THE ROLE OF NON-LAWYERS ON ADMINISTRATIVE TRIBUNALS: WHAT LAY MEMBERS THINK ABOUT LAW, LAWYERS, AND THEIR OWN PARTICIPATION IN ALASKA'S MIXED ADMINISTRATIVE TRIBUNALS

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ABSTRACT

Lay participation is a conventional, but little examined, aspect of Alaska's administrative law tribunals. The legal community is sometimes suspicious of lay members' competence, leading to a trust gap between legal professionals and their lay counterparts. With the goal of bridging this divide and shedding light on participants' perspective of serving on tribunals, this Article reviews the first survey study of Alaska lay members on state adjudicatory panels. Among other things, the survey focused on tribunals' gender and ethnic diversity, members' understanding of fairness and impartiality duties, their training, and the relationship lay participants had with administrative law judges. As detailed within this Article, the survey's results offer important findings that can help the legal community understand its interaction with lay participants. The Article also considers starting points for improving involvement on tribunals by lay members, who altogether appear to take their roles seriously.

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INTRODUCTION

Administrative tribunals, which often consist primarily of lay (non-lawyer) members, exercise many powers once held exclusively by courts.[1] This makes many lawyers uneasy. Historically, lawyers have been suspicious of lay engagement in legal decision-making by juries[2] and by lay judges.[3] Even today, the argument that non-lawyers are constitutionally unfit to interpret law continues to be made in Alaska

1. *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 770 (1986) (explaining that Crowell v. Benson, 285 U.S. 22 (1932), "allowed non-article III tribunals substantial powers, even in the formerly sacrosanct domain of private-rights cases"). Since *Crowell*, although issues have arisen over whether particular types of rights are subject to administrative adjudication, the fundamental acceptance of agencies engaging in judicial functions has survived. *See id.* at 859 ("[W]hen Congress creates an interest, short of a full-fledged, vested, old-style property right, it has great power to use potent non-article III tribunals for adjudication."). *See also, e.g.*, Alaska Pub. Interest Research Grp. v. State, 167 P.3d 27, 40 (Alaska 2007) ("The constitution grants the legislature and the executive broad power to organize administrative bodies. We have also recognized that the legislature has constitutional power to allocate executive department functions and duties among the different administrative bodies within state government.").

2. *See* Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases – A Study in Judicial Administration*, 43 YALE L.J. 867, 884 (1934) ("Whatever the political, psychological or jurisprudential values of the jury as an institution may be, its use in the civil litigation covered by this study is certainly not impressive. The picture seems to be that of an expensive, cumbersome and comparatively inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules."). *See also* Sparf v. United States, 156 U.S. 51, 101 (1895) ("Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves."); United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14545) (Story, J.) ("Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.").

3. *See* Chester H. Smith, *The Justice of the Peace System in the United States,* 15 CAL. L. REV. 118, 123 (1927) (arguing that even if lay justices of the peace were men of intelligence and moral character, "many would hesitate to submit the interpretation of the law and statutes to such a court"). For more recent criticism, see, for example, Benjamin Will Bates, *Exploring Justice Courts in Utah and Three Problems Inherent in the Justice Court System,* 2001 UTAH L. REV. 731, 773 (2001) (suggesting that there is greater potential for ethical abuse and ex parte contacts when judges are not lawyers); Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases,* 29 N.M. L. REV. 119, 130–31 (1999) (arguing that having non-lawyers adjudicate civil matters governed by substantive and procedural legal rules is anachronistic, particularly in urban areas).

courts.[4] There is no doubt that this distrust flows both ways. Lawyers are accustomed to facing hostility toward their profession,[5] but recent political discourse based on distrust of the legal profession illustrates how far the gap between lay citizens and lawyers has grown.[6]

As decision-making bodies, jurors have been attacked as incompetent, illogical, unable to follow the law, too independent, and inclined to be swayed by passion or prejudice.[7] However, over forty years of research demonstrates that United States juries generally function well as group decision-makers.[8] A jury's transience and independence—meeting once as a body in a single case and deciding facts without the judge present—is the foundation for claims that the jury strengthens democracy.[9] Jury service is recognized as a right that

4. *See, e.g.*, *Alaska Pub. Interest Research Grp.*, 167 P.3d at 41 (explaining that appellants argued that the Workers' Compensation Appeals Commission, composed of a majority of non-lawyers, could not constitutionally make decisions that had the force of legal precedent).

5. *See* Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass,* 75 CAL. L. REV. 379, 389 (1987) (arguing that the special hatred of lawyers in American popular culture derives from lawyers "embod[ying] the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion").

6. Distrust of the legal profession was a recurrent theme as two constitutional amendments directed toward lawyers' role in government proceeded through the 28th Alaska Legislature. Testimony presented by proponents of H.R.J. Res. 33, 28th Leg., 2d Sess. (Alaska 2014) (constitutional amendment to increase number of members on the judicial council, a mixed body of lawyers and non-lawyers responsible for screening and nominating judicial applicants) and H.R.J. Res. 18, 28th Leg., 2d Sess. (Alaska 2014) (constitutional amendment related to the attorney general office) illustrated this widening gap. The assumption underlying the distrust is that lawyers are the opponents of citizens, or the opponents of Alaskans, instead of being Alaska citizens themselves, who intermeddle between citizens rather than serve their interests.

7. *See, e.g.*, State v. Coon, 974 P.2d 386, 396–97 (Alaska 1999) ("[T]he *Frye* rule was intended to ensure the reliability of scientific evidence because: (1) lay jurors can be overly impressed by science; (2) lay jurors lack the capacity to evaluate scientific evidence critically; and (3) lay jurors are likely to give 'junk science' more weight than it deserves."). Here, the Alaska Supreme Court was quoting *State v. Carter*, 524 N.W.2d 763, 779 (Nebraska 1994).

8. For a concise response to the major criticisms of the civil jury based on empirical studies, see Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective,* 40 ARIZ. L. REV. 849, 898 (1998) ("Research findings bearing on the performance of civil juries yield little support for the extreme claims charging juries with poor and irresponsible performance. Trial judges agree with jury decisions most of the time and strongly support the jury system."). *See generally* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007) (providing a detailed synthesis of modern research on juries as effective decision-makers, and concluding with a verdict strongly in favor of the American jury).

9. *See* Richard O. Lempert, *The Internationalization of Lay Legal Decision-*

cannot be denied on the basis of race or sex.[10] Community participation is "critical to public confidence" in the fairness of courts.[11] Indeed, several recent studies of jurors demonstrate the positive impact that jury service has on subsequent civic engagement.[12]

Juries are not the only place that lawyers and lay citizens meet as legal decision-makers. The mixed administrative tribunal represents a singular arrangement where lawyer and lay citizen work together and share roles, instead of performing the strictly separate roles of lay jury and lawyer judge. Unlike juries, administrative tribunals are not transient bodies. Their members are appointed for years, rather than the duration of a single case. Further, tribunals generally are not meant to be representative of large communities,[13] like juries are. Rather, tribunal members are meant to represent a small community within a particular field,[14] and they are expected to learn the law of their tribunal and to develop its interpretation. Most importantly, tribunal members only have the power of independent deliberation when they are constituted as reviewing bodies. Most administrative tribunals are mixed; they share deliberation with a professional administrative law judge, who may be a voting member, an advisor, or a presenter of information.

The deliberative power of the tribunal is often shared with a professional administrative law judge (ALJ), who can be a voting member, an advisor, or a presenter of information. Professional, law-trained judges have "status, training, skill, and experience on their side," and therefore, in these mixed courts, they may disproportionately influence the tribunal's decision-making.[15] Thus, mixed tribunals are

Making: Jury Resurgence and Jury Research, 40 CORNELL INT'L L.J. 477, 481 (2007) ("Jury systems, once in place, support democratic forms of government, because they are uncongenial to authoritarian rule.").

10. Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579 (1935); Batson v. Kentucky, 476 U.S. 79 (1986); JEB v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

11. *Taylor v. Louisiana,* 419 U.S. 522, 530 (1975).

12. JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 174–75 tbl.9.1 (2010).

13. Exceptions are those statewide boards or commissions that require appointment based solely on geographic or population distribution, such as the Local Boundary Commission, ALASKA STAT. § 44.33.810 (2012).

14. *See, e.g.*, § 08.04.020 (requiring five members of the Board of Public Accountancy to be certified public accountants); § 08.62.010 (requiring two members of the Board of Marine Pilots to be licensed pilots and two to be managers of vessels); § 08.64.010 (requiring five members of the State Medical Board to be physicians "residing in as many separate geographical areas of the state as possible"); § 15.13.020 (requiring the Alaska Public Offices Commission to have two appointees from "each of the two political parties whose candidate for governor received the highest number of votes").

15. *See* Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and*

targets of two criticisms. First, lay tribunal members are viewed as irrational or prejudiced because the tribunals are intransient; and second, because lay members are not trained in the law, they might be dominated by more "competent" law-trained judges. Lay members in tribunals are not without their defenders, but the defense is often based on a latent contribution to the tribunal—by representing a "lay" view, they make the "professionals" do a better job of decision-making.[16] Even among defenders, however, the abilities of lay members are challenged.[17]

This Article does not review the scope of decisional authority or examine the decisions of any particular tribunal;[18] rather, it focuses on the implications of some of the findings of the author's anonymous survey research. Instead of speculating about the thinking of lay members, or examining theories of social behavior in hypothetical deliberations, the author asked Alaska's lay tribunal members for *their* thoughts. How representative of their community are they? Does the statutory mandate that a professional judge must preside over administrative hearings mean that the lay members are subservient to the professional in deliberation? Do tribunal lay members see themselves as equal or subordinate to the professional judge? What do they think about their legal role and the law? What happens when they perceive that we, members of the legal community, treat them without respect? Without diminishing the importance of lay expertise, what do lay members believe is needed to improve their participation in administrative justice?

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the Crisis of Criminal Procedure, 49 STANFORD L. REV. 547, 587 (1997) (hypothesizing on the persuasive power of professional judges mixed with lay judges in the American court system).

16. *See, e.g.*, MARK DAVIES, MEDICAL SELF REGULATION: CRISIS AND CHANGE 270 (2007) ("Lay members help us look at matters from another perspective, and make us aware of the needs and concerns of the public. . . .").

17. *See* Williams v. Kleaveland, 534 F. Supp. 914, 918–19 (W.D. Mich. 1981) ("[W]hile in some instances, lay members of the public serve on executive boards of hospitals, the determination of the medical competence of a physician is peculiarly within the domain of the medical profession.").

18. Practice before administrative agencies, agencies' authority to make particular legal decisions, and the political considerations in "rule-making" or regulation have been thoroughly studied and discussed elsewhere. *See generally* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997); Richard A. Epstein & Paula M. Stannard, *Constitutional Ratemaking and the Affordable Care Act: A New Source of Vulnerability*, 38 AM. J.L. & MED. 243 (2012); Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425 (2011); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002); Anthony Vitarelli, Note, *Happiness Metrics in Federal Rulemaking*, 27 YALE J. ON REG. 115 (2010).

The first part of this Article briefly introduces the reader to mixed tribunals and potential sources of internal conflict. The next part describes the survey and its respondents, including the geographic diversity of responses. Part Three of this Article describes in detail the survey's findings. Specifically, it addresses the distribution of women and minority members and perceptions of diversity among members and perceptions of tribunal fairness, findings on members' understandings of their duties of impartiality and fairness, members' desire for training in decision-making and respect for their role, barriers to active participation, and the members' understanding of their role as adjudicators and their relationship to the professional judge. In the conclusion, the Author presents suggestions for conduct and regulatory changes. An appendix of charts shows the numbers and percentages of responses to certain questions on the survey.

