SJR

14

FISCAL NOTE No. 1

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Bill Version: SJR 14
(S) Publish Date: 3/19/99

Revision Date/Time (Note if correction)
Dept. Affected Office of the Governor
Title Constitutional Amendment relating to the election and duties of the attorney general
BRU Elective Operations
Component General and Primary
Sponsor Senator Ward
Requester Senate State Affairs Committee
Component Serial No. 22

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by $22.0.

Prepared by Gail Fenumiai
Phone 465-3935
Division Division of Elections
Date/Time 3/5/99 9:27 AM
Approved by Lt. Governor Fran Ulmer
Date 3/5/99
Agency Office of the Lieutenant Governor

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

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FISCAL NOTE

No. 2
Bill Version: STR 14
(S) Publish Date: 3/19/99

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date:
Title: "Proposing amendments to the Constitution... election and the duties of the attorney general."
Sponsor: Senator Ward
Requester: Senate State Affairs

Dept. Affected: Office of the Governor
BRU: Executive Operations
Component: Executive Office
COMPONENT SERIAL NO. 6

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
PERSONAL SERVICES				*****	*****	*****
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	*****	*****	*****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF				*****	*****	*****
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	*****	*****	*****

Estimate of any current year (FY99) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, to handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders.)

The constitutional amendment proposed by this resolution would be on the 2000 ballot. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in 2002. Fiscal impact to the Office of the Governor would begin in FY03. A fiscal analysis for informational purposes is attached.

Prepared by: Michael A. Nizich, Administrative Director
Division: Administrative Services
Phone: 465-3876
Date: 3/9/99

Approved by Commissioner: Jim Ayers, Chief of Staff
Agency: Office of the Governor
Date: 3/9/99

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
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SJR 14 Analysis:

This fiscal impact below is for **illustration purposes only** and is based on 1999 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY03, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined and may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions – an attorney, rg.26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned office space would be available and does not include lease costs.

Personal services:	three PFTs	194.7
Contractual:	comm., phones, tolls Courier svcs, subscripts, etc.	19.2
Supplies:	office/library supplies	9.8
Equipment:	office furniture, DP and communication equipment	39.5 *
	Total first year costs:	263.2

- 39.5 first year set-up costs only and not required in subsequent years

1-LS0588\G
Kurtz
4/7/99

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR WARD

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

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

*** Section 1.** Article III, sec. 23, Constitution of the State of Alaska, is amended to read:

Section 23. Reorganization. **(a) Except as provided in (b) of this section, the** [THE] governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

*** Sec. 2.** Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a new subsection to read:

(b) The governor may not make a change in the organization or function of a unit of the executive branch that is headed by the attorney general.

* **Sec. 3.** Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

Section 24. Supervision. **Except for the unit of the executive branch that is headed by the attorney general, each** [EACH] principal department shall be under the supervision of the governor.

* **Sec. 4.** Article III, sec. 25, Constitution of the State of Alaska, is amended to read:

Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. **The head of a principal department** [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 **lieutenant governor and the attorney general** [SECRETARY OF STATE]. The heads of all principal departments shall be citizens of the United States.

* **Sec. 5.** Article III, Constitution of the State of Alaska, is amended by adding new sections to read:

Section 28. Attorney General: Qualifications, Compensation, and Duties. (a) There shall be an attorney general. The attorney general shall be at least thirty years of age and a qualified voter of the State, and a citizen of the United States and a resident of the state. The attorney general shall possess additional qualifications prescribed by law.

(b) The compensation of the attorney general shall be prescribed by law and may not be diminished during the term of office unless by general law applying to all salaried officers of the State.

(c) The attorney general shall defend the State in all civil actions in which the State, a State agency, a State public corporation, or a State public enterprise is named as a defendant party, shall prosecute violations of State criminal law, including infractions and violations, and shall perform other duties prescribed by law.

Section 29. Attorney General: Election, Term of Office, and Vacancy. (a) The attorney general shall be nominated in the manner provided by law for nominating candidates for other elected offices.

(b) The term of office of the attorney general is four years, beginning at noon on the first Monday in December after election under (a) of this section and ending

at noon on the first Monday in December four years later.

(c) A person who has been elected attorney general for two full successive terms is not eligible to hold that office until one full term has intervened.

(d) In case of a vacancy in the office of attorney general for any reason, a successor shall be elected for the remainder of the unexpired term at the first general election occurring not less than six months after the office becomes vacant. The governor may appoint a qualified person to fill the office between the date it becomes vacant and the date it is filled by election. The appointment is subject to confirmation by a majority of the members of the legislature in joint session.

(e) No person holding or who has at any time held the office of attorney general during a term of office described in (b) of this section may hold the office of governor or the office of lieutenant governor until one full term has intervened.

* **Sec. 6.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 30. Initial Election of Attorney General. The first election for an attorney general required by the constitution to be elected shall occur at the first general election at which a governor is to be elected occurring after the office of attorney general is established under the constitution. A vacancy that occurs in the office of attorney general before the first general election held at which an attorney general shall be elected after the office is established under the constitution shall be filled under the law as it existed before the office was established under the constitution.

* **Sec. 7.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

SENATE COMMITTEE REPORT

DATE: 3/19/99

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 14

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

and recommends:

[X] be **replaced** with S CS SJR 14 (11) (JUD)

[ ] adopt **previous** ____ CS _____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[✓] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR# ____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Rick Halford					
Dave Donley	✓	Fg Pops		X	
CHAIR: John Torgerson	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Gov. Exec. Ops	--		
Gov. Elections			

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

1-LS0588\I
Kurtz
2/25/00

Sen Taylor
faxed 2/25
delivered 2/2

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR WARD

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

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

* Section 1. Article III, sec. 23, Constitution of the State of Alaska, is amended to read:

Section 23. Reorganization. <u>(a) Except as provided in (b) of this section, the</u> [THE] governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

* Sec. 2. Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a new subsection to read:

(b) The governor may not make a change in the organization or function of a unit of the executive branch that is headed by the attorney general.

* Sec. 3. Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

Section 24. Supervision. Except for the unit of the executive branch that is headed by the attorney general, each [EACH] principal department shall be under the supervision of the governor.

* Sec. 4. Article III, sec. 25, Constitution of the State of Alaska, is amended to read:

Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. The head of a principal department [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 lieutenant governor and the attorney general [SECRETARY OF STATE]. The heads of all principal departments shall be citizens of the United States.

* Sec. 5. Article III, Constitution of the State of Alaska, is amended by adding new sections to read:

Section 28. Attorney General: Qualifications, Compensation, and Duties. (a) There shall be an attorney general. The attorney general shall be at least thirty years of age and a qualified voter of the State, and a citizen of the United States and a resident of the state. The attorney general shall have been a resident of the state for at least seven years, and licensed to practice law in the state for at least five years, immediately preceding filing for office. The attorney general shall possess additional qualifications prescribed by law.

(b) The compensation of the attorney general shall be prescribed by law and may not be diminished during the term of office unless by general law applying to all salaried officers of the State.

(c) The attorney general is the legal officer of the State and shall have duties and powers provided by law.

Section 29. Attorney General: Election, Term of Office, and Vacancy. (a) The attorney general shall be nominated in the manner provided by law for nominating candidates for other elected offices.

(b) The term of office of the attorney general is four years, beginning at noon on the first Monday in December after election under (a) of this section and ending

at noon on the first Monday in December four years later.

(c) A person who has been elected attorney general for two full successive terms is not eligible to hold that office until one full term has intervened.

(d) In case of a vacancy in the office of attorney general for any reason, a successor shall be elected for the remainder of the unexpired term at the first general election occurring not less than six months after the office becomes vacant. The governor may appoint a qualified person to fill the office between the date it becomes vacant and the date it is filled by election. The appointment is subject to confirmation by a majority of the members of the legislature in joint session.

(e) No person holding or who has at any time held the office of attorney general during a term of office described in (b) of this section may hold the office of governor or the office of lieutenant governor until one full term has intervened.

* **Sec. 6.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 30. Initial Election of Attorney General. The first election for an attorney general required by the constitution to be elected shall occur at the first general election at which a governor is to be elected occurring after the office of attorney general is established under the constitution. A vacancy that occurs in the office of attorney general before the first general election held at which an attorney general shall be elected after the office is established under the constitution shall be filled under the law as it existed before the office was established under the constitution.

* **Sec. 7.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

1-LS0588\H
Kurtz
4/13/99

adopted and amended
currently (2/9) before cmte.
moved 3/22/00

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR WARD

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

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

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(b) The compensation of the attorney general shall be prescribed by law and may not be diminished during the term of office unless by general law applying to all salaried officers of the State.

(c) The attorney general shall defend the State in all civil actions in which the State, a State agency, a State public corporation, or a State public enterprise is named as a defendant party, shall prosecute violations of State criminal law, including infractions and violations, and shall perform other duties prescribed by law.

Section 29. Attorney General: Election, Term of Office, and Vacancy. (a) The attorney general shall be nominated in the manner provided by law for nominating candidates for other elected offices.

(b) The term of office of the attorney general is four years, beginning at noon on the first Monday in December after election under (a) of this section and ending at noon on the first Monday in December four years later.

(c) A person who has been elected attorney general for two full successive terms is not eligible to hold that office until one full term has intervened.

(d) In case of a vacancy in the office of attorney general for any reason, a successor shall be elected for the remainder of the unexpired term at the first general election occurring not less than six months after the office becomes vacant. The governor may appoint a qualified person to fill the office between the date it becomes vacant and the date it is filled by election. The appointment is subject to confirmation by a majority of the members of the legislature in joint session.

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* Sec. 7. The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

L

1-LS0588\G
Kurtz
4/7/99

CS FOR SENATE JOINT RESOLUTION NO. 14(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR WARD

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

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

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Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. **The head of a principal department** [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 **lieutenant governor and the attorney general** [SECRETARY OF STATE]. The heads of all principal departments shall be citizens of the United States.

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(b) The compensation of the attorney general shall be prescribed by law and may not be diminished during the term of office unless by general law applying to all salaried officers of the State.

(c) The attorney general shall defend the State in all civil actions in which the State, a State agency, a State public corporation, or a State public enterprise is named as a defendant party, shall prosecute violations of State criminal law, including infractions and violations, and shall perform other duties prescribed by law.

Section 29. Attorney General: Election, Term of Office, and Vacancy. (a) The attorney general shall be nominated in the manner provided by law for nominating candidates for other elected offices.

(b) The term of office of the attorney general is four years, beginning at noon on the first Monday in December after election under (a) of this section and ending

at noon on the first Monday in December four years later.

(c) A person who has been elected attorney general for two full successive terms is not eligible to hold that office until one full term has intervened.

(d) In case of a vacancy in the office of attorney general for any reason, a successor shall be elected for the remainder of the unexpired term at the first general election occurring not less than six months after the office becomes vacant. The governor may appoint a qualified person to fill the office between the date it becomes vacant and the date it is filled by election. The appointment is subject to confirmation by a majority of the members of the legislature in joint session.

(e) No person holding or who has at any time held the office of attorney general during a term of office described in (b) of this section may hold the office of governor or the office of lieutenant governor until one full term has intervened.

* **Sec. 6.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 30. Initial Election of Attorney General. The first election for an attorney general required by the constitution to be elected shall occur at the first general election at which a governor is to be elected occurring after the office of attorney general is established under the constitution. A vacancy that occurs in the office of attorney general before the first general election held at which an attorney general shall be elected after the office is established under the constitution shall be filled under the law as it existed before the office was established under the constitution.

* **Sec. 7.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

draft CS

• original bill
1st CS draft w/instructions attached.
• new CS follows as "G"

SENATE JOINT RESOLUTION NO. 14

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY SENATOR WARD

Introduced: 3/4/99
Referred: State Affairs, Judiciary

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to the election and the duties of the attorney general.

