ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7896 HOUSE JUDICIARY

This is an appeal from a judgment holding a real estate broker liable for certain misrepresentations made in the course of a real estate transaction.

A. Facts

On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from Josephine, Patricia, and William Ferris. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They subsequently incurred expenses of $6,935.00 in deepening the well to an adequate level.

Believing themselves the victims of fraudulent misrepresentations, the Ballards sued the sellers, the broker (Bevins), and an employee of the broker (Lucas). Their complaint alleged, in part, intentional and negligent

misrepresentation.[1] In addition, it alleged that Bevins and

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1. The complaint made the following factual allegations:

(a) Bevins personally inspected the property;

(b) sellers told Bevins that there was a well drilled on the property;

(c) sellers failed to disclose to Bevins the incomplete nature of the well, with the knowledge and intent that Bevins would tell potential buyers there was a well;

(d) sellers represented to the broker's employee that the well was finished, held 36 feet of standing water, and was capable of supporting the reasonable water needs of residents of the house;

(e) sellers made those representations with the intent that Lucas would tell the buyers;

(f) Lucas did so represent to the Ballards;

(g) the representations were false;

(h) Lucas made the representations with the knowledge they were false;

(i) sellers made the representations knowing they were false, for the purpose of deceiving plaintiffs and inducing them to buy;

(j) plaintiffs did rely and were induced; and,

(k) plaintiffs were unable to discover the defect until after purchase.

In addition, the following legal allegations were made:

(l) Bevins owed plaintiffs a duty to investigate the accuracy of the sellers' representations, and breached that duty (this count was dismissed at the close of plaintiffs' evidence);

(Cont'd)

Lucas had a duty to check the well's condition; that Lucas knew there was no functional well, that Bevins was vicariously liable for Lucas's acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

After the close of plaintiffs' evidence, the trial court dismissed certain counts of the complaint. First, the court ruled that the broker did not have a general duty to inspect the premises. Second, it held that the broker was not vicariously liable for the acts of his employee, Lucas. In a subsequent written decision, the court further ruled that Lucas was not liable. It then held that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other for any payment in excess of a pro rata share. While both the sellers and the broker filed timely notice of appeal, only Bevins, the broker, pursues his appeal.

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1. (Cont'd)

(2) Lucas (broker's employee) owed plaintiffs a duty to investigate, and breached that duty;

(3) Bevins was vicariously liable for acts of his employee Lucas (this count was dismissed at the close of plaintiffs' evidence); and,

(4) sellers were vicariously liable for the acts of their agents, Bevins, the broker, and his employee, Lucas.

The basis of the broker's liability is not clear. The court found that the sellers were the source of the representation that the well was "good," i.e., capable of supplying the reasonable water needs of the residents. It ruled that the broker had a right to rely on the representations, and thus the sellers were liable (as principals) for the act of Bevins (their broker and thus their agent) who passed on the misrepresentation. The court also found that Lucas passed on the representation intending that it be relied upon; Bevins admitted to the same intent. The court further found that the Ballards did so rely, and that their reliance was justified.

Although the court earlier concluded that Bevins had no general duty to inspect, it subsequently held that a duty of inquiry arose when Lucas asked Bevins, on behalf of the Ballards, about the adequacy of the well. The court concluded that Bevins acted unreasonably by simply assuring Lucas that it was a "good well" rather than by investigating. Thus Bevins' liability appears to rest on a negligence theory.

Certain facts are not contested:

1. The listing mentioned a 100 foot well.

2. The well proved to be incomplete, i.e., inadequate to support reasonable water needs.

3. Bevins, the broker, testified that the listing of a well would reasonably lead buyers to assume the well was "good," i.e., adequate.

4. The Ballards relied on the listing and representations that the well was "good."

5. Both Lucas and Bevins intended that the Ballards so rely.

As to the source of the misrepresentation, Bevins testified that he would not have written it on the listing unless it came from the sellers. The sellers, however, denied telling him about it; they testified that Bevins must have misunderstood. The court believed Bevins, concluding that the sellers were the original source of the representation.

B. The Broker's Liability

There are three types of misrepresentations: intentional, negligent, and innocent. While the Ballards did assert an intentional misrepresentation claim against the sellers, they did not do so against Bevins or Lucas. Thus, we need address only the negligent and innocent mis-

representation claims in this appeal. Bevins' liability to be sustained, must rest on one of these two theories.[2]

1. Negligent Misrepresentation

The Ballards' third claim for relief stated a cause of action for negligence against Bevins. That claim alleged that Bevins had a duty to "take reasonable steps to determine whether or not the well . . . was a completed well" and had sufficient capacity to support a purchaser's reasonable water needs, that Bevins breached that duty, and that as a direct and proximate result of Bevins' breach the Ballards purchased the property believing the well was completed. As noted, the trial court subsequently dismissed that claim, and the Ballards did not appeal. In its final opinion, however, the trial court imposed liability on

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2. Bevins' liability could be based on a vicarious liability for the acts of his employee Lucas. As we noted in Black v. Dahl, 625 P.2d 876, 879 n.3 (Alaska 1981), a real estate broker can be liable under the doctrine of respondeat superior for the acts of his or her salespeople. However, two of the rulings below preclude resting liability on such a basis. First, at the close of the Ballards' evidence, the trial court dismissed the eighth claim for relief, which had asserted that Bevins was vicariously liable. Second, in its written opinion, the trial court found in favor of Lucas, the salesman. Thus there is no underlying liability for which Bevins could be held vicariously responsible. The Ballards have not appealed these rulings.

whether the well was, in fact, 'a good well.'" Bevins argues that the court thus held him negligent even though negligence was dismissed from the case and, further, that he was prejudiced thereby because dismissal of the third claim led him to forego a negligence defense.

We recognized the tort of negligent misrepresentation in Transamerica Title Insurance Co. v. Ramsey, 507 P.2d 492 (Alaska 1973), and Howarth v. Pfeifer, 443 P.2d 39 (Alaska 1968). Under this theory, Bevins could have been liable for breaching his duty to provide accurate information once he undertook to speak. In determining whether such a duty exists, one must consider: (a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it; (b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suffer harm; (d) the directness of causation; and (e) the policy of preventing future harm. Howarth v. Pfeifer, 443 P.2d at 42; see Transamerica Title Insurance Co. v. Ramsey, 507 P.2d at 494-95.[3] In the land sales context, such a duty

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3. In Transamerica Title, we upheld submitting the negligence issue to the jury where a title insurance company failed to inform a client that a power of attorney, upon which she was relying in asserting her authority to sell the property, had been revoked. Although the title

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can arise when a broker becomes aware of suspicious facts regarding his or her representations, or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his subsequent responding representation, or when a court determines that public policy requires brokers to undertake certain functions. See, e.g., First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 574 P.2d 1211 (Wash. App. 1978).

We believe, however, that the trial court's dismissal of Ballards' third claim for relief, which was their only negligence claim against Bevins, precludes the broker's liability from resting on a negligent misrepresentation

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3. (Cont'd)

company was unaware of the revocation, that information was readily available to it. We concluded that the title insurer knew that the seller, its client, desired information about her legal capacity to sell the land, that she intended to rely on that information, and that there was foreseeable harm to her should she be poorly advised. We concluded that the jury could find that the title company had a "duty to speak carefully." We rejected any distinction between the nonfeasance of the title company and the misfeasance in the Howarth case. 507 P.2d at 494-95.

In Howarth, a vendor sought damages for the alleged negligent misrepresentation by the defendant insurer that a purchaser of vendor's property had obtained fire insurance on the property. We held that assuming the presence of the essential factors establishing a duty of care, those engaged in the insurance business are required to speak with reasonable care.

theory. While Alaska Rule of Civil Procedure 15(b) allows

4. That the court intended to dismiss negligence claims from the case is further evidenced by the following colloquy:

> THE COURT: . . . I feel that it's the third claim for relief that you seek thereby to impose upon realtors a burden that does not exist except in extraordinary circumstances. That is when there's been -- when there has been evidence adduced as to the duty of a realtor to inquire arising from some circumstances directing the attention of a reasonable prudent realtor to some -- some -- something unusual. In this case it seems to me that this was just an ordinary transaction. That it's rural property, most of which does require that it be serviced by a well. It is incomplete, and if I accept the evidence as it now stands, that it was represented that there was a good well, that that's the end of the matter, that there's no duty on the realtors to go further and inquire whether that is the actual fact. You know, there's nothing unusual about that well that would alert the ordinary prudent realtor of the need to do something about it. To check it out.
>
> MR. FRIEDMAN: Well, if the court finds that there was no duty, then they can't obviously be negligent. But I still ask the court
>
> THE COURT: They -- well, they still can be -- the defendants still could be -- they made the representation, which is -- facts show was not true.
>
> MR. FRIEDMAN: Correct.
>
> THE COURT: So that they can be -- they can be held liable for having made the same. But not on -- not on -- (indiscernible) negligence -- or negligence theory.

post-judgment amendments to conform the issues tried to the evidence, and further provides that the failure to so amend "does not affect the result of the trial" on those issues, the rule sets as a threshhold the requirement that such issues be "tried by express or implied consent of the parties." We do not believe that this condition was met in the case at bar. Subsequent to the dismissal neither party argued negligent misrepresentation in their trial briefs. The court and parties treated the case as one involving innocent misrepresentations. Bevins neither expressly nor impliedly consented to trying a negligence claim. Accordingly, Bevins' liability cannot rest on a negligent misrepresentation theory.

2. Innocent Misrepresentation

The case went forward against Bevins on an apparent theory of innocent misrepresentation, evidenced by the colloquy quoted in note 4 and the arguments advanced in the trial briefs.[5] The tort of innocent misrepresenta-

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5. The elements of innocent misrepresentation were alleged to a sufficient degree. Paragraph 8 of the Ballards' first claim for relief makes the necessary allegation concerning Bevins' scienter. Paragraph 2 of the fifth claim for relief alleged that Bevins' agent passed on the representation with the intent to cause action in reliance thereon. Finally, paragraph 15 of the first claim for relief alleged actual reliance. In light of this, plus the

(Cont'd)

tion is defined by section 552C(1) of the Restatement (Second) of Torts (1977) as follows:

> One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Id. The Restatement leaves open the question of whether such a cause of action lies against real estate brokers. Id. § 552C, Comment g.

We have recognized a cause of action against the owner of realty who innocently misrepresents its condition to the purchaser. Cousineau v. Walker, 613 P.2d 608 (Alaska 1980). In Cousineau, we granted rescission and restitution to a purchaser where the seller made false statements concerning the highway frontage and gravel content of the purchased land. In so doing, we held that an owner guilty of even innocent misrepresentation could not hide behind the doctrine of caveat emptor. Id. at 614-16. This is so because owners are presumed to know the character and attri-

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5. (Cont'd)

court's and the parties' arguments concerning Section 552 of the Restatement, we conclude that Bevins was "adequately notified" that the Ballards were asserting a cause of action based on innocent misrepresentations. See Clary Ins. Agency v. Doyle, 620 P.2d 194, 201 (Alaska 1980).

butes of the land conveyed and buyers are consequently entitled to rely on the seller's reasonable representations. See Sorenson v. Adams, 571 P.2d 769, 776 (Idaho 1977), quoted in Cousineau v. Walker, 613 P.2d 608, 615 n.14 (Alaska 1980). The owner of land must therefore be both truthful and informed in making any representations, for fraud includes the pretense of knowledge where there is none. Spargnapani v. Wricht, 110 A.2d 82, 84 (D.C. App. 1954).

The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.[6]

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6. Sodal v. French, 531 P.2d 972, 973 (Colo. App. 1974); Spargnapani v. Wright, 110 A.2d 82, 85 (D.C. App. 1954); Pumphrey v. Quillen, 135 N.E.2d 328, 331 (Ohio 1956); Berryman v. Riegert, 175 N.W.2d 438, 442 (Minn. 1970); Lawlor v. Scheper, 101 S.E.2d 269, 271 (S.C. 1957); Polk Terrace, Inc. v. Harper, 386 S.W.2d 588, 593 (Tex. App. 1965). Contra Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 625 (Ill. App. 1979).

A.2d 82 (D.C. App. 1954). There, both the seller and broker were held liable for representing that a house could be heated for a little more than $100.00 per year, when a defect in the boiler made it impossible to heat the house at all. Id. at 85. The broker had merely passed on the seller's information, and neither defendant had knowedge of a defect. Nevertheless, the court sustained liability:

> If the broker innocently represented that the heating plant was in workable condition and was mistaken in that representation, or made the representation without knowing whether it was true or false, the injured party may recover in an action for fraud.
>
> . . . We may assume that the broker was guilty of no deliberate deception and had no actual knowledge of the concealed defect. But on defendants' own evidence their selling agent did not disclaim such knowledge . . . . The representation . . . was flagrantly inaccurate since the defect . . . made it impossible to heat the house at all . . . . "Fraud includes the pretense of knowledge when knowledge there is none."

