate the activities of the bar because this would constitute an interference with "the internal workings of the judiciary" such as will "impair the efficient operation of the courts or their ability to uphold their dignity and authority," which would therefore be an unconstitutional violation of the separation of powers doctrine. This argument is apparently based upon defendant's characterization of the ABA as "an arm of the judiciary." The Court should reject this reasoning, however, because (1) the ABA is not a part of the judicial branch of government; (2) even if the ABA is part of the judiciary, the Alaska Supreme Court has exercised a great amount of tolerance for legislative regulations of those functions of the judiciary which are not adjudicatory in nature; and (3) even if the ABA was a part of the

1 judicial branch, the Ombudsman's investigation of the ABA would
2 not constitute a disruption to the efficiency or dignity of the
3 courts so as to constitute a violation of the separation of
4 powers doctrine.

5 A. The ABA Is Not Part of The Judicial Branch.

6 As reviewed in plaintiff's initial Memorandum, the
7 Alaska Bar Association is a creation of the State Legislature.
8 A.S. 08.08.010. The Legislature obviously intended the ABA to
9 perform services for the benefit of the judicial branch of
10 government; A.S. 08.08.080(b)(1), for example states that the
11 [Board of Governors] may... approve and recommend to the state
12 supreme court additional rules for promulgation by the court
13 including rules concerning admission and discipline and defining
14 the practice of law;...." Unquestionably, the ABA has and will
15 continue to perform a large variety of tasks for the benefit of
16 the judiciary, and maintain a close working relationship with it.
17 However, defendant's argument that the ABA is therefore a part of
18 the judiciary requires a logical leap which is unsupported by
19 either the facts or by legal precedent.

20 Nothing in the statutes nor the legislative history
21 indicates that the legislature intended to place the ABA within
22 the judicial branch. Defendant's attempt to finesse the his-
23 torical fact that the ABA is a legislative, not judicial creation
24 is apparently based upon an argument that the Supreme Court is
25 not bound to recognize the statutorily integrated bar, but
26 acquiesces to it to the extent it is continually satisfied with
27 it. This argument has two major weaknesses:

28 (1) From the judiciary's acquiescence to legislative
29 creation of an agency it does not follow that such an agency is
30 a part of the judiciary. Defendant cites several state supreme
31

1 court opinions (none of them Alaskan) for the proposition that
2 "creation of an integrated Bar is an inherent judicial function
3 requiring no legislative authorization." Disregarding for the
4 moment the fact that Alaska's Supreme Court has never made such
5 a ruling, the argument that the judiciary could create an inte-
6 grated Bar does not merit the conclusion that an integrated bar
7 created by the legislature is a part of the judiciary. While the
8 judiciary may recognize a need for the establishment of such an
9 agency to perform services of benefit to the functioning of
10 Courts, such an agency need not be a part of the judiciary
11 itself, a point which is demonstrated by the judiciary's acqui-
12 escence to legislative creation of such an agency and legislative
13 delineation of its powers. The argument that if there was not
14 an ABA, it would be necessary for the court to invent one, even
15 if true, does not mean that the ABA, however created, is a part
16 of the judiciary.

17 (2) Alaska's Supreme Court has never held that the
18 ABA is part of the judicial branch; it has held that certain
19 functions of the ABA, as defined by legislative enactment, must
20 yield to the final authority of the Supreme Court. In a long
21 line of cases discussed at pp. 6-8 , infra, the Court has held
22 that the Supreme Court has inherent, final power to set standards
23 for admission to the practice of law in the courts of the State
24 of Alaska, to intercede in any individual admission matter, to
25 establish the limits of constitutionally created courts' contempt
26 powers, and to discipline attorneys. As discussed below, even in
27 these areas -- in which judicial concern for efficient operation
28 of the courts is most sensitive -- the Supreme Court has accepted
29 legislative regulation except where those regulations either are
30 without rational basis, are inconsistent with previously estab-
31

1 lished court standards, fetter the efficient operation of the
2 courts, or impair the courts' ability to uphold their dignity and
3 authority. Such rulings do not indicate that the Supreme Court
4 considers the ABA to be part of the judicial branch; rather, it
5 illustrates an attitude that the workings of governmental enti-
6 ties outside the judiciary, namely, the legislature and the ABA,
7 must be limited and subjected to the judiciary's final authority
8 in matters central to the operation of the judicial branch. That
9 certain ABA actions affecting these sensitive areas are tolerated
10 by the Court does not transform the ABA into an "arm of the
11 judiciary" any more than the Court's acquiescence to legislative
12 enactments concerning such matters make the legislature a part of
13 the judicial branch. The judiciary committees of both houses of
14 the legislature regularly take actions seriously effecting the
15 operation of Alaska's trial and appellate courts, and the Supreme
16 Court acquiesces to the great majority of such actions. But one
17 could not seriously argue that these committees are arms of the
18 judiciary.

19 From the fact that an agency regularly is engaged in
20 providing services for the judiciary it simply does not follow
21 that the agency itself is a part of the judiciary. Such struc-
22 tural separation does not exist in the American form of govern-
23 ment. Police and Corrections officials regularly detailed to
24 carry out court edicts, state agencies engaged in construction of
25 court buildings, and other state entities do not have to be a
26 part of the judiciary branch in order to function regularly and
27 closely with it. The doctrine of separation of powers carries
28 with it the assumption that the separate branches will regularly
29 and closely work with each other. The ABA is an agency created
30 by the legislature, in major part designed to bring services
31

1 beneficial to the judiciary. The Ombudsman Act was designed to
2 improve all state agencies, including the ABA, by providing an
3 independent perspective and evaluation of these agencies' opera-
4 tions. A legislatively ordained effort to improve legislatively
5 established services of benefit to the judiciary should not be
6 rejected under a notion of separation of powers which relies upon
7 the proposition that any agency working closely with the
8 judiciary is exempt from further legislative enactments.

