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STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: HB 20 Date on Bill: _____
 Title: "An Act relating to the responsibilities of the APOC: estab. standards of conduct"
 Sponsor: M.M. Miller and Duncan
 Requestor: _____

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital								
Operating				399.5	392.5	416.1		
Total				399.5	392.5	416.1		

b. Revenues:

Revenue								

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

All figures are in addition to the Governor's Request for \$590.6 which provides 6 F/T and 3 P/T positions for the APOC (under the three existing laws) in FY 84. FY 85 and 86 are based on an inflation factor of 6%. Since the task of working with municipalities and REAA School Districts is too large to be accomplished within the one year allowed for those entities to enact their own codes, substantial travel is anticipated for successive years.

4. Disclaimer:

This statement has not been reviewed by the OMB in the Office of the Governor.

Prepared By: Shelby S. Pittman, Exec. Dir. Phone: 276-4176
 Division: Alaska Public Offices Commission Date: 3/14/83
 Approved by Commissioner: Thomas J. Conroy Date: 3/15/83
 Department: Administration

5. Distribution:

- Original to Legislative Finance
- Copy to OMB
- Copy to Sponsor
- Copy to Requestor

2/8/83

HB 20 2/24/83 APOC Fiscal Note

The FY 84 total of \$399.5 includes an RSA of \$100.0 with the Department of Law for the services of a senior attorney, three new positions for the Alaska Public Offices Commission as well as funding to reclassify three existing positions, and increased travel and services to address the bill's applicability to municipalities and REAA school districts.

100 - Personal Services	\$154.9
New: Assistant Director, Range 23	
Research Analyst II, Range 16	
Secretary, Range 12	
Re-class: Executive Director from range 24 to 26	
Assistant Director from range 21 to 23	
Administrative Assistant II from range 14 to 16	
200 - Travel	\$ 32.4
4 additional Commission meetings @ \$3,220	
Municipal information & compliance \$15.0	
Council on Governmental Ethics \$4.5	
300 - Contractual	\$186.8
Printing (RSA) \$10.0	
Telephone \$7.2	
Word Processor Modum \$1.4	
Office Space (RSA) \$25.2	
Public Information \$25.0	
Data Processing (RSA or Contract) \$18.0	
Dept. of Law (RSA) \$100.0 - includes \$19.5 one-time	
Attorney, range 24 & 1/2 time Sec., range 10/10 mo. \$63.5	
Municipal travel, \$7.5; services, \$8.0; commodities, \$3.5;	
equipment, \$17.5	
400 - Commodities	\$ 3.0
500 - Equipment (one-time items)	\$ 22.4
Word Processor/terminal, \$17.9	
FY 84 total	\$399.5
FY 85 total	\$392.5
Delete \$41.9 in one-time items from FY 84; add \$12.7 to cover	
2 months of Dept. of Law salaries, multiply by 1.06 to add	
inflation factor of 6%.	
FY 86 total	\$416.1
Multiply FY 85 by 1.06 for an inflation factor of 6 %.	

INTRODUCTION OF BILLS (House)(cont'd)

HB 19 (cont'd)

after Governor's signature).

Introduced January 17 and referred to Health, Education and Social Services, then to Finance.

Public
Officials
(standards
of conduct)

HOUSE BILL NO. 20, By M.M. Miller, Duncan, Zharoff, Davis, McBride, Szymanski, Wendte, Koponen, Malone, Larson, Clocksin, Goll, McBride, and Vaska. Amends AS 39 (Public Officers and Employees) by adding a new chapter - (AS 39.49) outlining standards of conduct for public officials. Rewrites sections of law pertaining to the Alaska Public Offices Commission (APOC), expanding its powers in regards to conduct of public officials.

New standards of conduct would prohibit solicitation of gifts and abuse of office by a public official. Also outlined are various situations wherein conflicts of interest could arise and procedures to be taken by the state or municipal official in order to comply with state law.

New powers given to the Alaska Public Offices Commission (under AS 15.13, State Election Campaigns) provide the Commission administer laws relating to standards of conduct (AS 39.49), conflict of interest (AS 39.50) and regulation of lobbying (AS 24.45). The Commission has the power to issue advisory opinions on violations of standards of conduct, hold hearings and determine if there is sufficient cause to believe an official should be removed from office. The Commission may also assess civil penalties for violations of AS 24.45, AS 39.49 or AS 39.50. Provides the Commission may pursue appropriate legal remedies for violations, including criminal prosecution.

Provides the standards of conduct apply to state officials on the effective date of the bill (July 1, 1983), and to municipal public officials July 1, 1984, unless the municipality adopts standards of conduct for its officials, submits the standards to APOC, and APOC determines the municipal standards are substantially similar to those adopted under AS 39.49. APOC shall consider municipal standards based on the size of the municipality, recent budgets, procedures adopted for the regulation of fiscal procedures, and other matters submitted to the Commission by the municipality.

Repeals AS 15.13.045 (State Election Campaigns. Investigations, hearings.); AS 15.13.130(6) (current definition of "municipality"--replaced in new sections); and AS 39.50.090 (a) - (e) (Conflict of Interest. Prohibited Acts--does not repeal AS 39.50.090(f), prohibiting a municipal official from representing a client for a fee before the municipal body he represents).

Provides Act takes effect July 1, 1983.

Introduced January 17 and referred to State Affairs, Judiciary, then to Finance.

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 20
 Title "An Act relating to the responsibilities of the Alaska Public
 Requested by Representative Abood Date 1/19/83

Offices Commission; establishing standards of conduct for public
officials; and providing for an effective date."

II. FISCAL DETAIL

Agency Affected Department of Law
 Program Category Affected Legal Services
 BRU, Program, Or Subprogram(s) Affected Legal Services

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		0	0	0		

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Although additional work may be caused by enactment of this bill, the department does not believe additional attorney level resources will be needed. The department does note that the FY 84 budget requests, for both the APOC and Law, provide for additional investigative resources at the Associate Attorney level which will be definitely needed if this bill is approved. It is anticipated that, for the time being, any new litigation related to this bill will occur at various locations and be handled by the existing attorney staff.

