

Alaska State Legislature

Select Committee on Legislative Ethics

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November 4, 1999

ADVISORY OPINION 99-01

SUBJECT: Definition Employee – Contractual Services

RE: Do those who provide contractual services to the legislature fall within the definition of legislative employee?

You are a legislative employee and therefore covered by the legislative ethics code. You waived the confidentiality provision for advisory opinions, which allows the committee to discuss the matter in public.

STATEMENT OF FACTS

You asked "whether persons who provide personal services to the Legislative Branch, under a contract, fall within the definition of 'legislative employee' found in AS 24.60.990(a)(10)?" You state that, as you read the definition, "contractors who are not on contract directly with the Ethics Committee are not included in the definition." You reach this conclusion because you feel "personal services" should be read as meaning that the individual is paid through the state payroll system receiving wages or salary." You further state that this interpretation is "consistent with how the personal services line item is treated in state budgeting" in that there is a separate line for contractual services.

DISCUSSION

RELEVANT STATUTES: AS 24.60.990(a)(10) provides the following definition of legislative employee:

"legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to

legislative functions, including security, messenger, maintenance, and print shop employees, and other employees designated by the committee;

The committee finds that the terms "independent contractor, or consultant", as set out in AS 24.60.990(a)(10) are not limited to only those contracting with the ethics committee. The committee notes that there are additional restrictions on those who contract with the ethics committee, as set out in AS 24.60.134:

Sec. 24.60.134. Prohibited conduct by public members and committee employees and contractors.

(a) Except as provided in (c) of this section, in addition to complying with the other requirements of this chapter, a public member of the committee, an employee of the committee, or a person under contract to provide personal services to the committee may not, during the person's term of office or employment or during the life of the contract, participate in

(1) political management or in a political campaign for a candidate for election to federal, state, or local office, regardless of whether the campaign is partisan or nonpartisan, or for passage or defeat of a ballot measure of any type;

(2) the campaign of, attend campaign fund-raising events for, or make a financial contribution to

(A) a candidate for the legislature;

(B) an incumbent legislator or legislative employee who is a candidate for another public office; or

(C) a person running for another office against an incumbent legislator or legislative employee;

(3) a fund-raising event held on behalf of a political party or attend a political party fund-raising event; or

(4) lobbying activities that would require the person to register as a lobbyist except as required to inform the legislature concerning legislation requested by the committee or other matters related to the committee.

(b) A violation or alleged violation of this section shall be treated as any other violation of this chapter and shall be dealt with by the committee accordingly. During the pendency of a complaint against a member, committee employee, or committee contractor, the person complained against may not participate in official action of the committee.

(c) A person under contract to provide personal services to the committee who is part of a corporation or partnership that includes individuals who will not be participating directly in the work performed by the entity for the committee may request the committee to exclude members of the entity from some or all of the provisions of this section. The committee may grant the request if it finds that doing so will not lead to the appearance that the committee is subject to undue political influence and if there is no appearance of impropriety. (§ 25 ch 127 SLA 1992; am §§ 41,42 ch 74 SLA 1998)

The committee also notes that most contracts with the ethics committee have been professional contracts for legal and investigative services.

PREVIOUS EXEMPTIONS: On January 29, 1996 the ethics committee, under the authorizing language in AS 24.60.990, designated the following positions as being exempt from the definition of "legislative employee": print shop positions, maintenance positions, supply positions, Capitol Tour Guides, Range 15 and below positions in Legal and Research. The committee has not exempted any additional positions since that time.

CONTRACT TYPES: The definition of legislative employee refers to a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as full-time or part-time employee, independent contractor or consultant. Legislative employees paid through the state payroll system fall under the definition of legislative employee.

The Legislative Affairs Agency (LAA) is the agency responsible for preparing and co-authorizing contracts. There are generally two types of contracts issued by LAA.

1. **Reduced Benefit Contracts:** This type of contract is for employees who elect not to receive certain state benefits. They provide regular and substantial personal services, and though on contract, are paid through the state payroll system. Contractors paid under this type of contract fall under the definition of legislative employee, and are therefore subject to the ethics code, unless otherwise exempted by the committee.

2. **Services or Professional Services Contracts:** Contracts under this category cover a wide range, including but not limited to; construction, computer services, maintenance/repair, security, delivery, accounting/audit, document production, translation, utilities, leases, management, research, consulting, legal, etc.