9 B. Whether or Not the ABA Is an Arm of the Judiciary, The
10 Supreme Court has Indicated A High Level of Tolerance
11 for Legislative Regulation of Non-Adjudicatory Func-
12 tions of The Alaska Judiciary.

13 The classic confrontations between branches of
14 government under the separation of powers doctrine concern
15 efforts of one branch to perform the functions assigned by a
16 constitution to another branch. When the "judicial power" of
17 government is vested in certain courts, as it is in Alaska,
18 executive and legislative actions are scrutinized to determine
19 whether or not they are in fact exercises of judicial powers. In
20 this context, the issue as to whether an action is "judicial" as
21 opposed to legislative or executive, turns upon the character of
22 the action itself, defined under various tests including whether
23 or not it involves questions of law as well as fact, whether or
24 not it effects a legal right and whether the decision may result
25 in terminating or destroying that right. 16 Am.Jur.2d, Constitu-
26 tional Law, §220, p. 462. Acts of the legislature which are
27 challenged as encroaching upon the judiciary therefore normally
28 involve the issue as to whether a legislative action or decision
29 is or is not "adjudicatory" in nature. See 16 Am.Jur.2d, Constitu-
30 tional Law, §235, pp. 484-485. The adjudicatory function is the
31 central function of the judiciary, and courts have jealously

1 guarded their exclusive power to adjudicate against encroachment
2 from the other branches of government.

3 Many courts, including Alaska's Supreme Court, have
4 recognized a broader scope of judicial power which includes the
5 power to assure that the means of the adjudicatory system are
6 capable of delivering the ends, the competent resolution of legal
7 disputes. In Alaska, the Supreme Court has declared that
8 it has the inherent, final power to set the standards for admission
9 of attorneys to the practice of law. Application of Houston, 378
10 P.2d 644, 645 (Alaska 1963). It has the final authority, within
11 the limits of the Constitution, to determine the limits of the
12 contempt power which constitutionally created courts may exercise.
13 Continental Insurance Companies v. Bayless and Roberts, Inc, 548
14 P.2d 398, 409-11, (Alaska 1976). It has final authority in all
15 matters concerning admission of attorneys to the practice of law
16 in Alaska (Sullivan v. Alaska Bar Association, 551 P.2d 531, 534
17 (Alaska 1976)) and in matters concerning disciplining of attorneys
18 (In re MacKay, 416 P.2d 823, 836-837 (Alaska 1964)). Thus far,
19 these are the only accessory (non-adjudicatory, in the sense of a
20 final judgment involving a case or controversy) functions ennumer-
21 ated by the Alaska Supreme Court as falling within the exercise
22 of the "judicial power" as vested in the courts by the Alaska
23 Constitution. The Court has never indicated that all the functions
24 of the ABA or, for that matter, any of them, represent exercises
25 of the judicial power. If it were to do so, clearly these
26 functions would be recognized as being of the "accessory to
27 proper adjudication" type rather than as central, adjudicatory
28 functions themselves.

29 This distinction is significant because the Court has
30 tolerated past legislative efforts to regulate those accessory
31

1 functions over which the Court has declared its final authority.

2 In Houston, supra, at 645, the court stated that

3 "...we recognize that the legislature may
4 enact laws governing admission to practice
5 law but hold that it may not require this
6 court to admit on standards other than those
7 accepted or established by the court."

8 In Application of Brewer, 430 P.2d 150, 152 (Alaska 1967), the
9 Court elaborated upon the limits in its tolerance for legislative
10 regulation:

11 "Whether or not we accept legislative
12 standards or rules for admission to
13 the practice of law depends upon
14 whether they have a rational connection
15 with one's fitness to practice law in
16 Alaska. We will hold that there is
17 such a rational connection if application
18 of the legislative standards has a
19 reasonable tendency to determine
20 whether an applicant has sufficient
21 knowledge of law in Alaska to hold him-
22 self out to the public that he is ade-
23 quately prepared to assume efficiently
24 the obligations and responsibilities
25 commensurate with representing persons
26 in legal matters." (Emphasis added.)

27 The court upheld the legislatively established standard for
28 admission as not being unreasonable. Later, in Application of
29 Steelman, 448 P.2d 817, 819 (Alaska 1969), the Court clarified
30 its Brewer holding:

31 "By this holding we did not intend to
imply that legislative standards similar to and superimposed upon standards already established by the court would be accepted merely because they might have some relevancy to an applicant's fitness to practice law. The authority and responsibility for establishing clear and unambiguous standards for admission rests in this court and where the court has already established a standard it will not accept a legislative attempt to modify that standard which creates confusion and inconsistency without adding substantively to the standard." (Emphasis added.)

1 See also Application of Park, 484 P.2d 690, 691-692 (Alaska
2 1971). In Continental Insurance Company, supra the statutory
3 limitations upon the contempt powers of the courts were chal-
4 lenged. The court concluded that since the supreme and superior
5 courts had been created by the Alaska State Constitution and not
6 by legislative enactment, legislation endeavoring to limit the
7 contempt powers of these courts were not binding. Nevertheless,
8 the court stated:

9 "...statutory enactments, which reasonably
10 regulate the contempt power, as representing
11 the opinion of a co-equal branch of the
12 government, should be given effect as a
13 matter of comity unless they fetter the
efficient operation of the courts or impair
their ability to uphold their dignity and
authority." Continental Insurance Cos.,
supra at 411. (Emphasis added.)

