

DRAFT ADVISORY OPINION 19-01

You are two senators and you have asked nine questions, based on hypothetical facts provided with each, as follows:¹

Questions Presented

1. Should a legislator (with a conflict) declare a conflict on the record when the bill is brought up for discussion in the committee hearing?

2. During a public committee meeting, can a legislator (with a conflict) participate in discussion, debate the bill, advocate for the bill, and testify on the bill?

3. Can a legislator (with a conflict) discuss or advocate for the bill during private meetings with other committee members?

4. Can a legislator (with a conflict) discuss or advocate for the bill during private meetings with other legislators (that are not on the committee), including legislators in the other body?

5. Can a legislator (with a conflict) discuss or advocate for the bill during private meetings with constituents, or, generally, other citizens?

6. Can a legislator (with a conflict), during the public committee meeting:

a. Offer amendments to the bill?

b. Vote on amendments offered by others?

c. Vote on the motion to move the bill from committee?

d. Sign the committee report with a recommendation ("do pass," "do not pass," "amend")?

e. Sign the committee report "no recommendation"?

¹ For purposes of this opinion we have not altered the wording of the questions and facts you have presented.

7. According to Uniform Rule 24, committee reports are necessary to move a bill from committee and must be signed by a majority of the members of the committee. When a member has a conflict, would the member have to abstain from signing the report or sign the report "no recommendation" in order to comply with the law?

8. Would a legislator with a "large-enough" immediate family, who received more than \$10,000 in the aggregate from the Permanent Fund Dividend Corporation in October 2018, be prohibited from:

a. Taking official action on a bill related to the Permanent Fund Dividend (PFD) or supplemental dividend payment?

b. Discussing or advocating for a PFD bill during private meetings with other committee members?

c. Discussing or advocating for a PFD bill during private meetings with other legislators, including members of the other body?

d. Discussing or advocating for a PFD bill during private meetings with constituents, or, generally, other citizens?

e. Discussing or advocating for the management or asset allocation of the Permanent Fund investments?

9. If a bill authorizes a supplemental payment of a Permanent Fund Dividend in an amount that is a large percentage of the income of an immediate family member of a legislator, would that constitute a "substantial benefit" to that family member?

a. If yes, would a legislator be prohibited from taking official action on that bill?

b. What qualifies as a "substantial benefit?"

Statement of Facts

For purposes of this opinion, we rely solely on the hypothetical facts accompanying the foregoing questions.

Discussion

During the 30th Alaska State Legislature, the legislature passed, and the governor signed into law, SCS CSSH B 44(STA) (HB 44), a bill changing certain provisions of the Legislative Ethics Act (Act), including declaration of conflicts of interest, the taking or withholding official action, and exerting official influence on matters.² For purposes of this discussion we include the following excerpts from HB 44:

* **Sec. 7.** AS 24.60.030(e) is amended to read:

(e) A legislator may not directly, or by authorizing another to act on the legislator's behalf,

(1) agree to, threaten to, or state or imply that the legislator will take or withhold a legislative, administrative, or political action, including support **for** or opposition to a bill, employment, nominations, and appointments, as a result of a person's decision to provide or not provide a political contribution, donate or not donate to a cause favored by the legislator, or provide or not provide a thing of value;

(2) state or imply that the legislator will perform or refrain from performing a lawful constituent service as a result of a person's decision to provide or not provide a political contribution, donate or not donate to a cause favored by the legislator, or provide or not provide a thing of value; or

(3) **except as provided in (g) of this section or while participating in a public discussion or debate** [UNLESS REQUIRED BY THE UNIFORM RULES OF THE ALASKA STATE LEGISLATURE], take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of **a** [ANOTHER] person

(A) who is a member of the legislator's immediate

² Ch. 61, SLA 2018; SCS CSSH B 44(STA) took effect July 20, 2018. For purposes of this opinion, we will cite the measure as HB 44.

family;

(B) by [WITH] whom the legislator or a member of the legislator's immediate family is employed;

(C) with whom the legislator is negotiating for employment;

(D) from whom the legislator or a member of the legislator's immediate family has, in the immediately preceding 12-month period, received more than \$10,000 of income.

