

Alaska State Legislature

Select Committee on Legislative Ethics

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ADVISORY OPINION 18-05

The Select Committee on Legislative Ethics (the committee) asked three questions, based on hypothetical facts provided with each, as follows:

Questions Presented

1. Does the Legislative Ethics Act (the Act) permit a legislator who is employed by a corporation with many subsidiary corporations, including in the extraction industry in Alaska, and who receives from that corporation more than \$10,000 per year in income, to

A. take legislative action on a bill relaxing environmental controls on the extraction industry in Alaska, including assisting in the drafting and co-sponsorship of the bill;

B. discuss and advocate for the bill in a caucus meeting?

2. If a legislator's spouse owns rental property and receives more than \$10,000 per year in rent, does the Act

A. permit the legislator to take legislative action on a bill with the subject of "real estate" or "landlord and tenant" on the akleg.gov website;

B. permit the legislator to discuss or advocate against the bill in a caucus meeting;

C. require the legislator to declare a conflict of interest under AS 24.60.030(g) before a legislative committee on which the legislator serves;

D. require the legislator -- before voting on the floor on the bill or an amendment or question relating to the bill, in the house where the legislator serves -- to declare a conflict of interest and ask to be excused from the vote?

3. Does the Act permit a legislator, who earns \$10,000 or more annually from a business in which the legislator owns a minority interest, to

A. sponsor or take other official action on a bill that would modify the tax structure for the business;

B. testify on the bill before a legislative committee;

C. informally promote the bill to a member of the committee that may hear the bill?

Statement of Facts

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

Discussion

Recently the legislature passed, and the governor signed into law, SCS CSSSHB 44(STA) (HB 44), a bill changing certain provisions of the Act relating to declaration of conflicts of interest and the taking or withholding official action, or exerting official influence on matters.¹ 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 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.

¹ SCS CSSSHB 44(STA), took effect July 20, 2018. For purposes of this opinion, we will cite the measure as HB 44.

* **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:

Question (1). *Does the Act permit a legislator who is employed by a corporation with many subsidiary corporations, including in the extraction industry in Alaska, and who receives from that corporation more than \$10,000 per year in income,² to*

² For purposes of the Act, "income" is defined under AS 24.60.990(a)(7) as "an asset that a person has received or expects to receive, regardless of whether it is earned or unearned; inheritances and other gifts are not income."

(1)(A) take legislative action³ on a bill relaxing environmental controls on the extraction industry in Alaska, including assisting in the drafting and co-sponsorship of the bill?

AS 24.60.030(e)(3) now provides that, except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g), a legislator may not

take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of a person

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

(B) by 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.

The above provision would prevent a legislator who is employed by a corporation from taking or withholding official action or exerting official influence "that *could* substantially benefit or harm the *financial interest* of" the employer.⁴ Under the hypothetical facts presented, it appears that a bill relaxing environmental controls on the extraction industry in Alaska could benefit the financial interest of the employer whose subsidiary corporations are in the extraction industry.⁵ Accordingly, the legislator would be prevented from taking or withholding official action or exerting official influence on a bill relaxing environmental controls -- except when declaring a conflict of interest before voting in accordance with AS 24.60.030(g) or while participating in a public discussion or debate.⁶

³ For purposes of the Act, "legislative action" is defined under AS 24.60.990 as follows:

(9) "legislative action" means 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;

⁴ AS 24.60.030(e)(3) (emphasis added).

⁵ AS 24.60.990(a) now defines "financial interest," for purposes of the Act, to mean:

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.

⁶ The restriction from taking or withholding "official action" would include any "legislative action" as defined in AS 24.60.990(9).

When a legislator has a conflict of interest in a matter, the Uniform Rules of the Alaska State Legislature can require that the legislator cast a vote, the conflict of interest notwithstanding. However, a legislator's introduction or sponsorship of a bill is always discretionary; the rules never require that the legislator introduce or sponsor a bill. When, under the Act, a legislator has a conflict of interest in a matter, introducing or sponsoring legislation in the matter is contrary to AS 24.60.010 generally, and improper under AS 24.60.010(2) specifically.

With regards to voting, AS 24.60.030(g) now provides that

Unless otherwise required by the Uniform Rules of the Alaska State Legislature, a legislator shall declare a conflict of interest before voting 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 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 37.07.100.⁷ [Emphasis added].

Under AS 24.60.990(a) "financial interest" is now defined as

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. [Emphasis added].

