

**ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672**  
**7486 SENATE JUDICIARY**

Representative Dave Donley  
Page 3  
September 11, 1990

law, whether the instrument is or is not a deadly weapon. Barboursville ex rel. Bates v. Taylor, 174 S.E. 485 (W.Va. 1934), 92 A.L.R. 1093. Thus, if the crime to be charged is concealment under AS 11.61.220(a), misconduct involving weapons in the third degree, the court--not a jury--will ascertain whether the chemical agent or instrument is to be classified as a weapon. To the extent the court finds the statutes ambiguous, presumably, the court would apply the rule of statutory construction that applies a narrow reading and construction that favors the defendant against the state. See Dailey v. State, 675 P.2d 657 (Alaska App. 1984).

You should understand that concealed possession of one or more of these items may be safeguarded by the affirmative defense provided by AS 11.61.220(b):

In a prosecution under (a)(1) of this section, it is an affirmative defense that the defendant, at the time of possession, was

(2) actually engaged in . . . lawful outdoor activity that necessarily involves the carrying of a weapon for personal protection.

If mace, tear gas, or a stun gun are determined to be a "deadly weapon," then each is, of course, at the same time a "weapon." Arguably, depending upon the context of the weapon's use, a defendant could successfully contend that carrying of the weapon while engaged in lawful outdoor activity was reasonably necessary for personal protection. Surely, for example, the use of mace by a woman walking on public streets at late hours would fall within the coverage of activity protected by the affirmative defense. And, while it is not common for pedestrians to carry tear gas or stun guns as protection in like situations, it is not unreasonable to expect that, under certain circumstances, a similar argument may be presented that justifies a defendant's possession of either or both of them.

The statute cited, misconduct involving a weapon in the third degree, considers only a weapon that is concealed. The statute does not address the open possession of mace, tear gas, or a stun gun.

JBC:lrb  
L11/055

BILL NO: CSHB 104(JUD)

DATE: 3/26/91

TITLE: Relating to Misconduct  
Involving Weapons

CONTACT: Gayle A. Horetski  
Deputy Commissioner  
465-4322

DEPARTMENT OF  
PUBLIC SAFETY  
/

CSHB 104(JUD) makes numerous changes in Alaska's firearms laws. The Department of Public Safety supports this bill, but offers the following comment.

Section 4 of the bill makes it a class "C" felony offense for a convicted felon to possess "a removable rifle magazine capable of containing more than five cartridges". In an earlier draft of this bill, this section prohibited a felon from possessing "a semi-automatic firearm". The Department of Public Safety believes it makes more sense to prohibit the possession by felons of such dangerous firearms, rather than to prohibit possession of a component piece of the firearm. Under the present draft, possession of an empty rifle magazine by a felon would be a class C felony. This seems anomalous, especially as the mere possession of devices such as metal knuckles, switchblades, and gravity knives is being decreased from a class C felony to a class A misdemeanor in this bill. The Department believes this bill would be strengthened considerably by the substitution of "or a semi-automatic firearm" for the new language shown at page 2, lines 14 and 18 and at page 3, lines 11 and 12. As stated above, the Department of Public Safety supports the other aspects of CSHB 104(JUD).



Richard L. Burton  
Commissioner



## ALASKA OUTDOOR COUNCIL, INC.

Oliver E. (Bud) Burris, President  
2801 Talkeetna, Fairbanks AK 99709  
(907) 474-0437, FAX (907) 474-0437

Senator Rick Halford  
Alaska State Legislature  
P.O. Box V Juneau AK 99811

May 13, 1991

Dear Senator Halford:

As the first session of the Seventeenth Legislature draws to a close I want to thank you for your advise and assistance on the many issues during this tumultuous year of constitutional amendment proposals, campaigns, and legislation. I was particularly pleased to express to you the Alaska Outdoor Council's appreciation with our "legislator of the Year" award.

With regard to this year's legislation we are most interested in seeing SB 38 pass the Legislature. It appears that in order to pass SB 38 in the House it will be important for HB 104 to progress. We support HB 104 also and ask that you please schedule its hearing in the Senate Judiciary Committee. Working together I believe we can finally see an anti-hunter harassment law, and possibly pass the weapons bill on which our members have done considerable work.

Thanks again for all your work on behalf of Alaska's Outdoor users.

Sincerely,

Oliver E. (Bud) Burris

5/13 Keep + Bear Arms



NATIONAL RIFLE ASSOCIATION OF AMERICA  
INCORPORATED 1871

1600 RHODE ISLAND AVENUE, N.W.  
WASHINGTON, D.C. 20036

RUPE ANDREWS  
FIELD REPRESENTATIVE  
ALASKA

9416 LONGRUN DRIVE  
JUNEAU AK 99801  
907/789-7422

March 13, 1991

Representative Dave Donley  
Chairman, House Judiciary Committee  
Alaska House of Representatives  
Capitol Building  
Juneau, AK 99801

Dear Representative Donley:

This letter is to express the support of the National Rifle Association for CSHB-104. I have appreciated the close working relationship with your committee and staff in the markup and committee discussions of CSHB-104.

My personal thanks to you and staffer Ms. Laurie Otto for your sincere consideration of the NRA's input to this statute. I believe that you have accomplished the goal of the Judiciary Committee in strengthening the weapons statute and the penalties for violation.

Sincerely,

---

Rupe Andrews, Field Representative, Alaska

PHONE MESSAGE	TO	Rick	DATE	5/14	TIME	9	AM								
	FROM		AREA CODE				PM								
	OF		NO.	403-3830											
			EXT.												
	M	Dick Bishop would													
	E	really like to see													
	S	HB104 (Weapons Offenses - Donkey)													
	S	Scheduled in Judiciary Comm.													
	A														
	G														
	E														
		PHONED	<input type="checkbox"/>	CALL BACK	<input type="checkbox"/>	RETURNED CALL	<input type="checkbox"/>	WANTS TO SEE YOU	<input type="checkbox"/>	WILL CALL AGAIN	<input type="checkbox"/>	WAS IN	<input type="checkbox"/>	URGENT	<input type="checkbox"/>

HB

105

**SEVENTEENTH LEGISLATURE  
SENATE JUDICIARY COMMITTEE BILL FILE**

Bill Number: H 105  
 Abbreviated Title: Joint Trial/Multifile Defs.  
 Sponsor: House Jud Original Received: May 3, 1991  
 Written Request to Schedule Rcv'd: \_\_\_\_\_ From: \_\_\_\_\_  
 Sponser's Statement Rcv'd: \_\_\_\_\_ From: \_\_\_\_\_  
 Sectional Analysis Rqst'd: \_\_\_\_\_ From: \_\_\_\_\_  
 Sectional Analysis Received: \_\_\_\_\_  
 Fiscal Note (Original)  
 Rqst'd Of: \_\_\_\_\_ Rcv'd From: Court A Date: With File  
 Rqst'd Of: \_\_\_\_\_ Rcv'd From: Law A Date: "  
 Rqst'd Of: \_\_\_\_\_ Rcv'd From: Trainers A Date: "  
 Fiscal Note (C.S.)  
 Rqst'd Of: \_\_\_\_\_ Rcv'd From: OPA A Date: "  
 Rqst'd Of: \_\_\_\_\_ Rcv'd From: PD A Date: "  
 Rqst'd Of: \_\_\_\_\_ Rcv'd From: \_\_\_\_\_ Date: \_\_\_\_\_  
 Five Day Notice Given: By House - Notice of Hearings Given: \_\_\_\_\_  
 Committees of Referral: First: \_\_\_\_\_ Second: \_\_\_\_\_ Third: \_\_\_\_\_  
 LAA Contact: \_\_\_\_\_ To Senate Secretary: \_\_\_\_\_

**COMMITTEE ACTION**

DATE: 5-7-91  
Heard - Passed out with Ind Res. 3640 - 100  
Adm - no  
Transp. Rules & Admin. 110  
All vote to pass in House setting of Intent  
Delivered to Sen Sec - 5-7-91

**PERSONS TO BE NOTIFIED OF HEARING**

- |            |           |
|------------|-----------|
| 1. Sponsor | 6. _____  |
| 2. Agency  | 7. _____  |
| 3. _____   | 8. _____  |
| 4. _____   | 9. _____  |
| 5. _____   | 10. _____ |

# Alaska State Legislature



House of Representatives  
House Judiciary Committee  
Chairman Dave Donley

P. O. Box V  
State Capitol  
Juneau, Alaska 99811  
(907) 465-4990

## LETTER OF INTENT

HB 105

In adopting the amendment to Evidence Rule 404, the Legislature does not intend to require the court to admit, in all circumstances, evidence that is admissible under Evidence Rule 404. Instead, the Legislature intends that the court will retain the discretion under Evidence Rule 403 to exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The amendment changes Rule 404(b) to one of inclusion, rather than exclusion. At the same time, it establishes that the non-propensity purposes listed in the rule are not inclusive, and that evidence can be admitted if it is relevant to a purpose not listed in the rule.

# Alaska State Legislature



## House of Representatives

House Judiciary Committee  
Chairman Dave Donley

### M E M O R A N D U M

P. O. Box V  
State Capitol  
Juneau, Alaska 99811  
(907) 465-4990

TO: Senator Rick Halford, Judiciary Chair

FROM: Representative Dave Donley, Judiciary Chair **DB**

DATE: May 2, 1991

RE: Request to hear HB 105

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I respectfully request that HB 105, a House Judiciary Committee bill, be scheduled for a Senate Judiciary hearing. By amending three court rules, HB 105 will increase the number of cases in which only one trial need be held when either (1) two or more people are charged with committing the same crime or (2) one person is charged with more than one crime.

The amendments have the effect of forcing the Alaska Supreme Court to adopt the federal courts' interpretation of the rules being amended. Although the text of each of the rules was copied from (and is identical to) the federal rules, the Alaska courts have interpreted the rules in a much more restrictive manner than the federal courts. As a result, a case that is efficiently handled in one trial in the federal system often requires a series of trials to be held in Alaska. For example, a recent Fairbanks case in which a man was charged with abusing a series of minors was recently severed into eight separate trials.

The U.S. Supreme Court noted the importance of joint trials in Richardson v. Marsh, 481 U.S. 200, 209 (1987), stating that "joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years." However, Alaska trial statistics are dramatically different; in this state only 2% of the trials held annually involve multiple defendants.

The efficiency and fairness of the criminal justice system will be enhanced if more joint trials can be held. Witnesses will not be required to testify at multiple trials, thereby reducing the inconvenience and trauma to them. The possibility of inconsistent verdicts is also diminished when joint trials are held.

The legislation is strongly supported by the Departments of Law and Public Safety, the Alaska Association of Chiefs of Police, the Network on Domestic Violence and Sexual Assault, and Victims for Justice.

Thank you very much for your consideration of this request.

DD:lc

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES



### REPRESENTATIVE FRAN ULMER

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TO: Representative Johnny Ellis

DATE: April 3, 1991

FROM: Representative Fran Ulmer

SUBJ: Request to Calendar HB 105  
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I want to express my support for HB 105, a Judiciary Committee bill that changes three court rules. The effect of HB 105 is to increase the number of cases in which only one trial need be held when either: (1) two or more people are charged with committing the same crime, or (2) when one person is charged with committing multiple similar crimes.

The bill will eliminate an injustice in our criminal justice system that has been created by the way the Alaska Court of Appeals interprets three rules of court (the Alaska interpretation is the direct opposite of the way the exact same rules are interpreted by the federal courts). This interpretation results in an expensive and inefficient system which is unfair to victims and does not serve the interests of justice.

A recent case points out the clear need for the legislation. This case involves a Fairbanks man who has been charged with molesting many different children. Instead of having one trial for all charges, the court ordered that eight separate trials be held. The man was convicted in the first trial held in Fairbanks; however, the publicity surrounding the first trial caused the judge to order that the second trial be held in Anchorage. Having so many trials, and having to travel to Anchorage to testify, will greatly multiply the trauma and burden placed on the child victims. In addition, the substantial cost involved in holding eight separate trials has been dramatically increased by the need for witnesses, lawyers, judges, troopers and the defendant to travel to Anchorage for court.

Unfortunately, this is not a unique case in Alaska, but it illustrates why HB 105 is necessary and should be passed by the legislature.

FU/bvh

District 4B — Juneau  
P.O. Box V • Juneau, Alaska 99811-3100 • (907) 465-4947



Recycled Paper

# STATE OF ALASKA

## DEPARTMENT OF LAW

### CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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ANCHORAGE, ALASKA 99501-5993  
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April 3, 1991

The Honorable Dave Donley, Chair  
House Judiciary Committee  
Alaska State Legislature  
P.O. Box V  
Juneau, Alaska 99811

Re: HB 105 (Joinder)

Dear Representative Donley:

As I indicated in my remarks on HB 105 before the Judiciary Committee in early March, the federal courts and most other states promote judicial efficiency by permitting the joinder of offenses and defendants when it is reasonable to do so. One of the means they have to do this is their interpretation of Evidence Rule 404(b) as a rule of "inclusion," rather than a rule of "exclusion."<sup>1</sup>

Federal Evidence Rule 404(b) and its Alaska counterpart, Alaska Evidence Rule 404(b), sets out the standard a judge is to apply when determining whether to admit evidence in a particular criminal trial of a defendant's "prior bad acts." The rule provides that evidence of prior acts of the defendant is not admissible to prove criminal propensity, but that the evidence is admissible if it is relevant to prove an issue in the case such as motive or intent.

Although the same language is used in both rules, the courts of Alaska have interpreted the rule differently than has the federal judiciary. The Alaska courts treat Rule 404(b) as a rule of exclusion -- i.e., the evidence is presumed prejudicial and inadmissible even if it is relevant to an issue at trial. Lerchenstein v. State, 697 P.2d 312, 315 & 318 n.2 (Alaska App. 1985), aff'd, State v. Lerchenstein, 726 F.2d 546 (1986). The federal courts, on the other hand, interpret Rule 404(b) as a rule

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<sup>1</sup> This is because of the issue of "cross-admissibility" of such evidence in joined charges, which is a factor considered by courts when determining whether joinder is appropriate or severance should be granted; if the evidence is admissible as to both charges, joinder is much more likely.

of "inclusion," meaning that the evidence is admissible at trial if it is relevant to some issue other than the defendant's propensity to commit crimes.

At one point, the proper interpretation of Evidence Rule 404(b) was the subject of debate within the federal court system. As the following listing demonstrates, however, there is now unanimity within the federal circuits that Rule 404(b) was meant to be and is a rule of inclusion, as provided in HB 105, rather than a rule of exclusion:

First Circuit: United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1984) ("The most striking aspect of the rule is its inclusive rather than exclusionary nature: should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403").

Second Circuit: United States v. DeVaughn, 601 F.2d 42, 45 (2d Cir. 1979) ("Although this court has taken the 'inclusionary' approach to Rule 404(b), there is no presumption that other-crime evidence is relevant").

Third Circuit: United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978) ("The draftsmen of Rule 404(b) intended it to be construed as one of 'inclusion,' and not 'exclusion'").

Fourth Circuit: United States v. Masters, 622 F.2d 83, 85 (4th Cir. 1980) ("The Federal Rule, both prior to and as stated in Rule 404(b), Federal Rules of Evidence -- characterized as the 'inclusive rule,' -- 'admits all evidence of other crimes [or acts] relevant to an issue in a trial except that which tends to prove only criminal disposition'").

Fifth Circuit: United States v. Shaw, 701 F.2d 367, 386 (5th Cir. 1983) ("Rule 404 is a rule of inclusion, United States v. Halper, 590 F.2d 422, 432 (2d Cir. 1978), which admits evidence of other acts relevant to a trial issue except where such evidence tends to prove only criminal disposition.... The rule is exclusionary only as to evidence admitted to establish bad character as such; it very broadly recognizes admissibility of prior crimes for other purposes").

Sixth Circuit: United States v. Acosta-Cazares, 878 F.2d 945, 948 (6th Cir. 1989) ("Thus, we have explained that Rule 404(b) 'is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified').

Seventh Circuit: United States v. Jordan, 722 F.2d 353, 356 (7th Cir. 1983) ("The draftsmen of Rule 404(b) intended it to be construed as one of "inclusion," and not "exclusion." They

intended to emphasize the admissibility of "other crime" evidence").

Eighth Circuit: United States v. Johnson, 892 F.2d 707, 709 (8th Cir. 1989) ("Because 404(b) is a rule of inclusion, rather than exclusion, this court will not disturb the trial court's discretion absent a showing by the defendant that the proof 'clearly had no bearing upon any of the issues involved'").

Ninth Circuit: United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982) ("Rule 404(b) is 'one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition'").

Tenth Circuit: United States v. Naranjo, 710 F.2d 1465, 1467 (10th Cir. 1983) ("Thus, Rule 404(b) is not exclusionary, and allows admission of uncharged wrongs unless they are introduced solely to prove a defendant's criminal disposition").

Eleventh Circuit: United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989) ("The rule is one of inclusion which allows such evidence unless it tends to prove only criminal propensity").

D.C. Circuit: United States v. Miller, 895 F.2d 1431, 1435 (D.C. Cir 1990) ("The threshold inquiry, 'imposed by Federal Rule of Evidence 404(b), 'is whether th[e] evidence is probative of a material issue other than character.'... 'If offered for such a proper purpose, the evidence is [then] subject only to general strictures limiting admissibility,' the most important of which being the requirement of Rule 403 that the probative value of the evidence not be 'substantially outweighed' by its potential prejudice").

The interpretation that the Alaska courts have given to Evidence Rule 404(b) means that relevant evidence is being withheld from juries. HB 105 would change this by making it clear that Rule 404(b) has the same meaning as its federal counterpart.

Very truly yours,

CHARLES E. COLE  
ATTORNEY GENERAL

By:

*Margot O. Knuth*

Margot O. Knuth

Assistant Attorney General

**Rule 8. Joinder of Offenses and of Defendants.**

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate court for each offense if the offenses charged, whether felonies, misdemeanors or both,

(1) are of the same or similar character and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense,

(2) are based on the same act or transaction, or

(3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or information as to one of several defendants joined in the same indictment or information shall not affect the right of the state to proceed against the other defendants.

(Adopted by SCO 4 October 4, 1959; amended by SCO 906 effective nunc pro tunc May 28, 1988)

Note: SCO 906 incorporated changes in Criminal Rule 8(a) made by the legislature in ch. 66, §§ 8 and 9, SLA 1988. The legislation added the language in subparagraph (a)(1), "and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense."

Annotations

Cases

Crime of uttering or publishing a forged instrument and crime of procuring or offering forged instruments for recordation were properly charged in the same indictment in several counts. *Chambers v. State*, Op. No. 237, 394 P2d 778 (Alaska 1964).

A complaint which charged defendant in one and the same count with the separate crimes of failure to remain at the scene of an accident [AS 28.35.050(a)] and failure to render assistance to passenger [AS 28.35.060(a)] was duplicitous. *Drabosh v. State*, Op. No. 485, 442 P2d 44 (Alaska 1968).

Prejudice must be shown before the Supreme Court will reverse on grounds that a trial judge erred or abused his discretion in failing to order separate trials for different counts of an indictment. *Richards v. State*, Op. No. 527, 451 P2d 359 (Alaska 1969).

An allegation that the joint trial of two counts for escape created in the jurors' minds the image of defendant as criminally disposed toward escaping from jail is insufficient to raise the question whether the joint trial of the offenses prejudiced the defendant. *Richards v. State*, Op. No. 527, 451 P2d 359 (Alaska 1969).

The rationale underlying the prohibition of duplicitous indictments is to give notice to the defendant of exactly what charges he must defend against and to avoid the consequences of the inability of the jury to indicate which way they are voting on each of the charges. *Kimble v. State*, Op. No. 1184, 539 P2d 73 (Alaska 1975).

Propriety of joinder in cases where there are multiple defendants must be tested by Criminal Rule 8(b) alone. *Amldon v. State*, Op. No. 1434, 565 P2d 1248 (Alaska 1977).