IV. DATE January 26, 1983 PREPARED BY Richard I. Pegues Dir. Adm. Svcs.
 AGENCY Department of Law
 Original: Legislative Finance PHONE 465-3672
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

OMB Reviewed by: Guy Bell



Alaska State Legislature

House of Representatives

January 10, 1983 Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

TO: Representative Mike Miller

FROM: Michael Ford, Counsel
House Minority

RE: Conflicts of Interest (HB 20)

RECEIVED
JAN 17 1983

This bill as you know is identical to the one passed out of the House Judiciary Committee in the first session of the twelfth Alaska Legislature. The bill in essence creates standards of conduct for public officials, as well as setting up a system for disclosing conflicts that do occur. A commission is also created to accept and initiate complaints concerning violations of the conflicts law.

The major point to bear in mind is that the bill covers all "public officials", which includes members and employees of the legislature, appointed officers and employees of state agencies and municipalities, and the Governor and Lieutenant Governor. Only Judicial branch employees are not included. The bill is in two major parts, the first being the ethical standards and their operation, the second being the administration of the law through the Commission. Each part will be addressed in turn.

The standards to be applied to public officials is contained in section two of the bill. Specifically, gifts are prohibited where given to influence or reward an official action. Under the heading abuse of office, a list of specific conflicts is set forth, which are proscribed. These include using public office to benefit a member of the household, soliciting or accepting compensation for performing official duties, and using public equipment or facilities for private or campaign purposes.

The conflicts section of the bill sets forth those circumstances under which a public official cannot act, without violating the law. This section however does contain an escape clause for both public officials and officials of municipalities. By disclosing the conflict, and in some cases doing so in writing, the official can take action without breaking the law.

The remainder of the bill sets out the structure of the Commission that will administer the law. The existing A.P.O.C. is given the responsibility for enforcement and administration. Of note is the power to issue an advisory opinion at the request of a public official, as well as the power to issue a determination that a wilful violation of the conflicts law has occurred.

Finally it should be noted that municipalities may avoid coverage of this law by adopting "substantially similar" standards of conduct within one year of the effective date of this bill, which is July 1, 1983.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

December 3, 1982

Hon. Jay S. Hammond
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Re: Conflict of interests
Our files: 366-255-83, 366-286-83,
A66-393-81, J66-457-81

Dear Governor Hammond:

I. INTRODUCTION

Seven situations have been brought to our attention which require analysis of the law of conflict of interests. We address this opinion to you because of the statewide importance of these questions and because of the profound implications of our remarks for all officers and employees of state government.

At the outset we must emphasize our key theme. The fact that there may be no conflict of interests statute that makes a particular course of conduct criminal or otherwise improper does not mean that it is legal. A transaction may not violate Alaska's criminal conflict of interests law, AS 39.50.-090; it may not even violate any one of a dozen civil statutes which prohibit conflicts of interests in specific agencies; yet it may still be illegal. By this opinion, we hope to make state officers and employees aware of an ethical code which is not in

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the Alaska Statutes but which is in force in Alaska: the common law. Unless and until the legislature puts a different body of enacted law in its place, the common law of conflict of interests, as declared by the courts, prescribes the standards of conduct which must be followed by all state officers and employees.

The common law provides, generally, that public officers and employees are trustees of the people, and as such they are forbidden to have outside interests which conflict with that trust; they not only may not, as public officers, make decisions to benefit their own private businesses (or influence other public officers to do so), but they must avoid even the appearance that they have engaged in self-dealing or attempts to influence official decision-making for their private advantage. Where there is the fact or appearance of impropriety, the courts will declare the contract, transaction, or decision void unless a statute permits the action in question, and this result cannot be avoided by the expedient of letting a "disinterested" colleague or subordinate make the decision.

The questions which prompted this opinion are related below. Our analysis follows thereafter.

First, may a legislator, or his or her company, contract with the state to provide the state with goods or services? The answer is no.

Second, may a legislator, state officer, or state em-

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ployee receive a loan from the state? The answer with respect to educational and residential loans is a qualified yes. Because educational and residential loan programs have relatively rigid requirements and loan ceilings, there is much less opportunity for improper influence; thus, state legislators, officers, and employees may receive such loans. However, it would be incumbent upon the applicant/lendee to insure that no one takes any step which might be viewed as an attempt to influence the administrators of the program in their evaluation of the applicant/lendee's application and their administration of the loan. Commercial loans are much more questionable transactions which we will discuss below.

Third, may a legislator vote on a bill which will inure to the financial benefit of the legislator? The answer is yes, unless the legislator's interest is peculiarly personal, such as when the bill benefits only a tiny class of which the legislator is a member, or when the bill concerns a project on which the legislator, or the legislator's company, is a contractor.

Fourth, may a director of a state corporation, board, or commission which is governed by no specific conflict of interests statute hold that position if he or she is also an officer, manager, or large stockholder of a private company which has entered into contracts to provide the state with goods or services? If the director's company has a contract with an agency of state

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government different from the agency in which the director serves, and if the likelihood that the two agencies will interact on other than routine, ministerial matters is small, there would be no conflict. If, however, the director's company has contracts with the agency in which the director serves, the director must divest himself of his private holdings or resign his directorship; otherwise, any contracts his company executes with that agency would be void.

Fifth, may an officer of the Division of Minerals and Energy Management of the Department of Natural Resources (DMEM) own a mineral claim, an interest in a mine, or an interest in the products of a mine on land under state jurisdiction? Ownership of such interests is not prohibited under AS 27.05.010 unless DMEM is engaged in an "investigation" described in AS 27.05.010 -- 27.05.070. However, the common law does prohibit the ownership of such interests: A conflict of interests would exist because the officer (or the officer's subordinates) would be required to review and approve the officer's filings with DMEM concerning the officer's mining interests. In addition, the officer would have a substantial voice in the department's land use classifications, which could inure very much to the officer's benefit were he an actual or potential investor in mineral claims on land subject to state regulation.

Sixth, may an inspector in a state regulatory agency

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sell the right to use a process the inspector developed and patented to companies whose plants he inspects? The answer is no. Neither may that inspector obtain a state grant to test the process in plants which he inspects.

Seventh, may a person with an interest in a business that has a contract with the state be a member of the board of the Alaska Resources Corporation (ARC)? The answer is a qualified yes. A member is forbidden to acquire any conflicting interest after joining the board. AS 37.12.065(b). Concerning interests which a member holds and held before joining the board, there are two answers: First, if the contract is with an agency other than ARC, and if that other agency has only routine, ministerial contacts with ARC, there is no conflict. Second, if the contract is with ARC, the board member must abstain from voting and take no formal or informal part in discussions of ARC's policies or actions toward the business in which the member has an interest. Id.

