

Introduced: 3/20/85
Referred: State Affairs,
Judiciary and Finance

BY PETTYJOHN, MARTIN, RIEGER,
PHILLIPS AND JENKINS

1 IN THE HOUSE

2 HOUSE BILL NO. 299

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the conflict of interest of the
7 attorney general or the Department of Law and to the
8 appointment of independent counsel; and providing for
9 an effective date."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 * Section 1. AS 39.50 is amended by adding new sections to read:

12 ARTICLE 2. INDEPENDENT COUNSEL ON CONFLICTS OF INTEREST.

13 Sec. 39.50.300. INVESTIGATION BY ATTORNEY GENERAL. The attorney
14 general shall conduct an investigation under AS 39.50.330 whenever the
15 attorney general receives information sufficient to constitute grounds
16 for investigating the conduct of an individual described in AS 39.50.-
17 310 that involves a violation of the criminal law of the state other
18 than an infraction.

19 Sec. 39.50.310. OFFICERS INVOLVED. (a) The individuals subject
20 to an investigation by the attorney general under AS 39.50.330 are

21 (1) the governor and lieutenant governor;

22 (2) the head of each principal department;

23 (3) an individual working in the Office of the Governor who
24 is compensated at or above Range 24;

25 (4) an assistant attorney general, district attorney, or
26 assistant district attorney compensated at or above Range 24;

27 (5) the deputy commissioner and the directors of divisions
28 within the Department of Revenue and the director of the Alaska State
29 Troopers;

1 (6) the chairman and treasurer of the principal campaign
2 committee that seeks the election or the reelection of the governor
3 and an individual exercising authority as a campaign manager or
4 director of a gubernatorial campaign committee during the incumbency
5 of the governor.

6 (b) The conduct of an individual described in (a) of this sec-
7 tion is subject to an investigation conducted under AS 39.50.330
8 during the incumbency of the governor served by the individual plus
9 one year after that governor leaves office but in no event longer than
10 two years after the individual leaves office.

11 (c) The conduct of an individual described in (a) of this sec-
12 tion who continues to hold office for not more than 90 days into the
13 term of the next governor is subject to an investigation conducted
14 under AS 39.50.330 during the period the individual serves plus one
15 year after the individual leaves office.

16 Sec. 39.50.320. OTHER PUBLIC OFFICERS. The attorney general may
17 conduct an investigation under AS 39.50.330 whenever the attorney
18 general receives information sufficient to constitute grounds to
19 investigate the conduct of a public official not described in
20 AS 39.50.310 that involves a violation of a criminal law of the state
21 other than an infraction. The attorney general may conduct the
22 investigation under AS 39.50.330 and shall request the appointment of
23 independent counsel under AS 39.50.360(b) if the attorney general
24 determines that an investigation by the attorney general may appear to
25 result in a personal, financial, or political conflict of interest.

26 Sec. 39.50.330. PRELIMINARY INVESTIGATION BY ATTORNEY GENERAL.

27 (a) On the receipt of information determined by the attorney general
28 to constitute grounds for the investigation of facts concerning a
29 violation of a criminal law of the state other than an infraction by

1 an individual described in AS 39.50.310 or 39.50.320, the attorney
2 general shall conduct a preliminary investigation of the facts as the
3 attorney general considers appropriate for not to exceed 90 days. In
4 the review of the facts by the attorney general, the attorney general
5 shall consider

6 (1) the degree of specificity of the information received;
7 and

8 (2) the credibility of the source of the information.

9 (b) On a showing of good cause by the attorney general, the
10 three-judge panel may grant the attorney general a single extension of
11 the preliminary examination for a period not to exceed 60 days.

12 (c) The attorney general may not convene a grand jury, engage in
13 plea bargaining, grant immunity from prosecution, or issue subpoenas
14 in a preliminary investigation under this section.

15 (d) During the preliminary investigation under this section and
16 in the determination whether reasonable grounds exist to warrant
17 further investigation or prosecution, the attorney general shall
18 adhere to established policies of the Department of Law with respect
19 to the enforcement of the state criminal laws.

20 (e) After completing a preliminary investigation under this
21 section, the attorney general shall notify the three-judge panel of
22 the conclusions reached. The notification by the attorney general
23 under this subsection shall be by memorandum containing a summary of
24 the information received and a summary of the results of the prelimi-
25 nary investigation.