Where one defendant shot at gas station shortly after he and his brother had attacked gas station attendant, their actions were "the same series of acts or transactions," and it was proper to consolidate their trials. *Larson v. State*, Op. No. 1459, 566 P2d 1019 (Alaska 1977).

Assault by firing a shot towards two people is a single offense and may be included in a single count. *Larson v. State*, Op. No. 1502, 569 P2d 783 (Alaska 1977).

Offense of robbery in the first degree for theft of taxi and offense of theft in the second degree for theft of apartment were closely connected and constituted parts of a common scheme or plan, so as to justify charging both offenses in the same indictment. *Nell v. State*, Op. No. 77, 642 P2d 1361 (Alaska App. 1982).

Where each larceny count against defendant involved airplane theft accomplished through his role as partner in aircraft company and all of the thefts occurred within a five-week period, there was a common scheme or plan within the meaning of this rule justifying joinder of the offenses. *Montes v. State*, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Antagonistic defenses do not ordinarily require severance, however, where the defenses are irreconcilable, that is, mutually exclusive to the extent that one must be disbelieved if the other is to be believed, severance should be granted. *Abdulbaqui v. State*, Op. No. 659, 728 P2d 1211 (Alaska App. 1986).

Where codefendants presented defenses which were different but not irreconcilable, trial court did not abuse its discretion in refusing to grant severance. *Abdulbaqui v. State*, Op. No. 659, 728 P2d 1211 (Alaska App. 1986).

Trial court erred in denying severance of two similar sexual assault charges involving the same defendant where the evidence did not establish a common scheme or plan, whether or not the evidence of the assault on each victim would have been admissible in a trial for assault on the other victim. *Johnson v. State*, Op. No. 668, 730 P2d 175 (Alaska App. 1986).

Where the weapons that were the subject of theft by receiving charges against defendant were also the subject of felon in possession charges against him, the charges stemmed from the same act or transaction, thus initial joinder of the offenses was proper. *Elerson v. State*, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

Where prior conviction, admissible as an element of felon in possession of firearm charges, would have been inadmissible in a separate trial on theft by receiving charges, trial court erred in denying defendant's severance motion without pursuing the alternative of bifurcation, requiring reversal of the theft by receiving conviction but not the felon in possession conviction. *Elerson v. State*, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

Unless joinder is permitted under this rule, codefendants may not be tried together. *Greiner v. State*, Op. No. 736, 741 P2d 662 (Alaska App. 1987).

Trial court committed reversible error in denying defendant's motion to sever his trial on Counts I and IV from that of this codefendants on Counts II and III, in which he was not charged, since although each count involved drug offenses and there was evidence that all defendants were willing to sell drugs and were well-acquainted and cooperated with each in individual drug sales, there was no real evidence of a conspiracy, joint venture, or common scheme or plan justifying joinder. *Greiner v. State*, Op. No. 736, 741 P2d 662 (Alaska App. 1987).

Since the charges against defendant could properly have been joined in a single indictment, contemporaneous preservation of the same charges in separate indictments to the same grand jury did not violate defendant's due process right to an unbiased grand jury. *Massey v. State*, Op. No. 915, 771 P2d 448 (Alaska App. 1989).

Wherever there is more than one defendant, the joinder of both defendants and issues is governed by the subsection of this rule pertaining to joinder of defendants; the subsection of this rule

the prosecution were under such single indictment or information.

(Adopted by SCO 4 October 4, 1959)

Annotations

Cases

Propriety of joinder in cases where there are multiple defendants must be tested by Criminal Rule 8(b) alone. *Amidon v. State*, Op. No. 1434, 565 P2d 1248 (Alaska 1977).

Where one defendant shot at gas station shortly after he and his brother had attacked station attendant, their actions were "the same series of acts or transactions," and it was proper to consolidate their trials. *Larson v. State*, Op. No. 1459, 566 P2d 1019 (Alaska 1977).

Rule 14. Relief From Prejudicial Joinder.

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

(Adopted by SCO 4 October 4, 1959; amended by SCO 98 effective September 16, 1968)

Annotations

Cases

This rule permits the trial court to order election or separate trial of counts if a defendant is prejudiced by the joinder, but a motion to sever counts not made until after the jury had been selected and sworn, was properly denied in absence of a showing of sufficient cause and prejudice. *State v. Selman*, Op. No. 302, 406 P2d 181 (Alaska 1965).

Prejudice must be shown before the Supreme Court will reverse on grounds that a trial judge erred or abused his discretion in failing to order separate trials for different counts of an indictment. *Richards v. State*, Op. No. 527, 451 P2d 359 (Alaska 1969).

An allegation that the joint trial of two counts for escape created in the jurors' minds the image of defendant as criminally disposed toward escaping from jail is insufficient to raise the question whether the joint trial of the offenses prejudiced the defendant. *Richards v. State*, Op. No. 527, 451 P2d 359 (Alaska 1969).

That defendant's trial was consolidated with that of his brother, who had shot at gas station after the assault on attendant with which defendant was charged was not prejudicial in view of instructions. *Larson v. State*, Op. No. 1459, 566 P2d 1019 (Alaska 1977).

Trial court did not abuse its discretion in denying defendant's request for separate trials on two offenses charged to him where the charges arose out of the same incident, where much of the evidence pertaining to one charge would be relevant to the other, and where the public interest in avoiding duplicative trials might reasonably have been thought to outweigh any possible prejudice which might inhere in a combined trial. *Catlett v. State*, Op. No. 1752, 585 P2d 553 (Alaska 1978).

Where co-defendant refused to take the stand, but by affidavit indicated that if she were called in a court proceeding in which she was not a defendant she would testify in favor of one of the other co-defendants, refusal to grant the latter co-defendant's motion for

severance was not error where the proposed testimony was only marginally relevant. *Hawley v. State*, Op. No. 2137, P2d 1349 (Alaska 1980).

Where defendant, charged with both theft and robbery, had a good possibility of being able to testify on the robbery charge without being cross-examined on the theft charge, his generalized fifth amendment argument for establishing his need to refrain from testifying on the theft charge was not sufficient to support a severance motion. *Nell v. State*, Op. No. 77, 642 P2d 1361 (Alaska App. 1982).

It was not error to deny severance on charges of misdemeanor assault, felony assault and felony escape, where second assault occurred while police officers were arresting defendant for the first assault and the escape occurred shortly after defendant had been arrested. *Maynard v. State*, Op. No. 136, 652 P2d 489 (Alaska App. 1982).

Where trial court has made a decision to deny severance under this rule, it can be overturned only for abuse of discretion. *Maynard v. State*, Op. No. 136, 652 P2d 489 (Alaska App. 1982).

Defendant's generalized fifth amendment argument, standing alone, did not suffice to show that joinder was prejudicial; a defendant must make a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. *Montes v. State*, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Contention that severance should be routinely granted whenever an accused moves to sever similar offenses was rejected; on appeal, denial of a motion for severance will be reversed only when the court has abused its discretion and a showing of prejudice to the defendant has been made. *Montes v. State*, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Trial court erred in denying severance of two similar sexual assault charges involving the same defendant where the evidence did not establish a common scheme or plan, whether or not the incidence of the assault on each victim would have been admissible in a trial for assault on the other victim. *Johnson v. State*, Op. No. 668, 730 P2d 175 (Alaska App. 1986).

Where prior conviction, admissible as an element of felon in possession of firearm charges, would have been inadmissible in a separate trial on theft by receiving charges, trial court erred in denying defendant's severance motion without pursuing the alternative of bifurcation, requiring reversal of the theft by receiving conviction but not the felon in possession conviction. *Elerson v. State*, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

By waiting until the date of trial to move for severance, defendant waived his ability to do so. *Knutson v. State*, Op. No. 702, 736 P2d 775 (Alaska App. 1987).

Trial court did not err in joining cocaine charges with murder, kidnapping, and robbery charges against two defendants, but did err in denying their timely motion to sever based upon prejudice. *Mathis v. State*, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

Trial court erred in not granting defendants' motion to sever cocaine and murder charges where substantial risk existed that their defense on the cocaine charges was severely prejudiced by the evidence of murder; accordingly, the appellate court vacated the cocaine convictions but affirmed the murder convictions. *Mathis v. State*, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

Where defendant was charged with a murder which occurred on August 5 and several murders which occurred on August 6, joinder of the offenses was proper, since the August 6 murders resulted from defendant's belief that he was going to be killed because of his role in the August 5 murder; furthermore, the trial court did not err in denying defendant's motion for severance given the relevance of the August 5 murder to the August 6 murders and the absence of any specific and convincing showing of prejudice resulting from joinder. *Collins v. State*, Op. No. 962, 778 P2d 1171 (Alaska App. 1989).

There was a close nexus between the drug charges against defendant and drug charges against his codefendants, thus defendant's argument that he was prejudiced by the trial court's failure to

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The probative value of polygraph evidence is insubstantial because the polygraph has not been proven reliable, thus the prejudicial impact it may have on a jury clearly outweighs its probative value; accordingly, trial court did not abuse its discretion in refusing to admit defendant's polygraph results at trial. *Haakason v. State*, Op. No. 837, 760 P2d 1030 (Alaska App. 1988).

The primary purpose of the Rape Shield Statute is to prevent the use of evidence of past sexual conduct as proof of the victim's current willingness to consent; it is not intended to exclude evidence of prior sexual conduct when such evidence is directly relevant to establish bias, prejudice, or motive to fabricate. *Dankels v. State*, Op. No. 900, 767 P2d 1163 (Alaska App. 1989).

Where the defense witness in a DWI prosecution testified that she in fact had been driving the vehicle but traded places with the defendant because there was a warrant out for her arrest, the trial court did not commit error in permitting the state to cross-examine the witness on her prior DWI arrest and license suspension, since the knowledge that her license was suspended was directly relevant to her willingness to drive and since any additional prejudice was slight considering that the defendant introduced the issue. *Alward v. State*, Op. No. 901, 767 P2d 1175 (Alaska App. 1989).

In trial of defendant for murder arising out of an altercation between the defendant, the victim and the victim's brothers, where defendant claimed self-defense, the trial court did not err in preventing defendant from cross-examining one of the brothers about a prior hindering prosecution charge (later dismissed) against that brother as evidence of bias under this rule, since although the evidence arguably demonstrated the brother's willingness to engage in illegal conduct to protect his brother, the trial judge's conclusion that the probative value of the evidence was outweighed by the danger of unfair prejudice was not unreasonable considering that the brother had admitted to burglary and theft convictions and that defendant was still fully able to develop the brother's bias and interest in the case. *Lerchenstein v. State*, Op. No. 921, 770 P2d 1150 (Alaska App. 1989).

Trial court committed plain error requiring reversal by permitting questions concerning defendant's prearrest silence in the presence of police officers, silence which was at least as consistent with innocence as with guilt, without first determining whether the probative value of the challenged line of inquiry was outweighed by its potential for prejudicial impact. *Silvermail v. State*, Op. No. 945, 777 P2d 1169 (Alaska App. 1989).

There is a presumption that the prejudicial effect of propensity evidence outweighs its probative value; when, however, a prior bad act is relevant to a material fact other than propensity, the court may admit evidence of the prior bad act if it is more probative than prejudicial. *Mathis v. State*, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

In action against airline for property damage resulting from a runway collision at Anchorage International Airport where jury concluded that the airline's flight crew committed wilful misconduct in taking off in fog without knowing where they were on the runway, trial judge did not err in excluding, on grounds of relevance and potential prejudice to plaintiff, evidence that ground navigation in foggy conditions was known by the FAA and the State to be a dangerous problem at the airport, since the difficulty of taxiing in the fog was not a contested issue in the case and exclusion of the evidence did not in fact prejudice the airline, which was allowed to introduce other evidence as to the confusion on the taxiways on the day of the crash. *Korean Air Lines, Ltd. v. State*, Op. No. 3492, 779 P2d 333 (Alaska 1989).

In murder trial, trial court did not err in refusing to allow an Immigration Department investigator to testify for the defense regarding reports from unidentified informants of rumors that the victim's family had threatened to kill anyone who testified in favor of the defendant at trial; although the testimony of the informants themselves might not have been hearsay, the investigator's testimony would have been; furthermore, the probative value of the investigator's testimony would have been outweighed by possible

confusion of issues and needless presentation of cumulative evidence, particularly since the prosecution's primary witness as defendant acknowledged her awareness of the rumors. *Zer State*, Op. No. 956, 779 P2d 795 (Alaska App. 1989).

The standard of this rule, that relevant evidence be excluded if the probative value of the evidence is outweighed by confusion of the issues or by considerations of undue delay, proper standard to apply in determining whether cross-examination should be allowed in criminal cases; the case law dealing the issue of cross-examination in criminal cases does not set standards to replace this rule, but rather augment it. *Brown v. S*, Op. No. 957, 779 P2d 801 (Alaska App. 1989).

In trial of a black defendant for misconduct involving a controlled substance, trial court did not err in prohibiting him from cross-examining the undercover officer involved in the case concerning racial bias, because the evidence which would have developed through the cross-examination was so marginally probative, the judge's decision to exclude it due to possible confusion of the issues and delay was justified. *Brown v. State*, Op. No. 957, 779 P2d 801 (Alaska App. 1989).

Trial judge did not abuse his discretion in admitting evidence of defendant's flight from the scene of the crime as evidence of consciousness of guilt. *Charles v. State*, Op. No. 963, 780 P2d (Alaska App. 1989).

In prosecution of defendant for criminally negligent homicide in failing to timely seek medical treatment for her child, statement by policeman in taped interview of defendant that she received several calls from people saying that defendant had abused her child would have been unfairly prejudicial and therefore had to be excised from the tape. *Pinkerton v. State*, Op. No. 996, 784 P2d 671 (Alaska App. 1989).

In drunk driving prosecution, trial court did not err in admitting an audio tape recording, which the police made when defendant was arrested and while he was being transported to the police station, despite the tape's poor quality; the jury could tell when voices on the tape were obscured by background noise and static and would not conclude that the background noise and static obscured or garbled speech by defendant. *Suiter v. State*, Op. No. 978, 785 P2d 28 (Alaska App. 1989).

## Rule 404. Character Evidence Not Admissible to Prove Conduct—Exceptions—Other Crimes.

(a) **Character Evidence Generally.** Evidence of person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of Accused.** Evidence of a relevant trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of Victim.** Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor, subject to the following procedure:

(i) When a party seeks to admit the evidence for any purpose, he must apply for an order of the court at any time before or during the trial or preliminary hearing.

Evidence offered by defendant to show reasonableness of defendant's apprehension of being in imminent danger from shooting victim is not relevant when defendant did not know of such evidence at the time of the shooting. *Byrd v. State*, Op. No. 2184, 626 P2d 1057 (Alaska 1980).

Although the presentation of irrelevant evidence as to the scope of burglaries is error, it is harmless error if the presentation produces little or no prejudicial effect. *Nelson v. State*, Op. No. 2350, 628 P2d 884 (Alaska 1981).

Admissibility of breathalyzer refusals should be determined on a case-by-case basis by weighing probative value against potential for unfair prejudice. *Coleman v. State*, Op. No. 229, 658 P2d 1364 (Alaska App. 1983).

In prosecution for murder, admission into evidence of a .380 caliber automatic pistol owned by the defendant was not error even though expert testimony could not conclusively establish that the gun was the murder weapon. *Bangs v. State*, Op. No. 253, 663 P2d 981 (Alaska App. 1983).

In drunk driving prosecution of defendant who refused to submit to a breathalyzer examination, court erred in excluding expert testimony for the defense concerning defendant's blood alcohol level at the time of his arrest. *Quinto v. City and Borough of Juneau*, Op. No. 265, 664 P2d 630 (Alaska App. 1983).

Defendant's conviction for sexual abuse of child was reversed because extensive evidence of prior consistent statements made by the victim was admitted at trial without any determination of its actual probative value and before any charge of recent fabrication or improper motive or influence was made against the victim. *Nitz v. State*, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

Evidence of consistent statements made by a child abuse victim on prior occasions may be admitted to bolster the testimony of the victim in a case involving the sexual abuse of the child, provided that it is actually relevant to rebut an express or implied charge of recent fabrication or improper motive or influence, and provided that its probative value outweighs its potential for prejudicial impact; before such evidence is admitted, however, the victim must testify and be subjected to a charge of recent fabrication or improper motive or influence; furthermore when it appears that the alleged motive to testify falsely arose before the prior statement was made, the statement may be admitted only for the purpose of rehabilitating the victim's credibility and may not be considered as substantive evidence of guilt. *Nitz v. State*, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

### Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Added by SCO 364 effective August 1, 1979)

#### Annotations

##### Cases

Where only prejudice was possibility that jury might misestimate probative value of certain real evidence for state's case, even slight probative value outweighed such prejudice. *Eben v. State*, Op. No. 1920, 599 P2d 700 (Alaska 1979).

Where informant's credibility was relatively unimportant because testimony was corroborated by police officer's evidence that informant had made written statement alleging informant's testimony before grand jury in unrelated case was product of police coercion was properly excluded on grounds whatever relevancy

statement had to issue of informant's credibility was outweighed by likelihood it would confuse the issues, mislead jury and consume an undue amount of time. *Taylor v. State*, Op. No. 1932, 600 P2d 5 (Alaska 1979).

Where defendant was charged with assault and battery, evidence that victim was 9 months pregnant was relevant and not unfairly prejudicial to right of defendant. *Zatbun v. Anchorage*, Op. No. 1928, 599 P2d 751 (Alaska 1979).

Exclusion of relevant evidence concerning rape victim's poor grades and excessive school absenteeism was proper where other evidence had already made the jury aware of these factors. *Alexander v. State*, Op. No. 2077, 611 P2d 469 (Alaska 1980).

Evidence regarding prior confrontations between the defendant and trespassers was relevant and admissible to show that the defendant's pointing of a shotgun at the victim was not accidental or inadvertent. *Adkinson v. State*, Op. No. 2090, 611 P2d 528 (Alaska 1980).

At trial for murder, it was reversible error for the trial court to exclude a journal written by the victim, parts of which reflected a sense of mental instability and a violent nature. *Kelth v. State*, Op. No. 2099, 612 P2d 977 (Alaska 1980).

Evidence of the circumstances of a prior rape committed by the defendant was properly admitted for the purpose of providing the identity of the assailant by showing a distinctive modus operandi employed in both the prior rape and the rape of the current victim. *Coleman v. State*, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Evidence of drug use by the accused was admissible where it established direct contact between the victim and the accused and indicated that the accused possessed sufficient amounts of cocaine for him to have invested more than pocket cash in his purchase from the victim. *Dorman v. State*, Op. No. 2272, 622 P2d 448 (Alaska 1981).

The evidentiary rule precluding admission of post-injury accidents or design changes toward proof of negligence is inapplicable in products liability cases based on strict liability. *Caterpillar Tractor Co. v. Beck*, Op. No. 2304, 624 P2d 790 (Alaska 1981).

In statutory rape case, evidence of defendant's prior sexual conduct with victim was admissible. *Burke v. State*, Op. No. 2194, 624 P2d 1240 (Alaska 1981).

Testimony and photographs concerning the physical condition of a child allegedly kidnapped by defendant from state custody were admissible to show motive for kidnapping. *Crum v. State*, Op. No. 2309, 625 P2d 857 (Alaska 1981).

It was not error for the court to allow a defendant charged with drunk driving to be cross-examined regarding a possible law suit against the City of Fairbanks arising out of the same incident upon which the drunk driving charge was based. *Roth v. State*, Op. No. 13, 626 P2d 583 (Alaska 1981).

The trial court has considerable discretion in determining whether the probative value of an admission by silence is outweighed by the danger of unfair prejudice. *Doisher v. State*, Op. No. 30, 632 P2d 242 (Alaska App. 1982).

