

989 HJ AK BAR ASSN SUNSET REVIEW FILE NO. 9

Art. IX, Sec. 6, which prohibits the expenditure of public funds except for a public purpose.

If public funds are expended for an unlawful purpose, citizens have standing to seek reimbursement for the public treasury in the amount of the funds so spent. City of Chicago ex rel. Cohen v. Keane, 357 N.E.2d 452 (Ill. 1976). Cf. A.S. 37.10.090. As public officers are fiduciaries, the funds they manage are held in trust, the officers are insurers of the funds, and strict care must be used in their handling. People v. Savaiano, 359 N.E.2d 475, 480 (Ill. 1977); Brewer v. Hawkins, 455 S.W.2d 864 (Ark. 1970); State ex rel. O'Connell v. Egan, 371 P.2d 638 (Wash. 1962); Secretary of State v. Hanover Insurance Company, 411 P.2d 89 (Or. 1966).

In Kerby v. State ex rel. Frohmiller, 157 P.2d 698, at 703 (Ariz. 1945) the court denied the secretary of state the right to "charge for expenses by a public officer for services without the State, where the law does not authorize the performance of such service beyond the State's boundaries." The court further indicated that the reasonableness, practicability, or expediency of unlawful expenditures is no justification. Id. As in Kerby, the ABA can point to no authority justifying its violation of the open meeting act and its consequent unlawful expenditure of public monies.

VI. THE ACTIONS IN HOLDING A BUSINESS MEETING IN HAWAII, AND WITHOUT PUBLIC NOTICE, VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS.

The Fourteenth Amendment, United States Constitution and Article I, Sec. 7, Alaska Constitution guarantee that no citizen may be deprived of life, liberty or property by a state instrumentality without due process of law.

Arbitrary government conduct, whether in the form of legislative enactments or agency actions, is violative of the principles of substantive due process. Cf. Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447 (Alaska 1974); Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92 (Alaska 1974). Here, plaintiffs assert that the ABA's action in holding a business meeting in Hawaii, and without public notice, violated the due process guarantees afforded them even if Alaska's open meeting act did not apply to the ABA.

The standard for judging arbitrariness was enunciated by the Supreme Court in Concerned Citizens, supra, a decision upholding the constitutionality of a local ordinance. In disposing of plaintiffs' due process claims the court noted that: "Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." 527 P.2d at 452. The constitutional principles binding a local government must apply with equal force to state instrumentalities. Thus, in determining

plaintiffs' due process claims the question is whether the ABA's act of holding a business meeting in Hawaii bore a reasonable relationship to the ABA's legitimate public purposes. Given the statutory functions of the ABA, clearly no such reasonable relationship exists.

The ABA has been vested by statute with regulatory responsibilities directly affecting the justice system and of interest to all segments of the Alaska population. Through its Board of Governors it decides who will and will not practice law. A.S. 08.08.080(a)(1). The Legislature has also given it a voice in determining what acts constitute the practice of law and what rules will govern the operation of the State's courts. A.S. 08.08.080(b)(1). Indeed, it is responsible for all "matters in any way affecting the organization and functions of the Alaska Bar." A.S. 08.08.080(a)(6).

The importance of these functions to the public at large should be self-evident. Items before the Governors in Hawaii--especially such questions as mandatory pro bono, laymen on the Board of Governors, formation of a political action group, malpractice insurance, and surplus funds (which are, after all, public monies)--are clearly of interest to all citizens of the State. See R. 10-11, 50-60.

A Governors' meeting removed from the scrutiny of Alaska's public and media does nothing to further the ABA's broad policy responsibilities. It also ignores the agency's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII

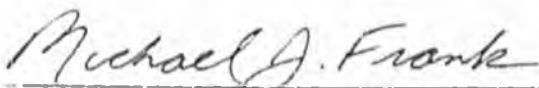
CONCLUSION

For the foregoing reasons, plaintiffs seek the following:

- (1) a declaration that the meetings of the ABA Governors are subject to A.S. 44.62.310-.312;
- (2) a declaration that the ABA violated A.S. 44.62-.310-.312 in holding a Governors' business meeting in Hawaii in February, 1978;
- (3) a declaration that the ABA violated plaintiffs' due process rights in holding a Governors' business meeting in Hawaii in February, 1978;
- (4) a declaration that all action taken at the unlawful ABA Governors' Hawaii business meeting is void, and that the public funds expended for the meeting are recoverable;
- (5) an award of costs and attorneys' fees for this appeal as determined pursuant to Appellate Rule 29; and
- (6) such further relief as the court deems just and reasonable.