Id. at 83-84 (citations omitted).

The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:

> Thus, § 212(f)(6) establishes that an attorney who is not regularly engaged in the real estate business and who does not offer to provide real estate services to the general public, may, for a commission, perform certain acts associated with the sale and use of real estate without being licensed as a real estate broker. Accordingly, such an attorney, who is not licensed as a real estate broker, and who engages in such acts, does not violate § 217(a). Therefore, the prohibition against recovery contained in § 228, generally applicable to unlicensed persons who act in the capacity of a real estate broker, is inapplicable to such an attorney.

In conclusion, the Court opined:

> While there was evidence to show that Sybert and Nippard were regularly engaged in the practice of law relating to real estate, there was no evidence to show that they were regularly engaged in the real estate business or that they publicly offered to perform acts authorized to be performed by a real estate broker. Under these circumstances, Sybert and Nippard were not real estate brokers within the definition of § 212 and did not have to be licensed as real estate brokers under § 271(a). Consequently, they were not prohibited by § 228 from recovering the agreed upon commission when the potential purchaser they had introduced to ARCO eventually bought the property.

[illegible]

[illegible] Connecticut [illegible]

BROKERS—BROKER IS HELD LIABLE FOR INNOCENT MISREPRESENTATION

BEVINS v. BALLARD
655 P.2d 757 (Supreme Court of Alaska, 1982)

ISSUE: Whether a broker who misrepresents, innocently, the state of a well to home purchasers is liable for the tort of innocent misrepresentation.

FACTS: On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from the Ferrises. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They later incurred expenses of $6,935 in deepening the well to an adequate level. The Ballards, believing that they had been the victims of fraudulent misrepresentations, sued the seller, the broker, Bevins, and an employee of the broker, Lucas. The Ballards alleged that Bevins and Lucas had a duty to check the well's condition, that Lucas knew there was no functional well, that Bevins was vicariously liable for Lucas' acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

SUPREME COURT CASE SUMMARY
BEVINS V. BALLARD

At the trial, the court held that the broker did not have a general duty of inspecting the premises; that the broker was not vicariously liable for Lucas; and that Lucas also was not liable. However, the court found that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other. Bevins then appealed.

HELD: Affirmed.

The Court initially reviewed the tort of innocent misrepresentation:

> The tort of innocent misrepresentation is defined by section 552C(1) of the Restatement (Second) of Torts (1977) as follows:
>
> > One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.
>
> *Id.* The Restatement leaves open the question of whether such a cause of action lies against real estate brokers. *Id.* § 552C, Comment g.

After this review, the Court restated the issue which the factual situation presented:

> The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.

The Court declared:

> The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:
>
> > Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes. Therefore there is a duty on the part of real estate brokers to be accurate and knowledgeable concerning the product they are in the business of selling — that is, homes and other types of real estate. Courts have held in many cases that purchasers are entitled to rely on real estate brokers' statements.
>
> *Lyons v. Christ Episcopal Church*, 71 Ill. App. 3d 257, 27 Ill. Dec. 559, 389 N.E.2d 623, 628 (1979) (dissenting opinion).
>
> We find this reasoning persuasive. Parties to real estate transactions frequently do not deal on equal terms. Real estate brokers are

> licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally.

The Court then held:

> Accordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation.

It further reasoned:

> Brokers, in turn, can protect themselves from liability by investigating the owner's statements, or by disclaiming knowledge, by requiring the seller to sign at the time of listing a statement setting forth representations which will be made, certifying that they are true and providing for indemnification if they are not.

In dissent, Justice Connor stated:

> I dissent from the holding that an action for innocent misrepresentation should be permitted against the real estate broker.
>
> When a realtor acts as a mere conduit for passing on information supplied by the seller, he should be under no duty independently to verify that information unless he has reason to believe the information to be false. . . . Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the "insurer" of the seller's representation.

CONDOMINIUMS—MEMBERS OF CONDOMINIUM BOARD OF DIRECTORS MAY BE HELD LIABLE FOR THEIR ACTS ONLY WHERE THERE IS EVIDENCE OF FRAUD, DISHONESTY OR INCOMPETENCE

SCHWARZMANN v. ASSOCIATION OF APARTMENT OWNERS OF BRIDGEHAVEN
655 P.2d 1177 (Court of Appeals of Washington, Division 1, 1982)

ISSUE: Whether the individual board of director members of a condominium are liable for their acts absent showing of fraud, dishonesty or incompetence.

FACTS: Robert and Eleonore Schwarzmann purchased a unit in the Bridgehaven condominium in Seattle in 1971. Bridgehaven Association is an unincorporated association with a seven-member Board of Directors (Board). The Association and the Board are responsible for the maintenance and repair of common areas of the condominium. In November, 1978, spots appeared in the Schwarzmanns' ceiling. They reported this at the December 6, 1978 board meeting and several days later the Board sent building chairman Nick Buono to look at the spots. At that time, the Schwarzmanns noticed additional spots on the ceiling.

HB

518

Alaska State Legislature

House of Representatives

House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
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SPONSOR STATEMENT

HB 513 EXTEND ALASKA BAR ASSOCIATION

The Board of Governors of the Alaska Bar Association regulates the *practice of law* in the State of Alaska. The Board consists of twelve (12) members including nine (9) attorneys elected by the active membership of the Bar Association and three (3) non-attorneys, which are public members 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 (Alaska Statute 08.08), the Alaska Bar Rules, and the Rules of Professional Conduct which are promulgated by the Alaska Supreme Court. In fact, the final power and authority to determine standards for admission to the practice of law in Alaska resides in the supreme court, which has the inherent power to intercede at any time in admission matters. In re Luna, 569 P.2d 789 (Alaska 1977).

The Board of Governors shall *report annually* to the legislature on all matters concerning admissions, discipline of members, and disbarment proceedings, except for those matters defined as confidential by court rule.

The purpose of the Board includes the following:

(1) to cultivate and advance the science of jurisprudence
(2) to promote reform in the law and in judicial procedure
(3) to facilitate the administration of justice
(4) to encourage continuing legal education for the membership
(5) to increase the public service and efficiency of the Bar

The Division of Legislative Audit supports legislative action on the extension of the termination date of the Board of Governors of the Alaska Bar Association until June 30, 1998. In fact, the Division asserts, " it is our opinion that the Board *meets the public need* in an effective and economical manner and should be reestablished."

REPORT CONCLUSION

In our opinion, the legislature should extend the termination date of the Board of Governors of the Alaska Bar Association until June 30, 1998. Since the first three attorneys were admitted to the practice of law in Alaska in 1884, membership has grown to its current level of 3,040. In addition to the number of applicants seeking admission to practice, court statistics indicate increasing numbers of lawsuits being filed annually. It would appear that more members of the general public are interacting with the legal profession and that financial resources both expended on and resulting from those interactions have greatly increased. These factors result in a greater potential for harm to the general public, thereby indicating a continuing need for regulation of the profession.

The public's interest in the legal profession requires that the public be secure in its expectation that those who are admitted to the Bar Association are worthy of the trust and confidence clients may reasonably place in their attorneys. The license to practice law in the State is a continuing proclamation by the Alaska Supreme Court that an attorney is fit to be entrusted with professional and judicial matters, to aid in the administration of justice as an attorney and counselor, and to act as an officer of the courts. The Board of Governors through the Supreme Court provides this protection by ensuring that persons licensed to practice law are qualified and by providing a complaint investigation and discipline process to ensure that those licensed act in a competent and professional manner.

Overall, it is our opinion that the Board meets the public need in an effective and economical manner and should be reestablished. However, we have made recommendations that, if implemented, will improve the efficiency and effectiveness of the Board's operations. (See the Findings and Recommendations section of this report.)

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit

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February 14, 1994

The Honorable Walter J. Hickel
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Hickel:

The Legislative Budget and Audit Committee approved the following audit reports, along with the response from the respective agency, for public release at their February 11, 1994 meeting.

Department of Commerce and Economic Development, Board of Veterinary Examiners, December 3, 1993.

Department of Commerce and Economic Development, Board of Certified Real Estate Appraisers, January 10, 1994.

Department of Commerce and Economic Development, Board of Barbers and Hairdressers, November 5, 1993.

Department of Environmental Conservation, Hazardous Substance Spill Technology Review Council, November 29, 1993.

Board of Governors of the Alaska Bar Association, November 17, 1993.

Department of Revenue, Alcoholic Beverage Control Board, December 3, 1993.

Department of Health and Social Services, Permanent Fund Dividend, Hold Harmless Program, October 4, 1993.

Department of Education, Performance and Operations of Regional Resource Centers, November 21, 1993.

University of Alaska, Health Care Benefits, January 5, 1994.

BACK - UP

University of Alaska, Unit Cost Analysis and Certain Operational Aspects, November 15, 1993.

We are enclosing a copy for your information.

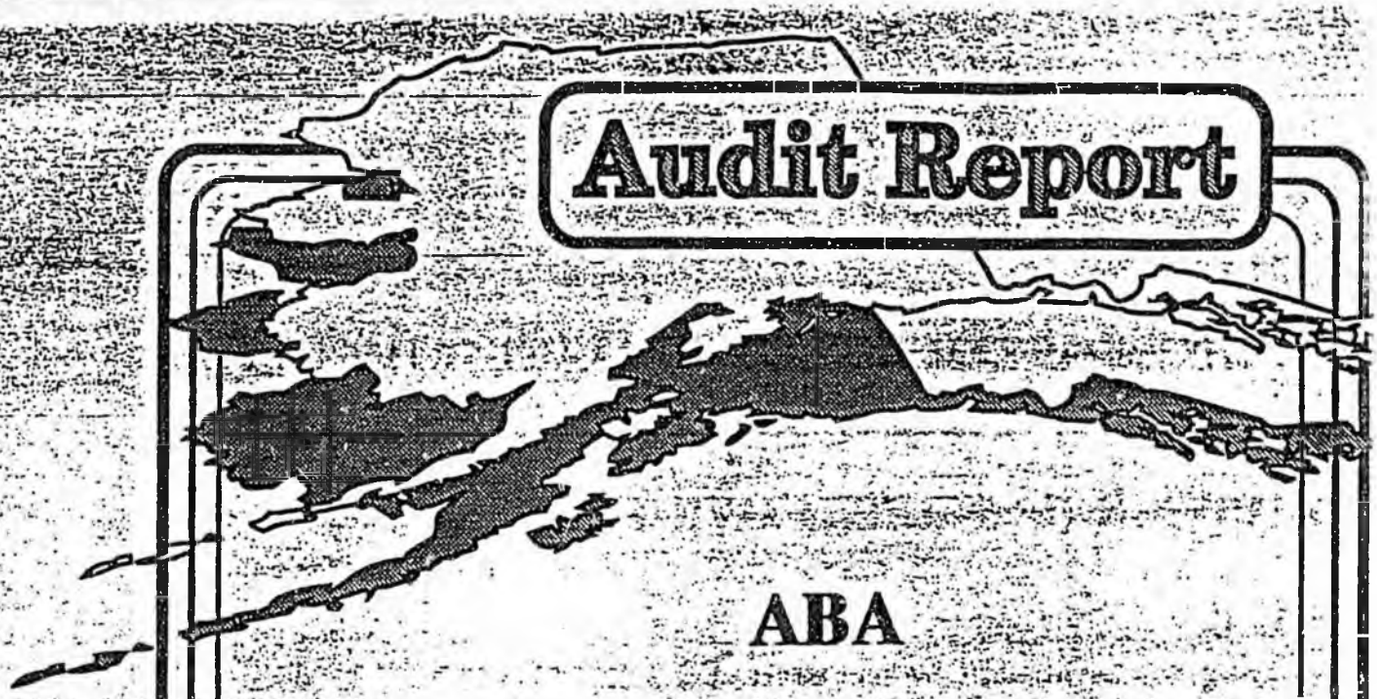
Sincerely,

Randy S. Welker
Legislative Auditor

Enclosures

cc: Commissioner, Department of Administration
Commissioner, Department of Revenue
Commissioner, Department of Education
Commissioner, Department of Health and Social Services
Commissioner, Department of Environmental Conservation
Commissioner, Department of Commerce and Economic Development
Commissioner, Department of Transportation and Public Facilities
Board of Governors, Alaska Bar Association
President, University of Alaska

Audit Report



ABA

BOARD OF GOVERNORS OF THE ALASKA BAR ASSOCIATION

November 17, 1993

Audit Control Number:

41-1405-94

Division of Legislative Audit

P.O. Box 113300, Juneau, Alaska 99811-3300

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

DIVISION OF LEGISLATIVE AUDIT

The Legislative Budget and Audit Committee is a permanent interim committee of the Alaska Legislature. The committee is made up of five senators and five representatives, with one alternate from each legislative chamber. The chairmanship of the committee alternates between the two chambers every legislature.

