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MANAGING OUTSIDE COUNSEL CONTRACTS



**Department of Law
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The Big Picture

The MOST IMPORTANT PART OF MANAGING OUTSIDE COUNSEL CONTRACTS IS YOUR ACTIVE INVOLVEMENT AS PROJECT MANAGER IN THE PLANNING AND DAY-TO-DAY MANAGEMENT OF A CASE. In the case of on-going general counsel contracts, a good relationship with the client agency is imperative to ensure that as project manager you know in advance what services the contractor will be providing. As project manager, you must make the commitment to participation.

Fees are by far the largest expense associated with a legal services or expert witness contracts. Work should be agreed upon before it happens. It is difficult to tell a contractor he or she should not have performed certain work and then refuse to pay for the services in a bill received one or two months after the work is performed, unless that work was outside of the parameters you clearly established in advance.

The contractor, wishing to do the best job possible for their client, the state, has the incentive to turn over every legal "rock" as it were. The state, however, wishes to receive the best representation it can, at the least possible cost. Certain work may be nice, but not necessary. It is your job as project manager, to make these decisions in conjunction with the contractor, and the client agency, if necessary, before the work occurs.

To ensure cost effective representation on every matter referred to outside counsel, project attorneys should **READ AND KEEP A COPY OF THE CONTRACT**. This seems simple, but not everyone does. The contract terms clearly set out the state's expectations related to contract management and answer many questions concerning allowable costs. A copy of the department's standard agreement form is appended to this manual for illustrative purposes, but should not substitute for reading the agreement specific to your case as the terms may vary.

General Counsel Contracts - An Extra Step

Outside counsel is sometimes retained to advise the state on specialized matters outside the practical scope of the Department of Law. Investment counsel and bond counsel contracts are examples where specialized expertise located outside of Alaska may be necessary. These types of contracts require extra effort on the part of the project manager, because the work assignments are generally coming from the agency, yet the project manager is ultimately responsible for approving payment of the bills.

The project manager must work with the client agency to establish regular communications regarding the work assignments being given to the contractor. Ideally, the project manager will be working closely with the agency and the contractor on day-to-day legal activities. This is not always practicable, and a mutually agreed upon method of ensuring you, as project manager, are aware of the contractor's work assignments and performance must be formally established and maintained. In addition, but not instead, the client agency must review the contractor invoices concurrently with the project manager, to double check their reasonableness.

Because the Department of Law is ultimately responsible for the legal representation of most executive branch agencies, AS 36.30.015(d) and 2 AAC 12.040 prohibit those agencies from entering into contracts for the services of legal counsel without the prior written approval of the Attorney General. Except in those instances where an agency has been specifically delegated the authority to procure and manage the services of legal counsel, the Department of Law will most likely be the contracting agency and held responsible for the administration of any such agreements. If problems develop over contractor oversight, we are whom the auditors are going to come visit.

Planning Ahead

All contracts regardless of size should have some form of **BUDGET OR WORKPLAN ESTABLISHED AND REGULARLY UPDATED**. They may be incorporated directly into a contract, developed separately after the contract has been executed, perhaps on an annual basis for very large contracts, or, in the case of very small or simple contracts, be an informal understanding between the involved parties.

1. Identify key dates or milestones and develop budget according to the effort needed to reach each point. This is often easiest to do as a month-to-month projection covering one year, keeping in mind court deadlines and the work that is likely to be necessary to meet those deadlines. Questions to ask:

How many attorneys will be assigned at what billing rate, for both prime and co-counsel, if necessary?

What level of expert assistance will be necessary, and at what rates?

What kind of direct case costs might be incurred?

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2. Establish the level of direct involvement and supervision by the department's attorneys and any other protocols necessary for the management of the case/project.
 3. Clearly establish that it is the contractor's responsibility to monitor his work efforts and to notify the state as early as possible when it becomes apparent that his costs and fees may exceed the budget amounts estimated above. Without such prior notification, the contractor may be required to bear the cost of any services beyond the authorized contract ceiling.

General Contract/Case Management

To ensure cost effective representation on every matter referred to outside counsel, the project attorney should:

1. clearly define the objectives to be achieved by contract counsel;
2. ensure that the contractor has a clear understanding of his role;
3. actively participate with the contractor in developing a case plan and budget;
4. impress upon the contractor the need to discuss and obtain the state's concurrence on any material changes in the case plan or budget;
5. ensure that the state is kept advised of any material developments as they occur; and
6. utilize state resources in order to reduce contract costs whenever possible (staff attorneys, paralegals, research, etc.).

Keep in mind that the state's overall objective is to seek the best possible resolution of legal matters at the lowest practicable cost. Consequently, outside counsel must avoid multiple representation at meetings or depositions, overstaffing, rotating lawyers knowledgeable about state matters and using state projects for purposes of training their personnel.

If it is apparent that multiple representation at a meeting would benefit the state or that staffing changes are necessary, these matters should be discussed in advance. Contractors should be expected to control their time carefully, avoid unnecessary polishing of their work, and to seek cost-effective solutions.

The time and effort devoted to legal research has become a costly element of legal representation. To avoid duplication of research efforts, to obtain benefits of previous research, and to ensure consistency with existing opinion, contractors should be instructed to discuss proposed major research efforts in advance with the project attorney and to check the Attorney General's brief bank/opinion index system for related legal opinions.

Monitoring Contract Performance - Status Reports and Billings

Formal written status reports may be requested on a periodic basis depending on the size and complexity of the contract and/or the degree of active involvement by department attorneys. In some cases the contract billings will be detailed enough to serve as status reports. Status reports should, at a minimum, compare the actual expenses to the previously prepared budget, and discuss any significant differences, so that the budget can be adjusted if necessary, to reflect unanticipated changes in the case.

With the utilization of computerized billing systems by most law firms, mathematical errors in invoices rarely, if ever, occur. As such, the project attorney should concentrate on reviewing billings for, among other things, substantive matters, reasonableness, cost consciousness, and compliance with the terms and conditions of the state's contract, including whether the work was within the scope, period of performance, and total amount of the contract. In reviewing invoices, the project attorney may want to ask the following questions:

1. Did the contractor utilize state resources in order to reduce contract costs whenever possible (staff attorneys, paralegals, research, etc.)?
2. Have we been given credit for the learning curve when the firm shifts attorneys for its own purposes rather than at the state's request?
3. Have there been multiple changes in the lawyers or paralegals working on or responsible for any one matter?
4. Is the case under control? Was there research done early in the case so as to establish a direction for the case?
5. Have we been billed for multiple office conferences?
6. Do the hours for any particular matter reflect the result?
7. Has there been excessive review by senior partners in the firm?
8. Has there been excessive time spent on certain pleadings?

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9. Has the case been moving?
 10. Have the disbursements and expenses as agreed upon been properly billed? (See discussion on costs, below.)
 11. Do the cumulative fees accurately reflect the status of the case?
 12. Are the rates charged the same as agreed?
 13. Are there excessive reviews of the file, or reviews of pleadings previously reviewed?
 14. Are there excessive status reports or status reviews? Are they calling client agency personnel to provide same or vice versa?
 15. Are there continuances on our side because firm was not ready?
 16. Has there been consultation with in-house staff before embarking on a major research project on state issues?
 17. Are there more attorneys than necessary working on a file, performing research, etc.?
 18. Are there excessive inter-office conferences? (Perhaps a more senior attorney is needed.)
 19. Are they "papering to death" - always writing a letter when a phone call would do?

Allowable Costs

State contracts have limits on reimbursable costs which may be unfamiliar to new contractors in particular. Most limitations are clearly listed out in Appendix D of the contract.

For example, the state will not pay for First Class airfares unless pre-approved by the Attorney General. The contract establishes a maximum level for hotel and meal costs. Tips will not be reimbursed, nor will laundry costs, alcoholic beverages, videotape rentals, or other entertainment expenses. (As a general rule, the state does not pay for costs which would otherwise be considered normal living expenses.)

The contract also establishes maximum rates which may be charged for certain types of costs, (i.e., copies and faxes), but for most direct disbursements, simply limits reimbursement to the actual amount of the cost incurred (i.e., no administrative surcharge or other overhead recovery fee).

Care should be taken on what costs are billed, which perhaps should be included in the contractor's rates as overhead. For example, time spent preparing budgets and invoices for submission to the state should not be billed to the state, unless the preparation is so onerous that pre-approval is obtained. Secretarial overtime is also an overhead cost, unless required by the nature or timing of the assignments made under the contract, and not because of other client work or other firm priorities. Lease costs, insurance (including automobile rental insurance), furniture, equipment, and software are overhead costs, unless pre-approved by the Deputy Attorney General.

Unless specifically modified during negotiations, the department's standard legal services and expert witness contracts do not permit the state to pay for travel time.

As a general rule, receipts should be provided for expenses over \$250.00 at a minimum. Requests for reimbursement for costs should be individually itemized, and costs categories labeled "miscellaneous" should be discouraged.

Costs are a small expense compared to fees; however, they can add up.

Contract Amendments

Nearly all legal services contracts issued by the department contain provisions that allow the contract to be amended under certain circumstances. 2 AAC 12.040 recognizes the rather unique character of legal services agreements and provides for the inclusion of language allowing for the adjustment of price, time of performance, and total dollar amount. In addition, 2 AAC 12.485 assigns the Attorney General authority to approve amendments that exceed the state's \$50,000 small purchase threshold. When a contract amendment is required, project managers shall work directly with the department's administrative services division to execute the amendment and, as necessary, the client agency to ensure sufficient additional funds are made available. Any amendment resulting in a significant change in the scope of a legal services contract, must be approved in advance by the Attorney General.

Role of Administrative Services Division

The role of the department's administrative services division is primarily two-fold. First, the department's contracting officer is responsible for assisting the project manager in procuring the services required in accordance with the State Procurement Code and department policy. He may undertake the solicitation on behalf of the department, prepare all contract documents (including any subsequent amendments), obtain the necessary signatures from all of the parties, and, if necessary, assist in securing RSA funding from the client agency.

Second, the department's fiscal section is responsible for processing all invoices submitted for payment and obtaining reimbursement from our client agencies as may be required. Unless an invoice is in dispute, AS 37.05.285 requires that payment must be made within thirty-days of receipt of a proper billing. Consequently, it is critical that project managers review and submit invoices as quickly as possible. As a rule, in order to stay within the thirty-day requirement fiscal section personnel will pay the oldest bills first when processing contractor payments. Fiscal will review the bill to determine whether it has been duly authorized for payment, if all necessary backup information and receipts are included, whether it falls within the contract's period of performance, and whether there are sufficient funds encumbered to pay for the services. Periodic spot checks will also occur to check for mathematical accuracy.

Frequently, delays in payment may occur as a result of the RSA process. In such instances, project managers may be asked to prompt client agencies to expedite the authorization of RSA's that are required to pay for services for which the department has already been billed.

Managing within a Fiscal Year

In most cases, you as project manager will need to be concerned about managing a contract and an appropriation at the same time. In certain instances, the legislature will make a separate appropriation for specific litigation. Large, complex cases may have a special appropriation to make it easier for the legislature and the governor to monitor them. Oil and gas litigation is an obvious example, as was the *Exxon Valdez* oil spill litigation. Other cases, not anticipated during budget development, may receive a special appropriation. The *Venetie* case required such an appropriation. In many cases, outside counsel and expert contracts are funded by a reimbursable services agreement (RSA) with another agency. These are like separate appropriations because the funds cannot be used for any other purpose than stated in the RSA.

When managing outside counsel on a case within the confines of a special appropriation or an RSA, the project manager must not only be concerned with costs remaining within the amount of the appropriation, but also on timing. All

appropriations have a lapse date, when any unexpended amount lapses back to the state treasury. **FUNDS CANNOT CARRY OVER PAST THE LAPSE DATE OF THE APPROPRIATION.** Most appropriations have a term of one fiscal year. Sometimes the legislature will add an "extended lapse date" to a special appropriation so it can carry over more than one fiscal year, perhaps two. (The State of Alaska fiscal year runs from July 1 to June 30.)

When requesting a special appropriation for an unanticipated, large case like *Venetie*, the department will request an extended lapse date when it is clear the case will not be completed before June 30 of that year. However, for large annual appropriations like Oil and Gas Litigation, the legislature does not normally provide an extended lapse date. This can be problematical, because cases do not necessarily neatly end by June 30, nor stick to the schedule that a budget was built on 18 months before. (For a fiscal year beginning July 1, the budget bill is introduced in the legislature in January.)

With RSAs, the agency providing the funds to Law encumbers the agreed upon amount in the accounting system so they cannot be used for another purpose.

Careful monitoring of expenditures becomes increasingly important under these circumstances. The legislature is the only body with the power to appropriate funds. They usually meet from mid-January to mid-May. If case expenditures are projected to be more than the amount of the appropriation, a decision must be made, preferably early in the legislative session, whether to seek a supplemental appropriation from the legislature, or to rein in expenditures to remain within the appropriation. On the other hand, if it looks like the case will not cost as much as budgeted, perhaps because delays are moving costs into the next fiscal year, the governor and the legislature need to know that as well. This is so that extra money can be released and reappropriated for some other purpose, and the budget request for the next year adjusted to reflect the delay.

The same applies to RSAs, with a slightly different twist. The funding agency has its own appropriation that is paying for the legal services contract. If costs are running above the RSA amount, that agency must agree to the increase and find the funds to pay for the increase either from existing appropriations or through a supplemental appropriation. If costs will be significantly under budget, they need to know about that too in a timely manner so they can use those funds for another purpose, and be aware that additional funds will be necessary in the next fiscal year. If they are not notified, the unused part of the RSA will lapse, and the agency may be startled to find out they are being asked to pay for the same legal services a second time.

Once the legislature is out of session in mid-May, this careful monitoring must continue. Outside counsel bills usually come in a month or more after the work is performed. If you are surprised by a larger than expected bill that blows your

budget, and exceeds your appropriation or RSA level, the funds will need to come from somewhere else in the department. If there are no excess funds elsewhere, the department will be before the legislature during the next session to explain why. This type of mismanagement can have painful consequences.

Disciplining Outside Counsel

If a problem becomes apparent, discuss it with the contractor attorney doing the work; if that does not bring about the desired result, review the matter in specific detail with your immediate supervisor, who should in turn discuss the problem with the responsible partner within the firm.

1. Remember that at one time we thought this was a good firm.
2. Have a meeting, detail the problems you have had or are having, but be willing to listen to the problems the firm may be having with the state.

If this fails, alert the Deputy Attorney General or the Attorney General to the problem in order to discuss available remedies.

STANDARD AGREEMENT FORM

1. Agency Contract Number	2. ASPS Number	3. Financial Coding	4. Agency Assigned Encumbrance Number
5. Vendor Number		6. Alaska Business License Number	

This contract is between the State of Alaska,

7. Department of	Division	hereafter the State, and
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8. Contractor	hereafter the Contractor
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Mailing Address	Street or P.O. Box	City	State	ZIP+4
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ARTICLE 1. Appendices: Appendices referred to in this contract and attached to it are considered part of it.

ARTICLE 2. Performance of Service:

2.1 Appendix A (General Provisions), Articles 1 through 14, governs the performance of services under this contract.

2.2 Appendix B sets forth the liability and insurance provisions of this contract.

2.3 Appendix C sets forth the services to be performed by the contractor.

ARTICLE 3. Period of Performance: The period of performance for this contract begins _____, and ends _____.

ARTICLE 4. Considerations:

4.1 In full consideration of the contractor's performance under this contract, the State shall pay the contractor a sum not to exceed \$ _____ in accordance with the provisions of Appendix D.

