

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672  
5780 HOUSE JUDICIARY

1 in the United States the judge pleads guilty or no contest or is found  
2 guilty of a crime punishable as a felony under state or federal law or  
3 of a crime that involves moral turpitude under state or federal law.  
4 If the conviction is reversed, suspension terminates, and the judge  
5 shall be paid the judge's salary for the period of suspension. If the  
6 judge is suspended and the conviction becomes final, the supreme court  
7 shall remove the judge from office.

8 \* Sec. 9. AS 22.30.070(c) is amended to read:

9 (c) On recommendation of the commission [OR AFTER AN APPEAL  
10 UNDER AS 22.30.011(e)], the supreme court may (1) retire a judge for  
11 disability that seriously interferes with the performance of duties  
12 and that is or may become permanent, and (2) reprimand, publicly or  
13 privately censure, or remove a judge for action occurring not more  
14 than six years before the commencement of the judge's current term  
15 which constitutes wilful misconduct in the office, wilful and persis-  
16 tent failure to perform duties, habitual intemperance, conduct preju-  
17 dicial to the administration of justice, or conduct that brings the  
18 judicial office into disrepute. The effective date of retirement  
19 under (1) of this subsection is the first day of the month coinciding  
20 with or after the date that the supreme court files written notice  
21 with the commissioner of administration that the judge was retired for  
22 disability. A duplicate copy of the notice shall be filed with the  
23 judicial council.

24 \* Sec. 10. AS 22.30.080(2) is amended to read:

25 (2) "judge" means a justice of the supreme court, a judge  
26 of the court of appeals, a judge of the superior court, or a judge of  
27 the district court who is the subject of an investigation or proceed-  
28 ing under sec. 10, art. IV, Constitution of the State of Alaska and  
29 this chapter, including a justice or judge who is serving in a full-

1            time, part-time, permanent, or temporary position.

2            \* Sec. 11. AS 22.30.011(e) and 22.30.011(f) are repealed.

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6-1132P  
Lauterbach  
3/5/90

Original sponsor(s): Judiciary Committee

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 268 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the Commission on Judicial Con-  
7 duct and to the Alaska Supreme Court's power to  
8 discipline judges."

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

10 \* Section 1. AS 15.58.050 is amended to read:

11 Sec. 15.58.050. INFORMATION AND RECOMMENDATIONS ON JUDICIAL  
12 OFFICERS. No later than August 7 of the year in which the state  
13 general election will be held, the judicial council shall file with  
14 the lieutenant governor a statement including information about each  
15 supreme court justice, court of appeals judge, superior court judge,  
16 and district court judge who will be subject to a retention election.  
17 The statement shall reflect the evaluation of each justice or judge  
18 conducted by the judicial council according to law and shall contain a  
19 brief statement describing each public reprimand, public censure, or  
20 suspension received by the judge under AS 22.30.011(d) ((3) OR (4))  
21 during the period covered in the evaluation. A statement may not  
22 exceed 600 words.

23 \* Sec. 2. AS 22.30.010 is amended to read:

24 Sec. 22.30.010. COMMISSION ON JUDICIAL CONDUCT. The Commission  
25 on Judicial Conduct shall consist of nine members as follows: three  
26 persons who are justices or judges of state courts, elected by the  
27 justices and judges of the state courts; three members who have prac-  
28 ticed law in this state for 10 years, appointed by the governor from  
29 nominations made by the governing body of the organized bar and

1 subject to confirmation by a majority of the members of the legisla-  
2 ture in joint session; and three citizens who are not judges, retired  
3 judges, or members of the state bar, appointed by the governor and  
4 subject to confirmation by a majority of the members of the legisla-  
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6 ceases to hold the position that qualified that person for appoint-  
7 ment. A person may not serve on the commission and on the judicial  
8 council simultaneously. A quorum of the commission must include at  
9 least one person who is a justice or judge, at least one person ap-  
10 pointed by the governor who has practiced law in the state for 10  
11 years, and at least one citizen member who is not a justice, judge, or  
12 member of the state bar. The commission shall elect one of its mem-  
13 bers to serve as chairman for a term prescribed by the commission. A  
14 vacancy shall be filled by the appointing power for the remainder of  
15 the term.

16 \* Sec. 3. AS 22.30.011(a) is amended to read:

17 (a) The commission shall on its own motion or on receipt of a  
18 written complaint inquire into an allegation that a judge

19 (1) has been convicted of a crime punishable as a felony  
20 under state or federal law or convicted of a crime that involves moral  
21 turpitude under state or federal law;

22 (2) suffers from a disability that seriously interferes  
23 with the performance of judicial duties and that is or may become  
24 permanent;

25 (3) within a period of not more than six years before the  
26 filing of the complaint or before the beginning of the commission's  
27 inquiry based on its own motion [START OF THE CURRENT TERM], committed  
28 an act or acts that constitute

29 (A) wilful misconduct in office;

1 (B) wilful and persistent failure to perform judicial  
2 duties;

3 (C) conduct prejudicial to the administration of  
4 justice;

5 (D) conduct that brings the judicial office into  
6 disrepute; or

7 (E) conduct in violation of the code of judicial  
8 conduct; or

9 (4) is habitually intemperate, SHALL

10 \* Sec. 4. AS 22.30.011(b) is amended to read:

11 (b) After preliminary informal consideration of an allegation,  
12 the commission may exonerate the judge, informally and privately  
13 admonish the judge, or recommend counseling. Upon a finding of proba-  
14 ble cause, the commission may hold a formal hearing on the [AN] alle-  
15 gation [UNDER (a) OF THIS SECTION]. A hearing under this subsection  
16 [SECTION] is public. Proceedings and records pertaining to proceed-  
17 ings that occur before the commission holds a public hearing on an  
18 allegation are confidential, subject to the provisions of AS 22.30.-  
19 060(b) [A HEARING UNDER AS 44.62.310(d) AND IS PRIVATE UNLESS A PUBLIC  
20 HEARING IS REQUESTED BY THE JUDGE].

21 \* Sec. 5. AS 22.30.011(d) is amended to read:

22 (d) The commission may, after a hearing held under (b) of this  
23 section, SHALL

24 (1) exonerate the judge of the charges; or

25 (2) [INFORMALLY AND PRIVATELY ADMONISH THE JUDGE OR RECOM-  
26 MEND COUNSELING;

27 (3) REPRIMAND THE JUDGE PUBLICLY OR PRIVATELY;

28 (4) refer the matter to the supreme court with a recommen-  
29 dation that the judge be reprimanded, suspended, removed, or retired

1 from office or publicly or privately censured by the supreme court.

2 \* Sec. 6. AS 22.30.060(b) is amended to read:

3 (b) All proceedings, records, files, and reports of the commis-  
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5 (1) upon waiver in writing by the judge at any stage of the  
6 proceedings;

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9 statement in order to confirm the pendency of the investigation, to  
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11 right of the judge to a fair hearing, or to state that the judge  
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14 charges, the subsequent formal hearing, and the commission's ultimate  
15 decision and minority report, if any, are [SHALL BECOME] public; even  
16 after formal charges are filed, the deliberations of the commission  
17 concerning the case are confidential.

18 \* Sec. 7. AS 22.30 is amended by adding a new section to read:

19 Sec. 22.30.068. MINORITY REPORTS. A member of the commission  
20 who believes that the commission failed to impose an appropriate  
21 disciplinary measure after a hearing under AS 22.30.011(b) may submit  
22 a report recommending a different disciplinary measure. The report  
23 shall accompany the majority report and may be submitted by the member  
24 to the chief justice of the supreme court, the attorney general, and  
25 the chair of the senate and house judiciary committees.

26 \* Sec. 8. AS 22.30.070(b) is amended to read:

27 (b) On recommendation of the commission [OR AFTER AN APPEAL  
28 UNDER AS 22.30.011(e)], the supreme court may reprimand, publicly or  
29 privately censure, or suspend a judge from office without salary when

1 in the United States the judge pleads guilty or no contest or is found  
2 guilty of a crime punishable as a felony under state or federal law or  
3 of a crime that involves moral turpitude under state or federal law.  
4 If the conviction is reversed, suspension terminates, and the judge  
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A M E N D M E N T

OFFERED IN THE HOUSE

TO: CS HB 268 [2/20/90 Lauterbach #6-1132G]

Page 3, Line 12:

Delete "or [THE COMMISSION MAY]

Insert "Upon a finding of probable cause, the  
commission may"

Page 3, Line 23, after "charges;"

Insert "or"

→ Page 3, Line 26, after "(3)":

Delete "]" ; after "privately;",

Insert "]"

→ Page 3, Line 27:

Delete "3", Insert "2"

→ Page 3, line 28, after "that the judge be":

Insert "reprimanded,"

Page 5, Line 2:

Delete "or who is retired"

Page 5, Line 3:

Insert a new bill section to read

→ Sec. 9. AS 22.30.011(e) and AS 22.30.011(f) are repealed.

Marked up in red to show changes  
from HB 268 as introduced.

6-1132G  
Lauterbach  
2/20/90

My Committee (HJV)  
file

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9 \* Section 1. AS 15.58.050 is amended to read: **NEW SECTION**

10 Sec. 15.58.050. INFORMATION AND RECOMMENDATIONS ON JUDICIAL  
11 OFFICERS. No later than August 7 of the year in which the state  
12 general election will be held, the judicial council shall file with  
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17 conducted by the judicial council according to law and shall contain a  
18 brief statement describing each public reprimand, public censure, or  
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21 exceed 600 words.

22 \* Sec. 2. AS 22.30.010 is amended to read: **NEW SECTION**

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24 on Judicial Conduct shall consist of nine members as follows: three  
25 persons who are justices or judges of state courts, elected by the  
26 justices and judges of the state courts; three members who have  
27 practiced law in this state for 10 years, appointed by the governor  
28 from nominations made by the governing body of the organized bar and  
29 subject to confirmation by a majority of the members of the

1 legislature in joint session; and three citizens who are not judges,  
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11 member of the state bar. The commission shall elect one of its mem-  
12 bers to serve as chairman for a term prescribed by the commission. A  
13 vacancy shall be filled by the appointing power for the remainder of  
14 the term.

15 \* Sec. 3. AS 22.30.011(a) is amended to read: **NO CHANGES**

16 (a) The commission shall on its own motion or on receipt of a  
17 written complaint inquire into an allegation that a judge

18 (1) has been convicted of a crime punishable as a felony  
19 under state or federal law or convicted of a crime that involves moral  
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22 with the performance of judicial duties and that is or may become  
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21 (d) The commission may, after a hearing held under (b) of this  
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HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF  
HB 268

Commission on Judicial Conduct

Received April 5, 1989  
by The Judiciary Committee

Heard April 12, 1989  
Heard May 2, 1989  
Heard May 3, 1989  
Heard February 6, 1990  
Heard February 7, 1990

CSHB 268 (SA) Adopted February 7, '990

Passed Out of Committee February 7, 1990  
3 Do Pass  
1 Do Not Pass  
1 No Recommendation

## TABLE OF CONTENTS

### HB 268: Commission on Judicial Conduct

- Item 1: HB 268 by The Judiciary Committee  
CSHB 268 (SA)
- Item 2: Fiscal Note by Commission on Judicial Conduct
- Item 3: Sectional Analysis from Rep. Gruenberg, April 11, 1989
- Item 4: Memorandum from Commission on Judicial Conduct, April 3, 1989
- Item 5: Memorandum from Alaska Judicial Council, April 3, 1989

# HOUSE COMMITTEE REPORT

(7)

Date Referred: April 5, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: \_\_\_\_\_

The STATE AFFAIRS Committee considered:

HB 268

HOUSE BILL NO. 268 [COMMISSION ON JUDICIAL CONDUCT]  
 "An Act relating to the Commission on Judicial Conduct."