I. BACKGROUND

A. Alaska's Mixed Administrative Tribunals

The creation of administrative tribunals in the United States was part of a move toward "expert" decision-making during the Progressive Era.[19] Soon after, however, the impact of the Great Depression resulted in "a host of zealous lawyers and academics descend[ing] upon the nation's capitol with a strong belief in the inevitability and viability of centralized economic planning" in support of new regulatory measures.[20] Members of government boards and commissions were intended to serve as non-lawyer experts, regulating a particular industry and enforcing rules in small but complex fields, free from partisan political considerations.[21] Now well-established as an arm of modern government, quasi-judicial administrative agencies are even recognized in the Alaska Constitution.[22]

In Alaska, as in rest of the United States, mixed administrative

19. Jerry Mitchell, *Representation on Government Boards and Commissions*, 57 PUB. ADMIN. REV. 160, 160–66 (1997).

20. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 30 (2d ed. 1985).

21. *Id.* at 31 ("[D]efenders of the administrative process sought to justify the agencies' combination of functions and to minimize procedural formalities and judicial review, contending that the salvation of the economy required administrative controls involving expert knowledge, mixed power, and discretionary management analogous to that exercised by business leaders.").

22. *See* ALASKA CONST. art. III, § 22 (providing that "[r]egulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department").

tribunals at the state and local levels allow citizens without legal training to bring their expertise and community experience to bear on decisions affecting a wide variety of legal rights and claims.[23] In these tribunals, the lay members of government boards and commissions may be joined by an ALJ in the decision-making process. When administrative tribunals include a professional judge in deciding legal disputes or rights, they are mixed administrative tribunals.[24] Unlike administrative adjudication that is delegated to a single ALJ and reviewed by a single executive, mixed administrative tribunals provide an opportunity for direct citizen participation in justice, which has diminished in civil disputes as cases are removed from the jury's reach by transfer to administrative proceedings, arbitration, and court-sponsored mediation.[25]

Unlike the jury, whose members are drawn by lot from the community, membership in tribunals is based on a theory of status representation.[26] Status representation states that when people are chosen because they are members of a group, they will act as members of the group would act. Status representatives include members appointed from specific geographic areas, minority populations, commercial industries, or professions. These appointments are often

23. Most government boards and commissions perform a number of different functions. They manage public enterprises, such as schools; they regulate industries and professions in the public good, such as utilities and medical professions; they inform and advise on public policy, such as land development and conservation; and, as "quasi-judicial bodies" they decide legal disputes and rights within the scope of their statutory authority. GALE GROUP, 8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 199–200 (2d ed. 2005). Regardless of other functions, when they decide legal disputes between parties, or the legal rights of parties, they are "adjudicatory administrative tribunals" or simply "administrative tribunals." *Id.* at 199.

24. The degree of formal involvement between the professional judge and the tribunal's lay citizen members varies. Usually the professional judge presides over a hearing with the tribunal's citizen members present or conducts a hearing alone on behalf of the tribunal. In deliberation, the professional judge may: participate in deliberation and cast an equal vote on the decision; be present in deliberation only to advise on points of law without voting on the decision; summarize the evidence and be present in deliberation to advise, without voting on the decision; or summarize the evidence, present a draft decision, be present in deliberation to advise, but not vote on the final decision. Kristin S. Knudsen Latta, Citizen Adjudicators Lay Members of Alaska's Mixed Administrative Tribunals as Lay Judges in Mixed Courts: A Study of Participation, Attitude and Recruitment 4 (Dec. 2012) (Masters Thesis, University of Nevada), *available at* http://gradworks.umi.com/15/22/1522070.html.

25. *See* VIDMAR & HANS, *supra* note 8, at 63 (noting trend away from jury trials with the growth of administrative adjudication and alternative dispute resolution).

26. *See* Mitchell, *supra* note 19, at 162.

termed "designated seats."[27] Status representation by "public" or "consumer" members generally does not affect the way decisions are made.[28] Instead, public and consumer appointments represent a symbolic legitimation of the boards' and commissions' decisions through public representation.[29] Thus, tribunals may derive some degree of legitimacy through being seen as representative of the larger community, even when they are not selected randomly.

B. The Conflicts Built Into Administrative Tribunals

As a result of financial and resource pressures, mixed administrative tribunals tend to be a neglected part of government. Executive agencies find it time-consuming and expensive to gather and train unpaid part-time members for hearings. Moreover, confirmation authorities, especially legislatures, lack adequate review time in a busy legislative session. These problems combine to make establishing mixed administrative tribunals especially difficult.

These problems compound to make the establishment of mixed administrative tribunals especially difficult. Even after established, conflicts persist between administrative agencies, lay members of administrative tribunals that monitor, curb, or enforce agency action, and the judiciary that reviews agency action and tribunal decisions. Judicial review of agency action operates as a brake on administrative discretion, but from the agency viewpoint, judicial mandates may hinder the agency's operations and the tribunal's efficiency by creating delay and requiring cumbersome procedural requirements. Conflicts can also arise because of how the tribunal functions. First, lay citizen participation may encourage negotiated deals and settlements rather than independent consideration of disputes, which undermines the rule of law.[30] And second, tribunal members can compete for power within

27. Knudsen Latta, *supra* note 24, at 2.

28. Research examining decision patterns before and after inclusion of "public" or "consumer" representative members showed little change associated with the presence of these members. Saundra. K. Schneider, *Influences on State Professional Licensure Policy*, 47 PUB. ADMIN. REV. 479, 483 (1987). However, some studies suggest that consumer representation does impact licensing board *rule-making* by reducing barriers to competition. *See* Elizabeth Graddy & Michael B. Nichol, *Public Members on Occupational Licensing Boards: Effects on Legislative Regulatory Reforms,* 55 S. ECON. J. 610, 623 (1989).

29. *See* Stefan Machura, *Silent Lay Judges – Why Their Influence in the Community Falls Short of Expectations*, 86 CHI.-KENT L. REV. 769, 770 (2011) (explaining that "lay participation is seen as a source of legitimacy for the courts and the legal system").

30. Sidney A. Shapiro, *Symposium on the 50th Anniversary of the APA: A Delegation Theory of the APA*, 10 ADMIN. L. J. 89, 92–93 (1996).

the tribunal.

Most administrative tribunals still rely on member expertise and community experience to lend accuracy to administrative tribunal decision-making and to represent regulated interests.[31] However, this expertise is less important after *Goldberg v. Kelly*[32] and *Mathews v. Eldridge*.[33] These cases raised the ALJ to a dominant role on administrative tribunals by elevating the importance of legal procedure over expertise.

C. Lack of Recorded Opinions

It would be easier to know what lay members think about law and their role in the legal system if they all recorded written opinions like judges do. Unfortunately, lay members leave few traces of their ideas concerning their proper role on the tribunal or their relationship with professional ALJs. Most members of administrative tribunals make no individual record as decision-makers; usually, the writing of the tribunal opinion is delegated to the professional judge or a staff lawyer. As a result, the voice of the tribunal is the ALJ.

A recurrent argument by some judges posits that the subject matter expertise offered by citizen members constitutes insider knowledge that can further diminish the role of lay member expertise. "Insider knowledge may strengthen agency performance[,] but it threatens fundamental fairness. If relevant to a decision, this knowledge . . . must be tested by an independent judge, not by an insider."[34] Lay expertise, these judges claim, is not required to analyze facts and weigh them appropriately.[35] However, increased involvement by well-trained, professional judges, as opposed to potentially biased insiders "produces a different emphasis . . . . The quality of the work, rather than the outcome, becomes more important."[36]

Without the mantles of expertise, community experience, or community representation, lay members are vulnerable to attacks as unnecessary holdovers of a bygone era, unqualified to make modern legal decisions. Professional judges and attorneys will tend to

31. Teachers and superintendents are represented on teacher licensing boards; physicians are represented on medical boards; and regional representatives from different areas of a state are required by other boards.

32. 397 U.S. 254 (1970).

33. 424 U.S. 319 (1976).

34. John Hardwicke & Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 NAT'L ASS'N ADMIN. L. JUDGES J. 231, 238 (2004).

35. *Id*. at 237–38.

36. *Id*. at 241.

discourage active lay member participation if they see the lay members' contributions as a threat to fairness, or believe the lay members lack confidence. If lay members do not participate actively, their presence on the administrative tribunal is seen as less valuable. If lay members perceive that their contribution is devalued, they themselves may lose faith in the fairness and legitimacy of the tribunal. Alternatively, they may consider their presence alone to be an adequate contribution to the tribunal by promoting the democratic legitimacy of the tribunal's decisions. In response to the rising status of the professional ALJ, lay members may have assumed the role of impartial jurors. This state of affairs devalues lay members' contributions to legal decision-making in an administrative context. Therefore, members of the legal community need to know whether lay citizen members trust the lawyer-judges who are advising them or believe that their views are being discounted by the professional judge. Legal practitioners need to better understand their impact on how lay members view the law and on how they see their duties to the tribunal.

D. The Research and Survey

To answer these and other questions, the Author undertook the first survey study of lay members of Alaska's adjudicatory tribunals.[37] On a practical level, the study was feasible. The population of Alaska lay members is small, well within the capacity of a single researcher to contact. The Governor's Office gave permission to contact current

37. The study was inspired by the disparity between the structurally similar United States administrative tribunals and the mixed courts of modern Europe. In theory, lay members of European mixed courts serve similar purposes to the jury in American courts. Valerie P. Hans, *Jury Systems Around the World*, 4 LAW & SOC. SCI. REV. 275, 278 (2008). On European mixed courts, lay members restrain the arbitrary exercise of state power by the professional members of the court, legitimate court decisions by representing the local community, and widen the outlook of professional judges by informing them of community values. DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM xiii (1979); JOHN P. RICHERT, WEST GERMAN LAY JUDGES: RECRUITMENT AND REPRESENTATIVENESS 9–10 (1983); Sonja Kutnjak Ivković, *An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals*, 25 L. & POL'Y 93, 96 (2003); Stephan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 INT'L REV. PENAL L. 451, 465–66 (2001). Lay participation can lend legitimacy to tribunals through its independence from royal power or the powerful state. *See* Ivković, *supra*, at 95. The responsibilities of European lay judges have been desribed as falling into two categorical functions—"a control function (influencing the courts) and a legitimation function (contributing to the acceptance of court decisions and to the trust of the public in the legal system)." Machura, *supra*, at 452 n.4 (emphases omitted).

members of administrative tribunals throughout the state. The Office of Administrative Hearings and other boards and commissions were supportive of the study. Resources for independent, anonymous, and confidential collection of survey data were available through the University of Nevada's Center for Research Design and Analysis. Additional support was provided by the University of Alaska Anchorage Justice Center.

After obtaining Office of Human Research Protection approval,[38] a twelve-page survey was distributed to every member identified on the Boards and Commissions roster as holding a lay seat on forty-five Alaska state administrative tribunals adjudicating legal disputes as of July 1, 2011. The survey was announced by email and paper mail on September 22, 2011, with an access code to enter the website; paper survey booklets were distributed October 25, 2011.

E. Survey Response

Of the 270 members surveyed, 156 participants returned substantially complete surveys, amounting to a 57% response rate. As the survey included over 100 items, the response rate alone was an indicator of the desire of lay members to be heard on these issues.

Protection of participant anonymity was a primary concern that limited the data collected.[39] The study relied on the accuracy of participant self-reports.[40]

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38. Because the research was conducted by University of Nevada Reno and involved human participants, it complied with University policies on social science research and federal law to ensure that the rights and welfare of research participants were protected. In a survey exploring individual experience, part of that protection is the assurance of anonymity and confidentiality. In accordance with the consent agreement of the survey respondents, the Office of Human Research protocols, and the grant of permission by the Governor's Office, the original data and booklets remain in the secure, confidential custody of the University of Nevada Reno, but a copy of the anonymous data file will be deposited at the Alaska Justice Survey Analysis Center at the University of Alaska Anchorage.

