

SB

286

HFIN

FILE

(11)

HOUSE COMMITTEE REPORT

Date Referred to Committee: April 18, 2000

FURTHER REFERRALS:

Date of Committee Action: 4/20/00

The FINANCE Committee considered:

CSSB 286(JUD)

CS FOR SENATE BILL NO. 286(JUD)

DUTIES AND POWERS OF ATTORNEY GENERAL

"An Act relating to the duties and powers of the attorney general."

recommends it be replaced with the following committee substitute HCS CS SB 286(FIN) the same title a new title

additional referral to _____ Committee

attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal note(s) _____

fiscal note(s) Law 3/23/00

zero fiscal note(s) _____

zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Therriault</i>			X	
<i>BUNDE</i>	✓			
<i>Austerman</i>			X	
<i>J. DAVIES</i>			X	
<i>Grossmunt</i>			X	
<i>g. Davis</i>			X	
<i>Mulder</i>			X	
<i>Foster</i>			X	

CO

CHAIR'S SIGNATURE

Therriault
Therriault

Mulder
MULDER

FISCAL NOTE

No. 1

Bill Version: SB286

BILL N(S) Publish Date: 3/23/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Law
 Title "An Act relating to the duties and powers of BRU Criminal Division/Civil Division
the attorney general." Component All
 Sponsor Senate Judiciary Committee
 Requester Senate Judiciary Committee Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
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Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
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1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 SB 286 amends AS 43.23.020, relating to the powers and duties of the attorney general. This bill may generate additional litigation over the attorney general's authority. Our opponents in litigation will use this language as another tool. Whether or not they are successful in their arguments, time must be expended to respond to the inevitable challenges. The Department of Law has no way of estimating how often the issue might arise, or how much time and expense would be necessary to respond.

Prepared by: Joan M. Kasson *Joan M. Kasson* Phone 465-5370
 Division Attorney General's Office Date/Time 3/8/00, 4:02 PM
 Approved by Commissioner *Bruce M. Botelho* Date 3/8/00
 Agency Department of Law

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House CS for CS for SB # 286 (JUD)

Amendment

1

Page 2 line 9

Delete or that generally in other states

After by law

Add that

Line 8 -10 would read

perform all other duties required by law that pertain to the office of attorney general; and

HCS FOR SENATE BILL NO. 286()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE

Offered:
Referred: Rules

Sponsor(s):

A BILL
FOR AN ACT ENTITLED

"An Act relating to the duties and powers of the attorney general."

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

*** Section 1. AS 44.23.020(b) is amended to read:**

(b) The attorney general shall

(1) defend the Constitution of the State of Alaska:

(2) [(1)] bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(3) [(2)] represent the state in all civil actions in which the state is a party;

(4) [(3)] prosecute, in the attorney general's discretion, all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(5) [(4)] administer state legal services, including the furnishing of written legal

opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;

(6) [(5)] draft legal instruments for the state;

(7) [(6)] make available a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office; and

(B) on needed legislation or amendments to existing law;

(8) [(7)] perform all other duties required by law [OR WHICH USUALLY PERTAIN TO THE OFFICE OF ATTORNEY GENERAL IN A STATE]; and

(9) [(8)] prepare, publish, and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication.

* Sec. 2. AS 44.23.020 is amended by adding a new subsection to read:

(d) The attorney general may,

(1) subject to the power of the legislature to enact laws and make appropriations, settle actions, cases, and offenses under (b) of this section;

(2) perform procedural duties pertaining to the office of attorney general which exist in a majority of states; and

(3) file *amicus curiae* briefs in any action in which issues regarding the Constitution or statutory laws of Alaska are raised.

HOUSE CS FOR CS FOR SENATE BILL NO. 286(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/18/00
Referred: Finance

Sponsor(s): SENATE JUDICIARY COMMITTEE

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9 party;

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15 departments as the governor directs; and give legal advice on a law, proposed law, or

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2 legislature;

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4 (7) [(6)] make available a report to the legislature, through the
5 governor, at each regular legislative session

6 (A) of the work and expenditures of the office; and

7 (B) on needed legislation or amendments to existing law;

HR - passed

8 (8) [(7)] perform all other duties required by law or that generally

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ORIGINAL 10

LA 09/20/12

9 [WHICH USUALLY] pertain to the office of attorney general in other states [A
10 STATE]; and

11 (9) [(8)] prepare, publish, and revise as it becomes useful or necessary
12 to do so an information pamphlet on landlord and tenant rights and the means of
13 making complaints to appropriate public agencies concerning landlord and tenant
14 rights; the contents of the pamphlet and any revision shall be approved by the
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17 (d) The attorney general may, subject to the power of the legislature to enact
18 laws and make appropriations, settle actions, cases, and offenses under (b) of this
19 section.

CS FOR SENATE BILL NO. 286(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 3/23/00

Referred: Rules

Sponsor(s): SENATE JUDICIARY COMMITTEE

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10 and]

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15 Department of Law, division of consumer protection, before publication.

16 * Sec. 2. AS 44.23.020 is amended by adding a new subsection to read:

17 (d) The attorney general may, subject to the power of the legislature to enact
18 laws and make appropriations, settle actions, cases, and offenses under (b) of this
19 section in which the attorney general represents the state and in which the state is a
20 party.