**RECOMMENDATIONS:**

- be replaced with CSHB 2108(SA)  the same title
- have attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(s):  
 (Dept)

APPROVES PREVIOUS: (Date/Dept)

- fiscal impact \_\_\_\_\_
- zero fiscal note <sup>AK Common</sup> Jud. Conduct
- zero with analysis \_\_\_\_\_
- fiscal note(s) \_\_\_\_\_
- zero fiscal note(s) \_\_\_\_\_
- zero fn/analysis \_\_\_\_\_

**SIGNING DO PASS:**

*Do not pass as amended*

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**SIGNING:**

(Check approp. column)

	Do Not Pass	No Rec	Amend
<i>[Signature]</i>	✓		
<i>[Signature]</i>		X	

*[Signature]*  
 \_\_\_\_\_  
 Chairman's Signature

Item 2

STATE OF ALASKA  
1990 LEGISLATIVE SESSION

Bill Version: HB 268  
Publish Date: 2-5-90

### FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Alaska Commission  
 Title: Act relating to the BRU: on Judicial Conduct  
Commission on Judicial  
Conduct  
 Sponsor: Judiciary Components: \_\_\_\_\_  
 Requestor: State Affairs

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

General Funds	-0-	-0-	-0-	-0-	-0-	-0-
Federal Funds	-0-	-0-	-0-	-0-	-0-	-0-
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Marla N. Greenstein, Executive Director  
 Division: Alaska Comm'n on Judicial Conduct

Phone: 272-1033  
 Date: 2-5-90

Approved by: Marla N. Greenstein, Executive Director  
 Agency: Alaska Comm'n on Judicial Conduct

Date: 2-5-90

Distribution (by preparer):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management & Budget  
 Impacted Agency(ies)

Item 3

# State of Alaska

## Committees



CO-CHAIR, HOUSE JUDICIARY  
VICE-CHAIR, HOUSE LABOR AND COMMERCE  
HOUSE HEALTH, EDUCATION  
AND SOCIAL SERVICES

P.O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-4712  
465-4968/4986  
(SESSION)

914 CLAY COURT  
ANCHORAGE, ALASKA 99503  
(907) 276-6844

Representative Max F. Gruenberg, Jr.  
District 11  
Spennard, Upper Midtown Anchorage

April 11, 1989

### MEMORANDUM

TO: Representative Red Boucher  
Chairman, House State Affairs Committee

FROM: Representative Max Gruenberg *[Signature]*

RE: Analysis of HB 268

House Bill 268 makes several minor technical changes to the statutes governing the Commission on Judicial Conduct; Sections 2 and 4 make substantive changes intended to make Commission proceedings more open to the public:

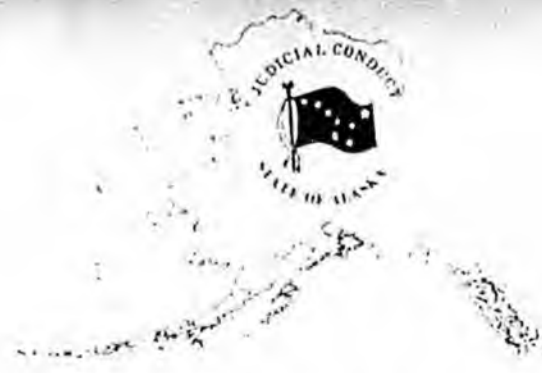
Section 1: A technical change, clarifying that the Commission is not authorized to investigate allegations more than six years old.

Section 2: Provides clear authority for the Commission to make preliminary inquiries into a complaint against a judge before holding a formal public hearing. Proceedings prior to a public hearing remain confidential, as they are under current AS 22.30.060(b)(3). (In addition, under the Open Meetings Act, AS 44.67.310(c)(7), agencies may discuss "subjects that tend to prejudice the reputation and character of any person" in executive session.) The bill also removes the judge's ability under current law to keep a hearing closed to the public.

Section 3: A technical change -- language removed in this section of the bill is now contained in Section 2 (page 2, lines 4 - 6).

Section 4: Requires that a Commission decision made after a public hearing also be made public. However, the deliberations of the Commission (like the deliberations of other quasi-judicial agencies, pursuant to AS 44.62.310(d)(1)) are expressly made confidential.

Section 5: A technical amendment, clarifying the term "judge" as including part-time or retired judges.



Commission on Judicial  
Conduct

303 K STREET  
ANCHORAGE, ALASKA 99501  
264 0528

April 3, 1989

M E M O R A N D U M

TO: Members of House Judiciary Committee  
FROM: Marla N. Greenstein, Executive Director *MG*  
RE: Commission Confidentiality and Independent Purpose

(1) Confidentiality of Commission Proceedings

Unlike other state agencies, Alaska's Commission on Judicial Conduct exists solely as an investigatory and adjudicatory body. The Commission's sole purpose is to investigate allegations of misconduct against judges. After a full investigation, if there is proof of misconduct in office, the Commission will issue formal charges and transform into a court-like body. After formal charges, the Commission will hear arguments and issue a recommendation for a sanction to the Alaska Supreme Court.

Throughout the investigatory stages the process is confidential. Purposes of confidentiality include:

- (a) protection of the judge's constitutional due process rights
- (b) encouragement of candor by witnesses
- (c) maintenance of public confidence in the judiciary
- (d) encouragement of retirement as an alternative to costly formal proceedings
- (e) protection of commissioners from outside pressures.

These purposes are achieved by the statutory requirements of AS 22.30.011 and 22.30.060 and Commission Rule 5 (attached). Any change to the constitution, statutes, or rules pertaining to the Commission must be consistent with the purposes stated above.

MEMORANDUM

House Judiciary Committee

RE: Commission Confidentiality and Purpose

April 3, 1989

Page 2 of 2

(2) Need for Commission Independence

The amendment to our state constitution that created the Commission on Judicial Conduct in 1968 was an outgrowth of a national movement to create independent judicial disciplinary commissions. The principle behind the creation of an independent commission was to provide a body that would "protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior of the part of judges themselves." (ABA Standards Relating to Judicial Discipline and Disability Retirement, 1977)

At the time the amendment was formulated by the Alaska State Legislature, the Judicial Council had been in existence for almost a decade. The Judiciary Committees of both houses knew that they could merely expand the functions of the Judicial Council to include the discipline of judges but chose not to. Reasons for creating a separate body with separate rules governing it, included an implicit recognition of the very different function of the Conduct Commission. As an investigatory body, the Commission on Judicial Conduct necessarily required stringent rules of confidentiality and procedures that would guarantee the constitutional rights of both complainants and judges. As an adjudicatory body, the Commission required a need of independence from outside pressures in its decision making and special subpoena powers. Any combination of functions with the Judicial Council appeared to have the potential of diluting these essential concerns.

## ATTACHMENTS

1. Constitutional Provision
2. Relevant Statutory Provisions
3. Commission Confidentiality Rule
4. Commission Procedures Flow Chart

Section 10. Commission on Judicial Conduct. The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

## Chapter 30. Judicial Conduct.

Section	Section
10 Commission on Judicial Conduct	66 Inquiry
11 Powers and duties of the commission	70 Disqualification, suspension, removal, retirement and censure of judges
40 Preparation of budget	80 Definitions
50 Validity of acts of the commission	
60 Rules and confidentiality	

**Sec. 22.30.010. Commission on judicial conduct.** The Commission on Judicial Conduct shall consist of nine members as follows: three persons who are justices or judges of state courts, elected by the justices and judges of the state courts; three members who have practiced law in this state for 10 years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three citizens who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. Commission membership terminates if a member ceases to hold the position that qualified that person for appointment. A person may not serve on the commission and on the Judicial Council simultaneously. The commission shall elect one of its members to serve as chairman for a term prescribed by the commission. A vacancy shall be filled by the appointing power for the remainder of the term. (§ 1 ch 213 SLA 1968; am § 23 ch 71 SLA 1972; am § 1 ch 160 SLA 1984)

**Sec. 22.30.011. Powers and duties of the commission.** (a) The commission shall on its own motion or on receipt of a written complaint inquire into an allegation that a judge

(1) has been convicted of a crime punishable as a felony under state or federal law or convicted of a crime that involves moral turpitude under state or federal law;

(2) suffers from a disability that seriously interferes with the performance of judicial duties and that is or may become permanent;

(3) within a period of not more than six years before the start of the current term, committed an act or acts that constitute

(A) wilful misconduct in office,

(B) wilful and persistent failure to perform judicial duties,

(C) conduct prejudicial to the administration of justice,

(D) conduct that brings the judicial office into disrepute, or

(E) conduct in violation of the code of judicial conduct; or

(4) is habitually intemperate.

(b) The commission may hold a hearing on an allegation under (a) of this section. A hearing under this section is a hearing under AS 44.62.310(d) and is private unless a public hearing is requested by the judge.

(c) A judge appearing before the commission at the hearing is entitled to counsel, may present evidence, and may cross-examine witnesses.

(d) The commission may, after a hearing held under (b) of this section,

(1) exonerate the judge of the charges;

(2) informally and privately admonish the judge or recommend counseling;

(3) reprimand the judge publicly or privately;

(4) refer the matter to the supreme court with a recommendation that the judge be suspended, removed, or retired from office or publicly or privately censured by the supreme court.

(e) A decision by the commission to reprimand a judge publicly or privately may be appealed by the judge to the supreme court.

(f) If the commission decides to reprimand a judge privately, the commission shall forward the reprimand to the judge. A copy of the reprimand shall be sent to the chief justice of the supreme court. A private reprimand is confidential.

(g) If the commission exonerates a judge, a copy of the proceedings and report of the commission may be made public on the request of the judge.

(h) If a judge has been publicly reprimanded, suspended, or publicly censured under this section and the judge has filed a declaration of candidacy for retention in office, the commission shall report to the Judicial Council for inclusion in the statement filed by the judicial council under AS 15.58.050 each public reprimand, suspension, or public censure received by the judge

(1) since appointment; or

(2) if the judge has been retained by election, since the last retention election of the judge. (§ 1 ch 58 SLA 1981; am §§ 2 — 4 ch 160 SLA 1984; am § 13 ch 38 SLA 1987)

**Sec. 22.30.060. Rules and confidentiality.** (a) The commission shall make rules implementing this chapter and providing for confidentiality of proceedings.

(b) All proceedings, records, files, and reports of the commission are confidential and disclosure may not be made except

(1) upon waiver in writing by the judge at any stage of the proceedings;

(2) if the subject matter or the fact of the filing of charges has become public, in which case the commission may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, or to state that the judge denies the allegations; or

(3) upon filing of formal charges, in which case only the charges shall become public. (§ 1 ch 213 SLA 1968; am § 7 ch 160 SLA 1984)

**Sec. 22.30.066. Inquiry.** (a) The commission may subpoena witnesses, administer oaths, take the testimony of any person under oath, and require the production for examination of documents or records relating to its inquiry under AS 22.30.011.

(b) In the course of an inquiry under AS 22.30.011 into judicial misconduct or the disability of a judge, the commission may request the judge to submit to a physical or mental examination. If the judge refuses to submit to the examination, the commission must determine the issue for which the examination was required adversely to the judge. (§ 2 ch 58 SLA 1981, am § 8 ch 160 SLA 1984)

**RULE 5 CONFIDENTIALITY**

A. Confidentiality. All investigative and disciplinary proceedings, records, files, and reports of the Commission shall be confidential and no disclosure shall be made except as permitted by A.S.22.30.060.

B. Disclosure - Generally. In order to preserve public confidence in the administration of justice the Commission, in its discretion, may issue one or more announcements confirming or denying the existence of accusations before it, clarifying the procedural aspects, or explaining the right of a judge to a fair hearing when: 1) a judge has been charged pursuant to Rule 9c(4) of these Rules, or 2) the subject matter of a proceeding is generally known to the public.

C. Disclosure - Dismissal. In any instance where accusations against a judge have been considered by the Commission and it has been determined that there is no basis for the filing of the charges or for further proceedings before the Commission, the Commission may, at the request, or with the approval of the judge, issue an explanatory statement.

D. Nondiscoverable Matters.

(1) The following matters and materials are not discoverable:

a. Commission deliberations concerning alleged acts of judicial misconduct or disability, and

b. Commission staff memoranda, notes and attorney work product.