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

*** Section 1.** Article III, sec. 23, Constitution of the State of Alaska, is amended to read:

Section 23. Reorganization. <u>**(a) Except as provided in (b) of this section,**</u> <u>**the**</u> [THE] governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

*** Sec. 2.** Article III, sec. 23, Constitution of the State of Alaska, is amended by adding a new subsection to read:

(b) The governor may not make a change in the organization or function of a unit of the executive branch that is headed by the attorney general.

* **Sec. 3.** Article III, sec. 24, Constitution of the State of Alaska, is amended to read:

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Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. **The head of a principal department** [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 **lieutenant governor and the attorney general** [SECRETARY OF STATE]. The heads of all principal departments shall be citizens of the United States.

* **Sec. 5.** Article III, Constitution of the State of Alaska, is amended by adding new sections to read:

Section 28. Attorney General: Qualifications, Compensation, and Duties. (a) There shall be an attorney general. The attorney general shall be at least thirty years of age and a qualified voter of the State, and a citizen of the United States and a resident of the state. The attorney general shall possess additional qualifications prescribed by law.

(b) The compensation of the attorney general shall be prescribed by law and may not be diminished during the term of office unless by general law applying to all salaried officers of the State.

(c) The attorney general shall defend the State in all civil actions in which the State, a State agency, a State public corporation, or a State public enterprise is named as a defendant party, shall prosecute violations of State criminal law, including infractions and violations, and shall perform other duties prescribed by law.

Section 29. Attorney General: Election, Term of Office, and Vacancy. (a) The attorney general shall be nominated in the manner provided by law for nominating candidates for other elected offices.

(b) The term of office of the attorney general is four years, beginning at noon on the first Monday in December after election under (a) of this section and ending

at noon on the first Monday in December four years later.

(c) A person who has been elected attorney general for two full successive terms is not eligible to hold that office until one full term has intervened.

(d) In case of a vacancy in the office of attorney general for any reason, a successor shall be elected for the remainder of the unexpired term at the first general election occurring not less than six months after the office becomes vacant. The governor may appoint a qualified person to fill the office between the date it becomes vacant and the date it is filled by election. The appointment is subject to confirmation by a majority of the members of the legislature in joint session.

INSERT Restrictions (e) See attached

* **Sec. 6.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 30. Initial Election of Attorney General. The first election for an attorney general required by the constitution to be elected shall occur at the first general election at which a governor is to be elected occurring after the office of attorney general is established under the constitution. A vacancy that occurs in the office of attorney general before the first general election held at which an attorney general shall be elected after the office is established under the constitution shall be filled under the law as it existed before the office was established under the constitution.

* **Sec. 7.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

general running jointly with the governor. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected attorney general.

(b) The term of office of the attorney general is four years, beginning at noon on the first Monday in December after election under (a) of this section and ending at noon on the first Monday in December four years later.

(c) A person who has been elected attorney general for two full successive terms is not eligible to hold that office until one full term has intervened.

(d) In case of a vacancy in the office of attorney general for any reason, a successor shall be elected for the remainder of the unexpired term at the first general election occurring not less than six months after the office becomes vacant. The governor may appoint a qualified person to fill the office between the date it becomes vacant and the date it is filled by election.

(e) No person holding or who has at any time held the office of attorney general during a term of office described in (b) of this section may hold the office of governor or the office of lieutenant governor until one full term has intervened.

* **Sec. 6.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 29. Initial Election of Attorney General. The first election for an attorney general required by the constitution to be elected shall occur at the first general election at which a governor is to be elected occurring after the office of attorney general is established under the constitution. A vacancy that occurs in the office of attorney general before the first general election held at which an attorney general shall be elected after the office is established under the constitution shall be filled under the law as it existed before the office was established under the constitution.

* **Sec. 7.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 12, 1995

The Honorable Robin Taylor, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Mr. Chairman:

I am in receipt of your letter of February 10, 1995, requesting my attendance at a hearing to consider my "qualifications for confirmation by the Legislature."

I respectfully decline to appear before the Senate Judiciary Committee on February 13. My appointment as Attorney General was confirmed in the Second Session of the Eighteenth Legislature. I have served continuously since that time as Attorney General. Governor Knowles did not request my resignation when he took office, nor did I at any time submit a resignation to the Governor. Therefore, the question of my confirmation is not before the Legislature. Att'y Gen. Op. No. 3 (Jan. 25, 1979).

I would be pleased to meet with you or appear before the Judiciary Committee at any other time to explain my position or the actions of my department concerning any matter of interest to you or the committee.

Very truly yours,

Bruce M. Botelho
Attorney General

cc: The Honorable Tony Knowles
Governor

95020

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

January 25, 1979

The Honorable Jay S. Hammond
Governor
Pouch A
Juneau, Alaska 99811

Re: Confirmation of heads of principal departments

Dear Governor Hammond:

You have asked whether either custom or law require you to submit the names of the heads of principal departments to the legislature for confirmation when they carry over in office following a gubernatorial election.

The short answer is that neither custom nor law impose any such requirement.

The law on the subject has been stated succinctly as follows:

> When the term of office is not fixed by law, the officer holds office at the will of the appointing power, and strictly speaking has no term of office.

67 C.J.S. Officers § 66(b). Under the Alaska Constitution, the Governor is the "appointing power." Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Article, section 25, of the Alaska Constitution provides as follows:

> The head of each principal department . . . shall be appointed by the governor, subject to confirmation by . . . the legislature . . . and shall serve at the pleasure of the governor. . . .

Accordingly, under the general rule, the heads of the principal departments, once appointed and confirmed, serve indefinitely until they leave office. Unlike the Governor, whose term is fixed by the constitution, their terms are indefinite. The occurrence of a gubernatorial election has no effect, in itself, on their terms. They continue to serve even upon the election of a new governor until they are discharged by the governor or resign. There is no vacant office to which the incumbent may be "appointed" or "reappointed," and therefore no appointment or reappointment for the legislature to confirm.

The custom nationally and in Alaska is consistent with this interpretation. No reelected President of the United States has been known to have submitted for confirmation the names of persons holding over as cabinet officers. One can search the diaries of Harold Ickes, the Secretary of the Interior from 1933 through 1946, in vain for any record of his reconfirmation in 1937, 1941, or 1945. There was none. Since the first election of Franklin D. Roosevelt in 1932, there have been seven instances of presidential reelections involving cabinet officers who held over and three instances of vice-presidential succession involving cabinet officers who held over. So far as is known, the name of none was submitted for confirmation.

In Alaska, prior to 1978 there has been only one instance of a gubernatorial reelection, Governor Egan's reelection in 1962. In 1963, Governor Egan submitted the names of the heads of six principal departments to the legislature for confirmation. All but one had succeeded to office since the adjournment of the 1962 legislature. The one exception was an appointment to head a new department established by law by the 1962 legislature. The Governor did not submit the names of the heads of seven departments who had carried over in office, e.g., Floyd Guertin, who had served as Commissioner of Administration since Statehood, and Phil Holdsworth, who had served as Commissioner of Resources for the same period. 1963 Supp. to H. and S. Jour. April 9, 1963.

When Lieutenant Governor Miller succeeded to the office of Governor, he did not submit the names of the heads of all the principal departments for confirmation but rather only those who had been appointed to office since their predecessors had been confirmed, i.e., a new Attorney General, new Commissioners of Adminsitration, Highways, and new Public Works. 1969 S. Jour. 491 (Mar. 27, 1969). Hence, the custom in Alaska is the same as at the national level.

Accordingly, neither by law nor by custom need you submit for legislative confirmation the names of the heads

of principal departments whose appointments have already been confirmed and who have carried over in office. There are no vacancies in those offices to which an appointment or reappointment can be made, and no appointment or reappointment which the legislature can affirm.

Sincerely,

Avrum M. Gross
Attorney General

AMG:chw:RWP

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.

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.

COMMISSION ON PRIVATIZATION AND DELIVERY OF GOVERNMENT SERVICES

SUBCOMMITTEE REPORT

ON THE

DEPARTMENT OF LAW

November 18, 1999

Subcommittee Members: Mark Johnson, Chair; Scott Brandt-Erichsen, Blake Call, John Cowdery, Pete Kinneen, Richard McVeigh, William Oberly, Betty Rollins, Bill Satterberg, Bruce Weyhrauch

November 3, 1999
13631 Windward Circle
Anchorage, Alaska 99516

Senator Jerry Ward
Representative John Cowdery
Co-Chairs
Commission of Privatization
and the Delivery of Government Services
Alaska State Legislature
Anchorage, Alaska 99501

Dear Senator Ward and Representative Cowdery:

This submission constitutes the final Report of the Subcommittee for the Department of Law.

The following individuals have contributed to the work of the Subcommittee:

Mark K. Johnson, Chair
Scott Brandt-Erichsen
William B. Oberly
Richard L. McVeigh
Blake Call
Bill Satterburg
Betty Rollins
Pete Kinneen
Bruce Weyrauch

While all have contributed, no particular point which has been made in this Report should be necessarily attributed to individual members.

APPROACH OF THE SUBCOMMITTEE

The Department of Law is fairly unique among state agencies in that it exclusively performs services for the State and agencies of the State. It does not provide services to the general public or to particular classes of the public. In addition, legal services in many, if not most, cases involve the exercise of considerable discretion on the part of the attorney assigned to the case, be it at the intake, trial or appeal level.

In recognition of these facts, the Subcommittee at the outset did not commence work from the standpoint of elimination of legal professional staff or the wholesale assignment of individual programs to the private sector. In the first instance, it seems clear that appropriation for legal staff will generally produce a commitment to litigation and prosecution at that level. If more funds are appropriated, more resources will be expended on those functions. If less funds are appropriated, less resources will be expended on those functions. In this regard, the Subcommittee is probably less able to address the question of the level of appropriation for the Department than the Finance Committees, as the Subcommittee has consisted of non-budgetary professionals working on a volunteer basis.

The Subcommittee has therefore focused upon those provisions of the Full Commission's authorizing legislation which permit examination of the Department of Law from the standpoint of efficiency and effectiveness. The Subcommittee has also examined contracting policy and procedures for the Department.

To a very considerable degree, each of the subjects inquired into on the part of the Subcommittee have, in one way or another, hinged on the exercise of discretion on the part of the leadership of the Department of Law. The Department of Law is also unique among the departments of state government in that with the exception of a handful of individuals, all of the professional employees of the Department are either exempt or partially exempt State employees who serve at the pleasure of the agency head, the Attorney General, and ultimately the Governor. There is clearly more discretion exercised in carrying out the functions assigned to the Department than in any other executive Department of State government.

This circumstance has led the Subcommittee into inquiring in various ways about how the Department exercises discretion and what legal and practical limitations exist on the exercise of discretion. If any change at all is going to be made to the functions and activities of the Department by the Legislature, sooner or later the issue of the exercise of discretion on the part of the Department will enter the equation.

In light of these circumstances, the Subcommittee has ventured probably a bit further from the pathway taken by some other subcommittees of the Commission and has examined the statutory underpinnings of the Department.

SUBCOMMITTEE MEETINGS AND PROCESS

The Subcommittee has met seven times, taken extensive testimony from the Department's leadership, posed two sets of written inquiries to the Department, and discussed and debated issues as a subcommittee on multiple occasions.

The written inquiries to the Department are attached to this Report, as are the responses of the Department.

The Department has been well represented by Deputy Attorney General Barbara Ritchie, Deputy Attorney General Cynthia Cooper, and Special Assistant to the Attorney General Joan Kasson. In all instances, these representatives have responded satisfactorily to the questions of the Subcommittee. Their cooperation is appreciated.

The Subcommittee at the outset adopted a policy that it would not discuss any particular matter currently in litigation. Discussion of cases by name has been extremely rare, if it has occurred at all.