2
Back to original
vars.
[8] passed

FISCAL NOTE

No. 1

Bill Version: SB286

BILL N(S) Publish Date: 3/23/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Law
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Prepared by: Joan M. Kasson *Joan M. Kasson*
 Division Attorney General's Office
 Approved by Commissioner *Paulson* Bruce M. Botelho, Attorney General
 Agency Department of Law

Phone 465-5370
 Date/Time 3/8/00, 4:02 PM
 Date 3/8/00

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Mark K. Johnson
13631 Windward Circle
Anchorage, Alaska 99516
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February 17, 2000

Senator Robin Taylor
Chairman, Judiciary Committee
Alaska State Senate
State Capitol Building
Juneau, Alaska 99811

Dear Chairman Taylor:

It is recommended that the Judiciary Committee consider adding the following language to SJR 14, in lieu of the material presently contained in the proposed Section 2S(c) of Article III (See lines 23 through 26 on page 2):

The attorney general is the legal officer of the state and shall have duties and powers provided by law.

This language is identical to language contained in the Montana Constitution. The single sentence captures the obligation to the state and citizens discussed by the Committee on February 9th and also assures appropriate Legislative control over the duties and powers of the position. The proposed language reflects a preference for simplicity in a constitutional provision.

The existing language of SJR 14 could be interpreted as setting out broader duties and powers for the attorney general than currently exist under Alaska law. Listing specific duties and powers in the constitution could lead to the conclusion that the attorney general's authority in the identified areas is broad and not subject to limitation or review. In contrast, at present the attorney general is not a constitutional officer and must base authority to act on the governor's constitutional power to execute the law or statutes such as AS 4.23.020. The proposed language would preserve Legislative control over the attorney general's powers and duties.

The Committee should understand and consider that the language providing that the attorney general "...is the legal officer of the state...", may have the effect of vesting the holder of the office with a new sense of independence in determining what may be in the best interests of the state. In this regard the Committee may want to reflect on the proposed language in connection

SJR 14

SB2286

with Article I, Section 2 of the Alaska Constitution, which provides that: "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." When read together, I believe that the two provisions achieve the result sought by the Committee.

Under the proposed language the attorney general may assume a different role in state government than if the constitution were to provide that "...the attorney general shall be the legal adviser of the state officers." This latter language is found in the constitutions of Utah and Washington and seems to lack the notion of obligation to the state and citizens sought by the Committee. Discussion on this point may be appropriate.

If I can provide further assistance to the Committee on this topic, please let me know.

Sincerely,

Mark K. Johnson

Mark K. Johnson
13631 Windward Circle
Anchorage, Alaska 99516
907-345-3850

RECEIVED
JAN 24 2000

Ans'd.....

January 19, 2000

The Honorable Robin Taylor
Alaska State Senate
State Capitol Building
Juneau, Alaska 99811

Dear Robin:

Enclosed is a copy of the recommendations of the subcommittee which reviewed the Department of Law for the Commission on Privatization, along with the Department's response and some of the appendices.

I do not take the Department's response very seriously for one paramount reason: The Department is unable as an institution to view itself critically and objectively. The Department consists almost entirely of career employees with a uniform political philosophy and close loyalty to Bruce Botelho. Mr. Botelho has hired a good number of these employees and has the ability to discharge any attorney at any time for pretty much any (or no) reason.

At the risk of repeating myself: The subcommittee found, and the Department reluctantly agreed that the Attorney General is NOT a constitutional officer and that Legislature, by statute, may define the role and responsibilities of the head of the Department of Law.

The subcommittee drafted a proposed amendment to AS 44.23.010 which would limit to some degree the scope of the Attorney General's powers and clarify that his obligation as a legal advisor runs to the State of Alaska, not "the governor and other state officers." The draft legislation would also put into law that the Legislative power to make appropriations constrains and limits the Attorney General's authority to settle cases.^{1 2} Finally, the draft legislation would

¹ The power to settle litigation in my view poses great danger to the State and is the source of considerable mischief by this and previous Attorney Generals. As a recent example, as I understand it an attorney with the State with knowledge of the World Plus Travel scandal brought litigation against the State in connection with her discharge but that litigation was quickly settled. Through settlement, the State has the ability to quickly close and limit the potential for embarrassment from a variety of problems.

² Please note that this legislation does not address the authority of the Attorney General to enter into settlements of Alaska's anti-trust laws under Title 45.

SB 086

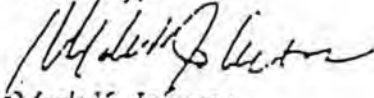
remove language which can be interpreted to vest common law powers in the Attorney General. It is my belief, and a belief shared by the subcommittee, that the Attorney General's powers should be enumerated powers – not unlimited powers.

Once it is appreciated that the Legislature can define and control the scope and powers of the Attorney General, it is interesting to consider the effect of dissolution of the office of Attorney General and the entire Department of Law. The office of State Prosecutor and Department of Prosecution could be established, which would address only criminal matters. Individual executive departments could be given authority to retain and employ counsel for needed legal services. The Governor could hire Bruce Botelho as the Governor's lawyer, which is the present situation.

Interestingly enough, under this set-up, the departmental commissioner would retain control of the legal budget of the department and the traditional relationship between client and attorney would be brought back to state government. Counsel retained in this fashion would be subject to the direction of the client – not the Attorney General. I personally believe that this arrangement would produce better results for the State of Alaska as the focus would shift to the issues presented in litigation. I would guarantee that discussions between the Governor and his department heads which touched upon legal issues would be much more substantive.

I hope this information is interesting and useful to you. Please let me know if I can answer any questions. My home phone is listed above. My work phone is 273-5290, but I am not always able to discuss non-work related matters.

Sincerely,



Mark K. Johnson

Sec. 44.23.010. Attorney general.

The principal executive officer of the Department of Law is the attorney general.

Sec. 44.23.020. Duties; and powers; waiver of immunity.