Respectfully submitted this 15th day of January, 1979.

MICHAEL J. FRANK
RICHARD BROWN
GREGORY M. O'LEARY



Attorneys for Appellants/
Cross-Appellees

FILED IN OPEN COURT

Date: 9/11/78 *R. C. ...*

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

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

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

Plaintiffs,)

vs.)

THE ALASKA BAR ASSOCIATION,)
Defendant.)

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT

SEP 11 1978

By *[Signature]*
Clerk of the Trial Courts
Deputy

No. 3AN-78-1198 Civ.

JUDGMENT

This matter came on before the Court on the Defendant's Motion for Judgment on the Pleadings filed pursuant to Rule 12(c) of the Rules of Civil Procedure, and the Plaintiffs' Motion for Summary Judgment filed pursuant to Rule 56 of the Rules of Civil Procedure, and the Court having reviewed the records and files herein and having heard oral argument, finds that the Alaska Administrative Procedure Act, Chapter 44.62 of the Alaska Statutes, is not applicable to meetings held by the Board of Governors of the Alaska Bar Association by virtue of A.S. 08.08.100, and the Court further finding that there is no genuine issue as to any material fact with respect to the Plaintiffs' Motion for Summary Judgment in which the Plaintiffs contended that they have been denied due process pursuant to Article 1, Section 2, and Article 1, Section 7 of the Constitution of the State of Alaska, and the due process provisions of the United States Constitution, and

AUG 7 1978

LAW OFFICES
ATKINSON, CONWAY
YOUNG, BELL
& GAGNON, INC.
1007 WEST THIRD AVE.
ANCHORAGE, ALASKA
TELEPHONE 278-3563

AUG 6 1978

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

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

DATED this 11 day of September, 1978.

[Handwritten signature]

Mark C. Rowland
Judge of the Superior Court

I certify that on 9/19/78
a copy of the above was sent to
each of the following at their ad-
dresses of record: All the way

Service Acknowledged this 7 day of
AUGUST, 1978
[Handwritten signature]

[Handwritten signature]
Dputy Clerk
d.c.c.: 9.19.78

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

JUDGMENT

AUG 09 1978

filed Aug, 22, 1979

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)

Civil Action No. 3AN-

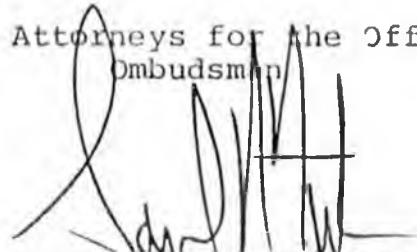
APPLICATION FOR ORDER COMPELLING
COMPLIANCE WITH OFFICE OF THE
OMBUDSMAN SUBPOENA

Comes now the State of Alaska, Office of the Ombudsman, by and through its attorneys, Hedland, Fleischer & Friedman, and respectfully applies to this Court, pursuant to AS 24.55.170(b), AS 44.62.590 and Rule 45(g) of the Alaska Rules of Civil Procedure, for an Order compelling the compliance of Donna C. Willard, President of the Alaska Bar Association with the Office of the Ombudsman Subpoena for Production of Documents served on her on August 2, 1979.

This Application is supported by the Affidavit of Frank Flavin, Ombudsman and the Memorandum filed herewith.

DATED at Anchorage, Alaska, this 22 day of August, 1979.

HEDLAND, FLEISCHER & FRIEDMAN
Attorneys for the Office of the
Ombudsman

By: 
Saul R. Friedman

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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)

Civil Action No. 3AN-

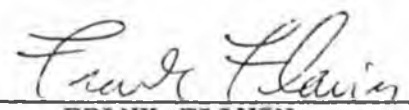
AFFIDAVIT OF FRANK FLAVIN

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)


Frank Flavin, being first duly sworn upon oath, deposes and says:

1. That I am the Ombudsman of the State of Alaska, Office of the Ombudsman.
2. That on August 2, 1979, Padeen Moriarty, acting as Ombudsman because of my absence from the State of Alaska, executed a Subpoena for Production of Documents, a copy of which is attached hereto as Exhibit "A", page one.
3. That the official records of the Office of the Ombudsman, attached hereto as pages two and three of Exhibit "A", indicate that said Subpoena was personally served upon Donna C. Willard and was also served upon her through service on John R. Loaff at the Alaska Bar Association.
4. That on August 10, 1979, the Office of the Ombudsman received a Response to Subpoena for Production of Documents, a copy of which is attached hereto as Exhibit "B", contesting the

1 jurisdiction of the Office of the Ombudsman and further indicating
2 that the Subpoena for Production of Documents requiring produc-
3 tion on Monday, August 13, 1979 would not be complied with.