Following the fact-finding segment, the Subcommittee has met to discuss and deliberate regarding the recommendations to be included in this Report. The chair has been of the view that it is the task of the Subcommittee to generate ideas to be passed along to the full Commission and ultimately the Legislature and that therefore it is not necessary or even desirable to seek a consensus or even majority support for any particular idea to be made part of this Report. Dissent from the points contained in this Report has been encouraged, and members may submit alternative viewpoints to any point to the full Commission. The Subcommittee stands behind the points contained in this Report as ideas meriting further examination by either the full Commission or the Legislature.

Sincerely,

Mark K. Johnson, Chair

Enclosures
Appendices

RECOMMENDATIONS OF THE SUBCOMMITTEE

Recommendation 1. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting functions currently performed by the Office of Special Prosecutions and Appeals. In particular, the handling of appeals and the issuance of opinion letters should be examined.

The Office of Special Prosecutions and Appeals is a component of the Department of Law, Criminal Division. Its functions were described to the Subcommittee as handling all appeals in criminal cases, prosecuting special categories of criminal offenses and providing legal opinions to the clients regarding the legality of laws both existing and prospective. Some of these functions seemed particularly suited for privatization. However, the information provided to the Subcommittee was not sufficient to make a solid recommendation on the appropriateness of such privatization.

The Criminal Division of the Department of Law described the functions of the Office of Special Prosecutions and Appeals to the Subcommittee. In so doing, the Division took the position that OSPA, like all activities of the Criminal Division, was not appropriate for consideration for privatization. However, a number of the functions of OSPA seemed to the Subcommittee open to consideration for privatization. Foremost among those were the major function of OSPA, handling appeals, and its function as provider of opinion letters when requested.

Criminal appeals handled by the State are brought to OSPA after the State or, as more frequently happens, the Defendant, appeals the case. At that point the attorney who is assigned to the case is not the trial attorney but an attorney who is new to the case. That attorney has to familiarize themselves with the case by reviewing the record on appeal. After familiarizing themselves with the issues, facts and law in the case, the attorney would prepare the appeal paperwork and arguments. The fact that the OSPA attorney must familiarize themselves with each new case means that privatization of this function would not mean a different, or extra step for the private attorney involved. Like the OSPA attorney, a private attorney contracted to handle an appeal would have to familiarize themselves with the issues, facts and law in the case before preparing the appeal. If this could be contracted at a lower per hour rate than the cost of an OSPA attorney, the State could save considerable amounts money on criminal appeals.

The same situation exists in the area of opinion letters. The requesting agency presents a new set of issues and questions to the attorney in each request. Therefore, a private attorney and an OSPA attorney would be starting from the same place, with each having to review and understand the question and do the research before writing the opinion. Again, if the contract rate for a private attorney to handle this work could be set lower than the cost to of an OSPA attorney, the State would save money.

These seem particularly fertile areas for privatization in the Criminal Division because there are no issues of prosecutorial discretion. Assuming the Department of Law itself would make all decisions on when the State wished to file an appeal in a criminal case, the contract attorneys would have no discretion on whether to proceed with a case or not, and would be hired only to do the appeal. This is so because, other then when the State appeals a case, all other appeals are brought by the Defendant and the State must respond. The same is true in the opinion letter area, as it is the State agency making the request, and the contract attorney would merely be providing the information.

A possible drawback of privatization of this function would be loss of institutional memory of each individual OSPA attorney. Although this would occur, it would seem that this could be lessened by requiring the contractors to have a certain base knowledge of Alaska criminal law. It could also be controlled by providing the contractors with access to prior work done by the State criminal appeals attorneys, whether OSPA or contract. Again the same logic applies to the opinion letters area.

Concurring views of Scott Brandt-Erichsen: Concerning the handling of criminal appeals, I favor contracting out of appeals on an hourly rate which is equivalent to or less than the in-house rate. Because the appellate counsel currently begins fresh and is confined to the record, there does not appear to be any inherent advantage to in house services. Thus, with qualified counsel, the less expensive alternative would presumably be the preferred alternative.

I do not favor contracting out issuance of opinion orders as I feel that such letters are closely related to the prosecutorial decision-making function. The advice given to law enforcement personnel can impact the ability of the trial counsel to prepare and present the best case for the state.

Recommendation 2. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting the misdemeanor prosecution function after intake screening.

Misdemeanor criminal prosecution involves, for the most part, simple fact patterns and simple statutory violations. The major characteristic of misdemeanor prosecution is the large number of cases. It seems, therefore, that contract attorneys could handle the prosecution of State misdemeanor charges more economically than the District Attorney's Office if the State could contract with private attorneys at a rate less than the rate of a District Attorney.

In the fiscal year ending July, 1999, the State of Alaska handled almost 20,000 misdemeanor prosecutions and felony probation revocations statewide. Historically the issues raised in misdemeanor cases are not complicated and often entail a small portion of the misdemeanor code. This work seems particularly appropriate for privatization if the private attorneys could be contracted at a lower rate then the hourly rate for a District Attorney.

Of concern in this area, as in privatization of any criminal prosecutions, is whether contract attorneys might choose to pursue or not pursue certain criminal cases for reasons other than the public interest. This concern could be addressed by having the screening function remain with the Department of Law, and the remainder of the case work be handled by contract attorneys.

Of additional concern is the availability of private attorneys in various parts of the State to contract for these services. However, both the Public Defenders Office and the Office of Public Advocacy have had to address these concerns and have successfully contracted the services of attorneys to handle criminal cases in remote locations. The example of these agencies could serve as a model.

Another concern is the amount of discretion which should be given to any attorney who handles misdemeanor prosecutions. Issues will undoubtedly come up after a case is screened in which might impact continuation of a prosecution. This concern might be addressed by having someone at the Department of Law be authorized as a contact person for the contracting attorneys. That person would have the power to make decisions on dismissing a prosecution if the facts and/or law dictated.

The Office of Public Advocacy contracts with private attorneys at a rate far below the prevailing rate in the private sector, and far below the hourly rate quoted by the Department of Law for the cost to the State of an attorney with the Department of Law. The work of the Criminal Division could, very well, be done as effectively, but more economically, if the private sector is allowed to participate in misdemeanor prosecutions after the screening stage. More information is necessary to determine just how much could be saved.

The Subcommittee discussed that privatization could pose problems with coordinating trial schedules with those of police. This matter would need to be considered in connection with this recommendation.

Recommendation 3. The Subcommittee recommends that the Legislature conduct specific hearings on the issue of the allocation of the costs and responsibilities for criminal prosecution between the State and local governments. Such hearings could and perhaps should be expanded to address the provision of police services. The Subcommittee believes that the goal of these hearings should be to develop a consistent statewide approach to the delivery of criminal justice functions which recognizes the varying level of resources available to local governments.

To the knowledge of the Subcommittee, no framework currently exists which allocates the powers and financial responsibility for criminal justice functions among State and local governments in Alaska. In some communities, local police are maintained, in many communities law enforcement responsibility is left to the Alaska State Troopers. Even where local police exist, those officers may charge offenders under State law, with the resulting prosecution carried out by the District Attorney's offices. In some communities, violations may be violations of local ordinances and the local government undertakes the prosecution function. Another very major component of this issue is the costs of incarceration. The statewide overall public safety costs are great. Public Safety costs (police, fire and prosecution) in Anchorage are probably the largest single item in the municipal budget.

The Subcommittee believes that one viable approach to the present situation would be to link classification of a local government for the purposes of Title 29 to the assumption of public safety functions. For example, a first class municipality would be given the statutory power to hire police, but would thereby assume responsibility for prosecution. At some threshold level, a community which desired to have certain local government powers would have to assume public safety responsibility.

The Subcommittee does not necessarily see this process as one intended to shift costs to local governments – but rather focused on providing some rationality and framework for the distribution of public safety powers and financial responsibilities.

Views of Scott Brandt-Erichsen: I oppose any increase in the burden on local governments through transfer of either policing or prosecution of functions to local governments. While I endorse the concept of equitable treatment as between municipalities, I do not believe that forcing municipalities to take on more law enforcement or prosecution functions is in the state's best interests where the effect is merely a shifting of costs from the state general fund to the local taxpayers.

Recommendation 4. The Subcommittee believes that it should be the policy of the Legislature that all privatization efforts which are undertaken regarding the Department of Law should result in commensurate reductions in staff.

As noted in the introduction to this Report, the Subcommittee did not engage in a component-by-component examination of the operating budget of the Department. With the exception of a small administrative group, each division of the Department renders either civil or criminal legal services to the State. In short, increased appropriations will permit the rendering of more legal services, reduced appropriations will require a reduced level of legal services. The Subcommittee sees little value in attempting to substitute the views of the Subcommittee for those of the Legislature on aggregate appropriations for the Department.

The Subcommittee does believe, however, than each change in the delivery of services should be evaluated from a budgetary standpoint. If the State is able to obtain legal services more efficiently from the use of outside counsel, corresponding reductions to the staff of the Department are necessary.

Recommendation 5. The Subcommittee recommends that the Legislature develop and enact additional measures to ensure that the selection of legal services contractors by the State is as objective as possible. The Subcommittee believes that the use of the of a pre-qualified list of potential providers would be a useful tool.

The Subcommittee received written material and oral descriptions from Department of Law staff regarding the existing practices for making decisions on whether to contract out for legal services and how to select a legal services provider. These materials and statements also included information regarding the practices of the Department of Law in monitoring existing legal services contracts.

In the course of Subcommittee discussion, several themes were addressed. Regarding the effectiveness and accountability of outside counsel, the comparison between in-house counsel and contracted counsel with respect to cost effectiveness or efficiency in achieving client objectives is difficult to evaluate without certain data. Regarding cost effectiveness, accurate data concerning the total cost of legal services both in-house and on a contract basis on a comparable indices is needed. This concern is also addressed in item 7 below.

Additionally, evaluation of the qualitative efficiency and effectiveness of legal representation (objectives versus outcome of specific cases) requires adequate information about those objectives and outcomes to determine the overall effectiveness of in-house versus contract counsel. The contracting procedures provided by the Department of Law include identification of the litigation plan and objective as part of the contract monitoring process. This definition of the litigation objective may be an appropriate requirement in each case (whether in-house or outside counsel) and would provide a measure which legislative audit or any other audit or oversight body might utilize to evaluate the effectiveness of both the department of law and contract counsel.

The fairness in contractor selection was an area of particular concern. Subcommittee members commented that the existing contractor selection process is largely subjective. With respect to legal services which are routine and could be adequately performed by a broad range of counsel in the relevant practice area (such as criminal appeals, collections, worker's compensation or other similar routine matters), committee members felt that a more objective contractor selection system from among a pool of qualified contractors would be more likely to serve the public interest in avoiding favoritism in the award of public contracts. One method suggested was the maintenance of pools or lists of qualified contractors for various categories of work. Contractor selection within the practice area of a particular pool would look to the name at the top of the list with new service providers being added to the bottom of the list and previously selected contractors rotating to the bottom of the list. Additionally, there was some discussion of utilizing a method whereby the state sets a maximum contract compensation rate for routine matters at or below the determined in-house rate for providing legal services. Subcommittee members commented that such a system could be used for specialized litigation needs as well.

The Subcommittee recognizes that in some instances there may be justifications for deviation from a pool type objective contractor selection system, and agrees that exceptions should be permissible. However, the Subcommittee feels that where exceptions to an objective award method are utilized, the justification for the exception should be documented in writing against a standard criteria to provide a basis for oversight and evaluation of the fairness of the selection process.

<u>Recommendation 6</u>. The Subcommittee recommends that the Legislature require the Department to develop in consultation with the Division of Legislative Audit a pilot project to test the feasibility of the use of a outside audit firm to assess the costs incurred in litigation. Such firms are presently utilized in the private sector. The Subcommittee believes that the pilot project may be best tested in tort cases.

During the course of meetings with the Department, Subcommittee members noted that it is becoming increasingly commonplace in the private sector for clients, particularly insurers, to utilize the services of an outside auditor to ascertain the reasonableness of charges for legal services rendered by attorneys to clients. The Department acknowledged that the Division of Risk Management had been approached by these types of service providers in the past.