39. For example, instead of asking participants to identify their tribunal, the survey asked them to identify the general subject matter of their tribunal and the decision-making model their tribunal used. Even together, these categories were so general that it is impossible to identify any single participant.

40. All data reported in this Article was supplied as an anonymous, coded electronic file to the Author by the University of Nevada Reno's Center for Research Design and Analysis. All statistical relationships reported in this Article were established using IBM's data analytics software, Statistical Program for the Social Sciences version 20 (SPSS-20). The *Alaska Law Review* does not have access to these confidential files; more information can be obtained from the Author by request.

Participation in the survey was broadly representative of lay members, drawing respondents from every subject area, type of tribunal practice, and geographical area of Alaska. Respondents' tribunal subject matter areas were most commonly described as individual disputes related to work, including occupational licensing (48.1%); followed by other conduct or activities (22.4%); public regulation, including utilities, labor standards, and elections (21.2%); and use of public resources and lands (8.3%).[41] The results of respondents' choices among the decision-making practices of their tribunals are set out in Table B in the Appendix.[42]

Geographically, the respondents' residence approximated the distribution of Alaska's working age population.[43] Communities under 6,000 inhabitants were slightly over-represented (26.9%), while small towns of 6,000 to 30,000 inhabitants (14.1%) and towns of up to 60,000 inhabitants (12.2%) were slightly under-represented. The Municipality of Anchorage (42.3%) was almost equal to its share of the state's working age population.[44]

F. Survey Respondents

Survey respondents were predominately male, white, long-time Alaskans, well-educated, employed, and over forty-five years old. Men outnumbered women almost two to one overall; in only one subject area (individual disputes related to work) did men drop below 60% of the respondents—to 58%.[45] The respondents to the question about race overwhelmingly identified themselves as white (89%), and only 7%

41. See *infra* Table A for the number of responses and category descriptions.

42. See *infra* Table B for the deliberation practice descriptions that participants could choose.

43. Geographic distribution was based on responses to a question that first asked if the respondent lived in the Municipality of Anchorage. If the respondent answered "No," the respondent was prompted to write in a "community of residence." Three survey respondents did not respond to the question whether they lived in the Municipality of Anchorage (1.9 %), and four respondents, after indicating they did not live in the Municipality of Anchorage, did not indicate a community of residence, so percentages do not add up to 100. *See infra* Table C.

44. According to the Alaska Department of Labor Research and Analysis Division website, which publishes population data from the 2010 census, 194,901 (42%) of the 467,915 Alaskans aged 18 to 64 reside in the Municipality of Anchorage. DEP'T OF LABOR & WORKFORCE DEV., ALASKA POPULATION OVERVIEW: 2010 CENSUS AND 2011 ESTIMATES (2012), *available at* http://labor.state.ak.us/research/pop/estimates/pub/1011popover.pdf [hereinafter CENSUS].

45. *See infra* Table A. By comparison, in the 2010 census, women made up 47.9% of the adult population of Alaska. *Id.*

identified themselves as Alaska Natives, American Indians, Native Hawaiian, or First Nations.[46] Most respondents had lived in Alaska long enough to experience significant social or historical change.[47] The median time of residence in Alaska was thirty-five years, and fewer than 20% had lived in Alaska twenty years or less.[48] Respondents were highly educated: 58% had a master's degree, professional licensure, or master craftsman's certificate or higher.[49] Most respondents (73%) said they were employed full time, or were seeking full-time employment.[50] Finally, 49% of respondents were forty-six to sixty years old, 27% were sixty-one to seventy years old, 14% were forty-five years old or younger, and 8% were over seventy years old.[51]

46. In the 2010 census, those identifying themselves as wholly or partly Alaska Native consisted of 19.5% of Alaska's population. *Id.* In the survey, respondents were invited to "check all that may apply." Only six respondents indicated they preferred not to say.

47. For a general overview of the social and economic change in Alaska between 1965 and 2000, see LINDA LEASK, MARY KILLORIN & STEPHANIE MARTIN, TRENDS IN ALASKA'S PEOPLE AND ECONOMY (2001) (explaining how Alaska's Native population doubled between 1970 and 2000, Alaska's total population rose 30% from 1980 to 1985, and has grown 76% since 1980). Respondents who resided in Alaska more than thirty years would have experienced the economic boom that followed the opening of the Trans-Alaska Pipeline, the recession that followed the crash in oil prices between 1986 to 1989, and the Exxon Valdez oil spill of 1989. *See id*.

48. *See infra* Table D.

49. *See infra* Table E. The survey inquiry on educational attainment was not limited to academic degrees. Some tribunals require specific vocational experience or licensure that does not require a university degree, such as "Master Pilot." Levels of vocational expertise were ranked alongside academic degrees based on years of preparation and examination. As a comparison, less than 10% of Alaskans over twenty-five years old have a master's degree or higher academic degree. *American Community Survey: 2008-2012 5 Year Data*, ALASKA DEP'T OF LABOR & WORKFORCE DEV., http://live.laborstats.alaska.gov/cen/acsarea.cfm (select Geographic Area "Alaska"; then follow "Next" hyperlink; select "School/Education Attainment"; then follow "Next" hyperlink). In this sense, tribunal members are not representative of the general Alaska population.

50. *See infra* Table F.

51. Some respondents declined to answer the question, so the percentages do not equal 100. *See infra* Table F. While a true median cannot be calculated from the data, it is clear that Alaska's general population is much younger than the respondents to this survey. Alaska's median age is around thirty-four years old and only 10% of the total Alaskan population is sixty-two years or older. CENSUS, *supra* note 44.

II. SURVEY FINDINGS

A. Participation by Women and Minorities

Appointees to boards and commissions are not drawn at random from the general population. In that sense they are not required, as a jury is, to be selected from a pool that represents a fair "cross-section of the community" of state citizens.[52] However, tribunal appointments are subject to the constraints of the Equal Protection Clause, despite their discretionary nature.[53] Most appointees are selected from regulated industries[54] and occupations,[55] resulting in a relatively small pool of qualified potential members.[56] Further, appointments can be burdensome, which may lead some qualified recruits to decline. Appointed members volunteer time to prepare for and attend hearings for little or no pay. Appointed members must also travel—85% of

52. Malvo v. J. C. Penney Co., 512 P.2d 575, 580 (Alaska 1973) (quoting Alvarado v. State, 486 P.2d 891, 898 (Alaska 1971)). In *Palmer v. Municipality of Anchorage,* 65 P.3d 832 (Alaska 2003), the court majority described the distinctive qualities of administrative tribunals:

> Unlike a jury, its constituent representative makeup was specified. And as an administrative agency, it differs fundamentally from a jury: it has repeat business and collective expertise; its members bring individual expertise and different professional perspectives that would probably preclude them from sitting as jurors if a jury were somehow trying Palmer's claim; and it even has some policy-setting capability entitling it to deference when it uses its expertise to interpret its enabling provisions.

Id. at 841.

53. Quinn v. Millsap, 491 U.S. 95, 105 (1989). *Cf.* Peloza v. Freas, 871 P.2d 687, 691 (Alaska 1994) (holding three-year durational residency requirement for candidacy for local elective office subject to "rigorous scrutiny under . . . the equal rights clause of the state constitution").

54. Some of the boards and commissions these appointees serve on include: Alcoholic Beverage Control Board, Big Game Commercial Services Board, Commercial Fisheries Entry Commission, Housing Finance Corporation, Natural Resources Conservation and Development Board, Oil and Gas Conservation Commission, Regulatory Commission of Alaska, and Workers' Compensation Board.

55. Some of the boards and commissions these appointees serve on include: Board of Public Accountancy, Bar Association Board of Governors, Board of Marine Pilots, State Medical Board, and Professional Teaching Practices Commission.

56. The pool for boards and commissions that require geographic diversity—including the Board of Parole, ALASKA STAT. § 33.16.020(e) (2012), and the Workers' Compensation Board, § 23.30.005(a)—is further limited by the uneven distribution of Alaska's population, which is concentrated in the Third Judicial District. ALASKA JUSTICE STATISTICAL ANALYSIS CTR., FACT SHEET: ALASKA TRIAL COURT CASE FILING STATISTICS, 2005-2012 1 (2013), *available at* http://justice.uaa.alaska.edu/ajsac/2013/ajsac.13-04.trial_courts.pdf.

respondents reported traveling by commercial or charter aircraft to attend a hearing or meeting of their tribunal at least once in the last two years.[57]

B. Impact of a Lack of Diversity

The lack of diversity among appointed members was troubling to some respondents.[58] About 38% of respondents indicated a lack of satisfaction with the diversity of their tribunal, but of these, 14.9% expressed rather mild dissatisfaction, agreeing that their commission "has some ethnic and gender diversity, but could be more diverse." Sixty-two percent were satisfied that their tribunal represented the diversity of Alaska's population, given the size of the tribunal. Of that number, a surprising 65% were residents of communities outside the Municipality of Anchorage. Only 51% of the Municipality of Anchorage residents responding to the question expressed themselves as being satisfied with the diversity of their tribunal, but 61% of those from large towns, 76% of those from small towns, and 73% of those from rural communities with less than 3,000 residents were satisfied. These high satisfaction numbers occur despite the reported dominance of white males on most tribunals, making it seem as if only a little diversity or regional mix satisfies most members. Nonetheless, the low percentage of Alaska Native (7%) or other minority respondents[59] presents a disturbing picture of the participation of Native or other minority citizens in state administrative justice.

One group of respondents stood out, however, as sensitive to the lack of diversity. Sixty participants reported they were motivated to seek appointment by a desire to advance non-partisan goals, or to improve the practice of a profession. This group tended to be less satisfied with the diversity of their tribunals to a small, but statistically significant

57. Air travel problems disproportionately affected Alaska Native or American Indian attendance at hearings or meetings, with 40% of Alaska Native or American Indian respondents reporting that air travel problems prevented attendance "sometimes" or "often," but only 9.5% of white respondents reporting that air travel problems prevented attendance as frequently.

58. See *infra* Table G for the number of responses to this question by community population and gender of the respondents.

59. Only eleven respondents described themselves as Alaska Natives, American Indian, or Native Hawaiian. Of those respondents, one person also chose "other," so was included in that category. Only one other respondent chose more than one category. Among the remaining respondents, two chose "Latino or Hispanic;" one chose Asian; one chose African American; and four chose "other." The majority (133) chose "white," while only six chose "prefer not to say."

degree.[60] No other reason for applying for a tribunal correlated with respondents' dissatisfaction with their tribunals' diversity.

It seems the method of recruitment may play a role in the lack of diversity among appointees. Respondents were asked how they first learned of the vacancy on their tribunal. Over 34% percent of respondents were recruited by a fellow professional or non-partisan interest group member, and 32.7% of respondents were recruited by a member of the tribunal or a state employee connected to it. Only 6.4% of respondents first saw the vacancy on the State's Boards and Commissions website, suggesting that very few members are "self-recruited." Among Alaska Native or American Indian respondents, 40% indicated that business or family connections first suggested they apply for a vacancy, but the total numbers of Native respondents are so small that further research would be needed to attach any statistical importance to them.