The services or professional services contractors under category 2 above, have traditionally not been paid through the payroll system, do not occupy legislative office space or have access to state resources such as computers, etc. It is the committee's understanding that while this is true for the majority of these category 2 contractors, there may be occasions when a category 2 contractor is allocated space in a legislative office and is authorized to use state resources for the committee work (e.g. a judiciary committee contracts with an attorney to assist with issues before that committee for a key period of time). Furthermore, the contractor may be involved in policy matters or serve in a capacity to represent the legislature on policy matters.

REGULAR or SUBSTANTIAL SERVICES: The committee notes that the definition for legislative employee refers to those who are compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant. The terms "regular or substantial" are not defined in the ethics code. The term "regular" appears to clearly include those reduced benefit contractors who perform legislative duties, have set work schedules and are paid through the payroll system.

The committee looks to the \$5,000 figure set out in AS 24.60.040, (the restrictions on legislators and legislative employee's participation in certain contracts and leases) in defining "substantial" for the purpose of this advisory opinion. The restrictions in AS 24.60.040 do not apply to contracts or leases under \$5000. The committee uses this guideline in addressing whether personal services rendered under a contract are considered substantial.

FINDING: The committee believes the legislature did not intend to include all those who contract with the legislature, in the definition of legislative employee but in fact intended to include those who are paid through the state payroll system, regardless of contract status, and those who contract, under category 2, for over \$5,000 and who have access to use of state resources or who provide policy related services.

THE TEST: In evaluating whether a potential contractor falls within the definition of legislative employee and therefore subject to the ethics code, the committee sets out the following step-by-step test:

1. Will the contractor be paid through the state payroll system? If yes, will contractor fall under any of the previously exempt categories, (listed on page 2)? If the position is exempt the contractor is not subject to the ethics code. If the position is not exempt, the contractor is subject to the ethics code.

2. Is the contractor providing services to the Ethics Committee? If yes, the contractor is subject to the legislative ethics code.

3. Is the services or professional services contract value greater than \$5,000? If no, the contractor is not subject to the ethics code. If yes, see below:

(a) Will the contractor (including those providing legal services) incur more than incidental use of state resources such as computers, desks, phones, fax machines, or the like?

or

(b) Will the contractor (excluding those who represent the legislature in litigation or in an administrative matter before the state executive branch) provide legislative policy related services or represent the legislature in a policy-related capacity?

If the contractor falls within either 3(a) or 3(b) above, the contractor is subject to the legislative ethics code.

CONCLUSION

The committee finds that any contractors who are paid through the state payroll system, contractors (or those designated within a contracting firm or company) with the ethics committee and those services or professional

services contractors with legislative contracts over \$5,000, who will incur more than incidental use of state resources or who either contract for legislative policy related services or who are designated to represent the legislature in a policy-related capacity, fall within the legislative employee definition and are therefore subject to the legislative ethics code.

RECOMMENDATIONS

If the initial concern of the legislature was to limit possible unethical contracting practices, the legislature may wish to consider amending the legislative procurement policies or related procurement code to include a disclosure requirement for all those who contract with the legislature, regardless of contract type. The public disclosure could include any close economic associations with legislators or legislative employees and would be filed prior to signing the contract.

Further, the committee recommends the contract language reflect these changes, specifying which contractors are subject to the legislative ethics code.

Adopted by the Select Committee on Legislative Ethics November 4, 1999.

Members present and concurring in this opinion:

**Shirley McCoy, Chair
Senator Lyman Hoffman
Representative Pete Kott
Dennis "Skip" Cook
Ed Granger
Conner Thomas
Curt Wallace**

Members absent: Senator Torgerson, Representative Kookesh

Alaska State Legislature

**Select Committee on
Legislative Ethics**

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February 11, 1997

Advisory Opinion 96-06

Subject: Ethics Committee Contracts

RE: Whether the prohibitions of AS 24.60.134 apply to every employee in a professional limited liability company which has a personal services contract with the Select Committee on Legislative Ethics.

You perform personal services for the Select Committee on Legislative Ethics under a personal services contract and therefore are covered by the legislative ethics code. You have requested an advisory opinion concerning whether other employees of the professional limited liability company by which you are employed are subject to the ethics code because of the contract between the company and the ethics committee.