* **Sec. 8.** AS 24.60.030(g) is amended to read:

(g) Unless **otherwise** required by the Uniform Rules of the Alaska State Legislature, a legislator **shall declare a conflict of interest before voting** [MAY NOT VOTE] on a question **before a committee of the legislature, and shall request to be excused from voting on a question before a house of the legislature,** if the legislator **or a member of the legislator's immediate family** has **a financial** [AN EQUITY OR OWNERSHIP] interest in a business, investment, real property, lease, or other enterprise if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on **the general public of the state. However, notwithstanding (e)(3) of this section and the limitations of this subsection, a legislator may vote on an appropriation bill that meets the requirements of AS 37.07.020(a) or 37.07.100** [A SUBSTANTIAL CLASS OF PERSONS TO WHICH THE LEGISLATOR BELONGS AS A MEMBER OF A PROFESSION, OCCUPATION, INDUSTRY, OR REGION].

* **Sec. 9.** AS 24.60.030(j) is amended to read:

(j) In this section,

(1) "administrative hearing" means a quasi-judicial hearing before an agency; "administrative hearing" does not include an informal conference or review held by an agency before a final decision is issued or a rate-making proceeding or other nonadjudicative public hearing;

(2) "substantially benefit or harm" means the effect on

the person's financial interest is greater than the effect on the financial interest of the general public of the state.

* * *

* **Sec. 11.** AS 24.60.990(a) is amended by adding a new paragraph to read:

(17) "financial interest" means ownership of an interest or an involvement in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit.

The foregoing excerpts are the sections of HB 44 relevant to our discussion of the questions posed, which we address in order as follows:

1. Should a legislator (with a conflict) declare a conflict on the record when the bill is brought up for discussion in the committee hearing?

Although AS 24.60.030(g) requires a legislator with a conflict of interest to declare the conflict "before voting on a question before a committee of the legislature," it does not require the legislator to declare the conflict at any other time during a committee hearing. Since a committee meeting is public, AS 24.60.030(e)(3) allows the legislator to discuss or debate a matter at the meeting regardless of whether the legislator has a conflict of interest under (e)(3). If the conflict of interest is one described in AS 24.60.030(e)(3), the legislator may not otherwise take or withhold official action or exert official influence.

"Official action" is not defined in the Act, but previously we found the meaning of "official action" to be broad enough to include "legislative action," a term defined in AS 24.60.990(a)(10) as "conduct relating to the development, drafting, consideration, sponsorship, enactment or defeat, support or opposition to or of a law, amendment,

resolution, report, nomination, or other matter affected by legislative action or inaction."³ Depending on the specific facts presented, discussion of a matter in a legislative hearing may be considered "conduct relating to . . . support or opposition to or of a . . . matter affected by legislative action or inaction." If so, AS 24.60.030(e)(3) would prohibit the legislator from participating in that discussion, unless the hearing is public.

Nevertheless, we recommend in that the legislator declare the conflict of interest — even for the limited purpose of discussing the matter. Depending on the facts, in some instances a failure to declare the conflict when discussing the matter may create an appearance of ethical impropriety that undermines the Act's goal of assuring "the trust, respect, and confidence of the people of this state."⁴

2. During a public committee meeting, can a legislator (with a conflict) participate in discussion, debate the bill, advocate for the bill, and testify on the bill?

Yes, as explained in our response to question 1 above, AS 24.60.030(e)(3) allows a legislator to discuss, debate, advocate, or testify on a matter where the legislator has a conflict if part of "a public discussion or debate." We also addressed this issue in our response to questions (1)(A) and (3)(A) of AO 18-05.

In our response to question (1)(A) of AO 18-05 we advised that AS 24.60.030(e)(3) would prohibit a legislator with a conflict in a matter from taking or withholding official action or exerting official influence except when declaring a conflict of interest before voting in accordance with AS 24.60.030(g), which requires a legislator to declare a conflict before voting on a matter in committee or while participating in a public discussion or debate.