Evidence that defendant, charged with driving while intoxicated, refused to take the breathalyzer examination had possible probative value, and trial court did not err in finding that the probative value outweighed the possibility of prejudice. *Williford v. State*, Op. No. 148, 653 P2d 339 (Alaska App. 1982).

Where the evidence in each of five rape and assault incidents was sufficiently similar and sufficiently unusual when viewed in its totality and in the common pattern it presented to constitute a modus operandi probative of defendant being the assailant in all instances, trial court did not err in denying defendant's request for severance of the various rape, burglary with intent to rape, and assault charges. *Nix v. State*, Op. No. 157, 653 P2d 1093 (Alaska App. 1982).

Defendant's contention that because his conviction for driving while intoxicated was predicated on his blood alcohol rate and not his driving it was error for the trial court to admit evidence that he

the presentation of cumulative evidence by the prosecution's primary witness against the defendant's awareness of the rumors. *Zecher v. State*, Op. No. 15 (Alaska App. 1989).

where the relevant evidence can be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

where the court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

**(3) Character of Witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

**(b) Other Crimes, Wrongs, or Acts.**

**Evidence Not Admissible to Prove Conduct—Except Other Crimes.**

Generally, evidence of a crime, wrong, or act other than the crime, wrong, or act for which the defendant is being prosecuted is not admissible to prove the defendant's conduct in a particular occasion.

**(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

**(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if admission of the evidence is not precluded by another rule of evidence and if the prior offenses**

**(i) are not too remote in time;**

**(ii) are similar to the offense charged; and**

**(iii) were committed upon persons similar to the prosecuting witness.**

(Added and amended by SCO 364 effective August 1, 1979; amended by SCO 906 effective nunc pro tunc May 28, 1983)

**Notes:** SCO 906 incorporated changes in Evidence Rule 404 made by the legislature in ch. 66, §§ 8 and 9, SLA 1988. The legislation added subparagraph (b)(2).

**Annotations**

**Cases**

defendant's pointing of a shotgun at the victim was not accidental or inadvertent. *Adklason v. State*, Op. No. 2090, 611 P2d 528 (Alaska App. 1980).

The giving of a jury instruction which drew attention to possible prejudicial inadmissible information regarding the accused was prejudicial error. *Kelth v. State*, Op. No. 2099, 612 P2d 977 (Alaska App. 1980).

A defendant may offer evidence of a relevant character trait of a victim without its having the effect of granting to the prosecution the right to introduce evidence of defendant's character. *Kelth v. State*, Op. No. 2099, 612 P2d 977 (Alaska 1980).

An unintentional reference at trial to defendant's probation did not violate this rule to the extent that a motion for mistrial should have been granted. *Preston v. State*, Op. No. 2146, 615 P2d 594 (Alaska 1980).

Trial court's refusal to permit defendant and others to testify concerning alleged prior instances of violent conduct committed by the victim toward third parties was not abuse of discretion where reputation and character evidence concerning the victim's propensity for violence had been admitted. *Loesche v. State*, Op. No. 2202, 620 P2d 646 (Alaska 1980).

Evidence of the circumstances of a prior rape committed by the defendant was properly admitted for the purpose of proving the identity of the assailant by showing a distinctive modus operandi employed in both the prior rape and the rape of the current victim. *Coleman v. State*, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Evidence of drug use by the accused was admissible where it established direct contact between the victim and the accused and indicated that the accused possessed sufficient amounts of cocaine for him to have invested more than pocket cash in his purchase from the victim. *Doman v. State*, Op. No. 2272, 622 P2d 448 (Alaska 1981).

Defendant's conduct at a store minutes after the armed robbery of another store for which he was accused was admissible to show that he was the same man who robbed the first store. *Vessel v. State*, Op. No. 2295, 624 P2d 275 (Alaska 1981).

In statutory rape case evidence of defendant's prior sexual conduct with victim was admissible. *Burke v. State*, Op. No. 2194, 624 P2d 1240 (Alaska 1981).

Evidence that defendant had previously vandalized the aircraft of customers who refused to pay their bills is admissible to prove the motive and identity of defendant as the one who vandalized plaintiffs' aircraft for their refusal to pay their bill. *State v. Grogan*, Op. No. 2356, 628 P2d 570 (Alaska 1981).

The admission of evidence proscribed by this rule is harmless error if the evidence does not have a substantial influence on the jury's verdict. *Fields v. State*, Op. No. 2360, 629 P2d 46 (Alaska 1981).

When a defendant through testimony places his intent in issue, evidence of similar assaults previously committed against other women by defendant is admissible upon the issue of intent. *Davis v. State*, Op. No. 23, 635 P2d 481 (Alaska App. 1982).

In negligence action against waterbed manufacturer, it was error to allow testimony concerning post-accident conduct of manufacturer in not recalling the product or issuing a warning. *Amer. Nat. Watermattress Corp. v. Manville*, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Trial court did not err in refusing to sever assault charge, arising from an incident which took place on September 19, 1977, from murder charge based on an incident which occurred six days later, since defendant's actions could be viewed as a continuing course of conduct and since the assault charge would have been admissible in the murder trial to prove criminal intent or motive or to show a common scheme or plan even if the charges had been severed. *Davidson v. State*, Op. No. 78, 642 P2d 1383. (Alaska App. 1982).

Where the evidence in each of five rape and assault incidents was sufficiently similar and sufficiently unusual when viewed in its totality and in the common pattern it presented to constitute a modus operandi probative of defendant being the assailant in all

cases presentation of cumulative evidence by the prosecution's primary witness against the defendant's awareness of the rumors. *Zecher v. State*, Op. No. 15 (Alaska App. 1989).

where the relevant evidence can be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

where the court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

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**(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if admission of the evidence is not precluded by another rule of evidence and if the prior offenses**

**(i) are not too remote in time;**

**(ii) are similar to the offense charged; and**

**(iii) were committed upon persons similar to the prosecuting witness.**

(Added and amended by SCO 364 effective August 1, 1979; amended by SCO 906 effective nunc pro tunc May 28, 1983)

**Notes:** SCO 906 incorporated changes in Evidence Rule 404 made by the legislature in ch. 66, §§ 8 and 9, SLA 1988. The legislation added subparagraph (b)(2).

**Annotations**

**Cases**

# MEMORANDUM

## State of Alaska

TO: Legislative Information Office

DATE: February 11, 1991

FILE NO:

TELEPHONE NO:

THRU:

SUBJECT: House B111 105

FROM:

~~BKB~~  
Barbara K. Brink  
Deputy Public Defender  
Public Defender Agency

I would appreciate it if the attached comments on HB 105 are read into the record at the hearing today at 1:30 p.m. in House Judiciary. Thanks.

BKB:sh

Attachment

## HB 105

This bill proposes significant changes in two areas of procedural criminal law. The Department of Law has previously proposed these changes in an attempt to persuade the legislature to overrule decisions of the Alaska Court of Appeals that the state does not like. The legislature has wisely rejected these proposals in the past, and they should again be rejected.

A. Section 2 of HB 105 proposes to modify the Alaska Rules of Criminal Procedure regarding joinder of multiple defendants in a single trial. The express purpose stated in Section (1)(a) is to overrule Greiner v. State, 741 P.2d 662 (Alaska App. 1987).

The proposed rule misstates the significance of Greiner. Greiner is a fact-bound decision, based on the appellate court's conclusion that the evidence presented by the state established no real connection between the defendants. The proposed modification of the rule would not change the result in Greiner.

In Greiner, the Court of Appeals relied explicitly on cases interpreting Federal Criminal Rule 8(b), which at present is essentially identical to Alaska Criminal Rule 8(b). Any claim that Alaska Rule 8(b) requires severance more frequently than the federal rule is simply erroneous. (There are many possible explanations why proportionately more joint trials may occur in the federal system than in Alaska; the point here is that any difference is not due to a narrower reading of Rule 8(b) in Alaska).

When the rules regarding joinder are relaxed, the chances that unfair prejudice will occur and that the defendant will not receive a fair trial increase greatly. The present rules exist to ensure that evidence from separate cases or related to other defendants does not infect the process of fact-finding. Relaxing the joinder rules as to joint trials for separate defendants can create a situation where a defendant against whom the state has a weak case can still be convicted through guilt by association.

B. Section 3 of the bill proposes a change to Alaska Criminal Rule 14(b), which governs judges' discretion to sever for separate trials charges previously joined under Criminal Rule 8. The "purpose" statement in Section (1)(b) misstates the current law. Contrary to the bill's statement, the Alaska Court of Appeals does not require that evidence be completely mutually cross-admissible in order for charges to remain joined for trial. In Mathis v. State, 778 P.2d 1161, 1167 (Alaska App. 1989), the Court of Appeals stated "Perfect cross-admissibility of evidence is not required under Criminal Rule 8(b) as long as 'the counts ... are logically interrelated or involve overlapping proof,'" quoting United States v. Swift, 809 F.2d 320, 322 (6th Circuit 1987). As the cite to Swift illustrates, the Alaska court tends to follow the federal law. See also Collins v. State, 778 P.2d 1171 (Alaska App. 1988) (allowing joinder of cases where evidence of one crime was relevant to establish the motive for other crimes, but there was no cross-admissibility).

One particular problem with the proposal is its attempt to define what is or is not prejudicial. Any attempt by a statute to legislate what is or is not prejudicial must fail. Prejudice can only sensibly be defined by a judge dealing with the specific facts of the case before him. The Court of Appeals has made clear that proving prejudice sufficient to require severance is a "heavy and difficult burden" for the defendant, and that the trial court may take special steps, such as giving cautionary instructions, to minimize prejudice. Mathis v. State, 778 P.2d at 1167.

Trying multiple charges together can create a perception, even if the cases are weak, that the defendant must have done something wrong. This is similar to the old cliché that "where there is smoke there must be fire." Thus a jury may convict not because the case has been proven beyond a reasonable doubt, but because it seems that the person is generally deserving of punishment.

In summary, relaxing the rules of joinder accomplishes very little except to increase the potential for unfair prejudice. While some judicial economy would be realized through advancement of these changes, it should be noted that over ninety percent of the cases which are prosecuted do not result in trials.

C. Section 4 proposes changes to Alaska Evidence Rule 404(b)(1). The purpose section notes two cases where specific "bad act" evidence was not allowed, but to call Alaska Rule of Evidence 404(b)(1) a "rule of exclusion" is misleading to people not familiar with the criminal justice system. A review of the Alaska cases shows plainly that admission of bad act evidence is not substantially restricted by the courts' interpretations of the existing evidence rule; in fact there is widespread use of this evidence against defendants in the Alaska courts. For every Lerchenstein case where the appellate court has ruled that the trial court impermissibly admitted prior bad act evidence, there are several cases where a defendant has unsuccessfully appealed his/her conviction based on the prosecution's successful use of this type of evidence. See, e.g., Adkinson v. State, 611 P.2d 528 (Alaska App. 1980) (evidence regarding prior confrontation between defendant and trespassers admitted); Coleman v. State, 611 P.2d 869 (Alaska 1980) (evidence of the circumstance of a prior rape committed by defendant was admitted); Dorman v. State, 622 P.2d 448 (Alaska 1981) (evidence of prior drug use by defendant admitted); Vessel v. State 624 P.2d 275 (Alaska 1981) (defendant's conduct at a store after armed robbery of another store admitted); Burke v. State, 624 P.2d 1240 (Alaska 1981) (evidence of defendant's prior sexual conduct with victim admissible in statutory rape case); State v. Grogan, 628 P.2d 570 (Alaska 1981) (evidence that defendant previously vandalized an aircraft admitted); Davis v. State, 635 P.2d 481 (Alaska App. 1982) (assaults previously committed against other women admitted); Bidwell v. State, 656 P.2d 592 (Alaska App. 1982) (evidence of a previous assault of a pharmacist and an attempt to pass a forged prescription admitted in a kidnapping case).

The above-cited cases are by no means a complete list of the reported appellate decisions. See annotations to Alaska Rule of Evidence 404, Alaska Rules of Court, 1990 edition. Even a complete list of reported appellate decisions where the defendant unsuccessfully argued that prior bad acts were admitted would represent just the tip of the iceberg. Trial courts around the state of Alaska regularly admit evidence of this nature against a defendant. The exact number of cases in which this is true would be difficult to discern as not all cases are appealed and thus reported. Cases which are appealed and where convictions are affirmed based on application of settled law appear frequently as memorandum decisions, and thus are not published opinions.

This proposed revision of the evidence rules is being advanced based on the contention that the Alaska Court of Appeals treats Alaska Rule of Evidence 404(b) as a rule of exclusion, whereas the federal system supposedly interprets the rule as one of inclusion. The fact of the matter is there is no unanimity either within the federal system or among the states. Among the federal courts, the Seventh Circuit, the Eighth Circuit and the District of Columbia have adhered to what some term the "exclusionary view". See, e.g., United States v. Foskey, 636 F.2d 517, 523-24 (DC Cir., 1980); U.S. v. DeJohn, 638 F.2d 1048, 1052 (7th Cir., 1981); U.S. v. Frederickson, 601 F.2d 1358, 1365 (8th Cir., 1979). The federal courts in the Third and Sixth Circuits are

undecided as to the issue. See, e.g., U.S. v. Lebovitz, 669 F.2d 984 (3rd Cir., 1982); U.S. v. Reed, 647 F.2d 678, 686 (6th Cir., 1981). The exclusionary rule apparently prevails in most other jurisdictions. State v. Lerchenstein, 726 P.2d at 550 n.8. (Rabinowitz dissenting)

Even though there is reference in appellate decisions to Alaska's exclusionary approach to 404(b) evidence, the case decisions and the evidence rule itself suggest otherwise. The "such as" language in the existing rule makes clear that the enumerated non-propensity reasons for which bad act evidence may be admitted are illustrative, not an exhaustive list. If Alaska strictly applied the rule of exclusion, prior bad act evidence would only come in against a defendant if it was relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Alaska Rule of Evidence 404(b)(1). A review of the reported decisions in Alaska shows that our jurisdiction goes beyond that exclusionary view. For example, in Patterson v. State, 732 P.2d 1102 (Alaska App. 1987), the Alaska Court of Appeals created the "lewd disposition" exception in a case involving sexual assault. See also Burke, cited *supra*. The Court of Appeals in Soper v. State, 731 P.2d 587 (Alaska App. 1987), allowed in evidence of prior sexual assaults on members of an immediate family even though it did not fall within the "motive" exception. See also Davis v. State, 635 P.2d 481 (Alaska App. 1981) (a date rape case where the court allowed in evidence of prior sexual assaults by the defendant on similarly situated victims). Section (1)(c) quotes Lerchenstein, but the short passage quoted leaves a false impression of the case's holding. Far from prohibiting balancing, as the quote implies, Lerchenstein specifically states, "When a prior bad act is relevant to a material fact other than propensity, the court may admit the evidence if ... balancing shows the evidence to be more probative than prejudicial." 697 P.2d at 315. A particularly undesirable change is the proposed change of one small word, from "may be admissible" to "is admissible". It is imperative to leave trial judges with discretion under Evidence Rule 403 to preclude evidence which is time-consuming, cumulative, or too distracting from the central issues of the trial.

It is also important to remember that Alaska Rule of Evidence 404(b)(1) must apply to both the prosecution and the defense. That is, the rule circumscribes a defendant's ability to admit bad act evidence concerning state witnesses, as well as the state's ability to offer such evidence about the defendant and defense witnesses. The rule as currently written represents a reasonable accommodation of each side's ability to present relevant evidence and the needs of both sides to prevent the trial from expanding with issues of marginal relevance but high potential to distract the jury from the real issues of the case.

In sum, the Lerchenstein opinion does not represent our courts' unwillingness to admit prior bad act evidence. Instead, the few cases prohibiting such evidence reflect the courts' careful study and treatment of this type of evidence and the need for determining these issues on a case by case basis. Given the already broad admissibility of "bad act" evidence, no change to the current law is necessary or desirable. Alaska Evidence Rule 404(b) guards against convicting defendants based on evidence they are bad people, as distinct from evidence that proves they committed the specific crime with which they are now charged. The rule is constitutionally based. Opening trials too broadly to bad act evidence risks depriving the accused of the presumption of innocence and violates the federal and state constitutional guarantees of due process.

**Schleuss & McComas**

ATTORNEYS AT LAW  
500 L STREET, SUITE 300  
ANCHORAGE, ALASKA 99501

(907) 858-7807  
FAX (907) 876-1150

February 11, 1991

TO: House Judiciary Committee  
FROM: Christine S. Schleuss and James H. McComas  
RE: House Bill 105

Dear Committee Members:

We are attorneys practicing substantially in the area of criminal law in Anchorage, Alaska. Ms. Schleuss has practiced for 12 years in the state and federal courts of Alaska. Mr. McComas has practiced for more than 12 years in state and federal courts in Washington, D.C., Wisconsin, and Alaska.

We first learned of the existence of House Bill 105, and of a proposed hearing on that bill, on Friday, February 8, 1991. Mr. McComas immediately contacted the Committee staff and requested an opportunity to testify telephonically in opposition to this bill. Subsequently, we were informed that no telephonic testimony would be permitted, but that written comments could be submitted by telefax to be read into the record.

The short notice and time constraints have prevented us from preparing extensive written comments. Given the radical nature of the proposed changes in criminal procedure which would be effected by House Bill 105, we urge the Committee to take more time in considering this proposal and to afford interested individuals and entities on both sides of the criminal justice system an adequate opportunity to address the important issues raised by this legislation.

SCHLEUSS & MCCOMAS

Our initial review of this legislation convinces us that it is nothing more than a Prosecutor's Relief Act. Each of the three proposed changes would make it easier for prosecutors to convict presumptively innocent individuals in cases where the proof that the accused had committed the charged crime was weak or insufficient simply by admitting unfairly prejudicial evidence or allegations of other crimes by the accused. Even in its most general terms, this proposal is offensive to the basic assumptions underlying our adversary criminal system.

The focus of the criminal trial has been, and should remain, upon the sufficiency of the proof that an accused citizen has committed specifically charged offenses. It is the offense, not the person, which has always been the focus of fact-finding in our criminal jurisprudence. This focus is one of the hallmarks of our system. We do not permit the reasoning process that because people have done something wrong in the past they are probably guilty of a present charge. Yet, the common thread of the proposals contained in House Bill 105 is to seriously undercut this historical starting point and to greatly expand the occasions upon which evidence of other, barely relevant or irrelevant alleged criminal activity would be introduced in trials.

Alaska Courts have long recognized the tremendous potential for unfair prejudice to the accused which arises from the introduction of such other crimes evidence. The Supreme Court has explained that improper admission of such evidence will "dilut[e] the requirement that present guilt be proved beyond a reasonable doubt." Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980). Such evidence also denies the accused the right fairly to defend against the particular crime charged. Adkinson v. State, 611 P.2d 528, 531 (Alaska 1980).

Alaska Rule of Evidence 404(b)(1), as presently construed, recognizes the tremendous potential for unfair prejudice to an accused person which arises from the admission of evidence of other crimes, wrongs, or bad acts. Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd State v. Lerchenstein, 726 P.2d 546 (Alaska 1986), clearly articulates what lawyers and judges who deal

SCHLEUSS & MCCONAS

daily in criminal trials must candidly admit -- that the introduction of evidence that an accused person has committed or has been accused of committing other unrelated criminal acts in the past frequently has an overriding and inflammatory effect upon jurors. Jurors naturally tend to assume that a person who has committed other wrongs is more likely to have committed the wrong charged, yet this sort of propensity-to-commit-crime inference has no place in our jurisprudence. Indeed, even the rule as amended by HB 105 does not purport to overturn this basic assumption. Yet, by deliberately expanding the occasions on which other crimes evidence may be admitted, the proposed amendment of Rule 404 contained in HB 105 would, as a practical matter, greatly increase jury misuse of presumptively prejudicial and inflammatory information. This, in turn, would result in convictions for the wrong reasons. If an accused person is found guilty, it should be on the basis of proof beyond a reasonable doubt which legitimately establishes his or her guilt of the charged offense, not on the basis for propensity inferences or juror animosity towards a "bad man" or "bad woman".