Statement of Facts

The facts and circumstances that you have related, and on which the committee relies in answering your questions, are as follows:

You are employed by a professional limited liability company which holds a contract to provide services to the ethics committee. You are the primary person designated by the company to provide those services. In addition, a number of other employees of the company, both professional and nonprofessional, assist you in providing the services. The company has implemented procedures to ensure the security and confidentiality of the documents and files of the ethics committee. Only staff assigned to work for the committee has access to them. You ask whether, given these circumstances, staff who do not have access to confidential committee information or perform work for the committee are required to comply with AS 24.60.134.

Discussion

Under AS 24.60.134(a), "a person under contract to provide personal services to the committee" may not engage in various partisan political activities or act as a lobbyist.¹ The Alaska Statutes define "person" as used throughout the laws of the state to include "a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." AS 01.10.060(8). Applying the definition of "person" to AS 24.60.134(a), the committee concludes that the company that enters into a personal services contract with the ethics committee is covered by AS 24.60.134(a) and should not, itself, engage in the prohibited activities. However, that conclusion does not directly address how to apply the restriction to the individuals employed by the company. Should restrictions that apply to the company be considered to apply to each of its employees or should the employees be treated differently, depending on their involvement in the contract?

To answer that question, it is helpful to review AS 24.60.020(a), which sets out the individuals to whom the legislative ethics code applies, and AS 24.60.990(a)(10), the definition of "legislative employee" for the ethics code. Under AS 24.60.020(a), the ethics code applies to legislators, legislative employees, and public members of this committee.²

¹ AS 24.60.134(a) states

(a) In addition to the requirements of this chapter, a public member of the committee, an employee of the committee, or a person under contract to provide personal services to the committee may not

(1) participate in political management or in a political campaign during the person's term of office, employment, or contract;

(2) participate in the campaign of, attend campaign fund-raising events for, or make a financial contribution to

(A) a candidate for the legislature;

(B) an incumbent legislator or legislative employee who is a candidate for another public office; or

(C) a person running for another office against an incumbent legislator or legislative employee; or

(3) participate in lobbying activities that would require the person to register as a lobbyist except as required to inform the legislature concerning legislation requested by the committee or other matters related to the committee.

² AS 24.60.020(a) states

(a) Except as otherwise provided in this subsection, [the legislative ethics code] applies to a member of the legislature, to a legislative employee, and to public members of the [ethics] committee. This chapter does not apply to

(1) a former member of the legislature or to a person formerly employed by the legislative branch of government unless the provision specifically states that it applies;

Under AS 24.60.990(a)(10),

"legislative employee" means a person, other than a legislator, who is compensated by the legislative branch in return for regular or substantial personal services, regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, including security, messenger, maintenance, and print shop employees, and other employees designated by the committee[.]

From these two provisions, it appears that the ethics code is intended to apply to persons "performing regular or substantial services for the legislature" and that individuals who perform "incidental" services of a type that do not involve policy decisions or access to confidential information are excluded from coverage. The ethics committee also may designate additional groups of employees who are excepted from the requirements of the code.

The committee finds that it is appropriate to use its power to exclude employees from coverage under the ethics code in the situation raised in your request for this opinion. Accordingly, the committee finds that the phrase "a person under contract to provide personal services to the committee" as used in AS 24.60.134 includes the company that has entered into the contract and those employees of the company that perform regular or substantial services on behalf of the committee. In addition, given the committee's obligation to preserve its status as a nonpartisan body and to protect the integrity of confidential information, the committee finds that any other individuals who are permitted to have access to confidential committee files and documents should also be covered by that phrase. Both of those groups are obliged to refrain from the partisan political activity and lobbying covered by AS 24.60.134(a). Given the circumstances you have described in your request for this opinion, the committee believes that the "shield wall" around confidential committee information that has been erected by your company is sufficient to preserve the confidentiality of committee information.

Conclusion

For the reasons stated above, the committee finds that because the company for which you work has adopted policies and procedures that preserve the confidentiality of the files and documents of the committee, only those employees of the company who have access to the documents and perform regular or substantial services for the committee are subject to the restrictions set out in AS 24.60.134. In reaching this decision, the committee has relied on its power under AS 24.60.990(a)(10) to designate employees who are outside the scope of the ethics code.

(2) a person elected to the legislature who at the time of election is not a member of the legislature.