³ AO 11-05, *citing* AO 07-01, advising that a legislator's introduction of a bill that could substantially benefit the legislator's employer would be of special concern to the committee in connection with AS 24.60.030(e), if the bill were introduced at a time when the legislator is negotiating terms of employment with that employer.

⁴ *See* AS 24.60.010(1).

We also advised, in response to questions (1)(A) and (3)(A) of AO 18-05, that a legislator's introduction or sponsorship of a bill is always discretionary because the Uniform Rules of the Alaska State Legislature (Uniform Rules) never require a legislator to introduce or sponsor a bill, and, when a legislator has an ethical conflict of interest in a matter, the legislator's introduction of or sponsoring legislation on the matter is contrary to goals of the Act set forth in AS 24.60.010.

3. Can a legislator (with a conflict) discuss or advocate for the bill during private meetings with other committee members?

We addressed this question previously, in a recent advisory opinion. In our response to question (1)(B) of AO 18-05, we advised as follows:

If the meeting is open to the public in accordance with AS 24.60.037, the exception in AS 24.60.030(e)(3) applies, and the legislator may discuss and advocate for the bill. The Act's open meetings guidelines provide that "[a] meeting of a legislative body is open to the public in accordance with the open meetings guidelines established in this section," and "[a] legislator may not participate in a meeting held in violation of these open meetings guidelines."⁵

Although a caucus⁶ is not the same as a "legislative body,"⁷ (and therefore

⁵ AS 24.60.037(a).

⁶ "Caucus" is defined under AS 24.60.037(g) as "a group of legislators who share a political philosophy, or have a common goal, and who organize as a group."

⁷ "Legislative body" is defined under AS 24.60.037(g)(2), as follows:

(2) "legislative body"

(A) includes

(i) the senate;

(ii) the house of representatives;

(iii) the senate and the house of representatives meeting in joint session;

not bound by the open meeting requirement under AS 24.60.037(a)), depending on who is in attendance at a caucus meeting, (e.g., if those in attendance also constitute the majority of a legislative committee or other legislative body), that meeting may also constitute a meeting of a legislative body for purposes of applying the open meetings guidelines.

Caucus meetings, however, are exempt from the open meeting requirement, if limited to discussion and deliberation of "political strategy," described under AS 24.60.037(c) as follows:

"political strategy" includes organization of the houses, assignment of committee membership, scheduling of bills, vehicles for adoptions, house-senate relations, other procedural matters, caucus operations, meetings between majority and minority caucus leaders, meetings between majority and minority caucus leaders of both houses, meetings with the governor, deliberations with regard to political strategy, and discussions of issues in the context of political strategy.

(iv) a committee of the legislature, other than the Committee on Committees, but including a standing committee, special committee, joint committee, conference or free conference committee, committee of the whole, and permanent interim committee;

(v) a legislative commission, task force, or other group established by statute or resolution; or

(vi) a caucus of members of one or more of the bodies set out in (i) - (v) of this subparagraph;

(B) does not include

(i) any committee or group of legislators considering only matters involving the organization of a committee or a house of the legislature, including selection of legislative officers;

(ii) any committee or group of legislators and the governor or staff of the Office of the Governor;

(iii) legislative leadership meetings;

(iv) officers of a caucus;

Accordingly, if the caucus meeting is a "closed caucus" or "private, informal meeting to discuss and deliberate on political strategy," as described under AS 24.60.037(c), for the reasons discussed under the analysis under (1)(A), the legislator will be prohibited from exerting "official influence" or advocating for the bill in the caucus meeting.

Like a caucus meeting, a private meeting between two or more members of a legislative committee is not public. Therefore, although the answer to your question may depend on the applicable facts in each instance, generally the answer is no; a legislator with a conflict under AS 24.60.030(e)(3) relating to a bill may not discuss or advocate for the bill during private meetings with other committee members.⁸

4. Can a legislator (with a conflict) discuss or advocate for the bill during private meetings with other legislators (that are not on the committee), including legislators in the other body?