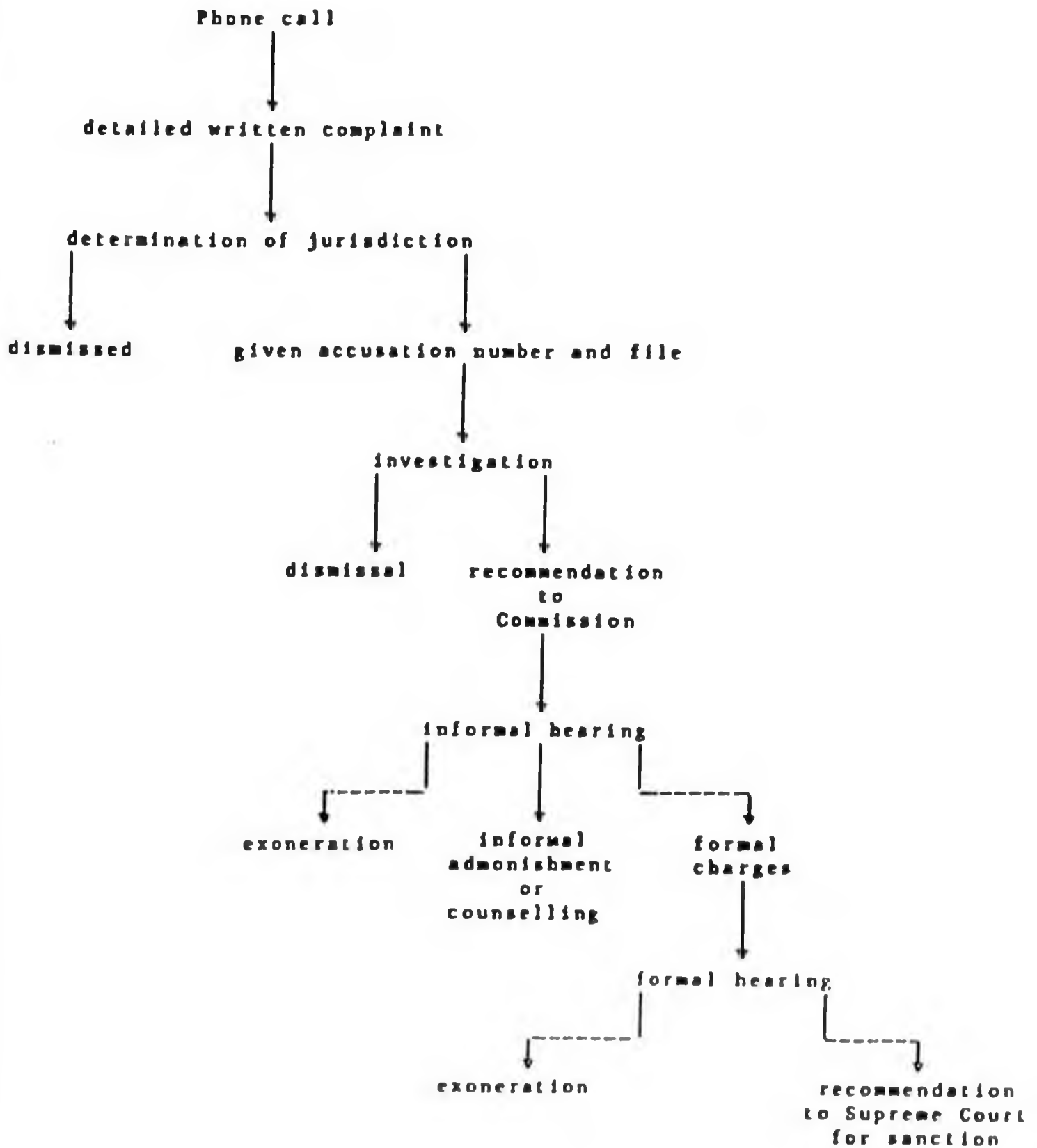
(2) Except as provided in Rule 8A, the identity and statements of witnesses are not discoverable prior to a probable cause determination.

E. Determination Disclosure - Determination. Upon completion of an investigation or proceeding, the Commission shall disclose to the person filing an accusation against the judge that after an investigation of the charges the Commission (i) has found no basis for action against the judge, (ii) has taken an appropriate corrective action, the nature of which, pursuant to statute, cannot be disclosed, or (iii) has filed a recommendation with the Supreme Court.

F. Public Information. The Commission may, from time to time, issue press releases and other public statements explaining the nature of its jurisdiction, procedure for instituting of accusations, limitations upon its power and authority, and

reports on the conduct of the affairs of the Commission, providing that such releases and reports shall not identify by name, position, or address the identity of any judge or other person involved in any inquiry before the Commission unless such disclosure is otherwise provided for in A.S.22.30.060 and these Rules.

JUDICIAL CONDUCT COMPLAINT PROCESS



Item 5



# alaska judicial council

1031 W. Fourth Avenue, Suite 301, Anchorage, Alaska 99501 (907) 279-2526  
FAX (907) 276-5046

EXECUTIVE DIRECTOR  
Harold M. Brown

April 3, 1989

NON ATTORNEY MEMBERS  
Hubert J. Hennickson, M.D.  
Renee Murray  
Leona Okaka

ATTORNEY MEMBERS  
Daniel L. Callahan  
William T. Council  
James D. Gilmore

CHAIRMAN, EX OFFICIO  
Warren W. Matthews  
Chief Justice  
Supreme Court

## MEMORANDUM

To: House Judiciary

From: HMB, Alaska Judicial Council

Re: Alaska Judicial Council/Commission on Judicial Conduct

The House Judiciary Committee has requested that the following issues be addressed in writing for the purpose of discussion at the April 3rd meeting of the committee.

1. What is the status of the communication of information between the Alaska Judicial Council (hereinafter COUNCIL) and the Commission on Judicial Conduct (hereinafter COMMISSION).

The sharing of information between the two agencies is not and has not been a problem, insofar as that exchange is not prohibited by law. AS 22.30.060 prohibits the COMMISSION from releasing information concerning evidence or allegations against a judge until and unless formal charges have been filed, in which event only the charges will be made public. A judge can waive the confidentiality provisions of the statute and, of course, if the allegations result in discipline serious enough to reach the level of public sanction or more, the information to the extent reflected in the opinion of the Supreme Court becomes available to the public.

Twice, the COUNCIL requested the legislature to modify the statute so that otherwise confidential information in the possession of the COMMISSION could be shared with the COUNCIL. Most recently, in 1986, the COUNCIL, without objection by the COMMISSION, urged the legislature to amend AS 22.30.011(f) so as to read:

(f) If the commission decides to reprimand a judge privately, the commission shall forward the reprimand to the judge. A copy of the reprimand shall be sent to the chief justice of the supreme court and to the judicial council. A private reprimand is confidential.

When the COUNCIL independently develops information reflecting adversely on the qualifications of a judge, it will be forwarded to the COMMISSION if the COUNCIL votes to do so. This requires an affirmative vote by four or more members of the COUNCIL. See Article IV, Sec. 6 of the Constitution of the State of Alaska.

2. When is information confidential?

The confidentiality of complaints to and evidence developed by the COMMISSION is governed by AS 22.30.060 and the rules adopted pursuant thereto. The confidentiality of information provided to or developed by the COUNCIL depends on the circumstances. Initially, it should be noted that all records of the COUNCIL, unless confidential or privileged, are public as provided in AS 09.25.110. See Article XI of the bylaws, (tab B). Article 1, Sec. 22 of the State Constitution provides for the right of privacy. While the parameters of this "right" have not yet been fully articulated, it is a principle that must be examined and balanced with other principles or rules of law on a case by case basis. This "right" is incorporated in Article XI, Sec. 2 of the COUNCIL'S bylaws which, in turn, provides for the confidentiality of certain communications including solicited information or communications concerning a judicial candidate or judge standing for retention where there is a promise or a reasonable expectation of confidentiality. See Doe v. Alaska Superior Court 721 P.2d 617 (AK. 1986). See also, page two of the October 1984 opinion of the Attorney General (tab D, p.I:17.31) endorsing the adoption of rules by the COUNCIL governing confidentiality that are consistent with state law.

## FISCAL NOTE

**REQUEST:**

Revision Date: _____	Agency Affected: <u>Alaska Commission</u>	
Title: <u>Act relating to the</u>	BRU: _____	<u>on Judicial Conduct</u>
<u>Commission on Judicial</u>		
<u>Conduct</u>		
Sponsor: _____	Components: _____	
Requestor: <u>State Affairs</u>		
	<u>Judiciary</u>	

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING: (Thousands of Dollars)**


General Funds	-0-	-0-	-0-	-0-	-0-	-0-
Federal Funds	-0-	-0-	-0-	-0-	-0-	-0-
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

**POSITIONS:**

Full-time						
Part-time						
Temporary						

**ANALYSIS: (Attach a separate page if necessary)**

No fiscal impact.

Prepared by:   
Marla N. Greenstein, Executive Director  
 Division: Alaska Comm'n on Judicial Conduct

Approved by: Marla N. Greenstein, Executive Director  
 Agency: Alaska Comm'n on Judicial Conduct

Phone: \_\_\_\_\_  
 Date: 2-5-90

Date: 2-5-90

Distribution (by preparer):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management & Budget  
 Impacted Agency(ies)

sented as to the charges that it constituted misconduct for the judges to act as attorneys in cases which originated in their courts, but in which they took no action as judges. Accordingly, these commissioners voted that respondents merely be admonished.

The Commission found that the judges' actions in transferring cases and later acting as attorneys in the cases also violated certain sections of the New York Judiciary Law. Section 16 prohibits a judge from practicing law in a matter originating in his court, and Section 17

further prohibits a judge from acting as an attorney in any case in which he or she took official action as a judge. Section 471 prohibits the law partner of a judge from accepting employment in any cases which originated before the judge. The term "originating" is not defined by statute or case law. The Commission stated that the term's meaning is clear: "any claim or charge initiated in respondent's court, whether or not he took any action on it, originated in his court." The dissent apparently disagreed with the Commission's interpretation of Section

16 and the term "originating" regarding cases in which the judges took no action and later acted as attorneys. Further, the Commission found that the judges' practice of transferring cases out of their courts and later representing a party to the matter "created the impression that the courts were being manipulated to benefit [respondents'] private law practice, to the possible inconvenience of the parties and to the burden of other courts that had to assume an additional case-load."

## Confidentiality Survey Results

by Anita Solanos

In 1985 an article was published in the *Temple Law Quarterly* which included an appendix showing when each state ceased confidentiality in the judicial discipline process. Shaman and Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Discipline Process*, 58 *TEMP. L.Q.* (1985).

According to this article, in 1985 nineteen commissions had provisions whereby confidentiality ceased upon the commission's post-investigation filing of formal charges against the judge, 22 commissions ceased confidentiality upon the commission's filing a recommendation for discipline with the state supreme court, and ten commissions ceased confidentiality upon the ordering of discipline.

In the last three years several states have amended their governing provisions to permit public scrutiny of commission records or proceedings at an earlier date. Since 1985, five states have changed their governing provisions, increasing from 19 to 24 the number of states which cease confidentiality upon the filing of formal charges against the judge. Three of these states, Ohio, Texas, and Washington, formerly ceased confidentiality upon the filing of a recom-

mendation for discipline with the state supreme court. The other two, Nevada and Massachusetts, made a more drastic change by shifting from provisions which ceased confidentiality upon the ordering of discipline—the least open type of provision—to provisions which cease confidentiality upon the filing of formal charges—the most open type of provision. Furthermore, nine states now allow judges to waive confidentiality in the hearing stages.

### Footnotes to Confidentiality Chart

\*States in which a judge can waive confidentiality in the hearing stages.

1 Alaska. Only the charging document is made public. The hearing is confidential.

2 California. Censure recommendations are not made public until thirty days after filing.

3 Connecticut. If probable cause is found to exist, an open public hearing shall be held.

4 District of Columbia. Confidentiality ceases on filing of notice of appeal of Commission decision with D.C. Court of Appeals.

5 Hawaii. Confidentiality only ceases if the Supreme Court enters an order imposing public discipline or the judge requests that the matter be public.

6 Kentucky. If the Commission's order is not appealed, the order becomes public when the 10-day appeal period has expired. Otherwise, the matter becomes public if the Supreme Court, after review, orders discipline or removal.

Consequently, a slim majority of 27 states and the District of Columbia still hold judicial disciplinary proceedings confidential until after a hearing to ascertain whether discipline is justified. However, the trend is toward allowing public access to information about disciplinary proceedings earlier in the disciplinary process.

The chart which follows this article is an update on the material published in the 1985 article.