The committee is responsible for providing the legislature with audits of state government agencies. The programs and activities of state government now cost more than $5 billion a year. As legislators and administrators try increasingly to allocate state revenues effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by the Division of Legislative Audit helps provide that information.

As a guide to all their work, the Division of Legislative Audit complies with generally accepted auditing standards established by the American Institute of Certified Public Accountants and with government auditing standards established by the U.S. General Accounting Office.

Audits are performed at the direction of the Legislative Budget and Audit Committee. Individual legislators or committees can submit requests for audits of specific programs or agencies to the committee for consideration. Copies of all completed audits are available from the Division of Legislative Audit's offices in either Anchorage or Juneau.

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ALASKA STATE LEGISLATURE

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November 17, 1993

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

November 17, 1993

Audit Control Number

41-1405-94

The objective of the audit was to determine if the Board of Governors of the Alaska Bar Association should continue its existence. Alaska Statute 08.03.010 scheduled the Board for termination on June 30, 1993. As of the date of this report, the Board is technically in its one-year "wrap-up" period and, if no action is taken by the legislature, the Board will be dissolved on June 30, 1994. We recommend the legislature extend the Board of Governors of the Alaska Bar Association's termination date until June 30, 1998.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section. Audit results may be found in the Report Conclusion, Findings and Recommendations, and the Analysis of Public Need sections of this report.

Randy S. Welker, CPA
Legislative Auditor

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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 to determine if there is a demonstrated public need for its continued existence and if the Board has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during the legislative oversight hearings to determine whether the Board of Governors of the Alaska Bar Association should be reestablished. The law currently specifies that the Board was terminated on June 30, 1993 and is now in its "wrap-up" period.

Objectives

The Alaska Bar Association was created in 1955 as an instrumentality of the State to ensure that only qualified members of the legal profession of good moral character are allowed to practice law in this State. A primary objective of this audit, therefore, was to determine whether the need for protection of the public continues to exist.

A secondary objective was to review the major processes instituted by the Bar Association, namely the examination of prospective members, admission, and discipline procedures, for effectiveness in meeting the public need. A tertiary objective was to evaluate those processes in particular, and Bar operations in general, for economy and efficiency of operation.

Our analysis of public need, findings and recommendations, and our conclusions have been summarized in the appropriate sections of this report.

Scope and Methodology

Recent state and national trends in the legal profession (e.g., trends in the number of students attending law school, applicants for admission to practice, cases litigated, etc.) were analyzed to determine public need. Statistical information was obtained from the Alaska Bar Association, the American Bar Association, assorted trade publications, and HALT (an Organization of Americans for Legal Reform). Our review of Bar Association operations included activities from January 1989 through October 1993.

Examination and admission statistics (e.g., pass/fail rates, required passing scores, Multistate Bar Exam scores, etc.) were obtained, reviewed, and compared with national statistics for consistency. Individual applicant records were reviewed for compliance with established Bar rules and procedures, accuracy of reporting, and timeliness of processing. Continuing legal education requirements were reviewed and compared with other jurisdictions of the American Bar Association.

Attorney discipline was analyzed for conformance with standards recommended by the American Bar Association and compared wi.h procedures adopted in other states. A sample of individual discipline files was reviewed for compliance with established Bar rules and procedures, accuracy of reporting, and timeliness of processing. Current discipline statistics produced by the Alaska Bar were reviewed against historical data to determine trends in caseload and processing time.

Activities of the Board were examined through a review of meeting minutes and discussion with Bar Association staff. The Board's composition and appointments were also reviewed for conformance with statutory requirements.

ORGANIZATION AND FUNCTION

The practice of law in the State of Alaska is regulated by the Board of Governors of the Alaska Bar Association. The Board consists of twelve members including nine attorneys elected by the active membership of the Bar Association and three non-attorneys, which are 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 (Alaska Statute 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 for the membership, and to increase the public service and efficiency of the Bar.

The two primary functions of the Bar Association are the admission and discipline of its members. To accomplish these and other functions, the Bar Association has a 1993 operating budget of $1,544,000. Funding is provided primarily by membership dues ($450 per year effective January 1, 1993), admission fees, lawyer referral fees, continuing legal education, interest income, and administrative discipline fees. The Bar Association did not receive any state funding within the audit period.

The Board of Governors of the Alaska Bar Association

Philip R. Volland, President
Third Judicial District
Term Expires 1996

Daniel E. Winfree, President Elect
Combined Second and Fourth Judicial Districts
Term Expires 1996

John B. Thorsness, Vice President
Third Judicial District
Term Expires 1994

Elizabeth J. Kerttula, Secretary
First Judicial District
Term Expires 1995

Brant G. McGee, Treasurer
Third Judicial District
Term Expires 1995

Barbara J. Blasco
First Judicial District
Term Expires 1994

Patricia Browner
Public Member
Term Expires 1994

William E. Dam, Sr.
Public Member
Term Expires 1995

J. John Franich, Jr.
Combined Second and Fourth Judicial Districts
Term Expires 1994

Marc W. June
Third Judicial District
Term Expires 1995

Ethel Staton
Public Member
Term Expires 1996

Diane F. Vallentine
At-Large Member
Term Expires 1995

Admission Function. The Board is responsible for the screening of applicants for admission to the Alaska Bar. The Board certifies to the Supreme Court the fitness of all applicants. 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 the discipline of all members of the Bar Association. The Board appoints the discipline counsel. This counsel is responsible for oversight of all disciplinary actions taken against the Bar Association's membership and provides an ethics course that is required for all applicants. The Board also appoints hearing committees from each judicial district.

Miscellaneous Functions. The Bar Association performs a wide variety of miscellaneous functions that include continuing legal education, lawyer referral service, and fee arbitration and rule making committees. The Bar Association provides a number of other member services including attorney liability protection, group insurance, the *Alaska Bar Rag*, and ethics opinions. The Bar Association is involved in a number of other related activities including the Alaska Bar Foundation, the *Alaska Law Review*, Alaska Legal Services Corporation, Alaska Commission on Judicial Conduct, American Bar Association, and the Judicial Council.

The Bar Association's office is located in Anchorage and is currently staffed by fifteen full-time employees.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Supreme Court should consider establishing continuing legal education requirements for attorneys.

The American Bar Association currently reports that 40 of 51[1] jurisdictions require Continuing Legal Education (CLE). CLE requirements range from eight to 15 hours per year with the majority of the jurisdictions requiring between 12 and 15 hours. It varies from state to state whether or not specific courses, such as ethics, are required.

In July 1990, the Board of Governors of the Alaska Bar Association proposed that all its active members be required to complete 24 hours of approved continuing legal education, including two hours of ethics, within each two-year reporting period. One purpose of the Bar Association, as set out in their bylaws, is to encourage continuing legal education. In proposing the 1990 change, the Board apparently believed that mandatory CLE would improve professionalism and client satisfaction. However, Bar members voted down this proposal with 56 percent opposed.

Many other professions in Alaska require continuing education to maintain licensure. For example, certified public accountants, chiropractors, dentists, doctors, nurses, optometrists, pharmacists, psychologists, and veterinarians are all required to obtain and report meeting specified continuing education standards.

Requiring Bar members to obtain continuing education may cause a slight increase in dues and other fees to cover costs of administration; however, we believe the benefits of continuing education far outweigh the additional costs that may be incurred. Maintenance of legal skills should be of paramount importance to attorneys and their clients.

We believe the legal profession as well as its clients would benefit from a CLE standard. However, the Bar Association has been unsuccessful in establishing such a program on its own. Therefore, we recommend the Supreme Court consider adopting a rule that would require attorneys to meet minimum CLE standards to maintain licensure and practice law.

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[1]The 51 jurisdictions include all 50 states and the District of Columbia.

Recommendation No. 2

The Bar Association should adopt rules requiring attorneys to take steps to educate their clients by disclosing to them the key elements of their relationship.

The Bar Association should consider adopting rules requiring attorneys to disclose items such as the existence and function of the Bar's disciplinary system, the amount of malpractice insurance carried, and prior disciplinary actions. A better informed client will help put attorneys and clients on equal footing, to the benefit of the legal profession as a whole and its clients. To accomplish this, we suggest that the Bar Association consider areas such as the following where education and disclosure would be most beneficial.

Discipline System — Attorneys should be required to disclose to their clients the existence and function of the disciplinary system. The Bar Association currently has a pamphlet that states it is responsible for the supervision of attorney conduct. This pamphlet also gives examples of misconduct, describes how to file a complaint, outlines the investigation, hearing, and appeal process, and explains what the complainant should and should not expect from the disciplinary system. However, clients can only obtain the pamphlet from the Bar Association or clerk of the court. We believe attorneys should be required to provide their clients with such a pamphlet that explains the existence and function of the disciplinary system.

Malpractice Insurance — Not all attorneys carry malpractice insurance. If a violation of a provision of the Rules of Professional Conduct occurs, a client may receive restitution from the Lawyers' Fund for Client Protection. However, in all other situations, the client would be forced to file a civil suit to obtain restitution. We believe the client has a right to this information and that it should be disclosed up front by the attorney. A client may wish to consider this in selecting an attorney.

Prior Discipline Actions — Attorneys with prior disciplinary actions could be required to disclose and inform their clients of the nature and outcome of all recent actions against them (e.g., all disciplinary actions in the past five years). We acknowledge that certain legal specialties, for instance criminal and family law, receive more complaints than others due to the nature of the cases. In such specialties, the number of complaints may not always be an accurate indicator of an attorney's capability; rather, the number of complaints may merely be an indication of the volume of such engagements. Nevertheless, clients should be aware of their counselor's background. Again, a client may wish to consider this type of information in selecting an attorney. Further, the effectiveness of discipline actions in producing real improvement in the legal profession would be greatly enhanced by such disclosure.

An alternative to attorney disclosure may be to improve public access to discipline records. The Board has already proposed more public access; they are awaiting the review and approval of this proposal by the Supreme Court. If more public access is granted by the court and if this record availability is outlined in the standardized discipline pamphlet

discussed above, we believe this alternative could achieve the same benefits as the attorney disclosure option.

Recommendation No. 3

The Bar Association should establish a toll-free complaint line to provide greater assistance to callers in formalizing any allegations of attorney misconduct.

Between January 1, 1989 and October 10, 1993, the Bar Association received 1,059 complaints against attorneys. Of those complaints, 60 percent were categorized as "Grievances Not Accepted." In some of these cases, the substance of the allegation was that the attorney refused to violate the rules of professional conduct. However, in other cases the complainants made insufficient allegations as to whether or not the attorney violated these rules. In these cases, Bar Association assistance would benefit clients and the legal profession.

The American Bar Association recommends in their *Model Rules for Lawyer Disciplinary Enforcement,* August 1993, that part of the intake function should be to *"provide assistance to complainants in stating their complaints."*

HALT, an Organization of Americans for Legal Reform, indicated in their 1990 *Attorney Discipline National Survey and Report* that some discipline agencies use a toll-free number. HALT recommended that *"at a minimum, every [disciplinary] agency should be listed in the Yellow Pages as well as in the white pages of local telephone directories."*

HALT also recommended that the disciplinary agency provide:

> *in-person and over-the-telephone help to clients in framing their allegations of misconduct, and advise them throughout the disciplinary process. Such help is essential if those other than the articulate and aggressive are to help the agency detect misconduct. This help should be provided by someone other than the investigator, as the functions could conflict.*

The cost to operate a toll-free complaint line, provide caller assistance, and investigate the additional allegations would be moderate. Caller assistance could be provided by a paralegal, rather than by an investigating attorney. We recommend that a toll-free line be established at least on a test basis. Whether the telephone line is toll free or not, the Bar Association's phone number should be included in local telephone directories and in the standardized discipline pamphlet discussed in Recommendation No. 2.

Currently, the Bar Association has a discipline assistant who assists clients when they contact the Bar to file a complaint against an attorney. We understand that the discipline assistant receives six to ten calls per day, spends 15 to 20 minutes on each call explaining the discipline process, and advises the client to submit evidence to support their allegation. We believe that operating a toll-free complaint line would enhance the current discipline system.

The primary benefits of adopting this recommendation would accrue to clients and the legal profession. Clients would have assistance in seeking due restitution in misconduct cases. The profession would benefit from the higher level of self-regulation; there would be greater assurance that attorney misconduct is detected. We believe these benefits would outweigh the cost.

Recommendation No. 4

The Bar Association should comply with the public notice requirements of Alaska Statute (AS) 08.08.075.

