

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE



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November 4, 2008

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

BOARD OF GOVERNORS OF THE ALASKA BAR ASSOCIATION SUNSET REVIEW

November 4, 2008

Audit Control Number
41-20057-08

The audit was conducted as required by AS 44.66.050 and under the authority of AS 24.20.271(1). Alaska Statute 44.66.050(c) lists criteria to be used to assess the demonstrated public need for a given board, commission, agency, or program subject to the sunset review process. Currently, under AS 08.03.010(c)(2), the Board of Governors of the Alaska Bar Association is scheduled to terminate on June 30, 2009.

In our opinion, the termination date for this board should be extended. The regulation and licensure of attorneys contributes to the protection of the public's welfare. We recommend the legislature extend the termination date to June 30, 2017.

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology.

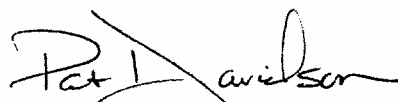

Pat Davidson, CPA
Legislative Auditor

TABLE OF CONTENTS

	<u>Page</u>
Objectives, Scope, and Methodology	1
Organization and Function	3
Report Conclusions.....	5
Findings and Recommendations.....	7
Auditor’s Comments.....	11
Analysis of Public Need	13
Appendices	
Appendix A – Financial Statements	23
Appendix B – Discipline Statistics	29
Appendix C – Bar Examination and Admission Statistics	31
Appendix D – Attorney Referrals.....	33
Agency Response	
Alaska Court System.....	35
Alaska Bar Association.....	39

OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 and Title 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Board of Governors of the Alaska Bar Association (board). Under AS 44.66.050(a), the legislative committee of reference is to consider this report during the legislative oversight process to determine whether the board's termination date should be extended. Currently, AS 08.03.010(c)(2) requires the board to terminate on June 30, 2009. If the legislature takes no action to extend the termination date, the board will have one year from that date to conclude its operations.

Objectives

There are four central objectives of our report. They are:

1. To determine if the termination date for the board should be extended.
2. To determine if the board is operating in the public's interest.
3. To determine if the board has exercised appropriate oversight of licensed members of the Alaska Bar Association (Bar).
4. To provide a current status on the recommendations made in the prior report.

The assessment of the operations and performance of the board was based on criteria set in AS 44.66.050(c). Criteria set out in this statute relates to the determination of a demonstrated public need for the board.

Scope and Methodology

Our review focused on the continuing legal education requirement, discipline function provided by the Bar, as well as board proceedings. Our audit reviewed board operations and activities from July 1, 2006 through June 30, 2008.

We reviewed and evaluated the following:

- Applicable statutes, Alaska Bar Rules, Alaska Rules of Professional Conduct, and Bar bylaws
- Board minutes
- Bar annual reports

- Attorney discipline files
- Audited financial statement of the board

In addition, we conducted interviews of the board president, staff, including the executive director, board counsel, director of continuing legal education, and comptroller.

ORGANIZATION AND FUNCTION

The practice of law in the State of Alaska is regulated by the Board of Governors of the Alaska Bar Association (board). The board consists of 12 members including nine attorneys elected by the active membership of the Alaska Bar Association (Bar) and three non-attorney public members that are appointed by the governor and confirmed by the legislature in joint session.

The powers and duties of the board are conferred by the Alaska Integrated Bar Act (AS 08.08), the Alaska Bar Rules, and the Rules of Professional Conduct which are promulgated by the Alaska Supreme Court. The purpose of the board includes the following: to cultivate and advance the science of jurisprudence, to promote reform in the law and in judicial procedure, to facilitate the administration of justice, to encourage continuing legal education (CLE) for the membership, and to increase the public service and efficiency of the Bar.

The two primary functions of the Bar are the admission and discipline of its members. To accomplish these and other functions, the Bar operated with a 2008 budget of \$1,983,738. Funding is provided primarily by membership dues (\$410 per year), admission fees, lawyer referral fees, CLE charges, administrative discipline fees, and interest income.