4
5 
6 FRANK FLAVIN

7 SUBSCRIBED and SWORN to before me this 22 day of
8 August, 1979.

9
10 
11 NOTARY PUBLIC in and for Alaska
12 My Commission Expires: 10-12-81

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30 Affidavit of Frank Flavin
31 Page Two of Two

OFFICE OF THE OMBUDSMAN

In the matter of)
)
)
Ombudsman Complaint)
No. A79-0641, A79-0642

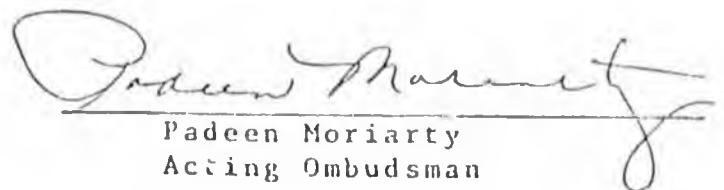
SUBPOENA FOR PRODUCTION OF DOCUMENTS

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

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 relating to grievances concerning attorneys;
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 fiscal year 1979; and
4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79


Padeen Moriarty
Acting Ombudsman

I hereby return that I served the annexed subpoena on
DORIS C. Willard by delivering a copy
thereof to him.

DATED: August 2, 1979

Carroll M. Allen

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on
John R. LOAFF by delivering a copy
thereof to him at his address.

DATED: August 2, 1979

Catherine M. Allen

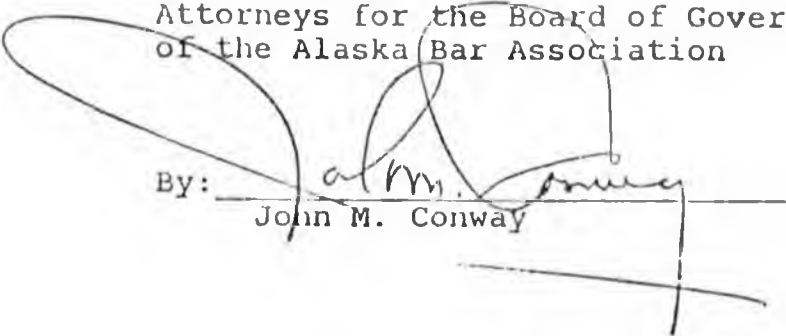
Received by John R. Loaff
Date: 2 August 1979

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
PHONE 279-5563

RESPONSE TO SUBPOENA
Page 2

EXHIBIT 'B'

Page 2 of 2

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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)
)

Civil Action No. 3AN-

ORDER SETTING HEARING ON APPLICATION
FOR ORDER COMPELLING COMPLIANCE WITH
OFFICE OF THE OMBUDSMAN SUBPOENA

TO: Donna C. Willard, President
Alaska Bar Association

Pursuant to the Application for Order Compelling
Compliance with Office of the Ombudsman Subpoena and the supporting
documents filed therewith, a hearing on said Application will be
held before this Court in Courtroom "___" in the Alaska State
Court Building at Anchorage, Alaska, on the ___ day of _____,
1979, at the hour of _____ o'clock __.m.

: DATED at Anchorage, Alaska, this ___ day of August,
1979.

Judge of the Superior Court

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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)
_____)

Civil Action No. 3AN-

ORDER COMPELLING COMPLIANCE WITH
OFFICE OF THE OMBUDSMAN SUBPOENA

This matter having come before the Court upon the Application for Order Compelling Compliance with Office of the Ombudsman Subpoena, and the Court having considered said Application, the pleadings and file herein and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that Donna C. Willard, President, Alaska Bar Association, shall produce the documents requested in the Office of the Ombudsman Subpoena for Production of Documents at the office of the Alaska Bar Association on _____, 1979, at _____ o'clock _____ .m.

DATED at Anchorage, Alaska, this _____ day of _____ 1979.