7 Maine. Confidentiality also ceases if the judge or Committee, after allowing the judge to comment, determines the committee hearing should be public.

8 Massachusetts. Proceedings may remain confidential if the judge, the Commission, and the complainant, if any, all concur.

9 New York. Hearing transcripts, the complaint, and the dispositive action of the Commission with respect to the complaint will not be made public unless the judge so requests in writing.

10 North Dakota. Confidentiality ceases at the start of the fact finding hearing.

11 Oregon. Confidentiality ceases at the start of the fact finding hearing.

12 South Carolina. If the court orders private reprimand, all proceedings remain confidential.

13 Texas. Confidentiality ceases at the start of the fact-finding hearing.

14 Utah. Only the action taken becomes public.

## When Confidentiality Ceases

State	Commission files formal charges against the judge (post-investigation)	Commission files recommendation for discipline with the state's supreme court (post-hearing)	Discipline is ordered
Alabama	x		
Alaska	x <sup>1</sup>		
Arizona		x	
Arkansas	x		
California		x <sup>2</sup>	
Colorado		x	
Connecticut	x <sup>3</sup>		
Delaware <sup>4</sup>			x
D.C. <sup>5</sup>			x <sup>6</sup>
Florida	x		
Georgia	x		
Hawaii <sup>7</sup>			x <sup>8</sup>
Idaho		x	
Illinois	x		
Indiana	x		
Iowa		x	
Kansas	x		
Kentucky <sup>9</sup>			x
Louisiana		x	
Maine		x <sup>7</sup>	
Maryland		x	
Massachusetts <sup>10</sup>	x <sup>9</sup>		
Michigan	x		
Minnesota	x		
Mississippi		x <sup>10</sup>	
Missouri		x	
Montana <sup>11</sup>		x	
Nebraska	x		
Nevada	x		
New Hampshire <sup>12</sup>			x
New Jersey		x	
New Mexico		x	
New York <sup>13</sup>		x <sup>11</sup>	
North Carolina <sup>14</sup>		x	
North Dakota	x <sup>10</sup>		
Ohio	x		
Oklahoma	x		
Oregon	x <sup>11</sup>		
Pennsylvania		x	
Rhode Island			x
South Carolina			x <sup>12</sup>
South Dakota		x	
Tennessee	x		
Texas	x <sup>11</sup>		
Utah			x <sup>14</sup>
Vermont	x		
Virginia		x	
Washington	x		
West Virginia	x		
Wisconsin	x		
Wyoming		x	

662(c); ex-wife therefore could not garnish ex-husband's federal retirement pay), *cert. denied*, 459 U.S. 927, 103 S.Ct. 238, 74 L.Ed.2d 188 (1982).

[2] On the basis of this record we are of the view that Judge Carlson's unappealed order of September 24, 1986, establishing that the \$182 monthly payments were in the nature of "a property settlement," was correct. We therefore hold that 42 U.S.C. § 659(a) prohibits Heidi from garnishing Bill's military retirement pay.

Further we are of the view that 10 U.S.C. § 1408(d)(2) precludes Heidi from reaching Bill's military retirement pay for payment of a property settlement because the parties were not married for ten years.<sup>3</sup> See, e.g., *In re Marriage of Beltran*, 183 Cal.App.3d 292, 227 Cal.Rptr. 924, 927 (1986) (subsection (d)(2) imposed requirement of ten-year marriage before direct payment may be made to former spouse as part of property settlement); *Le Vine v. Spickelmier*, 109 Idaho 341, 707 P.2d 452, 455 (1985) (ten-year limitation applies where direct payments made to spouse in response to court order); *Anderson v. Anderson*, 13 Ohio App.3d 194, 468 N.E.2d 784, 789 (1984) (ten-year limitation is threshold requirement to former spouse's entitlement to recover); *In re Marriage of Wood and Wood*, 66 Or.App. 941, 676 P.2d 338, 341 (1984) (before an ex-spouse can receive direct payments from the pension account, the couple's marriage must have spanned at least ten years of a military career).

Given the foregoing we hold that the superior court erred in denying Bill's motion to terminate garnishment of his military retirement pay.

#### IV. ACCOUNTING.

Bill's final specification of error in this appeal is that "the [t]rial [c]ourt [e]rr[ed] [w]hen [i]t [d]enied the [m]otion for an [a]ccounting of [i]mproperly [c]ollected [a]limony[.]" Given our holding that Heidi may not garnish Bill's military retirement pay for payment of a property settlement,

she has improperly collected the monthly \$182 payments from Bill. Thus an accounting should be conducted on remand to determine the amount improperly garnished as well as the amount to be credited to child support.

REVERSED and REMANDED for further proceedings not inconsistent with this opinion.



#### In re INQUIRY CONCERNING A JUDGE.

No. S-2529.

Supreme Court of Alaska.

Oct. 21, 1988.

On appeal from order of the Commission on Judicial Conduct publicly reprimanding a judge, the Supreme Court, Compton, J., held that statute empowering Commission to publicly reprimand judge violates provision of Alaska Constitution establishing Commission.

Reversed.

Judges 11(1)

Statute empowering Commission on Judicial Conduct to publicly reprimand judge violates provision of Alaska Constitution authorizing Commission to "recommend" sanctions. AS 22.30.011(d)(3); Const. Art. 4, § 10.

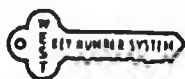
George N. Hayes, Jill E. Mickelsen, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for appellant.

Arden E. Page, Burr, Pease & Kurtz, Anchorage, for appellee Alaska Com'n on Judicial Conduct.

3. See *supra* note 1.

mproperly collected the monthly payments from Bill. Thus an account should be conducted on remand to the amount improperly gathered as the amount to be credited support.

SED and REMANDED for findings not inconsistent with this



In re INQUIRY CONCERNING A JUDGE.

No. S-2529.

Supreme Court of Alaska.

Oct. 21, 1988.

Appeal from order of the Commission on Judicial Conduct publicly reprimand a judge, the Supreme Court, J., held that statute empowering Commission to publicly reprimand judge in violation of Alaska Constitution established Commission.

AS 22.30.011(d)(3) empowers Commission on Judicial Conduct to publicly reprimand judges provision of Alaska Constitution authorizing Commission to "recommend sanctions. AS 22.30.011(d)(3); Alaska Const. art. IV, § 10.

Attorneys: V. Hayes, Jill E. Mickelsen, Delaney, Hayes, Reitman & Brubaker, for appellant. J. Page, Burr, Pease & Kurtz, for appellee Alaska Com'n on Judicial Conduct.

Before MATTHEWS, C.J., and BURKE and COMPTON, JJ.

OPINION

COMPTON, Justice.

This case presents the question of whether the Alaska Commission on Judicial Conduct (the Commission) acted within the authority given to it by the Alaska Constitution in publicly reprimanding a judge.

In 1986 Appellant<sup>1</sup> was served with a formal complaint regarding actions by Appellant in a judicial capacity that arose out of events which occurred in 1985. Appellant contested the complaint, and a hearing was conducted before the Commission.

The Commission concluded that there was insufficient evidence to support a finding of an actual impropriety committed by Appellant. However, the Commission determined that Appellant had failed to avoid conduct that created an appearance of impropriety. The Commission concluded that Appellant's conduct was prejudicial to the administration of justice and brought the judicial office into disrepute, in violation of AS 22.30.011(a)(3)(C) and (D). The Commission further concluded that Appellant had violated Canons 1 and 2(A) of the Code of Judicial Conduct and AS 22.30.011(a)(3)(E).

In furtherance of its conclusions, the Commission determined that the appropriate sanction was a public reprimand of Appellant by the Commission, pursuant to AS 22.30.011(d)(3). It so ordered.

Appellant appealed the Commission's determination to this court. This court *sua sponte* ordered the parties to brief whether AS 22.30.011(d)(3), which grants the Commission the power to issue public reprimands, conflicts with article IV, § 10 of the Alaska Constitution. It also ordered all further proceedings stayed pending its decision.<sup>2</sup>

The sole issue before this court is the constitutionality of the statute empowering the Commission to publicly reprimand a

judge. This issue is a matter of constitutional and statutory interpretation in which the appropriate standard of review is this court's independent judgment. See *Borkowski v. Snowden*, 665 P.2d 22, 25 (Alaska 1983).

Article IV, section 10 of the Alaska Constitution provides for a Commission on Judicial Conduct. The section states in part:

In addition to being subject to impeachment under section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

Alaska Const. art. IV, § 10. This section was added by amendment in 1968. It was based on a 1966 revision of the judicial article of the California Constitution. *In re Robson*, 500 P.2d 657, 658 n. 1 (Alaska 1972).

Under authority of this section the Alaska legislature passed AS 22.30.010-.080. These statutory sections delineate the membership, powers and duties, and procedures of the Commission. Among the powers granted the Commission are the following:

The commission may, after a hearing

- ....
- (1) exonerate the judge of the charges;
- (2) informally and privately admonish the judge or recommend counseling;
- (3) reprimand the judge publicly or privately;
- (4) refer the matter to the supreme court with a recommendation that the judge be suspended, removed, or retired from office or publicly or privately censured by the supreme court.

AS 22.30.011(d). This section was adopted in 1981. Subsection (2) was added by amendment in 1987.

1. This court has ordered that the identity of the judge be protected. Therefore, the judge is referred to throughout this opinion as the "Appellant."  
2. The facts are those agreed upon by the parties.

This court has had limited opportunities to review the functions of the Commission. We first discussed the Commission's powers in *In re Robson*. There we wrote:

Concerning the subject of sanctions article IV, section 10 of the Alaska Constitution, and AS 22.30.070(c)(2), provide that upon recommendation of the commission the Supreme Court of Alaska may suspend, remove, retire or censure a judge. Under this discretionary grant, our review of a particular recommendation by the commission is necessarily broader than the substantial evidence criterion adopted for review of findings of fact made by the commission. Normally considerable weight will be accorded to a given recommendation from the commission, if supported by an adequate factual basis. Nevertheless, both article IV, section 10 of the constitution and AS 22.30.070(c)(2) clearly establish that the Supreme Court of Alaska is to exercise its independent judgment in determining an appropriate sanction, if any, as to any recommendation made by the commission. It would be tantamount to an abdication of our constitutional and statutory obligations if we were to automatically adopt the commission's sanction recommendations. In every case of this character we must insure that procedure<sup>1</sup> the process has been accorded the judicial officer proceeded against and that requisite findings of fact have been made and are supported by substantial evidence. We are further obligated to decide whether the commission's recommended sanction is justified by the record and is in accord with the objectives of the commission as reflected in the relevant constitutional and statutory provisions.

3. That the legislature intended reprimand to be a lesser sanction than those reserved to the Supreme Court in article IV, section 10 seems to be supported by the little legislative history that exists. Bruce Campbell, Chairman of the Commission on Judicial Qualification explained the bill to the Senate Judiciary Committee saying:

We are looking for a lesser response than going for censorship by the Supreme Court. That is a very heavy response to make on a judge for a minor transgression.

*Robson*, 500 P.2d at 659-60, quoted in *In re Hanson*, 532 P.2d 303, 315-16 (Alaska 1975).

In *Hanson*, we further observed that "article IV, section 10 of the Alaska Constitution lodges in the Supreme Court of Alaska the exclusive adjudicatory power to suspend, remove from office, retire, or censure a justice or judge in the Alaska Court System." 532 P.2d at 307. Later in the opinion we concluded that our role required us to review independently the evidence supporting the Commission's recommendation:

Article IV, section 10 of the Alaska Constitution and AS 22.30.070(c) unambiguously establish the Supreme Court of Alaska as the body entrusted with the ultimate dispositive decision in a judicial qualifications matter. In light of this constitutional grant and adopting the reasoning of [*Geiler v. Commission on Judicial Qualifications*, 10 Cal.3d 270, 110 Cal.Rptr. 201, 515 P.2d 1 (1973)], we conclude that this court's scope of review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence.