II. THE ROLE OF THE ATTORNEY GENERAL

The attorney general is the chief legal officer of the state and "the legal advisor of the governor and other state officers." AS 44.23.020(a). As such, he is duty bound to assist the governor in "the faithful execution of the laws." Alaska Const., art. III, § 16. These laws include the common law of

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conflict of interest, see AS 01.10.010; the constitutional requirements that "[no] appropriation of public money [be] made ... except for a public purpose," and that "[n]o obligation for the payment of money shall be incurred except as authorized by law." Alaska Const., art. IX, §§ 6, 13; and AS 39.50 concerning conflicts of interests.

The attorney general performs this function by prosecuting legal actions, AS 44.23.020(b)(1), and furnishing written legal opinions. AS 44.23.020(b)(4). The attorney general is also empowered to bring an action to recover state funds which were illegally paid or paid to a person not authorized to receive them. AS 37.10.090. Short of court action, the attorney general may advise against an agency course of action which he believes is against the public interest. See Mobil Oil Corp. v. Kelley, 353 F. Supp. 582, 586 (S.D. Ala. 1973), aff'd 493 F.2d 784 (5th Cir. 1974). Indeed, the attorney general is duty bound, in the service of the public interest, to give such advice, even in the face of objections from client agencies, officers, or legislators. D'Amico v. Board of Medical Examiners, 520 P.2d 10, 20 (Cal. 1974)(In Bank); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974). The first allegiance of the attorney general is to the public interest. Id.

In this opinion, we advise on various courses of action. This advice is based upon our best reading of the case law

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and our conviction that, were the specific situations presented to a court in a lawsuit, particular outcomes would follow. This is not a certain prospect: as will be made clearer below, we are, with few exceptions, dealing not with specific statutes but with the common law, a general and changing body of principles developed and applied by courts over the centuries. Our conclusions are based upon what we believe a court would do given those general principles, prevailing public policy, the public interest, and the continuing silence of the legislature in this area generally. Thus, this memorandum is a prescription for agency action in the face of conflicts of interests not addressed by statute, and a guide for legislative action should the agency or court resolution be unsatisfactory to the legislature.

State agencies, officers, and employees should heed advice in this memorandum until ordered to do otherwise by a court. See Gray v. Main, 309 F. Supp. 207, 220 (M.D. Ala. 1968); State v. District Court of Mayes County, 440 P.2d 700, 707 (Okla. 1968).

III. STATUTES AND COMMON LAW PRINCIPLES

There are more than a dozen provisions dealing with conflict of interests scattered through the Alaska Statutes. Only AS 39.50 applies to state officers generally. One of that chapter's purposes is "to discourage public officials from acting

upon a private or business interest in the performance of a public duty," AS 39.50.010(a)(1), and it declares that "public office is a public trust which should be free from the danger of conflict of interest." AS 39.50.010(b)(1). Its main feature is its disclosure requirements. E.g., AS 39.50.020. The chapter's only prohibitions are contained in AS 39.50.090, subsection (a) of which provides:

No public official may use his official position or office for the primary purpose of obtaining financial gain for himself, or his spouse, child, mother, or father, or business with which he is associated or owns stock.

Violation of this subsection is a crime. AS 39.50.090(d).

Other Alaska conflict statutes incorporate AS 39.50 by reference, 1/ or impose other limitations. 2/ The other limitations range from a simple prohibition on the employment of close relatives, AS 14.14.140, to a duty to divest oneself of the conflicting interest or suffer forfeiture of one's office. AS 42.-07.061.

The statutes mentioned above speak only to a relative handful of government agencies, boards, corporations, and commissions. 3/ In some cases, the statutes prescribe rules of conduct

1/ AS 24.55.310; AS 46.12.090.

2/ AS 08.88.391; AS 14.14.140; AS 18.55.080; 18.55.500; AS 21.-06.040; AS 24.20.291; AS 27.05.020; AS 37.12.065(b); AS 38.06.-035; AS 42.07.061; AS 44.07.330; and AS 44.88.180.

3/ See nn.1, 2, supra.

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for officers of state agencies, but offer no guidance for employees. 4/ There remain hundreds of conflict situations to which no Alaska conflict legislation 5/ pertains except as AS 39.50. 6/

It is well-settled in the federal courts, particularly with regard to criminal sanctions for bribery and fraud, that the existence of criminal statutes (such as AS 39.50.090) does not extinguish the common law rights and remedies which would ordinarily exist. United States v. Kearns, 595 F.2d 729, 732-733 (D.C. Cir 1978); Continental Management, Inc. v. United States, 527 F.2d 613, 620 (Ct. Cl. 1975), and cases cited therein. We believe that the same rule would apply in Alaska: AS 39.50 will not be held to repeal, amend, or preempt the common law of conflict of interests which will apply "unless and until the Alaska legislature acts to modify it." Surina v. Buckalew, 629 P.2d

4/ Compare AS 21.06.040, AS 27.05.020, and AS 44.07.330 with AS 44.88.180, AS 46.12.090, and AS 48.55.500.

5/ Personnel Rules 13 12.0 and 13 16.0 apply to most executive branch personnel and prohibit conflicts of interests in terms which essentially incorporate the standards of the common law.

6/ AS 39.50 governs the conduct of very few persons. AS 39.50.090(a)(1) limits the chapter's scope by excluding officers or employees below the director level from the coverage of the provision. There remain outside the coverage of the Act deputy directors in the executive branch, assistant attorneys general, appointive officers of the legislative branch (including legislative assistants), non-judicial officers of the court system, and all subordinate employees of these agencies. Thus, fully 90 percent of state officers and employees are beyond the reach of the criminal sanctions in AS 39.50.090(a).

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969, 973 (Alaska 1981). Thus, a person may act illegally without violating the criminal law, and serious non-penal consequences may follow.

Neither is it possible to formulate a rule of administrative decision for a given situation by analogy, based upon legislative pronouncements with respect to other agencies, for no consistent policy is apparent from an examination of the various statutes. One statute lays down no other rule than that school boards may not hire close relatives of the board members, AS 14.-14.140, and even that rule may be waived by the commissioner of education. Id. Thus, on local school boards, were it not for the common law rule and AS 39.50.090(a), a board member could let a contract to himself. 7/ In another agency, the law provides that a board member may not vote on a contract with his own firm or one in which he holds a "direct" ownership interest, but he need not divest himself of the interest. AS 44.88.180. In still other agencies, such interests are prohibited and the officer must dispose of the interest or forfeit the office. AS 42.07.-061. See AS 21.06.040; AS 24.20.291; AS 27.05.020; AS 38.06.035. From this range of solutions, no overriding general policy prescription is apparent for the guidance of public officers and employees.