Judge of the Superior Court

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 THIRD JUDICIAL DISTRICT

3 STATE OF ALASKA, OFFICE OF)
4 THE OMBUDSMAN,)
5 Plaintiff,)
6 vs.)
7 DONNA C. WILLARD, President,)
8 Alaska Bar Association,)
9 Defendant)

10 Civil Action No. 3AN-

11
12 MEMORANDUM IN SUPPORT OF
13 APPLICATION FOR ORDER COMPELLING
14 COMPLIANCE WITH OFFICE OF THE OMBUDSMAN SUBPOENA

14 Statement of Facts

15 On June 12, 1979, the Office of the Ombudsman received
16 two complaints concerning the Alaska Bar Association (Bar).
17 Given case numbers A79-0641 and A79-0642, the first complaint was
18 directed towards the adequacy of the Bar's investigation and
19 resolution of citizen grievances against attorneys and the
20 propriety of the salary and fringe benefits of the Bar Counsel.
21 The second complaint alleged an improper use of Bar funds for
22 travel and associated expenses not directly benefiting the Bar
23 and further alleged an improper expenditure of Bar funds for the
24 guest speaker at the 1979 Hawaiian Conference.

25 By letter dated July 16, 1979, the Ombudsman, Frank
26 Flavin, advised Donna C. Willard, President of the Board of
27 Governors of the Bar of the complaints and that the Office of the
28 Ombudsman had commenced an investigation pursuant to AS 24.55.110.
29 A copy of that letter is attached hereto as Exhibit "A". Basically,
30 Mr. Flavin afforded Donna C. Willard the opportunity to voluntarily
31

1 cooperate with the investigation by providing copies of documents
2 and by allowing an examination of the Bar's financial records.

3 By letter dated July 19, 1979, attached hereto as
4 Exhibit "B", Donna C. Willard, while offering certain records to
5 Mr. Flavin as a member of the Bar, further advised him that the
6 Board of Governors "declines to recognize any jurisdiction" of
7 the Office of the Ombudsman.

8 By letter dated July 31, 1979, a copy of which is
9 attached as Exhibit "C", Frank Flavin reiterated the jurisdiction
10 of his Office and further advised Donna C. Willard that any
11 dealings with him in this matter were in his official capacity as
12 Ombudsman and not individually as an attorney licensed to prac-
13 tice law in the State of Alaska.

14 On August 2, 1979, Donna C. Willard was personally
15 served with a Subpoena for Production of Documents issued by
16 Padeen Moriarty, Acting Ombudsman. A copy of the Subpoena is
17 attached hereto as Exhibit "D".

18 On August 10, 1979, three days prior to the date for
19 production of documents pursuant to the Subpoena, the Office of
20 the Ombudsman received a Response to Subpoena for Production of
21 Documents from Donna C. Willard. That document is attached
22 hereto as Exhibit "E". The main thrust of that exhibit is
23 contained in two unsupported, conclusory statements concerning
24 the jurisdiction of the Ombudsman. Suffice it to say the response
25 indicates that there would be no compliance with the Subpoena.
26 While Donna C. Willard also asks that the Ombudsman defer action
27 enforcing the Subpoena until after the September 6, 1979 meeting
28 of the Board of Governors, Donna C. Willard in her letter of July
29 19, 1979 (Exhibit "B") advised the Ombudsman of the Board's
30 position that there was no jurisdiction over the Bar. In view of
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Page Two of Eight

1 the jurisdictional issue raised by the Bar and the Ombudsman's
2 obligation to investigate complaints, the Ombudsman has sought an
3 Order from the Court requiring compliance with the Subpoena.

4 The Office of the Ombudsman
5 Has Jurisdiction to Investigate
6 Acts of the Alaska Bar Association

7 The Office of the Ombudsman was established in July,
8 1975 and has since that time been heavily utilized by its citi-
9 zenry. The Office of the Ombudsman has two responsibilities:
10 (1) to receive complaints from the public and to investigate and
11 act upon such complaints; and (2) to improve public administra-
12 tion. As an external critic of governmental operations, scrutiny
13 by the Office of the Ombudsman is not always welcome.