Admission Function The board is responsible for screening applicants for admission to the Bar. The board certifies to the Supreme Court that all successful applicants are fit to practice law. The board appoints an executive director who is responsible for directing all staff functions, including the oversight of the admissions function.

Discipline Function The board is responsible for investigating grievances against all members of the Bar. The board appoints the discipline counsel. This counsel is responsible for oversight of all disciplinary actions taken against the Bar's membership and provides an ethics course that is required for all applicants. The board selects hearing committee members from a group of individuals in each judicial district

Exhibit 1

The Board of Governors of the Alaska Bar Association (as of October 20, 2008)
Mitch Seaver, President <i>First Judicial District</i>
Sidney K. Billingslea, President-elect <i>Third Judicial District</i>
Don McLean, Vice-president <i>Public Member</i>
Jason A. Weiner, Treasurer <i>Second/Fourth Judicial District</i>
Christopher R. Cooke, Secretary <i>Third Judicial District</i>
Carl Ekstrom <i>Public Member</i>
William A. Granger <i>Public Member</i>
Donald W. McClintock <i>Third Judicial District</i>
Allison Mendel <i>Third Judicial District</i>
Hanna Sebold <i>First Judicial District</i>
Krista S. Stearns <i>Third Judicial District</i>
John J. Tiemessen <i>Second/Fourth Judicial District</i>

appointed by the Chief Justice of the Supreme Court. The board is also responsible for issuing reprimands when warranted, and for recommending the Supreme Court impose disbarment, suspension, probation, or public censure when appropriate.

Miscellaneous Functions The Bar also performs a wide variety of miscellaneous functions that include providing classes for and accrediting CLE providers, a lawyer referral service, client mediation, and fee arbitration with clients. In conjunction with the Alaska Legal Services Corporation, the Bar sponsors the Alaska Pro Bono Program. The Bar provides a number of other member services including attorney liability protection, group insurance, the *Alaska Bar Rag*, ethics opinions, and alcohol and drug counseling. In addition, the association provides grants through the Alaska Bar Foundation from earnings of interest on the lawyers trust account program. These grants are used to support legal services for the economically disadvantaged and improve the administration of justice.

The Bar's office is located in Anchorage and is currently staffed by 19 full-time and job-share employees.

The board's decision involving examination and discipline may be appealed to the Alaska Supreme Court. The Alaska Supreme Court issues the order of admission to the Bar and lawyer disciplinary sanctions involving disbarment, suspension, probation, and public censure.

REPORT CONCLUSIONS

In our opinion, the termination date of the Board of Governors of the Alaska Bar Association (board) should be extended. The regulation and licensing of qualified attorneys contributes to the protection of the public's welfare.

The board, through the Alaska Supreme Court, protects the public by ensuring that persons licensed to practice law are qualified. It also provides for the investigation of complaints and has established a disciplinary process designed to promote licensed individuals to act in a competent and professional manner. Chapter 58, SLA 2005 amended AS 08.03.020(c) to increase from four to eight years the period for which a board scheduled for termination may be continued or reestablished by the legislature. As such, we recommend that the legislature extend the termination date of the board to June 30, 2017.

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FINDINGS AND RECOMMENDATIONS

In the prior audit, *Board of Governors of the Alaska Bar Association, Follow Up, September 15, 2006*, (Audit Control No. 41-20050-06), there were three recommendations, one of which has been fully implemented. The implemented recommendation was to adopt a due date for timely issuance of annual reports. The recommendation was resolved at the board's September 7, 2006 meeting where the board voted to amend their Standing Policies, setting April 15 as the due date for the completion of the preceding year's annual report. Review of the 2006 and 2007 annual report documentation confirmed they were completed prior to the April 15 due date.

