SB

286

# ALASKA STATE LEGISLATURE

**Sen. Robin Taylor, Chair**
Sen. Rick Halford, Vice-Chair
Sen. Dave Donley
Sen. John Torgerson
Sen. Johnny Ellis

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## Senate Judiciary Committee

Representative Pete Kott
Chair, House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Dear Representative Kott:

Please accept this letter as a request for the House Judiciary Committee to consider CS for Senate Bill 286. "An Act relating to the duties and powers of the attorney general."

This bill is the result of work conducted during the interim by the sub-committee on privatization. That panel determined that the attorney general is not a constitutional officer. Based on that, the legislature may by statute define the AG's role and responsibilities.

Attached you will find a copy of the Bill, Sponsor Statement, and other supporting information. Thank you for considering and scheduling this bill as soon a possible. If you have any questions, please feel free to contact Jim Pound or me.

Sincerely,

Robin L. Taylor
Senator

Attachments

RLT/jp

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## Senate Judiciary Committee

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.

**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**

**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 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;

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

other states (instead of being able to pick one state

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

wants to end these overreach

→ consent decree

→ chapter on common law powers of AG. (NAAG) publication position is that common law is necessary for AGs to do their jobs.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 23, 2000

**SUBJECT:** CSSB 286(JUD) (Work Order No. 1-LS1512\G)

**TO:** Senator Robin Taylor, Chair
Senate Judiciary Committee
Attn: Sue Mossgrove

**FROM:** Kathryn L. Kurtz KK
Legislative Counsel

Enclosed is the bill you requested, in final form.

The purpose of this memo is to explain why this version looks different than the previous draft.

The deletion of the words "state, including the" in line 5 of the previous version of the bill (1-LS1512\A) means that there is no longer any substantive change to AS 44.23.020(a). The change to the catch line deleting the word "and" is not substantive; that is a clean-up change made by this office. The catch line is not law. Since there is no substantive change, subsection (a) should not be included in the bill. The enclosed version reflects this.

The new subsection relating to the power of the attorney general to settle actions, on page 2 line 15 of the \A version, is being added as a new subsection (d), rather than subsection (c). This re-ordering will not change the legal effect of the bill. There may be a logical preference, however, to place this more general material before the existing date-specific material dealing with title to submerged lands in the current subsection (c).

If this is the case, and the bill is enacted, you may request that the revisor re-letter these subsections so that the new material on settling actions comes before the existing subsection on title to submerged lands by simply sending a letter to the revisor. The revisor is empowered to renumber parts of sections under AS 01.05.031.

These changes shorten the bill, and will, we hope, make it easier for the reader to quickly identify what is being changed. Thank you for your understanding. Please call me if you have any questions.

KLK:pl
00-107.plm

# LEGAL SERVICES

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 16, 2000

**SUBJECT:** SB 286: Powers and Duties of the Attorney General (Work Order No. 21-LS1512\D)

**TO:** Senator Robin Taylor

**FROM:** Kathryn L. Kurtz KK
Legislative Counsel

You asked 1) whether it would be possible, by statute, to make the attorney general terminable only for cause, and 2) how states such as New York, which do not give the attorney general common law powers, define the powers of the attorney general in statute.

**Hiring and Firing the Attorney General**

The powers and duties of the governor relating to department heads are set forth in Article III, sections 24 - 26 of the Constitution of the State of Alaska:

> SECTION 24. Supervision. Each principal department shall be under the supervision of the governor.
>
> SECTION 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.
>
> SECTION 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

Section 25 provides that department heads serve "at the pleasure of the governor." That phrase indicates an at-will employment relationship. However, section 25 also provides that "the head of each principal department shall be a single executive *unless otherwise provided by law.*" (emphasis added). If the legislature establishes a board or commission to head a department, the legislature can also provide in statute for the removal of that board or commission.

In at least one case, under Article III, section 26, the legislature has provided for a board to head a principal department. The Board of Education heads the Department of Education and Early Development. AS 14.07.010. Members of the Board of Education serve at the pleasure of the Governor. AS 14.07.115.

Arguably the legislature could by statute provide for a board or commission to head the department of law, and specify that the members of the board or commission may only be terminated for cause. However, as long as the attorney general is a single executive at the head of the department of law, I believe it would require a constitutional amendment to make the attorney general terminable only for cause.