14 In any event, AS 24.55.100 gives the Ombudsman "...
15 jurisdiction to investigate the administrative acts of agencies".
16 AS 24.55.150 sets forth those administrative acts which are
17 appropriately the subject of investigation because they may be:

- 18 "... (1) contrary to law;
- 19 (2) unreasonable, unfair, oppressive,
20 arbitrary, capricious, an abuse of
21 discretion, or unnecessarily discrim-
22 inatory, even though in accordance with
23 law;
- 24 (3) based on a mistake of fact;
- 25 (4) based on improper or irrelevant
26 grounds;
- 27 (5) unsupported by an adequate state-
28 ment of reasons;
- 29 (6) performed in an inefficient or
30 discourteous manner; or
- 31 (7) otherwise erroneous."

32 The term "administrative act" is defined in AS 24.55.330(1)
as:

HEDLAND, FLEISCHER
& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1018 WEST 6TH AVENUE
ANCHORAGE, AK. 99501
(907) 270-5520
FAX (907) 270-3033

1 "... an action, omission, decision,
2 recommendation, practice, policy, or
3 procedure of an agency, but does not
4 include the preparation or presentation
5 of legislation or the substantive
6 content of a judicial order, decision
7 or opinion;"

8
9 The definition of the term "agency", the issue raised
10 by the Bar in this case, is defined in AS 24.55.330(2) to include:

11 "a department, office, institution, corpora-
12 tion, authority, organization, commission,
13 committee, council or board of a municipality,
14 or in the executive, legislative, or judicial
15 branches of state government, and a department,
16 office, institution, corporation, authority,
17 organization, commission, committee, council
18 or board of a municipality or of the state
19 government independent of the executive,
20 legislative and judicial branches; it also
21 includes an officer, employee or member of
22 an 'agency' acting or purporting to act in
23 the exercise of his official duties, but
24 does not include the governor, lieutenant
25 governor, a member of the legislature, justice
26 of the supreme court, judge of the superior
27 or district court, magistrate, member of a
28 city council or borough assembly, elected city
29 or borough mayor, or a member of an elected
30 school board;"

31 The extremely broad jurisdictional grant to the Ombudsman
32 is certainly consistent with the legislative desire to provide,
33 in the Office of the Ombudsman, an accessible and official clearing-
34 house for citizen complaints. The Bar fits one or more of the
35 entities defined as "agency" in AS 24.55.330(2). First, it is a
36 creature of the state legislature having been created by the
37 legislature as "... an instrumentality of the state ..." AS
38 08.08.010. The legislature further established the Board of
39 Governors and conferred upon it certain powers and duties.
40 AS 08.08.030 and .080. Those powers relate in part to the holding
41 of annual and special meetings, the collection and disbursement
42 of funds and the organization and functioning of the Bar.

1 In essence, the legislature has charged the Bar with
2 certain managerial functions relating to matters of public concern.
3 That such functions are matters of public concern can hardly be
4 contested. As the Court stated in In Re Paul, 17 Alaska Reports,
5 360 (D.C. Alaska, 1957):

6 "For over 30 years there has been a
7 constant growth in the system of integrated
8 bars throughout the nation; in some states
9 they have been created by statute, in some
10 by court rule, but in all, the Bar of the
11 state or other jurisdiction, has taken a
12 leading role in policing their membership
13 so that the standards of the lawyers would
14 be kept at a high level in order that in
15 their dealings with the public they would
16 maintain proper comportment so as to
17 protect the public interest and safeguard
18 the general welfare of those with whom they
19 dealt." Id. at 368.

14 The Court in Petition of Moody, 524 P.2d 1261 (Alaska 1974)
15 also discussed the public benefits of an integrated bar stating
16 that:

17 "The disadvantages to an individual in such
18 a system are believed to be outweighed by
19 the advantages achieved by the profession
20 as a whole, and by the public to whose
21 benefit it is that the profession be governed
22 effectively by an authoritative organization."
23 Id. at 1266.

21 As far as the jurisdiction of the Office of the Ombudsman
22 over the Bar is concerned, given the absence of any statutory
23 exemption which explicitly or even implicitly contravenes the
24 broad jurisdictional grant, an investigation by the Office of the
25 Ombudsman of alleged administrative abuses by the Bar is clearly
26 contemplated by the legislature. In the case of Application of
27 Peterson, 499 P.2d 304 (Alaska, 1972), Peterson petitioned the
28 Alaska Supreme Court for admission to the Alaska Bar Association
29 alleging that the hearing afforded him by the Bar after he failed
30

1 the January and September, 1967 bar examinations was inadequate
2 and that the scoring system utilized was unfair. The Court held
3 that the "substantial evidence test" was the appropriate standard
4 of administrative review stating that "...we have consistently
5 adhered to the substantial evidence test as the appropriate scope
6 of review with regard to appeals from administrative agencies."
7 Id. at 307 (Emphasis added).

