

## **ETHICS COMMITTEE MEETING**

**January 23, 2014**

### **ITEM 10: Ethics Training for Independent Contractors or Consultants**

#### **Included in the packet:**

- AS 24.60.150. Duties of the committee; and AS 24.60.155 Legislative ethics course.
- AS 24.60.134. Prohibited conduct by public members and committee employees and contractors.
- Advisory Opinion 99-01, Definition Employee – Contractual Services.
- Advisory Opinion 96-06, Ethics Committee Contracts.
- February 13, 2003 memo to Wen Ibesate, LAA Administration, Contracts and Determination of Legislative Employee.
  - 2 sample contracts with language containing Coverage under the Ethics Law.
- February 27, 2003 memo to Karla Schofield, Deputy Director, Administrative Services, Explanation of AO 99-01.
- March 28, 2003 memo from Wen Ibesate, LAA Administration, Ethics Clause in Legislative Contracts.
- FY 13 (June 1, 2012 thru June 30, 2013) listing of contracts.
- Research of other states laws and definition of "employee" and "contractor."

#### **Available to testify at the Committee meeting**

- Doug Gardner, Director Legislative Legal Services.

#### **GENERAL BACKGROUND INFORMATION:**

Several inquiries have been received from legislative agencies within the last two months asking if independent contractors or consultants with the Legislature are required to complete ethics training. Another inquiry was received on Tuesday, January 14. The contract is for \$35,000 and is a personal services contract.

#### **AS 24.60.990(a)(11) states:**

In this chapter, "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 include public members and staff of the committee; it does not include individuals who perform functions that are incidental to legislative functions, and other employees designated by the committee;"

Under the provisions of **AO 99-01**, an independent consultant and contractor is considered a "legislative employee" if certain conditions are met.

**AO 99-01 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)? *[Note: The statutorily exempt categories were removed from the definition of "legislative employee" with 2012 legislation. Additionally, in 1996 the committee designated several other job categories which are also no longer in effect.]*
  - a. If the position is exempt, the contractor is not subject to the ethics code.
  - b. 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 service 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 3(a) or 3(b) above, the contractor is considered a 'legislative employee.'

**NOTE:** **AO 84-06**, which addresses an issue with a state contract, has relevance. In this opinion, "professional services contracts" are defined as:

professional, technical or consultant's services that are predominately intellectual in character and that include analysis, evaluation, prediction, planning or recommendation, and result in the production of a report or the completion of a task.

Keep in mind that contractors who provide goods (ex: West Law access), equipment (ex: moving vans), and labor (ex: work on the State Capitol building) would not fall in the category of "professional services contracts" under the definition in AO 84-06 in addition to the TEST in

AO 99-01; and therefore, these types of contractors would not be considered a legislative employee for purposes of the Act.

Under **AO 96-06**, the committee considered whether employees of the contractor who provides legal services to the Ethics Committee were required to comply with AS 24.60.134(c). *[AS 24.60.134 addresses prohibited conduct in addition to the other requirements of the Act. Specifically, activity relating to partisan political activity, campaigns, fundraising and lobbying.]*

AS 24.60.134(c) A person under contract to provide personal services to the committee who is part of a corporation or partnership that includes individuals who 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.

The committee concluded "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 of the scope of the ethics code."

It is important to note that the committee found 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.

**The bigger question is:**

**Do all the provisions under the Act apply to independent contractors and consultants if they meet the definition of "legislative employee" as determined in AO 99-01?**

- Ethics training.
- Disclosures.
- Gift prohibitions.
- Restrictions on fundraising.
- Complaints.

All contracts currently contain the following clause:

Clause XYZ – Coverage under the Ethics Code

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)(11). 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."

In March 2003 the clause was changed to the current language. (Note: Please note that ethics training did not become 'mandatory' until the 2008 legislative session.) The 2003 language is as follows:

Clause XYZ – 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(10)."

The reason for the change in 2003 was due to a contractor calling Mr. Wen Ibesate, LAA Administration, and this office asking for clarification of what it meant to be considered a "legislative employee" in relation to ethics compliance. Ethics staff consulted with H. Conner Thomas, chair of the committee at that time, and it was determined contract language should be updated. (See attached correspondence.)

CONTRACT INFORMATION - FY 2013 (July 1, 2012 through June 30, 2013)

(Note: Contracts issued for construction and labor are not included in these numbers.)

