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Distributed by: Reps. Kim Elton and Irene Nicholia

## MINORITY REPORT ON H96-02 BY TWO MEMBERS OF HOUSE RULES COMMITTEE

### *THE VIOLATION*

The House Subcommittee of the Select Committee on Legislative Ethics found that Rep. Jerry Sanders violated the Ethics Act by using state funds, legislative staff, state equipment and state facilities for non governmental purposes, including political purposes. During testimony before the House Rules Committee, Rep. Sanders himself admitted to a technical violation (P. 19, House Rules Committee transcript). The subcommittee recommended enhanced sanctions for the violation to the members of the Alaska House of Representatives because of two prior findings that Rep. Sanders violated the Ethics Act and because of his lack of cooperation in the review of the third violation.

*I don't think that he did. If I remember correctly, he was arguing hypothetically*

Five of seven members of the House Rules Committee (Chair Pete Kott, Speaker Gail Phillips, Reps. Al Vezey, Bill Williams, and Brian Porter) found Rep. Sanders did not violate the Ethics Act.

Two members of the House Rules Committee (Reps. Irene Nicholia and Kim Elton) concurred with the ethics subcommittee ruling that Rep. Sanders did violate provisions of the Ethics Act. This report is the finding of the House Rules Committee minority position on ethics report H96-02.

**1) The statutory rules we established to govern legislative conduct are, in this instance, clear.**

The ethics subcommittee found Rep. Sanders violated the Ethics Act by using state resources for a private benefit. That finding is predicated on AS24.60.030 (a)(2):

*A legislator or legislative employees may not . . . use public funds, facilities, equipment, services, or another government resource for a non governmental purpose or for the private benefit of either the legislator, legislative employee, or another person. . .*

The subcommittee noted a thank you letter to a discreet group of active Republicans in his election district during a year in which he ran for re-election did not promote government business but did have the salutary effect of enhancing his image with an active and highly partisan Republican constituency.

The Ethics Act is a recipe for appropriate legislative behavior. It does not proscribe behavior essential to the performance of legislative business. It does, however, list behaviors considered inappropriate. One of those prohibited behaviors is activity paid for by the state but which supports political party activities. The statute is clear:

*"A legislative employee may not on government time assist in political party or candidate activities, campaigning, or fund raising. A legislator may not require an employee to perform an act in violation of this subsection." AS 24.60.030 (b)*

Under this statutory provision, a mass-mailed thank you letter to those who participate in a Republican Party straw poll can not be construed to be normal legislative business. The ethics subcommittee defined the letter as a party-building, or political, activity. Rep. Sanders caused, by his own admission to the House rules Committee, two of his legislative employees to write a letter during office hours and using state equipment to all Republicans who voted in the straw poll in his election district. The postage was paid by a state-vouchered account.

Unlike the majority on the Rules Committee, we concur with the ethics subcommittee that the letter generated by his state-paid employees on his official letterhead and mailed through a state-paid postage account is a party-building activity and is a violation. In this case, the House Rules Committee minority position actually agrees with Rep. Sanders who, in his summation before the House Rules Committee noted that his transgression was a "\$72 technical violation". (The \$72 reference is a rough approximation of the cost of the mailing and does not include the cost of 6.5 hours of staff time.)

Further, it stretches credulity to assume that a letter to active Republicans thanking them for a party activity has anything to do with government business. We feel the only people likely to write a letter of thanks to Republican straw poll participants are Republican political candidates, potential Republican Party candidates, or Republican Party officials. Use of state employees and a state postage account is, therefore, inappropriate.

The majority on the House Rules Committee found that Rep. Sanders may not have understood this provision and his conduct (asking staff to draft a letter to very active Republicans in his election district) should therefore be excused.

The minority on the House Rules Committee finds that ignorance of the law is not an excuse for other Alaskans who violate statutes and should not be an excuse for Rep. Sanders' activity--especially when the Legislative Ethics Committee provides advisory opinions and especially when Rep. Sanders should have made a special effort to understand the ethics law after having been found guilty of two previous infractions in the past two years.

## **2) The ethics rules do not prohibit normal legislative business.**

An argument suggested by the majority on the House Rules Committee is that there are many things a legislator feels compelled to do that a "normal" Alaskan wouldn't need to do. They suggest that the Ethics Act is flawed when it does not protect these extraordinary activities. Thank you notes, apparently, are one of those extraordinary duties the majority feels are necessary for legislators but that they feel may be prohibited.

Despite inferences otherwise, nothing in the Ethics Act that governs legislators' activities precludes thank you letters to constituents. The only criteria applied by the ethics subcommittee is that there be at least a reference to legislative business if the letter goes to partisan political groups. There was no reference to legislative business in Rep. Sanders' letter.

Further, when we write letters (or cause staff to write) to high school graduates we shouldn't write only to Republican graduates or Democratic graduates. When we write (or cause staff to write) to constituents who

clean highways or urban creeks, we shouldn't write only to Republican or Democrat volunteers. If we thank only those of one political persuasion (especially only those of *our* political persuasion in *our* election districts), we should use personal or campaign funds and not use state employees, during office time, using state equipment.