**Statutory Powers of Attorney General in Other States**

The powers and duties of the attorney general are analyzed at some length in State v. Breeze, 873 P.2d 627, 632-34 (Alaska App. 1994). Based on that case, it appears that the effect of the change in SB 286 to AS 44.23.020(b)(7), removing the phrase "or which usually pertain to the office of attorney general in a state," would be to remove the common law powers of the attorney general, and limit him to the powers granted by statute. That case also compares the current status of Alaska's attorney general with that of New York's attorney general. In New York, the powers of the elected attorney general are limited to those granted in statute, and not supplemented by the common law. *Id.* at 635. Still, the statutory duties of New York's attorney general are quite broad. *See* 5 Executive Law sec. 63 (copy attached).

There may be other states which have taken an approach similar to New York's; if you would like me to identify those states and the respective powers and duties of the attorney general in each, let me know.

I hope this is helpful.

KLK:glc:jr
00-129.glc

Enclosure

Annotations:

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body. 75 ALR2d 1277.

## § 62. Assistants

1. The attorney-general may appoint such assistant attorneys-general, deputy assistant attorneys-general and attorneys as he may deem necessary and fix their compensation within the amounts appropriated therefor. Whenever deputy or deputy attorney-general is referred to or designated in any law, contract or document such references or designations shall be deemed to refer to and include assistant attorneys-general, deputy assistant attorneys-general or attorneys appointed by the attorney-general.

HISTORY:

Add, L 1951, ch 800, § 1, eff July 1, 1951, with substance transferred from § 61.
Sub 1, formerly entire section, so numbered sub 1, L 1962, ch 654, § 1, eff April 19, 1962.
Sub 2, add, L 1962, ch 654, § 1; repealed, L 1966, ch 391, § 4, eff June 1, 1966.

NOTES:

Repeal Notes:

[1966, ch 391] The purpose of this act was to provide workmen's compensation coverage for volunteers duly accepted in State service. The act repealed sections of the Education, Executive and Mental Hygiene Laws providing special authority to provide coverage for volunteers. Such special provisions are unnecessary as a result of this general law.

CROSS REFERENCES:

This section referred to in §§ 70, 73.
Powers and duties of deputies, generally, CLS Pub O § 9.

FEDERAL ASPECTS:

Assistant Attorneys General of the United States, 28 USCS § 506.

RESEARCH REFERENCES AND PRACTICE AIDS:

96 NY Jur 2d, State of New York § 25.
7 Am Jur 2d, Attorney General § 10.
63A Am Jur 2d, Public Officers and Employees §§ 567-577.

Annotations:

Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR2d 1140.

### CASE NOTES

The scheme of the statute is the payment by the county of expenses of state officers in the discharge of the county functions. If the expenses of special deputies assigned to such duties are covered by appropriations, their allowance by the attorney-general is final, and the duty of the county is absolute to make restitution of the quota expended for its benefit; but if the expenses of special deputies are not covered by appropriations allowance by the attorney-general is not within his authority and is ineffective to impose, without restraint or limitation, a charge upon the county. A charge in such circumstances, like other county charges, is subject to audit by the county officers and rejection if excessive. People ex rel. Rand v Craig (1921) 231 NY 216, 131 NE 894.

Assistant Attorneys-General, as members of the exempt class of the civil service, do not hold their positions by right of entitlement but, rather, at the pleasure of the Attorney-General. De Lucia v Lefkowitz (1978, 3d Dept) 62 App Div 2d 674, 406 NYS2d 150, affd (1979) 48 NY2d 901, 424 NYS2d 897, 400 NE2d 1349.

An Assistant Attorney-General, who was suspended without pay following his indictment for perjury and bribe receiving and who was a veteran





of the armed forces, is not entitled to a hearing pursuant to § 75(1)(b) of the Civil Service Law for, while that statute requires that a veteran be given a hearing, it excepts a person who holds the position of "deputy" and Assistant Attorneys-General are deputies within the meaning of paragraph (b); sections 62 and 63 of the Executive Law contemplate delegation of the Attorney-General's authority to Assistant Attorneys-General. In addition, the general nature of the position—the responsibilities, duties and functions—dictates that Assistant Attorneys-General be held to be deputies of the Attorney-General. De Lucia v Lefkowitz (1978, 3d Dept) 62 App Div 2d 674, 406 NYS2d 150, affd (1979) 48 NY2d 901, 424 NYS2d 897, 400 NE2d 1349.