(a) The attorney general is the legal advisor of the state, including the governor and other state officers.

(b) The attorney general shall

(1) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(2) represent the state in all civil actions in which the state is a party;

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(4) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;

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(A) of the work and expenditures of the office; and

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(7) perform all other duties required by law (OR WHICH USUALLY PERTAIN TO THE OFFICE OF ATTORNEY GENERAL IN A STATE); and

(8) prepare, publish, and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication.

(c) The Attorney General may, subject to the power of the legislature to make appropriations, settle actions, matters and prosecutions under subsection (b) in which the Attorney General represents the state and in which the state is a party:

(d) Before January 1, 1999, the attorney general may, in a case that involves the state's title to submerged lands, or in any case in which the state seeks to allocate fault to the federal government or a federal employee under AS 09.17.080, waive the state's immunity from suit in federal court provided under the Eleventh Amendment to the Constitution of the United States. The expiration on January 1, 1999, of the attorney general's authority to waive the state's Eleventh Amendment immunity does not affect existing waivers in ongoing cases.

STATE of Alaska, Appellant,

Robert A. HREEZE, Appellee.
Nos. A-1810, A-1818 and A-1819.

Court of Appeals of Alaska.

May 6, 1991.

Rehearing Denied May 25, 1991.

Indictments were dismissed by the Superior Court, Third Judicial District, Anchorage, Joan Katz, J., on ground that special prosecutor had exceeded scope of authority granted by Attorney General, and state appealed. The Court of Appeals, Wolverton, District Court Judge, held that: (1) Attorney General had authority to appoint special prosecutor; (2) special prosecutor acted within the scope of his authority; and (3) in any event, special prosecutor acted with at least de facto authority and there was no basis for dismissal of indictments absent demonstration of resulting prejudice.

Order vacated and indictments reinstated.

1. Criminal Law \S 1015

It was appropriate for Court of Appeals to resolve whether Attorney General had authority to appoint special prosecutor, though trial court chose not to reach the issue, where issue was fully briefed and argued before the trial court and on appeal.

2. Criminal Law \S 1131(3)

While Court of Appeals will reverse trial court's factual determinations only if clearly erroneous, questions that involve application of legal rules to the facts are subject to independent judgment of the Court of Appeals, which is to adopt the rule of law that is most persuasive in light of precedent, reason and policy.

3. Attorney General \S 6

Appointment of special prosecutor by Attorney General as remedy to Attorney General's perceived conflict of interest was appropriate and authorized pursuant to

statute; Attorney General is obligated under statute to investigate and prosecute law violations, and if Attorney General and Department of Law are disqualified, Attorney General is nevertheless "required by law" to ensure that investigation and prosecution are conducted by someone who is qualified, whether that person is denominated special counsel, special prosecutor, or some other title. AS 41.23.020, 41.23.020(b)(3, 7).

4. Attorney General \S 6

State Constitution and applicable statutes did not express or imply restriction on Attorney General's authority to properly delegate certain duties of the office, by appointing special prosecutor, where Attorney General maintained appropriate supervision, direction and control over special prosecutor, who was required to submit claims for services to the Department of Law and who was subject to termination by the Attorney General at any time. Const. Art. 3, \S 22; AS 41.17.010, 44.17.040, 44.23.020(b)(3, 7).

5. Attorney General \S 6

Reading of statutory authorization for Department of Law operations suggests intent to leave offices and their functions broad, general and flexible, even when circumstances do not involve disqualification of Attorney General, and demonstrate that the legislature contemplated retention of services of counsel outside the Department of Law. AS 36.30.015, 36.30.850(b)(32), 41.23.050.

6. Attorney General \S 6

Record did not show that Attorney General lacked consent of the principal so as to bar appointment of special prosecutor by Attorney General under common-law doctrine of delegatus non potest delegare.

7. Attorney General \S 6

Special prosecutor hired by Attorney General did not exceed the scope of his authority in securing indictments of target of investigation; appointment letter authorized special prosecutor to investigate other related matters and to serve as special counsel in "other matters that may arise in the course of the investigation," and Attorney General made it clear that special prosecutor had

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acted within the scope of authority intended. AS 44.23.020(b)(3).

R. Attorney General \Leftarrow 6

Person who was investigated by special prosecutor and against whom indictments returned did not have the same standing as the Attorney General to challenge whether special prosecutor exceeded the scope of his appointment by the Attorney General.

9. Attorney General \Leftarrow 6

Even if special prosecutor appointed by Attorney General were found to have technically exceeded the scope of his appointment, special prosecutor was a de facto officer and indictments obtained by him remained valid pursuant to that authority, absent showing of prejudice by the person indicted; special prosecutor had at least a fair color or right of title and acted for such length of time as to afford presumption of appointment, appointment process was reported publicly, target of investigation himself urged state to get on with the investigation, and questions regarding special prosecutor's authority had no demonstrated bearing on grand jury's determination to return indictments. AS 44.23.020.

David C. Stewart, Law Office of Hickey and Stewart, Anchorage, for appellant.

Douglas Pope, Wagstaff, Pope & Katcher, Anchorage, for appellee.

Before COATS, J., ANDREWS, Superior Court Judge,* and WOLVERTON, District Court Judge.*

OPINION

WOLVERTON, District Court Judge.