7/ A stricter rule applies to regional school boards. AS 14.-08.131.

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* * * *

Most conflict of interests situations in Alaska are covered not by statute but by the common law. Judge Wickersham described the common law in In Re Burkell, 2 Alaska 108 (D. Alaska 1903):

The common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority on any express and positive declaration of the will of the Legislature (1 Kent's Com. 533); a system of elementary principles and of general judicial truths which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanic arts and the exigencies and usages of the country (Pierce v. Props. Swan Point Cemetery, 10 R.I. 227, 14 Am. Rep. 667).

Id. at 117. See Howard v. Pfeifer, 443 P.2d 39, 44 (Alaska 1968). In Alaska, the common law controls judicial decision-making "unless and until the Alaska legislature acts to modify it." Surina v. Buckalew. See AS 01.10.010.

The common law of conflict of interests is clearest in the case of a contract made by a public officer who will, as a private person, benefit from the contract. The most comprehensive discussion of the typical situation, the controlling rule, and the underlying public policy is found in Beebe v. Supervisors of Sullivan County, 19 N.Y.S. 629 (App. Div. 1892), aff'd 37 N.E. 566 (N.Y. 1894):

At the time of his employment [by the board of supervisors as the board's attorney in several

collection matters], the defendant Anderson was a member of the board of supervisors. They were the agents of the county of Sullivan, and as such had no right to enter into contracts for their own benefit with their principal, the county of Sullivan. They are trustees, and have no right to enter into contracts with each other at the expense of those for whom they are acting, and whose interests they are bound to guard and protect. The illegality of such contracts does not depend upon statutory enactments. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers; and this principle applies with particular force to members of a board like the board of supervisors, which not only makes the contract, but subsequently audits the bill.

But it is said that in the case before us the supervisor who was employed did not vote on the question of his own employment, or upon the audit of his bill. That does not cure the evil. The influence upon fellow members is the same. His constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act. He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests. He is a part of the board of supervisors. Its act is his act; and he cannot, as a supervisor, make a contract with himself as a private citizen.

Id. at 630 (citations omitted).

IV. THE PROCESS OF COMMON LAW ADJUDICATION

In the absence of legislation, it is the task of the courts, with the assistance of the attorney general, other mem-

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bers of the bar, litigants, and amici curiae, to apply common law principles and policies articulated by the Beebe court and hundreds of other courts and commentators before and since. The task is a difficult one because, with the exception of the self-dealing public officer situation just described, the law is not settled; the courts must reason from the situations already addressed by the courts to solutions for new questions presented.

For this undertaking the common law is well-suited, as Chief Justice Lemuel Shaw noted in his classic description of the process:

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adopted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases which fall within it.

....

Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.

Norway Plains Co. v. Boston & Main Railroad, 1 Gray (67 Mass.)

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263 (1854), reprinted in Hart and Sacks, The Legal Process: Basic Problems In The Making And Application Of Law (1958) 386-395. 8/

It is our task to begin with the legislative solutions to determine if any statute answers any of the conflict questions posed. Failing that, we must turn to the common law and, beginning with the first principles, reason to the conclusion the courts would likely reach given the facts, judicial precedent in analogous cases, and prevailing public policy.

V. LEGISLATOR CONFLICTS

Two questions are presented concerning potential legislator conflicts: First, may a legislator, or his or her firm or business, contract with the state to provide the state with goods or services? Second, may a legislator receive a state loan?

The first question does not concern classic self-dealing, the letting of contracts by an official to himself or his relatives, associates or company. It is a different problem described in the following terms:

There is a great possibility that an official who has no immediate administrative connection with

8/ Thus, even if there is no statute and not one case addressing the situation before a court, that court may, by the process of common law adjudication, formulate a wholly new answer to settle the dispute which gave rise to the lawsuit. See Howard v. Pfeifer, 443 P.2d at 44.

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the contract may be sufficiently motivated by his personal interest to exert whatever influence his position allows to pressure the public official who in fact has a direct responsibility concerning the contract to favor that personal interest. In this way, an official without a personal interest in the contract acquires a conflicting interest in the sense that he must choose between appeasing the pressuring official and properly discharging his duties in the matter.

Experience indicates the harm that may flow from [this situation]. Contracts may be awarded that are over-priced or unnecessary, or the performance rendered under the contract may be inferior, all because of official favoritism, compromise or intentional oversight. Even if the abuse is nothing more than partiality in awarding a contract, it may import an aspect of unfairness into public administration, engendering popular disrespect for government.

Note, Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation, 107 U. Pa. L. Rev. 985, 987-988 (1959). See Eisenberg, Conflict of Interest Situations And Remedies, 13 Rutgers L. Rev. 666, 686 (1959).

There are no cases which squarely hold, as a matter of common law, that a legislator, having no formal, institutional connection with the letting or oversight of a contract, can or cannot contract with the state. The archetypical situation arises in the municipal context where principles of separation of powers do not apply and assemblymen or councilmen act administratively as well as legislatively. Thus, an assemblyman might, in a private contractor capacity, offer goods or services to the city, which goods or services are accepted, inspected, super-

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vised, and compensated by the assembly on which the contractor sits. It is the virtually universal rule at common law that such a transaction is illegal, even if the assemblyman-contractor abstains and takes no part in the review and compensation of the performance. E.g., Beebe v. Supervisors of Sullivan County, quoted supra. While some commentators have declared that the common law rule has been extended to bar such transactions if any public officer or employee, regardless of their official connection with the transaction, is the private contractor, 9/ a close analysis of the cases decided to date and due regard for the difference between holding and dicta belie the claim. 10/

Many states have statutes or constitutional provisions which prohibit legislators or other public officers from contracting with the state. A number of cases have declared that such provisions are declaratory of the common law, i.e., even if there were no statute, the same rule would apply by force of the common law. One case is Schultze v. City of New York, 136 N.Y.S.

9/ E.g., Note, Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034, 1039 (1961).