In addition, repeat appointments appear to be common.[61] A recognized danger of having recruitment conducted by professional groups, interest groups, and current tribunal members is that the tribunal may continue to reflect the status quo. A less obvious danger was uncovered in this survey, which is that there appears to be a statistically significant correlation between persuasion to volunteer for a second term and a negative perception of the tribunal experience.[62]

The impact of current recruitment methods can also be seen in the distribution of women on tribunals. Female respondents were slightly more likely to report they were first recruited through a political contact than were male respondents,[63] or through a non-partisan interest or

60. The mean value of satisfaction for those who selected the motivation "desire to advance non-partisan goals or improve practice of profession" was lower (3.03 on a one-to-four scale) than the mean value of all those who did not select that motivation (3.47). The format for such comparisons (Mann-Whitney U Test) is: $Md = 3.03$, $n = 57$; Not selected, $Md = 3.47$, $n = 91$, $U = 2009.00$, $z = -2.654$, $p = .008$, $r = .21$. Similarly, those motivated to apply for a vacancy by a desire to improve the lot of disadvantaged Alaskans were less likely to feel their service was important to improving life in Alaska. Selected motivation, $Md = 2.92$, $n = 13$; Not selected, $Md = 3.52$, $n = 143$, $U = 554.50$, $z = 2.723$, $p = .006$, $r = .21$. Perhaps this group's dissatisfaction reflects disappointment in the ability of the tribunal to make or cause change.

61. Slightly more than half of respondents (52%) indicated they had served more than one term on their tribunal.

62. Persuaded second-term membership was correlated with reports of less likelihood to report ample opportunity to ask questions in deliberation and more likelihood of reported disrespect by attorneys, tribunal staff, or other tribunal members. A statistical correlation does not mean that the second-term members themselves are more likely to experience negative events; the correlation was to the frequency of events that members were willing to report.

63. Women = 22%; men = 14%. "Other" responses with text references to the

professional group,[64] but the differences were not statistically significant. Fewer women than men have served more than one term.[65] When they served a second term, women were less likely than men to attribute their decision to persuasion by a professional/interest group or state agency.[66] Fewer women than men were offered formal training after their appointment, but the proportional difference was not large.[67] Female respondents were less likely to be required to attend hearings as members of their tribunal.[68] Finally, female respondents were markedly underrepresented on boards and commissions whose members hear evidence directly, suggesting that women were not as vigorously recruited for those positions.[69]

C. Impact of Women and Minorities

Does the lower number of women serving on tribunals make a difference? Some findings in this survey suggest that it may. To a statistically significant degree, women respondents were more likely to endorse "willingness to compromise, ability to negotiate," as a skill that is very important to being a successful tribunal member.[70] Not surprisingly, there was a statistically significant negative correlation between endorsement of the compromise-negotiate ideal and frequency of outcome disagreement—that is, the greater the endorsement of the ideal, the less frequently the respondent disagreed with the ALJ on the

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Governor's office were included as being recruited through a political contact. Men were more likely to report a "political" motivation for seeking appointment, either to serve in the appointing administration, or to gain community recognition.

64. Women = 39%; men = 34%.

65. Of those respondents who served a second term, 67% were men and 33% were women.

66. The numbers include text responses reflecting agency pressure or concern. Of those reporting this influence, only 1.7% were women. The numbers are very small, so no statistical significance should be attached.

67. Among women respondents, 46% reported receiving training; among men, 50.5% reported receiving training.

68. Of respondents who reported they attend hearings as tribunal members (instead of reviewing decisions or proposed decisions), 77% were men, and 22% were women.

69. When asked if they attend hearings with an ALJ to listen to evidence, 73% of those who responded affirmatively were men, and the other 27% were women.

70. The difference in the percentage of respondents who ascribe the greatest importance (six on a scale from one to six) to this ideal was significant (33% of men, 66% of women). A difference persisted among those scoring it as important, if not of highest importance: 39% of men and 28% of women chose a rating of five; 22% of men and only 6% of women chose a rating of four. No woman chose a rating below four.

final outcome in the case. Women respondents also gave greater importance to knowledge of a tribunal's laws and regulations than did men.[71]

Other findings cut against the willingness of women to compromise. Women were no more likely than men to endorse the importance of unanimity. Women respondents were slightly more inclined to endorse the role of delegate (if appointed to a designated seat, the member should consider the interest of the designated group / profession first),[72] but not to a statistically significant degree. Yet, women endorsed the importance of "overall fairness, open-mindedness, freedom from prejudice" as a member qualification at a higher rate than did men.[73] And, to a statistically significant degree, women were more likely than men to endorse a "legislative-constrained" attitude toward the law.[74]

Women respondents reported greater time spent preparing for hearings. Respondents who reported preparing for hearings also tended to report a stronger sense of equality to the ALJ, lower likelihood of feeling their tribunal participation devalued, greater endorsement of the power of "principled resignation" (i.e., to "resign if no one listens to their suggestions"), and less belief that members should always follow the advice of the ALJ.[75] While these attitudes were correlated with preparation for hearings, they were not directly correlated to gender.

Endorsement of a "precedent-regarding" view of decision-making appeared correlated with the race of the respondent to a statistically significant degree, with white respondents ascribing greater importance to "follow[ing] tribunal precedent so that decisions are predictable."[76]

71. Almost 65% of women scored this ideal as six on a scale of one to six; only 46% of men did so.

72. On a scale of one (disagree completely) to six (agree completely), 20.8% of women respondents endorsed the role statement at six compared to 10.2% of men; 17% of women endorse the statement at five compared to 10.2% of men. At the other end of the scale, 32.7% of men and 22.6% of women disagreed completely.

73. About 93% of women endorsed this ideal at six (agree completely), but only 79% of men did so.

74. The legislative-constrained attitude was reflected in this statement: "Decisions of [a tribunal] should follow the law as the Legislature wrote it, not as some member or the ALJ would like it to be." X^2 (df = 10, n = 155) = 26.706, p = .003, Cramer's V = .294.

75. There was also a strong correlation between advance preparation and participation as measured by the number of questions asked in a hearing, n = 73, Kendall's *tau*-b = .445, p = <.001; Spearman's *rho* = .501, p = <.001, but the number of questions asked at hearing was not otherwise directly correlated with increased participation.

76. X^2 (df=15, N=147) = 34.65, p = .003, Cramer's V = .28.

Respondents who identified themselves as Alaska Native or American Indian tended to disagree more strongly than white respondents with the proposition that tribunal members were appointed for loyalty to certain political views.[77] Minority race or ethnicity was also associated with more negative views of the importance of tribunal service to improving life in Alaska[78] and of the fairness of the outcome of the last case decided by the respondent.[79] However, Alaska Native and other minority respondents did not express greater dissatisfaction with the diversity of their tribunal than white respondents,[80] nor did they report lower personal influence on tribunal decisions than white respondents.[81]

None of the distinctions found in respondent endorsement patterns should be considered predictive of a member's views in any particular case or on any legal issue. They are presented here as signs that a member's gender, race, or ethnicity may affect a member's experience of tribunal service and perception of tribunal roles.[82] The survey responses did not suggest a perception of systematic discrimination or actual discrimination. Moreover, while a 57% response rate is high, the overall population of Alaska lay members is low, so generalizations should be very cautiously drawn. Based on the responses, however, current members agree that attention should be given to broadening recruitment of members, especially on tribunals with persistently low diversity.

D. Duties of Fairness and Impartiality

In *Keiner v. City of Anchorage*,[83] the Alaska Supreme Court outlined the requirements of administrative adjudication: due notice and full opportunity to be heard; a hearing consistent with the essentials of a fair trial; an impartial tribunal; and a complete record of the proceedings so that a reviewing court is able to determine that there was no substantial

77. X^2 (df=15, N=133) = 25.28, p = .046, Cramer's V = .25.
78. X^2 (df=9, N=149) = 18.53, p = .029, Cramer's V = .20.
79. X^2 (df=9, N=115) = 32.428, p = <.001, Cramer's V = .31.
80. Ninety percent of Alaska Native or American Indian respondents agreed that their tribunal membership represents the diversity of Alaska's population, given the size of the tribunal; only 57% of white respondents agreed with the statement.
81. The most frequently endorsed measure of personal influence for Alaska Native or American Indian (30%) and white respondents (36%) was, "When particular issues come up, I often influence the outcome."
82. *See* Sharyn Roach Anleu & Kathy Mack, *Gender, Judging and Job Satisfaction,* 17 FEMINIST L. STUD. 79, 88–96 (2009) (studying the various factors that affect work satisfaction for both male and female Australian magistrate judges).
83. 378 P.2d 406 (Alaska 1963).

failure to observe applicable rules of law and procedure.[84] In other words, a fair hearing before a fair tribunal is a basic requirement of administrative adjudication.[85] "Not only is a biased decision-maker constitutionally unacceptable[,] but our system of law has always endeavored to prevent even the probability of unfairness."[86] Due process requires that a person have the "opportunity to be heard in a meaningful, impartial hearing."[87] While Alaska's Executive Branch Ethics Act bars unethical conduct by members of boards and commissions generally,[88] the tribunal member's duty of impartiality in administrative hearings is embodied elsewhere in the Alaska Statutes:

> The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law, may not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present.[89]

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84. *Id.* at 409–10.

85. *See* State v. Lundberg Pac. Const. Co., 603 P.2d 889, 895 (Alaska 1979) (citing *In re* Robson, 575 P.2d 771, 774 (Alaska 1978)).

86. *Id.* at 896 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

87. Stevens v. State, Alcoholic Beverage Control Bd., 257 P.3d 1154, 1160 (Alaska 2011) (citing Thorne v. State, Dep't of Pub. Safety, 774 P.2d 1326, 1329 (Alaska 1989).

88. The Alaska Statutes provide:

> Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's (1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or (2) action or influence would have insignificant or conjectural effect on the matter.

ALASKA STAT. § 39.52.110(b) (2012). Section 39.52.120(b)(4) prohibits board and commission members from taking or withholding "official action in order to affect a matter in which the public officer has a personal or financial interest." In addition, title 9, section 52.020 of the Alaska Administrative Code states "[a] public officer may not take or withhold official action on a matter if the action is based on an improper motivation." ALASKA ADMIN. CODE tit. 9, § 52.020 (2012). Improper motivation is defined as "a motivation not related to the best interests of the state, and includes giving primary consideration to a person's (A) kinship or relationship with a public officer; (B) financial association with a public officer; (C) potential for conferring a future benefit on a public officer; or (D) political affiliation." tit. 9, § 52.990(b)(4). The term "public officers" includes members of state boards and commissions. ALASKA STAT. § 39.52.960(21)(B).

89. § 44.62.630.

The survey explored respondents' thoughts about fairness and impartiality in different contexts. First, respondents were asked to indicate on a six-point scale how important "overall fairness, open-mindedness, [and] freedom from prejudice" was to being a successful tribunal member. All but one respondent scored this trait at five or higher, and 84% scored it at six.[90] No other ideal trait was scored higher by so many respondents. The ideal of "impartiality, avoidance of conflict of interest" was scored at six by 78% of respondents, at five by 18% of respondents, and at four by 3%. Finally, the ideal of "courtesy, respect to parties and other members" also scored very high, with 95% of members choosing five or above. Clearly, the vast majority of respondents endorse the ideal of lay members being fair, impartial, and respectful toward other participants.

Another question asked respondents for their degree of disagreement or agreement with a role statement about impartiality. "Citizen members should be fair and impartial in deciding cases, regardless of their personal politics or other personal views." Of the 96% who responded to this question, 85% agreed completely and selected six. Another 12% of respondents agreed strongly and selected five. To gauge how much personal responsibility the respondents accepted for the fairness of the tribunal, the survey asked respondents if they agreed that they were "just as important as the administrative law judge in making fair decisions." Here, the respondents were less enthusiastic – only 56% agreed completely, and 27% agreed strongly that they had equal responsibility for fair decisions.

When asked about the decisions of their board or commission, however, members seemed to recognize that "fairness" as a substantive *outcome* was not always possible. When asked if they agreed that, in the context of tribunal decisions, "It is important to make sure the tribunal decisions are fair to the parties and have a just outcome, on terms the parties can accept," only 34% of respondents agreed completely by selecting six. Indeed, 16% of respondents disagreed with that statement. Nonetheless, substantive justice appears to be a goal of most members. When asked if they agreed that "making a just decision is sometimes more important than following the strict letter of the law," only 28% of respondents disagreed with the statement, while 18% agreed completely.