14 The court then accepted the statutorily established contempt
15 standards:

16 "We recognize that the trial bench must
17 have suitable powers to deal with such
18 recalcitrance. Remedies are afforded
19 under the applicable rules and statutes.
20 But if these provisions are inadequate,
21 we shall not hesitate to approve suit-
22 able remedies drawn from the reservoir
23 of the court's inherent power. That
inherent power, however, must be exercised
sparingly, and then only when it is
necessary to preserve the dignity,
authority and efficiency of the court
24 so that parties are assured of fair and
25 effective resolution of their disputes."
26 Continental Insurance Cos., supra at 411.
27 (Emphasis added.)

28 The precedent for legislative regulation of the accessory as
29 opposed to adjudicatory exercises of judicial power is therefore
30 not only well-recognized; such regulation is to be adhered to as
31 a matter of "comity" unless it has no rational basis, conflicts
with pre-existing court rules, or impairs the efficient operation
or dignity of the courts. As discussed infra at pp. 11-14, an

1 Ombudsman's investigation would have none of these effects.

2 The Court's acceptance of legislative regulation of
3 accessory judicial functions is in keeping with the "blending" of
4 powers of separate branches in American government. See 16
5 Am.Jur.2d, Constitutional Law, §214 pp. 455-457. The "over-
6 lapping" of powers often is the result of the recognition by one
7 branch that another branch is better equipped to deal with "gray
8 areas" existing between the respective powers. The Alaska Supreme
9 Court's willingness to allow legislatively enacted standards
10 relating to admittance and disciplining of attorneys can probably
11 best be explained in these terms.

12 Furthermore, constitutional sources of "blending" or
13 sharing of powers exist; e.g., a governor may veto legislation.
14 In fact, in exercising the type of judicial power which is the
15 subject of the instant case, the powers of the judiciary are
16 limited by those of the legislature. Art. IV, Sec. 15 of the
17 Alaska Constitution provides:

18 Rule-Making Power. The Supreme Court
19 shall make and promulgate rules governing
20 the administration of all courts. It shall
21 make and promulgate rules governing
22 practice and procedure in civil and
23 criminal cases in all courts. These
24 rules may be changed by the legislature
25 by two-thirds vote of the members elected
26 to each house.

27 Perhaps the most striking illustration of the Supreme
28 Court's reluctance to declare regulation of its accessory
29 functions to be "off limits" to the legislature is found in
30 the Court's opinion in Continental Insurance Cos., supra. In
31 discussing the legislature's power to delimit the contempt
powers of Alaskan courts, the court stated, at p. 410:

"We agree with the California court that
enactments endeavoring to restrict the
court's contempt powers are entitled

1 to respect as an opinion of a coordinate
2 branch of the government but are not
3 binding on the court. An exception to
4 this rule pertains to courts created by
5 legislative enactment. There the leg-
6 islature does have the power to limit
7 this court's exercise of contempt pro-
8 cedures. In Alaska, unlike the federal
9 system applicable to United States
10 district courts and courts of appeal,
11 the supreme and superior courts were
12 created by the Alaska State Constitution
13 and not by legislative enactment."
14 (Emphasis added.)

15 The court cited Art. IV, Sec. 1 of the Alaska Constitution,
16 which states:

17 The judicial power of the State is vested
18 in a supreme court, a superior court, and
19 the courts established by the legislature.

20 The court's "inherent and final authority" to deal with disciplinary
21 matters, which is itself qualified to the extent that a large
22 amount of legislative intrusion is tolerated, is therefore limited
23 only to those courts which were created by the Constitution. If
24 the legislature, and not the supreme court, has the final and
25 supreme authority over accessory functions such as establishing
26 contempt procedures as far as they relate to district and magis-
27 trate courts, then surely legislative enactments which affect
28 the ABA do not constitute an encroachment upon the judiciary by
29 the legislature. The ABA, like the district and magistrate
30 courts, is not established by the Constitution. Moreover, whereas
31 the "courts established by the legislature" are at least mentioned
in the judicial article of the Constitution, there is no mention
whatsoever of an ABA to be established by any authority.

In short, the Alaska Supreme Court has never exhibited
any great resistance to legislative regulation of those accessory
functions which are designed to assure effective resolution of
litigation. It has declared its own final authority over such
matters only in the context of the two courts specifically

1 established by the Constitution and, even in this context, it
2 will acquiesce to legislative regulation unless it is unrea-
3 sonable, inconsistent with existing rules, or disruptive.

4 C. The Ombudsman Act, As Applicable to The ABA, Will Not
5 Disrupt the Dignity, Authority, Nor Efficiency of Any
6 Court.

7 The Ombudsman Act (A.S. 24.55.010 et seq.) establishes
8 an Ombudsman whose powers are limited to investigation of com-
9 plaint regarding the administrative acts of agencies (A.S. 24.55.
10 110), investigations under his own motion (A.S. 24.55.120),
11 subpoena powers to aid such investigations (A.S. 24.55.170), the
12 rendering and reporting of his opinion and recommendations to the
13 concerned agency (A.S. 24.55.190) and later, to the governor,
14 legislature, grand jury, the public, or any of these (A.S. 24.55.
15 200). Under A.S. 24.55.220,

16 If the ombudsman believes there is a breach
17 of duty or misconduct by an officer or
18 employee of an agency in the conduct of his
19 official duties, the ombudsman shall refer
20 the matter to the chief executive officer
21 of the agency or, when appropriate, to a
22 grand jury or to another appropriate official
23 or agency. (Emphasis added.)