The Judiciary, not the Legislature, and not the Department of Law, is in the best position to assess the reality of the impact of the introduction of other crimes evidence upon jurors. The judicial interpretations of Rule 404(b) by the Alaska Appellate Courts reflect considered judicial judgments, based upon the experience of reviewing hundreds and hundreds of instances cases dealing with these issues. That judgment is that the introduction of such inherently prejudicial information should be limited to those instances in which there is legitimate probative value which outweighs the risk that an accused will be unfairly convicted for the wrong reasons. We concur in this judgment.

Under 404(b), as presently construed, other crimes evidence which is really offered for a legitimate reason is routinely admitted. But evidence with the primary effect of unfairly prejudicing the jury for no legitimate reason is excluded.

Strong law enforcement is certainly a desirable goal, and a strong political force. However, increased convictions obtained by methods which promote prejudice, and not accuracy, in the fact-

SCHLEUSS & MCCOMAS

finding process should not be confused with that laudable goal. We have an historical commitment to protecting the innocent from wrongful conviction in this country. We balance the tremendous resource advantages enjoyed by the State in the criminal system by according rights to the accused which guarantee that guilt will only be found upon proof beyond a reasonable doubt of a specific charged offense. Legislation like HB 105 undercuts the confidence that all of us can have in the proper functioning of our judicial system by dramatically and substantially increasing the risk that the increased convictions gained by such legislation will not comport with the demands of fairness to which we are constitutionally committed, but will rather reflect a conviction-at-any-cost mentality. This Bill will very likely lead to the wrongful conviction of innocent people whose only offense was that they did something wrong in the past.

Equally undesirable, and perhaps more radical, is the proposed amendment to Alaska Rule of Criminal Procedure 14 which would codify a legislative judgment that "showing that evidence of one offense would not be admissible during a separate trial of a joined offense or a co-defendant does not constitute prejudice that warrants relief under this rule." What in the world is the empirical basis for such an obviously wrong assertion? It is difficult enough for an accused person to get a fair trial when evidence of crimes other than the charged offense is admitted purportedly for a legitimate, relevant purpose. The amendment to the joinder rule, however, purports to exclude from the category of potentially unfairly prejudicial material, the joinder for trial of wholly separate crimes as to which there is not even a claim of inter-admissibility. In such situations, the likelihood that the accused would be convicted for the wrong reason -- that is, an inference of criminal propensity or conclusion that this is just a bad person needing punishment -- is extremely high. And since the evidence of each offense is admittedly not admissible to prove the other, the absence of a legitimate justification for the prejudice is apparent.

The way Rule 14 is presently administered, the court is free to consider the extent of prejudice which may result from a joint

SCHLEUSS &amp; MCCOMAS

trial on charges where the proof is not interadmissible. Where the risk of unfair prejudice is slight, the court may permit a joint trial. On the other hand, where offenses are likely to have a prejudicial effect upon a fair consideration of each other if they are tried together, and where the evidence pertaining to the separate offenses could not be admitted in separate trials, the court has the authority to prevent what would be the obvious and unfair prejudice engendered by a joint trial.

An additional and unfortunate result of amending Rule 14 as proposed would be the likelihood that prosecutors would obtain indictments containing multiple offenses as to many of which the evidence would be of dubious sufficiency. The limitations of Rule 404(b)(1) could be circumvented as a practical matter by simply charging other crime allegations in the indictment. Then, whether they ~~are~~ separately admissible or not, the prosecution would achieve the tactical advantage of a joint trial on which the jury would be exposed to evidence which would facilitate improper inferences of criminal propensity or bad character.

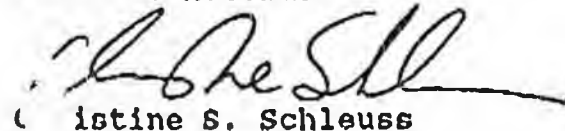
If there is perceived to be a problem with the conviction rate in criminal trials in this state, the appropriate solution is not to change the rules to make it easier to unfairly prejudice the people accused. The solutions lie in better investigation, preparation, advocacy, and exercise of discretion by state prosecutors.

Sincerely yours,

LAW OFFICES OF SCHLEUSS & MCCOMAS



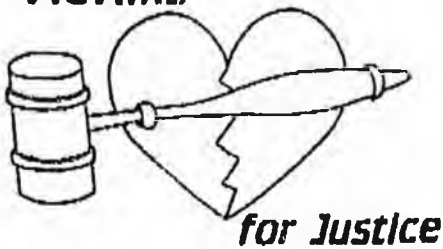
James H. McComas



Christine S. Schleuss

JHM:jm

# VICTIMS



March 5, 1991

Representative Dave Donley  
P.O. Box V  
Juneau, Alaska 99811

Dear Representative Donley,

Victims for Justice supports HB 105. Paul Stockler, an ex-district attorney who is on the Board of Victims for Justice will be representing VFJ on this important public hearing.

Thank you for the 1991 Anti-Crime Legislative package. Victims for Justice and its members will be responding in the up coming months. Thank you and your colleagues for all your hard work.

Sincerely,

*Janice Lienhart*  
Janice Lienhart

Fax# 465-2299

# ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);  
Advocates for Victims of Violence (AVV);  
Aiding Women in Abuse and Rape Emergencies (AWARE);  
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);  
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;  
Kodiak Women's Resource & Crisis Center (KWRCC);  
Manilaq Regional Women's Crisis Program;  
Tongass Community Counseling Center; Parent Aid Family Support Center;  
Safe & Fear-Free Environment (SAFE); Sitka Against Family Violence (SAFV);  
Seward Life Action Council (SLAC); Southwestern Alaska Council  
for the Prevention of Child Sexual Assault (SWACPCSA);  
South Peninsula Women's Services (SPWS);  
Standing Together Against Rape (STAR); Tundra Women's Coalition (TWC);  
Unalaskans Against Sexual Assault & Family Violence (USAFV);  
Valley Women's Resource Center (VWRC);  
Women in Crisis Counseling & Assistance (WICCA);  
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

February 28, 1991

Judiciary Committee  
Alaska House of Representatives  
Pouch V  
Juneau, Alaska 99811

Dear Committee Members:

The Network has had the opportunity to discuss information presented at the recent hearing of HB 105 and would like to express its support for the bill.

I have attached some statistics on rape compiled by the U.S. Senate Judiciary Committee which speak to the prevalence of date or acquaintance rape. The majority of sexual assault is not stranger assault (except for very young girls) but is in fact perpetrated by someone with whom the victim is acquainted. When these cases are reported and come to trial the primary issue at trial is that of consent, and juries are faced with a contest of credibility between the defendant and the victim.

Studies indicate that it is common for rapists to have many victims prior to the time they are first convicted of their first offense, and indeed, to have recidivism rates of around 80% after that conviction. It is also the case that rapists often develop a common pattern of behavior in locating and assaulting their victims.

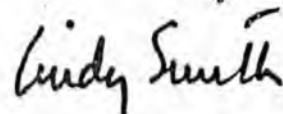
When a defendant is accused of the rape and attempted rape of 3 women within the period of one month, as occurred in the case of Velez v. State, and argues that he believed that sex was consensual, if those cases are tried singly the jury is deprived of vital information as to the defendant's pattern of actions and state of mind. The Network believes that the result of separation of trials in cases like Velez, in an attempt to be just toward the defendant, is being manifestly unjust toward victims.

Judiciary Committee  
Page Two

The Network believes trial joinder is also appropriate when there are multiple perpetrators and a single victim; i.e., gang rape. After the trauma of a rape, many victims simply cannot face the prospect of trial and cross-examination as it is. Asking a rape victim, or child sexual assault victim to repeatedly testify at separate trials is so traumatic that it can prevent prosecution because the victim simply cannot go through it.

The Network appreciates your consideration of these issues.

Sincerely,

A handwritten signature in cursive script that reads "Cindy Smith".

Cindy Smith  
Executive Director

# Alaska Association Chiefs of Police



February 2, 1991

Representative Dave Donley  
Alaska State Legislature  
P. O. Box V (MS 3100)  
Juneau, AK 99811

Dear Representative Donley,

As President of the Alaska Association of Chiefs of Police, I would like to extend our support for House Bill 105. The ability to prosecute multiple defendants and join charges against one defendant have long been hampered by existing court rules.

The result of this has been costly in terms of excessive trials. In some cases, the ability to prosecute is severely hindered, because certain types of evidence are excluded. The citizens of Alaska are the victims of this cumbersome system. They deserve better, and House Bill 105 would help balance the scales.

If I can be of any assistance, please contact me.

Sincerely,

A handwritten signature in cursive script, reading "Duane S. Udland", is written over the typed name.

Duane S. Udland  
President

HB

106



# Alaska State Legislature



## House of Representatives

House Judiciary Committee  
Chairman Dave Donley

P. O. Box V  
State Capitol  
Juneau, Alaska 99811  
(907) 465-4990

### M E M O R A N D U M

TO: Senator Rick Halford, Chair  
Senate Judiciary Committee

FROM: Representative Dave Donley, Chair D  
House Judiciary Committee

RE: HB 106 - Increasing Maximum Period of Probation

DATE: March 1, 1991

---

I would greatly appreciate if HB 106 could be scheduled for a hearing at the earliest possible opportunity. The legislation was introduced by the Judiciary Committee and extends the maximum period of probation from five years to ten years.

By increasing the maximum allowable period of probation to ten years, HB 106 gives judges greater flexibility in sentencing criminal defendants. Under current law, judges are prohibited from placing defendants on probation for longer than five years.

A longer probation period will allow for greater amounts of restitution to be paid to victims, will allow offenders who pose a high risk of reoffending to be supervised for longer periods of time, and for appropriate offenders, will provide a lower cost alternative to incarceration.

HB 106 passed the House unanimously and is supported by the Department of Law, the Department of Public Safety, the Alaska Association of Chiefs of Police, and the Network on Domestic Violence and Sexual Assault.

Thank you in advance for your help and assistance in scheduling this bill for a hearing.

DD:lho

**HOUSE BILL NO. 106**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**SEVENTEENTH LEGISLATURE - FIRST SESSION**

**BY THE HOUSE JUDICIARY COMMITTEE**

Introduced: 2/4/91

Referred: Judiciary, Finance

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act extending the maximum period of probation after conviction."

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

3 \* Section 1. AS 12.55.090(c) is amended to read:

4 (c) The period of probation, together with any extension, may [SHALL] not exceed 10  
5 [FIVE] years.

6 \* Sec. 2. AS 12.55.090(c), as amended by sec. 1 of this Act, does not apply in the case of a  
7 conviction for a criminal act committed before the effective date of this Act.

March 14, 1991 -

Would help victims receive restitution -  
will keep a look on likely re-investments  
Proceed out w/ Ind. Rec.

BILL NO: HB 106

DATE: 2/8/91

TITLE: An Act Extending the Maximum  
Period of Probation

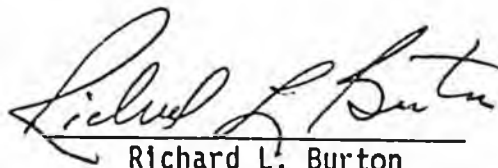
CONTACT: Gayle A. Horetski  
Deputy Commissioner

DEPARTMENT OF  
PUBLIC SAFETY

POSTMASTER  
RETURN TO  
100 SOUTH MAIN STREET  
MILWAUKEE, WISCONSIN 53233

HB 106 extends, from five to ten years, the maximum period of probation to which a convicted criminal defendant can be sentenced. There may be situations in which the court wishes to continue probation supervision of an offender for longer than the five-year period now allowed by law. This bill would allow the courts the flexibility to fashion a sentence which best fits a particular offense or defendant.

The Department of Public Safety supports this bill.



Richard L. Burton  
Commissioner

# Alaska Association Chiefs of Police



February 2, 1991

Representative Dave Donley  
Alaska State Legislature  
P. O. Box V (MS 3100)  
Juneau, AK 99811

Dear Representative Donley,

I am writing this letter to express the support of the Alaska Association of Chiefs of Police for House Bill 106. Existing law only allows for imposition of five years of probation. We support extending this to ten years as proposed in your bill.

Probation can be an excellent tool in protecting the public. We submit, however, that judges under current law are too limited and should be given the ability to require persons convicted of serious crimes to be monitored and supervised for longer periods of time when necessary.

If we can be any assistance in the passage of your bill, please contact me.

Sincerely,

A handwritten signature in cursive script, reading "Duane S. Udland", is written over a faint, larger version of the same name.

Duane S. Udland  
President

H B

1 3 0

FISCAL NOTE

No. 1

Bill Version: HB 130

(H) Publish Date: 2/22/91

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Department Affected: Community & Regional Affairs  
 Title: "An Act relating to immunity of a municipal ombudsman and staff..." BRU: Local Government Assistance  
 Component: Training and Development  
 Sponsor: Parnell et al  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 

	6	7	2
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Remond Henderson Remond Henderson Phone: 465-4708  
 Division: Administrative Services Director Date: 2/19/91  
 Approved by Commissioner: (Edgar Blatchford) Edgar Blatchford  
 Agency: Community & Regional Affairs Date: 2-17-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).



Official Business

# Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

University - Midtown, District 10

(907) 465-2647

State Capitol, Rm. 128

Juneau, AK 99801-1182

## SPONSOR STATEMENT

I have introduced House Bill 130, "An Act relating to Municipal Ombudsman Immunity," to provide for a municipal ombudsman and staff to have in the same fashion, immunity that is currently granted to the state ombudsman in Alaska.

It will ensure that a municipal ombudsman can carry out their duties as prescribed by law without reservation. The potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

CSHB 130 (JUD)am would provide citizens who wish to report matters to a municipal ombudsman, or witnesses coming before an ombudsman, the confidentiality to which they are entitled. It would also restrict the immunity to only apply to an office of a municipal ombudsman that is established by ordinance or charter and requires compliance with specified ombudsman duties.

The American Bar Association has adopted a resolution with model ombudsman ordinance statutes that include similar provisions. The courts have ruled valid the statutes protecting the ombudsman.

Immunity for the Ombudsman office is supported by the Municipality of Anchorage Assembly as stated in the resolution unanimously approved on March 5, 1991. The Anchorage Municipal Ombudsman office was established not only by city ordinance, but is also part of the city charter which guarantees the right to the assistance of a municipal ombudsman in dealing with grievances and abuses.



Official Business

# Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

University - Midtown, District 10

(907) 465-2647

State Capitol, Rm. 128

Juneau, AK 99801-1182

## SECTIONAL ANALYSIS

Section 1. AS 09.65 is amended by adding a new section.

Sec. 09.65.075.

(a) A civil action cannot be brought against the municipal ombudsman and staff, for anything they have done in performing their duties, as prescribed by ordinance or charter.

This does not apply if the act, statement, or omission constituted a gross negligence, or reckless or intentional misconduct.

(b) The municipal ombudsman or member of staff may not testify in court regarding the exercise of official duties of the ombudsman except as may be necessary to carry out responsibilities of the ombudsman by ordinance or charter.



State of Alaska  
**ombudsman**

Duncan C. Fowler

Reply to:

- P.O. Box 102636  
Anchorage, AK 99510-2636  
(907) 277-8848  
(800) 478-2624
- P.O. Box WO  
Juneau, AK 99811-3000  
(907) 465-4970  
(800) 478-4970
- P.O. Box 74358  
Fairbanks, AK 99707-4358  
(907) 452-4001  
(800) 478-3257

May 14, 1991

Senator Rick Halford, Chairman  
Senate Judiciary Committee  
Post Office Box V  
Juneau, Alaska 99811-3100

RE: CSHB-130(JUD)Am  
Municipal Ombudsmen

Dear Senator Halford:

You asked me for comments about the concept of granting municipal ombudsmen the privilege not to testify in court proceedings and immunity from civil suit.

CSHB-130(JUD)Am started its legislative "career" as a sister bill to SB-120. I support the bill. It supports the ombudsman concept. I believe it will help local government ombudsmen provide better legislative oversight of municipal programs.

The House hearing process improved HB-130 by ensuring the municipal ombudsman office would be established by ordinance or charter and must meet certain standards. It also lists the responsibilities of the ombudsman which must be adopted by local law before the provisions of the bill become effective locally. It incorporated criticisms offered by the Anchorage administration.

This bill has been supported by a wide variety of Alaskans. The Anchorage Assembly and the Alaska Municipal League have formally gone on record supporting the bill. Of special interest to me was the support provided by the Anchorage School Superintendent and School Board. I note that just this past fall Anchorage voters placed the school district under the municipal ombudsman's jurisdiction. I was pleased to see the school board's quick support for the municipal ombudsman office.

The concepts of immunity from suit and the privilege of not testifying in judicial actions is reflected in all of the model ombudsman legislation. The Harvard Journal on Legislation, The American Bar Association and the International Bar Association, in resolutions or model acts, all recommend such provisions for legislative ombudsmen.

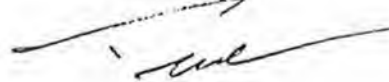
There are many parallels between an ombudsman and a mediator, but ombudsmen are officers of governmental legislative bodies, many mediators are private practitioners. And, I find it of interest that according to the recent American Bar Association study *Legislation on Dispute Resolution*, over 40 states have granted some or all of these privileges to mediators. I have enclosed a marked and

highlighted excerpt of the study which speaks to these issues. (If you would like to have the entire study, let me know.) It directly relates to your concerns about HB130/SB120.

Again, I do support the passage of CSHB-130(JUD)Am. It will not affect my office as it applies only to local governments. I do see it as good public policy to encourage local governments to take responsibility for the provision of local services. This bill does encourage that by providing reasonable protections to a local ombudsman office.

Please let me know if you have any questions.

Sincerely,



Duncan C. Fowler  
Ombudsman

DCF:pjc  
Enclosure



3-14-91  
Copies

April 30, 1991

## Position Paper

### CS HB 130 (Judiciary) am - Immunity of Municipal Ombudsman

The Alaska Municipal League, which represents 125 local governments and their citizens throughout the State of Alaska, supports CS HB 130 (Judiciary) am. This legislation would grant immunity from civil action and privilege not to testify about certain matters to a municipal ombudsman and the staff of the ombudsman's office.

Under the provisions of the bill, which are consistent with model legislation on ombudsmen, no civil action could be brought against either a municipal ombudsman or the ombudsman's staff for anything done, said, or omitted in performing the duties of the office as established by ordinance or charter, except in cases of gross negligence or reckless or intentional misconduct. In addition, they could not testify in court regarding a matter involving their official duties except as necessary to carry out the responsibilities of the office. The protection would apply only when the ordinance or charter establishing the office of ombudsman included specific provisions.

If enacted, HB 130 would not only afford protection to municipal ombudsmen and their staffs that is comparable to the protection granted to the state ombudsman's office, it would also help to ensure confidentiality for citizens seeking assistance from a municipal ombudsman comparable to the protection they would have if they sought assistance from the state ombudsman. HB 130 would correct the inequity that currently exists between citizens of municipalities that contract with the office of the state ombudsman for services and those that have established their own locally funded ombudsman's office.

AML supports the House Judiciary CS for HB 130, as amended.

**Municipality  
of  
Anchorage**



P.O. BOX 196650  
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TOM FINK,  
MAYOR

OFFICE OF THE MUNICIPAL MANAGER

April 3, 1992

Senator Rick Halford, Chairman  
Senate Judiciary Committee  
P.O. Box V  
Juneau, Alaska 99811

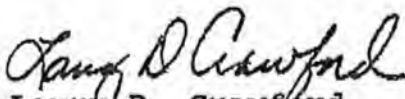
Re: HB 130, Municipal Ombudsman Immunity

Dear Senator Halford:

Attached is the Administration's position paper opposing HB 130, Municipal Ombudsman Immunity. Please provide copies of our position to the members of your committee for the hearing on this bill April 7th.