Finally, to test the respondents' awareness of procedural and substantive fairness in a concrete instance, respondents were asked two very general questions about the last decision they made as a tribunal

90. See *infra* Table J for the scores on desirable traits, skills and abilities.

member: "How fair was the outcome?" and "How just and impartial was the hearing and decision-making process?"[91] The results were not surprising: 89% of respondents said the outcome was "very fair," and 86% of respondents said the process was "very just and impartial."

The survey reveals that almost all lay members responding ascribe to an ethic of being "fair and impartial" decision-makers. A large majority accept that they bear responsibility equal to the professional judge with respect to the fairness of their tribunal's decisions. Furthermore, a large majority understands the distinction between the fair hearing and decisional process and a fair or just outcome. Clearly, the respondents want to be fair and impartial decision-makers. However, as discussed in the next section, disappointingly few appointees receive training in decision-making.

E. Lack of Training in Decision-making

Although most respondents (74%) considered the recruitment process successful or very successful in identifying well-qualified appointees, very few survey respondents (5%) considered new members well-prepared for service. Most respondents agreed that new appointees were only "somewhat prepared" (51%) or "not at all prepared" (21%). Yet, only 18% of all respondents received formal training in hearing procedure or decision-making from any source. About half of all respondents (49%) reported that they received *some* training in adjudication, hearing procedure, or decision-making after their appointment, which was usually informal training (67%). Informal training was given by agency staff, hearing officers, or ALJs. Only 13% of all respondents reported they had received training from outside professionals, like the Attorney General's Office. The Alaska Attorney General's Office maintains a web-based training site with specific information on the Executive Branch Ethics Act and provides in-person training for state boards and commissions,[92] but the low number of positive responses suggests that few boards and commissions take advantage of this service.

When provided, training has an impact. Respondents who received training reported overwhelmingly (97%) that training helped them "do a better job." Members who received training were more likely to agree

91. To avoid identification of the respondent or the decision, respondents were not asked any information about the decision itself.

92. *Executive Branch Ethics*, STATE OF ALASKA DEP'T OF LAW, http://www.law.alaska.gov/doclibrary/ethics.html (last visited Mar. 5, 2014).

completely that it was an honor to serve on a tribunal,[93] suggesting that training enhanced their understanding of the importance of the task. In addition, members with training more frequently considered the hearing and decision-making process in their last hearing very fair and impartial than did those without training.[94]

The provision of training had a larger impact on women's satisfaction with the overall tribunal experience. Among female respondents who received training, 83% reported a "better than expected" or "much better than expected" experience. Among women without training, only 45% reported a "better than expected" or "much better than expected" experience. Training was not associated with an appreciable difference in satisfaction among men. But both men and women with training reported a slightly higher frequency of serving a second term. Among men, 52% of second-term respondents had training and, among women, 56% of second-term respondents had training.

The lack of immediate formal training was especially apparent in one question. When hearings are delegated to an ALJ, tribunal members have the right to attend.[95] The survey asked respondents if they attended tribunal hearings with an ALJ to listen to evidence.[96] If respondents answered "no," the survey asked if the respondent had ever asked to attend, with responses permitted for "yes," "no, because I

93. Mann-Whitney *U* tests demonstrated the statistical significance of the difference in scores between those who received training (Md = 5.53, n = 77) and those who did not receive training (Md = 5.22, n = 79), $U = 2285.500$, $z = -2.466$, $p = .014$, $r = .20$.

94. Ninety percent of those with training (formal or informal) rated the hearing and decision-making process in their last decision reached as "very just and impartial," while 83% of those without training rated the process as "very just and impartial."

95. The Alaska Statutes provide:

> The agency may, with materials transmitted under (b) of this section, request the chief administrative law judge to permit the individual, board, or commission that will make the final decision to participate with the assigned administrative law judge in the conduct of the administrative hearing. The chief administrative law judge shall determine the degree and manner of participation and may terminate that participation at any time. However, the individual, board, or commission that participates under this subsection may not serve as the administrative law judge or preside during the hearing and may not take action on behalf of the agency in the agency's capacity as a party to the proceedings.

ALASKA STAT. § 44.64.060(c) (2014).

96. Responses were as follows: Yes = 80; No = 66; Do not know = 9. Later in the survey, respondents were asked if they attended hearings, without the "to listen to evidence" qualification, because some tribunals may have hearings largely limited to argument over documentary evidence.

did not know I could ask to attend," "no, although I knew I could ask to attend," and "not sure." The number of participants who were unaware of the right to ask to attend evidentiary hearings was surprisingly high: thirty-five of the sixty-six members who stated they did not attend hearings to listen to evidence were unaware of their right to ask to attend.

Respondents to this survey clearly desire more training. Of respondents who had not received training, they most frequently requested further training in "legal issues in hearing process, decision-making, or logic." Training on the history and past decisions of the tribunal was requested by 19% of respondents; training about technical aspects of hearings, handling unrepresented persons, preserving the record, safety, etc., was requested by 15% of untrained respondents; and only 5% wanted training about advances in the field of tribunal responsibility. Comments by respondents included requests for training on specific subjects, "background on current issues" of the tribunal, "Legal Theory training," "terminology used," and "all of the above plus training about the . . . regulation." The survey uncovered no disadvantage to providing members with training.[97] That 50% of respondents desired training in "legal issues in the hearing process, decision-making, or logic" strongly implies that at least some members felt disadvantaged because they lacked such training.

F. Impact of Perceived Disrespect

Despite the requirement that a fair hearing be "consistent with the essentials of a fair trial,"[98] procedural rules in administrative proceedings are meant to be less formal than court proceedings.[99] Typically, administrative hearings are conducted in less formal surroundings as well. Informality does not excuse a lack of respect by or

97. Only one commenter suggested that training was not needed, saying, "Learning the process isn't difficult if you listen to what is going on and ask appropriate questions in the meeting."

98. Keiner v. City of Anchorage, 378 P.2d 406, 409–10 (Alaska 1963).

99. *See, e.g.*, § 21.06.210(c) ("Formal rules of pleading or evidence need not be observed at a hearing."); § 21.39.170(b) ("Nothing contained in this chapter may require the observance at a hearing of formal rules of pleading or evidence."); § 23.30.135 ("In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure . . . ."); § 28.05.141(a) ("Hearings must be informal, and technical rules of evidence do not apply."); § 42.05.151(b) ("Technical rules of evidence need not apply to investigations, pre-hearing conferences, hearings, and proceedings before the commission."); § 44.62.460 ("The hearing need not be conducted according to technical rules relating to evidence and witnesses.").

for the tribunal members. The Code of Hearing Officer Conduct requires the presiding officer to "show patience, dignity, and courtesy to all parties, their representatives, witnesses, and others with whom the hearing officer or administrative law judge deals in an official capacity," and to "require similar behavior from parties and their representatives."[100] Results from this survey suggest that tribunals sometimes fall short of the ideals of collegial courtesy and respect for members.

A striking result was that only 29% of respondents to the question indicated that they were "always" formally thanked for their service following a hearing or deliberation. In light of the widespread adoption by courts of statements to jurors of respectful appreciation for their service upon discharge, such a failure to thank lay members for their attentive service on the record suggests that tribunals do not adequately value the members' service or respect the individuals who serve on the tribunals.

To examine how certain events affect perceptions of fairness, statistical correlations between measures of satisfaction with the tribunal and frequency of certain events experienced by respondents were explored.[101] The survey found that negative correlations between satisfaction and negative tribunal support experiences are more prevalent and stronger than positive correlations between satisfaction and positive tribunal support. The most powerful negative tribunal experiences describe public displays of disrespect:

- "An attorney or witness acted like I was not even there or only talked to the ALJ."
- "I observed staff or ALJ show disrespect or unfairness toward proceeding parties or tribunal members."

Another negative experience describes suppression of dissent:

- "I did not feel like I *could* disagree although I wanted to disagree about a part of the decision."

The third group of negative experiences concern staff omissions and poor facilities:

100. ALASKA ADMIN. CODE tit. 2, § 64.030(b)(3)(E) (2012).

101. This survey study did not look for causal relationships between citizen member attitudes and participation or other variables. No attempt was made to associate adjudicatory attitudes and decisional outcomes. The relationship between frequency of tribunal events and perceptions of satisfaction measured by ordinal scales (where participants chose a point on a scale from one to six, indicating a degree of disagreement or agreement) was examined using Kendall's *tau*-b and Spearman's *rho* correlation coefficients, using SPSS software. Otherwise, for nominal measures (where there was no scale) of satisfaction or fairness, analysis was limited to a Kruskal Wallis *H* test, again using SPSS software.

- "The facilities provided for hearing or deliberation were substandard, too small, uncomfortable, or dirty."
- "A matter settled before I arrived, but no one contacted me before I left for the proceeding."

The common thread running through these experiences is a perceived lack of respect. The citizen member often feels disregarded, embarrassed by a showing of disrespect, silenced, treated poorly by being given dirty or uncomfortable surroundings, and forgotten. When a tribunal permits a member to be treated disrespectfully, the tribunal communicates to that member that he or she is not fully a part of the tribunal's authority.

The impact of perceived disrespect was not limited to the member's sense of satisfaction with the tribunal experience. A line of negative correlations was identified between frequency of experiencing public disregard for equality of membership ("an attorney or witness acted like I was not even there or only talked to the ALJ") and member satisfaction with how well the appointing process works, how well members are prepared for service, how important service is to improving life in Alaska, and overall satisfaction with the tribunal experience in relation to initial expectations. These attitudes were also negatively correlated with a lack of time to deliberate carefully or completely,[102] staff failure to contact member after settlement,[103] substandard, small, uncomfortable or dirty facilities,[104] and observation of staff or ALJ disrespect toward parties or a member.[105] In short, acts of perceived disrespect, especially public acts, resonate beyond the actual event.

G. Suppression of the Right to Dissent

The right to express dissent from a collective decision is a key distinction between tribunal adjudication and one-time jury service. If lay members of a tribunal are truly adjudicators, they must be able to express their views of the evidence and tribunal law, instead of simply signing off on proposed decisions written by the ALJ. Practically, this means members should be allowed to dissent to written decisions.

The survey results demonstrate what happens when there is no right to dissent. An inability to dissent ("I did not feel like I *could* disagree although I wanted to disagree about a part of the decision") correlated with claims of little influence in deliberation. In contrast,

102. This was a common experience, with 48% of respondents reporting it had occurred to them, although most indicated it happened "rarely."
103. About 22% of respondents reported this experience.
104. About 36% of respondents reported this experience.
105. Only 14.5% of respondents reported observing such actions.

respondents who stated that they had ample opportunity to ask questions in deliberation tended to have strong beliefs about their ability to influence the course of deliberation. The suppression of dissent also correlated with low assessments of procedural fairness, fewer questions asked at the last hearing attended, and less frequency reviewing files before a hearing.

Although the effect was small, a statistically significant correlation existed between the view that "sometimes making a just decision is more important than following the strict letter of the law" and the view that "suppressing dissent is worrisome," suggesting that members who want to dissent on grounds that the decision is unjust are being denied the opportunity to do so.[106] A very small negative correlation nearing significance was found between suppression of dissent and higher endorsement of the ideal of active participation and communication with other members.[107] Those members who value discussion in deliberation may be interrupted more frequently, or become more sensitive to interruption, when time is inadequate for full deliberation.