Chapter 52, SLA 1981 amended the Alaska Integrated Bar Act (AS 08.08) to bring meetings of the Board of Governors under the public meeting statutes, AS 44.62.310 and .312. Specifically, the Bar Act was amended to require that the public be given 30 days notice of meetings of the Board, except for emergency meetings.

The Division of Legislative Audit's 1984 and 1989 audits of the Bar Association found that they had not publicly advertised all the meetings of the Board of Governors. Our review, of meetings held since 1989, found that the Board has properly noticed all face-to-face meetings; however, they did not publicly advertise teleconference meetings. These teleconferences were for Board business and in some cases included discussion and voting on resolutions before that body.

We recommend that the Bar Association publicly advertise all regular and teleconference meetings of the Board in compliance with applicable statutes.

Recommendation No. 5

The legislature should consider expanding AS 08.08.210(d) to allow all state agencies to utilize law school graduates prior to their taking the bar examination.

Periodically, state agencies have opportunities to utilize law school graduates prior to their taking and passing the bar examination. Currently, the Department of Law is the only state agency permitted to do this. Alaska Statute 08.08.210(d) currently reads as follows:

> *Employees of the Department of Law whose activities would constitute the practice of law under this chapter and under the Alaska Bar Rules are required to obtain a license to practice law in Alaska, no later than 10 months following the commencement of their employment.*

The Public Defender Agency and the Office of Public Advocacy could both benefit from a change in this statute. Both agencies agreed that expanding the statute would be very helpful by enhancing their ability to hire and utilize new legal staff. While we believe that these agencies should be given this capability, we also believe that persons working for the State

that have failed the bar exam should not be allowed to continue the practice of law under this statute.

We recommend the legislature amend AS 08.08.210(d) as follows:

> *[Employees of the Department of Law] All employees of state agencies whose activities would constitute the practice of law under this chapter and under the Alaska Bar Rules are required to obtain a license to practice law in Alaska, no later than 10 months following the commencement of their employment, provided the employee has not failed the Alaska Bar examination.*

Recommendation No. 6

The legislature should modify AS 08.08.070 to prevent Board vacancies from overriding the specified Board member rotation schedule.

Alaska statutes establish a triennial rotation schedule for membership on the Board of Governors of the Alaska Bar Association. The purpose of this schedule is to help new members in understanding how the Board operates, to provide for a smooth transition, to maintain continuity on the Board, and to retain the knowledge base acquired by the Board.

Alaska Statute 08.08.050 outlines the selection of the Board of Governors. Sections (b) and (c) of this statute read as follows:

> *(b) Members of the Board of Governors shall hold office for three years and until their successors are elected or appointed and qualified.*
>
> *(c) Four board members shall be selected on the following triennial rotation:*
>
> *(1) in the first year, one member from the first judicial district, one member from the combined area of the second and fourth judicial districts, one member from the third judicial district, and one appointed member;*
>
> *(2) in the second year, one member at large, two members from the third judicial district, and one appointed member; and*
>
> *(3) in the third year, one member from the combined area of the second and fourth judicial districts, one member from the third judicial district, one member from the first judicial district, and one appointed member.*

According to AS 08.08.050(b), Board members shall hold their office for three years and until their successor is elected or appointed and qualified; however, according to AS 08.08.070 *"the board shall fill a vacancy in the elected membership of the board until the next annual election."* If, at this election, the seat is filled for three years, the Board is forced off the rotation schedule. It is unclear as to which statute prevails.

The Bar Association has consistently had difficulty interpreting these statutes. At the March 1989 meeting, the Board determined they were not in compliance with AS 08.08.050(c) because seven members' terms would end in 1989; two of the members' terms would end in 1990; and three members' terms would end in 1991. The Board passed a resolution to suspend their bylaws for the next annual election and substitute a different voting process. This action reinstated the statutory rotation schedule.

The current Board members' terms expire as follows: four in 1994, five in 1995, and three in 1996. Vacancies again were allowed to override the statutory rotation schedule; four terms should expire each year.

We believe that the prescribed rotation should prevail over the vacancy provision. Alaska Statute 08.08.070(a) should be amended by adding an additional provision as follows:

> *The board shall fill a vacancy in the elected membership of the board until the next annual election. At that time, a new member will be elected to complete the remainder of the unexpired term.*

AUDITOR'S COMMENTS

The sunset process allows for an objective 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 independent conclusions of a review agency, such as this Division, provide certain assurances that entities such as the Board of Governors of the Alaska Bar Association are operating in the public interest. The overall conclusions of our review are that the Board is operating in the public interest and that there is a continuing public need for the attorney admission and discipline functions of the Bar. Nevertheless, an overall evaluation of the basic approach to these functions should be undertaken from time to time. Whether the admission and discipline functions are to be controlled by government or by attorneys is a policy-level determination that should be carefully considered by the Supreme Court, the Board of Governors, and the legislature. The following comments are intended to assist in the deliberations.

Self-regulation, whether by industries or professions, 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 licensure and discipline systems of the Bar Association are self-regulatory functions that may suffer from this public perception.

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

We believe that the attorney discipline system 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, 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 . . . . [T]he disciplinary process should be directed solely by the disciplinary policy of the court and its appointees and not influenced by the internal politics of the bar association. . . . [T]he disciplinary system should be free from even the appearance of conflicts of interest or impropriety.*

We also believe that the attorney licensing system could be a government function. The tasks necessary to license attorneys are not unlike those for various other professionals in Alaska. A board more closely controlled by the State could certainly perform this function. The concern over the perception of possible conflicts of interest is as applicable to licensure as it is to discipline.

The Supreme Court, Board of Governors, and the legislature should consider whether a move away from attorney self-regulation is warranted and, if so, how large a move is needed. The following options should be considered.

- Board membership could be realigned to increase the number of public members.

- Disciplinary investigations could be performed by Court System employees.

- The entire disciplinary function could be placed under the Supreme Court. A Disciplinary Board would be appointed by the court. This is the discipline system configuration recommended by the American Bar Association.

- Both the licensure and discipline systems could be placed under the Supreme Court.

There should be no general fund net cost to any of these options. They would be paid for the same as they currently are and as are other occupational licenses. 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 and inappropriate acceptance or exclusion of candidates from the profession. In a move away from self-regulation, the legal profession and the State's citizens would likely benefit.

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses of Board activities relate to the public need factors defined in the "sunset" law, Alaska Statute 44.66.050. These analyses are not intended to be comprehensive, but address those areas we were able to cover within the scope of our review.

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

The Bar Association admits applicants to practice law through an examination process that was designed in consultation with a national expert. The exam has withstood a court challenge as to its adequacy as a test of competence. Admission is also contingent on the passage of the Multistate Professional Responsibility Examination and a character investigation to determine if the applicant is of good moral character.

The Board has adopted changes in Alaska Bar Rules and Bar policies as follows:

- They changed the methodology used for combining the essay examination scores and the Multistate Bar Examination scores to be more equitable.
- They adopted rules to facilitate the Bar in the determination of what constitutes *"good moral character."*
- They adopted rules that prohibit disbarred or suspended attorneys from providing legal advice or preparing legal documents.
- They adopted rules that authorize trial judges to allow the discovery of discipline files under certain circumstances in criminal cases.
- They adopted rules to address instances when an attorney has had a substantial number of fee arbitration cases filed against them. The Fee Dispute Resolution Committee can forward a complaint to discipline counsel for an investigation.
- They adopted rules clarifying the notice requirements of attorneys filing lawsuits for fees against their clients and the requirements for obtaining stays of such actions.
- They changed the rules for the maximum amount of a claim against the Lawyers' Fund for Client Protection from $10,000 to $50,000 and the aggregate amount that all claimants may recover from a single instance from $50,000 to $200,000.

- They adopted rules requiring all applicants to attend the course "Mandatory Ethics: Professionalism in Alaska" prior to admission.

As of January 1, 1985 the Bar Association began admitting members by motion for reciprocity. That option is limited to attorneys in the active practice of law for five of seven years in states with which Alaska has a reciprocal agreement. On January 15, 1991 reciprocity became tied to the jurisdiction in which the attorney passed the written bar exam, rather than where the attorney has engaged in the practice of law. (See Appendix E.)

The Bar Association has a lawyer discipline process for the investigation of complaints alleging attorney misconduct. Sanctions are imposed on those found to be in violation of the Rules of Professional Conduct. This process was developed through a cooperative effort of the Supreme Court, the Board of Governors, the Bar Association staff, and a review team from the American Bar Association's Standing Committee on Professional Discipline.

To alleviate public concern that attorney discipline is not taken seriously by the Bar Association, the Board has recommended to the Supreme Court that once a complaint is received and discipline counsel determines probable cause exists to believe that attorney misconduct may have occurred an investigation will be opened and the disciplinary proceedings will be open to the public.

The Bar Association provides public notice of all attorneys who have been disbarred, suspended, or publicly reprimanded.

In addition to the three public members who serve on the Board of Governors, 51 non-attorneys serve on various committees, which include disciplinary hearing committees and fee arbitration panels throughout the State. (See Appendix G.)

When a complaint is received by discipline counsel and the complaint does not constitute misconduct on the part of an attorney, but rather is primarily concerned with a fee dispute, the Bar Association offers fee arbitration as an alternative dispute resolution process. This process provides for the dispute to be arbitrated by a three-member panel that consists of two attorneys and one public member. Failure by an attorney to participate in good faith in this process may be grounds for disciplinary action.

Similarly, the Bar Association offers a conciliation process that attempts to resolve disputes between attorneys and clients, when the dispute is neither fee nor misconduct related. Failure by an attorney to participate in good faith to the conciliation process may be grounds for disciplinary action.

The Bar Association operates an attorney referral service, which is funded by subscribing attorneys, whereby anyone from around the State or from outside the State can call toll-free and receive the names of three attorneys who practice law in a certain discipline. Subscribing attorneys agree to provide the referred clients the first half hour of consultation at a reduced rate of $50 (effective January 1, 1993). (See Appendix F for the number of referrals made by the Bar.)

The Bar Association maintains the Lawyers' Fund for Client Protection that is for the purpose of making reimbursements to clients of attorneys who have suffered non-insured losses of money, property, or other things of value as a result of a dishonest act by an attorney. Ten dollars of each Bar Association member's annual dues is deposited in this fund.

The Bar Association jointly sponsors the Alaska Pro Bono Program with the Alaska Legal Services Corporation in which attorneys provide free legal services to low-income Alaskans.

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

The operations of the Board are enhanced by a budget that is funded entirely by the membership through dues, admission fees, continuing legal education, lawyer referral fees, conventions, and interest income. The 1993 budgeted revenue was $1,719,500. (See Appendix A for a schedule of Bar Association revenues and expenditures for 1989 through 1992.)

As a policy enhancement of the Board, they have stated that for all disciplinary cases received after April 1, 1990, discipline counsel will make a determination within six months whether or not to open an investigation. Discipline counsel may request an extension on this rule from the Board Discipline Liaison.

The Board has recommended changes to the Supreme Court that would enhance the complaint investigation process by making all disciplinary actions public at the time an investigation was opened. However, the Board is awaiting further action by the Supreme Court.

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

The Board has not recommended any statutory changes during this audit period. However, the Board has been active in the process of evaluating and revising the Alaska Bar Rules that govern the Bar Association's policies and procedures.

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 which it has provided.

The Bar Association is enhanced by the involvement of its membership in its operations. This involvement may include serving on one of the six standing committees or five bar rules committees. It may also include participation in a section or group of members with

similar specialization (e.g., bankruptcy law, criminal defense, etc.). Each section is responsible for monitoring the law, suggesting revisions, and reporting annually to the membership. It may also include participating in an adjunct organization such as the Alaska Pro Bono Program or special projects like the Statewide Lawyer Referral Service.

The Bar Association publishes all proposed changes to the Alaska Bar Rules in its semi-monthly publication, the *Alaska Bar Rag*, that is distributed to all members of the Bar Association. Members are asked to submit any and all comments on proposed rule changes for review by the Board.

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 of Governors, a total of 51 non-attorneys serve on disciplinary hearing committees and fee arbitration panels throughout the State. (See Appendix G.)

The Bar Association has publicly advertised face-to-face meetings of the Board of Governors of the Alaska Bar Association in major newspapers and the *Alaska Bar Rag*. However, they have not advertised teleconferenced meetings when Bar Association business has been conducted. (See Recommendation No. 4.)

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 the Ombudsman have been processed and resolved.

The Bar Association is an instrumentality of the State and not administratively assigned to any department. Nine complaints have been filed against the Alaska Bar Association with the Office of the Ombudsman since January 1, 1989. Investigation into complaints filed with the Ombudsman have been stymied by a disagreement with the Bar Association about whether the Ombudsman's office has jurisdiction over the it.