No. The exceptions in AS 24.60.030(e) do not apply, as discussed above. In our response to question (3)(C) of AO 18-05, we advised that a legislator with a conflict of interest under AS 24.60.030(e)(3)(D) may not, except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g), take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of a person "from whom the legislator or a member of the legislator's immediate family has, in the immediately preceding 12-month period, received more than \$10,000 of income."⁹ Accordingly, we advised that a legislator with a conflict of interest under AS 24.60.030(e)(3)(D) would, "in an informal or non-public discussion . . . be prohibited from taking any official action or exerting official influence, including

⁸ Discussion or advocacy could be considered "exert[ing] official influence" in violation of AS 24.60.030(e)(3).

⁹ AS 24.60.030(e)(3)(D). It does not matter if the legislator owns a "minority interest" in the business if in the immediately preceding 12-month period, the legislator received more than \$10,000 of income from that business.

advocating for the bill" Therefore, based on AO 18-05 and the facts you have provided, a legislator with a conflict under AS 24.60.030(e)(3) relating to a bill may not discuss or advocate for the bill during a private meeting with one or more legislators that are not on the committee, even if they are in the other house of the legislature.

5. Can a legislator (with a conflict) discuss or advocate for the bill during private meetings with constituents, or, generally, other citizens?

Although the answer to this question may depend on the applicable facts in each instance, generally the answer is no — for reasons explained in our responses to questions 3 and 4, above. A legislator's discussion of, or advocacy for or against, proposed legislation in any kind of meeting would probably constitute official action, official influence, or both, and because the meeting you have described is private, not public, the public discussion or debate exception in AS 24.60.030(e)(3) would not apply.

***6. Can a legislator (with a conflict), during the public committee meeting:
a. offer amendments to the bill?***

No. While the offer might occur during public discussion and debate, it is nevertheless official action or official influence prohibited by AS 24.60.030(e)(3). As noted above in our response to question 2, and in AS 18-05, a legislator's introduction or sponsorship of legislation is always discretionary because the Uniform Rules never require a legislator to introduce or sponsor legislation, and choosing to do so in spite of a conflict of interest would be contrary to goals of the Act set forth in AS 24.60.010. Moreover, sponsoring an amendment or other legislation requires taking official action or exerting official influence beyond participating in discussion or debate or voting. It requires the legislator to make at least one formal motion, and in most instances it requires the legislator to request assistance from staff to prepare the legislation.¹⁰

b. vote on amendments offered by others?

Yes. The prohibitions in AS 24.60.030(e)(3), against taking or withholding official action or official influence in certain instances, are limited by the provision "except as

¹⁰ See, footnote 3.

provided in (g) of this section," which requires legislators who have a conflict of interest to declare it "before voting on a question before a committee of the legislature. . . ." We find that the provision "except as provided in (g) of this section" is an exception to the prohibitions in AS 24.60.030(e)(3) that allows a legislator to vote on a question before a committee of the legislature even though the legislator has a related conflict of interest under AS 24.60.030(e)(3), so long as the legislator declares a conflict before voting.

c. vote on the motion to move the bill from committee?

Yes, for reasons explained in (b) of this question. A vote on a motion to move a bill from committee is a vote "on a question before a committee of the legislature."

d. sign the committee report with a recommendation ("do pass," "do not pass," "amend")?

Yes, for reasons explained in (b) of this question. Signing the committee report is part of voting "on a question before a committee of legislature."

e. sign the committee report "no recommendation"?

Yes. See answer to question (6)(d).

7. According to Uniform Rule 24, committee reports are necessary to move a bill from committee and must be signed by a majority of the members of the committee. When a member has a conflict, would the member have to abstain from signing the report or sign the report "no recommendation" in order to comply with the law?

No. For reasons explained in (b) of question 6, signing a committee report with or without a recommendation, is part of voting on a question before a committee of the legislature.