The issues presented in this appeal are whether, under the circumstances of this case, the State Attorney General had the authority to appoint a special prosecutor and, if so, whether the trial court was correct in dismissing indictments on the grounds that

* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

1. The background is essentially not in dispute and is drawn largely from an affidavit submitted by Breeze's counsel as an offer of proof, and

the Special Prosecutor had exceeded the scope of the authority granted by the Attorney General. The case presents issues of first impression in Alaska. We find that the Attorney General had the authority to appoint a special prosecutor in this instance and that the trial court erred both in finding that the Special Prosecutor had exceeded the scope of his appointment and in dismissing the indictments on that ground. We therefore vacate the trial court's order and reinstate the indictments.

Background¹

On January 25, 1990, the law firm of Boyko, Breeze and Flansburg filed a lawsuit on its own behalf against Hazama-Gumi, Ltd., a Japanese firm that had sought a contract to finance and build a major part of the Bradley Lake hydroelectric project. In that suit, JAN-90-718CI, Attorney Robert A. Breeze claimed that he had been working on a \$500,000 contingency fee basis for Hazama, which was to be paid if the firm won a no-bid contract for the project. Although Hazama dropped out of the process when the state rejected its financing plan and decided to use competitive bidding, Breeze claimed that Hazama later agreed to pay him for services, and he submitted an itemized breakdown of services and expenses in excess of \$200,000. The suit also demanded repayment of \$50,000 for various political contributions made on behalf of Hazama.

The civil suit against Hazama-Gumi attracted prosecutorial attention to potential violations of lobbying without registration and lobbying under an improper contingency fee arrangement. By November of 1990, the Chief Prosecutor for the Department of Law had commenced an inquiry into the matter.

However, in early November of 1990, Walter J. Hickey was elected Governor and shortly thereafter on December 11, 1990, he announced the appointment of Charles E. Cole as his attorney general. Edgar Paul

from the statement of facts that Breeze submitted in briefing to the trial court. Both the affidavit and statement of facts referenced several letters, newspaper articles, and contract documents.

STATE v. BREEZE

Civ. No. 873 P.2d 627 (Alaska App. 1991)

Boyko, a partner in the firm under investigation, had been involved in Hickey's gubernatorial campaign, and after the election he was named to the Governor's Department of Law transition team. It was Boyko, in fact, who recommended to Hickey that he appoint Cole as attorney general.

The relationships among Governor Hickey, Boyko, and Cole were significantly intertwined. Boyko had served as attorney general in Hickey's first administration in the 1960s. During the 1970s and 1980s, Cole and Boyko were private practitioners and had represented one another in litigation where the other had been named as a party. Further, Cole and Boyko had jointly represented several different clients, and Cole had represented Hickey while in private practice.

On December 6, 1990, Boyko apparently asked Governor Hickey to appoint a special prosecutor to expedite the criminal investigation involving his law firm. Boyko expressed his belief that the investigation was a politically motivated attempt to reduce his influence with the new administration and to deflect attention from his complaints about the prior administration's selection of a private law firm to litigate the Exxon Valdez claims on behalf of the state.

Three attempts were made to secure the services of a special prosecutor. Although Cole had tried to remove himself from the selection process to some degree by assigning the selection duties to his deputy, he

Attorney General Cole later set forth his recollection of the selection process in an affidavit, which states, in part, as follows:

1. Charles E. Cole, being first duly sworn, do hereby testify and state as follows:

1. I am currently attorney general for the State of Alaska, a position I have held since December, 1990.

2. Sometime in 1991—I believe in the spring—Edgar Paul Boyko, then a law partner with Robert Breeze, told me that he believed an investigation being conducted by the Department of Law into possible criminal actions of Mr. Breeze was motivated by criticisms of Mr. Breeze by Edgar Paul Boyko, had made against the Department of Law concerning its selection of law firms to prosecute on behalf of the State the Exxon Valdez claims.

3. I assured Mr. Boyko that that was correct and not the case so far as I knew, that former Attorney General Doug Bailey had told me

stepped in and rejected the first candidate because the candidate had been a law partner of the prior administration's attorney general.² After the second and third candidates indicated that they had conflicts that prohibited them from taking the position, Breeze himself indicated that he wanted the state to get the investigation underway.

At the outset of the special counsel selection process, the Deputy Attorney General submitted a Request for Alternate Procurement, which was marked "confidential." In that document he stated that

this case involves investigation of individuals previously represented by both the Attorney General and the law firm with which the Deputy Attorney General was associated until his employment with the Department of Law. Because of the inherent conflict of representation, the use of a special prosecutor has been deemed to be necessary. Due to the confidential nature of all criminal investigations, the department must limit its contacts with prospective outside counsel to an absolute minimum in order to protect the constitutional rights of the individuals involved in the matter under investigation. As such, the use of any form of open competitive procurement is impractical and contrary to the public interest.

The selection process ultimately resulted in the appointment of Anchorage attorney

about this investigation shortly after I was appointed Attorney General, and that so far as I was aware, the investigation had nothing to do with the criticisms of Mr. Boyko about the Department of Law.

4. On the other hand, I told Mr. Boyko that I wanted to be certain that the investigation being conducted by the Department of Law was impartial, and not motivated by Mr. Boyko's criticisms of the Department of Law, so I would appoint special counsel to conduct the investigation and to prosecute violations of criminal law which might develop from the investigation.

5. Initially I said that because of my personal and professional associations with Mr. Boyko, and to avoid possible public criticism that the selection by me of the special counsel was motivated by improper considerations, I would commit the selection of independent counsel to the Deputy Attorney General.

David Stewart as Special Counsel.¹ In his appointment letter dated April 15, 1991, Attorney General Cole advised Stewart that

This letter constitutes your appointment as Special Counsel to act on behalf of the State of Alaska to investigate whether any violations of law may have occurred in connection with the matters mentioned in the complaint filed in JAN-590-718 Civil, a civil case filed by Boyko, Breeze, & Flansburg, et. al., to collect fees allegedly owed for services rendered to Hazama-Gund, Ltd., and to investigate such other related matters as may arise in the course of your investigation.