The Bar Association has adopted rules governing appeal procedures for both the disciplinary and examination/admission processes. The Bar Association has received various appeals. The appeals challenged the methodology used in ranking bar examinations and various questions on the examinations. The Board determined the methodology used in ranking the bar examinations was a policy decision. They reviewed that policy and determined that a standard deviation method of ranking the exams was appropriate. The Board granted and heard the appeals regarding bar examination questions.

Although many complaints were filed against attorneys during our audit period (1,059), only 67 complaints (see Appendix B and C) resulted in a public or private sanction against the attorney.

The extent to which a board or commission which regulated entry into an occupation or profession has presented qualified applicants to serve the public.

We found no instances where the Board had licensed unqualified applicants.

While many complaints are filed against attorneys, only six percent resulted in sanctions against the attorney. This represents sanctions against two percent of the Alaska Bar Association's membership.

The Bar Association offers continuing legal education programs to its membership and they also maintain an educational library (see Recommendation No. 1).

The extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity of interest.

We found no evidence that the Board was not complying with applicable personnel practices.

The Board has on several occasions voiced concern over the low minority pass rate of the Alaska Bar Examination. The Board is in the process of implementing a minority tutoring program to improve this pass rate.

The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the Findings and Recommendations and the Auditor's Comments sections of this report.

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APPENDICES

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APPENDIX A

Board of Governors of the Alaska Bar Association
Revenues Compared with Expenditures
1989 through 1992

Revenues	1989	1990	1991	1992
Membership Dues	$ 715,949	$ 729,163	$ 788,538	$ 827,536
Admission Fees	74,450	99,275	131,510	161,725
Continuing Legal Education	155,572	118,981	123,810	159,652
Lawyer Referral Fees	51,390	57,070	57,244	60,586
Annual Meeting	42,065	114,352	41,464	36,563
Interest on Investments	70,357	67,434	49,588	28,445
Other	100,792	106,681	82,320	74,963
Total Revenues	1,210,575	1,292,956	1,274,474	1,349,470
Expenses				
Admissions	155,269	167,202	165,978	171,532
Board of Governors	40,900	38,371	44,298	44,455
Discipline	301,538	368,583	437,823	449,038
Administration	263,127	293,739	284,069	298,434
Referrals	43,787	47,020	48,683	55,162
Continuing Legal Education	234,429	198,668	224,844	246,701
Fee Arbitration	37,678	39,510	45,281	40,526
Annual Meeting	41,648	148,718	57,155	43,233
Other	125,536	93,271	94,107	115,015
Total Expenses	1,243,912	1,395,082	1,402,238	1,464,096
Excess (deficit) of Revenues over Expenses	$ (33,337)	$ (102,126)	$ (127,764)	$ (114,626)

Source: Alaska Bar Association annual reports.

APPENDIX B

Board of Governors of the Alaska Bar Association
Discipline Statistics
1989 through October 1993

Disposition of Closed Disciplinary Cases	1989	1990	1991	1992	1993	Total
Disbarment by Supreme Court	0	0	0	0	0	0
Suspension by Supreme Court	5	1	3	0	0	9[2]
Public Censure by Supreme Court	0	0	0	0	0	0
Public Reprimand by Disciplinary Board	1	2	5	1	0	9[2]
Private Reprimand by Disciplinary Board	2	0	2	1	0	5[2]
Private Admonition by Discipline Counsel	9	10	9	12	2	42[2]
Closed after Probation Ended	0	1	0	0	0	1[2]
Dismissed	95	79	61	35	7	277
Grievances Not Accepted[3]	130	144	139	138	89	640
Total Closed Cases	242	237	219	187	98	983

Status of Open Cases at Period End	1989	1990	1991	1992	1993	Total
Attorney on Probation	0	0	1	0	0	1[2]
Pending Supreme Court	2	2	5	3	0	12
Pending Disciplinary Board	1	0	0	0	0	1
Pending Hearing Committee	0	2	2	2	0	6
Pending Stipulation	0	1	2	2	3	8
Pending Written Private Admonition	0	1	0	0	1	2
Abeyance due to Court Case	1	0	0	0	1	2
Pending Bar Counsel Investigation/Decision	0	1	1	4	20	26
Pending Complainant Reply	0	0	0	0	4	4
Pending Respondent Response	0	0	0	0	4	4
File Under Review	0	0	0	0	10	10
Total Open Cases	4	7	11	11	43	76

Source: This information was obtained from the Alaska Bar Association's discipline data base. All numbers reflect individual complaints filed and not the number of attorneys under investigation.

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[2]Represents a public or private sanction. There was a total of 67 of these sanctions in our audit period.

[3]Discipline counsel stated that approximately 25 percent of the "Grievances Not Accepted" are grievances that have been filed against an attorney because the attorney would not violate an ethical standard for the client. The remaining "Grievances Not Accepted" are due to inadequate or insufficient allegations by the complainant or because the allegations did not violate any Rules of Professional Conduct.

APPENDIX C

Board of Governors of the Alaska Bar Association
Grievances Filed by Category
1989 through October 1993

Grievances by Category[4]	1989	1990	1991	1992	1993	Total
Not Categorized due to Grievance not being Accepted	131	144	139	137	99	650
Trust Violations (embezzlement, conversion, withholding client's property, etc.)	15	9	5	3	4	36
Conflict of Interest	6	8	4	2	2	22
Neglect (failure to perform, delay, etc.)	33	27	33	22	17	132
Relationship with Client (disclosing confidential information, improper withdrawal, abandonment, failure to protect interest of client, etc.)	13	12	7	8	2	42
Misrepresentation/Fraud	12	19	21	6	4	62
Excessive Fees	0	0	0	0	0	0
Interference with Justice	34	25	16	17	8	100
Improper Advertising and Solicitation	2	0	1	0	4	7
Criminal Conviction	0	0	0	1	0	1
Personal Behavior	0	0	3	2	0	5
Willful Failure to Cooperate with Discipline Authorities	0	0	0	0	1	1
Medical Incapacity	0	0	0	0	0	0
Incompetence	0	0	1	0	0	1
Other	0	0	0	0	0	0
Total	246	244	230	198	141	1,059

Source: This information was obtained from the Alaska Bar Association's discipline data base. All numbers reflect individual complaints filed and not the number of attorneys under investigation.

[4]Fee arbitration is not included as a grievance category. Fee arbitration is a form of alternative dispute resolution.

APPENDIX D

Board of Governors of the Alaska Bar Association
Fee Arbitration Statistics
1989 through October 19, 1993

Disposition of Closed Fee Arbitration Cases[5]	1989	1990	1991	1992	1993	Total
Fee Arbitration Case Not Accepted	4	12	9	3	0	28
Closed due to Bankruptcy Proceeding	1	3	2	2	1	9
Closed Petition Withdrawn	12	12	7	1	0	32
Closed Settled by Parties	15	20	18	17	14	84
Closed Panel Decision Final	44	40	40	31	5	160
Closed Court Decision Issued	0	3	4	2	0	9
Total	76	90	80	56	20	322

Status of Open Cases at Period End	1989	1990	1991	1992	1993	Total
Pending Court Appeal	0	0	0	0	0	0
Pending Reconciliation/Clarification	0	0	0	0	0	0
Pending Reprimand	0	0	0	0	0	0
Panel Decision Issued	0	1	1	0	6	8
Pending Panel Decision	0	0	1	0	3	4
Pending Panel Hearing	0	0	2	4	11	17
Pending Panel Assignment	0	1	1	5	10	17
Pending 10 Day Settlement	0	0	0	0	4	4
Pending Stay	0	0	0	0	6	6
Pending Resolution Efforts	0	0	0	1	1	2
Pending Petitioners Completion	0	0	0	0	1	1
File Under Review	0	0	0	0	3	3
Total	0	2	5	10	45	62

Source: This information was obtained from the Alaska Bar Association's discipline data base. All numbers reflect individual fee arbitration cases filed not the number of attorneys with fee arbitration cases.

[5]Fee arbitration is a form of alternative dispute resolution. Fee arbitration offers a client the opportunity to dispute any and all fees paid, charged, or claimed for professional services by attorneys.

APPENDIX E

Board of Governors of the Alaska Bar Association
Bar Examination and Admission Statistics
1989 through October 1993

Bar Examinations	Number Taking Exam	Number Passing Exam	Percent Passing Exam
February 1989	56	36	64%
July 1989	81	62	77%
February 1990	74	45	61%
July 1990	106	71	67%
February 1991	80	57	71%
July 1991	81	44	54%
February 1992	80	47	59%
July 1992	107	69	64%
February 1993	85	49	58%
July 1993	102	64	63%
Total	852	544	64%

Admission Under Motion for Reciprocity

Year	Number Admitted
1989	8
1990	12
1991	14
1992	12
1993	17
Total	63

Source: This information was obtained from the Alaska Bar Association's statistical summaries in their annual reports. The 1993 information was obtained directly from the Bar.

APPENDIX F

Board of Governors of the Alaska Bar Association
Attorney Referrals
1989 through 1992

Area of Discipline	1989	1990	1991	1992	Total
Administrative	301	284	112	309	1,006
Admiralty	31	30	54	38	153
Alaska Native Law	0	0	0	0	0
Arts	4	7	12	17	40
Bankruptcy	329	290	357	332	1,308
Commercial	234	311	292	366	1,203
Construction	6	15	13	25	59
Consumer	690	698	717	804	2,909
Discrimination	19	12	20	61	112
Eminent Domain	12	16	11	11	50
Environmental	13	13	12	3	41
Family	2,837	3,061	3,383	3,479	12,760
Felony/Misdemeanor	677	846	500	880	2,903
Foreign Language	11	14	16	12	53
Immigration	18	25	85	104	232
Insurance	74	67	109	126	376
Labor Relations	584	655	761	866	2,866
Landlord/Tenant	360	465	603	663	2,091
Malpractice	154	214	259	297	924
Mining	13	13	12	8	46
Negligence	744	961	932	1,048	3,685
Patent/Copyright	134	113	104	87	438
Public Interest	0	0	1	2	3
Real Estate	585	549	562	432	2,128
Social Security Insurance Cases	53	61	110	164	388
Tax	114	113	108	101	436
Traffic	65	61	82	91	299
Trust/Will/Estate	254	324	370	313	1,261
Workers' Compensation	304	351	409	476	1,540
Total	8,620	9,569	10,006	11,115	39,310

Source: This information was obtained from the Alaska Bar Association's statistical summaries in their annual reports.

APPENDIX G

Board of Governors of the Alaska Bar Association
Committee Membership
As of November 17, 1993

Committee	Attorney Members	Public Members	Total Members
Board of Governors	9	3	12
Bar Polls and Elections	8	0	8
Continuing Legal Education	15	0	15
Ethics	18	0	18
Historians	15	1	16
Law Related Education	30	3	33
Statutes, Bylaws, and Rules	13	0	13
Total Standing Committees	99	4	103
Law Examiners	30	0	30
Disciplinary Hearing:			
First Judicial District	8	4	12
Second and Fourth Judicial Districts	9	3	12
Third Judicial District	28	8	36
Conciliation Panels:			
First Judicial District	4	0	4
Second and Fourth Judicial Districts	3	0	3
Third Judicial District	6	0	6
Attorney Fee Review (Fee Arbitration):			
First Judicial District	18	8	26
Second and Fourth Judicial Districts	8	5	13
Third Judicial District	41	19	60
Lawyers' Trust Fund for Client Protection	7	0	7
Total Bar Rule Committees	162	47	209
American Bar Association	1	0	1
Alaska Bar Foundation	5	0	5
Alaska Code Revision Commission	1	0	1
Alaska Commission on Judicial Conduct	3	0	3
Alaska Judicial Council	3	0	3
Alaska Law Review	3	0	3
Alaska Legal Services Corporation	17	0	17
Ninth Circuit Judicial Conference	4	0	4
Rocky Mountain Mineral Law Foundation	1	0	1
Total Other Adjunct Involvement	38	0	38
Substance Abuse Committee	6	0	6
Bar Rag	32	0	32
Minority Applicants	29	0	29
Tutors	38	0	38
Total Special Committees	105	0	105
Total Committee Membership	413	54	467

Source: This information was obtained from the Alaska Bar Association.

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303 K STREET
ANCHORAGE, ALASKA
99501

ARTHUR H. SNOWDEN II
Administrative Director

(907) 264-0547
FAX (907) 276-6985

Alaska Court System

January 26, 1994

Legislative Budget and Audit Committee
c/o Randy S. Welker, Legislative Auditor
P. O. Box 113300
Juneau, Alaska 99811-3300

Dear Committee Members:

You have asked for the Alaska Court System's response to recommendations contained in your preliminary audit report entitled *Board of Governors, Alaska Bar Association, November 17, 1993.*

Recommendation #1 states "The supreme court should consider establishing legal education requirements for attorneys."