26 (f) The memorandum together with any documents or materials
27 supplied with the memorandum is not a public record under AS 09.25.-
28 110 - 09.25.120 and may not be disclosed to any individual apart from
29 the judges of the three-judge panel appointed under AS 39.50.360(a) or

1 the Department of Law without the approval of the three-judge panel.

2 Sec. 39.50.340. DETERMINATIONS BY ATTORNEY GENERAL AFTER PRELIM-
3 INARY INVESTIGATION. (a) If the attorney general determines on
4 completion of a preliminary investigation under AS 39.50.330 that
5 there are no reasonable grounds to believe that further investigations
6 or prosecution is warranted, the attorney general shall notify the
7 three-judge panel appointed under AS 39.50.360(a) of the results of
8 the preliminary investigation and the three-judge panel may not ap-
9 point an independent counsel.

10 (b) If the attorney general determines on completion of a pre-
11 liminary investigation under AS 39.50.330 that further investigation
12 or prosecution is warranted, the attorney general shall apply to the
13 three-judge panel for the appointment of independent counsel.

14 (c) A memorandum to a three-judge panel requesting the appoint-
15 ment of independent counsel shall contain sufficient information to
16 assist the three-judge panel to select independent counsel and to
17 define the prosecutorial jurisdiction of the independent counsel.

18 (d) The determination of the attorney general under (a) - (b) of
19 this section is not reviewable in any court.

20 (e) If 90 days have elapsed from the initiation of the prelimi-
21 nary investigation and the attorney general has not made a determina-
22 tion under (a) or (b) of this section or received an extension under
23 AS 39.50.330(b), a resident of the state may file a petition with the
24 three-judge panel requesting the appointment of an independent
25 counsel. The three-judge panel shall appoint an independent counsel
26 on its determination that the petition states reasonable grounds for
27 believing that a further investigation or prosecution is warranted.

28 Sec. 39.50.350. ADDITIONAL INFORMATION. (a) If the attorney
29 general receives additional information sufficient to constitute

1 grounds to alter a determination made under AS 39.50.340(a), the
2 attorney general shall, not later than 90 days after the receipt of
3 the information, apply to the three-judge panel for the appointment of
4 independent counsel.

5 (b) The attorney general may request independent counsel to
6 accept a referral of a matter that relates to the prosecutorial juris-
7 diction of the independent counsel.

8 Sec. 39.50.360. DUTIES OF A THREE-JUDGE PANEL. (a) There is
9 created within the superior court a panel of five superior court
10 judges to be appointed by the chief justice under rules of the supreme
11 court and for terms as may be prescribed by the supreme court. The
12 chief justice shall designate three judges as members of the panel.
13 The chief justice shall designate the remaining two judges as first
14 and second alternates to sit as members of the panel in the event of
15 disqualification or disability under rules prescribed by the supreme
16 court.

17 (b) On receipt of a memorandum under AS 39.50.340(c), the three-
18 judge panel shall consider the memorandum and any documents or mate-
19 rials supplied with it. The three-judge panel shall appoint an attor-
20 ney admitted to practice in the state as independent counsel and shall
21 define the prosecutorial jurisdiction of the independent counsel. The
22 identity of the independent counsel and the prosecutorial jurisdiction
23 may be made public on the request of the attorney general or on a
24 determination by the three-judge panel that disclosure of the identity
25 of the independent counsel and the prosecutorial jurisdiction would be
26 in the best interests of justice. If the identity of the independent
27 counsel and the prosecutorial jurisdiction is not disclosed earlier,
28 the identity of the independent prosecutor and the prosecutorial
29 jurisdiction shall be disclosed if an indictment is returned.

1 (c) The three-judge panel may expand the prosecutorial jurisdic-
2 tion of an existing independent counsel in place of the appointment of
3 additional independent counsel.

4 (d) The three-judge panel may not appoint an individual as
5 independent counsel who holds or recently held an office of profit or
6 trust under the state.

7 (e) If an individual appointed by a three-judge panel resigns or
8 dies in office with the work of the independent counsel incomplete,
9 the three-judge panel may appoint an individual to complete the work
10 of the former independent counsel. If an individual appointed by a
11 three-judge panel is removed or suspended under AS 39.50.410, the
12 three-judge panel shall appoint an acting independent counsel to serve
13 pending review of the removal or suspension.

