



January 14, 2025

VIA HAND DELIVERY

The Honorable Amy Regier
Chairwoman, House Judiciary Committee
Members of the House Judiciary Committee
Montana State House of Representatives
P.O. Box 201706
Helena, MT 59620-1706

RE: House Bill 65

Dear Chairwoman Regier and Members of the House Judiciary Committee:

The professional independence of lawyers is a hallmark of the American legal profession,¹ and, therefore, regulation of the profession of law in the State of Montana, including admission to the bar and the conduct of its members, has long been a matter exclusively within the constitutional authority of the Montana Supreme Court. “Even before the adoption of article VII, Section 2, clause 3 [of the 1972 Montana Constitution], we had held that admission and regulation of attorneys in Montana is a matter peculiarly within the inherent power of this court.” *Kradolfer v. Smith*, 246 Mont 210, 213-14, 805 P.2d 1266, 1268 (1990).

The Montana Supreme Court also concluded long ago that its power to regulate the legal profession included the constitutional authority to unify the bar of Montana, creating the State Bar of Montana, a private organization which is not funded by the taxpayers of Montana through state appropriation. *In re:*

¹ “The legal profession is self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested in the courts.

Self-regulation helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.” Preamble, Montana Rules of Professional Conduct.

President of the Montana Bar Assoc., 163 Mont. 523, 526, 518 P.2d 32, 33-34 (1974). In fact, the Montana judicial branch previously determined that the State Bar is not a component unit of Montana state government, and the Legislative Audit Division is in possession of the records supporting that determination.²

Respectfully, the Montana legislature simply has no constitutional authority to intrude upon the regulation of the legal profession in Montana in a manner to require the Montana Supreme Court to conduct a “one-time performance audit,” “at the direction of the legislative auditor,” to ascertain “how each dollar from each source is spent [by the State Bar] over the past 10 years,” and “an analysis of budgets, costs, and functions of the state bar of Montana over time,” “including a consideration of the state bar of Montana's financial, operational, and technological risks associated with, meeting its intended purpose, goals, objectives, and legal mandates” and including within the scope “all of the responsibilities goals, and objectives of the state bar of Montana and the office of disciplinary counsel as part of the legislative auditor's scoping and selection process” and to present the findings of that audit to the legislative audit committee.

Those core regulatory functions exist under the sole and constitutional authority of the Montana Supreme Court, which has the exclusive authority to regulate the profession of law and oversee the State Bar.

The Montana Supreme Court has unequivocally rejected attempts by the legislative branch to dictate how it regulates the profession of law. *See In re Senate Bill 630*, 164 Mont. 366, 523 P.2d 484 (1974) (rejecting a legislative attempt to amend statute to establish its own regulations for the admissions of attorneys); *accord In re McCabe*, 168 Mont. 334, 340, 544 P.2d 825, 829 (1976) (“If the doctrine of separation of powers, which is specifically embodied in the 1972 Montana Constitution, is to mean anything, then even according to petitioners, this Court must have the authority to control the practice of law.”); *see also Coate v. Omholt*, 203 Mont. 488, 504, 662 P.2d 591, 600 (1983) (striking down a legislative enactment aimed at a core judicial function; “[T]he challenged statutes constitute a direct infringement on the functional and constitutional integrity of the judiciary as a separate branch of government, and therefore that the statutes violate the separation of powers clause (Art. III, Sec. 1) of our State Constitution.”) Other jurisdictions have similarly rejected efforts

² *See also* Technical Concerns expressed on HB65 Fiscal Note.

to audit state bar organizations on constitutional and separation of powers grounds.³

The sweep of HB65 is broad, not only in its stated intent to examine “how each dollar from each source is spent over the past 10 years,” but also in its efforts to assess whether the State Bar is “meeting its intended purpose, goals, objectives, and legal mandates.” Again, not only is that purpose constitutionally improper – the legislature has no oversight as to how well the Montana Supreme Court, or the State Bar of Montana, assists in regulating the profession of law – it is entirely unclear how that would occur without violating a number of Montana Supreme Court rules concerning confidentiality and the very reasonable and long-standing expectations of privacy the members of the State Bar have in their professional licensure information.