Unfortunately, negative experiences resonated louder than positive experiences. A comparison between the responses of the newest members and those with the greatest experience revealed that the newest members reported fewer positive experiences than older members, but the most experienced members reported negative experiences most frequently. While there were positive statistically significant correlations between tribunal respect gestures and expressions of authority or satisfaction, all were quite small in effect. For example, the frequency with which respondents reported attorneys standing or addressing them by title correlated with the degree of the respondents' perceived influence in deliberations.[108]

Rather than the ALJ or hearing officer presiding over tribunal deliberations, a senior member frequently chairs the deliberating tribunal. If the chair is domineering or disrespectful to other members, the ALJ or hearing officer faces a difficult situation. Silence may be viewed as tacit approval of the chair's tactics or position. Alternatively, speaking up may be viewed as partiality, an effort to sway members, a violation of the duty to be courteous to all members, or a subversion of the tribunal's authority and decisional independence. Disrespect adversely impacts the tribunal's ability to function as a fully deliberative body. Standards of conduct should be put in place to govern

106. n = 142, Kendall's *tau*-b = .242, $p = .001$, Spearman's *rho* = .28, $p = .001$.

107. n = 146, Kendall's *tau*-b = −.149, $p = .053$; Spearman's *rho* = −.160, $p = .054$.

108. n = 110, Kendall's *tau*-b = .17, $p = .025$; Spearman's *rho* = .215, $p = .024$.

adjudications in these situations. Standards that already exist should be clarified and enforced.[109] After all, protecting the integrity of the process and decisional independence of administrative adjudicators includes protecting the participatory rights and decisional independence of individual members of a tribunal.

H. Barriers to Active Participation

If diversity and active citizen participation serve to legitimate administrative tribunals, institutional barriers such as distance, lack of time to prepare for hearings, lack of tribunal support, or inadequate facilities could adversely impact tribunal legitimacy. The survey findings suggested institutional barriers do have such an impact, but in an unexpected way.

Surprisingly, distance, as measured by the need for air travel, was *not* a significant barrier to member participation. Only 28% of respondents reported that air travel problems had prevented them from attending a hearing or deliberation. Of those respondents, 18% indicated it happened "rarely."[110] Considering respondents' frequent air travel, it is surprising that 89% rated this travel barrier as occurring rarely or never.[111] Forty-five percent of respondents reported they had been paid per diem or travel expenses late, and 5% reported their payments were *always* late. Therefore, it came as a surprise that these factors did not contribute to dissatisfaction with the tribunal or affect participation in the decision-making process.

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109. Some standards do currently exist. For example, the Chief ALJ is authorized to:

> (3) foster open and clearly explained agency decisions and improve public access to the process of administrative adjudication; (4) guarantee protection of all parties' due process rights, increase the public parties' perception of fairness in administrative adjudication, and foster acceptance of final administrative decisions by the public and affected parties; (5) protect the integrity of the process of administrative adjudication and decisional independence of administrative adjudicators.

ALASKA STAT. § 44.64.020(b) (2012).

110. One respondent indicated this happened "often."

111. At the time of the survey, only 18% of respondents reported they often or always used a video link to participate in a hearing or meeting of their tribunal successfully from their home community. For those with this capability, there was a strong positive correlation to overall satisfaction with the tribunal experience in relation to initial expectations (n = 146, Kendall's *tau*-b = .28, p = <.001, Spearman's *rho* = .315, p = <.001). Use of a video link was also correlated with likelihood of expressing differing opinions on an issue in the case, a measure of active participation (n = 103, Kendall's *tau*-b = .23, p = .008; Spearman's *rho* = .26, p = .007).

Instead, lack of time to deliberate and lack of opportunity to contribute had the greatest impact on members. The greatest positive correlation was between participation and opportunities for members to contribute to tribunal decision-making. These opportunities include ample time to ask questions during deliberation, invitations to make suggestions to change decision wording, and the ability to ask questions before the final decision is circulated. Each of these experiences offers tribunal members the opportunity to contribute to the decision. Higher participation levels were associated with more tribunal culture, supportive staff and facilities, reduction in travel barriers, and greater frequency of experiences that invite member contributions. Decreased participation was repeatedly associated with lack of time to deliberate carefully or completely, a feeling that disagreement was unwelcome, and absence of a draft decision to review.

Some of the correlations were obvious. For example, the greater the frequency respondents were sent files to review before a hearing or deliberation, the more often they reviewed those files. Some correlations were not obvious. The frequency that attorneys demonstrated respect by standing or addressing members by title was positively correlated to the frequency of file review and the frequency of member questions at the member's last hearing. A greater frequency of receiving case files in advance was correlated with a lower perception that the hearing officer dominated discussion in deliberation (i.e., talked more than the average member). Frequency of failure to notify respondents of a settlement before scheduled hearing or deliberation was negatively correlated with frequency of reviewing files. A similar correlation was seen between not being sent a draft to review (and only receiving a final decision to sign) and number of questions asked at the last hearing. Conversely, those who reported higher frequency of reviewing case files before hearings reported the lowest frequency of not being sent a draft to review (i.e., they received more drafts to review). In other words, the more the respondent was overlooked by the tribunal, the less the respondent invested in tribunal duties.

Members preferred more opportunities to ask questions in deliberation. Many more respondents stated they "always" had ample opportunity to ask questions during deliberation (70%) than were "always" invited to provide input into the written decisions (30%) or contacted to see if they had any last minute questions (21%). This difference is problematic because the correlation between frequency of solicited input and participation occurs across forms of participation. For example, being sent a draft to review (soliciting written input) was correlated with increased frequency of questions at hearings (giving verbal input). Asking questions strongly correlated with length of time

spent preparing for hearings. Member contact for last minute questions before a final decision was issued was associated with a greater sense of influence in deliberation, which is associated with greater participation in other measures. Member contact for last minute questions was also associated with a greater importance accorded to member service on the tribunal. Therefore, to increase member participation, repeated invitations to participate in more than one way may be necessary.

I. Lay Members' Understanding of Their Role

There is no consensus on the appropriate role of lay members. Some believe that professional, judge-only administrative tribunals are most efficient and provide the best protection of the parties' due process rights, and that lay members serve no useful purpose that outweighs the cost of their presence. Arguing against mixed courts, Professor Richard Lempert states that "considerable research suggests that this is hardly a compromise [between the judge-only court and jury-court], for professional judges dominate decision-making in mixed tribunals to the point that the benefits of lay fact-finding may be largely, if not entirely, lost."[112] Setting aside the assumption that the only value lay members bring to a tribunal is "fact-finding," the question becomes whether the professional judiciary dominates the tribunal's view of the law. In other words, do lay members of Alaska tribunals see themselves as juror-substitutes, with no responsibility for interpretation of the law, or do they consider themselves full adjudicators whose responsibilities extend beyond fact-finding? If they see themselves as more than fact-finders, how constrained are they in acting on their understanding of the law?

To discover what lay members think their role is on a tribunal, the survey asked respondents four sets of questions designed to elicit views of what they believe they should do, what they want to do, and what benefit they feel they bring to the tribunal.[113] The first question set explored latent contributory roles, in which lay members cause indirect impact through other individuals' responses to their presence on the tribunal, such as forcing the professional judge to explain legal concepts

112. Lempert, *supra* note 9, at 484. *But cf.* Neil Vidmar et al., *Amicus Brief, Kumho Tire v. Carmichael*, 24 LAW & HUM. BEHAV. 387, 387–400 (2000) (providing a general review of the social science scholarship on the capacity of juries to deal with complex questions).

113. Charts showing the results are found in the Appendix. The survey also contained a question set asking how much respondents agreed with positively stated ideals (what traits, skills, or abilities a successful member should have). The results of this question set in context of gender differences were discussed *supra* Part II.A.

or encouraging community acceptance because community members are on the tribunal. The second set of questions asked about active contributions to tribunal decisions—not in terms of specific decisions, but in terms of general understanding of what the role of lay members ought to be. The third set of questions concerned lay members' attitudes toward the law when making collective tribunal decisions. The last set of questions probed the lay members' sense of equality and the importance of their contribution to the tribunal in relation to the ALJ. All questions asked for responses to a statement on six-point scales of complete disagreement (one) to complete agreement (six).

1. Actively Protecting Alaskans' Rights

The results show that most respondents do not see their role as essentially passive or symbolic. The only latent contribution statement that more than a third of respondents agreed *completely* with was "Citizen members make sure tribunal decisions are in the best interests of Alaskans, instead of being whatever government 'experts' want." This role, as a "guardian against government overreaching" was one that 59% of respondents *completely* agreed that their responsibilities included. A global monitoring function, typified by the statement that lay members "make sure that the hearing officers/ALJs do not lose sight of the impact of the decision on real people," was also popularly endorsed, with 71% agreeing strongly or completely. Respondents also saw themselves as having a community representative function, with 59% strongly or completely agreeing that lay members are generally more in touch with the community than hearing officers or ALJs. Those respondents who viewed lay members as "more in touch with the community" implicitly saw professional judges as less in touch with community values, suggesting that these respondents see themselves as responsible for representing the values of the community or "common man or woman" on the tribunal.

2. Duty to Be Independent of the Professional Judge and Respect the Law as Written

With respect to making decisions, the importance of the monitor function was again endorsed with minimal disagreement; 78% of respondents *completely* agreed that if a member "sees something wrong in a hearing or a decision, the member should speak up so it gets fixed" and only one respondent disagreed to any extent. The respondents overwhelmingly supported (85% agreed completely) the need to be "fair and impartial in deciding cases, regardless of their personal politics or

other personal views." A majority (60%) disagreed that their responsibilities included playing the role of delegate ("If appointed to a designated seat, a [lay] member should consider the interest of their group/profession first,") and most respondents (69%) disclaimed that political loyalty played a role in their decision-making. Finally, most respondents were willing to be critical of the legal advice they were given. Fifty-five percent of respondents disagreed that members "should always follow the advice" of the hearing officer or ALJ when it comes to the law, and only 13.5% of respondents agreed completely. In view of this openness to critical review of the law, it is not surprising that there was a less-than-whole-hearted endorsement of a purely fact-finding role: only 38% of respondents agreed completely that the most important part of their job is to get the facts right and decide who is telling the truth, although only about 13% disagreed with the statement. Lay members tended to view themselves as a repository of expert knowledge rather than pragmatic community mediators. Only about 30% of respondents agreed completely that "sometimes the [lay] members' common sense is needed to find a point where a decision accommodates competing community interests," but far more (47%) agreed completely that lay members have "special expertise that should be applied when making decisions concerning their field."

Another question set asked about attitudes toward the law by asking respondents what they feel tribunal decisions should reflect. The responses demonstrated independence coupled with respect for the law as it is written by the legislature. Respondents saw little value in unanimity; only 21% strongly or completely agreed that a unanimous decision was important, while 35% disagreed strongly or completely. The value of independent judgment is tempered, however, by awareness of the constraints of law. While a majority of respondents agreed (18% completely, 35.5% strongly, 19% mildly) that making a just decision is sometimes more important than following the strict letter of the law, a more robust majority (48% completely, 35% strongly, 11% mildly) endorsed the statement that "Decisions of a board or commission should follow the law as the Legislature wrote it, not as a member or the ALJ would like it to be." However, pragmatism won out over precedence. More than 63% of respondents strongly or completely agreed with the pragmatic view that making sure tribunal decisions are fair, just, and acceptable to the parties is important, but only 58% of respondents strongly or completely agreed that it is "important to follow tribunal precedent so that decisions are predictable."

3. Important to a Fair Decision

Finally, respondents were asked questions that probed their sense of equality with the professional judge. Not surprisingly, most respondents (56%) *completely* agreed they were as important as the professional judge in making fair decisions, and 69% completely disagreed that their participation in decision-making was a waste of state time and money. Most respondents (91%) agreed that tribunals are more successful if members trust the professional judge, but a lower majority (70%) agreed that members had the power of principled resignation. Although a majority of respondents disagreed that they should be given more respect than they are now, a surprisingly large percentage (36%) agreed, indicating some dissatisfaction with how others viewed their position.