10/ Kaplan and Lillich, Municipal Conflicts of Interest: Inconsistencies and Patchwork Prohibitions, 58 Col. L. Rev. 157, 158-174 (1958). We were guilty of uncritically accepting the conclusion of the Virginia Law Review note writer in our formal opinion of August 8, 1979; fortunately, it made no difference in the result in that opinion since the individual in question was an officer with authority to vote on the award of contracts and review the contractor's performance.

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715 (App. Div. 1912), aff'd 106 N.E. 1042 (N.Y. 1914). Schultze was a duly appointed coroner's physician whose duty it was to perform autopsies and give evidence at coroners' inquests. He was called upon to assist the district attorney in a homicide case involving a decedent whom Schultze had not examined; he acted as an expert consultant. He submitted a bill which was disapproved under a charter provision which forbade officers to become interested, directly or indirectly, in performance of any contract or work to be paid for from the city treasury; a violation was a misdemeanor, the violator forfeited his office, and the contract was voidable. The court held that the city was not required to pay the bill, and observed that "[t]hese prohibitions are merely declaratory of the common law." Id. at 718. Accord, Marjohn Realty Co. v. City of Long Beach, 204 N.Y.S. 53, 55 (Sup. Ct. 1924), aff'd 206 N.Y.S. 933 (App. Div. 1924).

The case of Norbeck & Nicholson Co. v. State, 142 N.W. 847 (S.D. 1913), involved a legislator who contracted with the state to drill a well. The contract was voided on the basis of a constitutional provision which prohibited legislators to be directly or indirectly interested in any state contract. However, there followed extremely broad dicta:

A member of the state Legislature, by virtue of his office, stands in a fiduciary and trust relation towards the state; in other words, he is the confidential agent of the state for the purpose of appropriating the state's money in payment of the lawful contractual obligations of the

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state, and it seems to be almost universally held that it is against sound public policy to permit such an agent, or any agent occupying a like position, to himself be directly or indirectly interested in any contract with the state or other municipality, during the period of time of the existence of such trust and confidential relationship. The private interest of such an agent should not become antagonistic to his public duty.

Id. at 849.

On the other hand, at least two courts have described statutory prohibitions of such contracts as new legislative rules foreign to the common law. In re Opinion of Justices, 82 A. 90, 93 (Me. 1911); Lindberg v. Benson, 70 N.W.2d 42, 45 (N.D. 1955). However, the Lindberg court went on to state in forceful terms the very public policy considerations which militate in favor of a common law rule in the absence of legislative action:

The purpose of the enactment was to extend the ancient common-law rule that no state officer may be interested in any contract which he has a voice in letting (which rule is expressed in many statutes of this state) by providing a more comprehensive legislative rule, founded in public policy, which would take away from legislators as a class any personal incentive to increase their opportunities to make profitable contracts by their votes in the legislature, or to use their influence as legislators in securing contracts or the approval of the work done under them. The members of the Legislative Assembly exercise a high degree of control over the fiscal affairs of the State and its subdivisions. They regulate assessments and tax levy limits. They authorize bond issues and, for the State, they make all appropriations. By enacting this initiated measure the people have attempted to remove from the legislators temptation to venality in the exercise of their legislative functions. Many states have constitutional or legislative provisions which are similar in

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nature and which have remained in force unchal-
lenged for many years.

Id. at 45-46.

In two recent cases, courts have held that legislator attorneys may not represent persons in litigation against their city or state. In Georgia Department of Human Resources v. Sistrunk, 291 S.E.2d 524 (Ga. 1982), the Sistrunks were represented by Hill, a state legislator. The department invoked fiduciary principles and a Georgia constitutional provision which declared that "[p]ublic officers are the trustees and servants of the people, and at all times are amenable to them." The court expressly noted that this was not analogous to the classic self-dealing situation, since Hill was not representing both the Sistrunks and the state. Id. at 526.

The Sistrunk court framed the issued in the following terms:

All public officers, within whatever branch and at whatever level of our government, and whatever be their private vocations, are trustees of the people, and do accordingly labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts.

....

May one trustee of the people, as attorney and for his own financial gain, negotiate on behalf of another for a favorable official dispensation at the hands of another trustee of the people?

Specifically concerning legislators, may one

trustee of the people -- in whose office are vested the powers of enhancement, diminution, and destruction of the office of another trustee of the people -- as attorney and for his own financial gain act in a manner to hinder or frustrate the discharge by such other trustee of the duties of their common trust?

No.

Id. at 528.

It bears noting that the court in Sistrunk based its decision on a Georgia constitutional provision and not on the common law. However, that provision is so general in its terms and was analyzed with such close attention to common law trust principles that the Sistrunk holding has significance independent of the constitutional language. A similar provision appears in Alaska law. 11/

In a California case, People v. Municipal Court of San Diego Judicial District, 138 Cal. Rptr. 235, 238 (Cal. App. 1977), the court barred a city councilman-attorney from representing a defendant being prosecuted by the city. The decision appears to rest primarily on the ethical standards of, and trust reposed in, members of the bar, rather than on any statutory or constitutional provision. 12/

11/ Compare the Georgia constitutional provision quoted in the text with AS 39.50.0.0(b)(1), which provides "public office is a public trust which should be free from the danger of conflict of interest."

12/ However, the court did, in passing, compare the councilman's

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A legislator contract also raises novel and troubling questions of separation of powers. The federal courts have, in perhaps a dozen cases, condemned the practice of interference by individual legislators or committees in executive branch decision-making. The leading case is Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952 (5th Cir. 1966). In Pillsbury, a decision of the FTC in its quasi-judicial capacity was invalidated because of intense Congressional committee pressure while the decision was pending.

Much less pressure was required to invalidate the decision at issue in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied 439 U.S. 1052 (1978). The court ruled that a letter sent by Congressman Dingell to the Secretary of the Interior, in effect urging him to deny several applications for "native village" status, compromised the Secretary's impartiality in a quasi-judicial proceeding; the court ordered reconsideration of the applications by the new Secretary. In other cases, however, explicit and extreme threats were said to be required before invalidation would occur. E.g., D.C. Federation v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972)(threat of loss of appropriation for unrelated project); Texas Medical Association v. Mathews, 408 F.

12/ cont. . . .
representation to conduct by "[a] local agency officer or employee" which is statutorily proscribed as "incompatible." Id. at 238.

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Supp. 303 (W.D. Tex. 1976)(threat of loss of job).