532 P.2d at 309.

The Commission argues that in spite of this court's "unambiguous" role in deciding questions of judicial qualifications, it may issue public reprimands regarding the conduct of a judge. The Commission sets forth two rationales in support of this argument: (1) article IV, section 10 authorizes the legislature to give the Commission the power to impose lesser sanctions than those reserved to the Supreme Court. Subparts of this argument are that the legislature intended a reprimand to be a lesser sanction and that by law it is a lesser sanction;<sup>2</sup> (2) the Alaska system is consist-

Whether the legislature attained its goal is another matter. As the Appellant points out, Black's Law Dictionary defines both "censure" and "reprimand" by using the other word. See Black's Law Dictionary 203, 1170 (rev. 5th ed. 1979). Webster's 3d New International Dictionary lists "censure" as a synonym for reprimand. In view of our resolution of the underlying issue, we do not address this question.

ent with the judicial discipline systems of other states and appeals to common sense.

The threshold question underlying the Commission's arguments is whether the Commission constitutionally may impose any sanction at all on a judge. To answer this question it is helpful to compare the system of discipline established by the Alaska Constitution and AS 22.30.010-.080 with that of other states. What can be seen by this comparison is that the Alaska statute is similar to other states' constitutions, but that the Alaska Constitution is more limited than either the Alaska statute or other states' constitutions.

As observed *supra*, the Alaska system was originally derived from California. The California Constitution allows the Commission on Judicial Performance (the California Commission) to do two things: (1) recommend suspension, retirement, censure or removal to the supreme court, Cal. Const. art. 6, § 18(b) and (c), or (2) on its own authority privately admonish a judge, subject to supreme court review. Cal. Const. art. 6, § 18(c) (added by amendment, 1976). The California Supreme Court has strictly construed the options of the California Commission. In *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 110 Cal.Rptr. 201, 203 n. 5, 515 P.2d 1, 3 n. 5 (1973) cert. denied, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1974), the California Supreme Court noted that "a recommendation of censure or removal . . . is not self-effectuating." Then, in *Mosk v. Superior Court*, 25 Cal.3d 474, 159 Cal. Rptr. 494, 601 P.2d 1030 (1979), where the California Commission tried to hold public hearings, the California Court wrote:

The question of confidentiality of proceedings before the Commission on Judicial Performance must be considered in light of the Commission's history and the limited scope of its constitutional authority. It was, as previously noted, created by constitutional amendment in November 1960. (See Cal.Const., art. VI, § 8.) It has authority to investigate complaints of judicial misconduct, a judge's failure or inability to perform the duties of a judge, and other conduct prejudicial to the administration of justice. The Com-

mission does not have the authority to investigate a "court." Its inquiry must be limited to misconduct or disability of an individual judge. The Commission has authority to conduct hearings, make findings of fact (see Gov.Code, §§ 68750-68755; Cal. Rules of Court, rules 901-922), and recommend to the Supreme Court that a given judge be censured or removed or retired from the court. (Cal. Const., art. VI, § 18, subd. (c)). *The Commission may privately admonish a judge for improper action or a dereliction of duty, but it has no power to censure, remove, retire or otherwise discipline a judge. It can only make certain recommendations to the Supreme Court, which then reviews the evidence and makes its own findings.* (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276, 110 Cal.Rptr. 201, 515 P.2d 1; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 119 Cal.Rptr. 841, 532 P.2d 1209.)

*Mosk*, 159 Cal.Rptr. at 504-505, 601 P.2d at 1040-41 (footnotes omitted, emphasis added).

Consistent with a strict reading of the powers of the California Commission, California statutes do not provide for sanctions in addition to those provided for constitutionally. The California statutes merely empower the California Commission to employ experts and counsel, pay its expenses, serve process and conduct hearings at which testimony may be taken under oath and witnesses may be compelled to attend and testify. See Cal.Gov.Code §§ 68701-68755 (West 1976 and Supp.1988). In other states too, where the power to sanction is reserved to the Supreme Court, that reservation is respected. See, e.g., *In re Neely*, 364 S.E.2d 250, 251 (W.Va.1987); *In re Voorhees*, 739 S.W.2d 178, 181 (Mo.1987); *Small v. Guste*, 383 So.2d 1011, 1013-14 (La.1980); *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427, 428 (1980). But see *In re Van Susteren*, 82 Wis.2d 307, 262 N.W.2d 133, 135 (1978) (Commission took action; Wis. Const. art. 7, § 11 provides in part:

"Each judge or justice shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the Supreme Court pursuant to procedures established by the legislature by law.").

The reasons for guarding the power to sanction were expressed by the Missouri Supreme Court in *Voorhees*:

Any discipline of a judge, even a reprimand, is a serious matter, and should be imposed only for substantial reasons and with all due process rights preserved. A reprimand is a public denunciation which permanently scars the judge's record. Cf. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 636-37, 105 S.Ct. 2265, 2274, 85 L.Ed.2d 652 (1985). It is not a minor matter and should not be lightly imposed. While complaints of violation of the constitutional standards should be thoroughly investigated when complaint is made, zealously prosecuted when possible cause is shown, and punished by appropriate sanctions when proved, judges should not be held up to public censure on account of good faith exercise of judgment. Our system provides other means of correction for erroneous decisions.

739 S.W.2d at 180. Compare, *Board of Overseers of the Bar v. Rodway*, 461 A.2d 1062, 1064 (Me.1983) (admonition was a form of discipline and therefore judge receiving admonition was due the same procedural protection as judges receiving other forms of discipline), *appeal after reprimand*, 470 A.2d 790 (Me.1984).

Some states' constitutions grant their respective judicial review commissions the power to admonish or censure judges. See, e.g., N.Y.Const. art. 6, § 22(a) ("The commission on judicial conduct ... may determine that a judge or justice be admonished, censured or removed from office for cause..."); Texas Const. art. 5, § 1-a(8) ("the commission may in its discretion issue a private or public admonition, warning,

4. The Commission argues that because a judge may appeal its decision to reprimand, AS 22.30.011(d)(3) does not deprive this court of its ultimate authority to discipline judges. However, the language of both *Robson* and *Hanson* indicates that article IV, § 10 of the Alaska Constitu-

tion requires this court to independently determine the sanction in each case.

reprimand, or requirement that the person obtain additional training or education."). However, the question before the court is not, as the Commission argues, whether the powers granted the Commission by AS 22.30.011 appeal to common sense. Instead, the question is whether the powers are constitutional. In New York and Texas, the state constitution expressly provides that the commission on judicial conduct may act on its own authority. Alaska's constitution contains no such express provision.

This court has held that on review of the Commission's findings the court must "exercise its independent judgment in determining an appropriate sanction." *Robson*, 500 P.2d at 660. Furthermore, this court has said that failure to exercise its independent judgment "would be tantamount to an abdication of our constitutional and statutory obligations." *Id.*<sup>4</sup> Given this court's strict interpretation of its role, and the apparent agreement of other courts that the powers of a judicial disciplinary commission should be limited to those constitutionally granted, we conclude that granting the Commission the authority to impose sanctions is not permitted by article IV, section 10 of the Alaska Constitution.

Because article IV, section 10 of the Alaska Constitution only empowers the Alaska Commission on Judicial Conduct to recommend sanctions to the Alaska Supreme Court, AS 22.30.011(d)(3) is in conflict therewith.<sup>5</sup> The Commission was without authority to impose any self-effectuating sanction on the Appellant.

REVERSED.

RABINOWITZ and MOORE, JJ., not participating.



tion requires this court to independently determine the sanction in each case.

5. Neither party has raised, nor do we address, the constitutionality of AS 22.30.011(d)(2).

H B

275

# HOUSE COMMITTEE REPORT

(7)

Date Referred: April 7, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 3/29/90

The LABOR & COMMERCE Committee considered:

HB 275

HOUSE BILL NO. 275

[WORKPLACE SAFETY FOR ALL-NIGHT FRANCHISES]

"An Act relating to workplace safety for certain franchises."

### RECOMMENDATIONS:

- be replaced with CS HB 275 (L+C)  the same title  
 a new title
- have attached amendment(s)
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(S):  
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- fiscal impact Labr
- zero fiscal note \_\_\_\_\_
- zero with analysis \_\_\_\_\_

- fiscal note(s) \_\_\_\_\_
- zero fiscal note(s) \_\_\_\_\_
- zero fn/analysis \_\_\_\_\_

### SIGNING DO PASS:

### SIGNING

(Check approp. column)

Do Not  
Pass

No Rec

Amend

David Duley  
Robert Finkelstein  
Richard Boucher  
Christopher Greenberg

SIGNING	Do Not Pass	No Rec	Amend
<u>Collins</u>			X
<u>Leman</u>			X

David Duley

Chairman's Signature

STATE OF ALASKA  
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 275 (L&C)  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: "An Act relating to workplace  
safety for certain franchises."  
Sponsor: Spohnholz  
Requestor: House Labor & Commerce

Agency Affected: Labor  
BRU: Labor Standards & Safety  
Components: Occupational Safety & Health

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	43.6	43.6	43.6	43.6	43.6	43.6
TRAVEL	5.0	5.0	5.0	5.0	5.0	5.0
CONTRACTUAL	11.4	11.4	11.4	11.4	11.4	11.4
SUPPLIES	0.8	0.8	0.8	0.8	0.8	0.8
EQUIPMENT	3.0	3.0	3.0	3.0	3.0	3.0
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	63.8	63.8	63.8	63.8	63.8	63.8

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	63.8	63.8	63.8	63.8	63.8	63.8
FEDERAL FUNDS						
OTHER						
TOTAL	63.8	63.8	63.8	63.8	63.8	63.8

POSITIONS:

FULL-TIME						
PART-TIME	2.0	2.0	2.0	2.0	2.0	2.0
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Note: There is no fiscal impact in FY'90.  
see attached

Prepared by: Tom Stuart, Director Phone: 264-2452  
Division: Labor Standards & Safety Date: 3/30/90

Approved by Commissioner: Jim Sampson Date: 3/30/90  
Agency: Department of Labor

Distribution (by preparer) :  
Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)

Fiscal Note Analysis  
for

"An Act relating to workplace safety for certain franchises."

This bill would increase the number and frequency of inspections required for every all night grocery and gasoline station in the state. In order to accomplish this the department would have to hire one part time compliance officer and a part time clerk. Because of the penalties involved, we expect an increase in the number of contested violations which would mean an increase in the costs for the OSHA Review Board. Additional legal support would also be required. The costs are summarized as follows:

Personal Services	43.6
Compliance Officer (29.3)	
Clerk Typist (14.3)	
Travel for Compliance Officer	5.0
Contractual	11.4
OSHA Review Board (2.5)	
Legal Support (2.5)	
Costs for positions (6.4)	
Commodities for positions	.8
Equipment for positions	3.0
<u>Total Cost</u>	<u>63.8</u>

This analysis assumes a start date of 7/1/90 with no fiscal impact to FY'90.

Contractual, Commodities, and Equipment costs for positions shown above are normal costs for these positions which include: phone & postage costs, office space rent, indirect costs, office supplies, and office equipment.

Position Title <b>Occupational Safety Compliance Officer IA</b>			No. of Positions <b>1</b>	Range/Step <b>50B</b>	Org. Unit <b>LTC</b>
Time Status <b>PPT</b>	Staff Months <b>6</b>		Location <b>Anchorage</b>		Election District
Justification					
Type of Expenditure			Amount		
1	2	3			
Salary	\$22,100				
Benefits	\$7,200				
Premium Pay					
Other					
Total Personal Services		\$29,300			
Travel		\$5,000			
Contractual		\$9,200			
Commodities		\$500			
Equipment		\$1,500			
Other					
Total Cost		\$45,500			
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	\$45,500			
GF Program Receipts	1005				
Other					

This position would inspect every all night grocery and gasoline station in Anchorage every two months and inspect on a semi-annual basis, all night groceries and gasoline stations in other parts of Alaska.

Travel costs would allow the officer to cover all parts of the state.

Contractual, commodity, and equipment costs are average per-employee costs.