4.2 When billing the State, the contractor shall refer to the Authority Number or the Agency Contract Number and send the billing to:

10. Department of	Attention: Division of
Mailing Address	Attention:

11. CONTRACTOR		13. CERTIFICATION: I certify that the facts herein and on supporting documents are correct, that this voucher constitutes a legal charge against funds and appropriations cited, that sufficient funds are encumbered to pay this obligation, or that there is a sufficient balance in the appropriation cited to cover this obligation. I am aware that to knowingly make or allow false entries or alterations on a public record, or knowingly destroy, mutilate, suppress, conceal, remove or otherwise impair the variety, legibility or availability of a public record constitutes tampering with public records punishable under AS 11.56.815-.820. Other disciplinary action may be taken up to and including dismissal.	
Name of Firm			
Signature of Authorized Representative	Date		
Typed or Printed Name of Authorized Representative			
Title	Employer ID No. (EIN) or SSN		
12. CONTRACTING AGENCY		Signature of Head of Contracting Agency or Designee	Date
Department/Division	Date		
Signature of Project Director			
Typed or Printed Name of Project Director			
Title			

GENERAL PROVISIONS

APPENDIX A

1. Definitions.

- 1.1 In this contract and appendices, "Project Director" or "Agency Head" or "Procurement Officer" means the person who signs this contract on behalf of the Requesting Agency and includes a successor or authorized representative.
- 1.2 "State Contracting Agency" means the department for which this contract is to be performed and for which the Commissioner or Authorized Designee acted in signing this contract.

Article 2. Inspection and Reports.

- 2.1 The department may inspect, in the manner and at reasonable times it considers appropriate, all the contractor's facilities and activities under this contract.
- 2.2 The contractor shall make progress and other reports in the manner and at the times the department reasonably requires.

Article 3. Disputes.

- 3.1 Any dispute concerning a question of fact arising under this contract which is not disposed of by mutual agreement shall be decided in accordance with AS 38.30.620-632.

Article 4. Equal Employment Opportunity.

- 4.1 The contractor may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, or because of age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position(s) do not require distinction on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy, or parenthood. The contractor shall take affirmative action to insure that the applicants are considered for employment and that employees are treated during employment without unlawful regard to their race, color, religion, national origin, ancestry, physical handicap, age, sex, marital status, changes in marital status, changes in marital status, pregnancy or parenthood. This action must include, but need not be limited to, the following: employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship. The contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting out the provisions of this paragraph.
- 4.2 The contractor shall state, in all solicitations or advertisements for employees to work on State of Alaska contract jobs, that it is an equal opportunity employer and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.
- 4.3 The contractor shall send to each labor union or representative of workers with which the contractor has a collective bargaining agreement or other contract or understanding a notice advising the labor union or workers' compensation representative of the contractor's commitments under this article and post copies of the notice in conspicuous places available to all employees and applicants for employment.
- 4.4 The contractor shall include the provisions of this article in every contract, and shall require the inclusion of these provisions in every contract entered into by any of its subcontractors, so that those provisions will be binding upon each subcontractor. For the purpose of including those provisions in any contract or subcontract, as required by this contract, "contractor" and "subcontractor" may be changed to reflect appropriately the name or designation of the parties of the contract or subcontract.
- 4.5 The contractor shall cooperate fully with State efforts which seek to deal with the problem of unlawful discrimination, and with all other State efforts to guarantee fair employment practices under this contract, and promptly comply with all requests and directions from the State Commission for Human Rights or any of its officers or agents relating to prevention of discriminatory employment practices.
- 4.6 Full cooperation in paragraph 4.5 includes, but is not limited to, being a witness in any proceeding involving questions of unlawful discrimination if that is requested by any official or agency of the State of Alaska; permitting employees of the contractor to be witnesses or complainants in any proceeding involving questions of unlawful discrimination, if that is requested by any official or agency of the State of Alaska; participating in meetings; submitting periodic reports on the equal employment aspects of present and future employment; assisting inspection of the contractor's facilities; and promptly complying with all State directives considered essential by any office or agency of the State of Alaska to insure compliance with all federal and State laws, regulations, and policies pertaining to the prevention of discriminatory employment practices.
- 4.7 Failure to perform under this article constitutes a material breach of the contract.

Article 5. Termination.

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

Article 6. No Assignment or Delegation.

The contractor may not assign or delegate this contract, or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Project Director and the Agency Head.

Article 7. No Additional Work or Material.

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

Article 8. Independent Contractor.

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

Article 9. Payment of Taxes.

As a condition of performance of this contract, the contractor shall pay all federal, State, and local taxes incurred by the contractor and shall require their payment by any Subcontractor or any other persons in the performance of this contract. Satisfactory performance of this paragraph is a condition precedent to payment by the State under this contract.

Article 10. Ownership of Documents.

All designs, drawings, specifications, notes, artwork, and other work developed in the performance of this agreement are produced for hire and remain the sole property of the State of Alaska and may be used by the State for any other purpose without additional compensation to the contractor. The contractor agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. The contractor, for a period of three years after final payment under this contract, agrees to furnish and provide access to all retained materials at the request of the Project Director. Unless otherwise directed by the Project Director, the contractor may retain copies of all the materials.

Article 11. Governing Law.

This contract is governed by the laws of the State of Alaska. All actions concerning this contract shall be brought in the Superior Court of the State of Alaska.

Article 12. Conflicting Provisions.

As specifically amended and approved by the department of Law the General Provisions of this contract supersede any provisions in other appendices.

Article 13. Officials Not to Benefit.

Contractor must comply with all applicable federal or State laws regulating ethical conduct of public officers and employees.

Article 14. Covenant Against Contingent Fees.

The contractor warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, contingent fee, or brokerage except employees or agencies maintained by the contractor for the purpose of securing business. For the breach or violation of this warranty, the State

may terminate this contract without liability or in its discretion deduct from the contract price or consideration the full amount of the commission, percentage, brokerage, or contingent fee.

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APPENDIX B²
INDEMNITY AND INSURANCE

Article 1. Indemnification

The Contractor shall indemnify, hold harmless and defend the contracting agency from and against any claim of liability for error, omission, or negligent act of the Contractor under this agreement. The Contractor shall not be required to indemnify the contracting agency for a claim of, or liability for, the independent negligence of the contracting agency. If there is a claim of, or liability for, the joint negligent error or omission of the Contractor and the independent negligence of the contracting agency, the indemnification and hold harmless obligation shall be apportioned on a comparative fault basis. "Contractor" and "contracting agency," as used within this and the following article, include the employees, agents and other contractors who are directly responsible, respectively, to each. The term "independent negligence" is negligence other than in the contracting agency's selection, administration, monitoring, or controlling of the Contractor and in approving or accepting the Contractor's work.

Article 2. Insurance

Without limiting contractor's indemnification, it is agreed that Contractor shall purchase at its own expense and maintain in force at all times during the performance of services under this agreement the following policies of insurance. Where specific limits are shown, it is understood that they shall be the minimum acceptable limits. If the Contractor's policy contains higher limits, the state shall be entitled to coverage to the extent of such higher limits. Certificates of Insurance must be furnished to the Contracting Officer prior to beginning work and must provide for a 30-day prior notice of cancellation, nonrenewal or material change of conditions. Failure to furnish satisfactory evidence of insurance or lapse of the policy is a material breach of this contract and shall be grounds for termination of the Contractor's services. All insurance policies shall comply with, and be issued by insurers licensed to transact the business of insurance under AS 21.

2.1. Workers' Compensation Insurance: The contractor shall provide and maintain, for all employees engaged in work under this contract, coverage as required by AS 23.30.045, and; where applicable, any other statutory obligations including but not limited to Federal U.S.L.&H. and Jones Acts requirements. The policy must waive subrogation against the State.

2.2. Commercial General Liability Insurance: covering all business premises and operations used by the Contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per occurrence.

2.3. Commercial Automobile Liability Insurance: covering all vehicles used by the Contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per occurrence.

2.4. Professional Liability Insurance: covering all errors, omissions or negligent acts in the performance of professional services under this agreement. Limits required per the following schedule:

Contract Amount	Minimum Required Limits
Under \$100,000	\$300,000 per Occurrence/Annual Aggregate
\$100,000-\$499,999	\$500,000 per Occurrence/Annual Aggregate
\$500,000-\$999,999	\$1,000,000 per Occurrence/Annual Aggregate
\$1,000,000 or over	Refer to Risk Management

APPENDIX C

Article 1. The services to be performed by the Contractor.

Article 1.1. At the specific direction of the Attorney General's Office, the Contractor ([INSERT FIRM NAME]) shall provide legal services to the State of Alaska in connection with the matter, [INSERT CASE NAME]. It is agreed between the parties that the State shall determine the scope of the services to be rendered by the Contractor and that the State has the option to and may perform all or part of the work involved in each matter assigned under this contract. It is further agreed that the State may require a separate contract on any matter which, in its judgment, may be sufficiently complicated or prolonged to justify a separate contract.

Article 2. Contract Management

Article 2.1 The designated contact person and lead attorney for the Contractor will be [INSERT NAME]. The Contractor's services under this contract shall be directed and managed from the Contractor's [INSERT CITY] office. In addition to [INSERT LEAD ATTORNEY], [INSERT OTHER KEY PERSONNEL] shall also provide attorney services under this agreement. The Contractor may assign other attorneys or paralegals to provide services under the contract after providing notice to, and obtaining approval from, the Project Director. All attorneys assigned to provide services under this Contract shall work under the direction and management of the lead attorney listed above.

Article 2.2 The Contractor will maintain the involvement of the individuals identified in Article 2.1 above in advising and representing the State in this matter. In the event of an unforeseeable circumstance that requires substitution for any of those individuals, the Contractor shall notify the State in writing of the proposed substitution. The State reserves the right to accept or reject a proposed substitute.

Article 2.3 In addition to providing notification of proposed substitution for the key individuals listed in Article 2.1, the Contractor is also required to notify the State where substitution of other attorney staff is made. Before substitution of any individual is effected, the State must approve the extent to which transitional time will be billed.

Article 2.4 Within the time period established by the Project Director, the Contractor shall develop an estimate of the time and costs necessary to litigate the matter assigned under this contract.

Article 2.5 The Contractor shall prepare and maintain a workplan and budget approved by the Project Director to accomplish the tasks necessary to defend the State's position in the assigned matter. The proposed workplan and budget shall be prepared by the Contractor within the time period established by the Project Director and shall include:

- a. a summary of the case;
- b. a discussion of the major strategy options including benefits, risks and the potential costs associated with each;
- c. a proposed/recommended strategy;
- d. a list of major tasks to accomplish within the next 12 months to support the recommended approach and strategies;
- e. identification of critical dates and proposed monthly schedule for completion of each task including responsibilities and estimated time and cost to complete; and
- f. a description of staffing roles and responsibilities.

The Project Director will review the proposed workplan and budget, specify any necessary changes, and approve the final plan. During the period of this agreement the Contractor shall continually update the workplan and budget to reflect changes in strategy, timing, cost, etc. and submit all proposed revisions to the Project Director for approval.

Article 2.6 The Contractor agrees to participate in periodic status meetings with the Project Director and others the Project Director shall designate, and to prepare and present at the meeting a summary of the status of the tasks for which the Contractor is responsible.

Article 2.7 BEFORE A COST OVERRUN IS INCURRED, THE CONTRACTOR AGREES TO ALERT THE PROJECT DIRECTOR AS SOON AS IT APPEARS THAT TOTAL EXPENDITURES UNDER THE CONTRACT MAY EXCEED THE CONTRACT CEILING ESTABLISHED UNDER APPENDIX D, ARTICLE 1.3. IN THE EVENT THE CONTRACTOR FAILS TO NOTIFY THE PROJECT DIRECTOR PRIOR TO INCURRING A COST OVERRUN, THE CONTRACTOR SHALL ASSUME LIABILITY FOR ANY EXCESS COSTS AND FEES INCURRED UP UNTIL THE TIME AT WHICH THE CONTRACTOR NOTIFIES THE PROJECT DIRECTOR OF THE OVERRUN.

Article 2.8

For those issues in which the parties determine that professional/expert witness services are needed by subcontract, the State shall set criteria for the Contractor to apply in selecting such experts. The State reserves the right to approve or reject the selection of all expert witnesses, to select the expert witnesses, and to participate in any subcontract negotiations with the Contractor. Generally, the State will require the Contractor to impose upon expert witnesses terms and conditions identical to those contained in this agreement, including the preparation and maintenance of a detailed workplan and budget, clearly establishing liability for cost overruns, and compliance with the billing policies and procedures contained in Appendix D. The Contractor agrees to direct and monitor expert witness performance and to assume responsibility for payment of expert witness invoices and the resolution of any fee disputes. For its part, the State agrees to reimburse the Contractor for all expert witness costs and fees that fall within the scope of an approved workplan and budget or are otherwise allowable under the terms and conditions of an approved expert witness subcontract or letter of agreement.

Article 2.9

At any point during the period of this agreement that the Contractor becomes aware of a potential conflict of representation and wishes to obtain a waiver from the State, the Contractor shall submit a written request to the Deputy Attorney General, with a copy to the Project Director, that contains the following information:

- a. Full disclosure of the scope of the matter the firm and designated lawyers desire to perform for the named entity or individual, and
- b. Statement of the reason why the conflict would not be so substantial as to be deemed likely to interfere with the lawyer's exercise of independent professional judgment or affect the integrity of services which the State expects and the firm and designated lawyers have contracted to perform for the State.

Article 2.10

Copies of any significant briefs prepared by the Contractor shall be sent to the department's Legal Administrator for review and possible inclusion in the state's automated brief bank indexing system. In addition, upon conclusion of this agreement, unless other storage/retention agreements are approved by the Deputy Attorney General, all case files including discovery, other evidentiary materials, and any automated litigation support data shall be forwarded to the department.

Article 2.11

As the demands of the case may dictate, the period of performance, scope and amount of this agreement may be amended in writing at the discretion of the State. In addition, the parties to this agreement acknowledge that work may begin on the date shown in Article 3. ("Period of Performance") and that the foregoing date may precede the date of execution of this agreement because immediate performance is required to serve the best interest of the state.

Article 3.**General Litigation Policies****Article 3.1**

The Contractor shall represent the State in a manner that is consistent with the State's philosophy of pursuing litigation in an aggressive and forthright manner while maintaining the overall objective of resolving litigation in the most expeditious and cost-effective manner.

The Contractor shall avoid taking extreme advocacy positions that are not likely to have a substantive impact on the litigation. Coercive, delaying or obstructive tactics are also to be avoided. In addition, the State discourages engaging in motion practice unless there is some clear, strategic advantage to be gained. Where appropriate, however, motions for judgment on the pleadings or for summary judgment pursuant to applicable rules should be employed to resolve or refine as many issues in dispute as possible.

Lengthy interrogatories or requests for extensive document production solely for the purpose of burdening another party are to be avoided. It is generally recognized that costly delays frequently result from abuses of the discovery process. The Contractor, in consultation with the Project Director, should consider available remedies when another party appears to be abusing the discovery process.

Article 3.2

The Contractor shall identify and consider early in the proceedings, and at each stage thereafter, the settlement possibilities of the dispute in order to achieve the greatest degree of cost-effectiveness. The Contractor should promptly report any and all settlement overtures received to the Project Director to permit his or her involvement in planning and negotiations.

Article 3.3

The Department of Law, Civil Division does not normally have the authority or responsibility for instituting, conducting or disposing of criminal proceedings. The department's policy is that the settlement of civil litigation may not, expressly or by implication, extend to the disposition of any criminal charges or recommendations with respect to such charges. In undertaking any settlement negotiations the Contractor shall not agree either to not disclose or not refer to law enforcement authorities any information relating to a possible criminal violation or investigation.

Article 3.4 The Contractor should be alert to and apprise the State of any opportunities for utilizing non-judicial dispute resolution approaches. Generally speaking, the State does not favor the use of arbitration or other forms of binding alternative dispute resolution; however, certain non-binding approaches, such as mediation or mini-trials, may result in a faster, less expensive resolution of disputes.

Article 3.5 In the event of any adverse ruling, the Contractor must notify the Project Director promptly in order that a decision may be made regarding possible appeals. No appeal may be taken without the prior approval of the Project Director, but the Contractor should protect the state's appeal rights pending a decision to appeal.