HB65 would appear to eviscerate that confidentiality by allowing legislative auditors to review a whole host of confidential information about our members. For example, the State Bar assists in the attorney admissions process. Those files, which include highly confidential background checks for each member, are very appropriately confidential. *See* Rule IX, Montana Supreme Court Rules for Admission to the Bar of Montana.⁴ The State Bar also assists in the administration of the mandatory continuing education obligation of all Montana attorneys, and those records, including what continuing education coursework our attorney members have completed, also are confidential. *See* Rule 16,

³ Courts have specifically addressed the issue of state and/or legislative audits of unified bar organizations and have found those also to be an unconstitutional intrusion into the judicial branch. *See e.g. Graham v. State Bar Ass'n*, 548 P.2d 310, 316 (Wash. 1976) (finding that an attempted legislative performance audit of the state bar was “an unwarranted and unconstitutional interference with the power of th[e] separate [judicial] branch of government to make necessary rules and regulations governing the conduct of the bar.”) Likewise, in *Chicago Bar Ass'n v. Cranson*, 539 N.E. 2d 327 (Ill. App.1989), the Illinois Court of Appeals held that state auditor lacked authority to audit funds of the Disciplinary Commission or State Board of Law Examiners of the Illinois Supreme Court: “The Disciplinary Commission and the Board of Law Examiners receive no funds by legislative appropriation or authorization and do not depend upon a legislative or executive grant. Because the Board of Law Examiners and the Disciplinary are creatures of Illinois Supreme Court rule, and because their funds derive exclusively from a judicial grant, it is for the Illinois Supreme Court, not the General Assembly or Governor to determine whether [they have] properly discharged the responsibilities delegated to them.” 539 N.E. 2d at 335. *See also Ex parte Auditor of Public Accounts* 609 S.W.2d 682 (Ky. 1980)(holding the state auditor of public accounts could not audit the state bar association because the bar association existed under the judicial branch and specifically noting that the association already had its finances regularly audited by certified public accounts.)

⁴ “Bar admission application files are confidential. Only the Montana Supreme Court, the Bar Admissions Administrator, the Commission on Character and Fitness, and the Board of Bar Examiners may have access to information in the files, unless otherwise provided in the Character and Fitness Rules of Procedure and the Montana Board of Bar Examiners’ Rules.”

Montana Supreme Court Rules for Mandatory Continuing Legal Education.⁵ Unless a formal complaint is filed with the Clerk of the Montana Supreme Court, lawyer disciplinary records maintained by the Office of Disciplinary Counsel (ODC),⁶ which is directly referenced in HB65, including dismissed and closed records, are confidential. *See* Rule 20, Montana Supreme Court Rules for Lawyer Disciplinary Enforcement.⁷

The State Bar also administers claims for the Lawyers Fund for Client Protection, and the Fee Arbitration Program, which have strict confidentiality requirements by State Bar and Montana Supreme Court rule. We administer the Lawyer Assistance Program to assist lawyers struggling with addiction and an “ethics hotline” to assist lawyers with ethical questions. We hold those records confidential, and our members also have an expectation of privacy in their financial transactions, including dues and assessments and penalty payments with the State Bar. We simply must defend our members’ reasonable expectations of privacy in these matters.

Yet, HB 65 seeks to give Montana legislative auditors access to all of these types of confidential information to “account for each dollar spent,” and otherwise to undertake a “performance audit” of how well it believes the bar is fulfilling its “responsibilities goals and objectives.” It is a bill almost certain to generate prodigious litigation due to these confidentiality issues alone.

But setting aside the clear constitutional and privacy issues this bill raises in its incredibly broad attempt to improperly access confidential and private information about Montana’s attorneys, when it comes to the overall finances of the State Bar, HB 65 is as unnecessary as it is unconstitutional.

Why?