Here, as in the federal legislator influence cases, the legislators would be placing themselves in a non-legislative, i.e., administrative or quasi-judicial, arena. But the kind of legislator pressure which caused the court in Pillsbury to invalidate the FTC decision is not involved here. Still, the federal legislator interference cases lead us to conclude that a court would not require a showing of direct threats where a legislator acted on behalf of himself rather than on behalf of a constituent.

The remarks of the Alaska Supreme Court in two opinions bear on this inquiry. Both cases, Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), and Warwick v. State ex rel. Chance, 548 P.2d 284 (Alaska 1976), involved legislators who held or wished to hold an office of state government outside the legislative branch.

In Begich, the court observed generally:

Alaska's constitutional prohibition against members of our three separate branches of state government holding any other positions of profit under the State of Alaska reflects the intent to guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers in regard to the exercise by these governmental officials of the executive, judicial, and legislative functions of our state government. The rationale underlying such prohibitions can be attributed to the desire to encourage and preserve independence and integrity of action and decision on the part of individual members of our state government.

441 P.2d at 35.

In Warwick, the court considered Alaska Constitution, article II, section 5, which forbids a person to accept a government post which was created, or the salary for which was increased, while that person served in the legislature. The court observed:

There is little disagreement as to the purpose of the type of constitutional provision under consideration here. Although the exact language varies from state to state, all such provisions are aimed at a common goal: to remove improper motives from considerations of legislators in voting for increased salaries or the creation of new offices. In one often-cited quotation, Justice Story, commenting upon a like provision in the Constitution of the United States, said:

The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness.

This type of constitutional provision is designed not only to stop overt trafficking in offices, but also to prevent less obvious influences on a legislator's actions:

[T]his constitutional provision was enacted through fear that a legislator might be, either consciously or unconsciously, influenced by selfish motives when voting for or against a bill.

Another purpose has been said to be the elimination of even the suspicion that legislators were acting with improper motives. As in the case of the judiciary, it is important that the legislature not only avoid impropriety, but also the appearance of impropriety.

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548 P.2d at 387-388 (emphasis added by the court, footnotes omitted).

Both the Alaska Constitution and AS 39.50 were adopted by popular vote. From these electoral expressions it is clear that Alaskans view as morally opprobrious public officials who use public office for private gain. Indeed, even the appearance of impropriety is a circumstance to be avoided. Warwick at 388, quoted supra; Falcon v. A.P.O.C., 570 P.2d 469, 477 (Alaska 1977). See AS 39.50.010(b)(1) ("public office is a public trust which should be free from the danger of conflict of interest").

The size of the legislature and the executive branch is also an important consideration. There are only 60 legislators, all of whom are likely well-known to the relatively few departmental commissioners, deputy commissioners and directors. Most of these persons work together in close proximity in Juneau for five months of the year.

Our legislators have a keen interest in the budget process. Those legislators who sit on the finance committees are usually familiar with the thousands of pages of budget documents in the minutest detail and make allocations in multi-billion dollar budgets in increments of thousands of dollars. Any legislator, and especially a member of the finance committees or the free conference committee on the budget, can have an enormous impact on the budget of a state agency. Recent legislative ses-

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sions have seen both the creation and destruction of agencies at the behest of single or a few legislators who took the initiative to bless or gut the agencies. In recent years, the legislature has also taken to designating its own non-governmental agents to carry out state programs. E.g., p. 25, § 51, ch. 120, SLA 1980.

Alaska is a very small state, with a small pool of talented people from which to draw its leaders. Many of the most talented have extensive commercial enterprises which may do business with the state. Unreasonable barriers should not be placed before these most promising aspirants to public service. Yet, with the legislature tending toward a half-time profession, and with the great potential for conflicts of interests with multi-billion dollar budgets and pervasive government involvement in private commerce, the courts might well be convinced that the only solution in the public interest is a common-law prohibition. This would be all the more compelling in the absence of evidence that aspirants to public service are being dissuaded by a common law rule prohibiting legislator contracts, and in the absence of legislative action in this area. Indeed, such a common law prohibition might be a telling experiment for the information of the courts and the legislature.

As we have already noted, there is no case authority directly on point pro or con, but the foundation is there, in Beebe and its progeny, in Begich, in Warwick, and in AS 39.50,

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upon which a common law rule against legislator contracts could be constructed. Any voter could bring an action to void such contracts 13/ and we would likely support that result in the absence of a compelling contrary justification. 14/

It is therefore our conclusion that a contract between a state agency, 15/ on the one hand, and a legislator, a business owned or operated by a legislator, or a business in which the legislator is an officer, manager, or large stockholder, on the other hand, would be illegal under the common law. 16/

* * * *

The second legislator conflict situation concerns legislators (and some state officers and employees) who apply to re-

13/ See AS 39.50.100.

14/ Were a legislator contractor the only possible source for particular goods or services, we might support an exception. Similarly, an exception might be justifiable if a legislator proposed to provide non-unique, "off-the-shelf" goods (e.g., office supplies, motor oil) where price would be virtually the only variable. Exceptions are not supportable where the transaction requires the exercise of judgment by an administrator or an extended period of performance by the legislator. See State v. Yoakum, quoted infra.

15/ A court might well go further and say that legislators may not, as private contractors, do business with any entities (state agencies, municipalities, nonprofit corporations) whose projects are financed with state funds.

16/ At this time, we offer no opinion on situations where the legislator is an employee of the contracting firm, or where a close relative of a legislator is an officer, manager, large stockholder or employee of the contracting firm.

ceive loans from the state. The only case which offers even brief analysis of the public policy considerations which would underlie an exception to the common law rule is State v. Yoakum, 306 S.W.2d 39 (Tenn. App. 1957). In explaining why a loan to a school board of which the president of the lender bank was a member did not violate a statutory prohibition of a direct or indirect interest in a public contract, the court impliedly undercut any common law prohibition:

A loan of money, however, is unlike a contract for goods or services involved in all our reported decisions. Because they involve questions of value, contracts relating to goods and services provide opportunity for imposition upon the public. In the loan of money the law fixes the maximum rate of interest and no question of value is involved. Only a rate of interest below the maximum fixed by law can be the subject of negotiation. In the loan here involved it is not insisted that such a short term loan could have been made elsewhere at a lower rate of interest and, as we have seen, the loan actually resulted in a loss to the Bank. To apply the statutes to such a situation, it seems to us, would be going beyond their meaning and purpose and result in great inconvenience in small communities where bank officers and stockholders frequently occupy positions of public trust and authority.

Id. at 40.