24 Finally, the Ombudsman shall submit to the legislature and the
25 public an annual report of his activities (A.S. 24.55.230.)

26 The Act therefore provides no authority for the Ombudsman
27 to attempt any regulation of accessory judicial functions such as
28 civil rules, handling of disciplinary proceeding, expenditures of
29 funds, or the like. To this extent, the Act as applied to such
30 functions is far less an encroachment upon the judiciary than
31 were those legislative enactments, tolerated by the Supreme
Court, governing rules of admission to the practice of law and
the limiting of contempt powers of courts. Indeed, the Ombudsman's
powers are basically informational only, being limited to investi-

1 gation and reporting. Clearly, the legislative purpose of the
2 Ombudsman Act was to assist state agencies by performing such
3 independent investigation and supplying such independent per-
4 spective to the workings of the agency as will assist it in
5 better performing its role. If the Ombudsman's investigation of
6 the ABA resulted in his opinion that something other than the
7 status quo should be considered by the agency, then A.S. 24.55.
8 190 requires that this opinion and recommendations first be made
9 available to the ABA. If the ombudsman believes that there has
10 been a breach of duty or misconduct by an officer or employee of
11 the ABA, A.S. 24.55.220 requires him to refer the matter to the
12 chief executive officer of the ABA or, when appropriate to the
13 grand jury or "another appropriate official or agency." Under
14 appropriate circumstances, misconduct by ABA personnel could be
15 reported to the Supreme Court under this authority.

16 In short, while the Ombudsman may investigate and make
17 recommendations, any corrective action must be dictated by
18 either higher authorities within the agency itself or by the
19 entity to whom the agency is responsible. The Ombudsman's
20 actions themselves represent no exertion of authority over the
21 agency.

22 Defendant argues that the Ombudsman could, through his
23 investigatory power "force the ABA, and the judiciary generally,
24 to divert resources and funds to the fulfillment of his investi-
25 gation demands," and that "if jurisdiction to cause such a diver-
26 sion is once conceded, there is virtuely no check or limitation
27 by statute to confine the scope of the diversion to acceptable
28 limits." In fact, there are statutory limits. A.S. 24.55.330
29 defines "agency" as referred to as being subject to investigation
30 under the Act:

31

1 "...agency"...does not include a...
2 justice of the supreme court, judge of
3 the superior or district court, magistrate
4"

5 More importantly, defendant fails to spell out how an
6 investigation of the ABA would disrupt the "internal workings of
7 the judiciary" in any significant way. The "floodgates" argument
8 made by defendant ABA may be characterized as the typical reaction
9 of a state agency to the prospect of an independent state office
10 investigating individual complaints regarding the agency. It is
11 the same type of reaction one would expect from agencies of the
12 executive branches of government, which regularly are required to
13 comply with in depth investigations by legislative committees or
14 by legislatively established auditors or ombudsmen. Though such
15 agencies could as easily as defendant herein argue that the
16 burdens imposed upon the agency by such investigations constitute
17 an encroachment upon the executive branch by the legislature,
18 plaintiff is unaware of any case holding that such investigations
19 violate the separation of powers doctrine. Clearly, a holding
20 that an Ombudsman's investigation of the ABA was an unconsti-
21 tutional encroachment on the judiciary would be difficult to
22 distinguish were executive agencies to litigate the ability of
23 the Ombudsman or the Budget and Audit committees from investi-
24 gating their activities.

25 Separation of powers has never meant isolation of the
26 branch of government from one another. The overlapping of
27 powers in those areas not central to the respective adjudicatory,
28 legislative, or executive functions has been the result of a
29 recognition of benefits resulting to government and the citizenry
30 it was intended to serve. The office of the Ombudsman is perhaps
31 one of the best examples of the benefit of interaction between

1 two branches of government. By establishing and funding the
2 Ombudsman, the legislature has provided a means for the executive
3 branch of government to better evaluate its performance and
4 consider alternatives. If the ABA were considered to be a part
5 of the judicial branch, there is no reasons why the judiciary
6 should not also take advantage of such independent evaluations
7 and recommendations.

8 II. THE OMBUDSMAN HAS THE STATUTORY AUTHORITY TO INVESTIGATE
9 THE ABA.

10 Defendant argues that since the ABA was created as an
11 "instrumentality of the State" under A.S. 08.08.010 (which does
12 not refer to the ABA specifically as a "agency") the legislature
13 did not intend the Ombudsman Act to apply to the ABA. Defendant
14 further purports that particular facets of the ABA are such as
15 to render it "radically different from the standard state agencies"
16 such that, if the legislature intended to subject it to the
17 jurisdiction of the Ombudsman, it would have specifically so
18 stated.

19 These arguments ignore the statutory definition of
20 "agency" contained in A.S. 24.55.330(2) of the Ombudsman Act.
21 In pertinent part, this states that

22 "agency" includes a department, office,
23 institution, corporation, authority,
24 organization, commission, committee,
25 council or board of a municipality or in
26 the executive, legislative or judicial
27 branches of the state government, and a
28 department, office, institution, corpora-
29 tion, authority, organization, commission,
30 committee, council or board of a municipality
31 or of the state government independent of the
executive, legislative and judicial branches....