The supreme court agrees with this recommendation. The supreme court will form a committee to look into the various aspects of a continuing legal education requirement. The committee will be charged to make their recommendations to the supreme court in a timely fashion.

There appears to be no other recommendations in the report for the supreme court's comment. I do note, however, that there were a number of "Auditors Comments" beginning at page 13 of the audit. The court views these as auditors suggestions rather than formal recommendations, and as such has provided no formal comments vis-a-vis these suggestions. Should specific hearings emanate from these suggestions, or draft legislation, the court would be most happy to provide input if requested.

Sincerely,

Arthur H. Snowden, II
Administrative Director

c: Chief Justice Moore

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ALASKA BAR ASSOCIATION

January 28, 1994

Randy S. Welker, CPA
Legislative Auditor
Division of Legislative Audit
P.O. Box 113300
Juneau, AK 99811-3830

Dear Mr. Welker:

Thank you for the opportunity to respond to the Division's Preliminary Audit Report regarding the Board of Governors of the Alaska Bar Association. In an effort to assist legislative review of the Preliminary Audit, I have tried to be both candid and comprehensive in my comments.

Let me first express the Board's appreciation for the audit and the auditor's work. Like any governing body, the Board relies on periodic external review to insure that it performs its responsibilities. We were pleased to see that the audit concluded that the Board of Governors meets its statutory responsibilities and public need in an effective and economical manner, and that it identified areas where changes might improve the effectiveness of the Board. As you can see, our comments principally concern those recommendations which reflect a misunderstanding of the Bar Association's function or the effectiveness of its regulation of attorney practice.

SUMMARY OF RESPONSE

The Board concurs with the audit conclusion that the termination date of the Alaska Bar Association be extended until June 30, 1998. We are pleased that the audit found that the Board addresses public interest in an effective and economical manner through its licensing, complaint investigation and discipline process.

The Board also agrees with the goals expressed by the findings and recommendations contained in the audit. However the Board questions whether the specific changes identified in the audit accomplish these goals and would result in actual benefits to clients and members of the legal profession.

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RESPONSE TO SPECIFIC RECOMMENDATIONS

The Problems Associated with Mandatory Continuing Legal Education Outweigh its Benefits in Light of the Bar Association's Existing CLE Program

Recommendation No. 1 of the Audit proposes that the I Association abandon its current continuing legal educat program in favor of one that is mandatory. Although the Bo would certainly agree with the Division that increas professionalism through regular legal education programs is paramount importance to attorneys and their clients, disagrees with the Division that mandatory continuing leg education (MCLE) is either the most efficient or effective w to accomplish this goal.

A continuing legal education requirement for attorne would be a disservice to the public if it did not, in fac improve substantive skills and reduce the type of complain frequently lodged against attorneys. MCLE would also be disservice to attorneys if it did not meet actual professio education needs and result in an efficient use of Association resources, given other obligations like disciplı and admissions. It is also the type of program where efficienc and effectiveness is directly linked to the size of a state ba and the geographical location of lawyers within a state. Fo these reasons, one cannot assume that because most jurisdictior require continuing legal education, that it is either necessar in Alaska or can be delivered efficiently.

The Bar's Present CLE Program is Well Attended and Effective

The Board believes that its present CLE program i effective at increasing professionalism. The tremendous amoun of breadth and participation in the Bar's existing program bear this out. In 1992 alone, nearly 1,000 individual Alaska Ba members (42% of the active Bar membership in Alaska) attende one or more CLE programs sponsored by the Alaska Ba Association. This figure does not reflect attendance by Alask Bar members at courses taken Outside, at courses by othe providers in Alaska, at in-house programs, or self-study. The Bar itself sponsors between forty and forty-five CLE programs annually (almost one per week), all of which are video recorded for additional use through a lending library. The CLE library

maintained by the Bar Association receives approximately 40 requests per week for videotapes and materials for self-study use. (The library requests are not included in the above figure of nearly 1,000 lawyers who attended live seminars.) These figures tell us that the vast majority of Alaska Bar members assume responsibility for regular professional education.

Mandatory Continuing Legal Education Will Not Address The Most Common Client Complaints

The Board's experience with discipline also leads us to believe that a MCLE requirement will not necessarily result in improved client satisfaction. Discipline complaints are generally not related to the lack of attorney education in a subject matter, but are more often related to bad practice habits (failure to return phone calls, neglect, etc.) or ethical issues (e.g., conflict of interest). To address this, the Board previously recommended a rule change requiring all new admittees to take a course in the rules of professional conduct. The Board will be considering a proposed rule requiring all practicing attorneys to submit an affidavit stating they have read and familiarized themselves with the Rules of Professional Conduct in order to maintain their license to practice. In our view, these mandatory ethics requirements will address client dissatisfaction far better and more directly than an MCLE requirement.

Mandatory CLE Will Not Necessarily Improve Legal Skills

One can also not assume that making CLE mandatory necessarily improves the quality of an attorney's practice. The fallacy of MCLE now being seen in other jurisdictions is that the requirement to obtain a certain number of CLE credits per year merely results in attorneys attending programs unrelated to the attorney's work, and therefore of little benefit. Many attorneys practice in a particular and somewhat narrow field. For these attorneys, mandatory CLE is effective only if there are sufficient courses offered in a particular field every year to meet CLE credit hour requirements. (For example, mandatory CLE is really meaningless if it forces a full-time criminal lawyer to take a course in natural resources law.) This means that if MCLE is adopted, the Bar Association must make sure there are sufficient courses each year in each field of practice to enable all attorneys to meet requirements without having to attend programs of no benefit to them. For a geographically large and diverse state with a relatively few number of attorneys this creates costs and administrative problems which the audit did not address.

The Costs of MCLE in Alaska Would Be Significant Because of Alaska's Size and Diversity of Attorney Practic

The audit concludes that MCLE would result in onl slight increase in professional dues to cover administrat costs. The audit does not reflect the basis for this conclus and we believe the Division failed to consider the signific administrative and financial impact that MCLE would have on Bar Association. The Board is well aware of these costs a result of its serious consideration of MCLE in 1990.

We estimate that an MCLE program would require additional staff to cope with programming requirements, monitor attendance, and to ensure enforcement. This is beca MCLE would require the Bar Association to offer more programs than the 40-45 live programs currently offered ev year. This expansion is necessary to offer a broad-ba curriculum of programs of interest to a diverse civil criminal practice in the state. Additional programs must offered to reach attorneys in small rural communities so t they are not unfairly penalized by having to travel l distances within the state to meet MCLE requirements. mandatory program also requires additional staff because of need to track attendance by attorneys at all programs, give n notice of deadlines, non-compliance and seek suspension necessary.

Moreover, Bar Association staff would need to monit CLE programs presented by approved providers and attended attorneys in Alaska and other jurisdictions. Coordination amo other MCLE jurisdictions and the need to approve non-B Association CLE providers would require additional staff time.

Additional staff and administrative expenses are n the only costs associated with MCLE. Other states which ha adopted a MCLE requirement have found themselves sponsori programs in every area of the law in a attempt to meet the C needs of all members. This necessarily means that many C programs will run at a loss because the topic is in a limite practice area. The Board believes that these losses may l greater in Alaska because of the state's comparatively sma population of attorneys spread throughout a large geographic area.

The costs and benefits of MCLE must also be evaluate in light of the Alaska Bar's other responsibilities. The Alask Bar is one of only five state bars with responsibility t administer admissions, discipline and CLE. As a result, Alask

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Bar dues are already among the highest in the nation and Ba dues were just increased in 1993 to $450. While MCLE is laudable goal which we share with the Division, its costs and benefits must be viewed in light of other budgetary demand which flow from a Bar Association which is conscientious abou admissions and aggressive on discipline.

We also believe that a recommendation for Supreme Cour action is premature. This recommendation seems to assume tha either the current Board or future Boards would not support rule change requiring MCLE. This is certainly not the case. Th vote among Board members in 1990 to sponsor a rule chang requiring MCLE was extremely close, and Board membership ha changed since that time. The current Board's consideration of mandatory ethics requirement reflects continuing concern abou improving professionalism and directly addressing clien dissatisfaction. We believe a more appropriate recommendatio would be for the Board to reconsider a rule change. This is no only consistent with the Board's statutory responsibility, bu more likely to result in rule changes that accommodate th problems with MCLE which I have discussed.

The Bar Association is Currently Addressing Disclosure Requirements Which Give Added Protection to Clients and Accommodate Professional Needs

The audit recommends rule changes requiring attorney disclosure of malpractice insurance, prior disciplinary action, and the Bar's grievance system during the initial client interview. The Bar Association is already considering rule changes regarding disclosure of malpractice insurance. The Board believes, however, that recommended rule changes now before the Supreme Court for approval, which open the attorney discipline process to greater public access, achieve the protection sought by the audit recommendations.

The Board shares the auditor's view that the more information a client may have about the attorney, the better the client's choice may be. However, the Board believes that this information should be made available in a way that does not interfere with the attorney-client relationship nor unfairly penalize certain practitioners.

The Board is Already Addressing Disclosure Requirements for Malpractice Insurance

The auditor recommended that attorneys should discl whether the firm or attorney carries malpractice insurance. Board is already addressing this issue. The Board of Governc is currently considering a proposed rule change which wo require each attorney to provide to the client writ disclosure if the attorney carries malpractice insurance w coverage limits less than $100,000/$300,000. This propo will be before the Board at its March meeting.

The Committee should know that this proposal stem from the Board's earlier consideration of a mandatory minir malpractice insurance plan similar to that used by the Ore Bar. The Board actually had a risk retention insurer devel preliminary estimates of costs. However, Alaska's comparative small bar, combined with insurance costs on the primary a secondary market, meant that such a program was not feasible.

The Public Is Well Aware of the Bar Association's Attorney Discipline Process

The auditor also recommended that attorneys be requir to disclose the existence and function of the discipl system. We question this recommendation because there was finding in the audit that dissatisfied clients in Alaska a unaware of the Bar's discipline process, or that it under-utilized. To the contrary, our experience has been tha clients dissatisfied with attorney services have no difficult bringing complaints. This is reflected by the fact that durir the audit period, the Bar Association received 1,059 complaint against attorneys. These numbers confirm the Board's belief tha the Bar Association's discipline function is well known by th public.

The Board also question the assumption that disclosur of the Bar's grievance system enhances the attorney-clien relationship when it is given during the initial clien interview. We are not aware of any other profession or busines that is required to make these kinds of disclosures.

We believe that a better alternative to the audi recommendation is for the Bar Association to make copies of brochure available to attorneys and encourage them to distribute them to their clients. The Bar could also make the public more aware of the discipline system through public service announcements. These efforts could be part of the Board's

current public awareness program to inform the public of th existence and function of the Bar Association.

Disclosure of Prior Discipline Action is Unnecessary Given Rule Changes Which Would Open Discipline Records To the Public

The audit also recommends that attorneys be required t disclose prior disciplinary action during the initial clien interview. We believe this recommendation is unnecessary an that it reflects a misunderstanding of the realities of practic in some areas of law, as well as the discipline process itself.

While clients should be able to know about significan disciplinary action, the disclosure suggested by the audito would be extremely unfair to attorneys who practice in som areas. Attorneys who practice criminal law, and to some exten those who practice family law, are subject to client grievance simply because of the types of cases they handle. Most crimina defendants go to jail, where they are unhappy, and have time t think of reasons to blame the district attorney who prosecute them, or the lawyer who defended them. Similarly, divorce case by their nature yield unhappy results, and participants blam the court system or their lawyers. These grievances are ofte without merit. An experienced criminal defense lawyer, fo example, may have a number of grievances filed against him o her, but this may reflect nothing about the lawyer's competence except that the lawyer has been practicing for many years. By contrast, another lawyer may leave a government agency where he or she had no direct client contact (and therefore nc grievances) and give the appearance of greater competence because of the absence of grievances. The disclosure syste recommended by the auditor might lead a client to mistakenly believe that the first lawyer was not as skilled as the second, when the opposite might be true.

A mandatory disclosure requirement is also unfair because lawyers in Alaska are subject to a discipline system that is a far more aggressive discipline process than any other profession. Lawyers can be disciplined for action which actually causes no harm or is otherwise insignificant, or conduct which would not be unethical for someone other than a lawyer. Such a disclosure may act as a deterrent to a client hiring a qualified lawyer who has caused no harm.

We also question this disclosure for attorneys, knowing of no other profession where it is required. Physicians, architects, and other professionals are not required

to disclose malpractice claims with patients or clients, alone disclose complaints. Similarly, businesses are required to inform customers of past complaints or lawsuits.