Given there was a violation, and given the House Rules Committee members in the minority do not find the Ethics Act is inadvertently flawed, we disagree with the notion Rep. Sanders' actions should be excused. We find the impulse to thank constituents is a natural and protected legislative function but the impulse to thank only active constituents of our political party in our district during an election year without referencing pertinent legislative business is not and should not be protected.

**3) Without new evidence, the House should not seize the reins from the public members of the ethics subcommittee.**

The evolution of the Ethics Act over the past 15 years has been to more fully involve the public. Prior to 1983, the only Alaskans who judged the ethics of legislators were other legislators. After 1983, the legislature created an ethics panel that involved one public member and a preponderance of legislators. After 1986, the legislature created an ethics panel that involved an equal number of legislators and public members. After 1992, the legislature created an ethics subcommittee that had five public members (two Republicans, two Democrats, and one undeclared) and two legislative members (one majority and one minority member).

This progression toward a panel that has more public members than legislators accomplished two purposes. First, it acknowledged that the previous legislatures recognized the difficulty of sitting in judgment of friends and colleagues. Second, previous legislatures recognized that, when politicians are on trial, Alaskans will trust the judgment of their neighbors more than they trust the judgment of other politicians.

We find, as the minority on the House Rules Committee, that reversing the decision of the public-dominated House ethics subcommittee without new compelling evidence regarding that violation, takes us back: not to the pre-1992 era when there were an equal number of public and legislative members; not to the pre-1986 era when there was only one public member; but all the way back to the pre-1983 era when there were

no public members who sat in judgment of legislators who got crosswise with ethics.

## COOPERATION

As one newspaper headline writer noted after the House Rules Committee hearing: "Rep. Sanders passes ethics, but not attitude test." The minority on the House Rules Committee disagreed with the majority on the issue of the Ethics Act violation but agreed with the majority on the "bad attitude" or lack of cooperation issue.

### 1) Rep. Sanders' defense tactics unreasonably raised costs.

The House Subcommittee of the Select Committee on Legislative Ethics spent: \$1,193 on a court reporter; \$4,118 on a hearing officer; \$12,487 on legal council; \$200 in staff time; and \$6,364 in costs related to Rep. Sanders' failed and futile petition to the courts.

These costs do not include the costs to Rep. Sanders for his attorney.

We find that an early attempt to remedy the issue, defined by Rep Sanders in his testimony when he admitted to the House Rules Committee he committed a "technical violation", would have reduced costs and not lead to sanctions. We further find his lack of cooperation led to enhanced sanctions that would not otherwise have been contemplated by the ethics subcommittee. (See P.6 of the ethics subcommittee report on H96-02.)

### 2) The defense tactics slandered Alaskans.

Members of the House Rules Committee rejected any notion that a political conspiracy drove the decision the ethics subcommittee made on H96-02. Further, the minority on the House Rules Committee emphatically rejects any characterization that the subcommittee is a "kangaroo court".

Unfortunately, during the course of the review process, the defense erroneously suggested:

a) the chair of the ethics subcommittee was out to get Rep. Sanders because he voted against her appointment, because her husband has contracts with the state (and has had under the Cowper, Hickel and Knowles' administrations), and because she was a Democrat;

b) the hearing officer was tainted because he is a member of a law firm that has contributed to Democrats (and, reportedly, to Republicans); and

c) the Superior Court judge was in cahoots with the Democrats (the judge was randomly suggested and could have been recused by Rep. Sanders or Rep. Sanders' attorney).

The minority of the House Rules Committee is outraged by any suggestion that an ethics subcommittee composed of five public members--two registered Democrats, two registered Republicans, and one undecided--and one Republican legislator (guided by the counsel of an attorney whose previous experience includes service as U.S. attorney in a Republican administration) were part of any conspiracy to ruin Rep. Sanders.

### 3) **Attacking the accuser is inappropriate.**

During the hearings before the House Rules Committee, there was a suggestion that the ethics complaint was filed by a "political opponent". Well, that is true, the complainant in this case did oppose Rep. Sanders in the 1994 general election. But our acknowledgment that the complaint was filed by a political opponent doesn't get to the issue of whether the complaint is false.

First, any notion that friends and colleagues file complaints as frequently as political opponents is flawed. Rep. Newt Gingrich filed ethics charges against former U.S. House Speaker Jim Wright. The ethics violations sustained against Rep. Gingrich were first filed by a candidate who opposed him. The fact that complaints were filed by political opponents didn't diminish the truth of the allegations.

Second, all complaints accepted by the Select Committee on Legislative Ethics are filed under oath. Each complaint form notes (prominently, in large type):

*"I understand that a person commits the crime of false accusation if the person knowingly or intentionally files a false complaint with the Select Committee on Legislative Ethics" (AS11.56.805).*

We, the minority of the House Rules Committee, believe that if the majority truly feels the accuser is at fault and the ethics subcommittee was duped through the filing of complaint H96-02 there is legal recourse against the accuser and they should try to book him under the false accusation statute.