In proceeding brought by trustees for construction of will, Attorney General, who appeared in the proceeding on behalf of the ultimate charitable beneficiaries, was not entitled to an allowance for attorney fees out of the general estate assets which were the subject of the construction proceeding. In re Estate of Dow (1977) 90 Misc 2d 950, 396 NYS2d 979, affd without op sub nom In re Marine Midland Bank-Rochester (1978, 4th Dept) 66 App Div 2d 985, 411 NYS2d 882.

Where there was no evidence whether the attorney-general acted under this section or under former § 65 [now § 67] in appointing a deputy attorney, the salary of the deputy was not exempt from the federal income tax where he had no position of permanent or continuous tenure and was free to carry on concurrently his general law practice. Commissioner v Murphy (1934, CA2) 70 F2d 790, 14 AFTR 194, cert den (1934) 293 US 596, 79 L Ed 690, 55 S Ct 111.

In light of the Pub Off § 9, it seems probable that deputies whose appointment is authorized by this section are the regular members of the staff of the attorney-general. Commissioner v Murphy (1934, CA2) 70 F2d 790, 14 AFTR 194, cert den (1934) 293 US 596, 79 L Ed 690, 55 S Ct 111.

## § 63. 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, but this section shall not apply to any of the military department bureaus or military offices of the state. No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.

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 proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge.

3. Upon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of insurance, superintendent of

banks, commissioner of taxation and finance or commissioner of motor vehicles, or the head of any other department, authority, division or agency of the state, investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both, including but not limited to appearing before and presenting all such matters to a grand jury.

4. Cause all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services, to be brought to trial.

5. When required by the comptroller or the superintendent of public works, prepare proper drafts for contracts, obligations and other instruments for the use of the state.

6. Upon receipt thereof, pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state.

7. He may, on behalf of the state, agree upon a case containing a statement of the facts and submit a controversy for decision to a court of record which would have jurisdiction of an action brought on the same case. He may agree that a referee, to be appointed in an action to which the state is a party, shall receive such compensation at such rate per day as the court in the order of reference may specify. He may with the approval of the governor retain counsel to recover moneys or property belonging to the state, or to the possession of which the state is entitled, upon an agreement that such counsel shall receive reasonable compensation, to be fixed by the attorney-general, out of the property recovered, and not otherwise.

8. Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation. All appointments made pursuant to this subdivision shall be immediately reported to the governor, and shall not be reported to any other state officer or department. Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the legislature for such purposes, which shall be deposited in a bank or trust company in the names of the governor and the attorney-general, payable only on the draft or check of the attorney-general, countersigned by the governor, and such disbursements shall be subject to no audit except by the governor and the attorney-general. The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them





under oath before himself or a magistrate and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the attorney-general, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. Each deputy or other officer appointed or designated to conduct such inquiry shall make a weekly report in detail to the attorney-general, in form to be approved by the governor and the attorney-general, which report shall be in duplicate, one copy of which shall be forthwith, upon its receipt by the attorney-general, transmitted by him to the governor. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor.

9. Bring and prosecute or defend upon request of the industrial commissioner or the state division of human rights, any civil action or proceeding, the institution or defense of which in his judgment is necessary for effective enforcement of the laws of this state against discrimination by reason of age, race, creed, color or national origin, or for enforcement of any order or determination of such commissioner or division made pursuant to such laws.

10. Prosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of race, creed, color, or national origin, in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute. In all such proceedings, the attorney-general may appear in person or by his deputy or assistant before any court or any grand jury and 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.

11. Prosecute and defend all actions and proceedings in connection with safeguarding and enforcing the state's remainder interest in any trust

which meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law.

12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

13. Prosecute any person for perjury committed during the course of any investigation conducted by the attorney-general pursuant to statute. In all such proceedings, the attorney-general may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties necessary or required to be exercised or performed in prosecuting any such person for such offense.