It is our view that making the Bar Associatio discipline process more public is the way to provide t information to clients. The audit recognizes that this achieve the same benefits as the attorney disclosure opti The Board embraced a more public discipline process by propos to the Supreme Court a rule change which would provide pub acces to the discipline process from the date a grievance accepted for investigation.

If the court adopts the rule opening up the discipl process, individuals could call the Bar office to get pub information on any attorney. The availability of tl information could be incorporated into the brochure and be pa of the public information process.

The Bar Association Presently Provides Staff and Telephone Assistance to Complainants

The audit recommends that the Bar Association estab a toll-free complaint line to provide greater assistance callers in formalizing allegations of attorney misconduc Although the Bar would certainly consider a toll-free complai line as part of its efforts to increase public awareness, question the need to provide greater assistance to complainan because of the significant staff help presently provided ar because there is no evidence that complaints are dismisse because complainants are unable to articulate them.

As the audit reports, the Bar Association currently ha a discipline assistant who talks with people who contact th office wishing to file a complaint against an attorney. Sh handles up to 6-10 telephone calls per day and spends 15-2 minutes talking with complainants and explaining the process t them. The assistant tries to give complainants as muc information as possible. Everyone receives a complaint form brochure and some get a copy of the Rules of Professiona Conduct. Complainants regularly come into the office wit papers and the assistant advises them to submit paperwork whic would support their allegations. She says that hardly anyon asks "how do you fill out the form," since our forms are simple.

The assistant, who also handles fee arbitrations, als asks complainants if they have a fee dispute with the attorne Often she makes suggestions such as writing a letter to th attorney if appropriate. She always makes it clear to peopl that they should feel free to call back if they have question We believe that this is the type of assistance recommended b the American Bar Association.

There is also no evidence that complaints are dismisse because allegations are poorly articulated. Complainants ar advised of the type of information needed to open a complain when their initial complaint is unclear. Bar Counsel regularl review complaints and find ethical issues that have not bee raised by the complainant. Further, it is Bar Counsel' responsibility to determine the nature of the complaint if it i at all unclear. Bar Counsel take particular efforts t understand or inquire further with people who hav unsophisticated communication skills. The discipline section' history simply does not reflect a problem with people havin difficulty communicating the essence of their complaints agains attorneys.

We also believe there is a certain danger in having Ba Associ tion staff assist clients in framing their allegations o misconduct beyond the assistance that is already provided. Grievances must stand or fall on their merits. And, given the time and cost involved in investigating and resolving grievances, the Bar's resources should be focused on valid complaints rather than those where staff may inadvertently create allegations that are not there.

The audit recommendation notes only that the increased cost to the Bar of providing a toll-free line and investigating additional allegations would be moderate. It may be a reasonable alternative to list a number in the white and yellow pages under attorney discipline. The Bar's telephone number is already listed on the informational brochure which is available to the public.

The Bar Association Agrees with the Importance of Public Notice of Teleconference Meetings

The audit recommended that the Bar Association publicly advertise all teleconference meetings. We agree with this recommendation. The Board has conscientiously complied with the

statutory requirement to give public notice of its regular scheduled meetings. Conference call meetings are usually call to deal with matters which arise unexpectedly or cann otherwise wait until the next board meeting. Often, they a called on short notice and the statute does grant exemptions the notice requirement in the case of emergency meeting. Frequently, as was the case with two conference call meetin last December, the entire conference call meetings dealt wi confidential admissions matters and the Board met in executi session.

The Board will make every effort to publish notice (conference call meetings as required.

The Bar Association Concurs that AS 08.08.210(D) Should be Amended to Apply to All State Agencies

The audit notes that AS 08.08.210(d) allows th Department of Law, but not other similar state agencies, t utilize law school graduates prior to passing the ba examination. The Board of Governors agrees that if th Department of Law has the ability to utilize law scho graduates for up to 10 months prior to their admission, t this same waiver should apply to other state agencies Currently these other agencies may utilize employees as lega interns in a much more limited capacity under the Bar Rules, an the permit is revoked if the applicant fails the Alaska Ba Exam. We agree that all employees of state agencies who hav failed the bar exam should not be allowed to practice law unde this provision. The recommended amendment would affect a relatively small number of attorneys.

The Board Agrees that Amendments to AS 08.08.070 Would Clarify Election Procedures When a Vacancy Occurs on the Board

The Board is aware that the board member terms are out of sync with the statutory rotation schedule of AS 08.08.070. In 1985, a vacancy was created when an attorney member from the First Judicial District resigned during his second term. A new attorney member was appointed, and in 1986 this attorney member ran for election for a new three year term, rather than complete the remainder of the term of the original member. Because this attorney remained on the Board until 1992, it was not obvious

that the terms were out of sync until 1992 when we had five ne members on the Board, rather than what should have been four i any given year.

The amendment as suggested would clarify procedure when there is a vacancy on the Board. The Board should have a election in the First Judicial District in 1995 for a one yea term on the Board and an election in 1996 for a regular thre year term. This should result in terms consistent with A (08.070.

CONCLUDING COMMENTS

Attorney Self-Regulation Has Been Effective in Alaska

The overall conclusion of the audit is that the Boar effectively serves the public interest through its attorne admission and discipline process. The auditor, however, ha offered comments which question the value of attorney self regulation. We appreciate these comments, but we also believ that attorney self-regulation is working very effectively i Alaska. Greater governmental involvement in the lega profession, like any other profession or business, should not b warranted unless the present system of regulation is failing To its credit, the Alaska Bar Association has one of the mos aggressive and effective discipline systems in the country.

For example, since 1989 the Board has issued 1 recommendations for suspension, ranging from 90 days to fou years, six recommendations for public reprimand, and three fo disbarment. In 1993, there have been four recommendations fo suspension and two for disbarment. These disciplinar recommendations are generally upheld by the Supreme Court and it is rare that the Court views the Board's actions as too lenient. These figures do not include the significant number of cases where discipline is achieved by private reprimand or admonition.

These results reflect the commitment of resources the Bar devotes to discipline. One-third of the Bar Association budget is now dedicated to the discipline section. This is entirely funded by attorney bar dues and the Association receives no state money for this effort. A third bar counsel was added half time in 1988 and became full time in 1990. A paralegal was added to the staff in 1990. In 1990 internal policies were modified to get initial responses from attorneys

to complaints within 10 days and requiring bar counsel to m charging or dismissal decisions within six months of the fil of a complaint. Due to the increased priority and resour which the Board has given to the discipline process, caseload has gone from a high of 175 in 1988 to a current low 75 open cases. The result is that more serious cases are prosecuted more quickly.

The Supreme Court and the Board have incorpora significant reforms to improve the discipline process si 1985. Other states still labor under excessive confidential procedural burdens. However, Alaska has already committed substantial improvement in opening the process to the public that concerns about self-regulation are allayed. Since 1 discipline hearings have been open to the public. The resu of public discipline are published so that members of the pub know the involved attorney and the sanction. The Board has a proposed rule changes now before the Supreme Court which w significantly open the grievance process to the public.

It is also our belief that the present manageme system of the Bar provides a blend of private and government functions which insure both accountability and good managemer The Bar is an instrumentality of the state and subject legislative audits. Its meetings are open to the pul Members of the public sit on discipline hearings and arbitration panels as well as the Board of Governors. I discipline functions are overseen by the Supreme Court whi assures a sound investigative and judicial process discipline. Finally, the statewide attorney membership on t Board also insures that the Bar Association is both responsi to the needs of its members as well as qualified to address su issues as admission standards and peer review.

Again, thank you for the opportunity to comment on t preliminary audit report. We trust that our response has bee helpful, and that it demonstrates the Board's continui commitment to improving the profession and its service to t public.

Sincerely,

P. R. Volland

Philip R. Volland
President

ed1155

HB

521

HOUSE COMMITTEE REPORT

(9)

Date Referred: March 9, 1994 FURTHER REFERRALS: Judiciary

Date of Committee Action: 4/6/94

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 521

HOUSE BILL NO. 521 JUDICIAL REVIEW:TEACHER TENURE DECISIONS

"An Act relating to judicial review of decisions of school boards relating to nonretention or dismissal of teachers."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note Education [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
	—			✓	
	—			✓	
	✓		✓		
				✓	

Carl Bivins
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 521

Revision Date: _____
Title: Judicial Review: Teacher Tenure Decisions
_____
Sponsor: House State Affairs Committee
Requestor: House State Affairs Committee

Department Affected: Department of Education
BRU: Executive Administration
Component: Commissioner's Office
_____
COMPONENT SERIAL NO. 185

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: $ _____

ANALYSIS: (Attach a separate page if necessary.)

This legislation will have no fiscal impact on the Department of Education. However, passage of HB 521 may result in considerable savings to the local school districts.

Prepared by: Sheila Peterson
Division: Commissioner's Office
Phone: 465-2803
Date: March 15, 1994

Approved by Commissioner: _____ Jerry Covey
Agency: Education
Date: March 15, 1994

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DOE - ZERO FISCAL NOTE

FAX

TO: Representative Cynthia Looney
HB 521

DATE: 3-30-94

FAX #: 907-349-6722

PAGES: 1

FROM: Alicia Newman
1710 Commodore Drive
Anchorage, AK. 99507

I am writing to ask you to oppose HB521. If all school administrators followed existing state regulations in observations, evaluations would be adequately documented and hearings on terminations would be fair and impartial. De novo trials are only used by people who were not given a full or impartial hearing.

Sincerely

Alicia Newman

State of Alaska

House State Affairs Committee

Session
Rm. 102
State Capitol
Juneau, AK 99801
(907) 465-3719

Interim
119 N. Cushman St.
Suite 211
Fairbanks, AK 99701
(907) 456-5081

March 14, 1994

SPONSOR STATEMENT: HB 521

·n Act relating to judicial review of decisions of school boards r·..ating to nonretention or dismissal of teachers."

This bill eliminates the requirement for a De Novo trial for appeals of school board decisions. The record that is built during the administrative hearing can be used as part of the record for the appeal to the superior court.

This bill clarifies that appeals from board decisions will be treated as an appeal from a decision of an administrative agency under the Administrative Procedure Act.

This bill also establishes that a non-tenured teacher is not entitled to appeal a board decision to the courts.

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

P.O. Box 71250 Fairbanks, Alaska 99707-1250 (907) 452-2000

March 1, 1994

The Honorable Al Vezey
Alaska House of Representatives
State Capitol, MS 3100
Juneau, Alaska 99801-1182

Dear Representative Vezey:

I was sorry that I missed meeting with you on a recent trip to Juneau.

The Board's major concerns this legislative session are:

Changes to Tenure - HB84 - The grants for school improvement and extending tenure from two to four years is acceptable. However, the rest of the bill regarding tenure review boards, the make-up and duties of such boards, etc., is not acceptable. Our statutes protecting teachers as public employees have diluted our negotiating power at the local level. Please, let us set up the parameters. Many districts have very good evaluation processes, the biggest deterrent is time. Keep it simple, just extend the time.

Open Meetings Act - Please define a meeting, allow at least two people to talk. Every time two Board members attend a school open house, we are in violation or at least the public sees it that way. It impedes the process of good local government.

De Novo Trial - $ - Funding

Full-Funding For Education

Thank you for allowing me to share the Board's concerns with you.

Sincerely yours,

Sue Wilken

Sue Wilken, President
Board of Education

SW/plh
cc: Board of Education
Superintendent

Fairbanks North Star Borough School District Legislative concerns.

NORTH SLOPE BOROUGH SCHOOL DISTRICT

Box 169 • Barrow, Alaska 99723 • (907) 852-5311 • FAX (907) 852-5984

Patsy Aamodt, Superintendent

Nunamiut Wolves
Nunamiut School
P O. Box 21029
Anaktuvuk Pass,
Alaska 99721
(907) 661-3226
FAX (907) 661-3402

Atqasuk Eagles
Meade River School
Atqasuk, Alaska 99791
(907) 633-6315
FAX (907) 633-6215

Barrow Whalers
Barrow High School
P.O. Box 8950
Barrow, Alaska 99723
(907) 852-8950
FAX (907) 852-8969

HMS 'VOLVES
Eben Hopson Sr ,
Memorial Middle School
P O. Box 3880
Barrow, Alaska 99723
(907) 852-3880
FAX (907) 852-7794

Arctic Fox
Fred Ipalook
Elementary School
P O. Box 450
Barrow, Alaska 99723
(907) 852-4711
FAX (907) 852-4713

Kaveolook Rams
Harold Kaveolook School
P O Box 10
Kaktovik, Alaska 99747
(907) 640-6626
FAX (907) 640-6718

Nuiqsut Trappers
Trapper School
Nuiqsut, Alaska 99789
(907) 480-6712
FAX (907) 480-6621

Tikigaq Harpooners
Tikigaq School
P.O. Box 148
Point Hope, Alaska. 99766
(907) 368-2662 or 368-2663
FAX (907) 368-2770

Cully Qavvik
Cully School
Point Lay, Alaska 99759
(907) 833-2311
FAX (907) 833-2315

Alak Huskies
Alak School
P.O. Box 10
Wainwright, Alaska 99782
(907) 763-2541
FAX (907) 763-2550

March 17, 1994

Carl Rose
Alaska Association of School Boards
316 W. 11th St.
Juneau, AK 99801-1510

Dear Carl,

The North Slope Borough School District is opposed to the "de novo" trial because of the seemingly unnecessary expenditure of funds for legal fees that instead could be used to educate our children. We have two clear examples that illustrate the high cost of going to trial after the Board has heard the termination hearing on a tenured teacher. Consider these recent examples:

Example #1: A tenured teacher was terminated for striking a child. The teacher requested a hearing. The Board hired our attorneys and a hearing officer for the hearing. This was expensive, but little compared to the $126,000 in additional legal fees the District spent for the "de novo" trial. This money could have purchased staff and supplies that would have helped educate our children instead of enriching our attorneys.