The recommendation to adopt mandatory minimum continuing legal education (CLE) for attorneys is partially implemented and is reiterated as Recommendation No. 1

The final recommendation, which relates to the Alaska Bar Association (Bar) developing a database of disciplined lawyers, has not been addressed and is reiterated as Recommendation No. 2. In addition, review of board meeting proceedings resulted in noted deficiencies. The deficiencies are further discussed in Recommendation No. 3

Recommendation No. 1

The board should recommend to the Alaska Supreme Court that mandatory minimum CLE for attorneys be adopted.

Prior Finding

CLE for attorneys is voluntary rather than required. The Supreme Court adopted voluntary CLE under Bar Rule 65 in 1999. It encouraged all active members of the Bar to complete at least 12 credit hours of approved CLE, including one credit hour of ethics. Incentives, such as reduction of Bar dues and eligibility to participate in the Lawyer Referral Service, are authorized to those who comply with the Bar rule.

Forty-one legal jurisdictions in the United States have a mandatory CLE requirement for attorneys desiring to practice law in their jurisdiction. Mandatory CLE requirements range from 8 to 27 credit hours per year with the majority of the jurisdictions requiring between 12 and 15 hours. Specific course requirements vary.

Most professions require continuing education to maintain licensure in Alaska. For example, Alaska-licensed dentists, doctors, pharmacists, and psychologists are required to meet minimum continuing education standards.

Overall, we believe a mandatory minimum CLE requirement will enhance the membership's continued professional competence and raise the public's confidence in attorneys. The board should encourage the Supreme Court to adopt an Alaska Bar Rule requiring mandatory minimum CLE.

Legislative Audit's Current Position

The board voted at their September 7, 2006 meeting to send the mandatory CLE rule, as published, to the Alaska Supreme Court. Based on this rule, the Alaska Supreme Court amended Alaska Bar Rule 65 through Supreme Court Order No. 1640, to require all members to complete three credit hours of mandatory ethics continuing legal education (MECLE) per year. In addition to MECLE, all members are encouraged to complete nine credit hours of approved voluntary continuing legal education (VCLE). Members must certify with the Bar that they have completed the required MECLE and provide the number or an estimated number of completed VCLE.

The Supreme Court Order No. 1640 also added Alaska Bar Rule 66 for the suspension of members who have not complied with completing the required MECLE or members who failed to report the MECLE and VCLE for the year. These rules became effective January 1, 2008.

The mandatory ethics requirement does not fully achieve the goal of promoting competency and professionalism in members of the Bar. Although ethics education is part of the goal, requiring CLE, as opposed to encouraging VCLE, will strengthen the public's confidence that attorneys are professional and competent. Therefore, we reiterate our prior recommendation.

Recommendation No. 2

The board should consider developing a database of disciplined lawyers in the Bar's website.

Prior Finding

While current procedures are adequate, the board could increase efficient and effective communication of lawyer discipline to the public by publishing their discipline list on the Bar's website.

Board procedures provide for public notice of all attorneys who have been disbarred, suspended, put on probation, publicly censured, or reprimanded. Currently, the board publishes the names of these attorneys in four major newspapers throughout the State, the local newspaper where the attorney practiced, the *Alaska Bar Rag*, and in the board's annual report. Notice of all disciplines imposed by the court, all orders granting reinstatements, and all public reprimands are also transmitted to the American Bar Association National Lawyer Regulatory Data Bank. These are long-standing means of providing public notice; however, 15 states currently also publish their lawyers discipline list on their websites.

The board should consider developing a database for the Bar's website of the disciplines imposed against lawyers. It would be an effective medium in addition to the others used to inform the public of lawyers who have been disciplined. It would enhance public notification and client protection through increased accessibility of discipline information.

Legislative Audit's Current Position

In their response to the prior recommendation, the board agreed that having public discipline information available on its website was a desirable goal and that they would work to that end. Although some steps have been taken towards the possible implementation of our recommendation, attorney discipline information is not yet available from the Bar's website.

The board stated in the prior recommendation that the new discipline module of the replacement database, including online reporting of public discipline would be operational in the summer of 2007. However, due to changing priorities, the Bar has not started implementing the discipline module, though it is tentatively scheduled for early 2009.