Article 3.6 The Project Director or the Attorney General's Office shall be the primary points of contact for all substantive dealings with the media. In the event the Contractor is contacted by media representatives concerning this or other cases being handled on behalf of the state, the Contractor should decline any comment beyond confirming factual matters that are already a matter of public record and refer the individuals to the Project Director.

Article 3.7 Prior to approaching employees of other government agencies for any purpose, including scheduling depositions or requesting documents, the Contractor shall notify the Project Director. In the event that such a contact or request for information is deemed to be of a sensitive nature, it may be coordinated directly by the Project Director.

APPENDIX D

Article 1.

Consideration

Article 1.1 In full consideration of the Contractor's performance under this contract, the State shall pay the Contractor [INSERT HOURLY RATES FOR EACH INDIVIDUAL]. Additionally, the State shall pay the Contractor for the services of other attorneys or paralegals who may be utilized in providing services under this agreement as long as the use of those individuals and their hourly rates are approved in advance by the State's project director.

Article 1.2 The State agrees to reimburse the Contractor for actual out-of-pocket expenses incurred while providing such services. Such reimbursement shall be limited as follows:

<u>Service or Expense</u>	<u>Charge/Rate</u>
Reproduction	\$0.10 per page
Computerized Legal Research (such as Lexis/Nexis, Westlaw/Dialog)	At cost as invoiced
Courier Services	
Automobile Messenger Deliveries	At cost as invoiced
Overnight Deliveries (such as UPS, Federal Express, Express Mail, DHL)	At cost as invoiced
Postage	At cost
Telephone	At cost as invoiced
Telecopier	\$0.75 (local), \$1.50 (domestic), \$2.25 (international) per page to send
Travel and Lodging	
Hotel Accommodations	Not to exceed \$150/night
Air Fare	Not to exceed coach fares
Cab Fare	At cost as invoiced
Meals	Not to exceed \$42.00/day
Litigation Process Disbursements (i.e., filing fees, subpoenas, depositions)	At cost as invoiced

Reimbursement for any of the above shall be limited to actual costs. No reimbursement shall be made for any administrative, surcharge, or other overhead recovery fee. Reimbursement shall not be made for the purchase or lease of office space, furnishings, equipment, or software unless approved in advance by the Deputy Attorney General. Upon conclusion of this agreement, unless other arrangements are approved by the Deputy Attorney General, the ownership of any furnishings, equipment, or software purchased under this contract shall revert back to the State and those items returned to the Department of Law.

Reimbursement for secretarial overtime or other temporary administrative or clerical assistance may be authorized but only if required by the nature or timing of assignments made under this contract (e.g. large projects or court imposed deadlines) and not because of other client work or firm priorities.

Unless otherwise approved by the Project Director, reimbursement for airline travel costs under this contract shall be limited to coach class fares. Contractor will not bill the State for time in travel status, except for that time during which the individual has performed work on the State's matter while in travel status; in that situation the Contractor shall adhere to billing rates provided in Article 1.2 of this appendix.

Reimbursement of hotel costs shall be limited to a maximum of \$150.00 per night unless otherwise approved by the Project Director. The Contractor shall, when possible, utilize moderately priced hotels comparable to those used by Department of Law employees. Reimbursement for meals shall be limited to either a total of \$42.00 per day or partial reimbursement for individual meals not to exceed \$9.00 for breakfast, \$11.00 for lunch, or \$22.00 for dinner. No reimbursement shall be made for alcoholic beverages, entertainment, gratuities, or what might otherwise be considered normal living expenses.

Article 1.3 Unless amended in writing, the total sum expended under this contract shall not exceed \$[INSERT CONTRACT AMOUNT], including out-of-pocket expenses.

Article 2. Billing Procedures

Article 2.1 The Contractor agrees to bill the State on at least a monthly basis and to bill the State within thirty days of the end of the monthly billing period.

Article 2.2 The Contractor's billing statements shall be itemized to show the time spent, a task description and the dates that the tasks were performed by the name and hourly rate of the individual performing the work. Billing statements shall also include an itemization of all costs and copies of invoices for travel and other significant out-of-pocket expenses.

Article 2.3 As applicable, monthly submission of bills shall include a contractor billing summary that shows the original estimated cost of completion as well as the monthly and cumulative total of fees and expenses incurred for each major task identified in the Contractor's workplan. The billing summary shall also provide an explanation for any variances from amounts budgeted for each task (ref. Appendix C, Article 2.6). The State reserves the right to withhold payment of fees and expenses pending satisfactory explanation and authorization to exceed original cost estimates or an approved task budget. As a standard cost control practice, the State may conduct an audit of time and cost records of the Contractor, its employees and expert witness subcontractors. Any such audit may be conducted at the Contractor's offices or a place mutually agreed to by the Contractor and the Project Director.

Article 2.4 Billing rates are capped for one year from date of execution of this Contract. If after one year the Contractor wishes to seek an adjustment of its billing rates, the Contractor shall:

- a. notify the Project Director in writing sixty (60) days before activating any increase in billing rates;
- b. specify the impact the rate adjustment would have on the existing workplan and budget; and
- c. limit the change in any individual billing rate to an amount that does not exceed the percent increase in the Consumer Price Index (CPI) for the locale from which the services are being rendered or obtain the approval of the Deputy Attorney General for any increase above the CPI.

If billing rates are increased under this article, the new rates are capped for one year following the date of the increase.

**LEGAL SERVICES CONTRACTUAL EXPENDITURES
FY94 - FY99**

	# CONTRACTS					FY94-99
SUBJECT	CLOSED		ACTIVE		TOTAL	AMT PAID
	Single Matter	Multi- Matter	Single Matter	Multi- Matter		
Administrative Law (federal)	2	1	0	2	5	\$587,304
Bankruptcy	5	0	2	0	7	\$143,785
Bond/Investment Counsel	1	8	0	10	19	\$9,206,446
Canadian/Admiralty	1	0	0	0	1	\$184,221
Child Protection	0	1	0	0	1	\$4,837
Civil Rights	3	0	0	0	3	\$185,727
Collections	8	0	2	0	10	\$23,493
Commercial	4	1	3	0	8	\$139,229
Constitutional	3	0	1	0	4	\$152,756
Construction Claims	4	2	2	0	8	\$690,626
Consumer Protection/Antitrust	5	0	1	0	6	\$57,990
Criminal Prosecution	3	0	0	0	3	\$185,625
Employment	6	2	3	0	11	\$626,011
Environmental	3	1	3	0	7	\$2,583,945
Investment Contract Litigation	4	0	0	0	4	\$1,352,535
Mental Health Lands	3	0	0	0	3	\$2,251,963
Natural Resources	2	0	0	0	2	\$15,063
Oil & Gas Litigation	6	5	2	5	18	\$78,334,941
Other	2	0	0	0	2	\$40,000
Real Estate	3	2	1	2	8	\$356,456
Regulations	20	0	0	0	20	\$271,011
State's Rights	7	2	4	1	14	\$4,834,808
Technology/Patent	0	3	0	1	4	\$133,256
Tort Litigation	6	2	8	0	16	\$2,720,752
Workers' Comp.	4	0	2	0	6	\$74,790
TOTAL	105	30	34	21	190	\$105,569,574

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**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY
SECTION OF BUSINESS LAW
SECTION OF STATE AND LOCAL GOVERNMENT LAW**

**REPORT WITH RECOMMENDATIONS
TO THE HOUSE OF DELEGATES**

Recommendation

RESOLVED, that the ABA Model Rules of Professional Conduct, as amended 1998, be further amended to add a new Rule 7.6, "Political Contributions to Obtain Government Legal Engagements or Appointments by Judges", as follows:

**RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN
GOVERNMENT LEGAL ENGAGEMENTS OR
APPOINTMENTS BY JUDGES.**

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain an appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate,

incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for

proposal process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Report

Background

The House of Delegates last August decided that the Model Rules should expressly prohibit "Pay to Play" by lawyers as recommended by the Task Force on Lawyers' Political Contributions (the Task Force). See Amended Recommendation 301A. The Standing Committee on Ethics and Professional Responsibility (the Committee) submits the new Model Rule 7.6 and accompanying Comment set forth above to accomplish this goal. The Rule also includes provisions governing lawyers' campaign contributions to judicial candidates that are similar to a recommendation in the Task Force's Part Two Report dealing with judicial campaign financing. A detailed description of the submitted Rule begins at page 10.

The practice commonly known as "pay-to-play" addressed by the Rule is a system whereby lawyers and law firms are considered for or awarded either government legal engagements or appointments by a judge only upon their making or soliciting contributions for the political campaigns of officials who are in a position to "steer" such business their way. As discussed further in this Report, the Rule's prophylactic effect inheres in its subjecting lawyers to possible disciplinary action when they knowingly participate in such a system.

The Committee notes at the outset, however, that although lawyers and their political contributions are an important component of the pay-to-play system, lawyers are not the most important players in such a system. The primary actor in any pay-to-play situation is the public official who, depending upon the style of his or her participation in the system, may be acting in dereliction of official duties. For this reason, the rules of professional conduct governing lawyer behavior should not be relied upon as the primary

method of preventing the practice of pay-to-play. Rather, 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 problem of pay-to-play. The fundamental harm done by a pay-to-play system is the harm that befalls the public when a government official, motivated by campaign contributions, chooses lawyers or law firms that may not be the best qualified to perform legal services on the public's behalf. Thus it is the integrity of a basic governmental process, and not just the integrity of the legal profession, that is undermined when such action by a public official is tolerated.

The Committee also notes that a second method of protecting against the evils of a pay-to-play system exists, and it also lies outside the scope of rules governing lawyer conduct: the use of uniform procurement or acquisition procedures for the placement of legal services engagements by government entities and the granting of appointments by judges. The Association has strongly supported the use by government agencies of such procurement procedures. As recently as August, 1998 it approved a recommendation proposed by the Section of Public Contract Law and the Section of State and Local Government Law supporting fundamental principles of competition in public acquisitions. That recommendation had as its aims both the promotion of the public interest in the integrity and honesty of the public acquisition process and the promotion of competition itself. As such, it is a model to be recommended for use in the area of government legal engagements and appointments by judges.

The Standing Committee therefore notes emphatically that where there is aggressive enforcement of prohibitions against pay-to-play conduct by public officials, and where there is reliance on uniform procurement codes and procedures in the placement of legal engagements and in appointments by judges, the need to focus on lawyer conduct will be diminished. The Committee therefore restates the Association's support for each of these concepts, even as it submits parallel measures of regulation within the Model Rules of Professional Conduct.

BACKGROUND FOR DEVELOPING A MODEL RULE

The Rule proposed by the Committee is the end result of three initiatives this Association has taken since 1997 to resolve the problem of pay-to-play. Following proposals made to the House of Delegates in 1996 and 1997 by the Association of the Bar of the City of New York, at the 1997 Annual Meeting, the House approved Report 10D, condemning the pay-to-play practice. The Report also called for the creation of a task force that would study the problems created by a pay-to-play system and develop appropriate professional standards or rules on the subject.

The second initiative began with the appointment by former President Shestack of the Task Force on Lawyers' Political Contributions. The Task Force collected and reviewed empirical data and extensive media reporting on pay-to-play practices as it considered possible approaches the Association might take to discourage or prevent them. In carrying out its charge, the Task Force expanded the scope of its investigation in two important ways. Initial concerns had focused on the existence of the phenomenon in the area of municipal finance engagements. The Task Force's review revealed at least some evidence that the practice occurs in a wider range of practice areas. Early proposals for a Model Rule limited in application to lawyers engaged in municipal finance work were therefore put aside and the Task Force focused on developing a Rule of wider

application.

The Task Force also discovered that a similar system was sometimes in evidence as well in the context of appointments of lawyers made by judges following the making or soliciting of substantial contributions to the judges' election campaigns.

This second stage of study was concluded when the Task Force presented a two-part Report to the House in August 1998 (filed as Reports 301A and 301B). Part One made recommendations with respect to lawyers' political contributions to public officials who were in a position to influence the award of legal engagements by government agencies. House action on Part One resulted in the Standing Committee on Ethics being directed to prepare and submit to the House in 1999 a Model Rule that would "prohibit lawyers from making or soliciting political contributions for the purpose of obtaining government legal engagements." A Rule formulated strictly according to the language proposed in Paragraph (4) of Amended Recommendation 301A has been drafted by the Standing Committee and is presented following this Report as Appendix A. The Committee does not propose its adoption.

Part Two of the Task Force Report, which contained recommendations for improving judicial campaign finance activities, was not acted upon at that time; instead, those recommendations were referred by President Anderson to an Ad Hoc Committee on Judicial Campaign Finance for further study. The Ad Hoc Committee on Judicial Campaign Finance has submitted a separate Report With Recommendations calling for amendments to the ABA Model Code of Judicial Conduct with respect to fundraising in support of election campaigns for judicial office. It has deferred to the Standing Committee, however, on the subject of an appropriate Model Rule of Professional Conduct governing lawyer contributions to judicial campaigns and their relationship to appointments by judges.

DEVELOPMENT OF THE PROPOSED RULE

The third stage of Association review of pay-to-play occurred this year as the Standing Committee and the Ad Hoc Committee, beginning with the resolutions of the House of Delegates and the two part Task Force Report, studied the many issues necessarily considered when enforceable rules of professional or judicial conduct are to be promulgated. These included separate (although frequently intersecting) review of three types of information: 1) the constitutional implications of such regulations, both with respect to their potential for abridging first amendment freedoms and with respect to their narrowness or breadth and their clarity; 2) regulations, either proposed or currently in existence, dealing with pay-to-play type practices; and most importantly, 3) an analysis of whether and how different proposals might operate effectively -- i.e., how each proposal might provide fair notice to lawyers of what is expected of them and how each would be enforced by disciplinary agency personnel -- to achieve the objective of prohibiting pay-to-play.

The Committee used the Task Force Report, Part One, and additional information it obtained to develop two possible "trial" rules addressing lawyers' roles in the pay-to-play system. One was almost verbatim the recommendation that had been made by the Task Force, prohibiting political contributions when the purpose of such contributions was the obtaining of legal business. Because the Committee questioned the wisdom of basing the restriction solely on a lawyer's purpose for making political contributions, and

recognized the difficulty of proving "purpose," it developed a second rule that approached the pay-to-play problem from a different perspective, prohibiting lawyers from accepting legal engagements where the awarding of the engagements was based upon lawyers' political contributions. Each draft rule was accompanied by extensive commentary that was intended, among other things, to establish criteria whereby a contributing lawyer's "purpose" could be proven.

The Committee circulated these trial drafts widely for comment and answered questions about them at a public hearing in February 1999. Many Association entities, individual members, and a variety of interested organizations outside the Association presented written or oral comments. The Committee also sought comment from the community of constitutional scholars (in particular Prof. William Van Alstyne of Duke University School of Law) in order to become thoroughly familiar with the constitutional implications of any possible Model Rule. Finally, the Committee sought formal and informal input from the community of disciplinary counsel as to the likelihood of either of the trial rules being favorably considered in the jurisdictions and effectively enforced through disciplinary agency proceedings. The following summary of the Committee's findings in each of these areas explains the Committee's ultimate decision to advance the proposed Model Rule presented here, which represents a combination of its two initial alternative proposals with refinements.

Constitutional Issues

Although the Standing Committee has on several past occasions written model rules that implicated First Amendment freedoms (e.g., rules regarding advertising and solicitation, or a rule governing trial publicity), it has not previously directly addressed lawyers' participation in the political process. Directed by the House to develop a Model Rule that involved lawyers' political "speech" in the form of making or soliciting campaign contributions, the Committee undertook a review of recent First Amendment jurisprudence treating legislatively-enacted campaign contribution limits. It found, not surprisingly, that limitations on the making and solicitation of political contributions must be predicated on the need to protect a valid state interest; that they must be narrowly drawn; and that their language must be sufficiently clear as to provide fair notice of when and how they operate, thereby satisfying the requirements of due process.