Example #2: A tenured teacher was terminated for incompetence. As in the previous example the teacher requested and received a hearing. The legal fees for our attorneys and the hearing officer were substantial. The preparation for the trial and settlement negotiations involved another $29,000 in legal fees. In addition our insurance company paid the ex-teacher $59,500 as a settlement to avoid the legal expenses of a trial. Total legal fees and settlement cost subsequent to the board hearing for this example, which did not even go to trial, were over $88,500. This is almost prohibitively expensive.

We oppose the "de novo" trial because of the tremendous legal expenses involved, as shown in the above two examples.

Sincerely,

Pat Aamodt,
Superintendent

PA/gcc

Enc: Board Resolution
cc: Board of Education

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

P.O. Box 71250 Fairbanks, Alaska 99707-1250 (907) 452-2000

February 17, 1994

Association of Alaska School Boards
Carl Rose. Executive Director
316 W 11th Street
Juneau. Alaska 99801-1510

Dear Mr. Rose:

This is in response to your request for information regarding hearing and litigation costs in personnel matters. The Fairbanks North Star Borough School District currently has two cases in progress.

The first is currently being appealed by the terminated employee to the Alaska supreme court. Hearing costs for this case were $44,512 and trial costs to date are $38,095, for a total of $82,607.

The second is scheduled for trial in superior court in January 1995. Hearing costs in this case were $82,920 and trial costs to date are $30,010, for a total of $112,930.

Please let me know if you need additional information.

Sincerely,

Barbara M. Martin
Assistant Superintendent
Business and Finance

SITKA SCHOOL DISTRICT

ACCREDITED BY THE NORTHWEST ASSOCIATION OF SECONDARY SCHOOLS & COLLEGES

JOHN HOLST
SUPERINTENDENT

P.O. BOX 179, SITKA, ALASKA 99835
PH 907-747-8622
FAX 907-747-5330

March 18, 1994

Carl Rose, Executive Director
Association of Alaska School Boards
316 W. 11th Street
Juneau, AK 99801-1510

Dear Mr. Rose:

As per your request concerning the costs of a recent termination case involving the Sitka School District, we are providing the following information.

The legal fees paid directly by the Sitka School District was $39,963. This included the original hearing before the School Board. At that point, an attorney and legal firm was appointed by our insurance carrier. They handled the case from that point onward. Their costs of the de novo trial were apparently $50,386 and the costs associated with the appeal to the Supreme Court another $24,067. Since the case has now been remanded to the Superior Court, we do not know at this time what the costs will be to process this next step.

This makes no accomodation for the administrative costs associated with a termination which often require 60%-70% of the supervisor's time for one to two years of close supervision and documentation prior to the actual termination recommendation to the Board. This item alone would amount to another $100,000 in actual costs.

If you need any clarification of this information, feel free to contact me.

Sincerely,

John Holst
Superintendent

KENAI

Date JAN 2 1 1994

Peninsula Clarion

Teacher hired back, but district to appeal ruling

By JANIE LAWLEY
Peninsula Clarion

George Clouston has been rehired as a teacher in the Kenai Peninsula Borough School District, but the school board isn't happy with his reinstatement and plans to appeal it to the Supreme Court.

The board decided Monday to appeal a judge's order to rehire Clouston, who was fired in 1991 for allegedly sleeping in class.

The board voted 6 to 1 in favor of appealing the superior court judge's order that the district rehire him. Board member Nels Anderson voted against the idea.

See TEACHER, page 9

...Teacher

Continued from page 1

The board didn't spend any time discussing the issue, which was included in a consent agenda package.

Sharon Radtke, personnel director, said that Clouston has been given a full-time teaching position at Skyview High School. He is teaching woodshop, math and study skills.

School Board President Betty Obendorf said she believes the district needs to pursue an appeal because it disagrees with the findings of Superior Court Judge M. Francis Neville. She ordered the district to rehire Clouston and to pay him damages for lost earnings of about $90,500.

"I think that because of our disagreement and disappointment about the judicial findings that we should go ahead and appeal," Obendorf said.

John Patterson, the attorney for Clouston, said that he wasn't surprised by the district's decision to appeal. However, he said he doesn't know what the district is basing its appeal on.

"I haven't the foggiest notion of what they will appeal. Usually, you have to have some reason for an appeal," Patterson said.

Clouston, a former shop teacher who worked 11 years with the district, was fired by the district in 1991 for what it believed to be incompetency and substantial non-compliance.

The charges stemmed from an incident that occurred in February of 1991 while Clouston was teaching at Soldotna High School. The district based its decision to fire him on the belief that an employee from Kenai Supply found Clouston sleeping in his office.

In addition, the district believed that Clouston misrepresented it during a phone call to the business later in which he allegedly said he would get physical with the driver and not purchase supplies there if he returned to the school.

Clouston appealed the district's decision and it went to Superior Court. It was here that Judge Neville ordered the district to reinstate him and to pay him the salary he would have been earning if he wouldn't have been fired.

The district has spent about $74,000 on the lawsuit so far. On Thursday, Radtke estimated that the appeal will run about $15,000. The district's attorney is working on the appeal now.

ANCHORAGE SCHOOL DISTRICT
ANCHORAGE, ALASKA

MEMORANDUM March 22, 1994

TO: LARRY WIGET
DIRECTOR/GOVERNMENT RELATIONS

FROM: LEE WILSON
EXECUTIVE DIRECTOR/LABOR RELATIONS

SUBJECT: HB 521, REGARDING TEACHER ACCESS TO DE NOVO TRIAL

We support the passage of HB 521.

The current provisions of AS 14.20.205, in combination with very generous tenure benefits, confer upon Alaska teachers a measure of job security unheard of in other employment arenas. That security imposes an extraordinary burden on School Districts which attempt to remove from the teaching ranks those whose performance insults public expectations and inhibits student growth.

Specifically, teachers judged by elected school boards to be unfit for duty - following lengthy and formal evidentiary hearing, usually before trained hearing officers, during which teachers may call and examine witnesses and be represented by legal counsel - have the option to begin the process all over again, in Superior Court. They may request, and must receive, a trial *de novo*, "a new trial", from scratch. Effectively, teachers can secure two complete trials over the same issues. The second trial typically occurs more than a year after the hearing before the school board, thus increasing the difficulty and cost of securing testimony from witnesses who may be out of state, or out of country. In a recent case, in Anchorage, after the District spent roughly $20,000 to prevail before a hearing officer, it was forced to expend an additional $100,000 to achieve the same result in Superior Court. All witnesses used in the hearing before the School Board were required to testify again at trial. All arguments, all discovery, all briefs, were recreated and submitted to a judge. Moreover, the motion practices in civil trials increase costs and cause substantial delays.

HB 521 would protect teachers by giving them access to court review of an administrative judgement, following a fair hearin g before an impartial arbitrator. This process is common to employees covered by collective bargaining agreements. The standards which govern courts during such review processes are well established and well known. Basically, in order for an award of a hearing officer to be overturned by a court, the appealing party is required to demonstrate that a substantial error in fact or law was made. The burden of proof rests clearly on the appellant.

If passed, this bill would place teachers in this state on an equal footing with other represented employees. A review of the established record of the hearing, to determine if a substantial error in law or fact was made will be provided. What will be lost is the extraordinary and completely unwarranted second evidentiary proceeding in Superior Court.

ASSOCIATION OF ALASKA SCHOOL BOARDS
316 W. 11th St. • Juneau, Alaska 99801-1510
(907) 586-1083 • Fax (907) 586-2995

To: The Honorable Con Bunde, Co-Chair, HESS
The Honorable Cynthia Toohey, Co-Chair, HESS
Members of the HESS Committee

From: Carl F. N. Rose, Executive Director, AASB

Date: March 22, 1994

Re: HB521: An act relating to judicial review of decisions of school boards relating to non-retention or dismissal of teachers

The Association of Alaska School Boards supports the passage of HB521.

Under AS14.20.205 Judicial Review: a school district is obligated to submit to a trial de novo (a new trial) if a decision of the school board is unfavorable to a teacher, and the teacher appeals the decision by the board to non-retain or dismiss them. This is an extraordinary standard that has not been extended to any other group of employees. AASB views this requirement to be both duplicative and extremely costly.

The history of de novo trials in various school districts has established a pattern of unnecessary legal expenses. We feel that, by simply adding a new trial, does not improve the due process protection for an employee.

HB521 will provide an opportunity for the superior court to review the established record of the local hearing. With HB521 a teacher will still be able to appeal a school board's decision to the superior court.

The question is; "Has the school board provided a fair and impartial hearing?" If the school board's action is in question, the superior court should review the record of the hearing to ascertain that judgement. If not, there is no need for a new trial.

KENAI PENINSULA BOROUGH SCHOOL DISTRICT

148 North Binkley Street • Soldotna, AK 99669-7598 • Phone 907/262-5846 • Fax 907/262-9645

March 15, 1994

TO: Carl Rose

FROM: Chris Monfor/ Personnel

Subject: Costs for Legal Services in Non-Retention of Tenured Teacher

According to Dick Swarner, KPBSD Business Manager, the costs thus far in the non retention legal fees for a tenured teacher have been $74,000 with another $20,000 anticipated in the appeal to the Supreme Court.

Accerding to Dick we also lost another non-retention case a number of years ago that cost the district $50,000.

As soon as Sharon returns I'll pass on the information you gave me so she can respond to the "chilling effective" these cases have on the district financially as well as the effects it has on administrators, etc.

If we can be of further help, please let us know.

KENAI PENINSULA BOROUGH SCHOOL DISTRICT

148 North Binkley Street • Soldotna, AK 99669-7599 • Phone 907/262-5846 • Fax 907/262-9645

March 20, 1994

Carl Rose
Executive Director, AASB
316 11th Street
Juneau, AK 99801-1510

Dear Carl:

I understand you will be speaking in favor of HB ~~531~~ 521 - legislation, which would, if enacted, amend Section I AK 14.20.205 to make the scope of judicial review be the same as an appeal from a decision of an administrative agency under AS 44.62.

Currently, as you know, once a tenured teacher is recommended for termination or dismissal, the recommendation is acted upon by the School Board. At that juncture, the teacher can appeal the Board's decision to a De Novo trial in superior court.

As Executive Director of Personnel for Kenai School District, I have had recent experience with the current process which allows for the De Novo trial appeal. This process is expensive, time consuming, and puts the District at a distinct disadvantage, since the Board hearing allows time for the defense to hear District testimony, and use the created record as it prepares for De Novo trial. At the same time, the District is not allowed to use the record which it has created for the Board hearing in preparation of further testimony.

School Boards statutorily are assigned a wide range of responsibilities, one of the most serious being conducting a fair and impartial hearing. These hearings take on all the elements of a trial. Testimony is given on-record, under oath. Legal counsel is used. Fair, impartial hearings allowing for due process are real expectations, and no participant should settle for less. The new legislation would allow for a judicial review of the Board process to see if a fair and impartial hearing was conducted, and that all aspects of due process were allowed.

It is important that all people be protected from an abusive system. A review of process is not an improper procedure. It is, however, unfair to saddle districts with the burden of proof twice, without benefits of using the first preparation for the second presentation, when, in fact, the defense uses the District record to prepare for the De Novo trial.

If the proposed legislation was enacted before Kenai's recent case, the cost would have been approximately 1/4 of what it has been.

The Kenai District is in strong support of the proposed language of HB 52/ ~~131~~. We, indeed, are proponents of a fair, impartial hearing process, with all participants having the benefits of due process.

If I can be of any further help in urging serious consideration of their amendment, please contact me.

Sincerely,

Sharon

Sharon Radtke
Executive Director, Personnel