Based on the limited hypothetical facts presented, it is difficult to determine whether the legislator's own financial interest, as opposed to the financial interest of the corporation, is substantial as to trigger a conflict of interest under AS 24.60.030(g). Nevertheless, given that the definition of "financial interest" includes "involvement in a business," the legislator's "financial interest" is likely to give the appearance of a conflict of interest, 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," the legislator should declare a conflict of interest before

⁷ There is a distinction between the conflict of interest provisions in AS 24.60.030(e)(3) and 24.60.030(g). In AS 24.60.030(e)(3), the legislator is prohibited from taking or withholding official action or exerting official influence "that could substantially benefit or harm the financial interest" of another person (including a member of the legislator's immediate family, employer, or person negotiating for employment), but in AS 24.60.030(g), the legislator shall declare a conflict of interest when "the legislator or a member of the legislator's immediate family has a financial interest . . . 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."

voting on the extraction bill in committee and request to be excused from voting on a question on the floor. In accordance with AS 24.60.030(g), the Uniform Rules of the Alaska State Legislature can require that the legislator cast a vote, regardless of the conflict of interest.

(1)(B) discuss and advocate for the bill in a caucus meetings?

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."⁸

Although a caucus⁹ is not the same as a "legislative body,"¹⁰ (and therefore 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

⁸ AS 24.60.037(a).

⁹ "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."

¹⁰ "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;
 - (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;

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.

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.

Question (2). *If a legislator's spouse owns rental property and receives more than \$10,000 per year in rent, does the Act*

(2)(A) permit the legislator to take legislative action on a bill with the subject of "real estate" or "landlord and tenant" on the akleg.gov website?

As discussed under part (1)(A) of this opinion, AS 24.60.030(e)(3) now provides that, except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g), a legislator may not take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of "a person who is a member of the legislator's immediate family" or "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." Under AS 24.60.030(j), "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." Under the limited hypothetical facts provided, assuming the legislative action "could substantially benefit or harm the financial interest"¹¹ of the spouse, the legislator would be prohibited from taking any official action under AS 24.60.030(e)(3)(A) and (e)(3)(D), except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g).

(2)(B) permit the legislator to discuss or advocate against the bill in a caucus meeting?

Assuming that the legislative action "could substantially benefit or harm the financial interest" of the spouse under AS 24.60.030(e)(3)(A) or (e)(3)(D), as stated under part

¹¹ The subject listed on the akleg.gov website is not relevant to determining whether the the legislative action "could substantially benefit or harm the financial interest" under AS 24.60.030(e). To determine whether a legislative action "could substantially benefit or harm the financial interest," the legislative action itself should be examined.

(1)(B) of this opinion, if the caucus meeting is open to the public in accordance with AS 24.60.037, the exception to AS 24.60.030(e)(3) applies, and the legislator may discuss and advocate for the bill. However, 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), the legislator will be prohibited from exerting "official influence" or advocating for or against the bill in the caucus meeting.

(2)(C) require the legislator to declare a conflict of interest under AS 24.60.030(g) before a legislative committee on which the legislator serves?

As discussed in part (1)(A) of this opinion, AS 24.60.030(g) now provides that

Unless otherwise required by the Uniform Rules of the Alaska State Legislature, a legislator shall declare a conflict of interest before voting 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 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.^[12] [Emphasis added].

Based on the limited hypothetical facts presented, if the spouse's financial 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," the legislator should declare a conflict of interest before voting on the bill in committee. HB 44 established a threshold for creating a conflict of interest when more than \$10,000 of income is received in a 12-month period in AS 24.60.030(e)(3)(D), therefore, it appears that receiving more than \$10,000 of income from rental properties would be considered a substantial financial interest.

(2)(D) require the legislator -- before voting on the floor on the bill or an amendment or question relating to the bill, in the house where the legislator serves -- to declare a conflict of interest and ask to be excused from the vote?

For the reasons discussed above in part (2)(C) of this opinion, under AS 24.60.030(g),

¹² There is a distinction between the conflict of interest provisions in AS 24.60.030(e)(3) and 24.60.030(g). In AS 24.60.030(e)(3), the legislator is prohibited from taking or withholding official action or exerting official influence "that could substantially benefit or harm the financial interest" of another person (including a member of the legislator's immediate family, employer, or person negotiating for employment), but in AS 24.60.030(g), the legislator shall declare a conflict of interest when "the legislator or a member of the legislator's immediate family has a financial interest . . . 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."

before voting on the floor, the legislator should declare a conflict of interest and request to be excused from voting.

Question (3). Does the Act permit a legislator, who earns \$10,000 or more annually from a business in which the legislator owns a minority interest, to

(3)(A) sponsor or take other official action on a bill that would modify the tax structure for the business?

As discussed under part (1)(A) of this opinion, AS 24.60.030(e)(3) now provides that, except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g), a legislator may not 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."¹³ Under AS 24.60.030(j), "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." Under the hypothetical facts provided, a bill that modifies the tax structure for the business would substantially benefit or harm the financial interest of that business and the legislator would be prohibited from taking any official action under AS 24.60.030(e)(3)(D), except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g).