*[14]15. In any case where the attorney general has authority to institute a civil action or proceeding in connection with the enforcement of a law of this state, in lieu thereof he may accept an assurance of discontinuance of any act or practice in violation of such law from any person engaged or who has engaged in such act or practice. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the reasonable costs and disbursements incurred by the attorney general during the course of his investigation. Evidence of a violation of such assurance shall constitute prima facie proof of violation of the applicable law in any civil action or proceeding thereafter commenced by the attorney general.

*The bracketed designator has been inserted by the Publisher.





HISTORY:
Add, L 1951, ch 800, § 1, eff July 1, 1951, with substance transferred from § 62.
Sub 3, add, L 1965, ch 790, § 1; amd, L 1968, ch 420, § 103, L 1969, ch 814, § 1, eff May 22, 1969.
Former sub 3, amd, L 1955, ch 586, § 1, L 1956, ch 118, § 1; repealed, L 1965, ch 790, § 1, eff July 15, 1965.
Sub 4, amd, L 1962, ch 60, § 12, eff Feb 27, 1962.
Sub 7, amd, L 1962, ch 310, § 129, eff Sept 1, 1963.
Sub 8, amd, L 1977, ch 451, § 5, eff July 19, 1977.
Sub 9, amd, L 1962, ch 165, § 3, L 1962, ch 562, § 1, L 1963, ch 589, § 1, L 1969, ch 359, § 1, eff May 2, 1969.
Sub 11, add, L 1994, ch 170, § 455, eff June 9, 1994, deemed eff April 1, 1994 (see 1994 note below).
Former sub 11, add, L 1954, ch 698, § 2; repealed, L 1988, ch 108, § 1, eff Jan 1, 1989.
Sub 12, add, L 1956, ch 592, § 1; amd, L 1958, ch 84, § 1, L 1958, ch 175, § 1, L 1959, ch 242, § 1, L 1962, ch 310, § 130, L 1965, ch 666, § 1, L 1967, ch 680, § 33, L 1970, ch 44, § 1, L 1975, ch 115, § 1, L 1977, ch 539, § 1, L 1981, ch 476, § 1, eff July 7, 1981.
Sub 12, second undesignated par, amd, L 1985, ch 86, § 1, eff May 14, 1985.
Sub 13, add, L 1958, ch 35, § 1, eff Feb 17, 1958.
Sub [14]15, add, L 1962, ch 743, § 1; amd, L 1982, ch 656, § 1, eff July 22, 1982, applicable to all assurances of discontinuance entered into on or after the effective date.

NOTES:
Editor's Notes:
Laws 1967, ch 680, § 148, eff Sept 1, 1967, provides as follows:
§ 148. Except as otherwise provided in section one hundred forty-five of this act [amending Correction Law § 230-a], the provisions of this act do not apply to or govern the prosecution, conviction or punishment for any offense committed prior to the effective date of this act. Such an offense must be prosecuted and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this act had not been enacted.
Laws 1994, ch 170, § 564, sub 57, pars (d), (f), (g), eff June 9, 1994, provides as follows:
§ 564. This act shall take effect immediately provided, however, that:
57. The provisions of sections four hundred forty-seven through four hundred seventy-two of this act shall be deemed to have been in full force and effect on and after April 1, 1994, provided that:
(d) nothing contained in sections four hundred forty-seven through four hundred seventy-two of this act shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any of such sections and such provisions shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law, except that paragraph (e) of subdivision 2 of section 365-a of the social services law, as amended by chapter 59 of the laws of 1993 and section four hundred fifty-eight of this act, shall remain in full force and effect, as amended, notwithstanding any previously enacted provision of law to the contrary, and except as provided for in sections four hundred sixty-two and four hundred sixty three of this act;
(f) the commissioners of health and social services and any appropriate council may take any steps necessary to implement sections four hundred forty-seven through four hundred seventy-two of this act prior to its effective date;
(g) the provisions hereof shall become effective notwithstanding the failure of the commissioners of health and social services or any appropriate council to promulgate regulations implementing sections four hundred forty-seven through four hundred seventy-two of this act.

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

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 28(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 44.23.020. 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

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



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.

SB 286

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

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[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.

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;
(5) draft legal instruments for the state;
(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;
(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.

