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2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
3 THIRD JUDICIAL DISTRICT AT ANCHORAGE

4 In the Matter of the Necessity )  
5 for the Hospitalization of: )  
6 ROSLYN WETHERHORN, )  
7 Respondent. )

Case No. 3AN 05-459 PR-S

**RECEIVED**  
AUG 08 2005  
Law Project For  
Psychiatric Rights

8 SUPPLEMENTAL MEMORANDUM IN REPLY TO  
9 OPPOSITION TO MOTION FOR ATTORNEY'S FEES

10 The Law Office for Psychiatric Rights (Law Office) asks for a court order  
11 requiring the state to pay the Law Office enhanced fees for work done in this case. The  
12 state provided good reasons in its opposition to the Law Office's motion, as to why it  
13 should be denied. In this supplemental memorandum, the state will further show that,  
14 under the holding of *Cooper v. State*<sup>1</sup> and related cases, the court does not have the  
15 statutory authority to award attorney's fees to the Law Office in this case. The state will  
16 also challenge the Law Office's claim for enhanced fees and the respondent's claim to  
prevailing party status.

17 **A. The court lacks statutory authority to award attorneys' fees in this  
18 case**

19 "The common law does not permit the recovery of attorney's fees, as  
20 costs, from the opposing party."<sup>2</sup> "The authority to make such awards is derived from  
21 AS 09.60.010."<sup>3</sup> That provision provides, in part that "[t]he supreme court shall  
22 determine by rule or order the costs, if any, that may be allowed a prevailing party in a  
civil action."<sup>4</sup>

23 1 638 P.2d 174 (Alaska 1981)

24 2 *McDonough v. Lee*, 420 P.2d 459, 460 (Alaska 1966).

25 3 *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979).

26 4 AS 09.60.010(a).

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2 In *Cooper v. State*<sup>5</sup> the Alaska Supreme Court determined that, AS  
3 09.60.010 did not give courts authority to order that attorneys' fees be awarded to the  
4 prevailing party in a Child in Need of Aid Proceeding.<sup>6</sup> The court also found that Civil  
5 Rule 82 does not apply to actions governed by the Children's Rules.<sup>7</sup> For the same  
6 reason, this court lacks statutory authority to award the Law Office attorneys' fees in  
7 this case.

8 Involuntary mental commitment proceedings, such as this one, are  
9 governed by the Probate Rules, not the Civil Rules.<sup>8</sup> In its reply, the Law Office cites  
10 *Crittell v. Bingo*<sup>9</sup> for the proposition that probate matters are civil actions for the purpose  
11 of Civil Rule 82.<sup>10</sup> This reliance is flawed because the nature of the proceeding in  
12 *Bingo* was fundamentally different than the nature of an involuntary mental  
13 commitment.

14 *Bingo* involved a will challenge brought by private individuals against the  
15 will's proponents---other private individuals.<sup>11</sup> In this case, a state entity petitioned the  
16 court to permit the state to take protective actions to preserve the well being of the  
17 respondent and her community. Therefore this case lacked the private adversarial  
18 component present in private probate disputes, such as the one in *Bingo*, and in normal  
19 civil actions.

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20 <sup>5</sup> *Supra*

21 <sup>6</sup> 638 P.2d at 178.

22 <sup>7</sup> *Id.*

23 <sup>8</sup> Probate Rule 1(b) "These rules govern practice and procedure in the trial courts  
24 in ...mental commitments under AS 47.30..."

25 <sup>9</sup> 83 P.3d 532 (Alaska 2004).

26 <sup>10</sup> Reply at 2.

<sup>11</sup> 83 P.3d at 532 ("Will proponents, an acquaintance of testator who was primary  
beneficiary under will and acquaintance's husband who was named as executor, filed  
petition for informal probate of will. Interested parties objected, alleging testator lacked  
testamentary capacity and acted under undue influence in executing the will.").

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2 Mental commitments are more like child in need of aid proceedings than  
3 civil actions. The court in *Cooper* found that child protection proceedings were not  
4 "civil actions" for purposes of the attorneys' fees authorization statute, AS 09.60.10.  
5 While *Bingo* acknowledged that AS 09.60.010 gives courts authority to apply Civil Rule  
6 82 to civil actions that take place in probate court, it did not reverse the basic holding of  
7 *Cooper*---- that AS 09.60.010 does not allow the award of attorneys fees in non-civil  
8 actions such as governmentally initiated children's cases. For the same reason, the  
9 statute does not authorize attorneys' fees award in governmentally initiated mental  
10 commitments.

11 *Cooper* supported its limited interpretation of AS 09.60.10, with a public  
12 policy analysis equally applicable in this case. The court found that "Children in need  
13 of aid proceedings are intended to promote an important public interest: the welfare of  
14 children."<sup>12</sup> Therefore, "[e]xposing the state to costs and attorney's fees when a child is  
15 ultimately determined not to be in need of aid would significantly chill the state's  
16 willingness to commence protective proceedings for children."<sup>13</sup> This, the court found  
17 would be inconsistent with the underlying purpose of children's proceedings.<sup>14</sup> The  
18 same can be said of mental commitment cases.

19 The purpose of the involuntary mental commitment proceedings is to  
20 hospitalize individuals who, as the result of mental illness are either gravely disabled, a  
21 risk to themselves, or a risk to others.<sup>15</sup> Hospitalization protects mentally ill individuals  
22 and the community. Therefore, the underlying purpose of the mental commitment  
23 statutes is to promote the welfare of the subject individuals and their community. As it  
24 would in children's proceedings, placing the state at risk of attorney's fee awards

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25 <sup>12</sup> 638 P.2d at 178.