Although most of the comments received by the Committee concerning the constitutionality of its first two draft proposals suggested that those proposals probably would survive a First Amendment attack, the Committee was advised that its proposals differed from the regulations cited by the commentators as examples of constitutionally permissible restrictions on campaign contributions. Moreover, a lengthy analysis of the proposals by Professor Van Alstyne confirmed that "there are nontrivial First Amendment issues that could be – and indeed have been – raised with respect to both of the draft proposals." He and other constitutional experts agreed, nevertheless, that a narrowly limited rule should pass First Amendment scrutiny.

Enacted or Proposed Regulations

The Committee examined numerous regulations that have been either adopted or proposed in different forums to regulate lawyers' contributions to political campaigns in connection with "pay-to-play"-type problems. They ranged from federal criminal statutes (18 U.S.C. Sec. 201) relating to the most egregious violations (bribery or the giving of illegal gratuities) to a considerably more narrowly-drawn Association of the Bar of the City of New York proposal which, like Municipal Securities Rulemaking Board Rule

GS-37, applicable to municipal finance professionals, would prohibit a lawyer or law firm from undertaking a municipal finance engagement within a certain period of time after having made a contribution in excess of a de minimis amount to a public official capable of influencing the public finance engagement.

The Committee recognizes that in some circumstances, the Model Rules of Professional Conduct already apply to lawyers' participation in pay-to-play. For example, the prophylactic effect of criminal statutes potentially applicable to pay-to-play participation by lawyers already has a parallel in the Model Rules of Professional Conduct: a lawyer whose style of participation in pay-to-play is so egregious as to result in conviction of bribery or a similar serious crime would also violate Model Rule 8.4 ("Misconduct"). Model Rule 7.2 (c), which prohibits a lawyer from giving anything of value to another for recommending the lawyer for employment, may in some pay-to-play circumstances also be applicable, although that provision has traditionally been interpreted to apply to the use of "runners" and similar techniques for obtaining business.

The House has, however, adopted the Task Force's position that the Association should adopt more stringent restrictions on pay-to-play than these Model Rules would afford. The Rule submitted herewith accords with that position.

Enforcement Issues

The Committee received oral comments from officers and members of the National Organization of Bar Counsel with respect to the two draft rules the Committee had circulated. A common and understandable concern of the bar counsel was the number of elements that would need to be proven in order to find that a lawyer's conduct in making political contributions constituted a violation of either draft rule. In this regard, bar counsel comment echoed that of other commentators, both proponents and opponents of either draft rule.

The successful enforcement of each of the draft proposals was considered to depend on the ability of disciplinary counsel to prove an element of purpose, whether it were the purpose of the lawyer making the contribution, or the purpose of the official or judge in giving the engagement or appointment to reward the lawyer's contribution.

It was also noted that any rule that prohibited a lawyer from accepting a legal engagement – no matter what other provisions it contained – would not, as a practical matter, be enforced against those participants in pay-to-play who might have an improper purpose in making contributions, but who do not obtain a legal engagement. The proposed Rule therefore combines the elements of proof of purpose and proof that a lawyer has accepted a legal engagement that the political contributions were intended to influence.

The lawyer's purpose in making or soliciting political contributions was deemed by many commentators to be the most significant test in determining if a Rule violation exists. Hence, it has been retained in the submitted Rule along with carefully crafted standards in the Comments designed to explain how "purpose" will be identified.

Disciplinary counsel who provided comment on the draft proposals also appeared generally unpersuaded that pay-to-play exists as a significant problem. Hence self-enforcement of this Rule to stem pay-to-play practices by lawyers and law firms is an

even more important consideration than it is in enforcement of certain other Model Rules.

The Proposed Model Rule

As a consequence of these considerations and extensive debate within the Standing Committee, we propose the Model Rule presented in the Recommendation. The Committee believes that the Rule and explanatory Comments come as close to achieving the goals described above as a rule of professional conduct on pay-to-play could be expected to come.

The new Model Rule would provide:

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Although the purpose of making or soliciting contributions is an element under the proposed Rule, it is not implicated until a government legal engagement or appointment by a judge is offered. The inquiry to determine if the Rule would be violated by accepting the work then becomes whether the purpose in making or soliciting contributions is *to obtain or be considered for an appointment by a judge or a government legal engagement of the type that is offered to the lawyer or law firm.*

The rationale for proscribing this conduct appears in Comment [1]: "when lawyers make or solicit political contributions in order to obtain [the engagement or appointment], the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit," and the integrity of the profession is thereby undermined.

A rule designed to limit political contributions and solicitations must, however, be carefully crafted in order to assure, as Comment [1] also says, that lawyers are free "to participate fully in the political process, which includes making and soliciting political contributions...." Accordingly, the Standing Committee strongly urges that guidelines must be provided to assist in identifying the purpose of contributions. This has been done in the Comments to the proposed Rule, particularly Comments [3] and [5].

Two safe harbors are established within the definitions in Comment [3]. The first excludes from government legal engagements and appointments by judges those awarded based on merit in a request-for-proposal ("RFP") process "that is free from influence based upon political contributions." The second excludes awards made on a rotational basis from lists compiled "without regard to political contributions." Also excluded under both definitions are "substantially uncompensated services."

In addition, Comment [5] seeks to explain when the proscribed purpose is or is not present. In formulating this Comment, the Committee became convinced that language was essential that would permit lawyers to make political contributions to personal

friends or clients or to candidates whose causes they support while remaining eligible to accept government legal engagements or appointments by judges. Accordingly, for the proscribed purpose to be found, it must be shown that, "but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions."

Comment [5] also provides an example of facts from which, absent other factors to the contrary, it may be fairly inferred that the proscribed purpose is present: substantial contributions for a candidate who can influence the selection of the lawyer to perform the work, followed by selection of the contributor. Factors weighing against the inference (taken from the Report of the Task Force, Part One pages 26-28) set forth in Comment [5] include the existence of a prior family or professional relationship or the desire to further a political or social cause. Unlike awards made in the circumstances described in Comment [3] that are excluded from the Rule's prohibition, the circumstances in Comment [5] are merely examples of factors that should be taken into account, among all others that are relevant, in order to determine if the proscribed purpose is present.

Comments [2] and [4] contain definitions that are necessary to apply the Rule properly. For the most part, these are the same definitions as appear in the Task Force Report and in the Discussion Drafts the Standing Committee circulated in January for comment. In Comment [2], defining "political contribution," those made to political parties now are specifically included. Comment [4] makes it clear that contributions made through a controlled PAC or other controlled entity used as a conduit to an official's campaign are to be treated the same as if the lawyer or law firm had made them directly. Lastly, Comment [6] notes that when bribery or another serious crime is involved, a violation of Model Rule 8.4(b) occurs.

Respectfully submitted,

M. Peter Moser, Chair

August, 1999

APPENDIX A

RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not make a political contribution or solicit political contributions for the purpose of obtaining or being considered for a government legal engagement or an appointment by a judge.

COMMENT

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government official or entity, or to obtain an appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit.

In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: M. Peter Moser, Chair

1. Summary of Recommendation(s).

The Model Rules of Professional Conduct (as amended, 1998) should be further amended to include a new Model Rule 7.6, "Political Contributions to Obtain

2. Approval by Submitting Entity.

The Standing Committee on Ethics and Professional Responsibility voted final approval of the proposed Model Rule at a teleconference meeting convened on May 12, 1999.

3. Has this or a similar recommendation been submitted to the House or Board previously?

At the 1998 Annual Meeting, the House of Delegates adopted amended Report 301A, originally submitted by the Task Force on Lawyers' Political Contributions. That report directed the Standing Committee on Ethics to report to the House at the 1999 Annual Meeting a proposed new Model Rule of Professional Conduct declaring that a lawyer shall not make a political contribution to a public official for the purpose of obtaining a government legal engagement.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The House of Delegates in August 1997 approved Report 10D, which condemned the practice known as "pay-to-play," a practice whereby lawyers or law firms are selected for government legal engagements based upon their making or having made political contributions to the government officials responsible for selecting counsel for those engagements.

Model Rule 7.2(c), which prohibits a lawyer from giving anything of value to a person to recommend the lawyer for employment, has been deemed to be related, but not directly applicable, to the problem of "pay-to-play" as it will be addressed by the new Model Rule.

Including a new Model Rule in the Model Rules of Professional Conduct specifically to address the phenomenon of "pay-to-play" gives expression to the Association's condemnation of the practice in the single document that traditionally has served as the model for state professional conduct rules throughout the country.

5. What urgency exists which requires action at this meeting of the House?

During the last several years the legal media have focused their attention on the practice of "pay-to-play." Action by the American Bar Association House of Delegates that will assist state courts and state lawyer discipline agencies with adoption of an effective means to combat the "pay-to-play" practice will help insure the integrity of public acquisition processes in which lawyers and law firms are chosen for government engagements, and bolster respect for and confidence in the legal profession.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

The Standing Committee's Report With Recommendations will be posted on the website at www.abanet.org/cpr/P2PFINIS.html and mailed to the Chairs and Staff Liaisons of ABA Sections, Divisions, Task Forces, Committees, and Commissions, and to state disciplinary agencies and supreme courts.

10. Contact Person. (Prior to the meeting.)

George A. Kuhlman, Ethics Committee Counsel, at 312-988-5300 or gkuhlman@staff.abanet.org or Center for Professional Responsibility, 541 N. Fairbanks Court, Chicago, Illinois 60611.

11. Contact Person. (Who will present the report to the House.)

M. Peter Moser, Chair, Standing Committee on Ethics and Professional Responsibility, 541 N. Fairbanks Court, Chicago, Illinois 60611 or mmoser@pipermar.com.

EXECUTIVE SUMMARY

A. Summary of Recommendation.

The ABA Model Rules of Professional Conduct (as amended, 1998) would be further amended to add a new Model Rule 7.6 ("Political Contributions to Obtain Government Legal Engagements or Appointments by Judges").

Issue Addressed.

The practice of "pay-to-play", whereby lawyers and law firms are considered for or awarded government legal engagements or appointments by judges based upon their making or having made political contributions to the campaigns of elected officials who are in a position to influence such awards, was condemned by the House of Delegates in August 1997 in House Report 10D. In August 1998 the House of Delegates, in amended House Report 301A, instructed the Standing Committee on Ethics and Professional Responsibility to submit at the 1999 Annual Meeting for House consideration a Model Rule of Professional Conduct that would prohibit lawyers from making or soliciting political contributions for the purpose of obtaining a government legal engagement.

How the Policy Position Will Address the Issue

The proposed Model Rule of Professional Conduct, which is intended to serve as a model for all state jurisdictions in their formulation of rules of conduct, will have the prophylactic effect of subjecting to possible disciplinary action lawyers who make or solicit political contributions for the purpose of obtaining government legal engagements or appointments by judges and accept such engagements or appointments. The Model

Rules are already adopted in forty-five jurisdictions; the substance of the Model Rules underlies most of the professional conduct rules of the jurisdictions that have not formally adopted the Model Rules. This demonstrated respect for the recommendations of the Association on the subject of acceptable lawyer conduct is evidence that ABA policy on this important subject is likely to be accorded favorable consideration on a nationwide basis.

The black-letter of the Model Rule identifies the two elements that will be required to find a violation of the Rule: making a contribution for the purpose of obtaining work of the type to be awarded, and accepting such work when it is offered. The Comment to the Rule, consistent with the style of the Model Rules, provides illustrative text that explains for the benefit of lawyers and disciplinary agencies how those elements are to be assessed, thereby providing clear and fair notice to lawyers of what conduct is expected of them and assisting discipline counsel with investigation of claims that the Rule has been violated.

Minority Views or Opposition

Although the Standing Committee is hopeful that the Recommendation to adopt the proposed Model Rule will be cosponsored by the Section of Business Law and the Section of State and Local Government Law, it is aware that within each of those two sections there are at this time some individuals who advocate a somewhat different Model Rule. The difference between their formulation and the Model Rule recommended in the Ethics Committee's Report is that the former would prohibit any contribution made for the purpose of obtaining a government legal engagement, whereas the Ethics Committee rule prohibits acceptance of legal engagements or appointments when contributions have been made in order to obtain them.



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**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL
RESPONSIBILITY
JANUARY, 1999 DISCUSSION DRAFT
REPORT ACCOMPANYING PROPOSED**

NEW MODEL RULE ON LAWYERS' POLITICAL CONTRIBUTIONS

INTRODUCTION

The Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") submits with this report discussion drafts of two alternative versions of a possible new Model Rule of Professional Conduct. Both versions are based on the Recommendations of the Task Force on Lawyers' Political Contributions (the "Task Force") that were adopted by the House of Delegates in August 1998. Proposed new Model Rule A and proposed new Model Rule B, along with Comments, are appended to this Report as Attachments A and B. A summary of constitutional issues and cases potentially applicable to rules of professional conduct directed at lawyers' political contributions is appended as Attachment C. Endnotes appear at the end of the Report, preceding these attachments.

Proposed new Model Rule A generally prohibits a lawyer from making or soliciting political contributions for the purpose of obtaining government legal engagements. Proposed new Model Rule B, on the other hand, generally prohibits a lawyer from accepting a legal engagement if its award is based on the lawyer's making or soliciting political contributions. Other important distinctions between the two proposals are noted elsewhere in this Report.

Please analyze the two proposals carefully. Both are sent as discussion drafts only. Please provide us with your personal comments and suggested changes, and those of the organization that you represent. Written comments should be directed to the Committee's Counsel, George Kuhlman by mail (541 N. Fairbanks Ct., Chicago, IL 60611), e-mail (gkuhlman@staff.abanet.org) or by FAX (312-988-5491), and must be received by March 31, 1999, in order that they may be considered in our formulation of Recommendation to the House of Delegates due in May 1999. You also may express your views orally to the Committee during the Midyear Meeting in Los Angeles on Saturday, February 6, 1999, from 11:00 a.m. to 1:00 p.m. in Room 208 of the Doubletree Hotel. If you wish to request a time to present oral comments, please contact Mr. Kuhlman at the locations noted above by Friday, January 22, 1999.

BACKGROUND

In 1995, the Association of the Bar of the City of New York ("ABCNY") proposed that a disciplinary rule be adopted in New York State prohibiting a lawyer or law firm doing business in New York from accepting public finance engagements for two years if the lawyer or anyone in the law firm makes a political contribution to a public official who has a direct or indirect influence on the awarding of the legal engagement, subject to the right of individuals to make a contribution of \$250 each to someone for whom they can vote.

In June 1996, the ABCNY put on the ABA House of Delegates agenda for the Annual Meeting in Orlando, Florida, a resolution recommending that each jurisdiction enact the ABCNY-proposed disciplinary rule. The resolution was withdrawn by ABCNY in order to provide a period of comment by interested persons as well as further study. When a revised

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ABCNY proposal was submitted for the 1997 Annual Meeting, a substitute recommendation was proposed by a Section Officers' Conference Committee, submitted to the House by ABCNY as Resolution 10D, and adopted. It condemned the practice of "pay to play" and called for creation of a task force to determine the need for additional professional standards, laws or procedures relating to the subject.¹

Pursuant to that House action, President Jerome J. Shestack appointed the Task Force on Lawyers' Political Contributions ("Task Force") to review issues related to campaign contributions by lawyers; and to determine whether additional lawyer standards, laws or procedures relating to practices condemned in Resolution 10D were necessary or desirable. Among those concepts to be considered were additional rules of professional conduct, new aspirational ethical standards or other measures.

At the 1998 Annual Meeting the Task Force presented its recommendations to the House of Delegates as Report 301A. The Report was supplemented by a lengthy booklet. An Amended Recommendation was adopted by the House.

DISCUSSION DRAFT A

In Discussion Draft A, the Committee has complied with the directive contained in the fourth section of the first Resolution in the Amended Recommendation by preparing a Model Rule that declares:

A lawyer or law firm shall not make a political contribution or solicit political contributions for the purpose of obtaining or being considered for a legal engagement.²

The text of Discussion Draft A deviates from the language of the House resolution only for grammatical purposes or for the sake of clarity.