Legislative Audit's position remains unchanged. We continue to believe the board should develop a database of disciplined lawyers to which access is provided the public via the Bar's website.

Recommendation No. 3

The board should adhere to existing public notice requirements for all meetings or modify the bylaws to clearly address conference call board meeting procedures and public notice requirements.

The board, as the governing body of the Bar, is vested with the power and authority to adopt regulations and policies concerning activities, affairs, and organization of the Bar, as well as collect and disburse all monies of the organization. In order to achieve these responsibilities, the board meets at least four times during the year. In addition to the four regular meetings, the president may, or upon written request of three governors, call emergency meetings. Public notice for regular and emergency meetings must be provided at least thirty and three days prior to the meeting, respectively. The proceedings for these board meetings are outlined in the Bar bylaws under Article IV specific to the board.

Since June 30, 2006, there were eight regular and five conference call board meetings. None of the conference call meetings met the public notice requirements for board meetings. There appears to be some confusion by the board as to the public notice requirements for conference call meetings.

The bylaws do not identify conference call meetings as a unique type of board meeting with unique public notice requirements; therefore the board should adhere to the public notice requirements for regular board meetings. Adequate public notice of meetings is necessary to allow for maximum public participation in public activities.

If the board believes the conference call meetings are inherently different from regular meeting then the bylaws should be modified to clearly address conference call board meetings to ensure the appropriate procedures are followed and the public receives adequate notice for such meetings.

AUDITOR'S COMMENTS

The sunset process allows for an objective and independent review of various boards and commissions to determine if the public need for protection continues to exist and if the entity is satisfying that need. The overall conclusions of our review are that the Board of Governors of the Alaska Bar Association (board) is operating in the public interest and that there is a continuing public need for the attorney admission and discipline functions of the Alaska Bar Association (Bar). Nevertheless, an overall evaluation of the basic approach to these functions should be undertaken from time to time. Whether the discipline function is to be controlled by government or by attorneys is a policy-level determination that should be carefully considered by the Supreme Court, the board, and the legislature. The following comments are intended to assist in such consideration.

Self-regulation, whether by industry or profession, has always been viewed skeptically by the citizenry. There is often a perception of conflict of interest in whether actions are for the benefit of the organization's membership or for the citizens' benefit. The attorney discipline system of the Bar is a self-regulatory function that may suffer from this public perception.

The board is comprised of twelve members, of which nine are attorney members elected by the Bar's membership and three public members appointed by the governor. As the majority is elected by the membership, the Bar's discipline activities will likely be perceived as self-regulation.

We believe that the attorney discipline system in Alaska could be a government function. The American Bar Association concurs and, in fact has recommended that the disciplinary function of state bars be under the direct control of the Supreme Court. The American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement*, August 1993,¹ recommended the following:

The disciplinary system should be controlled and managed exclusively by the state's highest court and not the state or local bar association...the disciplinary process should be directed solely by the disciplinary policy of the court and its appointees and not influenced by internal politics of the bar association... the disciplinary system should be free from even the appearance of conflicts of interest or impropriety.

The following options should be considered in a move away from attorney self-regulation:

- Disciplinary investigations performed by judicial branch employees.

¹ The *Model Rules for Lawyer Disciplinary Enforcement*, August 1993 was amended on August 5, 1996, on February 8, 1999 and on August 12, 2002. The 1993 recommendation is in the commentary under Rule 2.

- Disciplinary function placed under the Supreme Court with a Disciplinary Board appointed by the court.

There should be no general fund net cost to either of these options. They would be paid for by attorney licensing fees, the same as they currently are, and as they are for other occupations. Fees are established such that full costs are recouped.

From a citizen's perspective, there are no advantages to allowing the legal profession to self-regulate. However, there will always be the disadvantage of at least the perception of inadequate discipline. In a move away from self-regulation, the legal profession and the State's citizens would likely benefit.