## *ARTICLE V*

### *Officers and Civil Departments*

Section 1. The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, and shall possess the qualifications provided in section 2 of article IV. The legislature shall provide for filling vacancies in the office of comptroller and of attorney-general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor. The comptroller shall be required: (1) to audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. The payment of any money of the state, or of any money under its control, or the refund of any money paid to the state, except upon audit by the comptroller, shall be void, and may be restrained upon the suit of any taxpayer with the consent of the supreme court in appellate division on notice to the attorney-general. In such respect the legislature shall define his powers and duties and may also assign to him: (1) supervision of the accounts of any political subdivision of the state; and (2) powers and duties pertaining to or connected with the assessment and taxation of real estate, including determination of ratios which the assessed valuation of taxable real property bears to the full valuation thereof, but not including any of those powers and duties reserved to officers of a county, city, town or village by virtue of sections seven and eight of article nine of this constitution. The legislature shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this constitution to the contrary notwithstanding.

Sec. 2. There shall be not more than twenty civil departments in the state government, including those referred to in this constitution. The legislature may by law change the names of the departments referred to in this constitution.

Sec. 3. Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions. Nothing contained in this article shall prevent the legislature from creating temporary commissions for special purposes or executive offices of the governor and from reducing the number of departments as provided for in this article, by consolidation or otherwise.

Sec. 4. The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department. The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and

consent of the senate and may be removed by the governor, in a manner to be prescribed by law.

Sec. 6. Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen or an alien lawfully admitted for permanent residence in the United States and a resident of this state and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

Sec. 7. After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

## *ARTICLE VI*

### *Judiciary*

Section 1. a. There shall be a unified court system for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court, as hereinafter provided. The legislature shall establish in and for the city of New York, as part of the unified court system for the state, a single, city-wide court of civil jurisdiction and a single, city-wide court of criminal jurisdiction, as hereinafter provided, and may upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction. The unified court system for the state shall also include the district, town, city and village courts outside the city of New York, as hereinafter provided.

b. The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court, the family court, the

STATE of Alaska, Appellant,

v.

Robert A. BREEZE, Appellee.

Nos. A-1810, A-1818 and A-1819.

Court of Appeals of Alaska.

May 6, 1994.

Rehearing Denied May 25, 1994.

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 ⇐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 ⇐1134(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 the 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 ⇐6

Appointment of special prosecutor by Attorney General as remedy to Attorney General's perceived conflict of interest was both 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 44.23.020, 44.23.020(b)(3, 7).

4. Attorney General ⇐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, § 22; AS 44.17.010, 44.17.040, 44.23.020(b)(3, 7).

5. Attorney General ⇐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), 44.23.050.

6. Attorney General ⇐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 ⇐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

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

8. Attorney General ⇐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 ⇐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.

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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 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.

*Background* [1]

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, 3AN–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. Hickel was elected Governor and shortly thereafter on December 11, 1990, he announced the appointment of Charles E. Cole as his attorney general. Edgar Paul Boyko, a partner in the firm under investigation, had been involved in Hickel'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 Hickel that he appoint Cole as attorney general.

The relationships among Governor Hickel, Boyko, and Cole were significantly intertwined. Boyko had served as attorney general in Hickel'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 Hickel while in private practice.

On December 6, 1990, Boyko apparently asked Governor Hickel 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 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

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* 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 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.

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

> 1. I, 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 which he, 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 certainly not the case so far as I knew, that former Attorney General Doug Baily had told me 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.[3] 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 3AN-S90-718 Civil, a civil case filed by Boyko, Breeze, & Flansburg, *et. al.*, to collect fees allegedly owed for services rendered to Hazama-Gumi, 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.

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.[4]

Special Prosecutor Stewart directed the investigation and presented the matter before a grand jury, which indicted Breeze on various charges in three separate cases.[5] 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 dismissed the indictments on its finding that the 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, 1991 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. *Sea 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, 1175 (Alaska 1992). As to questions of law, we are

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 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 3AN-90-718 Cl. a civil case filed to collect fees for services from Hazama-Gumi, 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.

5. Three indictments were returned by the grand jury against Attorney Robert Breeze, charging him as follows. In case 3AN-S91-5933CR, 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(aX2), two counts of misapplication of property, AS 11.46.620(a), and a count of forgery in the first degree, AS 11.46.500(aX1). In case 3AN-S91-6507CR, 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(aX2). In case 3AN-S91-7934CR, 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(aX2) and a count of misapplication of property, AS 11.46.620(a).

to adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[3] Alaska Statute 44.23.020 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 44.23.020(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."