8 The Court obviously considered the Bar to be an administra-
9 tive agency when it stated that:

10 "The legislature has expressly included
11 the Board of Governors of the Alaska Bar
12 Association as an agency subject to the
13 adjudicative procedures of the Alaska
14 Administrative Procedure Act, AS
15 44.62.010-650." Id. at 306.

16 However, the Court did not find that the Bar was an agency because
17 it was subject to the A.P.A. but rather that it was an agency
18 which was subject to that Act. The subsequent action of the
19 legislature in deleting the Bar from the list of agencies subject
20 to the Administrative Procedure Act cannot seriously be relied
21 upon to support a conclusion that the legislature was therefore
22 indicating that the Bar was not an agency. Such an analysis was
23 rejected by the Court in Chronicle Publishing Company v. Superior
24 Court, 354 P.2d 637 (Calif. 1960). In Chronicle, the publishing
25 company served interrogatories on the State Bar of California
26 seeking information as to complaints and disciplinary actions
27 taken against Victor E. Cappa, an attorney who had filed a libel
28 action against it. In considering whether or not the State Bar
29 could claim a privilege based upon a section of the Code of Civil
30 Procedure relating to testimony of a "public officer" the Court
31 stated:

1 "That the Legislature considered the State Bar
2 as at least akin to a state public body or
3 agency and hence its officers as 'public
4 officers' is illustrated by the last para-
5 graph of section 6001, where it appears that
6 the Legislature felt the necessity of
7 providing that laws prescribing procedures
8 for state bodies, agencies, or classes, did
9 not apply to the State Bar, thus indicating
10 that the Legislature considered the State
11 Bar in their category..." Id. at 645.

12
13 In McGregor v. Clawson, 506 S.W.2d 922 (Tex. 1974) the
14 Court was faced with a question concerning the proper venue for a
15 disbarment brought by the State Bar of Texas against McGregor, an
16 attorney licensed in Texas. While the case turned on whether
17 venue provisions in the State Bar Act prevailed over a more
18 general civil rule, the Court did discuss the governmental
19 status of the Bar.

20 "The State Bar Act is purely a creature
21 of statute, prescribing the machinery
22 and procedure by which the State Bar has
23 been empowered to bring and maintain the
24 disbarment suit in question. But for the
25 statute, the State Bar and District
26 Grievance Committee would have no exist-
27 ence." Id. at 928.

28 The Court went on to say that:

29 "The State Bar and its Grievance Committees
30 exist solely by virtue of the exercise of
31 the power of the State, acting through its
32 legislative department. They are administra-
33 tive agencies of the State. ... The Legisla-
34 ture could at any time terminate their
35 existence and provide other and different
36 means for handling of the matters now
37 entrusted to them. They (the State Bar and
38 Grievance Committee) are creatures of the
39 State. An agency created by the State for
40 the better ordering of government has no
41 privileges, immunities or rights under the
42 State and Federal constitutions which it
43 may invoke in opposition to the will of
44 its creator." Id. at 929.



Ombudsman

State of Alaska

Frank Flavin

July 16, 1979

Reply to:

- 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011
- Pouch W0
Juneau, Alaska 99811
(907) 465-4970
- P.O. Box 74358
Fairbanks, Alaska 99707
(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 24.55.100 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'

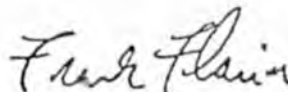
PAGE 1 of 2

- 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

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION

OFFICERS

JOHNA C. WILLARD
PRESIDENT
ANCHORAGE
WILLIAM B. ROZELL
PRESIDENT ELECT
JUNEAU
JONATHAN H. LINK
VICE PRESIDENT
FAIRBANKS
EDWARD G. KING
SECRETARY
KETCHIKAN

P.O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7489

WILLIAM GARRISON, BAR COUNSEL

BOARD MEMBERS

ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
ELIZABETH P. KENNEDY
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

HAND DELIVERED

July 19, 1979

RECEIVED
JUL 19 1979
ANCHORAGE
OFFICE OF THE OMBUDSMAN

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'

PAGE 1 of 3

ANCHORAGE
OFFICE OF THE OMBUDSMAN

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.