ANALYSIS OF PUBLIC NEED

The following analyses of the Board of Governors of the Alaska Bar Association (board) activities relate to the public-need factors defined in AS 44.66.050(c). These analyses are not intended to be comprehensive, but to address the areas we were able to cover within the scope of our review.

Determine the extent to which the board, commission, or program has operated in the public interest.

The board admits applicants to practice law through an examination process that was designed in consultation with a national expert. The board also admits members by motion for reciprocity. This option is limited to attorneys in the active practice of law for five of the last seven years in states with which Alaska has a reciprocal agreement.²

Additionally, the Alaska Bar Association (Bar) also provides services that are more typically provided by professional associations rather than regulatory agencies. These include:

- The Bar has a committee to administer the Lawyers' Fund (fund) for Client Protection. This fund receives \$10 from each active member's annual dues. The fund is used to reimburse clients for losses³ caused by dishonest conduct⁴ of a lawyer which is not covered by insurance or fidelity bond, whether of the lawyer or the client. The maximum amount payable to any individual is the lesser of \$50,000 or 10% of the fund amount at the time of the award. The aggregate maximum amount that may be paid to all claimants under a fee arbitration case arising from the dishonest conduct of a particular lawyer is \$200,000.
- Since 1976, the Bar has maintained a fee arbitration process allowing a client to resolve attorney fee disputes that have not been determined by statute or court rule or decision. For fee disputes of \$5,000 or less, the process provides for a single arbitrator. Disputes over \$5,000 are heard by a three-member panel that consists of two attorneys and one

² As of June 30, 2008, the Alaska Bar Association has reciprocal agreements with 33 states.

³ Reimbursable losses are losses of money, property, or other things of value caused by the lawyer when: (1) acting in a fiduciary capacity customary to the practice of law, such as a administrator, executor, trustee, guardian or conservator; (2) acting as an escrow holder; or (3) filed within three years after the claimant knew or should have known of the dishonest conduct of the lawyer (Alaska Bar Rule 45).

⁴ Alaska Bar Rule 45 defines dishonest conduct as,

... wrongful acts committed by a lawyer in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money, property or other things of value.

public member. Failure by an attorney to participate in this process may be grounds for disciplinary action.

- The Bar also offers a mediation process that attempts to resolve the differences between attorneys and their clients. This process is not used when the issues are of a very serious nature such as allegations of intentional dishonesty, material misrepresentation, or the alleged conduct could lead to suspension or disbarment. Mediation requires the approval of both parties and the Bar counsel. The agreement is considered a contract and is legally enforceable in court.
- The Bar operates a lawyer referral service funded by enrollment fees from participating members. Members of the public can call an in-state toll free number and obtain the names of three attorneys who have listed themselves as practicing law in a certain field. Lawyer referral service statistics are shown in Appendix D.
- The Bar provides grants to support legal services for the economically disadvantaged. Through the Alaska Bar Foundation, the earnings from the interest on Lawyers Trust Account are used to improve the administration of justice.
- The Bar jointly sponsors the Alaska Pro Bono Program with the Alaska Legal Services Corporation in which attorneys provide free legal advice to low-income Alaskans.
- The Bar also has a Lawyer Assistance Committee that provides assistance and counseling to members of the Bar, their families, or business associates when it appears a Bar member has substance abuse problems.

Determine the extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices that it has adopted, and any other matter, including budgetary, resource, and personnel matters.

The operations of the board are funded entirely by the membership through dues, admission fees, continuing legal education charges, lawyer referral fees, convention fees, and interest income. In September 2005, the board adopted an amendment to Bylaw III, Section 1(a) which states that, “*the annual membership fee for an active member is the amount approved by the board.*” Thus, the board can set the dues amount in accordance with the operating expenses and number of Bar members.

The 2008 budgeted revenue is \$1,983,738. The Bar has cumulative net assets of \$3,496,544 as of the end of calendar year 2007. The net assets include approximately \$1.1 million for the Lawyers’ Fund for Client Protection. This fund is for clients who have suffered monetary losses as a result of dishonest acts by their lawyer. These funds are designed to protect the public and cannot be used for general operating expenses.