14 (f) On the request by an individual who was the subject of an
15 investigation conducted by an independent counsel under AS 39.50.300 -
16 39.50.430, the three-judge panel may, in its discretion, award reim-
17 bursement from the state for all or a part of attorneys' fees incurred
18 by the individual if

19 (1) an indictment was not brought against the individual;
20 and

21 (2) the attorneys' fees would not have been incurred except
22 for the investigation under AS 39.50.300 - 39.50.430.

23 Sec. 39.50.370. AUTHORITY AND DUTIES OF INDEPENDENT COUNSEL.

24 (a) Notwithstanding any other provision of law, an individual ap-
25 pointed as independent counsel under AS 39.50.360(b) has, with regard
26 to each matter within the prosecutorial jurisdiction of the indepen-
27 dent counsel, full power and independent authority to exercise the
28 investigative and prosecutorial functions of the attorney general, the
29 Department of Law, and any officer or employee of the Department of

1 Law. The investigative and prosecutorial functions of the attorney
2 general and the Department of Law include

3 (1) the conduct of proceedings before a grand jury;

4 (2) the conduct of investigations apart from proceedings
5 before a grand jury;

6 (3) participation in court proceedings and litigation,
7 either civil or criminal;

8 (4) appeal of a decision in a case or proceeding in which
9 the independent counsel participates in an official capacity;

10 (5) review of documentary evidence from any source;

11 (6) contest of the assertion of a testimonial privilege;

12 (7) review of material otherwise considered confidential
13 under state law if the independent counsel determines that the materi-
14 al is germane to the investigation;

15 (8) application to a court for a grant of immunity under
16 state law to a witness;

17 (9) application for warrants, subpoenas, or other court
18 orders;

19 (10) inspection or use of an original or a copy of a tax
20 return filed under state law to the extent that the attorney general
21 could obtain the tax return for the purposes of an investigation;

22 (11) initiation of an indictment in the name of the state
23 and the conduct of a trial in a court of the state;

24 (12) consultation with the district attorney for the dis-
25 trict in which a violation of the criminal law is alleged to have
26 occurred.

27 (b) Independent counsel may request the assistance from the
28 Department of Law and the Department of Law shall provide the re-
29 quested assistance. Assistance may include access to records, files,

1 or other material relevant to a matter within the jurisdiction of the
2 independent counsel and the use of resources and personnel necessary
3 to the completion of the duties of the independent counsel.

4 (c) Independent counsel may request the attorney general to
5 refer a matter related to the prosecutorial jurisdiction of the inde-
6 pendent counsel. Independent counsel may accept the referral of a
7 matter from the attorney general if the matter relates to a matter
8 within the prosecutorial jurisdiction of the independent counsel as
9 established by the three-judge panel. If a referral is accepted, the
10 independent counsel shall notify the three-judge panel. Independent
11 counsel may request the three-judge panel to expand the prosecutorial
12 jurisdiction of the independent counsel.

13 (d) To the extent possible, independent counsel shall adhere to
14 the established policies of the Department of Law with respect to the
15 enforcement of the state criminal laws.

16 (e) Independent counsel may dismiss a matter within the prose-
17 cutorial jurisdiction of the independent counsel without conducting an
18 investigation or at any time before an indictment is returned if the
19 dismissal is consistent with the established policies of the Depart-
20 ment of Law with regard to the enforcement of the state criminal laws.

21 (f) Independent counsel appointed under AS 39.50.360(b) shall
22 receive compensation at a per diem rate equivalent to the annual rate
23 for Range 26 under the salary schedule established under AS 39.27.011.

24 (g) For the purpose of carrying out duties assigned to indepen-
25 dent counsel, an independent counsel has the power to appoint staff,
26 to fix the compensation of staff, and to assign duties to staff. The
27 positions established under this subsection are in the exempt service.
28 An individual appointed to a position under this subsection may be
29 compensated at a rate not exceeding Range 25.

1 Sec. 39.50.380. REPORTS OF INDEPENDENT COUNSEL. (a) Indepen-
2 dent counsel appointed under AS 39.50.360(b) may report to the legis-
3 lature on the activities of the independent counsel. The reports of
4 independent counsel shall contain information considered appropriate
5 by independent counsel.

6 (b) Independent counsel shall report to the three-judge panel on
7 the activities of the independent counsel. A report under this
8 subsection shall set out fully and completely a description of the
9 work of the independent counsel, including the disposition of all
10 cases brought and the reasons for declining prosecution on a matter
11 within the prosecutorial jurisdiction of the independent counsel.