**Request For  
New Position**

Agency Department of Labor  
 BRU Labor Standards & Safety  
 Component Occupational Safety & Health

Page 3 of 4

Revised Date

**FY 91**

Position Title <b>Clerk Typist III</b>			No. of Positions <b>1</b>	Range/Step <b>8A</b>	Barg. Unit <b>GGU</b>
Time Status <b>PPT</b>	Staff Months <b>6</b>		Location <b>Anchorage</b>		Election District
Type of Expenditure			Justification		
		Amount	<p>This position would provide the clerical support for this program.</p> <p>Contractual, commodity, and equipment costs are average per-employee costs.</p>		
<b>1</b>	<b>2</b>	<b>3</b>			
Salary	<b>\$9,800</b>				
Benefits	<b>\$4,500</b>				
Premium Pay					
Other					
<b>Total Personal Services</b>		<b>\$14,300</b>			
Travel					
Contractual		<b>\$2,200</b>			
Commodities		<b>\$200</b>			
Equipment		<b>\$1,500</b>			
Other					
<b>Total Cost</b>		<b>\$18,300</b>			
Funding Source for Total Cost					
Federal Receipts	1002				
G. P. Match	1003				
General Fund	1004	<b>\$18,300</b>			
GP Program Receipts	1005				
Other					

**Request For  
New Position**

Agency Department of Labor  
 BRU Labor Standards & Safety  
 Component Occupational Safety & Health

Page 4 of 4

Revised Date

**FY 91**

# HOUSE COMMITTEE REPORT

(7)

Date Referred: April 2, 1990  
(Finance added 4/2)

FURTHER REFERRALS:  
FINANCE

Date of Committee Action: 4-18-90

The JUDICIARY Committee considered:

HB 275

HOUSE BILL NO. 275

WORKPLACE SAFETY FOR ALL-NIGHT FRANCHISES

"An Act relating to workplace safety for certain franchises."

### RECOMMENDATIONS:

- be replaced with CSHB 275 (Jud)  the same title  
 a new title  
 have attached amendment(s)  
 do pass  
 do not pass  
 no recommendation  
 individual recommendations  
 additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(s):  
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- fiscal impact \_\_\_\_\_  
 zero fiscal note \_\_\_\_\_  
 zero with analysis \_\_\_\_\_

- fiscal note(s) LABOR 4-2-90  
 ~~zero fiscal note(s) \_\_\_\_\_~~  
 zero fn/analysis \_\_\_\_\_

### SIGNING DO PASS:

### SIGNING:

(Check approp. column)

Do Not  
Pass  
No Rec  
Amend

Peter J. Goll Goll  
J. Ellis Ellis  
Davidson DAVIDSON  
Michael Gruenberg Gruenberg  
Mike Davis DAVIS

	Do Not Pass	No Rec	Amend
<u>Mike Miller</u> Miller		<input checked="" type="checkbox"/>	

Chairman's Signature  
Chairman's Signature

Original sponsor(s): REP. SPOHNHOLZ, Martin

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 275 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to workplace safety for certain  
7 franchises and corporations."

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

9 \* Section 1. AS 18 is amended by adding a new chapter to read:

10 CHAPTER 61. SAFETY REQUIREMENTS FOR ALL-NIGHT BUSINESS ENTERPRISES.

11 Sec. 18.61.010. SAFETY REQUIREMENTS FOR ALL-NIGHT BUSINESS  
12 ENTERPRISES. (a) A business enterprise whose industry is defined by  
13 the United States office of management and budget in the 1972 standard  
14 industrial classification code manual as number 5411 (grocery stores)  
15 or 5541 (gasoline service stations), and that remains open for 24  
16 hours a day, shall

17 (1) where practicable equip the workplace with alarm equip-  
18 ment that signals to the peace officer in the jurisdiction within  
19 which the workplace is located that a robbery is taking place; and

20 (2) provide training for each employee, beginning within 30  
21 days after the employee is first hired, in how to minimize the danger  
22 of or prevent accidents, robberies, and other violence on the work-  
23 place premises.

24 (b) A franchisor that requires a franchisee to remain open 24  
25 hours a day is liable for the cost of complying with (a) of this sec-  
26 tion.

27 (c) An employer who violates this section is liable for civil  
28 penalties under AS 18.60.095.

29 (d) A business enterprise shall maintain the records required by

1 the department concerning compliance with this section.

2 (e) The department may adopt regulations necessary to implement  
3 this chapter.

4 (f) In this chapter,

5 (1) "business enterprise" means

6 (A) a franchisee;

7 (B) a corporation that has three or more outlets at  
8 different locations;

9 (2) "department," "employee," and "employer" have the  
10 meanings given in AS 18.60.105(a).

11 \* Sec. 2. Notwithstanding AS 18.61.010, enacted by sec. 1 of this Act,  
12 an employer shall, no later than 90 days after the effective date of this  
13 Act, install the required equipment and begin training of employees hired  
14 before the effective date of this Act or hired within 60 days after the  
15 effective date of this Act.

6-1200H  
Cramer  
4/18/90

Original sponsor(s): REP. SPOHNHOLZ, Martin

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 275 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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8 different locations;

9 (2) "department," "employee," and "employer" have the  
10 meanings given in AS 18.60.105(a).

11 \* Sec. 2. Notwithstanding AS 18.61.010, enacted by sec. 1 of this Act,  
12 an employer shall, no later than 90 days after the effective date of this  
13 Act, install the required equipment and begin training of employees hired  
14 before the effective date of this Act or hired within 60 days after the  
15 effective date of this Act.  
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A M E N D M E N T

OFFERED IN THE HOUSE

BY REP. MARTIN

TO: CSHB 275 (L&C)

Page 1, line 21, after "premises":

Insert "and in how to minimize or prevent shoplifting on the premises"

A M E N D M E N T

OFFERED IN THE HOUSE

BY REP. MARTIN

TO: CSHB 275 (L&C)

Page 1, lines 16 - 18:

Delete all material.

Page 1, line 19:

Delete "(2)"

STATE OF ALASKA  
THE LEGISLATURE

PO BOX STATE CAPITOL  
JUNEAU, ALASKA 998  
907 455 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 7, 1990

SUBJECT: Amendments to CSHB 275 (L&C)  
(Workplace safety)

TO: Representative Terry Martin

FROM: Teresa B. Cramer *TBC*  
Legislative Counsel

You have asked for answers to questions on the second amendment prepared to CSHB 275 (L&C) at your request.

Robbery and shoplifting are both crimes of theft. However, the elements for robbery in both the first and second degrees require proof that the crime occurred "in the course of taking or attempting to take property from the immediate presence and control of another" and that the robber use or threaten the immediate use of force. (See AS 11.41.510 and 11.41.520.) The crime of concealment of merchandise, which is the statutory name for shoplifting, does not require the presence of a victim or any threat of force. The elements of that crime, set out in AS 11.46.220, require the knowing concealment with intent to deprive the owner of the merchandise. I have attached copies of the statutes referred to for your convenience.

I have not included a definition of "shoplifting" in the second amendment. The requirement imposed by the amendment, that employers provide training in minimizing or preventing shoplifting, does not require a close scrutiny of what is and what is not shoplifting.

You have asked why the bill does not include all 24 hour markets and liquor stores. There is no legal reason of which I am aware for excluding them from the coverage of the bill. The original sponsor may have further insight to offer on the scope of the bill.

Representative Terry Martin  
Page 2  
April 7, 1990

If I may be of further assistance, please advise.

TC:pl  
WKP4/029

Enclosure: AS 11.41.500  
AS 11.41.510  
AS 11.46.220

6-1200E  
Cramer  
3/28/90

Original sponsor(s): REP. SPOHNHOLZ

1 IN THE HOUSE BY THE LABOR & COMMERCE COMMITTEE

2 CS FOR HOUSE BILL NO. 275 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to workplace safety for certain  
7 franchises."

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

9 \* Section 1. AS 18 is amended by adding a new chapter to read:

10 CHAPTER 61. SAFETY REQUIREMENTS FOR ALL-NIGHT FRANCHISES.

11 Sec. 18.61.010. SAFETY REQUIREMENTS FOR ALL-NIGHT FRANCHISES.

12 (a) A franchisee whose industry is defined by the United States  
13 office of management and budget in the 1972 standard industrial clas-  
14 sification code manual as number 5411 (grocery stores) or 5541 (gaso-  
15 line service stations), and who remains open for 24 hours a day, shall

16 (1) equip the workplace with sound alarm equipment that  
17 signals to the peace officer in the jurisdiction within which the  
18 workplace is located that a robbery is taking place; and

19 (2) provide training for each employee, beginning within 30  
20 days after the employee is first hired, in how to minimize the danger  
21 of or prevent a robbery or other violence on the franchised premises.

22 (b) A franchisor that requires a franchisee to remain open 24  
23 hours a day is liable for the cost of complying with (a) if it is a sec-  
24 tion.

25 (c) An employer who violates this section is liable for civil  
26 penalties under AS 18.60.095. In addition, an employer who knowingly  
27 refuses or fails to provide an employee with training required by this  
28 section is liable to the employee who did not receive training for a  
29 civil penalty in the amount of \$100 and for costs and attorneys fees

1 as the court may allow.

2 (d) A franchisee shall maintain the records required by the  
3 department concerning compliance with this section.

4 (e) The department may adopt regulations necessary to implement  
5 this chapter.

6 (f) In this chapter, "department," "employee," and "employer"  
7 have the meanings given in AS 18.60.105(a).

8 \* Sec. 2. Notwithstanding AS 18.61.010, enacted by sec. 1 of this Act,  
9 an employer shall, no later than 90 days after the effective date of this  
10 Act, install the required equipment and begin training of employees hired  
11 before the effective date of this Act or within 60 days after the effective  
12 date of this Act.

HB

276

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Item 5

STEVE COWPER, GOVERNOR

REPLY TO:

- 1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 276-3550
- 1st NATIONAL CENTER  
100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701-4679
- P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 485-3600

April 10, 1989

The Honorable H. A. Boucher  
Chair, House State Affairs Committee  
Alaska State Legislature  
P.O. Box V  
Juneau, Alaska 99811

Re: Proposed committee  
substitute for HB 276  
Our file: 773-89-0114

Dear Representative Boucher:

It has come to our attention that the title of HB 276 could be made more specific and that it would be helpful to make express a point that is now only implied in the amendment in sec. 1 of the original bill. A proposed committee substitute, drafted for possible adoption by your committee, is attached.

The change in the bill title makes clear that the bill is to prevent amounts received as a result of the State v. Amerada Hess litigation from being used for permanent fund dividends. The current title merely indicates that the effect of the bill will be to permit litigation of that case in Alaska courts and thus make moot the current legal challenge to having that case heard by an Alaska court.

With regard to the change in the text, the original version of the bill relies on the application of existing law with regard to oil and gas income. The change offered by this draft committee substitute makes clear that money received as a result of the State v. Amerada Hess litigation will be treated the same as other income of the Alaska permanent fund, except for

Honorable H. A. Boucher, Chair  
House State Affairs Committee  
Our file: 773-89-0114

April 10, 1989  
Page 2

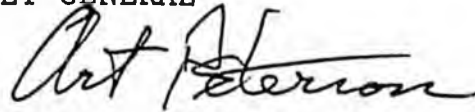
permanent fund dividends. Both versions make clear that that money is not available for distribution to the dividend fund from which permanent fund dividends are paid.

Thank you for your consideration of this matter.

Yours truly,

DOUGLAS B. BAILY  
ATTORNEY GENERAL

By:



Arthur H. Peterson  
Assistant Attorney General

AHP/cb

Enclosure

cc w/encl.: Robert A. Evans  
Legislative Liaison  
Office of the Governor

Bruce Botelho  
Assistant Attorney General  
Juneau

**DRAFT**

# 2 ch

DATE: 4/10/89

BOOKPROOFED: \_\_\_\_\_

APPROVED: 

IN THE HOUSE

BY THE STATE AFFAIRS COMMITTEE

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 276

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act amending the permanent fund dividend fund statutes to prevent amounts received as a result of the litigation of State v. Amerada Hess in Alaska courts from being used for permanent fund dividends; and providing for an effective date."

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

\* Section 1. AS 43.23.045(b) is amended to read:

(b) Notwithstanding any contrary provision of law, each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending on June 30 of the current year and available for distribution. However, income earned on money awarded after trial in State v. Amerada Hess, et. al., 1JU-77-847 Civ. (Superior Court, First Judicial District) shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund.

\* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

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STEVE COWPER  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

April 7, 1989

The Honorable Sam Cotten  
Speaker of the House  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Mr. Speaker:

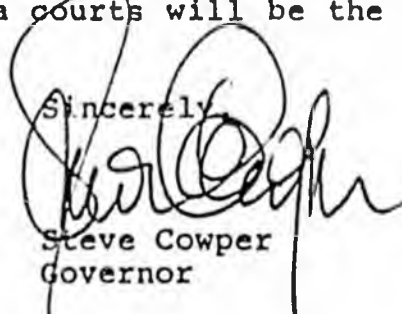
Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that amends AS 43.-23.045 by excluding potential revenue from the State v. Amerada Hess case from the permanent fund earnings available for distribution as dividends.

Under current law, the commissioner of revenue must transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which is determined to be available for distribution. Normally this would include income derived from litigation involving the state's royalties. However, in November 1987 three defendants in the State v. Amerada Hess royalty litigation filed suit in federal court to prevent that case from being tried in any court in Alaska. Standard Alaska Petroleum, Exxon, and Chevron USA claim that no judge or jury in Alaska can provide them with a fair trial since all judges and jurors have a financial stake in the outcome and are, therefore, unconstitutionally biased. In particular, the companies assert that these judges and jurors qualify for permanent fund dividends and would financially benefit if the state prevailed in the Amerada Hess case because any money awarded the state would increase the amount available for distribution.

The state Department of Law is vigorously contesting this claim and was successful in having the federal case dismissed in the United States District Court. However, the matter has been appealed to, and is pending before, the Court of Appeals for the Ninth Circuit. Were we to lose this case, the state would be faced with having a non-Alaska court interpreting the meaning of an Alaska lease form and deciding fundamental state policies regarding oil and gas leasing in this state. If the case is still on appeal at the time of trial, now scheduled for April 4, 1990, there would be a cloud hanging over the lengthy proceedings, perhaps compelling enough to lead to further postponements.

This bill would eliminate the due process arguments advanced by the companies, thus making it possible for the trial to stay on schedule in an Alaska court where it belongs. This result is achieved by preventing income earned from any judgment favorable to the state from entering the permanent fund dividend stream. This sacrifice is a small price to pay for assuring that Alaska courts will be the final arbiters of Alaska royalty law.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", written over the typed name and title.

Steve Cowper  
Governor

### FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Revenue-APFC  
 Title: Amending the PF dividend fund  
statutes to permit litigation of State v. Amerada Hess  
 BRU: \_\_\_\_\_  
 Sponsor: Rules-Request of Governor  
 Requestor: Governor  
 Components: \_\_\_\_\_

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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**FUNDING:** (Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

No fiscal impact - see attached

Prepared by: *David A. Rose* Phone: 465-2047  
 Division: David A. Rose, Exec. Director Date: April 6, 1989  
Alaska Permanent Fund Corporation  
 Approved by Commissioner: *[Signature]* Date: 4/6/89  
 Agency: \_\_\_\_\_

Distribution (by preparer):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

## Continuation of Fiscal Note/Bill Analysis

Permanent Fund Dividend Fund Statute Amendment to Permit  
Litigation of State v. Amerada Hess in Alaska

This bill would eliminate certain due process arguments currently advanced by the defendants in State v. Amerada Hess, by neutralizing the impact upon Permanent Fund dividends of a decision favorable to the State. The Alaska Permanent Fund's legally mandated share of all funds received in a settlement of the litigation, including associated interest, would be credited to the principal of the Fund at the time of receipt. It is expected that the settlement could range from \$400 million to \$2.6 billion, the latter number estimated by the defendants.

All future earnings on this portion of Fund principal would be forever excluded from Permanent Fund dividend calculations. In this manner, the bill prevents all income earned from a judgment favorable to the State from entering the Permanent Fund dividend stream, and makes it possible to continue the trial in an Alaska court on schedule.

STATE OF ALASKA  
1989 LEGISLATIVE SESSION

BILL VERSION: HB 276  
PUBLISH DATE: HOUSE 4/7/89

FISCAL NOTE

REQUEST

Revision Date: \_\_\_\_\_  
Title: An Act amending the PFD statutes  
Sponsor: Rules/Governor  
Requestor: Rules

Agency Affected: Revenue  
BRU: Permanent Fund Dividend Division  
Components: Permanent Fund Dividend Division

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
<b>OPERATING</b>						
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LANDS & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>REVENUE</b>	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS: This bill would have no affect on the administration of the dividend program.

Prepared By: Ernie Jones  
Division: Permanent Fund Dividend Division  
Approved by Commissioner: [Signature]  
Agency: Revenue

Phone: 465-2323  
Date: April 6, 1989

Date: 4/5/89

Distribution (by preparer):  
Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)

# MEMORANDUM

State of Alaska

Department of Law

TO Members of the Legislature


DATE April 24, 1989

FILE NO

TEL NO 465-3600

SUBJECT HB 276 and the recent  
court decision in  
Standard v. Schaible

FROM

  
Douglas B. Baily  
Attorney General

The recent Ninth Circuit Court of Appeals decision in Standard v. Schaible did not resolve the bias issue -- it only delayed its resolution. Basically, the court ruled that the issue was not "ripe", and that the federal courts would rule on the issue only after the Alaska courts had the initial chance to decide whether there was unconstitutional bias because of the potential impact of the Amerada Hess case on the amount of Permanent Fund dividends. The matter was dismissed "without prejudice" and with the express invitation to the Producers to come back to the federal courts if the State did not provide a fair and unbiased forum for the resolution of the dispute. The Ninth Circuit Court of Appeals stated:

In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors within a reasonable time. The district court invited the Producers "to reopen this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsibility of state and federal courts to provide every person with due process.

The burden, therefore, is still on the State to guarantee a fair tribunal. Without passage of legislation, the State would have to convince both the state courts and the federal courts that the effect on Permanent Fund dividends does not raise constitutional problems. Failure to convince either tribunal would result in losing the state forum. In essence, the Ninth Circuit Court of Appeals merely passed on the issue for the time being, reserving its look at the issue until after the state Superior Court and Supreme Court has a chance to make the initial judgment.

DBB:jf

STATE OF ALASKA  
THE LEGISLATURE

POUCHY - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907.465.3800

LEGISLATIVE AFFAIRS AGENCY  
LEGISLATIVE REFERENCE LIBRARY

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HB 276

H. State Affairs

4/18/89

# HOUSE COMMITTEE REPORT

(7)  
Date Referred: April 19, 1989

FURTHER REFERRALS: FINANCE

4/27

Date of Committee Action: 4/27/89

The JUDICIARY Committee considered:

HB 276

HOUSE BILL NO. 276 [PERMANENT FUND - AMERADA HESS LITIGATION]  
"An Act amending the permanent fund dividend fund statutes to permit litigation of State v. Amerada Hess in Alaska courts; and providing for an effective date."

- RECOMMENDATIONS:
- [  ] be replaced with S. 4276 State Affairs [ ] the same title
  - [ ] have attached amendment(s) [ ] a new title
  - [  ] do pass
  - [ ] do not pass
  - [ ] no recommendation
  - [ ] individual recommendations
  - [ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

- |  |                                   |
|--|-----------------------------------|
| ATTACHES NEW FISCAL NOTE(S):<br>(Dept) | APPROVES PREVIOUS:<br>(Date/Dept) |
| [ ] fiscal impact _____                | [ ] fiscal note(s) _____          |
| [ ] zero fiscal note _____             | [ ] zero fiscal note(s) _____     |
| [ ] zero with analysis _____           | [ ] zero fn/analysis _____        |

SIGNING DO PASS:

SIGNING:  
(Check approp. column)

Do Not Pass    No Rec    Amend

Mike Davis M. DAVIS  
Davidson DAVIDSON  
Ellis ELLIS  
Peter Goll GOLL

<u>Mike Miller</u> MILLER	✓		
<u>Tom Martin</u> MARTIN	✓		

P.A.

# HOUSE COMMITTEE REPORT

(7)

Date Referred: April 7, 1989

FURTHER REFERRALS: JUDICIARY  
FINANCE

Date of Committee Action: \_\_\_\_\_

The STATE AFFAIRS Committee considered:

HB 276

HOUSE BILL NO. 276 [PERMANENT FUND - AMERADA HESS LITIGATION]  
"An Act amending the permanent fund dividend fund statutes to permit litigation of State v. Amerada Hess in Alaska courts; and providing for an effective date."

RECOMMENDATIONS:

- be replaced with CSHB 276(SA)  the same title
- have attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(s):  
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- fiscal impact \_\_\_\_\_
- zero fiscal note \_\_\_\_\_
- zero with analysis \_\_\_\_\_

- fiscal note(s) \_\_\_\_\_
- zero fiscal note(s) 4/7/89 DOR
- zero fn/analysis 4/7/89 APFC

SIGNING DO PASS:

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SIGNING:  
(Check approp. column)

	Do Not Pass	No Rec	Amend
<u>Deane Dowley</u>		X	
<u>Jim Bunch</u>		X	
<u>Carl Weisberg</u>		X	
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*D. A. Bush*  
 Chairman's Signature

FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STANDARD ALASKA PRODUCTION  
COMPANY, EXXON CORPORATION,  
CHEVRON U.S.A., INC.,

*Plaintiffs-Appellants/  
Cross-Appellees.*

v.

GRACE B. SCHAIBLE, Attorney  
General of Alaska, JUDITH M.  
BRADY, Comm'r of Natural  
Resources of Alaska, MARGARET J.  
HAYES, Director of Div. of Lands,  
JAMES E. EASON, Director of Div.  
of Oil and Gas, and WALTER L.  
CARPENETI, Judge of Superior  
Court of Alaska,

*Defendants-Appellees/  
Cross-Appellants.*

Nos. 88-4008:  
88-4035

D.C. No.  
CV 87-521-RCB

OPINION

Appeal from the United States District Court  
for the District of Alaska  
Robert C. Belloni, District Judge, Presiding

Argued and Submitted  
March 7, 1989—Seattle, Washington

Filed April 21, 1989

Before: Eugene A. Wright and Arthur L. Alarcon, Circuit  
Judges, and Edward Rafeedie\*, District Judge

---

\*Honorable Edward Rafeedie, United States District Judge for the Cen-  
tral District of California, sitting by designation.

4134 STANDARD ALASKA PRODUCTION V. SCHAIBLE

Opinion by Judge Alarcon

---

**SUMMARY**

---

**Jurisdiction**

Affirming the district court's order denying motion to dismiss, the court held that the claim was not ripe.

Standard Alaska Production Co., Exxon Corporation and Chevron U.S.A., Inc. (Producers) filed suit in the District of Alaska for injunctive and declaratory relief. They contended that continuation of an underlying state action filed by the State of Alaska against Producers and other defendants for damages for underpayment of royalties statutorily owed every Alaska resident, was a violation of Producer's fourteenth amendment right to trial before an impartial tribunal. Because of the damages sought in the underlying state action, Producers claimed that every potential judge and juror in Alaska state court had a direct and substantial pecuniary interest in the outcome of the underlying state action. Judge Belloni of the District of Oregon presided over the federal court proceedings and dismissed the Producers' federal cause of action on ripeness grounds.

[1] There was no finding by any court that Alaska could not provide an unbiased trier of fact and appellate court to consider Producers' federal constitutional claims. Merely alleging there was no competent court in Alaska did not demonstrate that Alaska's disqualification procedures were inadequate to resolve the issue of bias. [2] There was no evidence in the record to support any estimated figure by Producers establishing that as a result of a favorable judgment in the underlying state action there would be a substantial financial interest compelling disqualification for cause. [3] Producers' failure to raise their claim of bias before the

---

STANDARD ALASKA PRODUCTION v. SCHAIBLE

4135

Alaska courts denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome. [4] Thus, the district court did not err in its determination that Producers' claim of bias could not be resolved until a factual presentation demonstrating bias was made before the state trial judge.

---

COUNSEL

C. Douglas Floyd, San Francisco, California, for the appellant, Chevron U.S.A., Inc.

Bruce Botelho, Assistant Attorney General, Department of Law, Oil, Gas & Mining Section, Juneau, Alaska, for the appellees/cross-appellants.

---

OPINION

ALARCON, Circuit Judge:

Standard Alaska Production Company, Exxon Corporation and Chevron U.S.A., Inc. (Producers), appeal from the order granting the motion of Grace R. Schaible, et al. (State Officials) to dismiss this suit on the ground that the claim is not ripe. The State Officials cross-appeal from (1) the denial of their motion to dismiss pursuant to the Eleventh Amendment and (2) the refusal to dismiss this matter under *Younger v. Harris*, 401 U.S. 37 (1971).