As Special Counsel, acting in an independent capacity and exercising your independent judgment, you are to direct all phases of the investigation, the filing of any charges you conclude from your investigation are warranted, and the prosecution of any such charges to their conclusion. You are also authorized, but are not required, to request the services of the Alaska State Troopers to assist you in the conduct of your investigation, and to retain such other attorneys and special services as you find warranted.

Enclosed are three copies of a State of Alaska Professional Services Contract for your signature setting forth and describing the terms and conditions embodied in this letter of appointment. Please sign and return two copies to the Department of Law.

3. In a continuing paragraph to the affidavit quoted in n. 2, *supra*, Attorney General Cole explained how the selection process finally resulted in the selection of Stewart as Special Prosecutor:

6. The initial nomination of independent counsel by the Deputy Attorney General, when it came to my attention, was—in my view—subject to possible criticism because either the independent counsel or the law firms with which he was associated had significant financial relationships with the Department of Law and therefore could be viewed as less than impartial. Another designation of special counsel was made, but the designee declined to act because of a perceived conflict of interest. Therefore, I elected to make the selection of the independent prosecutor myself and I eventually did select David Stewart because I viewed him as wholly impartial and competent to conduct the investigations and to pursue

The standard agreement form for professional services included, *inter alia*, the following provisions:

Article 5. Termination. The project director, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the State. The State is liable only for payment in accordance with the payment provisions of this contract for services rendered before the effective date of termination.

Article 7. No Additional Work or Material. No claim for additional services, not specifically provided in this contract, performed or furnished by the contractor, will be allowed, nor may the contractor do any work or furnish any material not covered by the contract unless the work or material is ordered in writing by the Project Director and approved by the Agency Head.

Article 8. Independent Contractor. The contractor and any agents and employees of the contractor act in an independent capacity and are not officers or employees or agents of the State in the performance of this contract.

Article 13. Officials Not to Benefit. Contractor must comply with all applicable federal or State laws regulating ethical conduct of public officers and employees.

Special Prosecutor Stewart directed the investigation and presented the matter to

whatever criminal prosecutions he concluded were warranted.

4. An appendix to the standard agreement form included the following typed provision:

Article 1. The Services to be performed by the Contractor

Article 1.1 The Contractor, in the person of David C. Stewart, shall serve as Special Counsel on behalf of the State of Alaska in connection with the investigation relating to the complaint in JAN-90-718 CI, a civil case filed to collect fees for services from Hazama-Gund, Ltd., and to other matters that may arise in the course of the investigation. The scope of Contractor's authority and services as Special Counsel are set out in the attached letter of appointment dated April 15, 1991, and incorporated by reference herein.

STATE v. BREEZE

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fore a grand jury, which indicted Breeze on various charges in three separate cases.¹ Breeze entered pleas of not guilty to all of the charges, and he moved to dismiss the indictments on two grounds: that the Attorney General had no authority to appoint a special prosecutor, and that the Special Prosecutor had exceeded the scope of his authority. Breeze also alleged that the Attorney General's declaration of a conflict was merely a ruse to deflect the investigation from others and limit it to Breeze only; on the other hand, Breeze argued that if the Attorney General had a conflict, the conflict should have prohibited him from selecting a special prosecutor.

Breeze moved to depose a number of government officials, and the state moved to quash the subpoenas. The trial court quashed some of the subpoenas, held the subpoenas for Governor Hickel and the Lt. Governor in abeyance, and ordered Cole, Deputy Attorney General Blankenship, and Boyko to appear for an evidentiary hearing. The trial court then stayed its order pending appellate review. After this court denied the state's petition for review, the Alaska Supreme Court granted review and stayed the evidentiary hearing.

pending a determination by the superior court of whether the attorney general has the authority to appoint a special prosecutor, and if so, the circumstances under which such authority may be exercised. If, after these questions are determined, an evidentiary hearing is necessary to facilitate the disclosure of relevant information, such a hearing should be held.

Rather than reach the issue of whether and under what circumstances the attorney general has the authority to appoint a special prosecutor, the trial court chose to resolve the question by ruling only on what it viewed as the "narrowest issue raised" and affirmed the indictments on its finding that the

three indictments were returned by the grand jury against Attorney Robert Breeze, charging as follows. In case JAN-591-593CR, he was charged with two counts of securities violation, AS 45.55.210, two counts of theft in the first degree, AS 11.46.120, a count of scheming to defraud, AS 11.46.600(A)(2), two counts of application of property, AS 11.46.620(A), and a count of forgery in the first degree, AS 11.46.

Special Prosecutor had "exceeded the scope of the authority vested in him by the appointment letter."

Following the trial court's order, the state moved for reconsideration and submitted a letter from the Attorney General, which read as follows:

I have reviewed my letter of April 15, 1991 appointing David Stewart Special Counsel to investigate the Breeze matter. I have also reviewed the decision of Judge Katz distributed on February 1, 1993 that interpreted that appointment.

Mr. Stewart's performance under that appointment resulted in three indictments being returned against Mr. Breeze. His investigation and assistance to the grand jury in the return of those indictments is within the scope of Mr. Stewart's authority that I intended him to have when I appointed him to be Special Counsel on April 15, 1991.

The trial court denied the state's motion for reconsideration, and the state appealed.