In preparing Comments³ to Discussion Draft A, the Ethics Committee carefully considered the Report and supplemental material accompanying the Task Force Recommendation. The Comments differ from material in the Task Force Report only in non-substantive respects. Some observations about the Comments are appropriate.

Definition of Political Contribution

In describing what is meant by the term "political contribution," the proposed Comment excludes uncompensated services, as the Task Force had recommended. In general, prevailing campaign contribution limitation laws take this approach, excluding uncompensated services from contribution reporting requirements. See, e.g., Title 15, Te Elec. Code Ann. § 254.033. On this point, the Ethics Committee has adopted the position implicit in the Task Force Report, that lawyers' willingness and ability to exercise their freedom of political expression, for example, by assisting public officials with the drafting of legislation, supervising election processes, or serving on commissions, task forces, and similar bodies would be diminished seriously if the proposed rule could be employed to call into question their motives in donating such important uncompensated services. Although the definition of "political contribution" specifically excludes uncompensated services for purposes of this Rule, such services may be "anything of value" for purposes Rule 7.2.

The proposed Comment definition differs in form but not substance from the definition supplied in the Task Force Report, in order to avoid the implication that uncompensated services were not, by definition, things of value. Uncompensated services may be things of value for purposes of Rule 7.2(c). By altering the Task Force Report definition, the Committee has preserved the substance of the exclusion of uncompensated services as a political contribution and avoided a clear conflict between rule 7.X and Rule 7.2(c).

Factors to be Considered

The five factors listed in Comment [5] virtually are identical to the factors described in the Task Force Report as among those to be considered by a disciplinary body in determining whether a political contribution has been made for the purpose of obtaining or being considered for a legal engagement.⁴ The Task Force acknowledges that the list is not, and could not be, exhaustive; the Ethics Committee shares this belief. The factors listed are examples only; many other factors could be relevant in making a determination of the purpose for which a contribution has been made.

No one of these factors is intended necessarily to create a "safe harbor" for a particular political contribution. The existence of a fact that might tend to suggest that a contributor purpose was other than to seek an engagement would not necessarily keep the Rule's prohibition from taking effect. For example, although the fact that the recipient of significant political contributions is a close relative of the lawyer may weigh against a determination that the purpose of the contribution was to obtain business, such wrongful purpose could still be otherwise proven. Similarly a record of a lawyer's having made political contributions to a candidate or elected official over a series of elections without seeking or being rewarded with a legal engagement nevertheless may have to be weighed against other circumstances suggesting that a present political contribution was made for prohibited purpose.

De minimis Contributions

The ABCNY proposed rule and the Task Force's proposed rule make exception for *de minimis* contributions: no disqualification lies if contributions are under specified dollar limitations, set separately for an individual and a law firm or political action committee. Discussion Draft A endorses a *de minimis* standard in Comment [5] when it speaks of a contribution being "substantial under all the circumstances." The Committee also is convinced by the evidence compiled in the Task Force's Report that a specific dollar-amount limitation cannot uniformly be applied to all elections in all jurisdictions. The cost of political campaigns varies dramatically from jurisdiction to jurisdiction and office to office; for that reason, the determination of what constitutes a "substantial" contribution (or one that is likely to influence the consideration for or award of legal service) also will vary.

ENFORCEABILITY

The Ethics Committee notes with some concern that a rule such as Discussion Draft "A", requiring as it does that the purpose of a contributor or solicitor be identified (and, indeed proven) poses considerable problems in enforcement, except in the most egregious circumstances. We also note that under the draft rule every political contribution could be subject to review for the giver's intent, regardless of any nexus between a contribution and a subsequent legal engagement, or even if no engagement ever occurs. Finally, we are obliged to note that the Task Force's original proposal and our draft "A" are rules that rely in great part, both in interpretation and application, upon an "appearance of impropriety"

standard. See Task Force Report at 7. That standard was specifically rejected by the House in 1983 when the Model Rules were adopted because it had been amply demonstrated that it could not be enforced uniformly or objectively. See ABA Formal Opinion 342, n.17 (1975).

CONSTITUTIONALITY

The Ethics Committee further notes that proposed Discussion Draft A raises concerns under the First and Fourteenth Amendments of the United States Constitution, and comparable state constitutional provisions. See Attachment C, ABA Ethics Counsel memorandum to Committee reviewing precedent in free speech issues pertaining to political expression.

Government restraints on free speech typically are subject to the strictest scrutiny. See *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Contributions to political campaigns are equated with pure speech and are accorded the highest level of First Amendment protection. *Id.* at 21-22. To survive the application of a strict scrutiny test, a rule must be necessary to serve a compelling state interest and must be narrowly tailored to achieve that end. Research has uncovered no case that supports or even considers a rule such as that proposed. The Ethics Committee is concerned that Discussion Draft A would invite attack on constitutional grounds because of its wholesale restriction on clearly protected conduct.⁵

In part due to the enforceability and constitutionality issues presented by Discussion Draft A, the Ethics Committee presents below for consideration and discussion a Discussion Draft B, an alternative rule arguably more narrowly tailored to achieve the goal of controlling the award of legal engagements based upon political contributions, and more readily enforceable.

ALTERNATIVE DISCUSSION DRAFT B

Discussion Draft B, like the Further Resolved portion of Amended Recommendation 301A, focuses on accepting the legal engagement. It states that a lawyer "shall not accept government legal engagement if the lawyer knows that the legal engagement has been awarded based upon the lawyer's having made or solicited a political contribution for the benefit of a public official who has the power to influence the award."

ENFORCEABILITY

Discussion Draft B is an effort to accomplish the objectives of the rule proposed by the Task Force without hinging the prohibition on an examination of the purpose of a political contribution, and without placing such a direct prohibition on political expression. Draft states that a lawyer "shall not accept a government legal engagement if the lawyer knows that the legal engagement has been awarded based upon the lawyer's having made or solicited a political contribution for the benefit of a public official who has the power to influence the award." Rather than looking to the purpose for which the lawyer makes a solicitation or contribution, the alternative draft looks to whether the lawyer knows that his or her solicitation or contribution was a reason that the engagement was awarded. The Terminology section of the Model Rules states that the term "knows" denotes actual knowledge of the fact in question, adding that "[a] person's knowledge may be inferred from the circumstances." Comment [3] to Discussion Draft B provides guidance as to the circumstances that may support an inference of actual knowledge.⁶

CONSTITUTIONALITY

Because Discussion Draft B would avoid passing directly on the propriety of constitutionally protected expression, it is more likely to pass constitutional muster than i Discussion Draft A. Although we are unaware of any case addressing a statute or rule that prohibits or punishes political contributions based upon a condemned purpose of the contribution, the Supreme Court's decision in *McCormick v. United States*, 500 U.S. 257 (1991), may be instructive. The Court there reversed a conviction of a state legislator und the Hobbs Act, 18 U.S.C. § 1951, for extortion "under color of official right," where the legislator claimed that the payments were political contributions. As summarized in Justi Scalia's concurring opinion, 500 U.S. at 276, the Court held that the Hobbs Act should n "be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action." While the ruling was one of statutory interpretation rather than constitutional law, the Court's reasons for requiring a special burden of proof in cases involving campaign contributions would seem to apply with equal force to a rule of legal ethics that would punish campaign contributions based upon their "purpose".

A prohibition of only those political contributions by lawyers that are made in exchange f explicit promises of future awards of work would not fully accomplish the goals of the Task Force in recommending Resolution 301A. Discussion Draft B would, however, accomplish those purposes without running afoul of the considerations that led the Court to rule as it did in *McCormick*.

ENDNOTES

1. Resolution 10D stated:

RESOLVED, that the American Bar Association:

condemns the practice of lawyers making campaign contributions to, and soliciting campaign contributions fo public officials in order to be retained by public agencies to perform professional services;

condemns the practice of public officials who require campaign contributions from those seeking to be retain by public agencies to perform professional services;

calls upon lawyer disciplinary agencies to enforce existing Rules of Professional Conduct insofar as they prohibit this practice, such as Model Rule 7.2(c) prohibiting a lawyer from giving "anything of value to a person for recommending the lawyer's services"; and

calls upon legislative bodies and regulatory agencies to enact and enforce appropriate laws that will discoura the practices of public officials condemned in these resolutions.

FURTHER RESOLVED, that the House of Delegates requests the President to appoint a task force:

to review issues related to campaign contributions by lawyers, including the issues raised by The Association the Bar of the City of New York and the proposed New York Court Rule;

to determine whether additional lawyer standards, laws or procedures relating to the practices condemned in these resolutions are necessary and desirable, including the practice of lawyers making significant campaign contributions to judicial candidates before whom the lawyers appear; and

to submit for consideration by the House of Delegates at its meeting in August 1998 recommendations as to any additional professional standards, laws or procedures found to be necessary and desirable in the form of amendments to the Model Rules of Professional Conduct, aspirational ethical standards or other measures.

Targeted in Resolution 10D were contributions made as a condition of being retained, and those solicited for the purpose of being qualified to be retained, situations of a return for the contribution, or *quid pro quo*.

The Resolution proposed by the ABCNY read as follows:

RESOLVED, that the American Bar Association:

encourages bar associations, judicial rule-making authorities and other relevant entities to consider adopting appropriate policies to prevent lawyers who make and solicit (other than de minimis) political contributions to public officials who can influence issuers of municipal securities, from accepting municipal finance engagements from such issuers for a two-year period commencing with the political contribution or solicitation; and

commends to the attention of bar associations, judicial rule-making authorities and other relevant entities the draft New York Court Rule dated August, 1997.

The ABCNY proposal was generally patterned after Securities and Exchange Commission ("SEC") G-37, which prohibits dealers from engaging in municipal securities business with an issuer within two years after making a contribution to an official of such issuer who has a direct or indirect influence on the award of such business. Both can be classified as disqualifying rules, which provide that the consequence of a political contribution made to an official in a position to influence the award of legal business from a governmental entity is disqualification from acceptance of business from that entity for a period of time thereafter.

2. RESOLVED, that the American Bar Association urges the following actions be taken to address any conduct by lawyers making or soliciting campaign contributions to public officials for the purpose of being considered or retained for government legal engagements:

(4) A The Standing Committee on Ethics and Professional Responsibility is directed to report to the House of Delegates by its 1999 Annual Meeting a proposed Model Rule should be adopted that declares that a lawyer law firm shall not make a political contribution or solicitation for the purpose of obtaining or being considered for a legal engagement.

BE IT FURTHER RESOLVED, That, where local circumstances warrant, the American Bar Association urge the adoption of a prescriptive rule, as set forth in Attachment One, Proposed Rule on Political Contributions- Lawyers Accepting Government Legal Engagements, dated August 1998; that a rule be considered for adoption that would limit or prevents a lawyer from accepting a legal engagement to perform professional services after making or soliciting a political contribution to a public official for the purpose of being retained, or being considered eligible for retention, by public agencies if the official is involved in selecting the lawyer to be retained; and requests that the Standing Committee on Ethics and Professional Responsibility take the appropriate action.

[additions are underlined, deletions struck through]

3. As noted in the "Scope" section of the current Model Rules of Professional Conduct, the Comments accompanying each Rule explain and illustrate the meaning and purpose of the Rule. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

4. Report accompanying Task Force Recommendation 301A, at 16.

5. The Task Force Report argues that the suggested rule is constitutional, but the sole precedent for that position relates to limited disqualification from receiving work following the exercise of "free speech," rather than to prohibition of the conduct. *Id.* at 2.

6. One of the five factors suggested by the Task Force to help determine whether a political contribution was given for the purpose of obtaining legal business is whether prior contributions had been made by the lawyer law firm without achieving the result of legal business. If the *quid pro quo* factor were irrelevant to the prohibited purpose of the Task Force recommendation, then the absence of a previous award of legal engagement would not be an ameliorating factor.

ATTACHMENT A

VERSION A (January 1999)

Rule 7.X. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENT

a lawyer or law firm shall not make a political contribution or solicit political contribution for the purpose of obtaining or being considered for a government legal engagement.

Comment

[1] This Rule is intended to maintain high standards of integrity in the legal profession and to instill in the public confidence that lawyers hired or appointed to perform work on their behalf are selected on a proper basis. If a lawyer makes or solicits a contribution as a prerequisite for obtaining or being considered for a legal engagement, then the lawyer may violate Rule 7.2 (c) because a contribution or a solicitation may reasonably be considered something of value as referred to in that provision. Moreover, if the contribution constitutes a crime, Rule 8.4 (b) also is implicated.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate or incumbent or campaign committee to influence or provide financial support for election to or retention in office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] The term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award, but does not include substantially uncompensated legal services.

[4] The term "law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] The purpose of making or soliciting political contributions in order to obtain or be considered for a government legal engagement may be determined by an examination of circumstances in which they occur. The following factors, among others, should be considered: (a) whether large contributions to the campaign of an official in a position to recommend or award work are shortly thereafter followed by an award of substantial legal work; (b) whether legal work was awarded to the contributor or solicitor pursuant to a request for proposal process that was insulated from political influence or on the basis of experience, expertise, professional qualifications and cost; (c) whether the amount of the contribution made or the amount of the contributions resulting from a solicitation was substantial under all the circumstances; (d) whether the contribution or solicitation was made to further a political, social, or economic belief or interest; (e) whether the

contribution or solicitation was made because of an existing personal, family, or professional relationship with the government official; and (f) whether, prior to the contribution or solicitation in question, the contributor or solicitor had made comparable contributions or had engaged in comparable solicitations on behalf of government official from whom the lawyer neither sought nor received legal work.

ATTACHMENT B

VERSION B (JANUARY 1999)

RULE 7.X. ACCEPTING GOVERNMENT LEGAL ENGAGEMENT BASED UPON POLITICAL CONTRIBUTION

A lawyer shall not accept a government legal engagement if the lawyer knows that the legal engagement has been awarded based upon the lawyer's having made or solicited a political contribution for the benefit of a public official who has the power to influence the award.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government official or entity, the public may legitimately question whether the lawyers engaged to perform government work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate or incumbent or campaign committee to influence or provide financial support for an individual's election to or retention in office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services. The term "lawyer" includes a law firm and a political action committee or other entity owned or controlled by a lawyer or law firm. "Government legal engagement" denotes any engagement to provide legal services that a public official has direct or indirect power to award, but does not include substantially uncompensated legal services.

[3] An award of legal work is based upon a political contribution when the contribution is a determining factor, even if not the only determining factor, in the award. A lawyer's knowledge that an award is based upon making or contributing one or more political contributions may be inferred from the circumstances. See Terminology. The circumstances include the size of the contribution in relation to the cost of the campaign, the timing of the award, the role of the relevant public official in influencing the award, the

prior history of similar awards to political contributors, and the presence or absence of other factors that reasonably explain the award. Among such other factors are the unique experience or expertise of the lawyer in the type of representation that is the subject of the award; the existence and use of a process for award of the type of legal work in question based upon experience, expertise, and cost; or a lawyer's prior professional relationship, if any, with a governmental entity that is the client.

ATTACHMENT C

MEMORANDUM

TO: Standing Committee on Ethics and Professional Responsibility

FROM: Eileen B. Libby, Associate Ethics Counsel

DATE: January 20, 1999

RE: First Amendment Issues Regarding Proposed Pay-to-Play Rule - Executive Summary

Based upon Recommendations of the Task Force on Lawyers' Political Contributions that were adopted by the ABA House of Delegates in August 1998, *see* final amended 301A (Report and Recommendation), the Standing Committee on Ethics and Professional Responsibility prepared discussion drafts of two alternative versions of a possible new Model Rule of Professional Conduct regarding lawyers' political contributions. Discussion Draft A generally prohibits a lawyer from making or soliciting political contributions for the purpose of obtaining government legal engagements. Discussion Draft B generally prohibits a lawyer from accepting a legal engagement if its award is based on the lawyer's making or soliciting political contributions. The purpose of this memorandum is to examine whether the rules proposed in the discussion drafts are overbroad and an impermissible infringement on the First Amendment right of political expression and association.