<u>NUMBERS</u>	<u>CATEGORY</u>	<u>AMOUNT/RANGES</u>
27	Contracts issued during FY 13	\$5,000 - \$300,027
1	Legislative Affairs Agency	\$81,599
1	Victims' Rights	\$74,863
1	Alaska Arctic Policy Commission	\$25,000
9	Legislative Council	\$15,000 to \$149,000
10	Senate Finance	\$5,000 to \$300,027
0	Ombudsman	-0-
5	Ethics Committee	\$5,000 to \$10,000
	Legislative Budget and Audit Committee	

**Note:**

- It appears that 22 of the 27 contracts would fall under the definition of 'legislative employees' under the TEST conditions outlined in AO 99-01. Further, the threshold of \$5,000 or more was met by every contract listed. Keep in mind, the AO was issued 15 years ago.
- A review of the contracts shows that it is possible a contract may include a living allowance for the contractor. This factor was not considered in AO 99-01. Should this type of contract be looked at differently from those where no living allowance is included?

**DISCUSSION:**

**Points to consider:**

- Does AO 99-01 need to be revisited to re-evaluate the parameters (TEST) defining 'legislative employee' as it relates to independent consultants and contractors?
  - AO 96-06 addressed exempting employees of Ethics Committee contractors by defining what factors and work assignments would place the employee under the provisions of the Act. The opinion also provided a process by which the contractor could request an exemption for employees.
    - If AO 99-01 is revisited, should the opinion include such a clarification and option?
- Consider the volume of contracts issued by the Legislature and legislative agencies that would meet the definition of 'legislative employee' under AO 99-01?
  - Staff time to monitor contracts issued, follow up on compliance, and answer questions from contractors could be considerable for both the administrator and administrative assistant (authorized for 60% time).
- The term of the contract (from/to date) would determine whether ethics training was a requirement.
  - Currently only 'legislative employees' who will be on board for 30 days or more are required to complete ethics training.
    - AS 24.60.155 states, ". . . a person who begins employment . . . shall complete the course required by this section within 30 days after the person's first day of service. . ."
    - AS 24.60.155 states, "A legislative intern or legislative volunteer who serves fewer than 30 days in one legislature is not subject to the requirements under (a) of this section."
- What other sections of the Act apply to contractors? Is it reasonable for contractors to file ethics disclosures, follow the gift prohibitions, and be restricted from certain fundraising activities?
- Determine the process for administering the requirements and compliance components.

- Should the contractor be informed prior to signing off on the contract of the requirement to complete ethics training and/or other requirements outlined in the Act?
- Who is covered by the requirements of the Act? The individual performing the consultant work, any support staff working on the issue, or the entire organization if the contract is with an organization.
- Who must complete the training? Same questions.
- A specialized on-line ethics training designed for contractors is an option. The on-line system is already in place and could be tailored for this purpose as well.
- Research of other states indicates that a contractor is not considered a public employee or covered by ethics provisions.

### **RECOMMENDATION:**

Staff has no recommendation at this time. See options below.

### **ACTION:**

Options include:

- Further study.
- Request an advisory opinion based on the current facts presented in order to provide guidance to contractors, Ethics staff, and LAA staff.
- Determine today the issues regarding ethics training and compliance with other sections of the Act.
- Recommend a statutory change to the definition of "legislative employee" and/or recommend specific language addressing contractors and ethics compliance.

**ETHICS COMMITTEE MEETING**

**January 23, 2014**

**Item 10: ETHICS TRAINING for Independent Contractors or Consultants –  
pursuant to AS 24.60.155**

**Legislative Budget and Audit Committee** - current contracts.

They can also be found at: <http://lba.akleg.gov/documents/contracts/>

**1) Janak Mayer**

Amount: \$250,000, plus \$13,000 for living expenses

Duration: January 1, 2014 – January 31, 2015

Purpose: Advise the legislature on matters relating to the oil and gas fiscal and commercial structures in Alaska and around the world

**2) Nikolaos Tsafos**

Amount: \$250,000, plus \$13,000 for living expenses

Duration: January 1, 2014 – January 31, 2015

Purpose: Advise the legislature on matters relating to the oil and gas fiscal and commercial structures in Alaska and around the world

**3) Roger Marks**

Amount: \$250,000

Duration: January 31 2013 – January 31, 2015

Purpose: Analyze and evaluate oil and gas fiscal regimes in Alaska and around the world

## ETHICS COMMITTEE MEETING

May 29, 2014

### Item 11: Independent Contractors/Consultants – Compliance with the Legislative Ethics Act

Background: Continuation from the January 23, 2014 meeting.