The Attorney General's Authority to Appoint a Special Prosecutor

[1,2] Although the trial court chose not to reach the issue, we believe that it is appropriate for us to resolve whether the attorney general has the authority to appoint a special prosecutor. The issue was fully briefed and argued before the trial court and in this appeal. See *Lion Corp. v. Air Logistics of Alaska*, 787 P.2d 109, 115 (Alaska 1990); *State v. Northwestern Construction, Inc.*, 741 P.2d 235, 239 (Alaska 1987). Further, while we will reverse a trial court's factual determinations only if clearly erroneous, questions that involve application of legal rules to the facts are subject to our independent judgment. *Jones v. Jones*, 835 P.2d 1173, 1176 (Alaska 1992). As to questions of law, we are

500(A)(1). In case JAN-591-550CR, he was charged with a count of misapplication of property, AS 11.46.620(A) and a count of scheming to defraud, AS 11.46.620(A)(2). In case JAN-591-793CR, Breeze was charged with a count of theft in the first degree, AS 11.46.120, a count of scheming to defraud, AS 11.46.600(A)(2) and a count of misapplication of property, AS 11.46.620(A).

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to adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Gwin v. Hu*, 591 P.2d 1251, 1251 n. 6 (Alaska 1979).

[3] Alaska Statute 11.21.020 sets forth the duties of the attorney general and states, in part, that

(a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(7) perform all other duties required by law or which usually pertain to the office of attorney general in a state.

In the case before us, no claim has been made that the offenses alleged in the indictments were improperly brought or involved prohibited subjects of prosecution under AS 11.21.020(b)(3). However, the record before us demonstrates that the Attorney General reasonably believed that he was ethically restrained from prosecuting the matter because, as the Deputy Attorney General stated in his Request for Alternate Procurement, "this case involves investigation of individuals previously represented by both the Attorney General and the law firm with which the Deputy Attorney General was associated until his employment with the Department of Law. Because of the inherent conflict of representation, the use of a special prosecutor has been deemed to be necessary."

A. A contrary application of AS 44.23.020(b)(3) and (b)(7) would lead to an illogical result: if an attorney general who is disqualified from prosecuting a particular case were also unable to appoint a special prosecutor, a case that would otherwise be appropriate for investigation and possible prosecution would not be subject to any prosecution. The attorney general in such a situation would be left with the untenable choice of (1) violating the duty specifically imposed by AS 44.23.020(b)(3) by not prosecuting a violation of state law (and possibly being faulted for not pursuing prosecution because of a prior association with the accused), or (2) prosecuting the

individual with the risk of being charged with an unethical conflict of interest.

Additionally, in a confidential document captioned "AUTHORITY TO SEEK PROFESSIONAL SERVICES" the Deputy Attorney General stated that due to "the inherent conflict of representation involved in such a situation, it has been determined that the use of a special prosecutor is necessary in order to maintain public confidence in the judicial process and to assure that the conduct of any resulting prosecution is done without bias or any appearance of impropriety."

Despite the Attorney General's belief that a conflict existed, however, we find that the Attorney General had a continuing obligation to ensure that all violations of law would be prosecuted as required under AS 44.23.020(b)(3). As a result, we find that the appointment of a special prosecutor by the Attorney General as a remedy to his perceived conflict was both appropriate and authorized under AS 44.23.020(b)(3). Prosecution of the alleged violations was a duty required by law (AS 44.23.020(b)(3)), and if the Attorney General in his discretion chose to disqualify himself and the Department of Law from prosecuting the violations, it logically follows that his appointment of a special prosecutor to conduct the prosecution was also a duty required by law.⁴

[1] Breeze argues that the Attorney General did not have the authority to appoint a special prosecutor because such delegations of power are limited by the Alaska Constitution, by statute, and by the common law doctrine of *delegatus non potest delegare* (absent consent of the principal, delegated power may not be delegated further). According to Breeze, article III, section 22 of the Alaska Constitution limited "all ... respective

functions, powers and duties" of the attorney general to those "allocated by law," and that the allocation under law is confined by AS 44.17.010 and AS 44.17.010, which somehow limits or restricts the attorney general from appointing a special prosecutor. However, we do not believe that the Alaska Constitution or the applicable statutes express or imply such a restriction on the attorney general's authority to properly delegate certain duties of the office.

Alaska Statute 44.17.010 states that the attorney general "may assign the functions vested in the department to subordinate officers and employees." Alaska Statute 44.17.010 authorizes the attorney general to "establish necessary subordinate positions, make appointments to these positions, and remove persons appointed within the limitations of appropriations and subject to state personnel laws. Each person appointed to a subordinate position established by the [attorney general] is under the supervision, direction, and control of the [attorney general]."

It is apparent the key concern is, that in delegating functions and establishing staff positions, the attorney general is to maintain appropriate supervision, direction, and control over individuals serving in positions that are subordinate to the attorney general. Under the circumstances of this case, the Attorney General perceived a disqualifying interest, but he nevertheless maintained appropriate supervision, direction and control over the Special Prosecutor to whom he had appropriately delegated functions.

As previously stated, the attorney general has the power and duty under AS 44.23.020(b)(3) and (b)(7) to ensure that state law violations are investigated and prosecuted. The Attorney General fulfilled this legal obligation by appointing a special prosecutor who, while operating in an ethically required, independent capacity, nevertheless remained subordinate to the Attorney General.

Article III, section 22 of the Alaska Constitution reads as follows:

Executive Branch. All executive and administrative officers, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by

The Attorney General hired the Special Prosecutor after directing the selection process to the extent necessary to ensure that the person selected would not also be disqualified by a conflict of interest. The Attorney General directed the Special Prosecutor to act "in an independent capacity," and he directed him to exercise his "Independent Judgment" subject, of course, to the requirement that he "comply with all applicable federal or state laws regulating ethical conduct of officers and employees," (as set forth in Article 13 of the Standard Agreement form for Professional Services).