Adopted by the Select Committee on Legislative Ethics on February 11, 1997.

Members present and concurring in this opinion were:

**Margie MacNeille, Chair
Joe Donahue
Shirley McCoy
Senator Jim Duncan
Senator Drue Pearce
Representative Con Bunde
Representative Kim Elton**

Members absent were:

**Ed Granger
Edith Vorderstrasse**

**TC:jdr:glc
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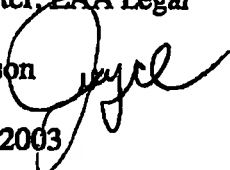
Alaska State Legislature

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TO: Wen Ibesate, LAA Administration
Terry Bannister, LAA Legal

FROM: Joyce Anderson 

DATE: February 13, 2003

RE: Contracts and Determination of Legislative Employee

This memo is in follow-up to our conversation from February 4, 2003 concerning whether a person on contract with the legislature is considered a legislative employee.

After reviewing the two sample contracts you provided and talking with Conner Thomas, Chair of the ethics committee, we recommend the following changes to all contracts over \$5000 except for professional services that relate to positions exempt under AS 24.60.990.

1. Include a statement in all contracts referencing Advisory Opinion 99-01.
2. Include a copy of the advisory opinion with each contract.

Let me know your thoughts on these suggestions.

** met with Karla 2/26/03
- will include in all contract
language (those applicable & not
exempt) the "Conclusion" segment
from A.O. 99-01*

notice to the Consultant. If this contract is so terminated and the termination is not based on a breach by the Consultant, the Consultant shall be compensated for services provided under the terms of this contract to the date of termination if the Consultant provides the Agency with a written report containing a description of the services performed, a statement of the results or conclusions formed based upon any research or analysis performed, and a copy of the written material produced during the contract.

CLAUSE III - COMPENSATION AND METHOD OF PAYMENT

- (A) For the work specified in this contract the Consultant shall be compensated _____.
- (B) Payment shall be based on proper billing provided by the Consultant.
- (C) The Project Director must approve a billing before it may be paid.
- (D) If a payment is not made within 90 days after the Agency has received a proper billing, the Agency shall pay interest on the unpaid balance of the billing at the rate of 1.5 percent per month from, and including, the 91st day through the date payment is made. A payment is considered made on the date it is mailed or personally delivered to the Consultant.

REMINDER: If the Consultant requires to travel then this Paragraph should be added: If the Project Director requires the Consultant to travel outside of the Consultant's home base of the _____, the Consultant will be reimbursed for reasonable travel expenses that are supported by receipts and that are approved by the Project Director.

- (E) Total payments under this contract may not exceed _____.

CLAUSE IV - PROJECT DIRECTOR

The Project Director is _____. The Project Director is authorized to oversee and direct the activities of the Consultant under this contract.

X CLAUSE V - COVERAGE UNDER THE ETHICS LAW

The Consultant may be subject to the provisions of AS 24.60 (Legislative Ethics) as a legislative employee unless excluded from the definition of "legislative employee" under AS 24.60.900(10).


CLAUSE VI - EXPENSES AND DUPLICATION

Alaska State Legislature

Select Committee on Legislative Ethics

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Mailing Address:
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TO: Karia Schofield
FROM: Joyce Anderson 
DATE: February 27, 2003
RE: Advisory Opinion 99-01
Contractual Services

I am providing a cleansed copy of informal advice given on the interpretation of Advisory Opinion 99-01. Let me know if you have any questions. I hope it will be helpful to you.

LIMITED NATURE OF INFORMAL ADVICE

My advice is informal and not binding on the Ethics Committee. Informal advice is cleansed of all identifying information and forwarded to the committee for review at their next meeting. The committee may question or object to any of the advice, at which point I contact the person who requested the advice to let him/her know the committee's concern and at the same time urge him/her to obtain a formal, binding opinion from the committee. By not objecting, the committee members endorse the advice, but again they do not bind themselves to the informal advice. If after reviewing my advice, you wish to request a formal advisory opinion, please let me know.

DISCUSSION

A.O. 99-01 addressed the issue of whether those who provide contractual services to the legislature fall within the definition of legislative employee. If a person on a contract is considered a legislative employee then that individual is covered by the ethics code and is required to adhere to the stipulations and requirements outlined in the ethics code, similar to a legislative employee on payroll.