If you have any questions, please feel free to contact me.

Very truly yours,

  
Larry D. Crawford  
Municipal Manager

Attachment

MUNICIPALITY OF ANCHORAGE  
1992 LEGISLATIVE PROGRAM

LEGISLATIVE ISSUES

TITLE: HB 130 and SB 120, Municipal Ombudsman's Immunity

The Municipality of Anchorage opposes HB 130 and SB 120 which would provide for Ombudsman immunity. While at first glance this legislation may seem attractive, we believe it suffers from several serious defects. As to SB 120, the blanket immunity granted to Municipal Ombudsman and their staff would go far beyond the traditional forms of immunity for governmental activities which are entitled to immunity under AS 9.65.070. It appears that HB 130 is the preferred version at this time; however, even this version represents a poor policy choice.

The proposed HB 130 would affirmatively prohibit an Ombudsman or his/her staff from testifying in court except as may be necessary to carry out responsibilities established by ordinance or charter. This prohibition would apparently prohibit testimony in criminal trials and in actions against a municipality arising out of gross negligence, recklessness or even intentional misconduct of Ombudsmen or their staff. The search for truth in criminal proceedings should not be ham-strung by this kind of restriction.

Similarly, the intent to subject an Ombudsman or his/her staff to responsibility for conduct which constitutes gross negligence or recklessness or intentional misconduct in subsection (a) of the proposed AS 9.65.075 is frustrated by the prohibition on testimony in subsection (b) of that section. Unless a provision of a municipal charter or ordinance requires the Ombudsman to testify in criminal matters, or cases arising out of the actions of the Ombudsman or his/her staff, the language regarding gross negligence or reckless or intentional misconduct is without effect.

The proposed legislation in effect grants to the Ombudsman an unlimited license to defame others. There is no assurance that individuals criticized, even wrongly, by the Ombudsman will have the opportunity to reply to such criticism. No real protection is afforded to an individual who might be defamed by the inaccurate

(more)

HB 130, and SB 120 Municipal Ombudsman's Immunity  
Continued

assertions of the Ombudsman.

Finally, the argument that "the state has such a law, therefore we should have one also" is not convincing. The majority of the states do not have similar legislation. Only the states of Alaska, Hawaii and Nebraska grant similar immunity to their Ombudsman. There are no public officials who should be outside of the civil law, be that officials of the state or its political subdivisions.

Contact: Richard L. McVeigh, Municipal Attorney  
Phone: 343-4545

20) LIABILITY/QUALIFICATIONS

State

MAR 12 1991

- a) California
- b) Colorado
- c) Florida
- d) Illinois
- e) Iowa
- f) Louisiana
- g) Maine
- h) Michigan
- i) Minnesota
- j) New Hampshire
- k) New York
- l) North Carolina
- m) Ohio
- n) Oklahoma
- o) Oregon
- p) Texas
- q) Virginia
- r) Wisconsin

To	Rep. Farrell / Beley	From	Mike Mills
Co.	House	Co.	MOA Ombudsman
Dept.		Phone #	343-4461
Fax #	463-5661	Fax #	343-4780

Family Law Act Sec. 4607 (1980)  
Dispute Resolution Act  
 Sec. 13-22-301 (1983; amended 1988)  
ADR Act of 1987 Sec. 44.1011 to 44.108 (amended 1990)  
Dispute Resolution Act (1987)  
 Sec. 679.1 (1985)  
 Sec. 9:351  
 4 Sec. 18 (1989)  
Dispute Resolution Program Act  
 Sec. 27.15(51) (1988)  
 Sec. 494.01 (1984)  
 Sec. 572.31 (1986)  
 Chap. 268 (1989)  
Dispute Resolution Act Art. 21-A  
 Sec. 849(a)  
 Art. 43(B), Sec. 1-539.10  
 Sec. 179.01 (1989)  
Dispute Resolution Act 12 Sec. 1801 to 1813 (1983; amended 1985; rules & procedures adopted, 1986)  
 Sec. 36.100 to 210 (1989)  
Alternative Methods of Dispute Resolution Act Tit. 7, Sec. 154.001 to 154.022 Civil Practice and Remedies (1987)  
Confidentiality in Mediation Act Sec. 8.01-581.21 to 8.01-581.23 (1988)  
Child Custody, Placement, and Visitation (Wisconsin Act 355) (1987)  
 Sec. 665.42 to 665.68 (1985)

21) PROPERTY

State

Statute

- a) California
- b) Colorado
- c) Hawaii
- d) Maine
- e) North Dakota

Chapter 22 (1989)  
 Sec. 32-1-1006 (1989)  
 Sec. 514(A)-121 to 514(A)-127 (1984)  
 Sec. 519-2 (1975)  
 Sec. 171-6(9) (1962)  
 Sec. 182-3 (1965)  
 Sec. 205-5.1(a) (1983)  
 Chapter 40 (1989)  
 Sec. 26.1-22-11 (1983; amended 1987)

Cal. Judicial Immunity Provision = Cal. Code of Civil Pro. Sect 1141.30

## 20) LIABILITY/QUALIFICATIONS

<u>State</u>	<u>Statute</u>
a) California	<u>Family Law Act Sec. 4607 (1980)</u>
b) Colorado	<u>Dispute Resolution Act</u> Sec. 13-22-301 (1983; amended 1988)
c) Florida	<u>ADR Act of 1987 Sec. 44.1011 to 44.10</u> (amended 1990)
d) Illinois	<u>Dispute Resolution Act (1987)</u>
e) Iowa	Sec. 679.1 (1985)
f) Louisiana	Sec. 9:351
g) Maine	4 Sec. 18 (1989)
h) Michigan	<u>Dispute Resolution Program Act</u> Sec. 27.15(51) (1988)
i) Minnesota	Sec. 494.01 (1984) Sec. 572.31 (1986)
j) New Hampshire	Chap. 268 (1989)
k) New York	<u>Dispute Resolution Act Art. 21-A</u> Sec. 849(a)
l) North Carolina	Art. 43(B), Sec. 1-539.10
m) Ohio	Sec. 179.01 (1989)
n) Oklahoma	<u>Dispute Resolution Act 12 Sec. 1801 to</u> 1813 (1983; amended 1985; rules & procedures adopted, 1986)
o) Oregon	Sec. 36.100 to 210 (1989)
p) Texas	<u>Alternative Methods of Dispute</u> <u>Resolution Act Tit. 7, Sec. 154.001 t</u> 154.073 Civil Practice and Remedies (1987)
q) Virginia	<u>Confidentiality in Mediation Act Sec.</u> 8.01-581.21 to 8.01-581.23 (1988)
r) Wisconsin	<u>Child Custody, Placement, and</u> <u>Visitation (Wisconsin Act 355) (1987)</u> Sec. 665.42 to 665.68 (1985)

## 21) PROPERTY

<u>State</u>	<u>Statute</u>
a) California	Chapter 22 (1989)
b) Colorado	Sec. 32-1-1606 (1989)
c) Hawaii	Sec. 514(A)-121 to 514(A)-127 (1984) Sec. 519-2 (1975) Sec. 171-6(9) (1962) Sec. 182-3 (1965) Sec. 205-5.1(a) (1983)
d) Maine	Chapter 40 (1989)
e) North Dakota	Sec. 25.1-22-11 (1983; amended 1987)

Cal. - Judicial Immunity Provision: Cal. Code of  
Civil Pro.  
Sect 1141.30

ALASKA STATUTES

LEGISLATURE

Chapter 55. Office of the Ombudsman.

Sec. 24.55.240. Judicial review. A proceeding or decision of the ombudsman may be reviewed in superior court only to determine if it is contrary to the provisions of this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.250. Immunity of the ombudsman. A civil action may not be brought against the ombudsman or a member of the ombudsman's staff for anything done, said or omitted in performing the ombudsman's duties or responsibilities under this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.260. Ombudsman's privilege not to testify. The ombudsman and the staff of the ombudsman may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter. (§ 1 ch 32 SLA 1975)

*state ombudsmen  
lang. identical  
except for "municipal"  
... "established by  
ordinance or charter"*

ALASKA STATUTES

Article 4. Older Alaskans Commission.

Sec. 44.21.231. Office of the long term care ombudsman.

(a) The office of the long term care ombudsman is established in the commission.

(b) The ombudsman shall be hired by the commission. A member of the commission who has a financial interest in a long term care facility in the state, or who has any other conflict of interest, may not participate in the hiring of the ombudsman. The ombudsman is a full-time position in the classified service.

(c) The ombudsman may not have a financial interest in a long term care facility in the state. The commission shall adopt regulations to ensure that the ombudsman, and employees and volunteers of the office, do not have a conflict of interest or an appearance of a conflict of interest. (§ 2 ch 106 SLA 1988)

Sec. 44.21.235. Confidentiality. (a) Records obtained or maintained by the ombudsman are confidential, are not subject to inspection or copying under AS 09.25.110 — 09.25.120 and, except as provided in (b) of this section, may be disclosed only at the discretion of the ombudsman.

(b) The identity of a complainant or an older Alaskan on whose behalf of the by cc

See good from the c (b) relative good

*Leaves question slightly open on being required to testify*

## 1989 AMENDMENTS

A bill to be entitled

An act relating to alternative dispute resolution; amending s. 44.101, F.S.; deleting authorization for the appropriation of revenues or the levying of a service charge, pursuant to a valid public purpose, to fund certain conciliation services; amending s. 44.302, F.S.; requiring assignment of certain disputes involving child custody, visitation, and child support to existing mediation programs; amending s. 44.303, F.S.; providing a cap on arbitrator's fees; directing the Supreme Court to encourage the use of voluntary arbitrators; providing that volunteer arbitrators shall be reimbursed for expenses; providing for discretionary rather than mandatory assessment of costs under certain circumstances; amending s. 44.304, F.S.; providing exceptions to disputes which may be referred to voluntary binding arbitration; creating s. 44.307, F.S.; providing that mediators and arbitrators shall have certain immunity; creating s. 44.308, F.S.; providing for funding mediation and arbitration services; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 44.101, Florida Statutes, is amended to read:

44.101 Family Mediation ~~or conciliation~~ services.

(1) A county may establish a family mediation ~~or conciliation~~ service to assist parties in resolving any controversy involving the family.

(2) The court on its own motion or on motion of a party may refer the parties to this service.

(3) Notwithstanding the provisions of s. 119.14, all oral or written communications in mediation ~~or conciliation~~ proceedings are exempt from the requirements of chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless the both parties agree otherwise. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(4) A family mediation ~~or conciliation~~ service is hereby declared to serve a valid public purpose. The board of county commissioners may support such a service by appropriating moneys from county revenues or by levying a service charge of no more than \$2 on any circuit court proceeding.

(5) ~~The provisions of this section shall be liberally construed in order to carry out effectively the purposes of this section.~~

Section 2. Subsection (1) of section 44.302, Florida Statutes, is amended to read:

44.302 Court-ordered mediation.

(1) Except as provided by rules promulgated by the Supreme Court, a court;

(a) May refer all or any portion of a contested civil action filed in a circuit court in which there is a dispute as to any issue; or

(b) ~~May refer all or any portion of any contested divination filed in county court in which there is a dispute as to any issue.~~

(c) May refer all issues relating to custody, visitation, or child support with the exception of those cases where there is any history of domestic violence in mediation, if an appropriate mediation program has been established in the circuit or county over which the court has jurisdiction,

Section 3. Subsections (2) and (5) of section 44.303, Florida Statutes, are amended to read:

44.303 Court-ordered, nonbinding arbitration.--

(2) Arbitrators shall be selected and compensated in accordance with rules adopted by the Supreme Court. ~~Compensation for arbitrators shall not exceed \$200 per day. The Supreme Court shall encourage the use of voluntary arbitrators whenever possible. Volunteer arbitrators shall be entitled to be reimbursed pursuant to s. 112.061 for all actual expenses necessitated by service as an arbitrator. Arbitrators shall be compensated by a fee of not more than \$75 per day plus 20 cents per mile for each mile of travel necessitated by service as an arbitrator.~~

(5) The party having filed for a trial de novo ~~may~~ shall be assessed the arbitration costs, court costs, and other reasonable costs of the party, including attorney's fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing if the judgment upon the trial de novo is not more favorable than the arbitration decision. ~~The court may waive an assessment of costs required upon a finding that the imposition of costs would create a substantial economic handicap or would not be in the interest of justice.~~

Section 4. Subsection (12) is added to section 44.304, Florida Statutes, to read:

44.304 Voluntary binding arbitration.--

(12) This section shall not apply to any dispute involving child custody, visitation, or child support, or to any dispute which involves the rights of a third party not a party to the arbitration.

Section 5. Section 44.307, Florida Statutes, is created to read:

44.307 Immunity for arbitrators and mediators.--An arbitrator appointed pursuant to s. 44.303 or s. 44.304 or a mediator appointed pursuant to s. 44.302 shall have judicial immunity in the same manner and to the same extent as a judge.

Section 6. Section 44.308, Florida Statutes, is created to read:

44.308 Funding of mediation and arbitration.--The board of county commissioners may support mediation and arbitration services by appropriating moneys from county revenues or by levying a service charge of no more than \$2 on any county court civil proceeding.

Section 7. This act shall take effect January 1, 1990.

CODING: words stricken are deletions; words underlined are additions.

*Torts § 216, Creditors' Rights and Remedies § 73, Guardianship and Conservatorship § 138; Miller & Starr, Cal Real Estate 2d § 4:60; Witkin Summary (9th ed) Agency and Employment § 472.*

## CHAPTER 1

## General Provisions

## Definitions.

- 1281.1. Immunity of arbitrator from civil liability  
 1281.2. Reference to portion of title or of any other law.

*Starr, Cal Real Estate 2d § 33:2; Cal Practice (Rev) Ch 23 Arbitration; Witkin Summary (9th ed) Actions § 13, Prov Rem § 71, PWT § 320; Witkin Summary (9th ed) Equity*

1280. [Definitions.] As used in this

(a) "Agreement" includes but is not limited to agreements providing for valuations, appraisals and similar proceedings and arbitrations between employers and employees or between their respective representa-

(b) "Award" includes but is not limited to an award made pursuant to an agreement in writing.

(c) "Controversy" means any question between parties to an agreement in which such question is one of law or of fact.

(d) "Neutral arbitrator" means an arbitrator who is (1) selected jointly by the parties to the arbitration or by the arbitrators selected by the parties to the arbitration; or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

(e) "Party to the arbitration" means a party to the arbitration agreement:

(1) Who seeks to arbitrate a controversy pursuant to the agreement;

(2) Against whom such arbitration is sought pursuant to the agreement; or

(3) Who is made a party to such arbitration by order of the neutral arbitrator upon the party's application, upon the application of any other party to the arbitration or upon the neutral arbitrator's own determination.

(f) "Written agreement" shall be deemed to include a written agreement which has been extended or renewed by an oral or

implied agreement. [1961 ch 461 § 2; former § 1280 repealed 1961 ch 461 § 1.] *Cal Jur 3d Actions § 19, Landlord and Tenant § 113; Miller & Starr, Cal Real Estate 2d §§ 1:48, 33:1, 33:3, 33:5, 33:6, 33:21, 33:30; Cal Practice (Rev) § 23:57; Witkin Procedure (3d) Attorneys § 179; Witkin Summary (9th ed) Contracts § 262, Equity §§ 41, 42, 46, 47.*

§ 1280.1. (Operative until January 1, 1996) Immunity of arbitrator from civil liability. An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract.

The immunity afforded by this section shall supplement, and not supplant, any otherwise applicable common law or statutory immunity.

This section shall remain in effect only until January 1, 1996, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1996, deletes or extends that date. Amended Stats 1990 ch 817 § 2 (SB 951), operative until January 1, 1996. *Cal Jur 3d (Rev) Arbitration and Award §§ 44, 93, 107; Miller & Starr, Cal Real Estate 2d §§ 4:60, 33:21; Witkin Summary (9th ed) Torts § 322, Equity § 39.*

§ 1280.2. [Reference to portion of title or of any other law.] Whenever reference is made in this title to any portion of the title or of any other law of this State, the reference applies to all amendments and additions thereto now or hereafter made. [1961 ch 461 § 2.]

## CHAPTER 2

## Enforcement of Arbitration Agreements

§ 1281. Requisites and validity.

§ 1281.2. Order to arbitrate. Determination of other issues.

Post-It <sup>®</sup> brand fax transmittal memo 7671		# of pages	1
To	Rep. Farrell / Beckley		
From	Mike Mills		
Co.	House	Co.	MOA Ombudsman
Copied		Phone #	343-4461
	463-5661	Fax #	343-4780

Submitted by: Assembly Members  
Evans, Flynn  
Prepared by: Ombudsman  
For reading: March 5, 1991

ANCHORAGE, ALASKA  
AR NO. 91-45

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A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING STATE LEGISLATION TO PROVIDE MUNICIPAL OMBUDSMEN AND STAFF IMMUNITY AND PRIVILEGE NOT TO TESTIFY

WHEREAS, legislation has been introduced before the Alaska State Legislature in both the House and Senate to provide a municipal ombudsman and staff immunity from civil action and privilege not to testify about certain matters; and

WHEREAS, these two provisions are in the state statute which established the state ombudsman; and

WHEREAS, citizens seeking assistance from a municipal ombudsman should be afforded the same rights to confidentiality as if they sought assistance from the state ombudsman who also serves, under contract, a number of local communities; and

WHEREAS, these provisions may only be established by state statute rather than by local ordinance; and

WHEREAS, these provisions are consistent with the American Bar Association's Model Statute on Ombudsmen and the United States Association of Ombudsmen guidelines; and

WHEREAS, the legislation is in harmony with the Anchorage Municipal Charter and the Alaska State Constitution and will further enhance the benefits that citizens of this municipality have come to appreciate by having an ombudsman within their local government.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

That this body endorses legislation providing municipal ombudsmen and staff immunity and privilege not to testify, and urges passage by the Seventeenth Alaska State Legislature.

PASSED AND APPROVED by the Anchorage Assembly this 5<sup>th</sup> day of March, 1991.

*Jim Kusitz*  
Chair

ATTEST:

*Lizanne Ferguson*  
Municipal Clerk  
*Deputy*

UNANIMOUSLY APPROVED ON MARCH 5, 1991

To	Sen. Collins / Marverne	From	Mike Mills
Co.	note: hand copy in mail	Co.	MOA Ombudsman
Dept.	FAX 465-4779	Phone #	343-4461
		Fax #	343-4780

**Position Paper**

**AN ACT TO PROVIDE MUNICIPAL OMBUDSMEN IMMUNITY AND PRIVILEGE NOT TO TESTIFY (SECTION 09.65.075)**

**A. Confidentiality / Privilege Not To Testify**

The ability for an ombudsman to effectively investigate complaints depends primarily on the ability to determine the facts surrounding the issue. Common among nearly all ombudsman offices is their authority to access essentially all information within their jurisdiction. Along with this power comes the requirement to protect information received which is confidential or privileged by law. Similarly, in an effort to ensure that an ombudsman is provided the most factual information possible from complainants or witnesses, their confidentiality is protected.

In order for an ombudsman to guarantee that these confidentiality laws are not violated and that citizens can continue to enjoy their right to speak freely to their ombudsmen, it is necessary to establish the privilege for an ombudsman and their staff not to testify in court regarding matters involving an ombudsman's official duties.

There is precedence for establishing this privilege not to testify for ombudsmen both on a national and international level. The State of Alaska specifically restricts the Ombudsman from testifying (Sec. 24.55.260); and the State of Nebraska prevents the Ombudsman from being required to testify or produce evidence (Sec. 81-8,253).

Common among nearly every classical ombudsman office is the provision to protect the confidentiality of certain individuals and information. The inclusion of specific language within a statute provides further clarification that an ombudsman should not be required to divulge information, or the identity of a complainant or a witness, which was received with the expectation of privacy. Case law is supportive of this protection at the state level, with Alaska contributing toward the courts' respect for the provisions contained within ombudsman statutes. Notwithstanding the limitations of states' statutes, the U. S. federal courts have exhibited considerable efforts in respecting the confidentiality provisions of state ombudsmen.