While the analysis is terse, Yoakum provides a basis for distinguishing the loan situation from other contracts between the state and legislators. However, we can say this with confidence only in the cases of loans for tuition or personal residences, where loan ceilings are relatively low, eligibility

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standards are fixed, and the range of administrator discretion subject to influence and abuse is small. 17/ Commercial loan programs, where ceilings are much higher and where evaluation of credit-worthiness is more subjective, may yet present conflicts of interests where the loans are made to legislators.

However, there is potential for influence or abuse in any loan program, especially when foreclosure or other enforcement actions must be considered. Thus, whether the loan is educational, residential, or commercial, a conflict of interests may arise, and state legislators (and some state officers and employees) and their agents, must act with the greatest circumspection and propriety in dealing with the agency concerning the loan or any other matter. The agency, in order to maintain public confidence in the fairness of its program, should brook not even a hint of interference and should report questionable communications to the attorney general.

* * * * *

We view the third question, concerning the propriety of a legislator voting on a bill which will financially advantage the legislator, in a different light. It is clear in the case law that, when a legislator acts in a legislative capacity, that

17/ Even a competitive bidding procedure is subject to greater influence and abuse where the contracting officer has discretion in evaluating the responsibility of the bidders. AS 39.05.230. See AS 36.98.040 -- 36.98.050.

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action can be challenged only when the legislator's conduct is "tainted with fraud, or palpably not in the service of the public interest, or otherwise a clear perversion of power." Rollins v. Carter, 69 A. 777 (N.H. 1908); Pyatt v. Mayor of Dunellen, 89 A.2d 1, 3 (N.J. 1952); MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 522. However, when a legislator acts outside the legislative sphere, with respect to a particular transaction or adjudication in which the legislator is interested, a challenge may be sustained if there is found a "private interest at variance with the impartial performance of ... public duty." Pyatt; Rollins. See Burton v. United States, 202 U.S. 344, 366-367 (1906); Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952, 964 (5th Cir. 1966); Note, Conflicts of Interest of State Legislators, 76 Harv. L. Rev. 1209, 1214, n.38 (1963)("[I]mproper activities in other capacities should not be protected merely because the impropriety arises from the fact that the actor is also a legislator.").

Therefore, where a legislator votes on a bill which will financially benefit the legislator as a member of the public generally, e.g., personal income tax repeal, or where a legislator votes on a bill which will financially benefit the legislator as a member of a numerous though limited class of Alaskans, e.g., bank deregulation or corporate income tax repeal which will benefit shareholders, the legislator's vote may not be challenged. See the memorandum opinion from Kenneth E. Vassar to Wilson L.

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Condon dated April 1, 1982.

Where, however, the class of beneficiaries of the legislation is tiny, especially where the bill relates to a project for which the legislator is a private contractor or affiliated with a private contractor, the legislator must disclose the conflict of interests and the legislative body should bar the legislator from voting. See MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 522 (1979).

VI. OFFICER CONFLICTS

Four potential conflicts of interests by executive branch officers have been presented for our review. We will treat them in turn.

It is first asked whether a director of a state corporation, board, or commission which is governed by no specific conflict of interests statute has a conflict if he or she is an officer, employee, or large stockholder of a company or firm which has contracts with the state to provide goods or services. If there is a conflict, what remedial steps need be taken?

The question is answered by the Beebe case, quoted supra, and the accompanying discussion: a conflict clearly does exist if the person with the potential conflict is associated with both parties to the contract, i.e., the state agency procuring the goods or services and the private contractor providing

them. 18/ If, however, the person with the potential conflict works for a state agency with no contracts with the private contractor with which the person is associated, there would be no conflict. 19/

The Beebe case makes it clear that public service demands total fidelity to the public interest at all times. A public servant, faced with a conflict of interests by reason of private financial associations may not pass official decision-making responsibility on to a colleague or subordinate who may share the same prejudice or be subject to influence. "He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests." Id. at 630. Faced with a conflict, the person must either resign his or her position, or forego the private opportunity to do business with the state.

18/ If the person is only an employee, there may not be a conflict. Those situations must be addressed on a case-by-case basis.

19/ We must qualify this last mentioned conclusion by noting that a conflict might arise even if the person was not an official in the contracting state agency if the person nevertheless has extensive contacts with the contracting state agency. For example, certain officers of the Department of Law and the Office of the Governor, though not within the Department of Administration, may have extensive contacts with, and considerable influence in, the Department of Administration. A person with similar "interdepartmental" duties might be in a conflict situation if he or she entered into an agreement as a private contractor with the other department.

* * * *

It is next asked whether an officer of the Division of Minerals and Energy Management (DMEM) may hold a mining claim, an interest in a mine, or an interest in the products of a mine on land under state jurisdiction. AS 27.05.020 provides:

In conducting the inquiries and investigations authorized by AS 27.05.010 -- 27.05.070, no officer or employee of the department may have any personal or private interest in a mine or the products of a mine under investigation, or accept employment from a private party for services in the examination of private mineral property. Nothing in this section prevents employment by the department, in a consulting capacity or in the investigation of special subjects, of an engineer, or other expert whose principal professional practice is outside his employment by the department.

The syntax of AS 27.05.020 is not an aid to understanding. A thoughtful reading of the provision reveals that it is not any officer or employee of the department who is prohibited from holding an interest in a mine under investigation; only officers and employees "conducting the inquiries and investigations authorized by AS 27.05.010 -- 27.05.070" are so restricted. We are informed by the director of DMEM that that division conducts virtually none of the "investigations" in question; those matters are within the jurisdiction of the Division of Geological and Geophysical Surveys. However, there is still the common law.

DMEM is the state agency which regulates the acquisition of mining claims and leases on lands under state jurisdiction, see AS 38.05.185 -- 38.05.280; 11 AAC 86, and issues mis-

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cellaneous land use permits. See 11 AAC 96. DMEM also has a representative on the regional planning teams which make recommendations to the commissioner on state land use classifications. See AS 38.04.065; 11 AAC 55.

As the regulatory agency for mining claims, DMEM receives the filings of persons who stake mineral claims. See AS 38.05.195. It must review the filings to verify that there has been a discovery, see 11 AAC 86.105, and that the claim has been properly staked. See 11 AAC 86.205 -- 11 AAC 86.215. On an annual basis, DMEM receives additional filings from each claim owner attesting to the performance of statutorily-required annual labor on the claim, see AS 38.05.210; 11 AAC 86.220, and must verify that the claimed labor meets prescribed requirements. Id. A major component of the DMEM mining section's effort and budget is devoted to this "adjudication" of mineral claims.