#### ITEMS IN THE PACKET

- April 30, 2014, legal opinion, LAA Legal, Dan Wayne: Independent Contractors and Consultants as Legislative Employees.
- LAA Research Report.
  - Summary Table.
  - Research Brief.
- May 13, 2014, legal opinion, LAA Legal, Dan Wayne: Clarification of statutory language in HB 127 (awaiting transmittal to the Governor), Personal Services Contracts with Ombudsman's office.
  - HB 127, Ombudsman's operation.
- January 23, 2014, Item 10, materials.

#### RESEARCH REQUEST

On March 3, 2014, a research request was submitted to Legislative Research. The request asked for the following information from at least 25 governmental bodies:

- Are independent contractors/consultants considered an employee for purposes of ethics compliance?
- Are independent contractors/consultants covered under separate statutory language for purposes of ethics compliance?
- If yes, what statutory ethics requirements apply?
- If only certain contractors/consultants are covered, what detailed criteria are used to make that determination?

Below is a recap of the research report:

#### TOTAL CATEGORY

- |   |   |
|---|---|
| 7 | Does not include independent contractors and/or consultants in definition of employee |
|   |   |
| 3 | Covers contractors under ethics laws with no separate distinction or qualification    |

#### ENTITY

Delaware, Florida, Iowa, Michigan, New York, Washington, West Virginia (relies on the definition of employee as determined by the IRS)	
North Carolina (definition of legislative employee specifically includes consultants and counsel to either house), Pennsylvania,	

(subject to "Contractor Integrity Provisions which requires compliance with state ethics laws), Indiana (Executive Branch subject to "Contractor and Executive Branch Lobbyist Ethics Training" course)

- |   |   |                          |
|---|---|--------------------------|
| 1 | Covers contractors under an Executive Order which requires state agencies to adopt standards of conduct for contractors & requires contractors to comply with "Plain Language Guide to Ethical Business Conduct"              | New Jersey               |
| 3 | Covers contractors if they perform a 'government function'  | Idaho, Louisiana, Oregon |
| 2 | Covers contractors if they are subject to the control of the employer   | Illinois, Nevada         |
| 1 | Covers contractors who make or participate in government decisions  | California               |
| 1 | Covers contractors who work at least 40 hours a week for the Legislature  | Alabama                  |
| 1 | Does not cover consultants; separate provision applies to contractors and consultants regarding confidentiality, acceptance of other state contracts, and accepting or giving anything of value that influences their actions | Connecticut              |
| 1 | Includes contractors in the definition of Employee; a contractor may be considered an independent contractor dependent upon the terms, substance, and working relationship  | Hawaii                   |
| 1 | Includes contractors who provide specialized services   | Massachusetts            |
| 1 | Includes consultants but not independent Contractors  | Ohio                     |
| 1 | Does not cover independent contractors but includes contractors (vendors) doing business  | Texas                    |

with the Procurement and Support Services  
division

- 1 Places restrictions on vendors who have sold Rhode Island  
goods or services during the preceding 24  
months

LEGAL OPINION from LAA LEGAL

Requested February 5, 2014. The request asked the following: What options would be available to the committee to provide clarity to the statutory definition "legislative employee" as defined in AS 24.60.990(a)(11).

• Option 1: Issue an advisory opinion.

- "... the committee could adopt definitions of those undefined terms [*independent contractor and consultant*], based on the commonly understood definition of the terms."
- The committee may not create a new meaning for the definition of "legislative employee."
- The committee may make the existing statutory definition more specific and which could allow the committee to find that some types of contractors or consultants are not subject to the Legislative Ethics Act because they are not legislative employees within the statutory definition.

• Option 2: Recommend legislation.

- The committee determines the statute is simply too narrow to allow the exemptions the committee feels are appropriate. ?
- Areas to consider if recommending legislation:
  - Clarifying the definition of "legislative employee."
  - Defining "independent contractor" and "consultant."
  - Limiting the Act's applicability to independent contractors and consultants. (Similar to statutory language for legislative interns and volunteers.)
  - Creating a separate statutory section for independent contractors and consultants that specify which provisions of the Act apply.

**Staff Recommendation:** Staff recommends Option 2, statutory change. Staff recommends creating a new statutory section limiting the Act's applicability to "independent contractors" and "consultants." The committee under AS 24.60.150(b)(1) may "recommend legislation to the legislature the committee considered desirable or necessary to promote and maintain high standards of ethical conduct in government."

The committee should keep in mind that ethics legislation always opens up the entire Act to other changes.

**Discussion:** Committee discussion of pros and cons of moving forward under Option 1 or Option 2. Some questions to consider:

- Should independent contractors and consultants be considered 'legislative employees?'
- What parameters of the Act should apply to independent contractors and consultants?

**Action:** Committee determines a course of action and makes specific recommendations for changes.