The clear message to be gleaned from this definition is that
the legislature intended the Ombudsman Act to apply to every
conceivable form of state government organization. That their

1 seemingly exhaustive listing of the types of entities it meant to
2 refer to by "agency" did not include the word "instrumentality"
3 is not significant. Indeed, "instrumentality" is practically
4 synonymous with a number of the terms referred to in the legis-
5 lative definition, including "office", "institution", and "organi-
6 zation". To make sure that every conceivable organization created
7 to serve state government was included under the Act, those
8 "agencies" which do not fall strictly within either the executive,
9 legislative or judicial branches were explicitly mentioned.

10 The better judicial construction of such an all-inclusive
11 definition is that every conceivable organization with some
12 direct connection to state government is included under the
13 Ombudsman Act unless it is specifically excluded. The statutory
14 definition of "agency" in fact does specifically exclude a
15 number of state officials, e.g., all judges and magistrates; it
16 does not, however, exclude the ABA.

17 The particular characteristics of the ABA discussed by
18 defendant do not really render it so "radically different" from
19 other state agencies, offices, institutions, corporations,
20 authorities, or organizations, etc. as to result in an assumption
21 that the legislature meant to exclude it from Ombudsman Act
22 coverage. Like the ABA, a small municipal government represents
23 only a particular group of Alaskans financed almost wholly by these
24 "members." Like the ABA, the Board of Medical Examiners governs
25 a particular group of Alaskans, and exists to perform certain
26 functions connected with furthering the quality of medical services.

27 Even if the characteristics of the ABA noted by defendant
28 were unique to it, defendant does not demonstrate that these
29 qualities are such that we may presume that the legislature would
30 conclude that the Ombudsman Act should not apply to it. There

31

1 are doubtless a number of state agencies possessing varying
2 qualities of uniqueness in their makeup, functions, funding, or
3 the like which nevertheless come within the definition of "agency"
4 under the Act.

5 That the ABA does not constitute a state agency for
6 other purposes such as the state retirement program or eligibility
7 of ABA membership for credit union enrollment, should not be a
8 basis for this Court's concluding that it is not an "agency"
9 under the Ombudsman Act. Defendant has not enlightened the Court
10 as to the definition of "agency" under those programs. At any rate
11 a state agency's interpretation hardly constitutes the type of
12 precedent upon which judicial construction should lie.

13 The Ombudsman legislation clearly intended to include
14 any conceivable type of organization which is "of state govern-
15 ment." That the ABA is "of the State" is explicit not only in
16 the legislation but also in the Alaska Supreme Court opinion in
17 Petition of Moody, 524 P.2d 1261 (Alaska 1974). In that case, a
18 law clerk in the court system challenged certain by-laws of the
19 ABA, partly upon grounds that they denied him equal protection as
20 guaranteed by the Alaska and United States Constitutions. The
21 Court found that equal protection had not been violated, but what
22 is significant here is that the Court did not even question that
23 the ABA's by-laws constituted state action. Petition of Moody,
24 supra at 1268-69.

25 III. CONCLUSION.

26 An investigation of the ABA by the State Ombudsman would
27 not constitute a violation of the separation of powers because the
28 ABA is not a part of the judicial branch of government, but only
29 performs certain functions for the benefit of that branch. Even
30 if it were to be considered an "arm of the judiciary", the ABA
31

1 deals only with the functions which are accessory to the central
2 adjudicatory duties and powers of the courts. The Alaska Supreme
3 Court has exhibited broad toleration for legislative regulation of
4 such functions. Investigation of the ABA by the Ombudsman would
5 not result in the level of disruption to judicial efficiency or
6 dignity which would exceed the limits of the Supreme Court's
7 tolerance for legislative activities in court-related areas.

8 The ABA was created by the legislature as "an instrumen-
9 tality of the State," and the Supreme Court has assumed that the
10 actions of the ABA are the actions of the State. The language of
11 the Ombudsman Act provides the broadest possible coverage of the
12 various entities and organizations of the State of Alaska, and
13 enumerate the specific exclusions. The ABA is not excluded and
14 is an "agency" subject to investigation by the Ombudsman.

15 DATED this 6th day of September, 1979, at Anchorage,
16 Alaska.

17 HEDLAND, FLEISCHER & FRIEDMAN

18 Attorneys for the Office of the
19 Ombudsman

20
21 By: 
22 Saul R. Friedman

23
24 By: 
25 James T. Brennan
26
27
28
29
30
31

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

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

DATED this 10th day of August, 1979.

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

By: 

John M. Conway

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
420 L STREET
FIFTH FLOOR
ANCHORAGE, ALASKA
TELEPHONE 278-5583

RESPONSE TO SUBPOENA
Page 2

file copy

THE SUPREME COURT OF THE STATE OF ALASKA

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

Appellants/Cross-Appellees,)

v.)

THE ALASKA BAR ASSOCIATION,)

Appellee/Cross-Appellant.)

File Nos.
4310/4311

O P I N I O N

[No. 2059 - April 4, 1980]

Appeal from the Superior Court of the State
of Alaska, Third Judicial District, Anchorage,
Mark C. Rowland, Judge.

Appearances: Michael J. Frank, Richard
Brown, and Gregory M. O'Leary, Anchorage, for
Appellants/Cross-Appellees. John M. Conway
and Patrick B. Gilmore, Atkinson, Conway,
Young, Bell & Gagnon, Anchorage, for Appellee/
Cross-Appellant.