In this light, we believe that an ownership interest in mineral claims (or in a company which owns mineral claims) on lands under state jurisdiction creates a common law conflict of interests on the part of officers and employees of DMEM. Given the size of the mining section of DMEM (25 persons) and the likely close working association of all the officers and employees, it is probable that a court, as a matter of common law, would forbid any person in DMEM to own a mineral claim on lands under state jurisdiction since the opportunity for influence is so evi-

dent. It is even clearer that a court would forbid a supervisory officer to own such a mineral claim since it would be that person's subordinate who would review the sufficiency of the claim and the annual labor affidavit. 20/ And, as we noted, supra, at page 31, the conflict is not cured by removing oneself from the review of one's own filings: the public has the right to demand that a state officer bring his or her skills to bear in all matters which the office calls upon him or her to consider.

DMEM is one of only three agencies principally responsible for overseeing mineral exploration and mining activities on lands under state jurisdiction. DMEM personnel cannot be both regulators and regulated. If they wish to serve in DMEM, they must forego this relatively narrow range of investment opportunities. The common law requires officers and employees in DMEM who have interests in mining claims to dispose of those interests with all deliberate speed, or resign. 21/

20/ DMEM officers and employees also have access to confidential geological, geochemical, geophysical, and airborne surveys. See AS 38.05.240. Were they permitted to own mineral claims, they might have a distinct advantage over other prospectors, miners, and investors. This is another aspect of the conflict of interests inherent in the situation.

21/ The Department of Law has had the full cooperation of DMEM officers and employees in this inquiry; indeed, it was a DMEM officer with an interest in mineral claims who first asked our advice on this matter. At that time, we informally advised him that there was no conflict, and he ordered his affairs accordingly. Thus, it was our erroneous advice, and no wrongdoing by the DMEM officer, that allowed the conflict situation to develop.

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* * * *

It is next inquired whether a Department of Environmental Conservation (DEC) inspector of seafood processing plants may sell the right to use a process he developed and patented to companies whose plants he inspects. The answer is clearly no.

The evil of such an arrangement is patent: seafood processors might feel compelled to purchase the right to use the process or suffer the wrath of the seller when next he inspects their plants.

We hasten to add that there is not the slightest suggestion that the particular inspector involved has ever acted improperly; it is the appearance of impropriety which condemns these proposed transactions. If the inspector wishes to market his process, he must resign or sell his rights in the process to another who may market it. 22/

The same inspector also wishes to apply to the Department of Commerce and Economic Development (DCED) for a grant to test his process. Because the grant project would likely involve one or more seafood processors in a cooperative effort to test the process, a conflict of interests on the inspector's part

22/ If the inspector chooses the latter course, he may not reserve any right to receive royalties or license fees; were he to do so, the spectre of influence would again appear since, though he is not personally marketing the process, each seafood processor that used the process would be paying the inspector indirectly.

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would almost certainly arise. In that case, the grant would be illegal. See Newton v. Demas, 258 A.2d 376 (N.J. App. 1969) (municipal engineer had an outside contract with a developer to design a water system; the contract was void because the engineer would have had to review his own design in his official capacity).

* * * *

It is last asked whether a member of the board of the Alaska Resources Corporation (ARC) has a conflict of interests if he or she is associated with a company that has a contract with the state. AS 37.12.065 provides:

(a) Members of the board are subject to the provisions of AS 29.50.

(b) No member or employee of the board may acquire an interest, direct or indirect, in a corporation, company, association, or project owned, controlled, or invested in by the corporation. If a member or employee owns or controls such an interest, he shall immediately disclose the interest in writing to the board and refrain from participating in any manner in any activity relating to that interest.

Subsection (b) modifies the common law as it would apply to ARC. Under the common law, the member could neither acquire a new interest nor keep an old interest in a company doing business with ARC, and this disability could not be cured by abstaining on votes and taking no part in deliberations. Under AS 37.12.065, acquisition is forbidden, but interests owned upon appointment may be retained, so long as the member abstains from

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voting and has no contact, formal or informal, with other members concerning ARC's policies or actions toward the firm in which the member has an interest. This departure from the common law applies only to members and employees of ARC. 23/

VII. CONCLUSION

The common law of conflict of interests is uncharted water for most public officials, including government attorneys. They err when they believe that a public official's conflict can be cured if the official takes no part in the decision in which he or she is interested. They err when they believe that a court will not invalidate a contract if, though a party to the contract has a conflict, it is still a fair price.

The courts take the view that officials have a duty to the public to participate in all the decisions they were elected or appointed to make. The courts ordinarily will not allow an

23/ It was also inquired whether an ARC board member may also be a member of the Alaska Historical Commission. AS 44.27.01, et seq. In view of the clear prohibition on holding "any other state or federal office, position, or employment . . .," AS 37.-12.045(b), we believe the board member must resign from either ARC or the Alaska Historical Commission. This prohibition goes further than the common law; indeed, as applied in this situation, it appears to advance no laudable goal. But it is within the legislature's power, and it does prevent the appearance of conflict of interests in many other situations. If a more refined provision is to be substituted, one which is better able to discriminate between real and imagined potential for abuse, the legislature alone has the power to do it.

Hon. Jay S. Hammond, Governor
366-255-83, 366-286-83,
A66-393-81, J66-457-81

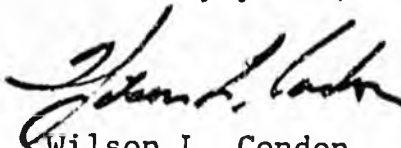
December 3, 1982
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official to decline to make a decision in order that he or she might be free to have the benefit of that decision.

The courts will not allow an official to make a contract with his agency and, when challenged, assert as a defense that the contract was more advantageous to the state than any other offer received.

The common law of conflict of interests aims not only to prevent officials from actually taking unfair advantage of their office. It also aims to eliminate the potential for abuse and the appearance to the public that officials are subject to temptation. For these reasons, the courts have dealt sternly with officials in conflict situations, and they will continue to do so. Unless the legislature formulates another means to sustain the public's confidence that public officials are not benefiting in private from their positions in public, we, and all public officials, must abide by the common law.

Sincerely yours,



Wilson L. Condon
Attorney General

WLC/pjg