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)(7). Prosecution of th 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.[6]

[4] 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 delgare* (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

6. 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.

A fair reading of AS 44.23.020 does not require placing an attorney general in such an untenable dilemma: the attorney general is obligated under the statute to investigate and prosecute law violations, and if the attorney general and Department of Law are disqualified from doing so, the attorney general is nevertheless "required by law" to ensure that the investigation and prosecution are conducted by someone who is qualified, whether that person is denominated as special counsel, special prosecutor, or by some other title.



functions, powers and duties" of the attorney general to those "allocated by law," [7] and that the allocation under law is confined by AS 44.17.010 and AS 44.17.040, 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 44.17.040 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.

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

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

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 44.17.040. 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

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) 2008 (January 13, 1956).

[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 44.23.050 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 36.30.015 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.[8]

In *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 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, includes the initiation, prosecution and disposition of cases.

*Id.* (citations omitted).

In *Florida ex rel Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir.), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 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 *Shevin* 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 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 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*, 60 N.Y.2d 46, 467 N.Y.S.2d 182, 454 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 on

8. AS 36.30.850(b)(32) 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 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.



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*, 467 N.Y.S.2d at 183–84, 454 N.E.2d at 523.

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 (1849).

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*, 467 N.Y.S.2d at 183–84, 454 N.E.2d at 523–24 (citing County Law § 700(1), McKinney's Consolidated Laws of New York (MCL)). County Law § 930 authorized the district attorney to appoint assistant district attorneys to serve at the pleasure of the district attorney. *Id.* 467 N.Y.S.2d at 184, 454 N.E.2d at 524. 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 Law[9] the governor

9. Executive Law § 63 sets forth the general duties of the New York Attorney General, who is also an elected constitutional officer under Article 5 § 1; section 63 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....
>
> 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

of New York has the power to order the attorney general to supersede a district attorney.

Schumer was elected to a congressional seat formerly held by Holtzman. *Id.* 467 N.Y.S.2d at 183–84, 454 N.E.2d at 523. After the United States Attorney investigated the Schumer campaign for possible violations and declined prosecution, Holtzman, who by then was elected as county district attorney, decided to pursue the matter. However, because she was concerned about charges of bias, she asked the governor of New York to order the attorney general to supersede her. *Id.*

After the governor refused her request, the district attorney apparently did not seek court appointment of a special prosecutor under § 701, but instead chose to bypass that provision by appointing a special prosecutor under § 930. *Id.* The terms of this appointment provided that the special prosecutor's decisions or actions would not be overridden by the district attorney, and that he could be removed from his duties only for disability or for "extraordinary impropriety," as opposed to removal at the pleasure of the district attorney as set forth in § 930. *Id.* 467 N.Y.S.2d at 184, 454 N.E.2d at 524. The court found this appointment to be invalid because "[s]uch a transfer may be accomplished only by executive or court order." *Id.* 467 N.Y.S.2d at 185, 454 N.E.2d at 525.

In Alaska, by contrast, there are no similar constitutional or statutory limitations regarding appointments of special prosecutors, and, as previously discussed, the Special Prosecutor appointed to investigate Breeze remained appropriately subordinate to the Attorney General.

The fact that the Special Prosecutor appointed to investigate Breeze remained subordinate to the Attorney General leads to our conclusion that the trial court erred in dismissing the indictments on the grounds that the Special Prosecutor somehow exceeded the scope of his authority. First, we believe the trial court erred in adopting such a restrictive interpretation of the phrase from the Special Prosecutor's appointment letter that authorized him "to investigate such other related matters as may arise in the course of your investigation."

Because the authority for the appointment was derived from AS 44.23.020(b)(3), which required prosecution of "all cases involving state law," the term "related matters" could as well be interpreted to include all law violations by individuals under investigation. This is particularly true when the appointment letter is read together with the appendix to the standard agreement form entitled "Article I. *The Services to be performed by the Contractor.*" Under Article I, Special Counsel was to investigate not only matters "in connection with the investigation relating to the complaint in 3AN-90-718CI, a civil case filed to collect fees for services from Hazama-Gumi, Ltd.," but he was more broadly authorized to serve as Special Counsel in "other matters that may arise in the course of the investigation...."