Some Subcommittee members believe that this type of review could be of benefit to the State in lowering the costs of representation. Other Subcommittee members expressed strong doubt that the use of this type of review contractor would either improve litigation outcomes or lower costs.

The Subcommittee obtained from the Department a copy of a solicitation from one of these types of review services. On balance, the Subcommittee believes that it may be useful to test the feasibility of the use of these types of services on a limited, experimental basis and recommends that a pilot project be developed by the Department and

the Division of Legislative Audit. The Subcommittee does not endorse a particular outcome for this pilot project, but believes that it may be useful to explore whether the State should consider this matter further.

Recommendation 7. The Subcommittee recommends that the Legislature direct the Division of Legislative Audit to determine the full and fair value per billable hour of legal services rendered by the Department of Law and ensure that the rates are consistently applied in the budgeting process pertaining to the Department. Following completion of this task, the Subcommittee recommends to the Legislature that it examine whether legal services rendered by the Department should be billed at different rates for different services. The Subcommittee is generally of the view that the Department's costs of service should distinguish between routine and complicated legal services.

During the course of Subcommittee deliberations, a discrepancy was noted in the hourly rate charged by the Department of Law to client agencies and the rate that the Department utilizes when making presentations to the courts on the costs of litigation.
Any discussion on potential privatization of services will at some point consider and compare the cost of contracting representation out to private attorneys and the costs of retaining the matter in-house. The Subcommittee generally believes that fully comparable data regarding such costs is needed and further that the Division of Legislative Audit is best equipped to gather, analyze and compare this information.

There are widely differing views in the legal community, among Subcommittee members and the Department on the rates which are and should be paid for legal services. The Department sincerely believes that many types of cases are more economically handled in-house. Some Subcommittee members believe that the Departmental costs are understated and that quality private counsel is available for less than the rate utilized by the Department in assessing the feasibility of the use of outside counsel.

In addition to the above, the Subcommittee questions whether it is appropriate for the Department to charge client agencies the same uniform rate for all types of legal services. Clearly there is a wide disparity in the complexity of legal tasks. As a general proposition, the Subcommittee is of the view that the development of multiple rates for particular types of legal services could produce a savings for the State.

One Subcommittee member expressed before the Subcommittee that an audit could also determine the percentage of time and money the Department expends on assisting persons and agencies which are not part of the State. The same commenter noted that a difference may be arising between and the "public interest", "State interest", and "bureaucratic interest." An audit could also determine how much public resources are expended defending the latter at the expense of the first. Finally the member noted that Department may be developing an in-house bureaucratic culture and that the use of private attorneys and other litigation support services can save Alaska money as well as diversify the departmental culture.

Recommendation 8. The Subcommittee recommends that the Legislature develop and enact measures to prohibit the linkage between contributions to political campaigns and selection to perform legal services on behalf of the State. The American Bar Association has engaged in several studies on this matter, which it refers to as the "pay to play" issue, and has drafted specific policies to address the matter. The Subcommittee believes that the centralized nature of the delivery of legal services for the State of Alaska justifies additional controls in this area.

There was broad support on the Subcommittee for action by the Legislature on the "pay-to-play" issue. The American Bar Association has appointed a task force to consider this issue and the task force has forward proposed amendments to the rules of professional responsibility to the ABA House of Delegates. These materials are included with this Report. The Department told the Subcommittee that it was aware of this issue but did not

elaborate as to what steps, if any, it may have taken to address the issue. In general, the Department has expressed confidence in the existing procurement rules and process.

The Subcommittee believes that the process for selection of outside counsel by the Department would be enhanced by the adoption of proposals comparable to the ABA task force proposal. In part, this view is based on the fact that in Alaska all outside legal service providers to the State, with the exception of conflict counsel by the Office of Public Advocacy, are selected by the Department of Law. In addition, the Subcommittee is mindful that virtually all professional employees of the Department of Law are either exempt or partially-exempt employees, and serve at the pleasure of the Governor. The centralization of procurement authority in the Department of Law and the subjective nature of outside counsel selection gives rise to the danger of favoritism in the selection process. Adoption of the "pay to play" rules could install additional safeguards into the process. At a minimum, the Legislature should hold hearings on this issue, which has attracted national attention.

Some members of the Subcommittee believe that the "pay to play" issue should involve broader considerations than simply the making of campaign contributions by attorneys and should encompass long-standing personal or professional relationships of attorneys to candidates.

Other Subcommittee members have commented that the Department of Law should be pro-active regarding this issue and develop protective measures for recommendation to the legislature using a "disclosure" approach rather than waiting for mandatory requirements to be imposed with the Department of Law in a reactive posture.

Recommendation 9. **The Subcommittee recommends that the Legislature develop additional tools to review and provide advice to the Department for litigation where the potential for significant financial liability exists. As presently arranged the roles of client and attorney are blurred, with the Department being charged with conducting litigation and being viewed by agencies as having superior knowledge as to the goals of litigation. Additional oversight is needed to protect and enhance the wishes of the ultimate client.**

While qualified and competent, the legal staff of the Department is by no means infallible and may, at times lack all the expertise which may be desirable for particular types of cases which pose the risk of significant financial liability to the State. At the same time those in supervisory roles are also advising or actually making decisions on litigation strategy including the decision to retain specialized counsel verses keeping the litigation "in house". The Subcommittee believes that it may be prudent to install mechanisms which permit and perhaps even require the Department to review cases with major liability exposure to assure the highest quality representation is considered in timely manner.

The Subcommittee lacked the time to further develop suggestions on how to accomplish this result. One idea was to establish a consultation process through the Division of Legislative Audit.
The contracting procedures provided by the Department of Law include identification of the litigation plan and objective as part of the contract monitoring process. This definition of the litigation objective may be an appropriate requirement in each case and would provide a measure which legislature audit or any other audit or oversight body might utilize to evaluate the effectiveness of both the department of law and contract counsel. Such a plan and objective may not be necessary or appropriate for routine cases.

Recommendation 10. **The Subcommittee recommends that the Legislature review and consider changes to statutes setting forth the powers and duties of head of the Department, the Attorney General. The Attorney General is not specifically provided for in the Alaska Constitution, but rather is but one of the heads of executive departments. Present statutes provide, and the Supreme Court has thus held that the Attorney General may exercise the powers of an attorney general at common law. The Subcommittee believes that such an arrangement may be incompatible with the concept of limited, constitutional government and may be in need of amendment.**

The Subcommittee posed a series of questions to the Department regarding the settlement process, and the Department responded in correspondence which is part of the Report. The Subcommittee urges that this response be examined closely by the Commission. Continued efficient delivery of government services by the Department of Law requires an ongoing appreciation of the limited resources available to the State of Alaska. The Subcommittee believes that the power to settle cases poses unique dangers since the Department of Law stands in a position to acquiesce to an incredible variety of claims and assertions that the Department would never make on behalf of the State. A restrictive view of the authority to settle cases is consistent with the notion of limited state resources. As a practical matter, attorneys with an expansive view of their authority to act on behalf of their client may be more inclined to agree to settlement terms which would not be available if the client alone was jealously guarding the checkbook.. Such considerations are all the more important in the case of non-financial terms of settlement. If legal services are to be delivered effectively and efficiently by the Department, as an institution it should very carefully husband the exercise of those powers. It is in this spirit that the Subcommittee examined settlement practices and authority.

In the response to the Subcommittee, the Department, after a description of the internal process utilized in evaluating proposed settlements, stated that the local case assessment committee will

> ...forward a recommendation to the Attorney General, or his designee, as appropriate, for consideration and action. All settlement decisions include the input of the state agency implicated by the settlement decision.
>
> *Final settlement authority rests with the Attorney General*, who may delegate final approval based on departmental policy. (Emphasis added)

Thus, unlike the typical situation in which the client decides whether to accept or reject a proposed settlement, it is the attorney who makes this judgment on behalf of the State of Alaska. The Subcommittee believes that this arrangement poses considerable danger for the State when it is combined with the Department's broad view of the powers of the Attorney General.

Status of the Attorney General

It is important to note that the Attorney General is not specifically provided for in the Alaska Constitution. Rather, the Attorney General by statute is but one of the heads of the departments of state government appointed by the Governor. At the Constitutional Convention, the following was said about the status of the Attorney General:

> Now it is my thought on the basis of the bill that we have here that probably what we want to decide is whether we want a constitutional attorney general or not. It seems to me on the executive department, as we have outlined in here so far, that we probably don't want a constitutional attorney general at all; that the matter should be left to the legislature as to whether we do or don't and to what his powers are when the legislature decides to set up an attorney general, and accordingly it seems to me pointless to discuss as to how the attorney general is be selected.
>
> *Alaska Constitutional Convention Proceedings*, Page 2221, comments of Delegate Davis. (Emphasis added)

In this respect, the Attorney General holds no greater status than that of the head of any other executive department. From a constitutional perspective, the Attorney General derives power from the Governor under Article III, Section 16, who is charged with the responsibility for the faithful execution of the laws. The Legislature has granted certain powers to the Attorney General by statute, AS 44.23.020.

The 1991 Opinion

The Department of Law has added to the above framework. In responding to the Subcommittee's inquiry regarding settlement authority, the Department provided what it apparently believes is the best statement of the powers of the Attorney General as stated in a 1991 memorandum opinion to the Legislative committees examining the Exxon Valdez settlement authored by then Attorney General Charles Cole. This Opinion is included with this report.

The Subcommittee recommends that the 1991 Opinion be examined by the Commission but with reference to the statement of Delegate Davis regarding the status of the Attorney General. In the hands of the Department, the office

of Attorney General is expanded from a statutorily created office into a broadly based[1] office with additional common law powers[2] which may not be limited.[3] Fortunately, the 1991 Opinion cannot supercede the Alaska Constitution or rewrite the Alaska Statutes. The Alaska Supreme Court in *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975) notes that the basis for the Attorney Generals common law powers is statutory, AS 44.23.020 and that such common law powers exist ". . . except where they are limited by statute or conferred upon some other state official." Id.

As embodied in the 1991 Opinion, the views of the Department may be at odds with the Alaska Constitution and the intent of the founders. The Subcommittee recommends that Legislature hold hearings on potential amendments to AS 44.23.020. The purpose of these hearings and potential amendments would be to discover ways to restore the balanced view of the authority of the Department envisioned by the framers of the Alaska Constitution.

The Subcommittee subscribes to the proposition that the duties and powers of the Attorney General should derive solely from the Alaska Constitution and legislative enactments. In the view of the Subcommittee, the effective, efficient and responsive delivery of governmental legal services will be obtained by reemphasizing the legislative basis for the Department's acts and the limited nature of the State's resources.

The Subcommittee has drafted legislation to achieve this purpose, or, at a minimum, serve as the starting point for review. It is included with this report.

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[1] See Opinion at page 13: "The Attorney General is the State officer charged with implementing the executive branch's policies with respect to execution of the law." The authority cited for this proposition is not particularly helpful in understanding the basis for the statement. The Subcommittee is unaware of any constitutional or statutory provision which vests more authority for implementing the law in the hands of the Attorney General than any other executive department.

[2] See Opinion at page 13-14: "In that respect, the Attorney General has broad common law powers and responsibilities;." and page 15: "Alaska takes a similarly expansive view of the Attorney General's common law powers." These statements appear to be flawed. To the extent that the Alaska Attorney General has common law powers, they are granted by the Legislature in AS 44.23.020 (b)(7).

[3] See Opinion at page 24-25: "Given the absence of any such express prohibition it is unnecessary to speculate concerning the issue whether and to what extent the Legislature might prohibit the Attorney General from so settling the litigation. However, it is clear that the separation of powers doctrine would restrict any legislative attempt to intrude on the executive branch's discretionary authority to conduct litigation in the State's interest." Contrast this view with the limited view of the Attorney General expressed by Delegate Davis during the Constitutional Convention. The Opinion's statement might be correct if it is referring to the Governor's constitutional power, but the issue is the Attorney General's power, not the Governor's. The Subcommittee does not believe it is as "clear" as the Department suggests. See also page 26, footnote 27: "Some courts have held that the legislature may not restrict the attorney general's common law powers." The Opinion cites *Gust K. Newberg, Inc. v. Ill. St. Toll Hwy.*, 456 N.E 2d 50 (Ill. 1983) and *Murphy v. Yates*, 348 A. 2d 837 (Md. 1975) for this last proposition. The Subcommittee read the cases and found the results revealing.