#### 4) Rep. Sanders use of the Fifth Amendment to the U.S. Constitution may have been misused.

When invoking fifth amendment protections against self-incrimination, a witness must have a "reasonable" fear that the testimony could lead to a criminal case. That is the only legal basis for invocation of "the Fifth". Rep. Sanders told the House Rules Committee the reason he didn't want to testify before the ethics subcommittee was because of "flaws" in the ethics statute and because of the political agenda of some people involved in the subcommittee process.

At *no* time did Rep. Sanders testify to the House Rules Committee that he feared criminal prosecution. He simply indicated he did not cooperate because, as he testified to the House Rules Committee, "I believe the select committee's actions are corrupted by the conflict of interest and perennial revenge interests" of the chair.

If Rep. Sanders invoked "the Fifth" for the reasons he stated under oath, both he and his attorney abused one of our most important constitutional privileges.

We, the minority, suggest the reasons for taking "the Fifth" were obstructive in nature instead of fear of criminal prosecution.

#### 5) Legal advice provided Rep. Sanders was questionable.

While not attempting to be overly critical of either Rep. Sanders or his attorney, Lester Syren, the minority would like to offer the following observations:

a) the bar association's Rule of Professional Conduct 3.7 says a lawyer should not advocate in a trial in which the lawyer may be a material witness, yet the attorney who represented Rep. Sanders is probably the same person who started the chain of events that lead to the "technical violation" because: Mr. Syren probably provided the list of Republicans to Rep. Sanders; he picked up the list from the Republican Party; and he is the District 19 Republican party chair;

b) the bar association's Rule of Professional Conduct 1.7 says a lawyer should not represent multiple clients in the same proceeding when the interests of the clients may conflict, yet Mr. Syren represented the legislator accused in H96-02 while also representing two material

witnesses who could have established a violation. One of those other clients is an at-will employee of Rep. Sanders and the other is a former at-will employee who hoped to be rehired by Rep. Sanders. Either of Mr. Syren's two other clients could have established the fact that the letter in question was written during office time, implicating Rep. Sanders. Mr. Syren advised both other clients--who depend upon Rep. Sanders' good will for employment--to take "the Fifth" and also advised his other client, Rep. Sanders to take "the Fifth".

Because Mr. Svren represented multiple clients whose interests before the ethics subcommittee were not parallel, the minority of the House Rules Committee is unable to determine whether all clients were ably represented by Mr. Svren and unable to determine whether the issue of a violation ultimately could have been settled at the ethics subcommittee level.

## SANCTIONS

The minority finds the violation was not egregious and was done without thought rather than done in purposeful contravention of the Ethics Act. Outside the context of the lack of cooperation, and outside the context of the previous violations, the appropriate sanction would have been sanction #3 recommended by the ethics Subcommittee:

*Rep. Sanders shall reimburse the legislative affairs agency for the \$76.48 postage and 8 hours compensation for one range 21, step A, employee (\$207.44). This is obviously not an exact equivalent of the labor cost of Rep. Sanders' employees' work on the letter, but it is intended to represent that cost.*

Given the previous violations over the past two years, and given the lack of cooperation and the "nuclear" defense tactics, the minority of the House Rules Committee feels the other sanctions recommended by the ethics committee also are appropriate, including: no committee chairmanship during this term, no travel outside the state during this term, taking the "unaccountable" option on office allowances, and an apology.

## ETHICS CHANGES

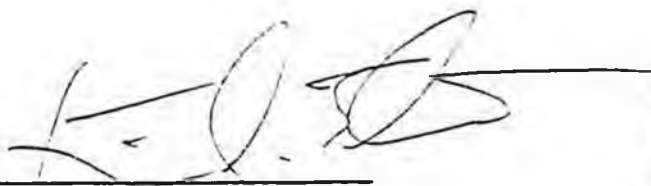
The minority on the House Rules Committee urges caution on precipitous changes to the Ethics Act. There is an appearance over the past

couple of weeks that the statutes were on trial rather than the behavior of members.

As a result of the House Rules Committee hearing, the only statutory change suggested by the minority on the House Rules Committee is that appeals from the ethics subcommittee to any other committee or subcommittee of the House or Senate should be appeals "on the record". In other words, the only evidence considered when ethics subcommittee reports are forwarded should be evidence that was admitted at the ethics subcommittee level unless new evidence is discovered subsequent to the issuance of an ethics subcommittee opinion.

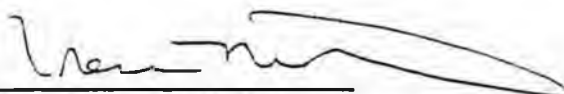
This statutory change would eliminate the possibility that a member or legislative employee could circumvent the process by stonewalling at the ethics subcommittee level (where public members clearly dominate) to be judged by friends and colleagues serving in the House or Senate.

Finally, any review of changes to the Ethics Act should be initiated at the Select Committee on Legislative Ethics level. Those recommendations can be forwarded to each body and each body can address recommended changes through the regular committee process. Generating changes, as suggested, through the Legislative Council gives the appearance that any changes are political since the council is comprised of 12 Republicans and two Democrats.



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Rep. Kim Elton



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Rep. Irene Nicholia

February 5, 1997