8. Would a legislator with a "large-enough" immediate family, who received more than \$10,000 in the aggregate from the Permanent Fund Dividend Corporation in October 2018, be prohibited from:

- a. Taking official action on a bill related to the Permanent Fund Dividend (PFD) or supplemental dividend payment?*
- b. Discussing or advocating for a PFD bill during private meetings with other committee members?*
- c. Discussing or advocating for a PFD bill during private meetings with other legislators, including members of the other body?*
- d. Discussing or advocating for a PFD bill during private meetings with constituents, or, generally, other citizens?*
- e. Discussing or advocating for the management or asset allocation of the Permanent Fund investments?*

Regardless of whether a member of the legislator's immediate family, or the entire family, receive permanent fund dividends with a cumulative value greater than \$10,000, the answer to each of the foregoing questions, (8)(a) - (e), is no, under AS 24.60.030(e)(3). In order for a prohibition under AS 24.60.030(e)(3) to apply, the action or influence targeted by that provision must "substantially benefit or harm" the "financial interest" of a person under subparagraphs (A) - (D) of that paragraph, including "a member" of the legislators immediate family. For purposes of AS 24.60.030, "substantially benefit or harm" means "the effect on the person's financial interest is greater than the effect on the financial interest of the general public of the state."¹¹ A member of the general public of the state, including a legislator, may have an immediate family large enough to be eligible for and receive permanent fund dividends for one benefit year with a value, when added together, that exceeds \$10,000, regardless of legislative status. Therefore, the benefit to the legislator is no greater than the effect on the financial interest of the general public of the state.

Furthermore, for purposes of the Act "financial interest is defined under AS 24.60.990(a)(6), as follows:

¹¹ AS 24.60.030(j)(2).

(6) "financial interest" means ownership of an interest or an involvement in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit.

Based on the facts you have provided, the legislator's interest in the Permanent Fund, the Permanent Fund Dividend program, or a permanent fund dividend received by the legislator or a member of the legislator's immediate family, is not a financial interest as defined in the Act.

9. If a bill authorizes a supplemental payment of a Permanent Fund Dividend in an amount that is a large percentage of the income of an immediate family member of a legislator, would that constitute a "substantial benefit" to that family member?

No, see answer to question 8, above.

a. If yes, would a legislator be prohibited from taking official action on that bill?

Because the answer to question 9 is no response to question (9)(a) is necessary.

b. What qualifies as a "substantial benefit?"

The term "substantial benefit" does not appear in the Act. For a discussion of the meaning of "substantially benefit or harm," see our response to question 8, above.

Conclusion

In addition to the foregoing advice, it is worth noting that, as we advised in AO 07-07:

The legislature set forth the Act's foundational principles in AS 24.60.010, and the first one, AS 24.60.010(1), says:

(1) high moral and ethical standards among public servants in the legislative branch of government are essential to assure the trust, respect, and confidence of the people of this state;

Creating the appearance of impropriety while in office is inconsistent with this principle. In previous advisory opinions the committee has indicated that the appearance of impropriety would be a factor the committee would consider in determining whether or not the Legislative Ethics Act has been violated.¹²

Compliance with the Act is the individual responsibility of each person to whom it applies.¹³ In determining whether future conduct like that described in the hypothetical facts violates the Act, the committee will consider the applicable facts in each instance. An appearance of ethical impropriety would be a factor the committee would consider.¹⁴

Adopted by the Select Committee on Legislative Ethics on **

Members present and concurring in this opinion were:

Members dissenting from this opinion were:

Members absent were:

¹² See AO 85-04, AO 94-08, AO 94-10, AO 96-04, AO 96-07, AO 99-01, and AO 05-01.

¹³ AS 24.60.010(7).

¹⁴ AO 18-05.

LIST OF MEMBERS OF THE COMMITTEE

Dennis "Skip" Cook, Chair	yes	no	absent
Representative	yes	no	absent
Representative	yes	no	absent
Senator John Coghill	yes	no	absent
Senator Tom Begich	yes	no	absent
H. Conner Thomas, public member	yes	no	absent
Joyce Anderson, public member	yes	no	absent
Deborah Fancher, public member	yes	no	absent
Lee Holmes, public member	yes	no	absent

DCW:boo

19-042.boo