For fifty years, since the Montana Supreme Court approved the first bylaws of the State Bar of Montana in 1975, there has been a requirement of an

⁵ “Unless otherwise directed by the Supreme Court or these Rules, the files, records and proceedings of the Commission, as they relate to or arise out of any failure of any member to satisfy the requirements of these Rules, are confidential and shall not be disclosed, except in furtherance of the duties of the Commission, upon the request of the Commission on Practice, or the member affected, or as introduced into evidence or otherwise produced in proceedings under these Rules.”

⁶ ODC submits quarterly and yearly public reports to the Montana Supreme Court covering its operations.

⁷ “All disciplinary information provided to the Office of Disciplinary Counsel and proceedings before the Commission prior to the filing of a Complaint with the Clerk of the Supreme Court shall be confidential...”

independent audit of the State Bar to be filed with the Montana Supreme Court.

In re Unified Bar of Montana, 165 Mont. 1, 14, 530 P.2d 765, 771 (1975) (approving the bylaw language: “The Board of Trustees shall “procure an annual audit thereof by a certified public accountant (a) copy of the annual audit shall be filed with the Supreme Court...”). That provision remains in today’s bylaws of the State Bar, which are publicly available on its website. Bylaws, Article III, Section 4(a)(iv).

Furthermore, following a Montana Supreme Court order in 2001, the State Bar added an additional financial reporting requirement to its bylaws requiring that it: “File with the Supreme Court ... every three years ... a special report analyzing the dues structure in light of the Bar’s responsibility to address the Bar’s purposes enunciated in Supreme Court orders and in the Preamble to these Bylaws.” Bylaws, Article III, Section 4(a)(ix). *See In re: Petition of the State Bar of Montana for a Dues Increase*, 2001 MT 108, ¶ 27, 53 P.3d 854.

The attorneys of Montana, and the public they serve, need to know that an independent audit of the State Bar is already regularly occurring, along with a special report that is also provided to the branch of government with constitutional oversight over the State Bar – and that is the judicial branch. In fact, we checked our records, and over the past ten years to conclude in 2025, we will have spent over \$120,000 on outside professional audits and reviews. It is simply unnecessary for the taxpayers of Montana, who do not fund the State Bar – again, there is no legislative appropriation involved with State Bar operations – to spend another \$200,000 to implement this unconstitutional legislation (see Montana Legislative Fiscal Division, Fiscal Note for HB65 (2025)), let alone defend litigation that will almost certainly come from it.

Should the Montana Supreme Court decide to share copies of the financial audits and special reports from the State Bar with the legislature, just as we previously cooperated and provided extensive information to the legislative branch in connection with the Law & Justice Interim Committee study of the State Bar under SJ31 from the last legislative session, we will certainly work with the Court to facilitate that information exchange. We are sending a copy of this correspondence to the Chief Justice in that regard.

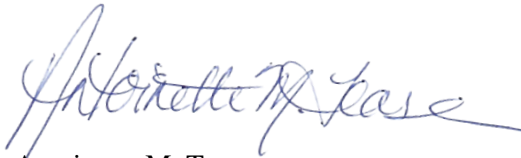
The Honorable Amy Regier,
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For the foregoing reasons, we strongly urge you do not pass this wholly unnecessary and plainly unconstitutional bill.

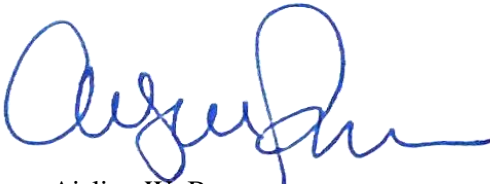
Sincerely,

THE STATE BAR OF MONTANA

BY: The undersigned members of its Executive Committee



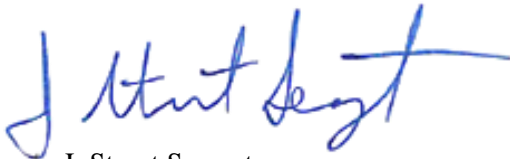
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c: The Hon. Cory Swanson,
Chief Justice, Montana Supreme Court