## B. Immunity From Civil Action

The structure of the classic ombudsman is designed to ensure that the ombudsman be provided the freedom to investigate any act or failure to act by an agency, official, or public employee with only specific exceptions. One of the essential provisions which the American Bar Association recommended in its 1969 Resolution promoting the establishment of ombudsmen within state and local governments was to provide immunity for ombudsmen and their staff from civil liability on account of official actions. Apparently the potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

The Immunity provision has been previously established at the local level as exemplified in the Charter of the City of Detroit (Sec. 4-315). The majority of classic ombudsman offices at state, provincial and national levels are provided protection from civil suits according to survey results from the International Ombudsman Institute. Many of these offices are protected from criminal suits as well; Hawaii and Puerto Rico among them. The Hawaii State Ombudsman also has jurisdiction over local governmental units.

### SUMMARY

The proposed amendments essentially allow duly established municipal ombudsmen the same protection from civil suits, and the privilege not to testify, as afforded our State Ombudsman. The benefits of these provisions within the Alaska State Ombudsman Statute have already reached certain local governments in this State by virtue of their contracting with the State Ombudsman for ombudsman services (i.e. Juneau). It would be consistent to include similar provisions as proposed for municipal ombudsmen.

Passage will ensure that municipal ombudsmen in this State carry out their duties as prescribed by law without reservation; and provide citizens who wish to report matters to an Ombudsman, or witnesses coming before an Ombudsman, the confidentiality to which they are entitled.

The appendices, including model statutes from the American Bar Association and the Harvard Journal on Legislation, provide significant justification for passage of this legislation.

Prepared by:  
Michael P. Mills  
Municipal Ombudsman, Anchorage  
(Past President, U. S. Association of Ombudsmen)

## Appendix

- A. University of Miami Law Review (Spring 1975)  
American Bar Association Model Ombudsman Statute for State Governments  
*Q. Section 17. Ombudsman's Immunities and C. Section 3. Definitions*  
Comment by Bernard Frank, Chairman, Ombudsman Committee, ABA.
  
- B. American Bar Association Model Ombudsman Statute *Background Summary*  
Ombudsman Committee Chairman Bernard Frank.
  
- C. American Bar Association Resolution (1969),  
*Dealing with Establishment of an Ombudsman*
  
- D. Harvard Journal on Legislation (June 1965)  
*A State Statute to Create the Office of Ombudsman*  
Sections 603, 604 & 605, and Comment.
  
- E. International Bar Association, Ombudsman Committee Letter (November 1978)  
Chairman Bernard Frank to MOA Ombudsman, Karla L. Forsythe  
*Necessity of State Statute for Municipal Ombudsman Protection.*
  
- F. Anchorage Municipal Attorney Memorandum (July 1990)  
*Lack of Privilege Not to Testify.*
  
- G. Alaska Statute: *Sec. 24.55.240-260, Office of The Ombudsman*
  
- H. Alaska Statute: *Sec. 44.21.231, 235 & 236, Long Term Care Ombudsman*
  
- I. International Ombudsman Institute Report (July 1986)  
*Court Cases of Special Interest to the Ombudsman Institution*  
(Excerpts from United States court cases)

## STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK\*

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### I. INTRODUCTION

Year after year, Ombudsman proposals have been introduced in a majority of the state legislatures in the United States.<sup>1</sup> Legislation has been passed for state-wide Ombudsmen in Hawaii, Nebraska, Iowa, and Alaska.<sup>2</sup> The word "Ombudsman," Swedish in origin, means ...

1975]

STATE OMBUDSMAN LEGISLATION

439

ABA  
MODEL  
STATUTE

#### Q. Section 17. Ombudsman's Immunities

- (a) NO PROCEEDING, CONCLUSION, RECOMMENDATION, OR REPORT OF THE OMBUDSMAN OR MEMBER OF HIS STAFF SHALL BE REVIEWABLE IN ANY COURT;
- (b) THE OMBUDSMAN AND HIS STAFF SHALL HAVE THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITIES AS A JUDGE OF THIS STATE.
- (c) THE OMBUDSMAN AND HIS STAFF SHALL NOT BE COMPELLED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THIS ACT.

COMMENT. (a) Sub-section (a) precludes judicial review of the Ombudsman's work, unless, of course, he has violated the Act.

(b) This sub-section avoids litigation and harassment by an uncooperative agency, but does not preclude

\*8. HAWAII REV. STAT. §§ 96-13, -16 (1968).

## UNIVERSITY OF MIAMI LAW REVIEW (Vol. XXIX)

prosecution for serious misconduct, or removal from office (§ 8(a)).

(c) This sub-section acts with § 11(h) to protect the secrecy and confidentiality of information obtained—in order to instill public confidence in his work; it also prevents unnecessary interruptions of his work to testify, while allowing him to proceed in court whenever necessary (§ 11(i)).

Section 17(a) precludes judicial review of the proceedings, conclusions, recommendations, or reports of the Ombudsman or members of his staff. Judicial review is likewise forbidden in the Nebraska statute and the Hawaii statute except if in Hawaii the Ombudsman contravenes the provisions of the statute.<sup>79</sup> The Iowa law is silent on the subject. It would seem to be implicit in the ABA Model Statute and the Nebraska statute that if the Ombudsman violates the Ombudsman statute his actions are subject to court review.

Section 17(b) further provides that the Ombudsman and staff shall have the same immunities from civil and criminal liabilities as a judge of the state. Somewhat similar language is used in the Hawaii statute except staff are omitted.<sup>80</sup> Iowa provides for no civil action except removal from office under Iowa law against the Citizens' Aide or his staff unless an act or omission is actuated by malice or is grossly negligent.<sup>81</sup> There is no provision in the Nebraska statute with respect to immunity from civil and criminal liabilities.

Section 17(c) specifically gives the Ombudsman and his staff immunity from being compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except such testimony or evidence that might be necessary to enforce the Act. Somewhat similar language is used in the Nebraska statute as to both judicial or administrative proceedings and in the Hawaii and Iowa statutes as to court proceedings.<sup>82</sup> As written, the Ombudsman and his staff may voluntarily testify, but cannot be compelled to do so at least in the state courts. It is the inability to compel the Ombudsman and his staff to testify in the state courts which protects the confidentiality of the information obtained by the Ombudsman. Application of the privileged communication immunity by statute to the activities of the Ombudsman is important to the Ombudsman office. However, it is submitted that the state Ombudsman and his staff can be compelled to testify in the federal courts<sup>82a</sup>—a problem which would have to be

79. NEB. REV. STAT. § 81-8.253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968)

80. HAWAII REV. STAT. § 96-17 (1968).

81. IOWA CODE ANN. § 601G.20 (Supp. 1974).

82. NEB. REV. STAT. § 81-8.253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968); IOWA CODE ANN. § 601G.20 (Supp. 1974).

82a. Raymond A. Cornell, Deputy Citizen's Aide for Corrections, Iowa, was subpoenaed to

resolved by appropriate federal legislation.<sup>83</sup> That a complaint-handling official appointed by, responsible to, and serving at the pleasure of the executive has no immunity at all, is one of the reasons the use of the term "Ombudsman" should be confined to those coming within the definition given at the outset of this article.

## C. Section 3. Definitions

AS USED IN THIS ACT,

(a) "AGENCY" MEANS ANY DEPARTMENT, ORGANIZATION, BOARD, COMMISSION, COUNCIL, INSTITUTION OR OTHER GOVERNMENTAL ENTITY OF

[NAME OF STATE], AND ANY OFFICIAL, OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT BY REASON OF HIS CONNECTION WITH

[NAME OF STATE], EXCEPT:

(1) ANY COURT, OR JUDGE AND APPURTENANT JUDICIAL STAFF;

(2) THE LEGISLATURE, ITS MEMBERS, ITS COMMITTEES, ITS STAFF AND ITS EMPLOYEES;

(3) THE GOVERNOR AND HIS PERSONAL STAFF;

[(4) (ALTERNATE A) ANY POLITICAL SUBDIVISION OF THE STATE;]

[(4) (ALTERNATE B) MAYORS, COUNCIL MEMBERS, AND JUDGES OF ANY POLITICAL SUBDIVISION AND THEIR PERSONAL STAFFS,]

(5) ANY MULTI-STATE GOVERNMENTAL ENTITY.

(b) AN "ACT OF AN AGENCY" MEANS ANY ACTION, DECISION, FAILURE TO ACT, OMISSION, RULE OR REGULATION, INTERPRETATION, RECOMMENDATION, POLICY, PRACTICE OR PROCEDURE OF ANY AGENCY.

(c) "PERSON" MEANS ANY INDIVIDUAL, AGGREGATE OF INDIVIDUALS, CORPORATION, PARTNERSHIP, OR UNINCORPORATED ASSOCIATION.

## COMMENT.

29 ...

4. Local government exclusion from or inclusion in the Ombudsman's jurisdiction is left to the decision of the legislature. If political subdivisions are to be excluded (as in Nebraska), appropriate language is recommended in the ABA Model Statute. If local government is to come within the jurisdiction of the Ombudsman, then the ABA Model Statute recommends that the phrase "and local" be included in the legislative purpose (section one) and further that consideration be given to exclude in the section three definition of "agency" certain local officials. Both Iowa and Hawaii have jurisdiction over

19. IOWA CODE ANN. § 601C.1-2(a) (Supp. 1974); NEB. REV. STAT. § 31-3,340(1) (Supp. 1969).

20. HAWAII REV. STAT. § 96-112X(1) (Supp. 1974).

21. HAWAII REV. STAT. § 96-112X(2) (1968); IOWA CODE ANN. § 601C.1-2(b) (Supp. 1974).

22. NEB. REV. STAT. § 31-3,340(1)(d) (Supp. 1969).

23. HAWAII REV. STAT. § 96-112X(1) (Supp. 1974).

## UNIVERSITY OF MIAMI LAW REVIEW Vol. XXIX

local government, but only the Hawaii law makes provision (by a 1974 amendment) for an exclusion for mayors and councils of the various counties.<sup>24</sup>

It is appropriate to discuss at this point several problems in connection with local government. It is obvious that omitting local government from the jurisdiction of the state Ombudsman does not prevent the creation of the office by a political subdivision of the state. On the other hand, the comment to section one does raise the question (originally posed by Professor L. Harold Levinson, a member of the Ombudsman Committee) whether inclusion of local government will be interpreted as preempting to the state jurisdiction over both state and local agencies to prevent a local government from establishing its own local Ombudsman. The ABA Model Statute does not address this point, but this writer believes that the question must be answered in the affirmative. The problem of immunities of the local Ombudsman discussed hereafter under section 17 points to the desirability of state legislation covering the subject of local government. Either a state should give its Ombudsman jurisdiction over both local and state agencies or a state should have several statutes, one permitting local government to establish a local Ombudsman under the detailed provisions of a state statute and the other establishing a state Ombudsman without local jurisdiction.<sup>25</sup>

Another possible alternative suggested by Professor Levinson is to have a statute provide for a state-wide Ombudsman without local jurisdiction but to give enabling authority for any local government to establish a local Ombudsman with essentially the same attributes and powers, subject to some variations.<sup>26</sup>

5. It is made clear in the ABA Model Statute and the three state statutes that multi-state government entities are exempt from the jurisdiction of the Ombudsman.<sup>27</sup> However, the language of the ABA Model Statute and the Hawaii statute is preferable, because of its simplicity, to the language of the Nebraska and Iowa statutes, the latter stating, "any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

6. The ABA Model Statute like Iowa does not specify an exclusion for federal agencies because it was deemed superfluous in view of constitutional limitations. However, the Hawaii and Nebraska statutes do contain such an explicit exclusion.<sup>28</sup>

24. HAWAII REV. STAT. § 90-12A(7)(8) (Supp. 1974).

25. For example, the Georgia legislature passed in 1974, H. B. 85 amending the Atlanta City Charter providing for an Ombudsman. On opinion of the City Attorney to the effect that the state law was improper, the City Council passed its own Ombudsman ordinance.

26. Letters from Professor L. Harold Levinson to Bernard Frank, Oct. 23, 1973, and Jan. 11, 1974.



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You will find attached a Model Ombudsman Statute for State Governments (pages 1-15), the American Bar Association resolution on the Ombudsman (page 16), and a recommended bibliography on the Ombudsman (pages 17-19).

The Ombudsman Committee, Section of Administrative Law, American Bar Association, concluded several years ago that a uniform State Ombudsman Act was not needed in this country but that a Model Ombudsman Statute would serve a very useful purpose.

At the request of the Ombudsman Committee, Yale Legislative Services undertook to prepare a Model Ombudsman Statute for State Governments. Edward G. Grossman, a student at Yale University Law School, acted as project co-ordinator and prepared a first draft of a Model Ombudsman Statute for State Governments. The Model Statute as prepared by Yale Legislative Services was reviewed by a special committee of the Ombudsman Committee and the comments of the committee members are reflected in the final draft of the Model Statute attached hereto. The Model Statute draws heavily on Professor Walter Gellhorn's Unofficial Model Ombudsman Statute. Professor Gellhorn, who is a member of the special committee, gave his consent to the use of his Unofficial Model Ombudsman Statute as a base to prepare the Model Ombudsman Statute for State Governments.

The Model Ombudsman Statute for State Governments meets the twelve (12) essentials of an Ombudsman Statute set forth in the resolution adopted by the House of Delegates of the American Bar Association in 1969 as recommended by the Ombudsman Committee then headed by Professor Kenneth Culp Davis and amended in 1971.

This Model Ombudsman Statute for State Governments is issued by the Ombudsman Committee, Section of Administrative Law, American Bar Association, but represents a joint work product of the Yale Legislative Services and the Ombudsman Committee, Section of Administrative Law, American Bar Association. The bibliography was prepared by Mr. Grossman.

The Ombudsman Committee extends its appreciation to Yale Legislative Services and to Edward G. Grossman.

Bernard Frank, Chairman  
Ombudsman Committee  
Section of Administrative Law  
American Bar Association  
931 Hamilton Mall  
Allentown, Pennsylvania 18105

American Bar Association Resolution

The following Resolution dealing with the establishment of an Ombudsman was adopted by the American Bar Association at the Midyear Meeting of the House of Delegates in 1959:

*Be it Resolved*, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an ombudsman or ombudsmen for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.

4. That establishment of a Federal government-wide ombudsman program should await findings based upon the experimentation recommended.

*Be it Further Resolved*, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

## A State Statute to Create The Office of Ombudsman

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*Harvard Journal on Legislation**SECTION 603. Judicial review.*

No proceeding or decision of the Ombudsman may be reviewed in any court, unless it contravenes the provisions of this Act.

*SECTION 604. Immunity of the Ombudsman.*

The Ombudsman has the same immunities from civil and criminal liability as a judge of this state.

*SECTION 605. Ombudsman's privilege not to testify.*

The Ombudsman and his staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this Act.

### COMMENT

*SECTION 603. Judicial Review.*

This section prevents an agency or official from securing judicial review of the Ombudsman's recommendations. Since the Ombudsman has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. However, since the institution is new in this country, one cannot be certain how the law will develop. This provision is included to guarantee that the Ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions.

*SECTION 604. Immunity of the Ombudsman.*

The Ombudsman is given the immunities from civil and criminal prosecution that are enjoyed by a state judge. The most significant of these is immunity from liability for defamation arising out of statements made in the exercise of his duties.

*SECTION 605. Ombudsman's privilege not to testify.*

The purpose of this section is to encourage people to cooperate with the Ombudsman, without fear that he will divulge information disclosed to him in confidence. This section also protects the Ombudsman and his staff from the embarrassment and interruption of having to testify in regard to cases they have investigated. However, since the Ombudsman may need recourse to the courts to perform his duties under this act, this privilege is not withheld from him. Its most likely use is to enforce his subpoena power under section 403. He may also testify in regard to the penalty for obstruction under section 607.

# International Bar Association

## Ombudsman Committee

Chairman  
Bernard Frank (USA)

Vice Chairman  
Alex B. Weir (Canada)

November 17, 1978

Ms. Karla L. Forsythe  
Ombudsperson  
Municipality of Anchorage  
Office of the Ombudsman  
Pouch 6-650  
Anchorage, Alaska 99502

Dear Ms. Forsythe:

Thank you for the copy of the letter to Peter Freeman. You raised two points:

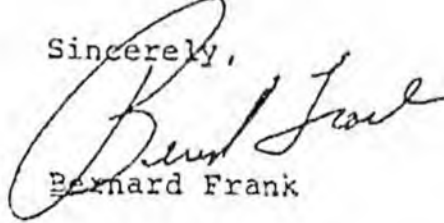
1. Confidentiality of communications between complainants and your office. This problem, please note pages 439 to 441 inclusive from my article on "State Ombudsman Legislation in the United States", Section 17, pages 13-14, of the Model Ombudsman Statute, and pages 47-48 of my article on the Nebraska Public Counsel. This problem was discussed at one of the workshops at the Dayton conference. The problem with local government is that the only item on the subject is a local ordinance and then the immunity extends only in those courts which are subject to the jurisdiction of the local governments. You will not have immunity in the state courts and certainly not in the federal courts. However, if I were you I would do what I could on the local level and you will note there are sections on immunity in the Flint Charter, page 20, and the Detroit Charter, Section 4-315. The state statute might be necessary to protect you in the state courts but this would, of course, not preclude being subpoenaed for a federal court. Your only hope there would be to have a federal statute to cover this subject. There remains a great deal of work in this particular area. I would suggest that you write to William P. Angrick, II, Office of the Citizens' Aide, 515 East Twelfth Street, Des Moines, Iowa, 50319, because his office has been involved in several cases involving freedom from subpoena in a federal court. The early part of this year, a Federal Judge upheld the confidentiality of the Iowa Ombudsman records on the basis that there was no federal interest involved and the state policy should prevail as reflected in the Statute granting immunity.

Ms. Karla L. Forsythe  
Page 2  
November 17, 1978

2. With respect to provisions containing non-retaliation sections, I would refer you to page 44 of the Nebraska article, Section 13(e) of the Model Statute, and page 432 of the University of Miami article. Offhand, I found only a section on this in the Nebraska statute.

If you wish to discuss this further, please contact me.

Sincerely,



Handwritten signature of Bernard Frank in cursive script.

Bernard Frank

BF:dc

Enclosures

~~CONFIDENTIAL~~  
Communication  
Attorney/Client

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

RECEIVED

JUL 12 1990

DATE: July 6, 1990

TO: Michael Mills, Ombudsman

FROM: Kevin Finnigan, Assistant Municipal Attorney

THRU: James E. Ramsey, Deputy Municipal Attorney

THRU: Richard D. Kibby, Municipal Attorney

SUBJECT: MOA v. Robert H. Stafford  
Superior Court Case No. 3AN-89-7337 Civil

Office of the Ombudsman

KF  
JR

You have asked whether AMC 2.60.120(C) provides authority to exempt the Ombudsman from honoring a subpoena to testify at a trial.

SHORT ANSWER

AMC 2.60.120(C) does not provide a recognizable privilege exempting the Ombudsman from honoring a subpoena and testifying at trial.

FACTS

Mr. Stafford has advised the Ombudsman and his assistant that he would be issuing them a subpoena to appear and testify at his upcoming trial. Mr. Stafford had previously filed a complaint with the Ombudsman's office concerning alleged improprieties by an employee at the Parks and Recreation Department. The Ombudsman's office made an initial inquiry into the matter but did not investigate the matter because of pending litigation.

DISCUSSION

AMC 2.60.070(C) states:

The Ombudsman shall protect the confidentiality of complainants or witnesses coming before them except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties.