[8] Certainly the Attorney General, who was privy to the agreement that contracted the services of the Special Prosecutor and who authored the appointment letter, would have had some standing to challenge the Special Prosecutor for exceeding his authority; however, the Attorney General made it clear that the Special Prosecutor had acted within the scope of the authority intended. We find no basis to assume that Breeze had the same standing to challenge whether the Special Prosecutor exceeded the scope of his appointment.

[9] Even if the Special Prosecutor were found to have technically exceeded the scope of his appointment, absent a showing of prejudice by Breeze, the indictments would remain valid pursuant to the Special Prosecutor's authority as a *de facto* officer. *See People v. Davis*, 86 Mich.App. 514, 272 N.W.2d 707, 710 (1979).

In *Davis*, the county prosecuting attorney petitioned the court pursuant to statute for

proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending.

N.Y.Executive Law § 63 (McKinney 1993).



appointment of a special prosecutor due to a conflict of interest he perceived regarding the close working relationship between his office and the sheriff's department whose deputy was the subject of investigation. The court appointed a special prosecutor who conducted an investigation and authorized issuance of warrants that charged the defendant with embezzlement and fraudulent conversion. *Id.* 272 N.W.2d at 708. The lower court later determined that because the circuit court was without authority to appoint a special prosecutor to appear in district court, it was necessary not only to set aside the appointment but also to dismiss the warrants. *Id.* at 709–10.

The appellate court agreed that the circuit court did not have the power to appoint a special prosecutor for the purposes requested. However, the appellate court held that the lower court erred in dismissing the warrants that were issued by the special prosecutor, relying on the *de facto* doctrine, which validates, on grounds of public policy and prevention of failure of public justice, the acts of officials who function under color of law. *Id.* at 710. The court in *Davis* quoted from 46 C.J. Officers, § 366 p. 1053, which read as follows:

> A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action; and, in some, although not all, jurisdictions, only when the office has a de jure existence.

We believe that the *de facto* doctrine is applicable under the circumstances, and that it requires reinstatement of the indictments against Breeze. The Special Prosecutor was investigating and prosecuting Breeze pursuant to the authority of the Attorney General, derived from AS 44.23.020 and vested in him by his appointment.

Although we have found that the appointment and exercise of authority were proper, the result would be the same even if the trial court were correct that the incumbency was illegal in some respect; the Special Prosecutor had "at least a fair color or right of title," and "acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment." *Davis*, 272 N.W.2d at 710.

The process of appointing a special prosecutor was reported publicly and conducted at the request of Boyko, Breeze's law partner at the time. After Boyko made this request to the Governor, the Attorney General, as chief legal advisor to the Governor, commenced the selection process. When difficulties arose in selecting a qualified person, Breeze himself discussed the selection process and urged the state to get on with the investigation. Thus, the Special Prosecutor had a fair color or right to title, and he acted under circumstances of reputation or acquiescence not only of public authorities and the public, but also by Breeze himself. The Special Prosecutor conducted an investigation, submitted regular reports to the Attorney General, and presented the matters to a grand jury under circumstances that induced people to submit to or invoke his action.

Questions regarding the Special Prosecutor's authority had no demonstrated bearing on the grand jury's determination to return indictments against Breeze. Even if the Special Prosecutor's incumbency were illegal in some respect, there was no basis for the dismissal of the indictments, since, in any case, his acts achieved *de facto* legitimacy. *See People v. Montoya*, 44 Colo.App. 234, 616 P.2d 156, 162 (1980). There is nothing in the record to show how Breeze could have been prejudiced by the appointment of a special prosecutor who was contractually bound by "all applicable federal or state laws regulating ethical conduct of public officers," and who presented the cases to a grand jury for review.

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

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

10. In light of the Attorney General's subsequent clarification regarding the Special Prosecutor's scope of authority, it is apparent that the Special Prosecutor would not now be prohibited from further prosecuting these matters in any event.



CITY OF DILLINGHAM, an Alaska Municipal Corporation, Petitioner,

v.

CH2M HILL NORTHWEST, INC., Respondent.

No. S-5230.

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, Beverly 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, Rabinowitz, 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.

1. Appeal and Error ⇐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 ⇐250

While city was beneficiary or "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 ⇐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 ⇐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 ⇐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 ⇐129(1)

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

7. Indemnity ⇐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 claus-