To date, only one court has reviewed a rule or regulation prohibiting a contributor to an elected public official from performing governmental work if the official has the influence to award such work. In *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996), the court upheld a First Amendment challenge against Rule G-37 approved by the Securities and Exchange Commission (SEC) through its Municipal Securities Rulemaking Board. The purpose of the challenged rule was to address the issue of broker and dealers engaging in ethically questionable practices in order to secure underwriting contracts in the municipal securities market. *Id.* at 939. The rule prevents a municipal securities firm from performing government work if, in the last two years, the firm, the firm's political action committee or any member of the firm contributed to an elected official who can directly or indirectly influence hiring decisions. The rule also requires such firms to disclose all direct and indirect contributions to any such elected official.

Applying strict scrutiny, the court concluded that the SEC had a compelling governmental interest in protecting investors from fraud and shielding underwriters from corrupt market practices. *Id.* at 944. The court concluded that Rule G-37 would advance these interests by fostering fair contracting processes and removing "artificial barriers to competition for those firms that either cannot afford or decide not to make political contributions." *Id.* at 945. Once the court determined that the government's interest was compelling, it concluded that the law was sufficiently narrowly tailored and that disclosure requirements

alone would not adequately serve the SEC's interest in deterring so-called "pay-to-play practices." *Id.* at 947-48. In this regard, it should be noted that one of the problems with mandatory disclosure of campaign contributions is that the First Amendment guarantees the right to engage in a wide range of political activities without risking public disclosure, see, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960). Only if the state can demonstrate a compelling governmental interest in preventing corruption and assuring an informed electorate can there be justification for compelled public disclosure of the sources and amounts of campaign spending and lobbying expenses. See *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (*per curiam*).

Several court decisions since *Blount* call its holding into question. Restrictions on political campaign contributions are analyzed under the framework established in *Buckley*, which recognized that campaign contribution limits that infringe First Amendment freedoms of speech and association nevertheless may be constitutionally permissible if enacted or adopted to prevent corruption and if narrowly tailored to advance the government's interest in preventing actual or perceived corruption. Restrictions on protected speech in this context are narrowly tailored if they limit the *quid pro quo* corruption that may follow from political contributions without concomitantly retarding the ability of the affected parties to engage directly in political speech to the extent they would be able to do so through their own efforts absent the regulation. *Toledo Area AFL-CIO Council et al. v. Pizza*, 154 F.3d 307, 318 (6th Cir. 1998). The Supreme Court has cautioned that "broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415 438 (1963) (internal citations omitted).

Nor is there reported authority that prohibits or punishes political contributions based upon a condemned purpose of the contribution. In *McCormick v. U.S.*, 500 U.S. 257 (1991), the Court held that under the Hobbs Act, 18 U.S.C. § 1951, which punishes officials who solicit or accept something of value with the knowledge that it is being given to them in an effort to influence their official exercise of discretion, legislators who accept campaign contributions commit official extortion only if they explicitly promise an official favor in return for the campaign contribution. *Id.* at 273-74. The Court held that where a public official solicits or accepts campaign contributions in return for an official favor, the government must prove the existence of an explicit *quid pro quo*. *Id.* at 274. The Court's holding was a very narrow one, applicable only to campaign contributions, which have historically been given special First Amendment status. See, e.g., *Buckley v. Valeo*, 424 U.S. at 21. The Court explained that it would make no sense "to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries," since such conduct "has long been thought to be well within the law" and "in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures." *Id.* 500 at 285.

Further, if a limitation is so restrictive as to prevent candidates and political committees from amassing the resources necessary for effective advocacy, then it would have a direct and substantial impact on a contributor's freedom of political association. *Id.* at 21. In such cases, the limits are subject to much closer scrutiny so that the state is required to make a greater showing that they serve an important state interest. *Id.* at 24-25; *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996). Contrary to *Blount*, in *Shrink Missouri Government PAC v. Adams et al.*, 161 F.3d 519, 521 (8th Cir. 1998), the court rejected the argument that the state had a compelling interest in avoiding the

corruption or the perception of corruption brought about when candidates for elective office accept large campaign contributions. Also unavailing is the argument that the state has a compelling interest in preventing the appearance of impropriety created by public officials' supporting of legislation favored by contributors. *Russell v. Burris*, 146 F.3d 56 (8th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 510, 571 (1998). Nor may the state set a *de minimis* contribution level if it is so low as to prevent meaningful participation in the political process and significantly impairs a candidate's ability to collect the necessary funds to run an effective campaign. *Arkansas Right to Life State Political Action Committee et al. v. Butler et al.*, 983 F. Supp. 1209, 1225 (W.D. Ark. 1997), *aff'd*, 146 F.3d 558 (8th Cir. 1998) (campaign contribution limit too low to allow); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 517 U.S. 1119 (1995) (same). Aside from specific monetary contributions, prohibiting the volunteering of unpaid personal services to candidates for elective office violates contributors' First Amendment rights of association and expression. *Barker v. Wis. Ethics Bd.*, 841 F. Supp. 255, 262-63 (W.D. Wis. 1993).

By prohibiting lawyers or law firms from making political contributions or soliciting political contributions for the purpose of obtaining or being considered for a government legal engagement, Discussion Draft A furthers the state's interest in preventing the appearance of impropriety created by the awarding of legal work to large campaign contributors, as well as preventing any actual *quid pro quo* arrangement between lawyers and elected officials. However, Discussion Draft A might be deemed overly broad in that it has a chilling effect upon lawyers' exercise of the full measure of their constitutional right and their ability to wield political influence. *See Federal Election Comm'n v. National Conservative Political Action Committee, et al.*, 470 U.S. 480 (1985). It arguably curtails speech more than necessary to deal with any purported pay-to-play problem.

Discussion Draft B, on the other hand, does not suffer this constitutional infirmity because it does prohibit or punish political contributions based upon a condemned purpose of the contribution. Instead of stating that lawyers or law firms are prohibited from making political contributions or soliciting political contributions for the purpose of obtaining or being considered for a government legal engagement, Discussion Draft B states that "[a] lawyer shall not accept a government legal engagement if the lawyer knows that the legal engagement has been awarded based upon the lawyer's having made or solicited a political contribution for the benefit of a public official who has the power to influence the award." (Emphasis supplied). The term "knows" already is defined in the Terminology section of the Model Rules. The requirement of a special burden of proof in cases involving campaign contributions seems to apply with equal force to a rule of legal ethics that punishes campaign contributions based upon their "purpose." Discussion Draft B thus comes closer to accomplishing the goals of the Task Force by eradicating corrupt pay-to-play practices without placing an impermissible restraint on lawyers' right of expression and association.



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Attorney at Law
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Anchorage, Alaska 99516
907-345-3850

September 13, 1999

Ms. Barbara Ritchie
Deputy Attorney General
State of Alaska
Juneau, Alaska 99811

Dear Deputy Attorney General Ritchie:

Thank you for your response of August 31, 1999 on behalf of the Department of Law to some initial inquiries on behalf of the Subcommittee.

Additional questions have arisen among members of the Subcommittee in two areas:

1. Settlement Authority and Practices

What internal process does the Department have for review of potential settlements of litigation?

What practical constraints exist with regard to settlement of litigation?

What legal constraints exist with regard to settlement of litigation? Do constraints exist to limit the Department's authority to enter into settlements which include terms which would impose new obligations on the State? Are potential settlements reviewed from the standpoint of whether they may encroach upon the legislative power?

In the case of financial terms, to what extent are settlements subject to appropriation by the Legislature? Please distinguish, as appropriate between typical tort claims and other civil litigation.

What circumstances, if any, would trigger consultation with the Legislature or legislative leaders prior to settlement of litigation?

What other considerations arise when it comes to proposed settlements?

2. Legal assistance and support to administrative and adjudicative boards and commissions.

Is budgetary data available to determine the extent to which the Department provides legal counsel to specific administrative and adjudicatory boards and commissions? Is it possible to summarize that data by board or commission? In the case in which the board or commission is empowered by statute to make policy decisions and members are confirmed by the Legislature, could the legal services to these boards and commissions be privatized? Why not? To what extent has the privatization of such services been considered?

Sincerely,

**Mark K. Johnson
Chairman
Subcommittee on the Department of Law**

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 485-3600
FAX: (907) 465-2075

September 30, 1999

Mark K. Johnson
Attorney at Law
13631 Windward Circle
Anchorage, Alaska 99516

Dear Mr. Johnson:

This is in response to your letter which we received on September 17th requesting information about settlement authority and practices in the Department of Law and legal services provided to boards and commissions.

1. Settlement Authority and Practices

- You have asked what internal process the department has for review of potential settlement of litigation.

The department has an internal policy that establishes levels of authority to enter into settlement of litigation depending upon the monetary value of the case and/or policy implications raised by a settlement. Generally, if the amount in controversy exceeds a certain internally established threshold or if the case implicates a major policy issue (regardless of the amount in controversy), the case is reviewed by a case assessment committee in the office where the case is being handled (*i.e.*, Anchorage, Fairbanks, or Juneau). The local case assessment committee carefully reviews the case with the assistant attorney general who is handling the matter and 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. AS 09.50.300; AS 44.23.020. In those instances where the litigation is being handled by outside counsel through a contract with the Department of Law, the assistant attorney general assigned as the contract manager coordinates with the Attorney General, or his designee, in considering settlement recommendations and giving final approval for a settlement.

In considering whether to settle litigation, we carefully and fully consider all relevant factors, including: the facts; the legal issues; the applicable law; the posture of the case; the court rulings to date; the views of the agency involved; the public interest; any public policy issues; and, if money is at stake, the reasonableness of the amount sought in settlement considering the factors set out above.

- You have asked what practical and legal constraints exist with regard to the settlement of litigation.

Probably the most common practical constraint is the availability of money to fund a financial settlement. Most cases will require a legislative appropriation to fund a settlement. Agencies, including Law, do not have funds available to pay for settlements of litigation. This can impact settlement if, for instance, the opposing party for some reason wants payment immediately. That is not generally something the state can accommodate. The item must be submitted to the Legislature for its consideration and appropriation. Therefore, settlements will generally be contingent on appropriation of the funds; if funds are not appropriated, the litigation will continue.

Turning to the issue of legal constraints with regard to settlement, this issue has been examined in detail in the past. Specifically, the question of the authority of the Attorney General to settle litigation arose in the course of the EXXON VALDEZ litigation. Then Attorney General Charlie Cole issued a comprehensive legal opinion on the authority of the Attorney General to settle litigation. 1991 Inf. Op. Att'y Gen. (April 2). (The opinion is lengthy, and we are mailing a copy to each member of the subcommittee.)

The opinion discusses that the Attorney General is the state officer charged with implementing the executive branch's policies with respect to execution of the law. "In that respect, the Attorney General has broad common law powers and responsibilities." Op. at 13-14. See, AS 44.23.020; *Public Defender Agency v. Superior Court*, 534P.2d 947, 950-51 (Alaska 1975).

The opinion concludes (regarding this issue), at 16:

"It is thus entirely clear that, as an incident of both common law and statutory powers, the Attorney General has the discretionary authority to settle the State's litigation."

- You have asked to what extent are the financial terms of settlements subject to appropriation of funds by the Legislature.

Settlements and judgments on tort claims are funded through the state's property/casualty self-insurance program administered by the Division of Risk Management, Department of Administration. Settlement of other litigation (or tort claims in the event the self-insurance program lacks sufficient funds for the judgment/settlement of a particular claim) is funded through the legislative budget bill process. Such appropriations are usually included in the supplemental budget bill which is submitted to the Legislature each session. (The section of the supplemental budget bill that includes funds for settlements and judgments is often referred to as "the judgment bill.") AS 09.50.270 provides for the payment of judgments against the state and for the submission of judgments to the Legislature for appropriation.

In short, the financial terms of a settlement (or judgment) in other than tort cases are almost always submitted to the Legislature for appropriation. State agencies do not typically have funds in their budgets to pay for such claims. The review process for the payment of settlements and judgments is thorough and involves both the executive and legislative branches. I have enclosed a copy of the form which must be completed by the assistant attorney general who handled the case.

Our process is as follows: first, the attorney who handled the case is required to complete the form, attach the pertinent backup materials, and submit it to our administrative services director for review and calculation of interest owed through June 30 (the latest projected date of payment). The director also periodically sends out information to all of the lawyers in the department on the interest rate as it changes.¹ Then, the civil or criminal deputy general, depending on which division handled the case, reviews the information to make sure it is complete and clearly articulated. We prepare the forms throughout the year. At the appropriate time, we transmit the forms to the

¹ Under AS 09.30.070(a), the interest rate on judgments entered on causes of action accruing after August 7, 1997, is tied to the discount rate in the 12th Federal Reserve in effect on January 2 of the year the judgment is entered. Thus, the interest rate changes each year and the director makes sure the lawyers know the applicable dates for the interest rates and the correct percentages.

Office of Management and Budget for review and inclusion in an appropriate legislative budget bill, generally the supplemental budget bill. The forms and attachments are then transmitted by OMB to both the House and Senate Finance Committees as backup to the budget bill that includes the judgments and claims at issue.

The House and Senate Finance Committees each carefully review the settlement and judgment items submitted in the budget bill(s) during the committee hearing process. We testify at the committee hearings on the requests, often item by item, in front of both committees. Through that process, questions are asked of the Department of Law and sometimes the agency involved as well. We will also provide any additional information requested.

Most settlements are entered into contingent upon appropriation. Thus, if the Legislature decides not to appropriate funds for the settlement, the matter will go back into the litigation process.

- You have asked what circumstances, if any, would trigger consultation with the Legislature or legislative leaders prior to settlement of litigation.

We work to keep the Legislature and legislative leaders informed on significant developments in cases in litigation. For instance, each year, during the legislative session, we provide a comprehensive confidential briefing on the status of all oil and gas related litigation -- all members of the Legislature are invited to attend the briefing.

A circumstance that would probably trigger consultation with the Legislature prior to settlement of litigation would be if a proposed settlement were presented to the Legislature for appropriation and the Legislature did not approve the settlement. This circumstance came up in 1995 with regard to the settlement of litigation concerning environmental contamination and cleanup at Toksook Bay, *City of Toksook Bay v. Lower Kuskokwim School District*. The settlement of the litigation was submitted to the Legislature for funding. The appropriation was not approved and the case went back into litigation. A settlement proposal reached later was discussed with legislators, which enabled the parties to know that the new proposal would likely pass legislative scrutiny. The appropriation for the settlement was approved by the Legislature in 1996.

We also prepare a quarterly update on all significant natural resources litigation. This report is provided to the Legislature and is now also available on our web page, along with our monthly report. In addition, we provide updates and information to legislators frequently on cases of special interest. Examples would be the *Evans v. State*

Mark K. Johnson
Attorney at Law

September 30, 1999
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litigation, a constitutional challenge to the 1997 Tort Reform Act, the *Irby Construction v. State* litigation challenging the constitutionality of the local hire statutes, the *ACLU v. State* case challenging the constitutionality of the campaign finance reform legislation, and the several cases we have now in the courts concerning abortion rights.

2. Legal assistance and support to administrative and adjudicative boards and commissions.

You requested budgetary data on legal services provided to administrative boards and commissions. A list of FY99 actual expenditures by individual board and commission is attached. While this is not a comprehensive list of all boards and commissions, it is what we have readily available through our timekeeping and billing system. If there is a board or commission not on the list that you are particularly interested in, we can work on getting the budgetary data on legal services for that entity. I have also indicated on the spreadsheet whether the legal services are provided in-house, or by outside counsel, and whether they are funded within the Department of Law's budget or by reimbursable services agreement with the board or commission.