While acting independently, however, the Special Prosecutor was required to submit claims for services to the Department of Law which were subject to the approval of the Attorney General (Article 7, Professional Services Agreement), and which made his work subject to some degree of review. Additionally, the Special Prosecutor was subject to termination by the Attorney General at any time that the Attorney General perceived it to be in the best interest of the state (Article 5, Professional Services Agreement). Thus, the Special Prosecutor remained in a position subordinate to the Attorney General, as required by AS 44.17.010 and AS 44.17.010. We therefore conclude that the trial court was clearly erroneous in its factual finding that the Special Prosecutor was not under appropriate and continuing supervision of the Attorney General.

Further support for the proposition that the Alaska Constitution and statutes were not meant to serve as restrictive limits to the attorney general's authority to delegate is found in the Proceedings of the Alaska Constitutional Convention. The Chairperson of the Executive Committee commented that

In keeping with the modern thinking of a strong executive, it is certainly the policy not to establish offices by name and to narrow down their functions in the constitution. The policy is to leave [] them

law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department

broad and general and flexible enough so they can be adjusted to meet changing times and changing circumstances.

3 Proceedings of the Alaska Constitutional Convention (PACC) 2003 (January 13, 1977).

[5] A reading of the statutory authorization for other Department of Law operations suggests an intent to leave offices and their functions broad, general, and flexible, even when circumstances do not involve a disqualification of the attorney general. For example, AS 41.23.050 provides that

If a matter in which the state is interested is pending in a court distant from the capital, and it is necessary for the state to be represented by counsel, the attorney general, with the approval of the governor, may engage one or more attorneys to appear for the attorney general. The attorney general may pay for these services out of appropriations for the attorney general's office.

Additionally, the fact that the legislature provided a mechanism in AS 36.20.015 for state agencies to procure personal services contracts demonstrates that the legislature contemplated retention of the services of counsel outside of the Department of Law.¹

In *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 531 P.2d 917, 950 (Alaska 1975), the Alaska Supreme Court explained that "[g]enerally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official." In describing the breadth of this authority, the supreme court went on to state that

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. This discretionary control over the legal business of the state, both civil and criminal,

1. AS 36.20.015(b)(2) now provides that the procurement code does not apply to contracts that are between the Department of Law and attorneys who are not employed by the state and that are for the review or prosecution of possible violations of the criminal

law, includes the initiation, prosecution and disposition of cases.

Id. (citations omitted).

In *Florida ex rel. Shreve v. Ezum Corp.*, 526 F.2d 206, 264 (5th Cir.), cert. denied, 429 U.S. 829, 97 S.Ct. 68, 50 L.Ed. 2d 92 (1976), the court discussed the evolution of the office of the common law attorney general, and explained that as chief legal representative of the king, the

attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

(Footnotes omitted).

Elaborating on the same point made by the Alaska Supreme Court in *Public Defender Agency*, the court in *Shreve* went on to explain that

The attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making determination as to the public interest.

Id. (footnotes omitted).

As previously stated, neither the Alaska Constitution nor the legislation establishing

law of the state in situations where the attorney general concludes that an actual or potential conflict of interest makes it inappropriate for the Department of Law to review or prosecute the possible violations

the Department of Law limits or deprives the attorney general of the power to appoint a special prosecutor when, in the wide discretion granted, the attorney general believes such an appointment to be in the public interest. We hold that the proper appointment of a special prosecutor in circumstances where the attorney general believes he and the Department of Law are disqualified by a conflict of interest is within the attorney general's discretionary control over the legal business of the state.

[6] With respect to the argument that the appointment was somehow barred by the common law doctrine of *delegatus non potest delegare*, we are unable to find from the record and applicable law that the Attorney General did not have the consent of the principal to make a proper delegation to a special prosecutor.

The Scope of the Special Prosecutor's Authority

[7] Although we have concluded that the trial court erred in its factual finding that the Special Prosecutor was not under the continuing supervision of the Attorney General, we nevertheless must address the trial court's legal conclusion that the Special Prosecutor exceeded the scope of his authority. In reaching this conclusion, the trial court apparently relied upon the argument made by Breeze that *Schumer v. Holtzman*, 63 N.Y.2d 46, 167 N.Y.S.2d 182, 451 N.E.2d 522 (1983) was controlling. We find that *Schumer* is distinguishable on several grounds, and that the trial court therefore erred in its legal conclusion as well.

Schumer, in fact, serves to highlight the difference between jurisdictions that have express constitutional or statutory limitations

Executive Law § 63 sets forth the general duties of the New York Attorney General, who is also an elected constitutional officer under Article 3 § 1; section 6) reads as follows:

General duties

The attorney general shall

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state

on the attorney general's authority to appoint a special prosecutor, and those that do not. In *Schumer*, the New York Court of Appeals upheld the lower court's decision that the district attorney had improperly appointed a special prosecutor to investigate and prosecute an individual whom the district attorney, Holtzman, had run against for a congressional seat. *Schumer*, 167 N.Y.S.2d at 187-81, 451 N.E.2d at 521.

In contrast to the Alaska attorney general who functions with the broad powers and duties as explained in *Public Defender Agency*, the district attorneys in New York "do not hold a common law office; and they have no powers but such as can be found written in the statute book." *People v. Corning*, 2 N.Y. 9, 18 (1819).