The above provision does not provide a privilege from honoring a subpoena or testifying in court. Instead, AMC 2.60.070(C) prohibits the Ombudsman from voluntarily disclosing information

Michael Mills, Ombudsman  
July 6, 1990  
Page 2

obtained from complainants and witnesses except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties. The State Ombudsman is afforded protections not given to the Municipal Ombudsman. AS 24.55.260 states that "the ombudsman and the staff of the ombudsman's office may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter." Based on AS 24.55.260, the State Ombudsman may refuse to testify as a witness. Alaska Rule of Court 501 recognizes certain privileges from testifying in court. Among those recognized are privileges provided in enactments of the Alaska Legislature. Alaska Rule of Court 501 thus would recognize the privilege of the State Ombudsman pursuant AS 24.55.260 from testifying as provided by state law. No such protection is recognized for the Municipal Ombudsman.

Please contact this office if we may be of further assistance.

KF:ld  
M/MILLS1

# CHAPTER 601G

## CITIZENS' AIDE

- 601G.1 Definitions.
- 601G.2 Office established.
- 601G.3 Appointment — vacancy.
- 601G.4 Citizen of United States and resident of Iowa.
- 601G.5 Term — removal.
- 601G.6 Deputy — assistant for penal agencies.
- 601G.7 Prohibited activities.
- 601G.8 Closed files.
- 601G.9 Powers.
- 601G.10 No charge for services.
- 601G.11 Subjects for investigations.
- 601G.12 Complaints investigated.
- 601G.13 No investigation — notice to complainant.
- 601G.14 Institutionalized complainants.
- 601G.15 Reports critical of agency or officer.
- 601G.16 Recommendations to agency.
- 601G.17 Publication of conclusions.
- 601G.18 Report to general assembly.
- 601G.19 Disciplinary action recommended.
- 601G.20 Immunities.
- 601G.21 Witnesses.
- 601G.22 Penalties.
- 601G.23 Citation.

### 601G.1 Definitions.

As used in this chapter:

1. "Person" means an individual, aggregate of individuals, corporation, partnership, or unincorporated association.
2. "Agency" means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of official duties, but it does not include:
  - a. Any court or judge or appurtenant judicial staff.
  - b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.
  - c. The governor of Iowa or the governor's personal staff.
  - d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state.
3. "Officer" means any officer of an agency.
4. "Employee" means any employee of an agency.
5. "Administrative action" means any policy or action taken by an agency or failure to act pursuant to law.

[C73, 75, 77, 79, 81, §601G.1]

### 601G.2 Office established.

The office of citizens' aide is established.

[C73, 75, 77, 79, 81, §601G.2]

### 601G.3 Appointment — vacancy.

The citizens' aide shall be appointed by the legislative council with the approval and confirmation of a constitutional majority of the senate and with the approval and confirmation of a constitutional majority of the house of representatives. The legislative council shall fill a vacancy in this office in the same manner as the original appointment. If the appointment or vacancy occurs while the general assembly is not in session, such appointment shall be reported to the senate and the house of representatives within thirty days of their convening at their next regular session for approval and confirmation.

The citizens' aide shall employ and supervise all employees under the citizens' aide's direction in such positions and at such salaries as shall be authorized by the legislative council. The legislative council shall hear and act upon appeals of aggrieved employees of the office of the citizens' aide.

[C73, 75, 77, 79, 81, §601G.3]

### 601G.4 Citizen of United States and resident of Iowa.

The citizens' aide shall be a citizen of the United States and a resident of the state of Iowa, and shall be qualified to analyze problems of law, administration and public policy.

[C73, 75, 77, 79, 81, §601G.4]

### 601G.5 Term — removal.

The citizens' aide shall hold office for four years from the first day in July of the year of approval by the senate and the house of representatives, and until a successor is appointed by the legislative council, unless the citizens' aide can no longer perform the official duties, or is removed from office. The citizens' aide may at any time be removed from office by constitutional majority vote of the two houses of the general assembly or as provided by chapter 66. If a vacancy occurs in the office of citizens' aide, the deputy citizens' aide shall act as citizens' aide until the vacancy is filled by the legislative council.

[C73, 75, 77, 79, 81, §601G.5]

### 601G.6 Deputy — assistant for penal agencies.

The citizens' aide shall designate one of the members of the staff as the deputy citizens' aide, with authority to act as citizens' aide when the citizens' aide is absent from the state or becomes disabled. The citizens' aide may delegate to members of the staff any of the citizens' aide's authority or duties except the duty of formally making recommendations to agencies or reports to the governor or the general assembly.

The citizens' aide shall appoint an assistant who shall be primarily responsible for investigating complaints relating to penal or correctional agencies.

[C73, 75, 77, 79, 81, §601G.6]

84 Acts, ch 1046, §1

#### 601G.7 Prohibited activities.

Neither the citizens' aide nor any member of the staff shall:

1. Hold another public office of trust or profit under the laws of this state other than the office of notary public.
2. Engage in other employment for remuneration with an agency against which a complaint may be filed under this chapter or that could create a conflict of interest or interfere in the performance of the person's duties under this chapter.
3. Knowingly engage in or maintain any business transactions with persons employed by agencies against whom complaints may be made under the provisions of this chapter.
4. Be actively involved in partisan affairs.  
[C73, 75, 77, 79, 81, §601G.7]  
84 Acts, ch 1046, §2

#### 601G.8 Closed files.

The citizens' aide may maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the citizens' aide, except that the general assembly, any standing committee of the general assembly or the governor may require disclosure of any matter and shall have complete access to the records and files of the citizens' aide. The citizens' aide may conduct private hearings.  
[C73, 75, 77, 79, 81, §601G.8]

#### 601G.9 Powers.

The citizens' aide may:

1. Investigate, on complaint or on the citizens' aide's own motion, any administrative action of any agency, without regard to the finality of the administrative action, except that the citizens' aide shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency. A communication or receipt of information made pursuant to the powers prescribed in this chapter shall not be considered an ex parte communication as described in the provisions of section 17A.17.
2. Prescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made; and, subject to the requirements of this chapter, determine the form, frequency, and distribution of the conclusions and recommendations of the citizens' aide.
3. Request and receive from each agency assistance and information as necessary in the performance of the duties of the office. The citizens' aide may examine the records and documents of any agency unless its custodian demonstrates that the examination would violate federal law or result in the denial of federal funds to the agency. If the document sought is required by law to be kept confidential, the agency may refuse access until the citizens' aide demonstrates that the document is relevant or material to an investigation authorized under subsection 1. If the citizens' aide is provided access to the confidential document, the citizens' aide is subject to the same policies and penalties regarding the confidentiality of the document as an employee of the agency. The citizens' aide may enter and inspect premises within any agency's control.
4. Issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence relevant to a matter under inquiry. The citizens' aide, deputies, and assistants of the citizens' aide may administer oaths to persons giving tes-

timony before them. If a witness either fails or refuses to obey a subpoena issued by the citizens' aide, the citizens' aide may petition the district court having jurisdiction for an order directing obedience to the subpoena. If the court finds that the subpoena should be obeyed, it shall enter an order requiring obedience to the subpoena, and refusal to obey the court order is subject to punishment for contempt.

[C73, 75, 77, 79, 81, §601G.9; 82 Acts, ch 1026, §1]

#### 601G.10 No charge for services.

No monetary or other charge shall be levied upon any person as a prerequisite to presentation of a complaint to the citizens' aide.

[C73, 75, 77, 79, 81, §601G.10]

#### 601G.11 Subjects for investigations.

An appropriate subject for investigation by the office of the citizens' aide is an administrative action that might be:

1. Contrary to law or regulation.
2. Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though in accordance with law.
3. Based on a mistake of law or arbitrary in ascertainment of fact.
4. Based on improper motivation or irrelevant consideration.
5. Unaccompanied by an adequate statement of reasons. The citizens' aide may also be concerned with strengthening procedures and practices which lessen the risk that objectionable administrative actions will occur.

[C73, 75, 77, 79, 81, §601G.11]

#### 601G.12 Complaints investigated.

The citizens' aide may receive a complaint from any source concerning an administrative action. The citizens' aide shall conduct a suitable investigation into the administrative actions complained of unless the citizens' aide finds substantiating facts that:

1. The complainant has available another remedy or channel of complaint which the complainant could reasonably be expected to use.
2. The grievance pertains to a matter outside the citizens' aide power.
3. The complainant has no substantive or procedural interest which is directly affected by the matter complained about.
4. The complaint is trivial, frivolous, vexatious, or not made in good faith.
5. Other complaints are more worthy of attention.
6. The citizens' aide resources are insufficient for adequate investigation.
7. The complaint has been delayed too long to justify present examination of its merit.

The citizens' aide may decline to investigate a complaint, but shall not be prohibited from inquiring into the matter complained about or into related problems at some future time.

[C73, 75, 77, 79, 81, §601G.12]

#### 601G.13 No investigation — notice to complainant.

If the citizens' aide decides not to investigate, the complainant shall be informed of the reasons for the decision. If the citizens' aide decides to investigate, the complainant and the agency shall be notified of the decision. After completing consideration of a com-

plaint, whether or not it has been investigated, the citizens' aide shall without delay inform the complainant of the fact, and if appropriate, shall inform the administrative agency involved. The citizens' aide shall on request of the complainant, and as appropriate, report the status of the investigation to the complainant.

[C73, 75, 77, 79, 81, §601G.13; 82 Acts, ch 1026, §2]

#### 601G.14 Institutionalized complainants.

A letter to the citizens' aide from a person in a correctional institution, a hospital, or other institution under the control of an administrative agency shall be immediately forwarded, unopened to the citizens' aide by the institution where the writer of the letter is a resident. A letter from the citizens' aide to such a person shall be immediately delivered, unopened to the person.

[C73, 75, 77, 79, 81, §601G.14]

#### 601G.15 Reports critical of agency or officer.

Before announcing a conclusion or recommendation that criticizes an agency or any officer or employee, the citizens' aide shall consult with that agency officer or employee, and shall attach to every report sent or made under the provisions of this chapter a copy of any unedited comments made by or on behalf of the officer, employee, or agency.

[C73, 75, 77, 79, 81, §601G.15]

#### 601G.16 Recommendations to agency.

If, having considered a complaint and whatever material the citizens' aide deems pertinent, the citizens' aide finds substantiating facts that:

1. A matter should be further considered by the agency;
2. An administrative action should be modified or canceled;
3. A rule on which an administrative action is based should be altered;
4. Reasons should be given for an administrative action; or
5. Any other action should be taken by the agency, the citizens' aide shall state the recommendations to the agency. If the citizens' aide requests, the agency shall, within twenty working days notify the citizens' aide of any action taken on the recommendations or the reasons for not complying with them.

If the citizens' aide believes that an administrative action has occurred because of laws of which results are unfair or otherwise objectionable, the citizens' aide shall notify the general assembly concerning desirable statutory change.

[C73, 75, 77, 79, 81, §601G.16]

#### 601G.17 Publication of conclusions.

The citizens' aide may publish the conclusions, recommendations, and suggestions and transmit them to the governor, the general assembly or any of its committees. When publishing an opinion adverse to an administrative agency or official the citizens' aide shall, unless excused by the agency or official affected, include with the opinion any unedited reply made by the agency.

Any conclusions, recommendations, and suggestions so published may at the same time be made available to the news media or others who may be concerned.

[C73, 75, 77, 79, 81, §601G.17]

#### 601G.18 Report to general assembly.

The citizens' aide shall by April 1 of each year submit an economically designed and reproduced report to the general assembly and to the governor concerning the exercise of the citizens' aide functions during the preceding calendar year. In discussing matters with which the citizens' aide has been concerned, the citizens' aide shall not identify specific persons if to do so would cause needless hardship. If the annual report criticizes a named agency or official, it shall also include unedited replies made by the agency or official to the criticism, unless excused by the agency or official affected.

[C73, 75, 77, 79, 81, §601G.18; 82 Acts, ch 1026, §3]

#### 601G.19 Disciplinary action recommended.

If the citizens' aide believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, the citizens' aide shall refer the matter to the appropriate authorities.

[C73, 75, 77, 79, 81, §601G.19]

#### 601G.20 Immunities.

No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the citizens' aide or any member of the staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties except as may be necessary to enforce the provisions of this chapter.

[C73, 75, 77, 79, 81, §601G.20]

#### 601G.21 Witnesses.

A person required by the citizens' aide to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in district courts of this state. Officers and employees of an agency shall not be entitled to such fees and allowances. A person who, with or without service of compulsory process, provides oral or documentary information requested by the citizens' aide shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

[C73, 75, 77, 79, 81, §601G.21]

#### 601G.22 Penalties.

A person who willfully obstructs or hinders the lawful actions of the citizens' aide or the citizens' aide's staff, or who willfully misleads or attempts to mislead the citizens' aide in the citizens' aide's inquiries, shall be guilty of a simple misdemeanor.

[C73, 75, 77, 79, 81, §601G.22]

#### 601G.23 Citation.

This chapter shall be known and may be cited as the "Iowa Citizens' Aide Act".

[C73, 75, 77, 79, 81, §601G.23]

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES  
July 24, 1966

## UNITED STATES - ALASKA

"Kimberly Shinn v. Charles Dexter, et al."  
4FA -81-1736-Civ. (Alaska S.C.) Order June 8, 1982

## OMBUDSMAN OFFICES - CONFIDENTIALITY\*

The plaintiff sought to compel the testimony of a staff member of the Office of Ombudsman for Alaska at trial. The Office of Ombudsman had investigated a complaint which related to the plaintiff's present legal action. The Office of Ombudsman brought a Motion to Strike the staff member's name from the Witness List and a Protective Order barring the production of Witnesses or documents from the office of Ombudsman. The Ombudsman's motion was based primarily on the confidentiality provisions of the statute: AS 24.55.160(b) "The Ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before him except insofar as disclosures may be necessary to enable him to carry out his duties and to support his recommendations."; and on AS 24.58.260 "The Ombudsman and his staff may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be

necessary to enforce the provisions of this chapter." The Superior Court granted the Order striking the staff member's name from the Witness List and a Protective Order barring the production of Witnesses and/or documents from the Ombudsman Office was entered

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES  
July 24, 1986

UNITED STATES - IOWA

"Kelly v. Brewer"

RC Civil No. 73-177-2, order filed April 28, 1975

IOWA CITIZENS' AIDE\* U.S. FEDERAL COURT SUBPOENA\* OMBUDSMAN -  
CONFIDENTIALITY\*

The Iowa Citizens' Aide (Ombudsman) Mr. Thomas R. Mayer was served with a Federal Court subpoena. Mr. Mayer has tried to resist attempts to have his Ombudsman office used as a means of discovery for litigation. The only possible solution to the present dilemma facing State Ombudsmen in the United States would be Federal legislation granting immunity from Federal subpoena. The court ruling requiring a member of the Ombudsman's staff to testify in court was not appealed since an accord was worked out between the plaintiff's counsel and the Ombudsman's counsel enabling the testimony to be given "in camera" if the subpoena was withdrawn.

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UNITED STATES - IOWA

"Remmers et al. v. Brewer"

U.S. District Court, Southern District of Iowa, Judgment delivered  
January 4, 1978 36 pages

CITIZEN'S AIDE FOR CORRECTION\* U.S. FEDERAL COURT SUBPOENA\* OMBUDSMAN -  
CONFIDENTIALITY\*

A prison ombudsman was subpoenaed to testify in United States District Court regarding Remmers v. Brewer. Litigation was to determine the status of a prison religion. The state was trying to prove no such religion existed, and the prison ombudsman's testimony was to provide proof through information gathered in the course of his duties. The Citizen's Aide objected, based on Iowa Code which stated that information gathered by the prison ombudsman was confidential. He wished to protect the confidentiality, credibility, and physical safety of the prison ombudsman and other staff while in the prisons. On November 29, 1977 a magistrate granted the motion to quash, because no serious federal interest overrode his statutory immunity from subpoena. The state's interest in protecting the confidentiality of the Ombudsman outweighed the defendant's need for the prison ombudsman's testimony. An appeal to the District Court was dismissed because "the state interest in the efficient operation of its administrative agencies as embodied in the Citizen's Aide concept would clearly be adversely affected by compelling Cornell (the prison ombudsman) to testify."

UNITED STATES -ALASKA

"Patricia v State of Alaska (Department of Health and Social Services, et al.)"

1985 Annual Report of Alaska Ombudsman, App. F 6pages, 161-167

Ombudsman-Non-Compellibility\* Ombudsman Statute, A.S., §24.55.260\*

The Ombudsman for the State of Alaska sought to quash a subpoena which had been issued requiring an employee of his office to provide a deposition, and for a further order enforcing the privilege of the Alaska Statute and barring any production of witnesses from The Office of the Ombudsman in the action. An employee of The Office of the Ombudsman, in the course of his employment, had investigated a complaint by the plaintiff against the State of Alaska, Department of Health and Social Services. The complainant had alleged that the department's hiring, practises contravened the State Personnel Act and Personnel Rules. The employee had completed the investigation and drafted a report which was issued to Ms. Williams and signed by the Ombudsman, Frank Flavin. Ms. Williams ultimately filed an action against The Department of Health and sought through the subpoena, information obtained during the course of the investigation. The Court reviewed the provisions of -The Ombudsman Act- regarding the confidentiality of the Ombudsman and the protection afforded him and members of his staff from testifying in respect to matters coming to their attention during the course of their investigation and concluded that the privilege was such that it should be recognized and accordingly ordered that the subpoena be quashed and a protective order issued. In coming to this conclusion, the Court viewed the privilege necessary in order to protect the confidentiality of information obtained by the Ombudsman, encourage co-operation on an investigation, and keep the Ombudsman out of vexatious litigation. In addition, the Court held that the plaintiff would have to establish the special need for the information. Finally, it concluded that the adverse impact in compelling testimony would be substantial. For all the above reasons the Court recognized the privilege from testifying and quashed the subpoena.

UNITED STATES -HAWAII

"Jake Lapin v. William C. Plowden, Jr., and Joshua C. Agsalud Re: Civil No. 84-0143, order filed April 10, 1984"

U.S. Federal Court Subpoena\*

The State Ombudsman, Herman S. Doi, was served with a Federal Court subpoena which was issued at the request of a Plaintiff in a civil suit. A motion to quash the subpoena was filed to resist the attempt to have the Ombudsman testify and produce records in court pursuant to the subpoena. The motion was based on the premise that court may quash or modify the subpoena if it is unreasonable and oppressive. The memorandum in support of the motion cited section 96-9(b), Hawaii Revised Statutes (HRS), the Ombudsman is required to maintain secrecy in respect to all matters and identities of complainants and witnesses - section 96-17, HRS, the Ombudsman and his staff shall not testify in any court- and that the court should decide the issue by balancing State and Federal interest under Rule 501, Federal Rules of Evidence. Hawaii's interest, to protect the statutory privilege granted the Ombudsman, an officer of the legislature, prevailed and the subpoena was quashed by the magistrate hearing the motion. Plaintiff appealed the decision of the magistrate by filing a "Motion to Set Aside the Magistrate's Order Granting Motion to Quash Subpoena Duces Tecum", which motion was denied on the grounds of mootness because the court dismissed the case for Plaintiff's lack of standing.

VICKI M. YOUNG  
Editor of Court Decisions

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## ARBITRAL IMMUNITY

Arbitration has been an important dispute settlement aid to courts in the United States since the nineteenth century. Recognized as an effective adjudicatory process, it is only natural that arbitration and litigation be accorded some safeguards. One important safeguard, which is the topic of this *Letter*, is that of arbitral immunity.<sup>1</sup> The doctrine of arbitral immunity, which stems from the doctrine of judicial immunity, applies to both the arbitrators and the arbitral institutions that sponsor and administer the arbitration process.

1. This *Letter* updates and expands two earlier *Lawyers' Arbitration Letters* on immunity: No. 10, May 15, 1962, *Personal Liability of Arbitrators*, and Vol. 7, No. 1, March 1983, *Immunity and the Arbitration Process*.