The maintenance of substantial net assets is not consistent with the other professions regulated by the State, under the jurisdiction of the Department of Commerce, Community, and Economic Development (DCCED) – Division of Corporations, Business, and Professional Licensing. Those professional fees are required by statute to be set so the total fee collections approximately equal the actual regulatory cost of the occupation. As the Bar is not included in DCCED’s organizational structure, the ability to pool resources and meet funding shortages is not available. Although the Bar’s funding needs are greater, the net assets are still substantial.

In order to address the cumulative net assets, the board voted at the end of 2007 to reduce the active members’ due from \$550 to \$410, effective in the 2008 membership year. The Bar anticipates that with the reduction in membership dues net assets will be reduced by approximately \$400,000 per year.

Determine the extent to which the board, commission, or agency has recommended statutory changes that are generally of benefit to the public interest.

Although the board has a Statutes, Bylaws, and Rules Committee, consisting of 12 members responsible for drafting proposed revisions of the statutes, bylaws, and rules which govern the activities of the Bar, the board has not recommended any statutory changes during July 1, 2006 through June 30, 2008. However, the board has been active in the process of evaluating and revising the Alaska Bar Rules, bylaws, and Rules of Professional Conduct that govern Bar policies and procedures.

Determine the extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service that it has provided.

The Bar’s membership is involved in its operations. This operation may include service on one of the ten standing committees or five Alaska Bar Rules committees. It may include participation in one of 23 sections or groups of members with similar specialization (bankruptcy, criminal law, etc).

In addition to the above committees, members of the Bar may be appointed to serve in an adjunct organization, such as the Alaska Legal Services Corporation. Also, special committees are established from time to time by the president with the advice and consent of the board.

The Bar publishes all proposed changes to the Alaska Bar Rules in its quarterly publication, the *Alaska Bar Rag*, which is distributed to all members of the Bar and to interested members of the public. Members are asked to submit any and all comments on proposed rule changes for review by the board.

The board advertises board meetings on the Alaska Public Online Notice system and on the Bar's website. Members of the general public are encouraged to make comments and adequate time is allotted at all meetings.

Determine the extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.

In addition to the three public members who serve on the board, non-attorneys serve on disciplinary hearing committees and fee arbitration panels throughout the State.

As mentioned above, the Bar publicly advertises meetings of the board. Time is allotted at all board meetings for public comments. However, some board meetings did not have adequate public notice. Further discussion on public notice of the conference call board meetings is in Recommendation No. 3.

Determine the efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of victims' rights or the office of the ombudsman have been processed and resolved.

The Bar is an instrumentality of the State, but is not administratively assigned to any department. However, the Alaska Supreme Court exercises a great degree of oversight. Two complaints specifically involving the actions and activities of the board were filed with and investigated by the Office of the Ombudsman during July 1, 2006 through June 30, 2008. The investigations were closed due to the Ombudsman not having jurisdiction over the activities of the Bar.

There were no complaints filed with the Office of Victim's Rights against the board from July 1, 2006 through June 30, 2008.

The board has a lawyer discipline process for investigation of grievances alleging attorney misconduct. If a grievance does not result in an investigation being opened by the bar counsel, the complainant may ask for that decision to be reviewed by the board discipline liaison. Additionally the Supreme Court may review decisions made by the bar counsel or the liaison, though this is done rarely.

Sanctions are imposed on those found in violation of the Rules of Professional Conduct. The Supreme Court reviews only the most serious disciplinary actions, such as public censure, disbarment, suspension, or probation. Other disciplinary cases are not subject to Supreme Court review. These sanctions would include written private admonition and board reprimand. This process for professional discipline was developed through a cooperative effort of the Alaska Supreme Court, the board, Bar staff, and a review team from the American Bar Association's Standing Committee on Professional Discipline.