Applicable Statute: AS 24.60.990(a)(10) states: "*Legislative employee*" means a person, other than a legislator, who is compensated by the legislative branch in return

for regular or substantial personal services regardless of the person's pay level or technical status as a full-time or part-time employee, independent contractor, or consultant; it includes public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, including security, messenger, maintenance, and print shop employees, and other employees designated by the committee.

I will briefly explain the step-by-step test set forth in A.O. 99-01 to determine if an individual on contract is considered a legislative employee and subject to the ethics code. There are three tests which are independent of each other. The first test is whether the person on contract is being paid through the state payroll system. Usually this type of contract is for legislative employees who elect not to receive certain state benefits. They would receive a yearly W-2 for tax purposes.

The second test asks if the contractor is providing services to the Ethics Committee. If the answer is NO to both of these questions, the third test must be considered.

The third test asks if the services or professional services contract will exceed \$5000. If YES, two subquestions must also be answered before a determination can be made if the person on contract is considered a legislative employee.

The first subquestion to consider is will the contractor incur more than incidental use of state resources such as a computer, desk, fax machines, use of an office in a legislative building, or the like. The term incidental is not defined in the ethics code, however, incidental use has also been described in past informal advice as infrequent use.

The supervisor responsible for the contract must determine if the use of state resources will be more than incidental use. Example: The consultant will be performing work for the legislature for two months. Some of that time will be in the capitol building using state resources. This scenario, as described, appears to lend itself to more than incidental use during the term of the contract but again that is a decision the supervisor of the contract must make.

The second subquestion to consider is will the contractor provide legislative "policy related services" or "represent the legislature in a policy-related capacity". There is no definition of "policy related services" in the ethics code nor is there an explanation of what constitutes "representing the legislature in a policy-related capacity".

However, I feel comfortable in saying that if the consultant is appearing before committees, boards, commissions, etc. to testify on policy related issues, then the proposed contract does fall under "representing the legislature in a policy related capacity".

Will the consultant provide "policy related services"? Examples might include: presenting a plan, course of action, guidelines, procedures, strategies, etc. This scenario

appears to fall within the category of policy related services. However the supervisor, who has a much more in-depth understanding of the services to be provided, must determine if the services are policy related.

CONCLUSION

The bottom line is that if the answer to either of the subquestions in test three is YES and the contract exceeds \$5000 then the contractor is considered a legislative employee.

If the contract exceeds \$5000 and the answer to the two subquestions in test three is NO, then the contractor is not considered a legislative employee and is not subject to the ethics code.

Alaska State Legislature

Legislative Affairs Agency



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MEMORANDUM

TO: Joyce Anderson, Ethics Committee Administrator
Select Committee on Legislative Ethics

FROM: Wen Ibesate, Administrative Assistant
Administrative Services

DATE: March 28, 2003

SUBJECT: Ethics Clause in Legislative Contracts

In response to your memo of February 13, 2003 relating to Advisory Opinion 99-01 and determination of legislative employees for purposes of the ethics statutes, we will be changing the ethics clause in legislative contracts. Thank you for pointing out that the current language needed updating.

I have discussed this matter with Terry Bannister, Pam Varni, and Karla Schofield. We will be changing our ethics clause to read as follows:

COVERAGE UNDER THE ETHICS LAW

The Consultant may be subject to the provisions of AS 24.60 (Legislative Ethics) as a legislative employee unless excluded from the definition of "legislative employee" under AS 24.60.990(a)(10). Select Committee on Legislative Ethics Advisory Opinion 99-01 concludes that "any contractors who are paid through the state payroll system, contractors (or those designated within a contracting firm or company) with the ethics committee and those services or professional services contractors with legislative contracts over \$5,000, who will incur more than incidental use of state resources or who either contract for legislative policy related services or who are designated to represent the legislature in a policy-related capacity, fall within the legislative employee definition and are therefore subject to the legislative ethics code."

We believe this is the most concise way to advise contractors of the possibility they may be subject to the ethics code. If any contractors wish to receive a complete copy of Advisory Opinion 99-01 we will be happy to provide it.

I hope this change in our contract language answers your concerns.

cc: Pam Varni, Executive Director, LAA
Terry Bannister, Legal Attorney, Legal Services
Karla Schofield, Deputy Director, Administrative Services