In addition, as also discussed under (1)(A), a legislator's introduction or sponsorship of a bill is always discretionary; the rules never require that the legislator introduce or sponsor a bill. When, under the Act, a legislator has a conflict of interest in a matter, introducing or sponsoring legislation in the matter is contrary to AS 24.60.010 generally, and improper under AS 24.60.010(2) specifically.

(3)(B) testify on the bill before a legislative committee?

AS 24.60.030(e)(3) has an exception that allows a legislator to participate "in a public discussion or debate" regarding a matter, even if a conflict of interest would otherwise exist. Accordingly, as discussed in part (1)(B) of this opinion, 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, advocate for, or testify regarding the bill.

(3)(C) informally promote the bill to a member of the committee that may hear the bill?

As discussed under part (1)(A) and (3)(A) of this opinion, AS 24.60.030(e)(3) now provides that, except while participating "in a *public discussion or debate*"¹⁴ or voting in

¹³ 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.

¹⁴ AS 24.60.030(e)(3) (emphasis added).

accordance with AS 24.60.030(g), a legislator may not 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."¹⁵ Accordingly, in an informal or non-public discussion, a legislator would be prohibited from taking any official action or exerting official influence, including advocating for the bill, under AS 24.60.030(e)(3)(D).

Appearance of Impropriety

In AO 07-07, we advised as follows:

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.^[16]

In determining whether future conduct like that described in the hypothetical facts violates the Act, an appearance of ethical impropriety would be a factor the committee would consider.

Conclusion

For the reasons stated above, and based on the facts described at the top of this opinion, the committee finds the following under the Act:

1. Does the Act permit a legislator who is employed by a corporation with many subsidiary corporations, including in the extraction industry in Alaska, and who receives from that corporation more than \$10,000 per year in income, to

A. take legislative action on a bill relaxing environmental controls on the extraction industry in Alaska, including assisting in the drafting and co-sponsorship of the bill?

¹⁵ 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.

¹⁶ See AO 85-04, AO 94-08, AO 94-10, AO 96-04, AO 96-07, AO 99-01, and AO 05-01. AO 18-05

No, the legislator would be prevented from taking or withholding official action or exerting official influence on the bill relaxing environmental controls -- except when declaring a conflict of interest before voting in accordance with AS 24.60.030(g) or while participating in a public discussion or debate.

B. discuss and advocate for the bill in a caucus meeting?

Yes, if the caucus 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. However, if the caucus meeting is a "closed caucus" or "private, informal meeting to discuss and deliberate on political strategy," the legislator would be prohibited from exerting "official influence" or advocating for the bill in the caucus meeting.

2. If a legislator's spouse owns rental property and receives more than \$10,000 per year in rent, does the Act

A. permit the legislator to take legislative action on a bill with the subject of "real estate" or "landlord and tenant" on the akleg.gov website?

No, assuming the legislative action "could substantially benefit or harm the financial interest" of the spouse, the legislator would be prohibited from taking any official action under AS 24.60.030(e)(3)(A) and (e)(3)(D), except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g).

B. permit the legislator to discuss or advocate against the bill in a caucus meeting?

Yes, if the caucus 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. However, if the caucus meeting is a "closed caucus" or "private, informal meeting to discuss and deliberate on political strategy," the legislator would be prohibited from exerting "official influence" or advocating for the bill in the caucus meeting.

C. require the legislator to declare a conflict of interest under AS 24.60.030(g) before a legislative committee on which the legislator serves?

Yes, if the spouse's financial 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," the legislator should declare a conflict of interest before voting on the bill in committee.

D. require the legislator -- before voting on the floor on the bill or an amendment or question relating to the bill, in the house where the legislator serves -- to declare a conflict of interest and ask to be excused from the vote?

Yes, under AS 24.60.030(g), before voting on the floor, the legislator should declare a conflict of interest and request to be excused from voting.

3. Does the Act permit a legislator, who earns \$10,000 or more annually from a business in which the legislator owns a minority interest, to

A. sponsor or take other official action on a bill that would modify the tax structure for the business?

No, the legislator would be prohibited from taking any official action, including sponsorship of the bill, under AS 24.60.030(e)(3)(D), except while participating in a public discussion or debate or voting in accordance with AS 24.60.030(g).

B. testify on the bill before a legislative committee?

Yes, 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, advocate for, or testify regarding the bill.

C. informally promote the bill to a member of the committee that may hear the bill?

No, in an informal or non-public discussion, a legislator would be prohibited from taking any official action or exerting official influence, including advocating for the bill, under AS 24.60.030(e)(3)(D).

Adopted by the Select Committee on Legislative Ethics on November 1, 2018.

Members present and concurring in this opinion were: Senator John Coghill, Senator Berta Gardner, Representative Chris Tuck, Skip Cook, Conner Thomas, Joyce Anderson, Deb Fancher, Lee Holmes.

Members dissenting from this opinion were: Representative Lora Reinbold.

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