In response to the second part of question 2, whether the board or commission is empowered by statute to make policy decisions and its members are confirmed by the Legislature has no bearing on whether legal services are provided by the Attorney General or private counsel. Only a very limited number of agencies (such as the Alaska Railroad Corporation and the University of Alaska) are exempted from AS 36.30.015(d), which provides, "[a]n agency may not contract for the services of legal counsel without the approval of the attorney general." As was discussed at the September 16th subcommittee meeting, these legal services could perhaps be privatized, but at a significant cost, both monetary and institutional.

You have also asked to what extent has privatization of these services been considered. The department has not systematically examined legal services to boards and commissions for privatization. As was discussed at the September 16th meeting, the department procures private counsel to supplement our in-house attorneys and resources when such additional services are in the best interests of the state. The boards and commissions serve fundamental governmental functions, such as the regulation of fish and game resources in the state, the enforcement of campaign finance disclosure laws, the regulation of professional licensing, the regulation of public utilities, and deciding state personnel and executive branch ethics issues. Similarly, the legal services we provide on these issues involve core governmental issues. Thus, we believe it is most appropriate for these legal services to be provided by the Attorney General.

Mark K. Johnson
Attorney at Law

September 30, 1999
Page 6

We have also enclosed with this letter follow up information requested at the last meeting concerning tort litigation and areas of law worked on by contract counsel. We look forward to our next meeting with the subcommittee.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:


Barbara J. Ritchie
Deputy Attorney General

Enclosures

cc: All members
Subcommittee on the Department of Law
Commission on Privatization and Delivery of
Government Services

LEGAL SERVICES PROVIDED FOR BOARDS AND COMMISSIONS*
FY99 ACTUAL EXPENDITURES

Board or Commission	FY 99 Actual Expenditures	In-house or Outside Counsel	Agency Reimburses Law (RSA) or Dept of Law Funds
Occupational Licensing	\$379,873	In-house	RSA
APUC Legal Services (now ARC)	\$298,000	In-house	RSA
Postsecondary Education Commission	\$231,597	In-house	RSA
Alaska Public Offices Commission	\$189,560	In-house	Law
Oil & Gas Conservation Commission	\$90,477	In-house	Law
Human Rights Commission	\$89,313	In-house	Law
Alcohol Beverage Control Board	\$81,716	In-house	Law
Board of Fish	\$69,778	In-house	Law
Commercial Fisheries Entry Commission	\$61,054	In-house	Law
Board of Game	\$53,489	In-house	Law
Alaska State Pension Investment Board	\$44,144	Outside Counsel	RSA
Professional Teaching Practices Commission	\$20,023	In-house	RSA
Personnel Board			
Board of Education	\$19,332	In-house	RSA
	<u>\$1,628,354</u>		

* The list is not comprehensive. It represents the boards and commissions for which information is readily available through the department's timekeeping and billing system.

Department of Law

**JUDGMENT/SETTLEMENT FUNDING REQUEST
QUESTIONNAIRE**

PART TWO

The following information needs to be provided on all judgment awards and/or settlements made against the State.

Case Name:

Case No.:

1. Describe the circumstances or events resulting in this case and ultimately this judgment/settlement against the State.
2. Describe issues of State policy or law involved in this case, if they are relevant to and resulted in substantial effort and expense for the department to bring or defend this case.
3. Did the State prevail on any issues? If so, describe.
4. Did we challenge plaintiffs' request for costs and fees or in other ways seek to reduce the costs to the State? If so, describe to what extent we were successful.

5. What was the source of the State's liability in this case?

6. What, if any, preventative action has been taken by the involved agency to prevent or reduce the potential for such liability in the future?

7. If the information is available to you, has the agency involved taken any corrective action as a result of this case? If the information is not protected from publication by statute, privilege, or right to privacy, indicate what the corrective action was.

8. Any recommendations concerning cases of this type in the future?

9. Any recommendations for changes in statutes, regulations or policy? Cite any applicable statutes or regulations.

Attorney completing form:

Title

Date:

Phone Number

DEPARTMENT OF LAW
Response to Subcommittee Questions Concerning Tort Litigation

The subcommittee has asked if the department retrospectively reviews the performance of in-house counsel after a trial to consider whether outside counsel might have achieved a better outcome. Essentially the question is whether the department's use of less costly in-house counsel instead of private attorneys in litigation could be "penny-wise and pound foolish."

The department's torts section and the Division of Risk Management always reflect on the outcome of the few cases the section defends through trial and how the case or issues might be handled differently. We have not evaluated what might have happened if different attorneys had been assigned to the defense. Such an exercise is highly speculative and pure conjecture.

Moreover, we believe that our torts section attorneys are on a par with, or in some cases better than, private attorneys at representing the state's interests. The director of risk management, Brad Thompson, who is very familiar with the work of the torts section and outside counsel for nearly two decades, can attest that our tort litigators rival their private sector counterparts. And in many tort cases, our assistant attorneys general have superior expertise to litigate issues unique to government, such as discretionary immunity defenses.¹

Moreover, there is an economy of scale when in-house attorneys deal with recurring issues and agencies with which they have a continuous working relationship.

We have previously explained to the subcommittee that it is difficult to make a direct comparison between tort cases handled in-house and those done by outside counsel, as every case is unique. There have been three trials in the past few years that provide anecdotal information.

¹ In the past few years, the torts section has successfully litigated a number of important cases all the way through the Alaska Supreme Court which have resulted in very useful precedents: Mesiar v. Heckman, 964 P.2d 445 (Alaska 1998); Kooly v. State, 958 P.2d 1106 (Alaska 1998); Karen L. v. Dep't of Health and Human Services, 953 P.2d 871 (Alaska 1998); Hawks v. State, 908 P.2d 1013 (Alaska 1995); Arrowwood v. State, 894 P.2d 642 (Alaska 1995). In addition, the section frequently wins summary judgment motions on issues of duty and immunity, such as the recent victories in the Miller's Reach fire class action cases filed in the Palmer and Anchorage Superior Courts.

- Last year private counsel defended the state in the Walden case, in which the plaintiff's son's catastrophic injuries incurred in a single vehicle accident were blamed on the state's allegedly defective highway maintenance and signing. An Anchorage jury trial lasted over seven weeks and resulted in a verdict of no liability for the state. (The boy's father, who was the driver in the accident, was found 100% liable for damages of \$8.1 million; the state had brought the father into the case as a third-party defendant for equitable apportionment purposes). The state's defense, including expert witnesses, other related costs, and attorney's fees, exceeded \$850,000, not counting costs of the appeal now underway.
- A few years earlier an assistant attorney general took the Arrowwood case to jury trial, in which the plaintiff's son's death was also attributed to the state's allegedly negligent highway maintenance. The two- to three-week trial resulted in a verdict for the state of no liability, which was affirmed on appeal by the Alaska Supreme Court. Total costs at the trial court level were \$101,902, again excluding appeal costs.
- Another case handled by in-house counsel presented different legal issues, but the length of trial and use of experts more closely parallel the Walden case. In Kerr, the state Department of Corrections was sued for not preventing inmates from directing the creation and delivery of a mail bomb, which resulted in the death of David Kerr and significant injury to his spouse. After a five-week Anchorage jury trial, the state was found responsible for only 12% of the \$12.4 million damages awarded, which we viewed as a favorable outcome in a difficult and emotional case. Defense costs in that case amounted to \$326,000.

While every case presents its challenges and not every ruling goes our way, we are confident that the state is well represented by our in-house staff. A testimony to the capability of our tort litigators is the fact that the state's excess insurers approve of their work. Even where plaintiffs approach excess insurers directly to pressure settlement of high-exposure cases, the insurers have declined to second-guess our defense.

The subcommittee also requested additional detail on the 16 tort litigation outside counsel contracts for which expenditures were made between FY94 and FY99. The contracts are categorized by reason for entering into them below:

- Resources (caseload of in-house tort section too high when case filed): 5
- Resources and expertise (caseload consideration, and special expertise required): 3
- Limited extra help needed, but case handled in-house: 2
- AHFC tort case (agency not a participant in state's self-insurance program): 2
- Conflict in representation: 2
- Excess insurers paid cost directly: 2

DEPARTMENT OF LAW
Contractors by Type of Legal Services

FIRM	AREA OF LAW
Alfred J. Hendron	miscoded expenditure; expert witness
Ashburn and Mason	Employment; Oil & Gas
Atkinson, Conway & Gagnon	Tort Litigation
Baker & Hostetler	Administrative Law (federal)
Baxter, Bruce, Brand & Douglas	Employment
Bernd C. Guetschow, P.C.	Bankruptcy
Birch Horton et al.	Civil Rights; State's Rights; Tort Litigation
Bliss & Holmes	Construction Claims; Investment Contract Litigation
Carney, Badley, Smith & Spellman	Construction Claims
Charles E. Cole	State's Rights
Charlson, Marben & Jorgenson	Collections
Computer Forensics, Inc.	miscoded expenditure; expert witness
Constantino & Associates	Employment
Covington & Burling	Administrative Law (federal)
Crowell & Moring	Administrative Law (federal)
Delaney, Wiles, Hayes	Employment
Dillon & Findley	Regulations
Donelan, Cleary, Wood & Maser	Oil & Gas; State's Rights
Douglas K. Mertz	Regulations
Foreman, Arch, Dodge, Volyn & Zimpo	Collections
Foster, Pepper & Shefelman	Bond/Investment Counsel
G. Thomas Koester	Mental Health Lands; Natural Resources; Oil & Gas; State's Rights
Groh, Eggers & Price	(See Groh, Eggers, LLC - firm name change)
Groh, Eggers, LLC	Employment
Heller, Ehrman, White & McAuliffe	Environmental; Investment Contract Litigation; Real Estate; State's Rights
Hogan & Hartson	State's Rights
Hosie, Frost & Large	Consumer Protection/Antitrust; Oil & Gas
Hosie, Wes, Sacks & Breisford	(See Hosie, Frost & Large - firm name change)
Ikon Office Solutions	miscoded; printing charge
Jeff Killip	Child Protection
Jensen, Harris, Roth	Construction Claims
Jermain, Dunnegan & Owens, P.C.	Bankruptcy
Johnston & Savage	Criminal Prosecution
Kaye, Scholer, Fierman, Hays & Handler	Oil & Gas
Kuntz, Keenan & Laughlin	Collections

DEPARTMENT OF LAW
Contractors by Type of Legal Services

L.C.M.F. Limited	miscoded; expert witness
Marvin S.C. Dang, Law Offices	Collections
Michael A.D. Stanley	State's Rights
Milton B. Barker	Commercial (paralegal services)
Mooers & Associates	Collections (investigator/paralegal services)
Morrison & Foerster	Bond/Investment Counsel; Oil & Gas
Mot, Inc.	miscoded; expert witness
National Association of Attorneys General	miscoded; dues
Owens & Turner, P.C.	Employment; Technology/Patent
Pachulski, Stang, Ziehl et al	Investment Contract Litigation
Partnow, Sharrock & Tindall	Oil & Gas
Partnow, Sharrock & Tindall (c/o trust account)	Oil & Gas
Perkins Cole	(See Hosie, Frost & Large - firm name change)
Preston, Gates & Ellis	Bankruptcy; Bond/Investment Counsel; Environmental; Oil & Gas; Consumer Protection/Antitrust; Employment
Price & Price	Real Estate
Price & Swan	(See Price & Price - firm name change)
Reid & Riege, P.C.	Commercial
Ringert Clark Chartered	Collections
Robertson, Monagle & Eastaugh	Criminal Prosecution; Environmental
Ruddy, Bradley & Kolkhorst	Environmental
Sarah E. Gay	Regulations
Savage & Associates	Collections
Simpson, Tillinghast, Sorensen et al	Constitutional; Regulations
Stephan H. Williams	Oil & Gas
Susan M. Reitter	Collections
Washburn, Briscoe & McCarthy	Oil & Gas; State's Rights
Welborn, Sullivan, Meck & Tooley	Oil & Gas
William Brian Prince	miscoded; can't identify older vouchers
Williams, Kastner & Gibbs, LLP	Real Estate
Wilson-Epes Printing Co.	miscoded; printing charge
Wohlforth, Argetsinger, Johnson et al.	(See Wohlforth, Vassar, Johnson, et al. - firm name change)
Wohlforth, Vassar, Johnson, et al.	Real Estate

MEMORANDUM

State of Alaska Department of Law

TO: Sen. Richard I. Eliason, Chair
Senate Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

DATE: April 2, 1991

FILE NO:

TEL NO: 465-3600

Rep. Max F. Gruenberg, Jr., Chair
House Special Committee on the
Exxon Valdez Oil Spill
Claims Settlement

SUBJECT: Authority of the Governor
and Attorney General to
Enter into the EXXON VALDEZ
Settlement Agreement

FROM: Charles E. Cole
Attorney General

As you know, the Agreement and Consent Decree (hereinafter "Settlement Agreement") in the EXXON VALDEZ litigation was reached between Exxon,^{1/} the State and the Federal governments after several weeks of discussion about the pending and potential litigation between them. The terms of the Settlement Agreement reflect many hours of hard bargaining among the parties, an effort to resolve on mutually acceptable terms their respective claims related to the EXXON VALDEZ oil spill ("Oil Spill") without additional expensive, potentially interminable, and uncertain litigation.

This memorandum will discuss the reasons why the Governor and the Attorney General have the authority to negotiate and agree to the Settlement Agreement on behalf of the State of Alaska.

I. THE ECONOMIC TERMS OF THE SETTLEMENT AGREEMENT

The basic economic terms related to the Settlement Agreement are the provisions pertinent to this memorandum's discussion and, therefore, merit summary at the outset.

A. The Federal Criminal Plea Agreement

The State played no role in the negotiations between Exxon and the Federal government with respect to the Plea Agreement in the Federal government's criminal case against Exxon (Case No. A-90-015 CR., United States District Court for the District of Alaska). However, under that Plea Agreement, the State is to receive half of the fine to be paid by Exxon.

^{1/} The Exxon entities involved in the Settlement Agreement are Exxon Corporation, Exxon Shipping Company, Exxon Pipeline Company, and the T/V EXXON VALDEZ, the supertanker that caused the Prince William Sound oil spill. Those entities will be referred to in this memorandum collectively as "Exxon."

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Under the Plea Agreement, Exxon Shipping pleads guilty to violations of the Clean Water Act, 33 U.S.C. §§1311(a) and 1319(c)(1)(A), the Refuse Act, 33 U.S.C. §§407 and 411, and the Migratory Bird Treaty Act, 16 U.S.C. §§703 and 707(a); Exxon Corporation pleads guilty to Migratory Bird Treaty Act violations, 16 U.S.C. §§703 and 707(a). Exxon will pay \$100 million as a criminal fine under the Plea Agreement.

The Plea Agreement provides that \$50 million of that fine is to be paid as restitution to the State of Alaska within 30 days of the Court's acceptance of the Plea Agreement. It further provides that those monies "are to be used by the State of Alaska exclusively for restoration projects" relating to the Oil Spill. Restoration is defined to include "restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills." Plea Agreement §4(A). Those monies will be entirely under the control of the State and will thus be subject to the legislative appropriations process, though with that restriction on their use. Plea Agreement §4(B).

B. The Agreement And Consent Decree

The Settlement Agreement requires Exxon to make a total of \$900 million in payments.^{2/} After the first installment of \$90 million is paid within ten days after the effective date of the Settlement Agreement, payments are to be made annually on September 1st, over a ten year period beginning in 1992, in amounts set out in the payment schedule in paragraphs 9(b) and (c) of the Settlement Agreement.

The Settlement Agreement includes two basic types of recoveries from Exxon related to the settlement of the State's civil claims. The first type, in a amount of up to \$72 million, is in settlement to reimburse the State 1) for response and clean-up costs incurred prior to January 1, 1991, 2) for its natural resource damages assessment costs, and 3) for its litigation costs, including attorneys' fees, experts' fees and other costs. Settlement Agreement §10.