The district attorney in *Schumer* was an elected constitutional officer who was directed by statute to prosecute crimes that were recognized by the courts in the county for which she had been elected to serve. *Schumer*, 167 N.Y.S.2d at 187-81, 451 N.E.2d at 523-24 (citing County Law § 700(1), McKinney's Consolidated Laws of New York (MCL)). County Law § 910 authorized the district attorney to appoint assistant district attorneys to serve at the pleasure of the district attorney. *Id.* 167 N.Y.S.2d at 151, 451 N.E.2d at 521. However, unlike in Alaska, the New York county laws included a specific statutory scheme for the appointment of a special prosecutor. In the event that the district attorney were to become disabled or disqualified, the statutory scheme provided for court appointment of a special district attorney who would supersede the district attorney. *Id.* (citing County Law § 701). Further, under subdivision 2 of section 63 of the Executive Law² the governor

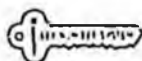
2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement, in which case the attorney general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform, and in any of such actions or

In summary, we find that the Attorney General had the authority to appoint the Special Prosecutor under the circumstances of this case. We also find that the Special Prosecutor acted within the scope of his authority.¹⁰ Finally, we hold that the Special Prosecutor acted at least with *de facto* authority and that, absent any record demonstrating resulting prejudice, there was no basis for dismissal of the indictments. The

10. In light of the Attorney General's subsequent clarification regarding the Special Prosecutor's scope of authority, it is apparent that the Special

order of the trial court is therefore VACATED, and the indictments are reinstated.

BRYNER, C.J., and MANSHEIMER, J., not participating.



Prosecutor would not now be prohibited from further prosecuting these matters in any event.

CITY OF DILLINGHAM, an Alaska
Municipal Corporation,
Petitioner,

CH2M HILL, NORTHWEST,
INC., Respondent.

No. S-5330.

Supreme Court of Alaska.

May 6, 1994.

Construction contractor brought action against city, seeking increased costs in connection with alleged differing site conditions regarding construction of sewage treatment facility. City filed third-party complaint against engineering firm retained to prepare environmental plan related to treatment system, alleging breach of contract, breach of duty of care, and breach of fiduciary duty. The Superior Court, Third Judicial District, Anchorage, Heverly W. Cutler, J., granted partial summary judgment for firm on claims for breach of contract and breach of fiduciary duty. City petitioned for review. The Supreme Court, Rabbinowitz, J., held that: (1) legislature's general goal in enacting statute generally rendering void contractual provisions purporting to indemnify promisee against liability for damages caused by promisee's civil negligence or willful misconduct was to provide remedies for all wronged persons, as opposed to only governmental indemnitees; (2) exculpatory clause that limits liability for party's "negligent acts, errors, or omissions" should be construed to limit liability for negligent acts, errors or omissions only; (3) statute generally rendering void contractual provisions purporting to "indemnify" promisee prohibits limitation of liability clauses; and (4) that statute applies to clause that is questioned under it, regardless of whether indemnification has been sought.

Reversed.

Appeal and Error \S 893(1)

Interpretation of statute and related questions of interpretation of contractual

clause presented questions of law, which Supreme Court reviewed *de novo*.

2. Municipal Corporations \S 250

While city was beneficiary of "promisee" of contract with engineering firm retained to prepare environmental plan related to sewage treatment system, city was "promisor" with regard to limitation of liability clause, as it was promising to limit firm's liability.

See publication Words and Phrases for other judicial constructions and definitions.

3. Indemnity \S 3

Legislature's general goal in enacting statute generally rendering void contractual provisions purporting to indemnify "promisee" against liability for damages caused by promisee's civil negligence or willful misconduct was to provide remedies for all wronged persons, as opposed to only governmental indemnitees. AS 45.45.900.

4. Contracts \S 206

Exculpatory clause that limits liability for party's "negligent acts, errors, or omissions" should be construed to limit liability for negligent acts, errors or omissions only, and clause therefore applies to breaches of contract and fiduciary duty only insofar as breaches are negligent.

See publication Words and Phrases for other judicial constructions and definitions.

5. Municipal Corporations \S 250

Trial court correctly ruled that limitation of liability clause in contract between city and engineering firm, limiting liability for party's "negligent acts, errors, or omissions," applied to breaches of contract and fiduciary duty, but only insofar as breaches were negligent.

6. Contracts \S 129(1)

Liability for knowing or bad faith breaches of contract can never be limited.

7. Indemnity \S 3

Statute generally rendering void contractual provisions purporting to "indemnify" promisee against liability for damages caused by promisee's sole negligence or willful misconduct prohibits limitation of liability clause.

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SPONSOR STATEMENT

SB 286

"An Act relating to the duties and powers of the attorney general."

SB 286 is an attempt to clarify the duties of the Attorney General, place into statute that the Attorney General shall defend the Constitution of the State of Alaska, and put into law that the Legislative power to make appropriations constrains and limits the Attorney General's authority to settle cases.

The Judiciary Committee worked closely with members of the Subcommittee on Privatization and considered recommendations. The subcommittee found, and the Department reluctantly agreed, that the Attorney General is NOT a constitutional officer and that the Legislature, by statute, may define the role and responsibilities of the head of the Department of Law.

It is the intent of this legislation that the Attorney General defend and uphold the Constitution of the State of Alaska, and that any settlement entered into by the Attorney General which recognizes a present or future duty or obligation on the part of the State which is not contained in statute or for which appropriations have not been provided must expressly provide that the duty or obligation is subject to appropriation by the Legislature.

Alaska State Legislature

Chairman:
Judiciary Committee
Administrative Regulations
Revenue Committee

Vice Chairman:
Resources Committee



Senator Robin L. Taylor

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