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### Judicial Immunity

The doctrine of judicial immunity is based on public policy grounds to ensure the finality of court decisions as well as the independence of the judiciary. The origins of this doctrine can be traced as far back as the early seventeenth century to two English cases, *Floyd v. Barker*<sup>2</sup> and *The Marshalsea*.<sup>3</sup> Almost 250 years later, it was applied by an early American court in *Pratt v. Gardner*,<sup>4</sup> in which the court concluded that:

Where the subject matter and the person are within the jurisdiction of the court, the judge [is immune. While his judgment may be reversed or affirmed,] he himself can be liable only to an impeachment for corruption or other misconduct, if there be any.<sup>5</sup>

The United States Supreme Court, in *Randall v. Brigham*,<sup>6</sup> stated that:

it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial

2. 77 Eng. Rep. 1305 (1607).

3. 77 Eng. Rep. 1027 (1612).

4. 2 Cushing 68 (Mass. 1848).

5. *Id.* at 70-71.

6. 74 U.S. 285 (1868).

act done within their jurisdiction. . . . This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness . . . This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement.<sup>7</sup>

Four years later, in *Bradley v. Fisher*,<sup>8</sup> the Court reiterated its position that judges are not liable in civil actions for their judicial acts, "even when such acts are in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly."<sup>9</sup> More specifically, the Court held:

a general principle of the highest importance to the proper administration of justice [is] that a judicial officer, in exercising the authority vested in him, be free to act upon his own convictions, without apprehension of personal consequences to himself.<sup>10</sup>

#### Extension of Immunity

More recently, the Court reaffirmed the doctrine of judicial immunity in *Stump v. Sparkman*,<sup>11</sup> stating that a "judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."<sup>12</sup> Moreover, the Court,

taking a narrow view of the judicial act limitation on immunity, stated that an act is judicial when it is one normally performed by a judge and the parties have dealt with the judge in his judicial capacity.

Courts started to recognize over a century ago that arbitrators serve in a "quasi-judicial" capacity. In *Burchell v. Marsh*,<sup>13</sup> the Supreme Court stated that "arbitrators are judges chosen by the parties. . . ." Indeed, an "arbitrator acts in a quasi-judicial capacity,"<sup>14</sup> and while they are not "e nomine judges, [arbitrators] are judicial officers and bound by the same rules as govern those officers."<sup>15</sup> Because courts have extended quasi-judicial immunity to those performing quasi-judicial acts, quasi-judicial immunity has also been extended to arbitrators.

*Jones v. Brown*<sup>16</sup> was one of the earliest cases in which judicial immunity was extended to arbitrators. *Jones* involved an action by an arbitrator who sued to collect his fee. The losing party in the arbitration filed a cross-claim for damages, alleging conspiracy and fraud among the arbitrators. The court, noting that review by a court of the arbitration award does not divest the arbitrators of their judicial functions, and relying in part on the doctrine of immunity as enunciated in *Pratt*, dismissed the allegations.

Four years later, a Massachusetts court, in *Hoosack Tunnel, Dock and Elevator Co. v. O'Brien*,<sup>17</sup> followed suit. The *Hoosack Tunnel* court determined that a court-

7. *Id.*

8. 80 U.S. 335 (1872).

9. *Id.* at 351.

10. *Id.* at 347.

11. 435 U.S. 349 (1978).

12. *Id.* at 359.

13. 58 U.S. 344 (1855).

14. *Id.* at 349.

15. *American Eagle Fire Insurance Co. v. New Jersey Insurance Co.*, 240 N.Y. 398, 405, 148 N.E. 562 (1925).

16. *Babylon Milk and Cream Co., Inc. v. Horvitz*, 151 N.Y.S.2d 221, 224 (1956); *aff'd mem.*, 165 N.Y.S.2d 717 (2d Dept. 1957).

17. 54 Iowa 74, 6 N.E. 106 (1880).

18. 137 Mass. 424 (1884).

appointed arbitrator was not civilly liable for his actions while exercising his arbitral duties. It reasoned that an arbitrator is a quasi-judicial officer when exercising his judicial functions. Furthermore,

[t]here is as much reason in this case for protecting and insuring [the arbitrator] his impartiality, independence and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and . . . the same immunity extends to him.<sup>19</sup>

Early arbitral immunity cases involved commercial arbitrators. This changed in 1956 when a New York court, following the Massachusetts and Iowa courts, dismissed an action against an arbitrator and extended the doctrine of arbitral immunity to include labor arbitrators. *Babylon Milk and Cream Co., Inc. v. Horvitz*<sup>20</sup> involved an allegation of collusion in the making of the award. The unsuccessful party also sought to recover damages from the arbitrator, the union, its representatives, and its attorney. The court found that dismissal of the action against the arbitrator was warranted. It noted that:

It is well established that judicial officers cannot be subjected to civil liability by an unsuccessful litigant [and that there is] no reason to distinguish between a judge and an arbitrator. . . . The analogy is clear, and considering the favor in which arbitration is held by the courts in this state, the same rule of immunity should apply to arbitrators as applies to the judiciary, inasmuch as the same reasons of public policy are applicable. If arbitrators are

to be distinguished from jurists in this respect, a blow would be dealt to the cause of arbitration which is unwarranted.<sup>21</sup>

In accordance with its findings, the court held that the arbitrator could not be sued for alleged misconduct in the arbitration proceeding.<sup>22</sup>

Another immunity-related issue that has arisen in the context of labor arbitration is the arbitrator-umpire's status as a fiduciary in arbitration under the Employee Retirement Income Security Act of 1974 (ERISA)<sup>23</sup> and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).<sup>24</sup> Under these acts, individuals who exercise certain powers are fiduciaries. Whether an arbitrator may be held liable as a fiduciary under these acts was the issue addressed in *International Union, United Auto Workers v. Greyhound Lines, Inc.*<sup>25</sup>

The United Auto Workers (UAW) and Greyhound entered into a pension trust agreement that was to be jointly administered by three representatives from each side. The agreement provided that, in the event a board vote should result in a dead-

21. *Id.* at 224.

22. For additional cases involving the extension of arbitral immunity to labor arbitrators, see *Hill v. Aro*, 263 F. Supp. 342 (N.D. Ohio 1957) (arbitrator held immune from liability for actions performed in his arbitral capacity); *Cahn v. ILGWU*, 311 F.2d 113 (3d Cir. 1965) (action against arbitrator alleging conspiracy with union in violation of the Sherman Antitrust Act was dismissed); *Calzarano v. Liebowitz*, 550 F. Supp. 1389 (S.D.N.Y. 1982) (complaint against arbitrator for damages on the ground that the award violated the "cruel and unusual punishment" proscription of the Eighth Amendment to the U.S. Constitution was dismissed).

23. 29 U.S.C. § 1001 *et seq.*

24. Pub. L. No. 96-364, 94 Stat. 1208 (1980).

25. 701 F.2d 1181 (6th Cir. 1983).

19. *Id.* at 426.

20. *Supra* note 16.

lock, an arbitrator would be selected to resolve the dispute. A dispute arose over proposed benefit increases and the matter was submitted to arbitration. The arbitrator found in favor of the UAW and issued an opinion and award implementing their proposal. A dispute arose over whether the bonding requirement for fiduciaries under ERISA was complied with. The court held that the requirement was inapplicable because the arbitrator was not a fiduciary and enforced the award. Greyhound appealed.

The appellate court affirmed. It analyzed the policy of arbitral immunity and concluded that the arbitrator was entitled to immunity because he had no interest in the outcome of the proposed benefit plan and that, in breaking the deadlock at issue, his purpose was functionally comparable to that of a judge.<sup>26</sup> The court also found that Congress had not intended to weaken the firmly established principle of arbitral immunity when it enacted ERISA. Specifically,

[o]ur construction of the principle of arbitral immunity leads us to conclude that ERISA was not intended to abrogate this common law immunity. . . .

[W]e do not believe that ERISA was intended to abolish arbitral immunity in the absence of Congress having specifically so provided such an abrogation in the legislative record. . . .

[Moreover, although the arbitrator] performed functions that arguably come within the definition of a fiduciary, we conclude that he would be entitled to immunity from liability for damages, in any event, for those acts committed while performing in his official capacity as an arbitrator.<sup>27</sup>

26. See discussion on *Butz v. Economou*, *infra*, for more information on the "functional comparability" standard.  
27. *Supra* note 25, at 1187.

## When Given

A question that frequently arises is under what circumstances it is appropriate to accord an individual the protections of arbitral immunity. The standard used for determining when the appropriate circumstances exist is dependent on the "functional comparability" of an individual's role to that of a judge. This standard was addressed in the Supreme Court decision of *Butz v. Economou*.<sup>28</sup>

*Butz* involved the issue of personal immunity of federal officials in the Executive Branch from claims arising from their violations of citizens' constitutional rights. The Court noted that judges have absolute immunity "not because of their particular location within the Government but because of the special nature of their responsibilities."<sup>29</sup> Consequently, immunity is granted to individuals when it can be shown that "the functional comparability of their judgments to those of . . . judge[s]" exists.<sup>30</sup> Thus, under *Butz*, the nature of one's responsibilities is the determining factor of when arbitral immunity is accorded, not the professional source of the individual making the decisions.

Even with the "functional comparability" standard in mind, decisions to grant or deny immunity are still decided on a case-by-case basis. However, the effect of *Butz* is really a restatement by the Supreme Court of the criteria used by the earlier courts to determine whether, and when, the doctrine of arbitral immunity should be extended. This is particularly evident in cases involving individuals who are sometimes designated as "quasi-arbitrators."

For example, in *Lundgren v. Freeman*,<sup>31</sup> immunity was extended to architects be-

28. 438 U.S. 478 (1978).  
29. *Id.* at 511.  
30. *Id.* at 512.  
31. 307 F.2d 104 (9th Cir. 1962).

cause they were acting as quasi-arbitrators. James Lundgren entered into a series of written contracts with a school district to construct a school, shop, swimming pool and bathhouse. Almost two years later, a month after Lundgren had notified the architectural firm of Freeman, Hayslip and Tuft that the school and shop were about ready for final acceptance, the school district notified Lundgren that it was terminating Lundgren's employment because of total breach. This was done on the advice of the architects. Lundgren sued the school district, and his claim was later submitted to arbitration. He also sued the architects, but that claim was never submitted to arbitration. Instead, the court granted the architects' motion for summary judgment, finding that the architects were acting as quasi-arbitrators and were immune from suit because they were expressly authorized by Lundgren to interfere with the contracts. Lundgren appealed.

The appellate court found that the contracts between the school district and Lundgren provided for the architects' duties as both agents for the school district and quasi-arbitrators. The court stated that, as agents for the school district, the architects were not liable for their decisions because the appropriate remedy is an action against the school district, which Lundgren had elected to file. As for their role as quasi-arbitrators, the court concluded that immunity was warranted because:

[i]f their decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide. It is for this reason that architects, acting as quasi-arbitrators, have been held immune from suit. . . . An architect acts as a "quasi-arbiter" within this rule when, using the contract as a guideline, he resolves dis-

putes between owner and contractor.<sup>32</sup>

In *Wasyf, Inc. v. First Boston Corp.*,<sup>33</sup> an appraiser, who was asked to resolve an asset evaluation of general and limited partnership interests in connection with an option to purchase those interests, was held entitled to immunity. Wasyf and Edward Smolarski entered into option agreements with John Moller regarding the option to purchase Wasyf's and Smolarski's general and limited partnership interests in USA Petroleum Company. The option agreements provided for the manner in which the fair market value of the assets would be determined. Specifically, three independent appraisers would establish the value if the parties could not agree, with the optionor and the optionee each choosing one appraiser and the third chosen by the other two appraisers.

Moller exercised his option, but appraisers had to be selected because the parties could not agree upon a price. First Boston Corporation was chosen as the third appraiser, and resolved those asset valuations on which there was no agreement. Wasyf and Smolarski subsequently filed suit against First Boston, alleging breach of contract, gross negligence, and willful misconduct in First Boston's preparation of an appraisal report. The court granted First Boston's motion for summary judgment, holding that it was entitled to arbitral immunity but denied First Boston's motion for sanctions. Both parties appealed.

The appellate court noted at the outset that the contracts at issue involve commerce and that the question of arbitrability is controlled by federal law—namely, the Federal Arbitration Act. It stated that the Act establishes that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The court

32. *Id.* at 117.

33. 513 F.2d 1579 (9th Cir. 1975).

stated further that: (1) the Act does not define "arbitration"; (2) state law is preempted only to the extent necessary to protect the aims of the Act; and (3) California's arbitration statute which governs because of the parties' choice of law clause, defines "agreement" in the context of agreements to arbitrate. In Cal. Civ. Proc. Code § 1280(a), "agreement" includes "agreements providing for valuations, [and] appraisals."<sup>34</sup> Because the definition did not conflict with the Act's purpose, and in fact seemed to promote the federal policy favoring arbitration agreements, the court held that the option agreements "called for 'arbitration.'"<sup>35</sup>

As for the immunity issue, the court noted the

functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners. . . . Because federal policy encourages arbitration and arbitrators are essential in furthering that policy, it is appropriate that immunity be extended to arbitrators for acts within the scope of their duties and within their jurisdiction. . . . Since the contracts in question provided a means of "arbitration," [and because] First Boston acted within the scope of its duties and [there was no challenge to] First Boston's authority to have resolved the disputed valuations,<sup>36</sup>

the court affirmed the lower court's holding that First Boston is entitled to arbitral immunity.

The granting of immunity to third persons connected to the judicial process was recently extended to a psychologist acting

as a mediator in *Howard v. Drapkin*.<sup>37</sup> Vickie Howard initiated an action involving a family law matter in which she sought to have her ex-husband's custody and visitation rights terminated. Prior to the court hearing, she and her ex-husband entered into a stipulation that provided that Robin Drapkin, as an independent psychologist, would evaluate Howard and her family and render non-binding findings and recommendations. The stipulation was later signed by the court and converted into an order. Howard subsequently filed an action against Drapkin, alleging that Drapkin acted improperly during the evaluation, failed to include certain information in her report, and failed to disclose her prior professional relationship with Howard's ex-husband, as well as her personal relationship with the wife of a partner in the law firm representing him in the custody proceedings.

The court was asked

to go beyond California's apparently heretofore limited application of the "persons connected with the judicial processes" analysis and apply common law quasi-judicial immunity like the federal courts have applied it—to people connected with the judicial process who are not "public officials," arbitrators or referees, such as (1) mediators, guardians ad litem, therapists, receivers, bankruptcy trustees and other persons appointed by the courts for their expertise and (2) persons whose work product comes into the judicial process to be used by the court even though they were not court-appointed, such as social workers and probation department employees . . . [and to extend immunity] even further to a third category of people

34. *Id.* at 1582; quoting Cal. Civ. Proc. Code § 1280(a)(West 1982).

35. *Id.*

36. *Id.*

37. 271 Cal. Rptr. 893 (Cal. App. 2d Dist. 1990).

—those persons involved in alternative methods of dispute resolution, such as mediators and “neutral fact-finders,” who function apart from the courts, as did [Drapkin] in the instant case.”

The court found persuasive support in the federal case law regarding such an extension of immunity. In deciding whether an extension of immunity was appropriate in this case, it reviewed Drapkin’s role in the child custody dispute. The court noted that a “psychologist who is mediating a child custody dispute, whether by court appointment or not, is not an advocate for either parent, even if paid by them.”<sup>38</sup> It further noted that the job of mediators, conciliators, and evaluators was much like that of judges because it involves impartiality and neutrality. Thus, the court concluded that they are entitled “to the same immunity given others who function as neutrals in an attempt to resolve disputes.”<sup>39</sup> It reasoned that:

those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions, (2) making recommendations to the court, or (3) privately attempting to settle disputes, such as [Drapkin] here.<sup>40</sup>

Based on its finding, the court held that:

absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the mak-

ing of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation, or other similar resolution of pending disputes.<sup>41</sup>

Because Drapkin was “clearly engaged in [the] latter activity,”<sup>42</sup> the court ruled that she was entitled to the protection of immunity.

It would appear from the case law that any third party asked to render a determination on a disputed issue between two other parties may be entitled to arbitral immunity. Not everyone, however, is conferred immunity. Much depends upon the facts in each case and the nature of the responsibilities of the third party. For example, in *Gammel v. Ernst & Ernst*,<sup>43</sup> immunity was not conferred upon the auditors in an action by a stockholder for damages resulting from the auditors’ alleged negligence and fraud in connection with the examination and audit of a corporation’s books.

The court stated that a person selected to make a binding judicial determination performs the functions of either an arbitrator or quasi-arbitrator and, therefore, is clothed in immunity.

It reviewed a number of decisions of English courts wherein the courts “applied its protective features to a class designated as ‘quasi-arbitrators.’”<sup>44</sup> The court found that, in those cases

immunity was held dependent upon some contractual provision which called for the exercise of independent judgment or discretion by a person acting as an arbitrator and which

38. *Id.* at 899.

39. *Id.* at 902.

40. *Id.*

41. *Id.* at 902-903.

42. *Id.* at 903.

43. *Id.*

44. 245 Minn. 249, 72 N.W.2d 364 (1955).

45. 72 N.W.2d at 368.

made his determinations binding upon the parties selecting him. But in the absence of such contractual provisions, or where the agreement does not call for the exercise of judicial authority, ordinarily the person selected to perform skilled or professional services is not immune from charges of negligence . . ."

After reviewing Ernst & Ernst's contract of employment, the court determined that the contract did not clothe "them with judicial immunity as quasi-arbitrators."<sup>46</sup> The court found that the contract provided merely that the auditors were to make an examination and audit of the corporation's books. Because they did not acquire the status of arbitrators or quasi-arbitrators, they could not claim immunity from suit on that basis.

More recently, in *Coopers & Lybrand v. Superior Court*,<sup>47</sup> auditors were denied arbitral immunity because it was unclear whether the parties' agreement for a binding audit reflected a clear intent to arbitrate.

The issue before the court was whether an agreement for a binding audit was included within the definition of an agreement to arbitrate under the state statutory scheme so as to confer arbitral immunity upon the auditors. After reviewing the provisions of California's current arbitration statute, as well as its legislative history, the court concluded that agreements to arbitrate include "independent examinations by way of valuations, appraisals and similar proceedings, such as audits."<sup>48</sup> As for the requirement that a controversy exist, the court noted that "controversy" is

broadly defined as any question arising between parties to an agreement. From this, the court concluded that the requirement is met when "parties contractually have agreed to resort to a third party to resolve a particular issue."<sup>49</sup> It also found that "[b]ecause the parties to an arbitration may dispense with a formal hearing and the taking of evidence, the absence of such elements does not impair the status of a proceeding as an arbitration."<sup>50</sup>

As for the extension of immunity, the court reviewed the legislative purpose for the enactment of a provision in the state arbitration statute that extended to arbitrators the same broad immunity enjoyed by judges. It explained that:

the statute had the further effect of cloaking arbitrators in independent examinations with the immunity of other arbitrators . . . [such that] full arbitral immunity [is conferred] upon arbitrators in appraisals, valuations and similar proceedings, such as audits, irrespective of the arbitrator's particular role in a given situation. . . . Thus, arbitral immunity attaches not because of the professional credentials of the arbitrator, nor because of the ethical canons of the profession to which the arbitrator may belong. Rather, arbitral immunity attaches simply by virtue of the fact that a proceeding is deemed to be an arbitration.<sup>51</sup>

In this case, however, the court found that the parties' agreement was ambiguous with respect to whether it was an agreement "for a formal arbitration within the ambit of the [California Civil Procedure] Code, or for

46. *Id.*

47. *Id.*

48. 212 Cal. App. 3d 524, 260 Cal. Rptr. 713 (1989).

49. 260 Cal. Rptr. at 719.

50. *Id.*; see Cal. Civ. Proc. Code § 1280(c).

51. *Id.*

52. *Id.* at 720-721.