In the *Newberg* case, the Illinois courts found that the constitutionally created attorney general held common law powers. Unlike the Alaska Constitution, the Illinois Constitution has established the elected office of Attorney General and declared that he is "...the legal officer of the State...". Once again, compare the comments of Delegate Davis, set out above.

In the *Murphy* case, the appeals court in Maryland determined that the constitutionally established State's attorney could not have his powers restricted by the legislature. Interestingly enough, when the 1991 Opinion was written it failed to mention that the voters of Maryland in 1976 overturned the effect of the *Murphy* case by amending the Maryland Constitution. *Goldberg v. State*, 519 A.2d 779 (Md. App. 1987): "The likely effect of the 1976 amendment to Art. V, Sec. 9 was to make valid, once again, the proposition that the duties and powers of the State's Attorney derive solely from the constitution and legislative enactments. *Id.*, footnote 4, at 783. Under these circumstances, it is fair to say that the precedential value of the *Murphy* case is extremely limited.

STATE OF ALASKA

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November 15, 1999

Commission on Privatization and Delivery
of Government Services
Alaska State Legislature
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Dear Commission Members:

The Department of Law appreciates the opportunity to respond to the recommendations of the citizen volunteer subcommittee that reviewed our operations. Our responses address the subject matter in each recommendation.

Recommendation 1. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting functions currently performed by the Office of Special Prosecutions and Appeals. In particular, the handling of appeals and the issuance of opinion letters should be examined.

The department strongly opposes contracting the functions of the Office of Special Prosecutions and Appeals (OSPA) to the private sector.

The department has previously expressed its view that the prosecution function is an inherently governmental activity that is not appropriate for privatization for both ethical and public policy reasons. In appellate work, it is extremely important for the state to be uniform in the interpretation of the criminal laws and in presenting the state's legal position in the appellate courts. Indeed, this is the precise reason that the

appellate function was centralized: before OSPA, district attorney offices often took varying and sometimes contradictory legal positions in writing appeals.[1]

Maintaining a consistent legal position is just one reason why it is best to have one criminal division office handle the vast majority of the state's criminal appellate work. In addition, similar issues can be assigned to the same attorney, thereby avoiding duplication of research. Moreover, because OSPA appellate attorneys devote full time to criminal appeals, they develop a high level of expertise. OSPA enjoys a good reputation and a high level of credibility with the appellate judges and justices. This is precisely why the United States Department of Justice utilizes a centralized office of the solicitor general, which handles all federal cases in the United States Supreme Court.

The OSPA appellate attorneys are also called upon daily to provide advice to prosecutors and police agencies. They must be available to immediately respond to telephonic and e-mail inquiries that often need answers in a matter of hours or even minutes. For example, trial attorneys frequently contact OSPA appellate attorneys during a 10-15 minute recess in trial to seek advice on a legal issue that has just arisen. In addition, OSPA attorneys often work jointly with prosecutors to prepare briefs in serious or complicated trials. This on-call function is not well suited for privatization. OSPA appellate attorneys rarely issue formal, written legal opinions. They do not issue "letter opinions."

<u>Recommendation 2.</u> The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting the misdemeanor prosecution function after intake screening.

The department strongly opposes contracting the misdemeanor prosecution function to the private sector.

Although the Public Defender Agency and Office of Public Advocacy do have private contracts for criminal *defense* work, that does not present a model the department can follow. The ethical obligation of a criminal defense attorney is to advocate what is best for *that particular client*, regardless of how others might be affected. A public prosecutor, on the other hand, has broader obligations to the public as a whole, to victims, to law enforcement agencies, and to other similarly situated criminal defendants.

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[1] The department would note that the report includes little, if any, examination of performance as measured through such means as client and court interviews and input. We believe that such an examination is one necessary component in determining whether privatization of legal services, criminal or civil, would be in the best interests of the state.

As noted above, the department has previously expressed its view that the prosecution function is an inherently governmental function that is not appropriate for privatization for both ethical and public policy reasons. In addition, the department believes that the administration of criminal justice can best be served by observing statewide policies designed to promote uniformity in the application of the criminal law and in the state's legal position taken in case screening and case resolution. For these reasons, the department strongly believes that its District Attorney offices should handle misdemeanor prosecutions.

In response to the department's points, the subcommittee has suggested that the Department of Law continue to review and screen the 20,000 misdemeanor cases that it now handles each year, and only then refer the cases to private counsel. The subcommittee also suggests that the Department of Law retain supervisory review over all those cases, and approve any dismissals of charges. For the same reasons, we presume the subcommittee would also recommend the department supervise and review all reductions in charges and plea bargains.

The subcommittee's suggested procedure thus requires department attorneys to spend essentially the same amount of time handling misdemeanor cases as they presently do, because the majority of the effort in those cases (aside from complying with victim's rights laws) goes into initial screening and analyzing possible negotiated resolutions. This duplication of effort would not only remove any cost savings, but would make misdemeanor prosecution much more costly, much more time consuming, and much less efficient than it is today.

Recommendation 3. The Subcommittee recommends that the Legislature conduct specific hearings on the issue of the allocation of costs and responsibilities for criminal prosecution between the State and local governments. Such hearings would and perhaps should be expanded to address the provision of police services. The Subcommittee believes that the goal of these hearings should be to develop a consistent statewide approach to the delivery of criminal justice functions, which recognizes the varying level of resources available to local governments.

Ever since the decline of oil revenues in the mid- to late-1980s, there has been considerable discussion about the role of municipalities in the criminal justice system, particularly in providing police protection, jails, and prosecution of misdemeanor offenses. The Alaska statutes provide that the attorney general shall prosecute cases involving violation of state law. AS 44.23.020(b)(3). In addition, Title 29 allows, but does not require, certain municipal governments to adopt and prosecute misdemeanor criminal ordinances. Indeed, earlier this year the criminal division provided testimony on

this subject before the House Finance Subcommittee. The Department of Law will continue to participate in any legislative review of whether this statutory scheme should be changed to require municipalities to prosecute some cases, and how that could be done equitably.

Recommendation 4. The Subcommittee believes that it should be the policy of the Legislature that all privatization efforts which are undertaken regarding the Department of Law should result in commensurate reductions in staff.

The department certainly supports reducing government expenditures when possible. However, the department does not believe the subcommittee should recommend that the legislature automatically cut its budget if further efficiencies are achieved. Instead, each year's budget must be based on the department's current workload, any new duties that might be imposed by law, and an analysis of the work that the department is not now able to do with its current staffing levels. Moreover, whether budget cuts take the form of "reductions in staff" or reductions in other non-staff costs should depend on a more complete analysis of the department's activities.

Recommendation 5. The Subcommittee recommends that the Legislature develop and enact additional measures to ensure that the selection of legal services contractors by the State is as objective as possible. The Subcommittee believes that the use of a pre-qualified list of potential providers would be a useful tool.

The department agrees that fairness and objectivity in the selection of outside counsel is necessary; however, we do not agree with the subcommittee's premise that the current system is flawed.

Formal avenues are in place for complaints about procurement violations. Legislative Audit, the Ombudsman, and the State Procurement Code itself provide the means for such complaints to be investigated and, if necessary, resolved. Individual legislators are often the first to hear from constituents who feel they have been wronged by a state agency. Yet, our office has rarely received a complaint or protest concerning the award of a legal services contract.

When the legislature adopted its own version of the Model Procurement Code in 1986 it established procedures that mirrored those in use by many other states, counties, and local governments. In adopting the code, the legislature set into place a wide range of procurement procedures that acknowledged the need for flexibility and the fact that the objective measures used in purchasing commodities and equipment are different from the subjective criteria that must be considered in hiring professional

service providers. Subsequent revisions to the code have sought to streamline these procedures even further, in part to stem the growth of a "procurement bureaucracy" within state government and to better meet the needs of both state agencies and private vendors.

Regardless of whether an agency is attempting to secure the services of a medical doctor, engineer, architect, accountant, economist, or attorney, the factors that are considered *most* heavily in the selection process are those that have to do with the knowledge, experience, and skills of each professional. Assessing which prospective provider's unique combination of knowledge, experience, and skill is best suited to the circumstances of a particular case, project, or body of work must be at the heart of any selection process.

In adopting the Procurement Code, the legislature acknowledged the inherent difference involved in securing professional services, and it established procedures by which those services are to be procured. In our view the need for any additional legislation seems unwarranted; however, if the legislature chooses to pursue changes to the code it would be advisable to continue to address the procurement of "professional services" as a whole and not to single out any one profession.

The approach the subcommittee recommended the legislature take is the use of a "pre-qualified list of potential providers" for classes of matters which may be more "routine" in nature. Contracts would then be awarded on a rotating basis through the list. Specific examples provided by the subcommittee include criminal appeals, collections, and workers' compensation cases. Past experience has shown that such a rotating system does not work.

The idea of rotating through a list of pre-qualified law firms for workers' compensation and certain tort cases was tried by the Division of Risk Management. They had initially identified seventeen different categories of work and requested that firms submit separate proposals outlining their qualifications and proposed hourly rate for each category for which they wished to be considered. The entire procurement process turned out to be *very* time consuming for both the agency and the prospective contractors. Because the categories of work were based on previous caseloads and given the uncertainty of future work, there was no guarantee that any work would ever be assigned to a particular category or that each firm in that category would be reached during the contract period. As a consequence there was little incentive for firms to significantly lower their rates and the costs of contracting out significant amounts of the tort caseload proved to be exorbitantly high. In addition, the process of rotating through the list, while it may have seemed to be the fairest method of doling out work, proved to be less than

satisfactory when factors such as trial skills or related experience should have entered into the selection decision.

Because of this experience, when these contracts expired, the Division of Risk Management decided that it would prefer to bolster the in-house staff within the Department of Law to handle the bulk of the state's tort litigation, at a greatly reduced rate, and turn over to the department responsibility for procuring the services of outside legal counsel on an as needed basis.

If the state hopes to gain the services of qualified and capable outside counsel at rates that are equal to or less than the cost of in-house counsel, the "rotating-list" concept is clearly self-defeating. Without the assurance of a consistent level and high volume of work, which is simply not possible with a rotating list, it is extremely doubtful (and has never been achieved in the past by this department) that the state could ever expect to obtain the services of outside counsel at comparable rates.[2]

Recommendation 6. The Subcommittee recommends that the Legislature require the Department to develop in consultation with Division of Legislative Audit a pilot project to test the feasibility of the use of an outside audit firm to assess the costs incurred in litigation. Such firms are presently utilized in the private sector. The Subcommittee believes that the pilot project may be best tested in tort cases.

The department has no objection to the concept of a legal auditing firm providing additional review of outside counsel bills, provided funding is appropriated to pay any additional cost. Such a firm can help deflect potential criticism as a quasi-independent reviewer of outside counsel bills. We believe, however, that we are doing an excellent job of managing contracts and that no legal auditing firm could find sufficient items to cut out of our outside counsel bills to pay its own fees, let alone provide a savings.

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[2] The FY 2000 hourly rate for a department civil division attorney, including all overhead costs, is $92.49. We question whether the state can contract with private counsel for less than this amount, given that our actual experience shows that the hourly rate for contract counsel, with discounts provided to the state, is typically between $125 to $200 per hour, and higher for non-Alaska attorneys retained for specialized expertise. We discussed the issue of in-house and outside counsel rates in our letter to the subcommittee dated August 31, 1999. We discussed the issue of performance/effectiveness of in-house as compared to outside counsel in tort litigation, using examples from actual case experience, in our memorandum on tort litigation attached to our September 30, 1999, letter. These materials are all included in the subcommittee's attachments provided to the commission. See also our response to recommendation 8.