12 (c) The three-judge panel may release to the legislature, the
13 public, and an individual portions of a report made under (b) of this
14 section. The three-judge panel shall make appropriate orders to
15 protect the rights of an individual named in the report and to prevent
16 undue interference with a pending or anticipated prosecution.

17 (d) The three-judge panel may make a portion of a report under
18 (b) of this section available to an individual named in the report and
19 invite the individual to comment or offer factual information germane
20 to the comments in the report on the individual. The three-judge
21 panel may include the comments and the factual information, in whole
22 or in part, in its publication of the report.

23 Sec. 39.50.390. IMPEACHMENT. Independent counsel shall advise
24 the senate of credible and substantial information received by inde-
25 pendent counsel that may constitute grounds for impeachment. Docu-
26 ments and records developed by the independent counsel are available
27 to the senate or the house of representatives during an impeachment
28 proceeding.

29 Sec. 39.50.400. LEGISLATIVE OVERSIGHT. (a) The judiciary

1 committees of the legislature may exercise legislative oversight
2 jurisdiction with respect to the conduct of independent counsel and
3 independent counsel shall cooperate with the judiciary committees in
4 the exercise of their legislative oversight jurisdiction.

5 (b) A majority of majority party members of a judiciary commit-
6 tee or a majority of minority party members of a judiciary committee
7 may request in writing that the attorney general request the appoint-
8 ment of independent counsel.

9 (c) Not later than 30 days after the receipt of the request or
10 not later than 15 days after the completion of a preliminary investi-
11 gation of the matter that is the subject of the request, whichever is
12 later, the attorney general shall notify the committee of action taken
13 under the request and, if a request for the appointment of an inde-
14 pendent counsel has not been made by the attorney general, why a
15 request has not been made.

16 (d) The notification shall be provided to the committee on which
17 the members making the request to the attorney general serve and the
18 notification may not be revealed to any other person unless the com-
19 mittee, either on its own initiative or on the request of the attorney
20 general, makes public portions of the notification that will not, in
21 the judgment of the committee, prejudice the rights of an individual.

22 Sec. 39.50.410. REMOVAL OF INDEPENDENT COUNSEL. (a) An inde-
23 pendent counsel appointed under AS 39.50.360(b) may be removed from
24 office, except by impeachment and conviction, only by the personal act
25 of the attorney general and only for good cause, physical disability,
26 mental incapacity, or other condition that substantially impairs the
27 performance of the duties by the independent counsel. If the attorney
28 general removes an independent counsel from office, the attorney
29 general shall promptly report to the three-judge panel and the

1 judiciary committees of the legislature the facts found and the actual
2 grounds for the removal.

3 (b) The committees shall make the report available to the public
4 except that each committee may, to protect the rights of an individual
5 named in the report or to prevent undue interference with a pending or
6 anticipated prosecution, delete portions of the report or delay the
7 publication of any or all of the report.

8 (c) The three-judge panel may release any or all of the report
9 and may make a portion of a report filed under (a) of this section
10 available to an individual named in the report and invite the indi-
11 vidual to comment or offer factual information germane to the comments
12 in the report on the individual. The three-judge panel may include
13 the comments and the factual information, in whole or in part, in its
14 publication of the report.

15 (d) An independent counsel removed under this section may obtain
16 judicial review of the removal in a petition filed before the three-
17 judge panel and, if the removal was based on error of fact or law, may
18 obtain reinstatement and other appropriate relief. The three-judge
19 panel shall expedite the hearing and decision on the petition.

20 Sec. 39.50.420. TERMINATION OF RESPONSIBILITIES OF AN INDEPEN-
21 DENT COUNSEL. (a) The responsibilities of an independent counsel
22 terminate when

23 (1) the independent counsel notifies the attorney general
24 that the investigation of each matter within the prosecutorial juris-
25 diction of the independent counsel or accepted under AS 39.50.370(c)
26 has been completed or so substantially completed that it would be
27 appropriate for prosecutors from the Department of Law to complete the
28 investigation or prosecution; and

29 (2) the independent counsel files a final report under

1 AS 39.50.380.

2 (b) The three-judge panel may at any time terminate the respon-
3 sibilities of an individual acting as independent counsel, either on
4 its own motion or on the request of the attorney general, on its
5 determination that the investigation or each matter within the prose-
6 cutorial jurisdiction of the independent counsel or accepted under
7 AS 39.50.370(c) has been completed or so substantially completed that
8 it would be appropriate for prosecutors from the Department of Law to
9 complete the investigation or prosecution. If the responsibilities of
10 independent counsel are terminated under this subsection, the indepen-
11 dent counsel shall file a final report under AS 39.50.380.