26 <sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> AS 47.30.735(c).

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2 anytime a court finds a commitment petition unfounded could have a chilling effect on  
3 the willingness of the state to file commitment petitions.

4 *Cooper* is still good law. The Alaska Supreme Court cited it as authority  
5 for refusing to award Rule 82 attorney's fees in juvenile delinquency or criminal cases  
6 where the respondent is represented by private counsel.<sup>16</sup> Its principles are consistent  
7 with the statutory scheme for mental commitments that require the superior court to  
8 appoint counsel for every respondent at the time the ex parte commitment order is  
9 issued<sup>17</sup> and requires the respondent to pay for his appointed counsel if he or she can  
10 afford it.<sup>18</sup> Clearly the legislature did not expect respondents to hire their own lawyer,  
11 let alone expect the state to pick up the costs if the respondents are not committed.  
12 Therefore, the court, in this case should follow *Cooper* and deny the Law Office's  
13 motion for attorney's fees.

14 **B. In the alternative, the Law Office would not be entitled to fees,  
15 enhanced or not, even if Civil Rule 82 applied to this case.**

16 Even if Civil Rule 82 applies here, respondent is not entitled to an  
17 attorney's fee award because she was not the prevailing party in the case.<sup>19</sup> The state  
18 prevailed at the April 15, 2005 hearing on its petition for a 30-day commitment and for  
19 administration of medication.<sup>20</sup> The state also prevailed over the Law Office's  
20 objection, in its motion to dismiss the 90-day commitment petition without prejudice.<sup>21</sup>  
21 Acknowledging this court holding, the Law Office claimed that "whether dismissed  
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23 <sup>16</sup> *State v. Superior Court*, 743 P.2d 381 (Alaska 1987).

24 <sup>17</sup> Alaska Statute 47.30.700(a) ("Within 48 hours after completion of the screening  
25 investigation, a judge may issue an ex parte order...The court shall...appoint an  
26 attorney to represent the respondent, and may direct that a peace officer take the  
27 respondent into custody...").

28 <sup>18</sup> Alaska Statute 47.30.905(b)(1).

29 <sup>19</sup> Civil Rule 82(a).

30 <sup>20</sup> State's Opposition at 1.

31 <sup>21</sup> Memorandum in Support of Motion for Attorney's Fees at 2.

1 with or without prejudice, Ms. Wetherhorn is the prevailing party in this matter.”<sup>22</sup> The  
2 Law Office presses its claim on the theory that the state moved to dismiss the 90 day  
3 petition because the Law Office requested a jury trial on the state’s 90 day commitment  
4 petition. In fact, the state asked for dismissal of the 90 petition because the respondent  
5 had already been released from the Alaska Psychiatric Institute.<sup>23</sup> She was released  
6 because she no longer required hospitalization.<sup>24</sup> The respondent did not prevail in  
7 court. Therefore, neither she nor the Law Office is entitled to an attorney’s fees award.

8 The court’s actions in this case also eliminates respondent’s claim for  
9 enhanced fees. The Law Office asks for an award of full attorney’s fees in this case to  
10 punish the state for allegedly failing to comply with some technical statutory  
11 requirements of AS 47.30. The Law Office’s representative paints with a broad brush in  
12 this portion of his reply. He alleges that in this case the state exhibited “cavalier  
13 disregard for Ms. Wetherhorn’s statutory rights, enabled and emboldened by the Public  
14 Defender Agency’s complete abdication of its responsibility to protect the rights of its  
15 AS 47.30 clients.”<sup>25</sup> Even if these allegations were true, they do not support a claim for  
16 full fees.

17 The Alaska Supreme Court has “consistently held that an award of full  
18 attorney’s fees is ‘manifestly unreasonable’ in the absence of a bad faith defense or  
19 vexatious conduct by the losing party.”<sup>26</sup> He does not allege that the state brought the

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20 <sup>22</sup> *Id.*

21 <sup>23</sup> Motion to Dismiss at 1.

22 <sup>24</sup> See Discharge Summary, attached as exhibit 1 to respondent’s Response to  
23 Motion to Dismiss.

24 <sup>25</sup> Reply at 5.

25 <sup>26</sup> *State v. University of Alaska*, 624 P.2d 807, 817 (Alaska 1981). See also *Bingo*,  
26 83 P3d at 537, n. 20, *Marathon Oil Co. v. ARCO Alaska, Inc.*, 972 P.2d 595, 605  
(Alaska 1999); *State, Child Support Enforcement Div. v. Allsop*, 902 P.2d 790, 795  
(Alaska 1995); *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987).

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2 case in bad faith or for a vexatious purpose. How could he? The state won at every step  
3 in this case. Respondent was released, as appropriate, when she no longer needed  
4 hospitalization. Therefore the state was not vexatious and did not bring the case in bad  
5 faith. Furthermore there is nothing in the record or in the Law Office's filings that  
6 support any enhancement of attorneys' fees in this case.

7 **CONCLUSION**

8 The motion for attorney's fees should be denied because this court lacks  
9 statutory authority to grant it. Even if the court had such authority, the motion should  
10 be denied because respondent is not the prevailing party here and there is no  
11 justification for the court to make an enhanced attorney fees award.

12 DATED: 8/04/05

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