

# LEGAL SERVICES

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## MEMORANDUM

April 9, 2013

**SUBJECT:** Legislative power over Board of Governors  
(Amendments to SB 51; Work Order No. 28-LS0483\A.1 and A.2)

**TO:** Senator John Coghill  
Attn: Rynnieva Moss

**FROM:** Hilary Martin   
Legislative Counsel

You have asked a number of questions related to the power of the legislature to statutorily direct the Board of Governors for the Alaska Bar (Board). Specifically, you have asked whether the legislature can statutorily direct the Board to require certain CLEs, require the Board to deposit fees collected into the general fund, and to require all attorney members of the Board to be confirmed by the legislature.

### **CLE requirements**

It is my opinion that the legislature cannot statutorily set a certain number of continuing legal education (CLE) hours for attorney licensure. The Alaska Supreme Court has the power to regulate the practice of law in the state. Article IV, sec. 1, Constitution of the State of Alaska, vests the judicial power of the state in the Supreme Court. The court has consistently held that this provision means that the Supreme Court has the power to regulate the practice of law in the state.<sup>1</sup> Regulation of the practice of law includes the number of CLE hours a lawyer must obtain in order to renew the lawyer's license to practice law. Therefore, a statute prescribing required CLE hours would violate the separation of powers doctrine.

### **Deposit fees into general fund**

As I stated in my February 19, 2013 memo, the Alaska Bar Association (Bar) would likely be viewed as a state agency, and therefore any money collected by the Bar should be deposited first in the general fund and then appropriated to the Bar. I have drafted an amendment that deletes the power of the Board of Governors to "establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds," and that also adds the receipts of the Board of Governors into AS 37.05.146(c), the list of program receipts that are to be accounted for separately as non-general fund program

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<sup>1</sup> See, e.g., *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 165 (Alaska 1991); *In re Stephenson*, 511 P.2d 136, 140 (Alaska 1973).

receipts. AS 37.05.146(c) states: "The program receipts of the following are accounted for separately, and appropriations from these program receipts are not made from the unrestricted general fund."<sup>2</sup> Another option, instead of placing language regarding the program receipts into the statutes, is to simply add the Bar's program receipts to the operating budget and appropriate them back to the Bar through the normal operating budget process.

**Require attorney members to be confirmed by the legislature**

I have drafted an amendment requiring the attorney members of the Board of Governors to be confirmed by the legislature. However, the attorney board members likely cannot be subject to legislative confirmation.

The legislature does not have the power to require legislative confirmation of executive appointments beyond the authority conferred by art. III, secs. 25 and 26.<sup>3</sup> Executive appointments and subsequent legislative confirmation is required under art. III, sec. 26 when a "board or commission is at the head of a principal department or a regulatory or quasi-judicial agency. . . ." The Alaska Bar Association is not a principal department, but is governed by a board, the Board of Governors of the Alaska Bar.<sup>4</sup> It is unlikely that the Alaska Bar Association is either regulatory or quasi-judicial for purposes of art. III, sec. 26.

AS 08.08.010 confers powers on the Alaska Bar Association, but there is no direct grant of regulatory or quasi-judicial powers to the association. AS 08.08.080 grants additional powers to the Board of Governors of the Alaska Bar Association, but the powers granted, other than for internal organizational matters, are only to make recommendations to the supreme court for the court to consider under the court's rule making powers under art. IV, section 15. AS 08.08.010(a) states:

Except as may be otherwise provided in this chapter or the Alaska Bar Rules, the board may approve and *recommend to the state supreme court* rules (1) concerning admission, discipline, licensing, continuing legal education, and defining the practice of law; (2) providing for continuing legal education and for certification of a continuing legal education

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<sup>2</sup> Arguably, these fees should be included under AS 37.05.146(c)(24), which are receipts collected from the Department of Commerce, Community, and Economic Development under AS 08.01.065 and from fines and penalties collected in licensing and disciplinary actions for occupations under AS 08.01.010. However, as the Bar could be considered within the Judicial branch and not a part of the Department of Commerce, Community, and Economic Development, it is unclear if AS 37.05.146(c)(24) applies.

<sup>3</sup> *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).

<sup>4</sup> AS 44.17.005; AS 08.08.030.

program; (3) establishing a program for the certification of attorneys as specialists.<sup>5</sup>

The Board may adopt bylaws and certain regulations, but only those consistent with the Alaska Bar Rules, and only to the extent that the regulations or bylaws affect internal operation of the Alaska Bar Association.<sup>6</sup> Therefore, when considering the relevant statutes, the Board of Governors is likely not to be viewed as an art. III entity and, under *Bradner*, holding that the legislative confirmation power is to be narrowly construed, its members could not be constitutionally subject to confirmation. This is particularly true of the attorney members, who are not appointed by the governor, but are instead elected by the active members of the Alaska Bar Association.

The matter is somewhat complicated by the fact that the Alaska Bar Rules, promulgated by the Supreme Court, do confer some regulatory and quasi-judicial powers on the Board of Governors, though not on the Alaska Bar Association itself. It might be argued that this grant of authority to the Board of Governors by the Supreme Court makes it the type of regulatory or quasi-judicial board that is subject to confirmation under art. III, sec. 26. However, that argument is unlikely to succeed because art. III appears to apply to the executive branch rather than to the judicial branch. The court would probably not view a delegation of its own authority to "administer the operations of the judicial system" under art. IV, sec. 16 as anything other than the exercise of a judicial power. The legislature has been granted no authority to confirm boards in the judicial branch outside of art. IV, sec. 8 (judicial council) and sec. 10 (commission on judicial conduct).<sup>7</sup>

There is not a clear answer as to whether the attorney members can be subject to legislative confirmation, but it seems likely that the court would hold that appointees to the Board of Governors of the Alaska Bar Association are not subject to confirmation.

If I may be of further assistance, please advise.

HVM:ljw  
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Enclosures

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<sup>5</sup> AS 08.08.080(a) (emphasis added).

<sup>6</sup> AS 08.08.080(b) and (c).

<sup>7</sup> The public members of the Bar are currently subject to legislative confirmation under AS 08.08.050(a). The analysis regarding confirmation of the attorney members applies equally to the non-attorney members.