

# MEMORANDUM

State of Alaska

#26,6

TO: ALL DIRECTORS  
DOT&PF  
Fairbanks, AK 99701

DATE: April 10, 1980

FILE NO:

TELEPHONE NO:

FROM: William R. Satterberg, Jr.  
Assistant Attorney General  
604 Barnette, Room 233  
Fairbanks, AK 99701

SUBJECT: Attorney/Client Communications

This memorandum is to clarify our office's position regarding attorney/client communications. Normally, it is our position that all files within State agencies are public record, subject to certain privileges as set forth by statute and common law. One of these privileges is the attorney/client privilege, which attaches in cases of active litigation or immediately pending litigation. The purpose of the privilege is to allow the attorney and the client to communicate openly with respect to lawsuits to establish the client's position, gather evidence, and discuss settlement factors. Due to the size of the State of Alaska government, much of the communications are conducted by memorandum and letter form to the client agency, as opposed to telephone conversations. Similarly, it is my understanding that, in some cases, telephone memorandums by agencies are kept following telephone conversations. In cases of active litigation or pending litigation, it is crucial that an attorney be present or have authorized the review of files by the opposing party or witnesses for the opposing party when such files are made available for review. This is to determine the nature of any communications contained within the files as well as to be aware of any materials being furnished the opposing side pending the lawsuit in order to keep track of discovery which has been given and made available should arguments develop along those lines.

Generally, there is no cause for alarm. Nevertheless, it can be somewhat embarrassing to tell an individual that they must return the file after it has already been given to them because the attorney must be present. Accordingly, if there is any question in anyone's mind regarding whether or not a case is involved in active litigation or pending active litigation with the State, I would request that they contact this office for our position on the subject.

With regard to confidential communications between the attorney and client, in addition, it has come to my attention that, although the Department of Law may send out only one memorandum to one particular agency representative

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on a subject which is involved in litigation, this memorandum is later photocopied in some cases and distributed throughout the State to numerous reading files. This is not wise, if one wishes to preserve the attorney/client privilege. I would suggest that such distribution be kept to an absolute minimum and that, furthermore, if necessary, a special file be established for confidential attorney/client communications outside of the regular reading files and outside of any case files or project files. This file should be kept in a secure area.

It should also be noted that, in corresponding with this office regarding active pending or active litigation, it is also advisable to put a banner in capitals across the top of the memorandum "CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION". This will alert the judge or any other parties to the action that a privilege is being claimed. This privilege, however, should not be abused and used only when the matters are indeed intended to be confidential communications between attorney and client.

This memorandum is intended in no way whatsoever to criticize any agency activities to date. The openness of the agency with the public has been quite pleasing and has averted many problems and accusations that the State of Alaska somehow functions in secret. Nevertheless, with respect to pending active or active litigation, it is crucial that the attorneys and agencies representing the State be insured that their communications with the various representatives of the State be held in confidence so that open discussions regarding case strategy, settlement, and other evidentiary factors be freely allowed. It is also important, as mentioned, that an attorney be present anytime that a file which may be connected with active pending or active litigation wish to be reviewed by a witness or party. This is not to say that the file will not be reviewed, but only to state that this office must be aware prior to the time of review of that which is being reviewed in the nature of any materials photocopied or taken from the files.

Incidentally, should you have any questions regarding this particular memorandum, although this memorandum is in the form of an attorney/client communication itself, please circulate the memorandum freely within the department. Should you have any questions on this matter, please do not hesitate to contact our office.

WRS:bsb