This Article does not include a statistical analysis of respondents' attitudes because such analyses are unlikely to benefit those who practice before boards and commissions or who work with them. It is too easy to fall into the trap of viewing such analyses as predictive of a result in a particular case. Instead, the value of the information in this research lies in the degree to which respondents demonstrate that they think individually and independently about the law. They ascribe great importance to their role as fact-finders, but they do not limit themselves to that role. They are confident of their ability to understand the law and don't rely unquestioningly on the ALJ's interpretation. Those who appoint, confirm, work with, or practice before lay members of mixed tribunals should keep their inclination to independence in mind.

CONCLUSION

The results of the survey clearly demonstrate that Alaska's lay members of administrative tribunals are serious, dedicated, and engaged members of the administrative bureaucracy. Lay members think about their roles in a "quasi-judicial" way, they accept responsibility for fair decision-making, and they ask to be respected as members of the tribunal. They clearly desire more training, especially in decision-making. They are not subservient to lawyer-judges in deliberation, but ask to be heard. If their participation is solicited, they will respond, but the solicitation may need to be repeated across forms of participation.

However, these results also show the extent of problems for tribunals: lack of diversity, lack of consistent training, lack of clear standards regarding the right of members to fully participate, inconsistency in tribunal support for participation, and lack of a rule

requiring board decisions to contain an announcement of dissent for non-unanimous decisions. Allowing a culture of perceived disrespect and distrust to develop may have serious consequences for the substantive and procedural fairness of the tribunal. For these reasons, amending the Alaska Administrative Procedure Act to clarify the right of members to express dissent, to be present in deliberations, and to participate fully in deliberation would be advisable.

Alaska's Executive Branch Ethics Act addresses blatant conflicts of interest, wherein members of a board or commission stand to personally gain or lose something of value in a decision. Most adjudicatory boards and commissions in Alaska do not suffer from structural conflict of interest, which can occur when a board has multiple functions, such as deciding a claim and then paying a claim from board-administered funds.[114] The combination of functions can create a bias where an oversight or regulatory board (or in-house hearing officer) favors an agency's investigators or staff.[115] In Alaska, few boards or commissions are composed of full-time appointees who exercise direct, daily oversight; this makes combination of functions arguments less persuasive because the boards are essentially part-time and the agency functions on a daily basis without direct oversight. In any case, institutional dual functionality alone does not create a conflict of interest sufficient to deprive a claimant of a fair hearing,[116] although personal participation of interested staff in decision-making does so.[117]

Moving to a system that divorces board members entirely from decision-making would deprive Alaska of the advantages of lay participation. However, there is no doubt that members, especially chairs, would benefit from education on distinguishing the various board functions. The practices that make a chair effective in a quasi-legislative setting do not necessarily lend themselves to ensuring the full, fair deliberation of a legal dispute. Education in differences between

114. Denmark v. Liberty Life Ins. Co., 566 F.3d 1, 8 (1st Cir. 2009).

115. Stephen R. Miller & Larry T. Richardson, *A Central Panel System for Mississippi's Administrative Law Judges: Promoting the Due Process of Law in Administrative Hearings*, 6 MISS. C. L. REV. 133, 133 (1986).

116. *See In re* Hanson, 532 P.2d 303, 306 (Alaska 1975) (holding that a "combination of judicial and investigative functions in the Commission did not violate petitioner's due process rights . . . [and] did not result in a biased or partial tribunal"); *In re* Deming, 108 Wash. 2d 82, 105 (1987) (noting that combining investigative and adjudicative functions results in no inherent unfairness or due process violations).

117. *See In re* Robson, 575 P.2d 771, 775 (Alaska 1978) (holding that "to assure both the fact and appearance of impartiality in the Disciplinary Board's decisional function, counsel associated with either the prosecution or defense should not be present during deliberations").

adjudication and executive action, including structured deliberation, is strongly recommended to diminish the possibility of suppressing member contributions.

Survey respondent satisfaction and estimates of the procedural fairness of the respondent's last decision were positively associated with ample opportunity to ask questions during deliberation. However, satisfaction, procedural fairness, and substantive fairness were all negatively associated with suppression of dissent and inadequacy of time to deliberate carefully and completely. Allowing sufficient time in the schedule for deliberation and repeated solicitation of member questions on points of debate could improve both member satisfaction and perception of procedural fairness. For some boards and commissions, this may require scheduling longer conferences, more frequent meetings, use of video conferencing, or other procedures to ensure that all members have a fair opportunity to participate.

The demographic data of respondents suggests that recruitment for adjudicatory tribunals needs to be broadened. Admittedly this is a difficult proposition, especially for designated seats. The Governor's Office of Boards and Commissions has made commendable efforts to recruit through the State's website, but the low use of the website as an "initial contact" is disappointing. State-generated publicity is generally limited to press announcements of appointments. Wider publication of opportunities to serve may generate more diverse applications. The Alaska Legislature could contribute as well by elevating the importance of its duty to review appointments. Giving more public recognition to current members or the adjudicatory work of tribunals, elevating the significance of tribunal service through legislative attention, and publicizing the existence of tribunals as opportunities to serve the State in a "quasi-judicial" capacity may attract more candidates.

For those who practice before Alaska's boards and commissions, the message is clear: there is no downside to bestowing formal respect toward lay members of administrative tribunals. Moreover, the commitment shown by respondents to the ideal of fair and impartial decision-making is ample reason for the bar to support structural and training initiatives that increase participation by lay citizens appointed to quasi-judicial boards and commissions.

APPENDIX

TABLE A. Subject Matter of Disputes Decided by Tribunal and Gender*

Kind of Disputes Decided by the Tribunal on which Participant Currently Serves	# of Responses	% of Participants	% of Responses	Male	Female
Individual Disputes Related to Work (occupational, professional or guiding licenses, practices, or violations, individual commercial fishing permits, benefit or monetary claims like workers' compensation, disability, retirement, medical benefits or individual employment rights)	75	48.1	48.1	43	30
Use of Public Resources (land and natural resources, including oil and gas, mining, taxes, tariffs, boundaries, land use, non-commercial hunting or fishing, or environmental enforcement)	13	8.3	8.3	9	2
Public Regulation (labor relations, labor standards and safety, employment discrimination, human rights, and public offices and officials, elections, commercial activity, public utilities, insurance, corporations, banks or business)	33	21.2	21.2	24	9
Cases about Conduct, Activity, or Rights Not Listed Above	35	22.4	22.4	22	13
Total	156	100	100	98	54

* Note: Four respondents did not respond to gender question.

TABLE B. Reported Tribunal Decision-Making Style

Choice of group that "best fits" how member's tribunal works to decide cases	# of Responses	% of Responses
Shared Hearing + Conference Deliberation. Citizen members and an ALJ(or qualified member) hear the case together. They deliberate and decide the outcome together. The ALJ and citizen members each have one vote. Usually, the ALJ writes the decision.	43	29.30
Shared Hearing + Advisory Deliberation. Citizen members attend the hearing with an ALJ who presides over the hearing. During deliberation, the ALJ remains in the room to advise the tribunal members, but does not vote. The ALJ writes the decision.	19	12.90
Delegated Hearing + Advisory Deliberation. An ALJ conducts a hearing for the tribunal. Before a proposed decision is written, the ALJ meets with the tribunal members while they discuss the evidence. The members make a decision. The ALJ does not vote. Usually the ALJ writes the decision.	16	10.90
Delegated Hearing + Collaborative Deliberation. The ALJ conducts a hearing for the tribunal and prepares a draft proposed decision. Then the ALJ meets with the tribunal while members discuss the evidence and the draft decision. The ALJ does not vote. The ALJ writes the final decision.	38	25.90
Delegated Hearing + Tribunal Review. An ALJ hears the case and writes a proposed decision. Members of the tribunal review the proposed decision without the presence, collaboration or advice from the ALJ The tribunal may adopt, amend, or reject the proposed decision.	31	21.10
NO RESPONSE GIVEN	9	0
TOTAL	156	100

TABLE C. Distribution of Community Population by Gender

Community	# of Responses	% of Total Participants	% of Responses	Female	Male
Rural	42	26.9	28.2	11	31
Small Town 6K or more	22	14.1	14.8	7	14
Town 30-60K	19	12.2	12.8	8	11
Municipality of Anchorage	66	42.3	44.3	25	40
Subtotal	149	95.5	100	51	96
No Entry or No Response	7	4.5	–	9	
Total	156	100	100	–	–

TABLE D. Years Lived in Alaska by Decades and Gender

Years in Alaska*	# of Responses	% of Total Participants	% of Responses	Female	Male
0-10 years	7	4.5	4.5	4	3
11 to 20 years	25	16	16.2	12	13
21 to 30 years	32	20.5	20.8	10	21
31 to 40 years	45	28.8	29.2	11	34
41 or more years	45	28.8	29.2	17	27
No response	2	1.3	0	4 no response	
Total	156	100	100	54	98

*Years in Alaska were reported as a number, but coded into decades. The median, 35, and the mean, 34.66, were calculated from the total number of years reported by 154 responses.

TABLE E: Reported Education Level of Participants by Gender

Level of Education Reported	# of Responses	% of Total Participants	% of Responses	Female	Male
Up through High School or GED	4	2.6	2.6	1	3
Some vocational training or college after High School or GED	25	16	16.1	5	20
Completed formal (union) apprenticeship or BA, BS degree	38	24.4	24.5	12	26
Master's Degree, Master Craftsman, or professional license (PE, CPA, PA-C, etc.)	51	32.7	32.9	28	23
Ph.D. or M.D., J.D., Ed.D., etc.	37	23.7	23.9	8	26
No response	1	0.6	0	4	
Total	156	100	100	54	98

TABLE F: Age and Employment Status of Respondent

Age	# of Responses	% of Total	% of Responses	# employed / seeking employment	# not employed / not seeking employment
18-25 years	1	0.6	0.6	0	1
26-45 years	22	14.1	14.3	20	2
46-60 years	76	48.7	49.4	67	8
61-70 years	42	26.9	27.3	21	21
Over 70 years	13	8.3	8.4	6	7
Prefer not to say	1	0.6			
No response	1	0.6		3	
Total	156	100%	100%	114	39

TABLE G. Satisfaction with Diversity, by Community Population and Gender

Degree of satisfaction with diversity	Rural	More than 6,000	Town 30,000-60,000	Municipality of Anchorage	Female	Male
Lacks both ethnic and gender diversity	2	3	3	5	2	11
Lacks either ethnic or gender diversity	5	0	1	14	11	10
Has some ethnic and gender diversity, but could be more diverse given the size of the board or commission	4	2	3	11	8	13
Represents the diversity of Alaska's population given the size of the board or commission	30	16	11	32	29	60
Total	41	21	18	62	50	94

TABLE H: Deliberation Form by Race and Gender*

Deliberation Form	Alaska Native / American Indian	>1 chosen	White	Other	Female	Male
Shared Hearing + Conference Deliberation	2	0	34	4	12	30
Shared Hearing + Advisory Deliberation	4	0	15	0	5	14
Delegated Hearing + Advisory Deliberation	0	0	14	0	8	6
Delegated Hearing + Collaborative Deliberation	2		33	2	12	25
Delegated Hearing + Tribunal Review	1	1	29	0	12	19

*Not all participants answered every question; absent responses are excluded. Therefore, numbers will not necessarily total equally.

TABLE J. Desirable Traits: How Important It Is for Lay Members to Have _____?