RECEIVED
JUL 19 1979

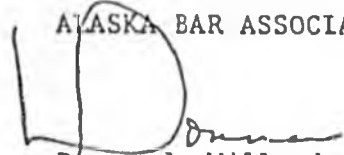
ANCHORAGE
OFFICE OF THE OMBUDSMAN

Therefore, the Board, at this time, respectfully 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



Ombudsman

State of Alaska

Frank Flavin

Reply to:

July 31, 1979

- 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011
- Pouch W0
Juneau, Alaska 99811
(907) 465-4970
- P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

Donna C. Willard, Esq.
President
Alaska Bar Association
P.O. Box 279
Anchorage, Alaska 99510

Re: Ombudsman Complaints A79-0641
and A79-0642

Dear Ms. Willard:

I have reviewed our statute and relevant court cases and feel strongly that the Alaska Bar Association is subject to the jurisdiction of the Office of the Ombudsman.

All previous and future contacts between myself or any other member of this office are within the scope of the authority and duties of the Office of the Ombudsman.

I am treating these complaints as any other complaints in this office. Consequently, they have been assigned to Paddy Moriarty, Deputy Ombudsman and Supervisor of the Anchorage office, for investigation. Any future contacts will be made by her.

I have reviewed the specific information given by our complainants. While we are interested in all Board of Governor's travel for the past two fiscal years, the complainants specifically mentioned Atlanta, San Diego, Chicago and Hawaii.

Thank you for your patience and consideration in this matter.

Sincerely,

Frank Flavin
Frank Flavin
Ombudsman

FF:rj

OFFICE OF THE OMBUDSMAN

In the matter of)

)

)

SUBPOENA FOR PRODUCTION OF DOCUMENTS

Ombudsman Complaint)

No. A79-0641, A79-0642

TO: Donna C. Willard
President
Board of Governors
Alaska Bar Association

YOU ARE COMMANDED to appear at the office of the Alaska Bar Association at 310 K Street in Anchorage, Alaska, on Monday, August 13, 1979, at 8:30 a.m., and to produce the following documents to be used as evidence in this complaint:

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 relating to grievances concerning attorneys;
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 fiscal year 1979; and
4. Brochures, pamphlets or other written materials describing any meetings attended outside the state of Alaska by members of the Board of Governors.

DATED: 8/2/79

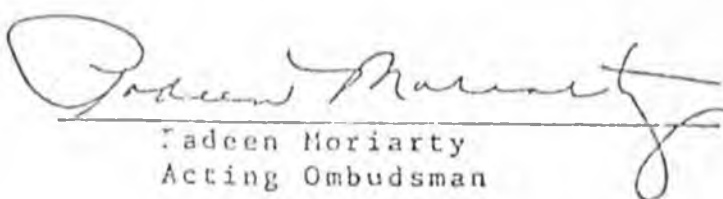

Faeen Moriarty
Acting Ombudsman

EXHIBIT 'D'

Page 1 of 3

RETURN OF SERVICE OF SUBPOENA

I hereby return that I served the annexed subpoena on
DONNA C. Willard by delivering a copy
thereof to him

DATED:

August 2, 1979

Carleton M. Allen

I hereby return that I served the annexed subpoena on

John R. LOAFF by delivering a copy thereof to him at Bar Assoc.

DATED: August 2, 1979

Catherine M. Allen

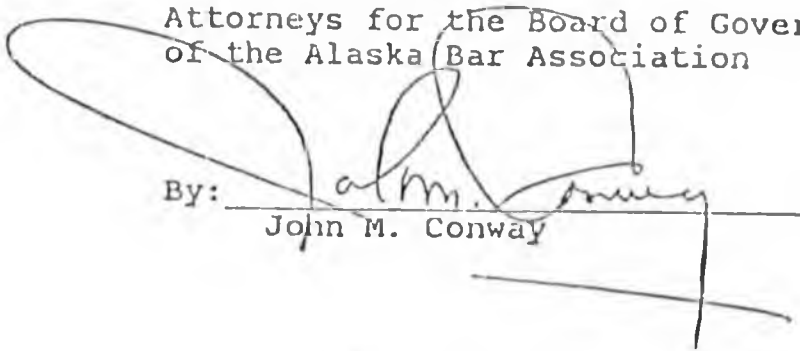
Received by John R. Loaff
Date: 2 August 1979

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
NORWALK, ALASKA
PHONE 279-563

RESPONSE TO SUBPOENA
Page 2

Exhibit E

Page 2 out of 2