In 1997, the Division of Legislative Audit performed an audit of the department's contract management. The audit found in most cases the contracts were properly managed, and where the auditors found problems, they attributed them to a lack of training and clear directives for project managers. The exceptions resulted in an audit recommendation for contract management guidelines. The department developed a manual on contract management, which has been provided to the Commission on Privatization and the Delivery of Government Services by the subcommittee as an appendix to the subcommittee's report.

Based on other states' experience, we conservatively estimate the cost of contracting with a legal auditing firm for all legal services contracts would have been at least $150,000 in FY 1999. A pilot project for torts cases would have cost about $20,000. The department is not funded for this additional cost.

Recommendation 7. The Subcommittee recommends that the Legislature direct the Division of Legislative Audit to determine the full and fair value per billable hour of legal services rendered by the Department of Law and ensure that the rates are consistently applied in the budgeting process pertaining to the Department. Following completion of this task, the Subcommittee recommends to the Legislature that it examine whether legal services rendered by the Department should be billed at different rates for different services. The Subcommittee is generally of the view that the Department's costs of service should determine between routine and complicated services.

The Department of Law implemented full timekeeping and billing for the Civil Division in the final quarter of FY 1996. The decision to implement full timekeeping grew out of concerns expressed in a legislative audit that resulted in a monetary assessment imposed on the department by the federal government. The findings from that audit did not arise because the department had unfairly or inconsistently allocated costs to federal programs, but because, at the time, the department could not show that it had not.

Since the implementation of full timekeeping for the Civil Division, annual reviews of the division's rates are performed by a number of entities:

- The Division of Legislative Audit's annual statewide single audit examines the rate-setting methodology for financial soundness and consistency. Legislative Audit's annual audit report for the fiscal year ending June 30, 1998, did not include any findings regarding the Department of Law's timekeeping and billing rate, or any other aspect of the department's business, for that matter.

- The state also contracts with a consulting firm to assist the department in the development of its federally approved cost allocation plan, which includes approval of the department's timekeeping and billing methodology. This review assures that the methodology is consistent from year to year and is in compliance with OMB Circular A-87 governing what costs government entities may allocate to federal programs. Again, no findings, exceptions, or disallowed costs have resulted from this review.

- In addition, the Office of the Governor's Office of Management and Budget conducts a review of the rates. The Department of Law's ability to implement proposed rates in any fiscal year is subject to this approval process.

- The department is also required to submit the annual timekeeping and billing rates for similar scrutiny by the heads of the administrative divisions of each department. Questions arising from this review could result in a revision to the rates.

All of these governing bodies have accepted the rates and methodology proposed by the Department of Law. As a consequence of these reviews and audits, the department's rates receive fully adequate review to ensure consistency, accuracy, and fairness.

The department has no incentive to understate costs in the development of its rates. Such an understatement would lead to a shortfall situation tantamount to insolvency. In such a situation, the department would be forced to seek supplemental funding from the legislature in order to make up the shortfall. While an error in the rate calculation or some set of unforeseen circumstances may result in a need for supplemental funding, the department does not approach setting its rates by intentionally excluding some of its costs. Such practices would be at the very least unethical, and perhaps even illegal.

The Department of Law's "clean bill of health" with respect to its time-keeping and billing rates is in part due to its simple and straightforward methodology and the consistency with which it is applied from year to year. In the world of rate setting, once an acceptable rate-setting methodology has been established, it is inadvisable to seek a new methodology without the most compelling circumstances, *i.e.*, some fundamental shift in the underlying business process makes the previous methodology unacceptable or unworkable. Such a shift has not occurred in the Department of Law.

It may seem that different timekeeping rates should be applied depending on the complexity of the work, however adopting such a change would be unwise for the following reasons:

- The current rate methodology is highly objective. In its simplest terms, costs are divided by billable hours to produce a rate. What the subcommittee seems to imply is that an objective process be replaced with a subjective one. That suggestion appears to conflict with other subcommittee recommendations that seek to diminish subjectivity in the contract award and other discretionary arenas.

- A more subjectively applied rate is likely to expose the department to the risk that a monetary assessment or loss of federal funds may result - bearing in mind that it is not necessary for an audit to find that an agency inappropriately applied costs, only that it could not prove otherwise.

- No savings can occur from a multiple rate structure. Whatever rate structure is used, it must recover all costs or the department will be in budget shortfall at the end of the fiscal year.

- Implementation of a more complex rate application system will result in an administrative burden that will in turn result in higher administrative costs. This outcome by itself is a compelling reason to continue with the simple approach developed by the department.

Finally, the subcommittee expressed concern over a discrepancy between the rates charged the department's client agencies and the rates claimed in motions for the recovery of legal fees and costs before the courts. The department requests reimbursement of attorneys' fees based on the prevailing market rate, not based on its interagency billing rate. The attached Memorandum of Law, which is in the form most commonly used by the department's attorneys when requesting attorneys' fees and costs, describes the legal basis for this claim. The superior court in that case awarded the requested market rate, as have the trial courts in numerous other cases.

<u>Recommendation 8.</u> **The Subcommittee recommends that the Legislature develop and enact measures to prohibit the linkage between contributions to political campaigns and selection to perform legal services on behalf of the state. The American Bar Association has engaged in several studies on this matter, which it refers to as the "pay to play" issue, and has drafted specific policies to address the matter. The Subcommittee believes that the centralized nature of the delivery of legal services for the State of Alaska justifies additional controls in this area.**

At the outset the department states again, as we did in our testimony to the subcommittee, that no "pay-to-play" system exists in the Department of Law for the retention of outside counsel. There simply is no pay-to-play problem that needs to be

addressed. Moreover, Alaska's State Procurement Code, the Executive Branch Ethics Act, and the campaign finance laws, together provide very adequate controls and standards to prevent against any such system.

We have reviewed the American Bar Association's pay-to-play materials. These materials relate to the issue of lawyers making political contributions or soliciting political contributions for the purpose of obtaining or being considered for a government legal engagement. We note that the ABA House of Delegates voted, at its meeting in August 1999, to *not* adopt the model rule of professional conduct on pay-to-play that was proposed by the ABA committee.

As discussed in the background report by the ABA committee that considered the pay-to-play issue, while lawyers and their political contributions are an important component in pay-to-play, lawyers are nc the most important players. Rather, the issue is primarily one of campaign finance practices and laws, and uniform procurement procedures. (See pages 2-3 of ABA committee background report included in the attachments to the Law Subcommittee's report.)

The ABA committee background report states that consistent and diligent enforcement of statutory provisions governing fair campaign finance practices and the conduct of public officials is the "most fundamental method" of addressing the issue of pay-to-play. In this regard, it should be noted that the Alaska Legislature enacted a comprehensive campaign finance reform law in 1996. The Alaska Public Offices Commission enforces this law. The department would of course participate in any legislative process to consider further campaign finance reform measures. At this time, however, we do not see a justification or need to specifically single out lawyers for special treatment in the campaign finance laws. Also, the conduct of public officials in the executive branch is regulated in detail in the Executive Branch Ethics Act, AS 39.52.

The ABA committee background report notes that the second method of protecting against a pay to-play system is the use of uniform procurement procedures for placement of legal engagements by government entities. We previously addressed for the subcommittee the procurement procedures used by the department when outside counsel is retained by the department. The entire procurement and contracting process is directed and supervised by the department's contracting officer within the Administrative Services Division. The department adheres to the requirements spelled out in the State Procurement Code (AS 36.30) and the corresponding administrative regulations (2 AAC 12) whenever we secure the services of outside counsel. We set out the procurement procedures and step-by-step process used by the department in our letter to Mr. Mark Johnson dated August 31, 1999, a copy of which is included in the subcommittee's

attachments, and we provided testimony to the subcommittee on our procurement procedures as well.

As mentioned above, the ABA House of Delegates recently voted down the pay-to-play rule proposal. Opponents of the measure contended that a professional conduct rule of this nature would be unconstitutional under the First Amendment and an inappropriate infringement on the right of lawyers to participate in the electoral process. According to press reports on the debate at the annual meeting, a past chair of the ABA ethics committee pointed out there is need for campaign finance reform, "but not reform disguised as an ethics rule, only for lawyers."
See, www.abanet.org/journal/oct99/10ahouse.html

Recommendation 9. The Subcommittee recommends that the Legislature develop additional tools to review and provide advice to the Department for litigation where the potential for significant financial liability exists. As presently arranged, the roles of client and attorney are blurred, with the Department being charged with conducting litigation and being viewed by agencies as having superior knowledge as to the goals of litigation. Additional oversight is needed to protect and enhance the wishes of the ultimate client.

The attorney general serves as the chief legal officer for the state executive branch. AS 44.23.020. As such, the attorney general plays a major role in articulating the powers and duties of the agencies of state government through appropriate legal interpretation. The attorney general is by law responsible for the conduct of litigation in which the state is a party. The attorney general is responsible for ensuring consistency and uniformity in the state's legal policy.

The attorney general does in fact have more knowledge with respect to the goals of litigation and matters of legal interpretation than the agencies he or she represents. Indeed, the provision of legal expertise, advice, and representation to state agencies and officers is the very function of an attorney general. It is through this advice and representation that the attorney general, in daily consultation with state agencies and officers, is able to establish consistency and uniformity in the state's legal policy. These concepts of the role of the attorney general are certainly not unique to Alaska. *See*, State Attorneys General, Powers and Responsibilities, National Association of Attorneys General, Second Printing 1998.

There are clearly differences between government attorneys and their private counterparts, and this is true whether the government be federal, state, or local. Attorneys general, while representing the state agencies, also are (and should be)

concerned with the public interest in any given situation. This is different from the private attorney, who generally represents only the interests of a particular individual client. This difference does not mean that with the attorney general the roles of client and attorney are "blurred" or that the wishes of the client are somehow not being "protected." What it means is that in advising and consulting with the client agency or officer as to legal interpretations, or a possible step in litigation, or a proposal to resolve an issue in dispute, or other matters, the attorney general in providing advice will carefully consider the law, the interests and position of the agency, and the public interest. It is a delicate and important blend, and a part of the responsibility of a government lawyer. By the same token, the agencies are also concerned with the public interest in carrying out their various functions, so the blend here is natural and generally not problematic.

As the department explained to the subcommittee in our written responses to questions and in testimony, cases that we are handling in which there is a potential for significant financial liability undergo close scrutiny through reviews by settlement committees and case status meetings at appropriate supervisory levels. For instance, often a settlement committee will be convened at the request of the assistant attorney general handling the matter even when a particular settlement proposal is not on the table - the purpose instead being to lay out and discuss case status and strategy in anticipation of further developments, be they motion practice, court rulings, discovery proceedings, or settlement negotiations. Reports on those sessions are prepared for the attorney general to seek direction or to advise him on the status of the case and the strategy being pursued, as appropriate. And, we are fortunate to be able to draw upon legal expertise in a variety of substantive areas in the department in assembling committees with the necessary experience to effectively and critically consider any particular matter.

We understand from the subcommittee's written discussion on recommendation 9 that the subcommittee did not have time to fully develop suggestions on this recommendation. However, one idea mentioned in the report is to establish a "consultation process through the Division of Legislative Audit" presumably for some sort of oversight of the attorney general's conduct of litigation. We do not think such oversight is necessary or appropriate for the following reasons:

- First, as discussed above, supervisory work within the department of the representation provided to state agencies is professional, competent, ongoing, and provided at several levels up to and including the attorney general.

- Second, we believe such oversight would, depending on the specifics of the consultation idea, violate the separation of powers. The governor is constitutionally charged with the responsibility of executing and enforcing the laws. Alaska Const.,

Art. III, Sec. 16. The attorney general, appointed by the governor, is the state officer charged with implementing the executive branch's policies with respect to execution of the law. AS 44.23.020. It is the attorney general, in consultation with the state agencies, who decides how to proceed in litigation, not the legislative branch.