Before: Rabinowitz, Chief Justice, Connor,
Boochever, and Burke, Justices, and Dimond,
Senior Justice. [Matthews, Justice, not
participating.]

CONNOR, Justice.
Dimond, Senior Justice, with whom Rabinowitz,
Chief Justice joins, dissenting in part.
Rabinowitz, Chief Justice, dissenting in part.

At issue in this case is whether a meeting of the
Board of Governors of the Alaska Bar Association held in
Hawaii in 1978 was valid.

This is an appeal from an order of the Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, J., granting the Alaska Bar Association's (hereinafter ABA) motion for judgment on the pleadings pursuant to Alaska Rule of Civil Procedure 12(e) but denying ABA's motion for attorney's fees. The suit was brought against the ABA by ten members and two non-members seeking a declaration that a business meeting of the ABA Board of Governors held in Kauai, Hawaii in February, 1978,¹ was void because it violated their federal and state due process rights and Alaska's open meeting statute. Appellants challenge the Superior Court's rejection of their due process claims and the finding that the open meeting statute, as part of the Administrative Procedure Act, is not applicable to the ABA. The ABA has cross-appealed from the superior court's denial of its motion for an attorney's fee award. The superior court denied that award on the ground that the suit constituted public interest litigation.

The open meeting statute contained in Sections .310 and .312 of the Alaska Administrative Procedure Act, AS 44.62, requires that the meetings of a number of public agencies and entities be open to the public, that votes be recorded in a certain manner, that executive sessions be

1. The Board of Governors' meeting was held in conjunction with a continuing legal education program conducted in Kauai for the members of the ABA.

held in conformity with the act and limited to the discussion of certain enumerated subjects, and that reasonable public notice be given for all meetings required to be open under the act.²

2. AS 44.62.310 provides in full:

Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

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

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

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

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

The Alaska Bar Association concedes, for the

2. (Continued)

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

(d) This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

or

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

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

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

AS 44.62.312 states:

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

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

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) Section 310(c)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

purpose of this appeal, that the Hawaii meeting did not comply with the open meeting statute in a number of respects.³ The question presented is simply whether the ABA is exempt from the open meeting statute, as part of the Administrative Procedure Act, by reason of AS 08.08.100, which provides:

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

Appellants assert that this language meant only to exempt the ABA from the procedures prescribed by the Administrative Procedure Act for the adoption of bylaws and regulations. If the meaning of a statute is plain it should be enforced as it reads without judicial modification or construction. Poulin v. Zartman, 542 P.2d 251, 270 (Alaska 1975), reh., 548 P.2d 1299 (Alaska 1975); Application of Babcock, 387 P.2d 694, 695 n.6 (Alaska 1963); Sutherland, Statutes and Statutory Construction, § 45.02 at 4-5 (4th ed. 1973).

3. In answer to an interrogatory, the ABA admitted that public notice was not given, although notice was given in the Alaska Bar Brief and was sent to the officers of the ABA, the members of the Board of Governors, and to the presidents of local bar associations, as required by the ABA's bylaws. During the Hawaii meeting the Board of Governors held a number of executive sessions without following AS 44.62.310(b), and subjects were discussed which do not fall within AS 44.62.310(c) and (d).

The language of AS 08.08.100 is clear. It exempts the bylaws and regulations themselves, not merely their method of adoption, from the Administrative Procedure Act, both by naming that act and by referring to the chapter number, AS 44.62. There is nothing in this language which hints that the exemption should be any narrower in scope.

Other statutory provisions empower the ABA to adopt "reasonable bylaws and regulations, and other reasonable provisions concerning annual and special meetings" and "all other matters affecting in any way the organization and functioning of the Alaska Bar." AS 08.08.080(a)(3), (a)(6) and (b)(2). The Hawaii meeting was convened in accordance with the bylaws adopted by the ABA.⁴ Thus, if these provisions are applied in accordance with the plain meaning of AS 08.08.100, the Hawaii meeting was lawful.

4. Article V, Section 8, of the ABA's bylaws provides in relevant part:

"Section 8. MEETINGS.

(a) Regular Meetings. Unless otherwise ordered by the Board of Governors, the regular meetings of the Board shall be held at such times and places as designated by the President. It shall be the duty of the Executive Director to mail timely notice of each meeting of the Board of Governors to the officers of the Alaska Bar Association, members of the Board of Governors, and to the presidents of local Bar Associations, together with a tentative agenda."

Alternatively, appellants argue that despite AS 08.08.100, the ABA is subject to the open meeting statute. They contend that because the open meeting statute was repealed and re-enacted in 1966, it is no longer part of the Administrative Procedure Act, and that it is a new, independent enactment, operating upon all subjects within its scope.⁵ But the legislature did not remove the open meeting statute from chapter 62 of title 44, which is denominated the Administrative Procedure Act,⁶ and there is no other indication that the legislature intended to do so. To the contrary, the fact that the legislature repealed the original statute and replaced it with another which was given the same statutory numeration is ample evidence that the legislature intended to merely amend the statute.

Moreover, the interpretation contended for by appellants would mean that the legislature's action in 1966 amounted to an implied repeal of AS 08.08.100, a result which we should be reluctant to reach in the absence of an

5. The ABA's exemption from the Administrative Procedure Act as to "rules" adopted by the Board of Governors of the ABA was created in 1960. Ch. 178, § 3, SLA 1960. In 1976 the exemption was changed to "by-laws and regulations." Ch. 181, § 1, SLA 1976.