1. Expertise or experience in regulated field				
	Score	# of Responses	% of Total	% of Responses
	1	2	1.3	1.3
	2	5	3.2	3.2
	3	13	8.3	8.3
	4	28	17.9	17.9
	5	35	22.4	22.4
	6	73	46.8	46.8
	Total	156	100	100
2. Impartiality, avoidance of conflict of interest				
Note: no response to 2, 3	Score	# of Responses	% of Total	% of Responses
	1	1	0.6	0.6
	4	5	3.2	3.2
	5	28	17.9	17.9
	6	122	78.2	78.2
	Total	156	100	100
3. Prompt, ready, and regular attendance				
Note: no responses to 2, 3	Score	# of Responses	% of Total	% of Responses
	1	1	0.6	0.6
	4	2	1.3	1.3
	5	43	27.6	27.6
	6	110	70.5	70.5
	Total	156	100	100
4. Ability to understand and weigh the evidence				
Note: no responses to 2, 3	Score	# of Responses	% of Total	% of Responses
	1	2	1.3	1.3
	4	2	1.3	1.3
	5	31	19.9	20
	6	120	76.9	77.4
	Total	155	99.4	100
	No opinion	1	0.6	
	Total	156	100	

TABLE J cont'd.

5. Knowledge of the tribunal's laws and regulations				
	Score	# of Responses	% of Total	% of Responses
	1	1	0.6	0.6
	2	3	1.9	1.9
	3	4	2.6	2.6
	4	10	6.4	6.4
	5	55	35.3	35.3
	6	83	53.2	53.2
	Total	156	100	100
6. Active participation, communication with other members				
	Score	# of Responses	% of Total	% of Responses
	1	1	0.6	0.6
	2	1	0.6	0.6
	3	3	1.9	1.9
	4	11	7.1	7.1
	5	45	28.8	28.8
	6	95	60.9	60.9
	Total	156	100	100
7. Willingness to stick to principles, independence				
	Score	# of Responses	% of Total	% of Responses
	1	2	1.3	1.3
Note: no response to 2	3	8	5.1	5.1
	4	13	8.3	8.3
	5	49	31.4	31.4
	6	84	53.8	53.8
	Total	156	100	100

TABLE J cont'd.

8. Overall fairness, open-mindedness, freedom from prejudice				
Note: no response to 2, 3, 4	Score	# of Responses	% of Total	% of Responses
	1	2	1.3	1.3
	5	23	14.7	14.7
	6	131	84	84
	Total	156	100	100
9. Willingness to compromise, ability to negotiate				
Note: no response to 2	Score	# of Responses	% of Total	% of Responses
	1	3	1.9	1.9
	3	4	2.6	2.6
	4	24	15.4	15.5
	5	55	35.3	35.5
	6	69	44.2	44.5
	Subtotal	155	99.4	100
	No opinion	1	0.6	
	Total	156	100	

Table 1. Endorsement of Latent Contributions

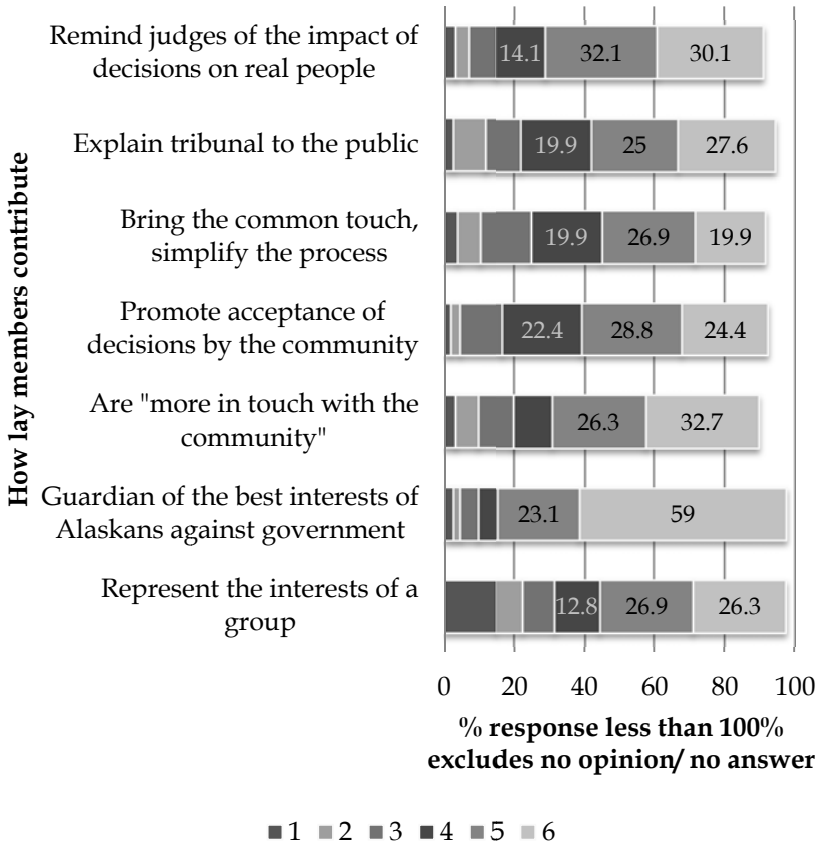


Table 2. Endorsement of Lay Roles When Making Decisions

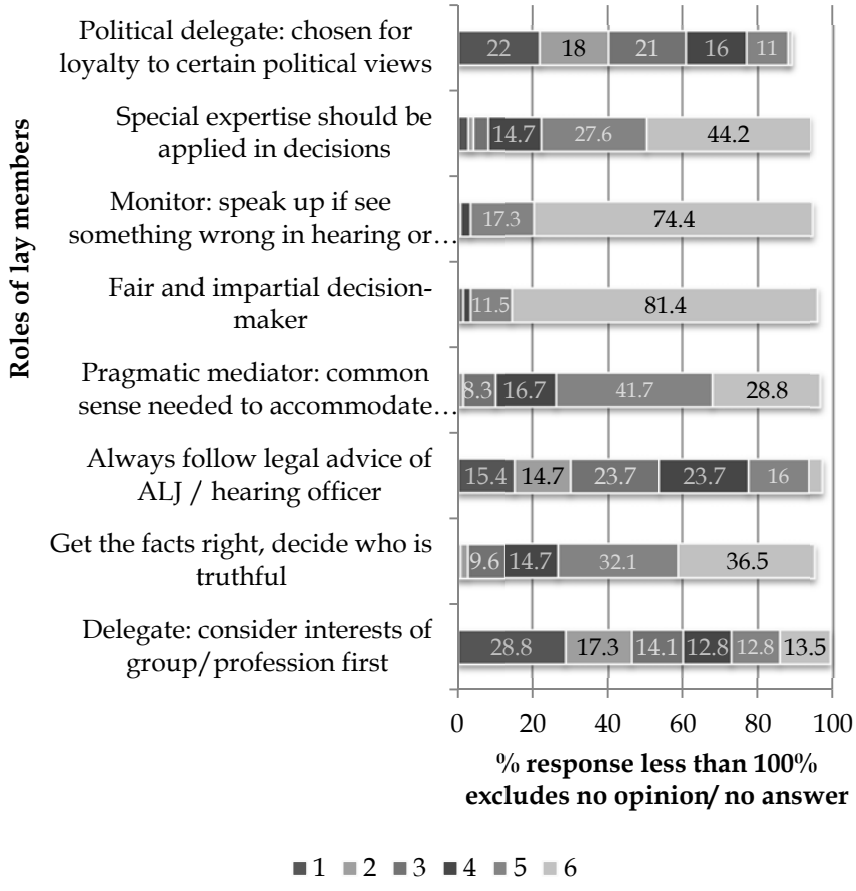


Table 3. Endorsement of Attitudes toward Law

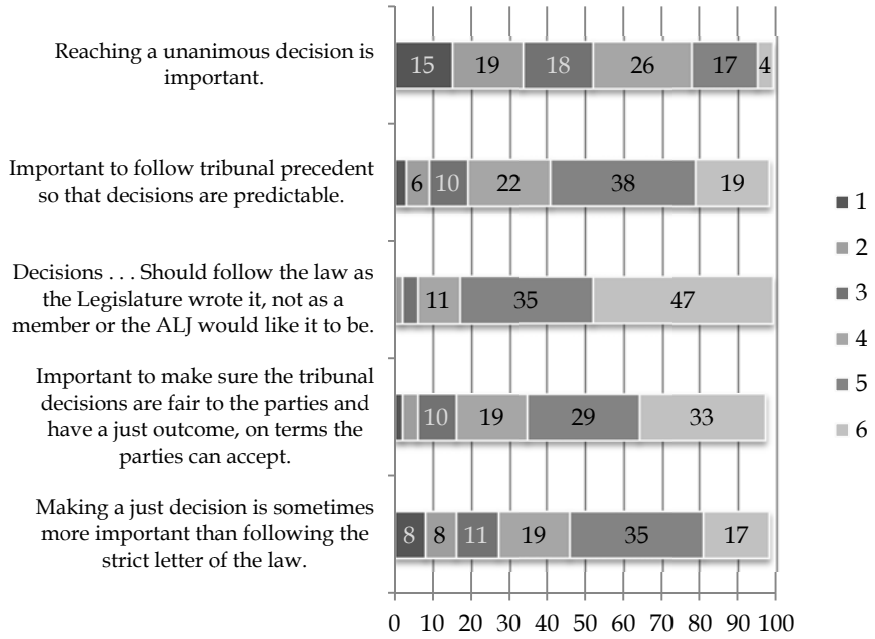


Table 4-A. Endorsement of Equal Responsibility for Fair Decisions

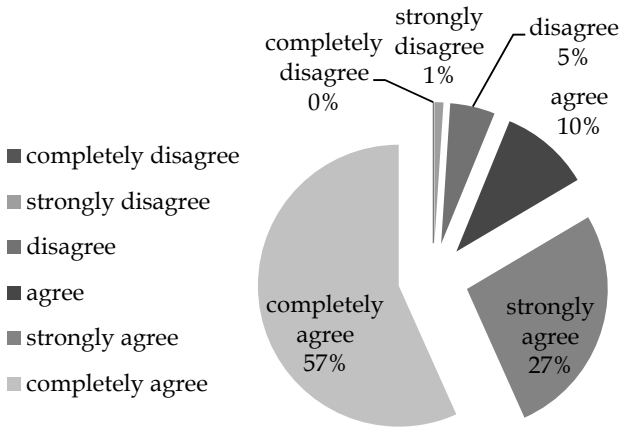
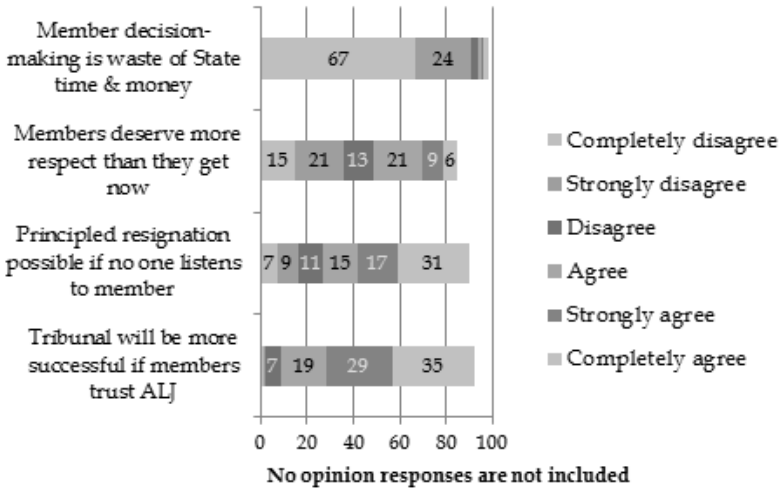


Table 4-B. Endorsement of Relative Power of Lay Members



No opinion responses are not included