- Third, the legislative branch of government already has an important tool that may be used to review action of the attorney general in cases in which financial liability to the state is determined - the power of appropriation. Let's say the attorney general settles an employment case and the state is obligated under the settlement to pay the plaintiff $100,000 in damages. The settlement would be entered subject to appropriation by the legislature, and the matter would be presented to the legislature for its consideration during the next session. If the funds are not appropriated, the case would go back into litigation mode for some other resolution, whether by court decision or new settlement amount (which would again be presented to the legislature). Our letter to Mr. Mark Johnson dated September 30, 1999, included in the attachments to the subcommittee's report, sets out this process in detail. *See also,* AS 09.50.270.

Recommendation 10. The Subcommittee recommends that the Legislature review and consider changes to statutes setting forth the powers and duties of head of the Department, the Attorney General. The Attorney General is not specifically provided for in the Alaska Constitution, but rather is one of the heads of executive departments. Present statutes provide, and the Supreme Court has thus held that the Attorney General may exercise the powers of an attorney general at common law. The Subcommittee believes that such an arrangement may be incompatible with the concept of limited, constitutional government and may be in need of amendment.

The department strongly questions the wisdom of eliminating or limiting the common law powers of the attorney general in Alaska. The common law powers of the office of attorney general have evolved over literally hundreds of years of Anglo-American law and are entirely appropriate to the fulfillment of an attorney general's responsibilities.

> The common law is the fountainhead of the Attorney General's authority to represent, defend, and enforce the legal interests of state government and the public. Notwithstanding relatively recent constitutional and statutory enumerations of Attorney General powers, traditionally recognized prerogatives of the state's chief legal officer continue to shape and expand the role of the modern

> Attorney General. Contemporary experience convincingly demonstrates that the common law is a vital source of power for Attorneys General who seek to protect public interests in recently developing areas of the law.

State Attorneys General, Powers and Responsibilities, National Association of Attorneys General, Second Edition 1998, page 27.

An examination of the common law powers of the attorney general, as articulated by the Alaska Supreme Court as well as courts all over the United States, demonstrates that these powers are complementary and incidental to the functions of the office of attorney general, and are not inconsistent in the least with the duties and powers of the attorney general as set out in the Alaska statutes, AS 44.23.020. *See also,* AS 09.50.300.

The National Association of Attorneys General, in its comprehensive review of the case law on the common law powers of attorneys general, describes the common law roles of the attorney general as follows:

- The attorney general has the duty to appear for and to defend the state and its agencies.
- The attorney general has the right to control litigation and appeals.
- The attorney general has the right to intervene in legal proceedings on behalf of the public interest.
- The attorney general has the power to determine the state's legal policy.
- The attorney general has the authority to prosecute criminal activity, in the absence of express legislative restriction.

State Attorneys General, Powers and Responsibilities, at pages 37-38.

The common law functions of the attorney general were recognized by the Alaska Supreme Court in *Public Defender Agency v. Superior Ct., Third Judicial Dist.*, 534 P.2d 947 (Alaska 1975). In *Public Defender*, our court held that it would violate the separation of powers for the judicial branch to order the attorney general to prosecute an action for civil contempt for nonsupport; while the attorney general had the power to prosecute such an action, the court did not have the power to control the exercise of the attorney general's discretion as to whether he will take action in particular cases. "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. The discretionary control over

the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases." 534 P. 2d at 950 (citations omitted).

The attorney general's common law powers, as well as statutory powers, are not incompatible with the Alaska Constitution. The subcommittee is correct that the Alaska attorney general is not a constitutional officer. The attorney general is appointed by the governor and serves as the chief legal officer for the governor and the executive branch of state government. Alaska Constitutional Convention Proceedings 2193-2201; 2215-23.[3]

However, this does not mean that the Alaska attorney general does not properly have common law powers - as discussed above, our Supreme Court has held that under current Alaska law the attorney general does have such powers, consistent with the Alaska Constitution. In other words, whether the duties and responsibilities of the attorney general are spelled out in constitution or in statute or both, the long-recognized common law powers of the attorney general still apply unless specifically limited by law. "In most states, the modern-day office retains common law authority, as well as the powers and duties that specifically are assigned by constitutions and statutes." State Attorneys General, Powers and Responsibilities, at page 38.

Both the common law powers and the statutory authority of the Alaska attorney general are important in ensuring that the public interest can be protected as new laws are enacted, new law enforcement issues arise, and technology advances. The removal of the attorney general's common law powers could have unintended consequences. We could easily find ourselves spending our limited legal resources litigating whether or not the attorney general had the authority to bring some particular action. For example, consider the participation by the Alaska attorney general in the 50-state action against the tobacco industry brought on a variety of new consumer fraud, antitrust, and Medicaid reimbursement theories. Do we want the attorney general spending state resources litigating his authority to bring such a case because the common law powers of the office were removed? As you know, this case brought in hundreds of millions of dollars for the State of Alaska.

Recommendation 10 again discusses the authority of the attorney general to settle litigation on behalf of the state. For purposes of this response, we note that we

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[3] We would note that an expansion of the role of the attorney general from legal advisor of the governor and other state officers to legal advisor of the "state, including the" governor and other state officers, as suggested by the subcommittee in its proposal concerning AS 44.23.020, would be inconsistent with the intent of the framers of the Alaska Constitution.

disagree with many of the subcommittee's characterizations of the opinion of former Attorney General Charlie Cole on the issue of the governor's and the attorney general's settlement authority under Alaska law. 1991 Inf. Op. Att'y Gen. (April 2). Be that as it may, we believe it would be disastrous for the state to allow its approach to litigation and settlements to be fragmented from agency to agency as suggested by the subcommittee.

The subcommittee would apparently have one believe the attorney general goes out on his own, without the benefit of consultation and involvement of the client agency, to settle cases, without taking into account the state's limited resources or the needs and desires of the agency. Nothing could be further from the truth. The relationship between the attorney general and our clients is one of constant communication, sharing of information and viewpoints, discussion and consultation, and ultimately decision on what course of action is in the best interests of the State of Alaska. And the best interests of the state and the zealous guarding of its limited resources are always of paramount concern.

In conclusion, thank you for this opportunity to provide the Department of Law's response to the subcommittee's report and we appreciate your consideration of our comments. Please let us know if you have questions or would like further information.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Barbara J. Ritchie
Deputy Attorney General - Civil

By: Cynthia M. Cooper FOR
Deputy Attorney General - Criminal

Attachments

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
KETCHIKAN

DEC 21 1998

Clerk of the Trial Courts
By S M/C Deputy

Case no. 1KE-97-117 CI

ORDER GRANTING ATTORNEY'S FEES

THE COURT having considered the State of Alaska's Motion for Attorney's Fees, supporting documents, and any response thereto, and being fully advised in the premises,

HEREBY ORDERS that the motion is GRANTED. The court finds that the defendant State of Alaska, Department of Health & Social Services, Division of Family & Youth Services (the state) is a prevailing party in this case, and the state's attorney's and paralegal fees of $12,443.40 are reasonable and were necessarily incurred. Under Civil Rule 82(b), the state shall be awarded $ 2488.68 in fees from plaintiff Gregory A. Shapley.

DATED: 12/21/98

Judge Thomas M. Jahnke

SEAL OF THE TRIAL COURTS STATE OF ALASKA FIRST JUDICIAL DISTRICT

CERTIFICATION
Copies Distributed
Date 12-21-98
To G. Shapley
M. Lessmeier
Susan Cox, AG
By S M/C

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record:
Gregory A. Shapley, Pro Se
PO Box 85
Craig, AK 99921

Michael Lessmeier, Esq.
Lessmeire & Winters
124 W. 5th Street
Juneau, AK 99801
(Attorney for Dr. Johnson)

Pamla Credo-Hayes DATED: September 30, 1998

OCT 5 1998

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

vs.

DAVID E. JOHNSON, M.D. and STATE OF ALASKA, DEPT. OF HEALTH AND SOCIAL SERVICES, DIVISION OF FAMILY AND YOUTH SERVICES,

Defendants.

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
KETCHIKAN

SEP 14 1998

Clerk of the Trial Courts
By _____ Deputy

CASE NO. 1KE-97-117 CI

FINAL JUDGMENT

This case, having been dismissed with prejudice by granting summary judgment motion in favor of David E. Johnson, on August 10, 1998 and the court having examined the documents on file herein and otherwise being fully advised;

IT IS HEREBY ORDERED that final judgment is entered on the summary judgment motion in favor of David E. Johnson against Gregory A. Shapley. David E. Johnson shall receive after proper application an award of costs in the amount of $154.04 (RWS 9/21/98) and attorney fees in the amount of $457.00, plus interest accruing on said amounts at 10.5% per annum from August 10, 1998 until paid. 12/21/98

DATED this 11th day of ~~August~~ Sept, 1998 at Ketchikan, Alaska.

SUPERIOR COURT JUDGE

Approved/Disapproved as to form:

Gregory A. Shapley, Pro Se

CERTIFICATION
Copies Distributed
Date 12-21-98
To G. Shapley
M. Lessmeier
Susan Cox, AG
By CNH

LESSMEIER & WINTERS
LAWYERS - LLC
124 WEST 5TH STREET
JUNEAU, ALASKA 99801
TELEPHONE (907) 586-5912
FACSIMILE (907) 463-3020

AUG 17 1998

Approved as to form:

Michael L. Lessmeier, Attorney for Defendant
ABA #7910082

The undersigned hereby certifies that on the 24 of August, 1998, a copy of the foregoing document was mailed to:

Susan D. Cox, Chief Asst. A.G.
Attorney General's Office
P.O. Box 110300
Juneau, AK 99811-0300

Gregory A. Shapley, Pro Se
P.O. Box 85
Craig, AK 99921

0023-050.fjudform

CERTIFICATION
Copies Distributed
Date 9.21-98
To Gregory Shapley
Michael Lessmeier
Susan Cox
By

LESSMEIER & WINTERS
LAWYERS - LLC
124 WEST 5TH STREET
JUNEAU, ALASKA 99801
TELEPHONE (907) 586-5912
FACSIMILE (907) 463-3020

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Case no. 1KE-97-117 CI

STATE OF ALASKA'S MOTION FOR AWARD OF ATTORNEY'S FEES

Pursuant to Rule 82 of the Alaska Rules of Civil Procedure, the defendant State of Alaska, Department of Health & Social Services, Division of Family & Youth Services (the state), as prevailing party in the above captioned action, hereby moves for an award of attorney's and paralegal fees. The state requests an award of 20 percent of its fees, for a total award of $2,488.68. Civ. R. 82(b)(2).

This motion is supported by the accompanying memorandum of law, affidavit of counsel, and the attached exhibit.

DATED: 9/30/98

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record: Gregory A. Shapley, Pro Se, PO Box 85, Craig, AK 99921; Michael Lessmeier, Esq., Lessmeire & Winters, 124 W. 5th Street, Juneau, AK 99801, (Attorney for Dr. Johnson)

Pamla Credo-Hayes

Pamla Credo-Hayes DATED: September 30, 1998

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Case no. 1KE-97-117 CI

MEMORANDUM OF LAW IN SUPPORT OF STATE OF ALASKA'S MOTION FOR AWARD OF ATTORNEY'S FEES

On August 10, 1998, this court granted defendant State of Alaska's Motion for Summary Judgment, dismissing the above captioned case against the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services (the state) with prejudice. The state is therefore the prevailing party in this action and, as such, moves for an award of attorney's fees pursuant to Civil Rule 82.[1]

I. THE STATE OF ALASKA IS ENTITLED TO AN AWARD OF 20 PERCENT OF NECESSARILY INCURRED ATTORNEY FEES

Alaska Civil Rule 82(b)(2) provides that defendants who are prevailing parties are automatically entitled to an award of 20 percent of their actual reasonable fees for judgment without trial, 30 percent with a trial.