## I

We review independently, without deference to the district court's rulings, each of the issues raised on this appeal: (1) whether the district court erred in denying the motion to dis-

## 4136 STANDARD ALASKA PRODUCTION V. SCHAIBLE

miss based on the ground that federal jurisdiction was lacking due to the Eleventh Amendment, *South Delta Water Agency v. United States Dept. of Interior*, 767 F.2d 531, 535 (9th Cir. 1985); (2) whether the district court erred in dismissing the case on ripeness grounds, *Assinibouine and Sioux Tribes v. Board of Oil and Gas Conservation of Montana*, 792 F.2d 782, 787 (9th Cir. 1986); and (3) whether this suit should have been dismissed pursuant to the *Younger* abstention doctrine, *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987).

## II

On September 2, 1977, the State of Alaska (Alaska) filed an action in an Alaskan trial court for injunctive and declaratory relief against Amerada Hess Corporation and eighteen North Slope oil companies including Standard Alaska Production Company, Exxon Corporation, and Chevron, U.S.A., Inc. *State of Alaska v. Amerada Hess Corporation et al.*, Civil No. IJU-77-847, (Hess). Alaska sought a declaration of its rights under certain oil and gas leases negotiated with the Producers.

On July 6, 1983, Alaska filed a second amended complaint in the state action seeking damages for underpayment of royalties pursuant to the leasing agreement. In this pleading, Alaska alleged it had not received all of its royalties because the Producers had been underestimating the value of the oil and gas taken from Prudhoe Bay and Kuparuk River oil fields. The state court proceedings are scheduled for trial on April 4, 1990.

In their amended complaint for injunctive and declaratory judgment, the Producers claim that there would be three basic adjustments to Alaska's share of royalties: (1) the lessees will owe at least \$1 billion in royalties on past production; (2) the value of royalties on future production would increase by an additional \$1 billion; and (3) Alaska would receive \$600

million in contract adjustments on any oil previously received in the form of royalties-in-kind.

The Producers contend that "the monetary recovery sought by the state in *Hess* will substantially increase the Alaska Permanent Fund and, consequently, the annual amount of dividends from the fund that every Alaska resident has a statutory right to receive." Brief for Appellants at 3. Every resident of Alaska who applies and who meets certain residency requirements is entitled to receive an annual dividend from the earnings on the permanent fund investment. (Alaska Statute §§ 43.23.005-.015.) The residency requirements are: (1) that an applicant live in Alaska from October 1st through March 31st of the year preceding disbursement of dividends, and (2) the applicant submit a written statement of intent to remain a permanent resident of Alaska. *Id.* The amount of each year's dividend is determined by a fixed formula. (Alaska Statute § 7.13.140).

### III

On November 2, 1987, the Producers filed suit in the District Court for the District of Alaska for injunctive and declaratory relief under 42 U.S.C. § 1983 "on the ground that the continuation of [the state] action is a violation of their Fourteenth Amendment right to trial before an impartial tribunal." Brief for Appellants at 2. They claim that with an annual increase in dividends, "every potential judge and juror in Alaska state court has a direct and substantial pecuniary interest in the outcome of *Hess*." *Id.* at 3. The Producers argue that issuance of an injunction "would not prevent the state from pursuing its royalty claims against the *Hess* defendants, but would require it to pursue those claims in an alternative forum where the judges and jurors have no financial interest in the case, such as the court of another state." *Id.*

The State Officials moved to dismiss on the following grounds: (1) The Eleventh Amendment deprives the district

4138 STANDARD ALASKA PRODUCTION V. SCHAIBLE

court of subject matter jurisdiction; (2) There is no justiciable case or controversy; (3) Principles of comity and federalism embodied in the rule of abstention require dismissal; and (4) The complaint failed to allege sufficient facts to support a finding of a due process violation.

This matter was assigned to Judge Kleinfeld of the United States District Court for the District of Alaska. Judge Kleinfeld recused himself from presiding over this matter. Judge Kleinfeld advised the parties of the reasons he disqualified himself as follows:

I don't think we need go so far as to examine a judge's balance sheets and the exact size of his family. Mine is five, as counsel obviously researched when they wrote their memorandum. Some judges have smaller families and they make less money off of dividends, but it doesn't matter a whole lot, it's still substantial. It's substantial enough so that it would make a good hostile headline impairing the appearance of integrity of the judicial process.

As a result of Judge Kleinfeld's recusal, Judge Belloni of the United States District Court for the District of Oregon was designated to preside over the federal court proceedings. The district court dismissed the Producers' federal cause of action on ripeness grounds. The court expressly denied the motions to dismiss based on the Eleventh Amendment and failure to state a claim. The court did not reach the State Officials' abstention arguments.

We first consider the State Officials' contention in their cross-appeal that the district court lacked jurisdiction to hear this matter because they are immune from suit under the Eleventh Amendment.

## IV

The State Officials argue that there is no federal court jurisdiction over this matter because the Eleventh Amendment

## STANDARD ALASKA PRODUCTION V. SCHAIBLE 4139

prohibits a citizen from suing a state. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). Eleventh Amendment immunity extends to an action or a suit filed against a state agency or official. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984). The Eleventh Amendment does not, however, preclude a suit to enjoin a state official from violating the federal constitution. *Ex Parte Young*, 209 U.S. at 159-60; *Pennhurst*, 465 U.S. at 101-103.

The Producers allege that the filing of the *Hess* action in an Alaskan state court is a violation of their right under the Fourteenth Amendment to an impartial tribunal. They contend that the monetary recovery sought in the *Hess* matter will increase the annual dividends paid to the Alaska residents. Thus, it is argued, every judge and potential juror in that state "has a direct and pecuniary" interest in the outcome of *Hess*. Brief for Appellants at 3.

The State Officials argue, however, that "the connection between them and the alleged due process deprivation must be deemed too tenuous to permit reliance upon the doctrine of *Ex Parte Young* to avoid the bar of Eleventh Amendment state immunity." Brief for Appellees at 36. They further argue that the essence of the Producers' claim "is directed at the effect of the Permanent Fund dividend program on the *Anerada Hess* judge and jury; their claim does not arise out of any allegation of unconstitutional conduct on the part of any of the defendants named here." *Id.*

The State Officials' argument is unpersuasive. They are the parties responsible for the filing and maintenance of the state court action against *Hess*. Grace B. Schaible is the Attorney General of Alaska. She is responsible for bringing civil suits on behalf of the state. (Alaska Stat., § 44.23.020(b)). Judith M. Brady, the Commissioner of Natural Resources of the State of Alaska, Mary J. Hayes, the Director of the Division of Lands, and James E. Eason, the Director of the Division of Oil and Gas are the officials responsible for collecting the roy-

## 4140 STANDARD ALASKA PRODUCTION V. SCHAIBLE

ality revenues in dispute in the state court proceedings. (*Id.* §§ 44.37.010 -.020, 38.05.035.) The action was assigned for trial before Walter L. Carpeneti of the Superior Court of the State of Alaska. The required connection with the enforcement of the act, under the doctrine announced in *Ex Parte Young*, is therefore present.

We find that the Eleventh Amendment does not bar the Producers from seeking relief in the federal courts and we affirm the district court's denial of appellees' motion to dismiss under Eleventh Amendment state immunity.

## V

The Producers contend that the district court erred in granting the state officials' motion to dismiss on the ground that the issue was not ripe for review. The Producers allege that "the district court failed to address the relevant questions governing the ripeness determination." Brief for Appellants at 13.

The doctrine of ripeness is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Ripeness requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Friedman Brothers Investment Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982).

The Producers contend that their due process claim is ripe for review because "there is nothing hypothetical, specula-

tive, remote, or contingent about the denial of due process presently resulting from the pending Alaska state court action in *Hess*." Brief for Appellants at 10. They claim that their action seeks "to enjoin *currently ongoing* proceedings before a financially interested tribunal on the ground that they have an absolute due process right to the adjudication of *Hess* by a disinterested judge and jury." *Id.* (emphasis in original). They argue that "[t]he right to a decisionmaker free of a pecuniary interest is absolute [and] it does not depend on any determination of actual bias." *Id.* at 11. The Producers assert that their "due process claim in this case thus presents a legal issue that 'will not be clarified by further factual development.'" *Id.* (citation omitted). They claim that the financial interest of every Alaskan judge or juror in the outcome of the pending state proceedings supports a ruling that, as a matter of law, Alaska cannot provide an unbiased tribunal.

The Producers argue further that the district court should not have dismissed their claim on ripeness grounds because "the state's disqualification procedures are inadequate to cure the financial bias in *Hess*, which, . . . affects every Alaska resident regardless of subjective belief, and works a per se constitutional disqualification of every judge or juror in Alaska state court." *Id.* at 24. They contend that "[s]uccessful invocation of the state's disqualification procedures would simply result in the appointment of another judge or juror having an identical pecuniary interest." *Id.* at 24-25. The Producers rely on *Gibson v. Berryhill*, 411 U.S. 564 (1973), for the proposition that "an 'adequate opportunity' does not exist where, as in this case, the state tribunal has a financial interest in the outcome of the case:

'[*Younger*] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for appellees alleged, and the District Court con-

4142 STANDARD ALASKA PRODUCTION V. SCHAIBLE

cluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it." (*Id.* at 577)(emphasis added)."

Reply Brief for Appellants at 21.

A brief summary of the issue before the Supreme Court in *Gibson* will readily demonstrate that it does not support the Producers' argument. In *Gibson*, the Alabama Optometric Association (Association) filed with the Alabama Board of Optometry (Board) charges against various optometrists (the employee-pharmacists) who were practicing their profession as employees of Lee Optical Co. The Association asked the Board to revoke the licenses of each of the employee-optometrists. The Association alleged that the practice of optometry by individuals employed by a business establishment was unethical conduct. *Id.* at 567-68.

Two days later, the Board filed a suit in state court against Lee Optical Co. "seeking to enjoin the company from engaging in the 'unlawful practice of optometry.'" *Id.* at 568. The state court enjoined Lee Optical from practicing optometry without a license or from employing licensed optometrists. Thereafter the Board scheduled hearings on May 26th and 27th on the unethical conduct charges brought against the employee-optometrists by the Association.

The employee-optometrists filed suit in the United States District Court against the Board, its individual members, and the Association pursuant to the Civil Rights Act, 42 U.S.C. § 1983, for an injunction against the scheduled license revocation proceedings. *Id.* at 569. The employee-optometrists alleged that they could not get a fair and impartial hearing because the Board was biased. *Id.* at 570.

The district court concluded that the Board was so biased by pecuniary interests that it could not conduct the revocation hearings. *Id.* at 578. The district court found that of the

192 licensed optometrists in Alabama, 92 were employed by a business establishment. None belonged to the Association. Each member of the Association was an independent optometrist engaged in private practice for his own accord. Only members of the Association were eligible to be members of the Board. *Id.* at 578. The district court concluded from these facts that revocation of the employee-optometrists licenses "would possibly redound to the personal benefit of members of the Board." *Id.* at 578.

The Supreme Court concluded that the district court's findings were not clearly erroneous. *Id.* at 579. Accordingly, the Supreme Court held in *Gibson* that, based on the district court's findings, "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose." *Id.* at 579. The Supreme Court also concluded that the district court did not err in failing to abstain because the matter was pending before the Board. *Id.* at 577. The Court instructed that the application of *Younger v. Harris* "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.* (emphasis added). The Supreme Court concluded that "the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it." *Id.*

[1] In the matter before this court, there has been no finding by any court that Alaska cannot provide an unbiased trier of fact and appellate court to consider the Producers' federal constitutional claims. The Producers have not presented to the state courts their claim that all Alaskan judges and prospective jurors are biased because of a substantial pecuniary interest in the outcome of the pending proceedings in *Hess*. The simple fact that the Producers claim that there is no competent court in Alaska to preside over the injunctive and declaratory relief action does not demonstrate that Alaska's disqualification procedures are inadequate to resolve the issue of bias. In *Ohio Civil Rights Comm'n v. Dayton Chris-*