12 Sec. 39.50.430. RELATIONSHIP WITH DEPARTMENT OF LAW. (a) When
13 a matter is within the prosecutorial jurisdiction of an independent
14 counsel or has been accepted by an independent counsel under AS 39.-
15 50.370(c), the Department of Law, the attorney general, and the prose-
16 cutors of the Department of Law shall suspend each investigation and
17 proceeding regarding the matter except to the extent that independent
18 counsel requests the assistance of the Department of Law under AS 39.-
19 50.370(b).

20 (b) The provisions of AS 39.50.300 - 39.50.430 do not prevent
21 the attorney general or an attorney from the Department of Law from
22 making a presentation to a court as amicus curiae as to issues raised
23 by a case or proceeding in which an independent counsel participates
24 in an official role.

25 * Sec. 2. AS 39.25.110 is amended to read:

26 Sec. 39.25.110. EXEMPT SERVICE. Unless otherwise provided by
27 law, the following positions in the state service constitute the
28 exempt service and are exempt from the provisions of this chapter and
29 the rules adopted under it:

- 1 (1) persons elected to public office by popular vote or
2 appointed to fill vacancies in elected offices;
- 3 (2) justices, judges, magistrates, and employees of the
4 judicial branch including employees of the Judicial Council;
- 5 (3) employees of the state legislature and its agencies;
- 6 (4) the head of each principal department in the executive
7 branch;
- 8 (5) officers and employees of the University of Alaska;
- 9 (6) certificated teachers and noncertificated employees
10 employed by a regional educational attendance area established and
11 organized under AS 14.08.031 - 14.08.041 to teach in, administer, or
12 operate schools under the control of a regional educational attendance
13 area school board;
- 14 (7) certificated teachers employed by the Department of
15 Education as correspondence teachers or teachers in skill centers
16 operated by the Department of Education;
- 17 (8) patients and inmates employed in state institutions;
- 18 (9) persons employed in a professional capacity to make a
19 temporary or special inquiry, study or examination as authorized by
20 the governor;
- 21 (10) members of boards, commissions, or authorities;
- 22 (11) the officers and employees of the following boards,
23 commissions, and authorities:
- 24 (A) Alaska Gas Pipeline Financing Authority;
- 25 (B) Alaska Permanent Fund Corporation;
- 26 (C) Alaska Energy Center;
- 27 (D) Alaska Industrial Development Authority;
- 28 (E) Alaska Commercial Fisheries Entry Commission;
- 29 (F) Alaska Commission on Postsecondary Education;

1 (12) the executive secretary and legal counsel of the Alaska
2 Municipal Bond Bank Authority;

3 (13) physicians licensed to practice in this state and
4 employed by the division of mental health and developmental disabili-
5 ties, Department of Health and Social Services;

6 (14) petroleum engineers and petroleum geologists employed
7 in a professional capacity by the Department of Natural Resources and
8 by the Oil and Gas Conservation Commission, except for those employed
9 in the division of geological and geophysical surveys in the Depart-
10 ment of Natural Resources;

11 (15) officers, agents, and employees of the Alcoholic Bever-
12 age Control Board granted limited peace officer powers by the Alco-
13 holic Beverage Control Board under AS 04.06.110;

14 (16) persons employed by the division of marine transporta-
15 tion as masters and members of the crews of vessels who operate the
16 state ferry system and who are covered by a collective bargaining
17 agreement provided in AS 23.40.040;

18 (17) officers and employees of the state who reside in
19 foreign countries;

20 (18) employees of the Alaska Seafood Marketing Institute;

21 (19) firefighters employed by the Department of Natural
22 Resources for a fire emergency;

23 (20) employees of the Office of the Governor and the office
24 of the lieutenant governor, including the staff of the governor's
25 mansion;

26 (21) Employees of the Citizens' Advisory Commission on
27 Federal Areas in Alaska (AS 41.37.010);

28 (22) youth employed by the Department of Natural Resources
29 under the Youth Employment and Student Intern programs;

1 (23) independent counsel and the staff of independent coun-
2 sel appointed under AS 39.50.360(b).

3 * Sec. 3. This Act takes effect immediately in accordance with AS 01.-
4 10.070(c).