6. AS 44.62.650 states:

"This chapter may be cited as the Administrative Procedure Act."

irreconcilable conflict between the two statutes. Peters v. State, 531 P.2d 1263, 1268 (Alaska 1975). Cutting against this argument is the legislature's action in 1976, ten years after the re-enactment of the open meeting statute, broadening the exemption of AS 08.08.100 from merely "rules" to "by-laws and regulations." Ch. 181, § 8, SLA 1976.⁷

We hold that the Board of Governors' meeting in question was not subject to the requirements of AS 44.62.310. It follows that the meeting was valid. The superior court ruled correctly on this question.

Appellants also claim that by reason of the meeting being held in Hawaii, they were denied due process of law. We will take cognizance of a due process claim only where there is an alleged deprivation of a sufficient liberty or property interest to warrant constitutional protection. Herscher v. State Dept. of Commerce, 568 P.2d 996, 1002 (Alaska 1977); Nichols v. Eckert, 504 P.2d 1359, 1362 (Alaska 1963). On the record we do not think that a

7. It is noteworthy that in 1978 the legislature, in exempting the Alaska Housing Finance Corporation from the Administrative Procedure Act, expressly did not exempt it from the open meeting statute. AS 18.56.088, Ch. 167, § 5, SLA 1978. Therefore, it is reasonable to conclude that when the legislature acted concerning the ABA in 1976, it consciously granted the ABA a broad exemption from AS 44.62.

cognizable deprivation of property or liberty has been made out. We find no merit in this contention.

As to appellee's cross-appeal, we find no abuse of discretion by the superior court in denying appellee an award of attorney's fees, because the case was brought in the public interest, under Civil Rule 82. Gilbert v. State, 520 P.2d 1131, 1136 (Alaska 1974).

AFFIRMED.

DIMOND, Senior Justice, with whom Rabinowitz, Chief Justice, joins, dissenting in part.

AS 08.08.100 provides:

Administrative Procedure Act. The 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 effect of the majority opinion is to hold that this statute plainly¹ exempts from the Administrative Procedure Act not only the Alaska Bar Association's method of adopting bylaws and regulations, but also any act of the Alaska Bar which happens to be authorized by bylaw or regulation, including violation of the open meeting act, AS 44.62.310.

With this, I disagree.

1. The majority relies on Poulin v. Zartman, 542 P.2d 251, 270 (Alaska 1975), for the proposition that a statute whose meaning is plain is not subject to judicial construction. But in Poulin the court also said that the plain meaning rule applies if the legislative language is "so unambiguous as to leave no doubt as to the meaning or scope of the result dictated." 542 P.2d at 270. I do not find any plain legislative intent to exempt the Alaska Bar from the open meeting act, AS 44.62.310-.312.

The main impact² of the Act on state agency regulations is to provide a detailed and comprehensive procedure for their adoption, promulgation, amendment and repeal,³ and for judicial⁴ and legislative⁵ review. If the bylaws⁶ and regulations of the Alaska Bar were subject to the Act, they would be subject to the procedural requirements of the Act with respect to their adoption and other handling, because that is the principal relevance of the Act to such bylaws and regulations. The effect of AS 08.08.100 making these by-

2. There is a substantive, rather than merely procedural, aspect of the Act as it relates to regulations. AS 44.62.030 provides:

Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

However, this section has no relevance to the controversy in this case.

3. AS 44.62.040 - .290.

4. AS 44.62.300.

5. AS 44.62.320.

6. I would hold that "bylaws" fall generally in the category of regulations, since they are "[r]egulations . . . [or] rules . . . adopted by an association . . . for its government." Black's Law Dictionary at 182 (5th ed. 1979).

laws and regulations "not subject to the Administrative Procedure Act (AS 44.62)" (emphasis added), is that they are not subject to the procedural aspects of the Act, i.e., their method of adoption is not governed by the Administrative Procedure Act, but rather by action of the Alaska Bar Association or its Board of Governors under the Alaska Integrated Bar Act.⁷

The majority errs, I believe, in concluding from the fact the Alaska Bar's bylaws and regulations are exempt from the Administrative Procedure Act that the Alaska Bar, as an agency, is exempt from the Administrative Procedure Act, including its open meeting requirements. AS 44.62.310-.312, the open meeting statute, is a portion of the Administrative Procedure Act. It does not deal at all with the procedural aspects of the adoption of regulations, and purports by its terms to encompass the activities of legislative-created agencies such as the Alaska Bar Association and its Board of Governors. It follows that the Association and Board are subject to the Administrative

7. AS 08.08.080(b)(2) provides in part that the Board of Governors of the Alaska Bar Association may "adopt reasonable bylaws and regulations consistent with the Alaska Bar Rules." AS 08.08.090 provides:

Power of the bar to make or change bylaws and regulations. Any bylaw or regulation adopted by the Board of Governors may be modified or rescinded, or a new bylaw or regulation may be adopted, by a vote of the active members of the association under bylaws and regulations to be prescribed by the Board of Governors.