> In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case . . . resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

The purpose of Civil Rule 82 in providing for the allowance of attorney's fees is to partially compensate a prevailing party for the expense of litigation. City of Valdez v. Valdez Development Co., 523 P.2d 177, 184 (Alaska 1974).

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[1] Final Judgment in favor of the state was distributed by the clerk on September 21, 1998.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Although the Attorney General, as counsel for the state, bills client agencies at a rate far below the market rate of attorneys in private practice, it is well settled that when the state is the prevailing party, it may request reimbursement of attorney's fees at a reasonable market rate. The Attorney General is not limited to recovering fees based on the Department of Law's inter-agency billing rate.[2] There is clear authority for awarding attorney's fees under Civil Rule 82 based on market rates instead of the department's overhead rate. Atlantic Richfield Co. v. State, 723 P.2d 1249, 1251-52 (Alaska 1996) (Alaska Supreme Court ruled it appropriate to use average of hourly billing rates charged by private attorneys to calculate fee award for legal work performed by assistant attorneys general); Amfac Hotels v. State, Dept. of Transportation, 659 P.2d 1189, 1194 (Alaska 1983) (approved fee award based on "the average private billing rate" -- $75 per hour, 14 years ago); Morrison-Knudsen Co., Inc. v. State, 519 P.2d 834, 844 (Alaska 1974) (Alaska Supreme Court specifically rejected argument that state could not recover attorney's fees at a rate higher than hourly salary of highest paid assistant attorney general who worked on the case).

The Attorney General has worked to identify a uniform reasonable market rate upon which to base attorney fee requests that will more fairly reimburse the State of Alaska for its fees as a prevailing party. See Affidavit of Counsel. This was necessary because the department's historic rate formulae and the newer universal blended rate formula all produce figures far below the market rate and value of the services rendered, and because Civil Rule 82 provides for only 20 percent reimbursement of actual fees where there is no trial or money judgment and 30 percent where the case goes to trial. Based on the recommendations of a working group tasked with assessing the Department of Law's policy on attorney fee requests, the Attorney General established in 1997 a policy to request $150 per hour as the market rate for journey level attorneys (Attorneys III and above). Id. This decision was based on the working group's review of attorney billing rates statewide, a similar policy in the U.S. Attorney's Office, and the fact that the average rate (typically reflecting a discount for the state) that the Department pays experienced private

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[2] The Department of Law has formulated a blended attorney "overhead rate" for any assistant attorney general (regardless of years of practice), which was $94.72 per hour for Fiscal Year 1998. This is a uniform rate used to bill client agencies for legal services, regardless of the experience level or salary range of the individual assistant attorney general who actually handled the legal matter.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
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PHONE: 465-3600

practitioners to provide legal services to the state under contract exceeds $150 per hour. Id. The rate of $125 per hour was approved for less experienced attorneys. Id.

In the case at bar, the court granted all defendants summary judgment, dismissing the case with prejudice. In pursuing its defense, the state's attorney's fees, calculated using the market rates described above, amount to $8,325.00. Affid. Of Counsel. A copy of the billing print-out detailing the work done and time spent relative to this case is attached as Exhibit A. The state's counsel of record in this case, Susan Cox, holds an Attorney VI position, and has been practicing law over 15 years. She consulted as needed with Assistant Attorney General Shannon O'Fallon, who handled the guardianship proceeding that was at issue in this case; her hours are also reflected in Exhibit A. The attorney hours expended in defending this action total 56.1 hours: 52.5 for AAG Cox and 3.6 for AAG O'Fallon. The billing print-out reflects an attorney hourly billing rate of $150 per hour for AAG Cox, and $125 for AAG O'Fallon. The totals are 52.5 hours at $150/hour or $7,875.00, and 3.6 hours at $125/hour, or $450.00, for the combined total of $8,325.00.

Also included in Exhibit A are the hours billed by paralegal assistants who worked on this case. The paralegals performed tasks delegated to them by AAG Cox, which would customarily be done by an attorney. The paralegals spent 57.2 hours performing legal work necessary to this case, amounting to a cost of $4,118.40, at the overhead billing (non-market) rate of $72 per hour.

Under Civil Rule 82(b)(2), prevailing defendants who do not recover a money judgment are entitled to 20 percent of their reasonable attorney's fees, including fees for legal work delegated to a paralegal. The State of Alaska prevailed in this case without trial. Therefore, under Civil Rule 82 the state is entitled to recover 20 percent of its fees. As indicated in Exhibit A, the state's legal (attorney and paralegal) fees incurred in this action, at appropriate hourly rates, total $12,443.40. The state is entitled to an award of 20 percent of that amount, or $2,488.68, in fees.

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ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

II. CONCLUSION

For the reasons set out above, the State of Alaska respectfully requests that this court award it attorney's fees in the amount of $2,488.68.

DATED: 9/30/98

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General
Alaska Bar No. 8611136

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record: Gregory A. Shapley, Pro Se, PO Box 85, Craig, AK 99921; Michael Lessmeier, Esq., Lessmeire & Winters, 124 W. 5th Street, Juneau, AK 99801 (Attorney for Dr. Johnson)

Pamla Credo-Hayes DATED: September 30, 1998

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

DAVID E. JOHNSON, and STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF FAMILY & YOUTH SERVICES,

Defendants.

Case no. 1KE-97-117 CI

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

I, Susan D. Cox, having been duly sworn, hereby state as follows:

1. I am an assistant attorney general employed by the Department of Law, and attorney of record in the above captioned action on behalf of the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services (the state). I submit this affidavit in support of the state's motion, as prevailing party, for attorney's fees.

2. Legal fees (representing attorney and paralegal assistant time) in the amount of $12,443.40 were incurred on behalf of the state through August 1998 in defense of this case. This amount represents a total of 56.1 hours of attorney time, and 57.20 hours of paralegal time, broken down as follows:

Susan D. Cox	52.5 hours @	$150/hr = $ 7875.00
Shannon O'Fallon	3.6 hours @	125/hr = $ 450.00
Paralegals	57.2 hours @	72/hr = $ 4118.40
TOTAL	113.3 hours	$12,443.40

Exhibit A contains an itemized listing of the dates, descriptions of work accomplished and by whom, and the time expended. I have reviewed this report for accuracy and applicability.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

3. I have determined both that the information presented in Exhibit A is correct, and that the time listed was necessarily spent in defending this matter. I do not believe that any of the work performed in this case was unnecessary or duplicative. I do believe the total amount of time and money expended on behalf of the state is reasonable.

4. The attorney time set forth above was billed, for the purposes of this motion, at market rates approved by the Attorney General. Although the state bills client agencies at a rate far below the market rate of attorneys in private practice (the uniform overhead billing rate was $94.72 per hour in fiscal year 1998), the Attorney General established in 1997 a policy which would more fairly reimburse the state for its fees as a prevailing party. To that end the Attorney General approved the hourly rate of $150 as the market rate for journey level attorneys (Attorneys III and above). This rate was based on the recommendations of a working group tasked with assessing the Department of Law's policy on attorney fee requests. After reviewing attorney billing rates statewide, the policy in place at the U.S. Attorney's Office, and the fees paid by the state to experienced private practitioners who provide legal services to the state, the working group determined that $150 per hour was a reasonable rate which would more fairly reimburse the state for its legal services. The rate of $125 per hour was approved for less experienced attorneys.

5. While the purpose of the department's uniform overhead billing rate is to track and recover the costs of legal services provided to the state's client agencies, there is legal authority for awarding attorney's fees under Civil Rule 82 based on market rates rather than the department's overhead billing rate. Atlantic Richfield Co. v. State, 723 P.2d 1249, 1251-52 (Alaska 1996); Amfac Hotels v. State, Dept. of Transportation, 659 P.2d 1189, 1194 (Alaska 1983); Morrison-Knudsen Co., Inc. v. State, 519 P.2d 834, 844 (Alaska 1974).

6. I was responsible for all facets of the defense of this case. I prepared all of the written discovery on behalf of the state. I also consulted as needed with Assistant Attorney General(AAG) Shannon O'Fallon, who had personally handled the underlying guardianship matter that was at issue in this case.

7. I have been practicing law in Juneau for over 15 years and with the Attorney General's office for more than 14 years; I am an Attorney VI. I have been aware of rates charged by private practitioners over the years through state procurements for legal services, attorney fee requests in cases, and personal conversations with private attorneys. In my professional judgment, a request for reimbursement for my time spent on this case at a rate of $150 per hour is reasonable.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

8. The paralegal time is billed at the actual, non-market rate of $72 per hour. The paralegals worked on discovery, coordinating witness lists, and performing other legal tasks that I delegated to them and that would customarily be done by an attorney.

Further your affiant sayeth naught.

DATED: 9/30/98

Susan D. Cox

SUBSCRIBED AND SWORN to before me this 30th day of September 1998.

Notary for the State of Alaska
My Commission expires: 2000

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

SENATOR JERRY WARD

ALASKA STATE LEGISLATURE

SPONSOR STATEMENT SJR 14

SJR 14 is a Constitutional Amendment to allow a vote of the people to elect the Attorney General.

Many states elect the attorney general as opposed to having that important office as a political appointment. Many times in the history of the state of Alaska, the "appointed" attorney general has followed political whims of the Governor instead of working for the Alaskan people. Under the present governor appointee system, the governor has his own personal lawyer, who very clearly enforces laws as the governor directs, instead of the way it should be, with the Attorney General owing his allegiance and loyalty to the Constitution and the people of the State of Alaska instead of to one man's personal political agenda.

The advantages are many for Alaskans with an elected attorney general:

- A Department of Law that serves only the people of Alaska.
- That stands up for Alaskans.
- Answers only to the Alaskan people.
- Interprets the Constitution, instead of the Governor.
- Works directly for Alaskans.

Past experience shows us that appointed attorney generals do not have Alaskan's Rights at heart. We have had attorney generals drop very important actions at the insistence of the Governor:

- Statehood Compact
- Subsistence Lawsuit
- State's Rights issues
- 90/10 Royalty NPRA

SJR 14 allows a Constitutional Amendment vote of the people to begin the process of electing the State's Attorney General, taking that process out of the hands of the Governor as a political appointee.

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SENATOR JERRY WARD

ALASKA STATE LEGISLATURE

'Constitutional amendment relating to the duties and election of the Attorney General'

Many states elect the attorney general as opposed to having that important office as a political appointment. Many times in the history of the state of Alaska, the "appointed" attorney general has followed political whims of the Governor instead of working for the Alaskan people. Under the present governor appointee system, the governor has his own personal lawyer, who very clearly enforces laws as the governor directs, instead of the way it should be, with the Attorney General owing his allegiance and loyalty to the Constitution and the people of the State of Alaska instead of to one man's personal political agenda.

The advantages are many for Alaskans with an elected attorney general.

A Department of Law that:

- Stands up for Alaskans.
- Answers only to the Alaskan people.
- Interprets the Constitution, instead of the Governor.
- Works directly for Alaskans.

Past experience shows us that appointed attorney generals do not have Alaskan's Rights at heart. We have had attorney generals drop very important actions at the insistence of the Governor:

- Statehood Compact
- Subsistence Lawsuit
- State's Rights issues
- 90/10 Royalty NPRA
- State Sovereignty- dropped appeal of Tribal Listing
- Failed to enforce civil fraud laws – Ponzi Scheme
- Failed to enforce civil invasion of privacy – APSIN violations

SJR 14 allows a vote of the people to elect the State's Attorney General, taking that process out of the hands of the Governor as a political appointee.

It's the people's state, it's the people's constitution, it should be the people's Attorney General, this constitutional amendment will return this issue back to the people of Alaska to decide. Political decisions made by the attorney general must stop. The people of the State of Alaska need to have an elected AG loyal to the Constitution and the people of Alaska, not a personal lawyer for the Governor.

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