Procedure Act to this extent. Article 6 of Title 44, chapter 62 (AS 44.62.310 - .312), requires meetings of a broad range of governmental agencies of the state and its political subdivisions to be open to the public. AS 44.62.310 provides in part:

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

This comprehensive statute includes meetings of the Board of Governors of the Alaska Bar Association not exempted

under AS 44.62.310(c) and 44.62.310(d).⁸ This is so because the legislature created the Alaska Bar Association and its Board of Governors, and expressly provided that the Association was created as an "instrumentality of the state." AS 08.08.010. Furthermore, the Alaska Bar is "supported . . . in

8. AS 44.62.310(c) provides:

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

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

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

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

AS 44.62.310(d) provides:

This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

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

part by public money or authorized to spend public money" as that term is used in defining the scope of the open meeting statute, AS 44.62.310(a). First, the Alaska Court System provides a portion of the Alaska Bar's income for various purposes. The Alaska Court System in turn is supported by legislative appropriations. Second, the Board is empowered by the legislature to "fix the annual membership fees for active and inactive members," AS 08.08.080(b)(4), and to adopt reasonable provisions "concerning the collection, deposit, and disbursement of membership and admission fees, penalties, and all other funds." AS 08.08.080(a)(4). There can be little question that the mandatory annual dues paid to the Association by its members to support the Association constitute "public money" as that term is used in AS 44.62.310(a). As was stated by a Louisiana appellate court,

[R]evenues raised through exercise of such governmental powers by an agency created by the legislature and pursuant to legislative authorization constitute state funds no less than revenues deposited in the State Treasury

State Licensing Board of Constructors v. State Civil Service Commission, 110 So.2d 847, 851 (La. App. 1959), aff'd, 123 So.2d 76 (La. 1960).

I conclude that the public meeting portion of the Administrative Procedure Act is applicable to the Board of

Governors of the Alaska Bar Association.

The Alaska Bar Association admits that its Hawaii meeting did not comply with the open meeting statute in a number of respects. These are listed in note 3 of the court's opinion. It is my opinion that there is another way in which the meeting did not comply with the requirements of the statute. That is the fact that the meeting was held in Hawaii and not in Alaska. I believe it is fair to presume that when the Alaska legislature required meetings to be "open to the public," it contemplated that the "public" should consist principally of people residing in Alaska. It would follow from this that Alaska residents should not be expected to travel outside the state in order to take advantage of their right to be present at a meeting of an Alaska governmental agency. In my opinion, the public meeting statute was violated by the fact that the Board of Governors met in Hawaii and not in Alaska.

With respect to the cross-appeal regarding denial of attorney's fees to the Alaska Bar, I concur in the court's holding.

RABINOWITZ, Chief Justice, dissenting in part.

I concur in Senior Justice Dimond's dissent. In addition to the grounds advanced by Justice Dimond, I wish to note a further point of disagreement with the majority opinion. More particularly, I have concluded that even if the Alaska Bar Association's meeting was exempt from the Administrative Procedure Act, holding the meeting in Hawaii violated Article IX, Sec. 6 of the Alaska Constitution, which provides:

Public Purpose. No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

We have stated that the "public purpose" concept in this provision is not capable of precise definition. Wright v. City of Palmer, 468 P.2d 326, 320 (Alaska 1970); Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245, 251 (Alaska 1966); DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962). Under even the broadest of definitions, however, I have difficulty finding any legitimate public purpose in locating the meeting in Hawaii. The use of the dues mandatorily paid by ABA members, which I agree with Justice Dimond constitute public monies, to hold the meeting outside Alaska seems to me to be clearly prohibited by Article IX, Sec. 6 of the Alaska Constitution.

This same principle is subsumed within the broader

constitutional guarantee of substantive due process of which appellants argue they have been deprived. Substantive due process is denied when the actions of a public agency are arbitrary and bear no reasonable relationship to a legitimate governmental purpose. Concerned Citizens of Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974). While one challenging government action bears a heavy burden of proof under this standard, I am persuaded it has been met here. The ABA has not offered any legitimate reasons for holding the meeting in Hawaii.

The ABA alleges appellants have not shown that they were deprived of any cognizable liberty or property interest by the actions of the Board of Governors, since no issues directly affecting the appellants' livelihood were resolved at the meeting, and since none of the appellants have indicated that they attempted to attend the meeting in Hawaii or would have attended the meeting even if it had been held in Alaska. There remains the fact, however, that property of appellants in the form of mandatory dues money was spent by a public agency in an apparent arbitrary manner. This, in my opinion, is probably sufficient to establish a violation of substantive due process under the standard noted herein.

DRAFT COMMITTEE REPORT ON ALASKA BAR ASSOCIATION

In compliance with AS 44.66.010 - 060 and referral by the Speaker of the House on January 15, 1980, the House Judiciary Committee has conducted a review of the Alaska Bar Association. By letter of July 31, 1979 the Speaker had notified the Committee of the forthcoming referral, thereby permitting advance work to be done during the interim between legislative sessions.

The Alaska Bar Association has taken the position "that it is not a State agency, and that it is not subject to the Sunset review process." The Association refused the Legislative Auditor access to all of its records; therefore, no performance audit has been conducted.

On November 7, 1979 the Committee requested information on 87 points; by letter of January 30, 1980 and a 71-page booklet, The Alaska Bar Association, February 1980, the Association answered of the questions posed. Some questions were not answered "for reasons of privacy and because of limitations on its own authority as regards the confidentiality of the Association's discipline and grievance files" and others because "the Association has not kept those records -- until very recently -- in a manner which would make the retrieval of those statistics feasible."

In addition to receiving testimony during interim hearings, the Committee held hearings in Juneau. Also, two teleconference hearings were held to obtain testimony from Anchorage, Fairbanks, Kodiak, Valdez, Ketchikan, Sitka and Nome. Written testimony was received from persons, and oral testimony from

Witnesses included