^{2/} The Settlement Agreement also includes a "reopener" provision that provides for Exxon to pay up to \$100 million dollars for additional restoration projects in areas affected by the Oil Spill, if the projects meet a cost/benefit criterion and the injury being redressed was not reasonably known or anticipated based on information available at the time of the Settlement Agreement's effective date. Settlement Agreement §§17-19.

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The second type governs the balance of the \$900 million to be paid, after deductions are made for the State reimbursement payments, for the similar federal reimbursement payments of up to \$62 million, and for expenditures made by Exxon with respect to continuing Oil Spill clean-up, as defined in paragraph 11 of the Settlement Agreement. In addition, the related Memorandum of Agreement ("MOA") provides for reimbursements to the State and Federal government for "all of the Governments' unreimbursed response and cleanup costs incurred after December 31, 1990," as certified by their spill response coordinators, "shall be paid directly to the Governments by Exxon over a period of 5 years." MOA §V(B). These reimbursements will thus be paid to the State and subject to the Legislature's appropriations power, like the \$72 million in reimbursements to the State for pre-1991 costs and the \$50 million in restitution to be received under the Plea Agreement.

The remaining balance of Exxon's settlement payments will be held in and administered through a joint trust fund ("Trust Fund"). Those monies must be used by the Trust Fund's trustees "to assess injury resulting from the Oil Spill, and to plan, implement, and monitor the restoration, rehabilitation, or replacement of Natural Resources or natural resource services injured, lost, or destroyed as a result of the oil spill, or the acquisition of equivalent resources or services." The Settlement Agreement provides that the Trust Fund monies are to "be allocated, received, held, and used in accordance with the Memorandum of Agreement and Consent Decree between the United States and the State of Alaska." §10.

Pursuant to the MOA, the Trust Fund will be administered by the State and Federal governments as "co-trustees." MOA §III(A). A group of six Trustees designated by the President and the Governor, three each from the State and Federal governments, are to act as co-trustees: the Administrator Of the National Oceanic and Atmospheric Administration, the Secretaries of the Departments of the Interior and Agriculture; the Commissioner of the Alaska Department of Fish and Game, the Commissioner of the Alaska Department of Environmental Conservation, and the State Attorney General. The MOA requires that the Trustees act jointly in the collection and use of all damage recoveries. Decisions on use of the monies in the Trust Fund for restoration are to be made by unanimous agreement of the Trustees, though provisions are made in the MOA for methods to resolve any disputes. MOA §IV(A)(3). The MOA provides that the Trustees "shall establish procedures providing for meaningful public participation in the injury assessment and restoration process, which may include establishment of a public advisory group" MOA §IV(A)(3). The funds are to be held subject to this co-trusteeship in a joint Trust Fund under the supervision of the United States District Court for the District of Alaska. MOA §IV(A)(2).

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II. DEFINING THE REAL ISSUE

The only real issue presented by the joint Trust Fund aspect of the settlement is whether the executive branch of the State government has authority to negotiate and agree to such a settlement mechanism.

In framing that issue, it is critical to understand that the Trust Fund monies are not monies to be received by or belong to either the State or the Federal governments. While the State's position is that it owns and is the trustee for most of the resources impacted by the Oil Spill, the Federal government contends otherwise. As a compromise of both governments' claims to exclusive control of monies recovered, the governments agreed that the monies would instead be placed in the joint Trust Fund established by Consent Decree under the Clean Water Act.

Thus, under the Settlement Agreement, those monies comprise a trust per se, as to which neither government has sole ownership or control, held jointly for the benefit of certain damaged natural resources.^{3/} Consistent with well-established trust law, the governments, as co-trustees, have joint ownership control over the Trust Fund monies and must exercise that control jointly and consistently with the terms of the Settlement Agreement. See generally Restatement (Second) of Trusts §§2, 34, 185, 194 (1959) (two or more co-trustees hold trust property as joint tenants; unless terms of trust provide otherwise, co-trustees share duties and powers, which can properly be exercised only by all trustees).^{4/}

^{3/} The rights and obligations of the governments with respect to the Trust Fund are governed by the terms of the Settlement Agreement, construed in light of common law trust principles. See Restatement (Second) of Trusts §4 (1959) (terms of trust are defined by instrument creating trust). See also *State v. Weiss*, 706 P.2d 681, 683-83 & n.3 (Alaska 1985) (applying common law trust principles to State's obligations with respect to public lands; state legislature had no power to alter status of Mental Health Lands granted by United States, because doing so effectively terminated trust in violation of the State's duties as trustee); *State v. University of Alaska*, 624 P.2d 807, 814 (Alaska 1981) (private trust law principles applied to evaluation of State's obligation with respect to University lands).

^{4/} See also *Mitchell v. Mitchell*, 655 P.2d 748, 752 (Alaska 1982) (person seeking recovery as representative for surviving family members is "a nominal party only and holds the recovery in trust"); *Thomson v. Wheeler Construction Company*, 385 P.2d 111, 114 (Alaska 1963) ("A trust is a fiduciary relationship with respect to
(continued...)

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A. The Trust Fund Does Not Violate
The Legislature's Appropriations Authority

While there has been concern expressed about whether the Trust Fund violates the Legislature's appropriation power, that power simply does not extend to monies that are not public revenues or assets of the State and can not be placed in the State Treasury.^{1/}

The Alaska Supreme Court has discussed the definition of "appropriations" in delineating the scope of the governor's line item veto power:

'An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'

For our purpose, the operative phrase "public revenue" is critical since it is the basis of the general fund and special funds from which the legislature may allocate money. Thus, any time the legislature allocates monies from the general fund or special funds, the governor's line item veto would be appropriate. However, the sale of general obligation bonds is the commitment of the state to a debtor relationship with those who purchase the bonds, and is therefore distinguishable from such allocations.

Thomas v. Rosen, 569 P.2d 793, 796-97 (Alaska 1977) (citations omitted) (governor lacks constitutional power to line item veto general obligation bonds authorizations, since they "do not qualify as appropriations").

^{1/}((...continued))

property, subjecting the person who holds ... the property to equitable duties to deal with it for the benefit of another person.") Cf., In re Cornelius, 520 P.2d 76, 85 (Alaska 1974) (one who receives money on behalf of another is a fiduciary; "the funds are impressed with a trust and conversion by the [person to his or her own uses] is a breach of that trust").

^{2/} The provision of the Alaska Constitution concerning appropriations provides, in relevant part:

No money shall be withdrawn from the Treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.

Alaska Const., Art. IX, §13 (emphasis added).

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Most broadly interpreted, the Legislature's appropriations power extends both to "public revenues" and to all "state assets," all property owned by the State. Thomas v. Bailey, 595 P.2d 1, 4-9 (Alaska 1979) (Beirne initiative to transfer State lands to private persons based on residency violated constitutional prohibition against making "appropriations" by initiative). As the Supreme Court later explained, invalidating initiative provisions requiring the University of Alaska to transfer real and personal property to Community College System:

The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

McAlpine v. University of Alaska, 762 P.2d 81, 87-88 (Alaska 1988) (emphasis added). See also Alaska Conservative Political Action Committee v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987) (initiative seeking to require sale of municipally owned utility to private, nonprofit cooperative for \$1 would unconstitutionally make "appropriation," where utility had \$32.7 million in equity; "prohibition against appropriations by initiative applies to all state and municipal assets") (emphasis added).

However, that power obviously does not extend to monies that are not assets belonging to the State, but are instead assets of a joint Trust Fund not subject to sole State ownership or control.^{6/}

^{6/} Courts in other jurisdictions have ruled that funds received by a state for specific purposes are trust funds and are not subject to the legislative appropriations power, even where they are received and held solely by the state and not in a joint trust fund subject to co-trusteeship obligations. The Massachusetts Supreme Court well stated the rationale for that conclusion:

(continued...)

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2/((...continued)

If Federal funds are received by State officers or agencies subject to the condition that they be used only for objects specified by Federal statutes or regulations, the money is impressed with a trust and is not subject to appropriation by the Legislature. The recipient of such funds has no choice but to comply with the requirements imposed by Federal law.

Moreover, legislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and be expended only on appropriation by the legislative branch, would result in the Legislature's interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws.

Opinion of the Justices to the Senate, 378 N.E.2d 433, 436 (Mass. 1978) (citations omitted). See, e.g., Colorado General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987) (expenditure of federal block grant funds, not subject to state matching requirement or other legislative decisionmaking, was within governor's executive power to make resource allocation decisions, since funds were essentially custodial in nature); Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985) (oil company's payment to state pursuant to consent order resolving administrative proceeding alleging that company violated regulations in marketing petroleum and natural gas products was not subject to General Assembly's appropriation power, and governor's exercise of authority over fund was not an impermissible invasion of Assembly's right to appropriate public funds); Opinion of the Justices to the House of Representatives, 471 N.E.2d 1266 (Mass. 1984) (even if revenues received pursuant to bill establishing Development Bank constituted "money received on account of the Commonwealth" within meaning of State Constitution's article establishing process by which revenues are to be received and disbursed, revenues would not be subject to those requirements, since funds were impressed with a trust established to secure debt obligations of Bank, which could disburse those funds pursuant to specific conditions and limitations). See also Navajo Tribe v. Arizona Dept. of Administration, 528 P.2d 623 (Arizona 1974); MacManus v. Love, 499 P.2d 609, 610 (Colo. 1972); State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974); Application of State ex. rel. Dept. of Transportation, 646 P.2d 605, 609-10 (Okla. 1982). Contra, Shapp v. Sloan, 391 A.2d 595, 604-07 (Pa. 1978), appeal dismissed sub nom., Thornburgh v. Casey, 440 U.S. 942 (1979) (custodial Federal funds must be appropriated by the legislature or returned to the Federal government).

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B. The Trust Fund Does Not Violate The Constitution's
Prohibition Against Dedicated Funds

For similar reasons, the Alaska Constitution's prohibition concerning dedicated funds is not violated by the Trust Fund. The relevant sentence in the Constitution states:

Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 [the Constitution's Permanent Fund provisions] of this article or when required by the federal government for state participation in federal programs. ...

Alaska Const. Art. IX, §7.

The Supreme Court has interpreted that prohibition against dedicating "proceeds of a state tax or license" to extend to all similar "source[s] of revenue" received by the State. State v. Alex, 646 P.2d 203 (Alaska 1983). In Alex, the legislature had passed a statute authorizing private aquaculture associations to collect mandatory assessments on the sale of salmon by commercial fishermen, in a way that "dedicate[d] the proceeds of the assessments to the associations." The Court rejected "a distinction between 'general revenue taxes' and 'special assessments' for services," and held the dedication of assessments unconstitutional. Id. at 208-210. As discussed previously with respect to the appropriations issue, however, the Trust Fund monies are simply not "revenues" of the State.^{2/}

^{2/}/(...continued)

The Alaska Supreme Court has not decided the issue whether the Legislature can or must exercise its appropriations power in order to authorize the State to expend trust monies or custodial funds held by the State, though a Superior Court decision has ruled (without elaboration) that the governor could not expend custodial funds without a legislative appropriation. Kelly v. Hammond, Case No. 77-4 Civ. (Juneau, 4/19/78).

^{2/} There is obviously a strong link between the Alaska Constitution's appropriations language and the dedicated funds prohibition. That prohibition is aimed at restraining the Legislature's creation of dedicated funds from certain State revenues through its appropriations power. See Alaska Constitutional Convention Proceedings 2364 (dedications of funds had the undesirable effect of preventing the "legislature" from "decid[ing] each case on its merits," causing it to "lose[] [the] control that it should have over the workings over state government"; appropriations should be made only after legislature (continued...))

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Furthermore, even if the Trust Fund monies were State revenues, the limitations on the use of those monies to those allowed under the Clean Water Act would not violate the dedicated funds prohibition for two additional reasons: 1) the monies would be received by the State subject to co-trusteeship obligations; and 2) the monies would be received by the State subject to a federal statutory requirement as to their use.^{7/}

^{7/}(...continued)

"decide[s] each case on its merits"); *id.* at 2367-70 ("eventually you get so many funds earmarked that the legislature just does not have the money to work with for current operating expenses").

^{8/} In a thorough analysis of the dedicated funds prohibition after the Alex decision, the Attorney General concluded that even under the strictest conceivable interpretation, monies received in trust would not be subject to that prohibition. 1982 Op. Att'y Gen. No. 13, File No. 366-649-80 (Nov. 30, 1982) ("[E]ven under the strict view, there would be some kinds of monies received by the state which it could not, for independent legal reasons, deposit into the general fund. These monies would include trust funds, restricted gifts, and funds subject to restrictions by contract"). That opinion also concluded that the fact that some State revenue was subject to federal statutory requirements that it be spent in a particular way did not violate the prohibition. *Id.* ("The dedication of proceeds of fishing and hunting licenses to the operation of a Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by Article IX, section 7. See 16 U.S.C. §669."). See also Op. Att'y Gen., File No. 366-403-85 (Aug. 13, 1985) (trust obligation exists with respect to public school fund; dedication of revenues to public school fund would not violate dedicated fund prohibition because "the legislature has removed the lands from a federally-created trust and substituted a monetary fund. We believe the exceptions to the prohibition on dedicated funds contained in article IX, section 7, of the Alaska Constitution--i.e., for dedicated funds 'required by the federal government' or 'existing upon the date of ratification of this section by the people of Alaska'--authorize the dedication of revenues to the public school fund, since the dedication of revenues is an alternate form to the pre-statehood federal dedication of lands."); Op. Att'y Gen., File No. 388-140-82 (June 22, 1982) (federal statute specifying use to which State could put its share of receipts from oil and gas leasing in National Petroleum Reserve; "federal legislation directing payment of the money to the state attaches conditions to the state's receipt of that money" and thus "impose[s] a requirement which is exempt from the dedicated fund prohibition").

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C. The Real Issue

The Trust Fund monies are not "State assets" or "public revenues," subject to the Legislature's appropriations power or the constitutional prohibition against dedicated funds.

The issue then, purely and simply, is whether the Governor and the Attorney General of the State of Alaska have the power and authority to agree to a settlement of the Exxon litigation in which a portion of Exxon's settlement payments are made into a Trust Fund, supervised by the United States District Court and administered by the State and Federal governments as co-trustees, or whether they are legally constrained to settle the Exxon litigation only on terms that require all monies to be paid directly to the State.

III. THE SEPARATION OF POWERS DOCTRINE IN ALASKA

As the legislature well knows, the principle of separation of powers is a central construct of American constitutional government and of Alaska's Constitution.^{9/}

^{9/}((...continued))

A common sense reading of the exemption where a dedication of funds is "required by the federal government for state participation in federal programs" would allow funds to be taken under the restrictions embodied in the Settlement Agreement, even were those funds considered "public revenues." The purpose of this exemption is to ensure that the State may receive monies available under federal law subject to restrictions. Though recoveries under the Clean Water Act might not be received literally from a federal "program," it is likely that the dedicated funds prohibition would be interpreted by the courts to allow the State to benefit from such recoveries with the statutory restrictions as to their use.

^{9/} The historical and intellectual origins of the separation of powers doctrine have been extensively reviewed and analyzed by scholars. See, e.g., W. Gwyn, *The Meaning of the Separation of Powers* (1965); M. Vile, *Constitutionalism and the Separation of Powers* (1967); Sharp, "The Classical American Doctrine of 'the Separation of Powers'," 2 U.Chi.L.Rev. 385 (1935). The doctrine is generally considered to have been derived primarily from the writings of John Locke concerning the delineation of functions in the English government, and the writings of Montesquieu, who strongly "argued that any combination of the judicial, legislative or executive powers would create a system with an inherent tendency towards tyrannical actions." The doctrine was incorporated into the state constitutions that predated the American Constitution and has been embodied in subsequent state constitutions. J. Nowak, R.
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The Alaska Supreme Court has long and consistently recognized that although "the Alaska Constitution does not expressly address itself to the doctrine of separation of powers," that principle is clearly "implied" from the Constitution's separate articles creating the executive, legislative and judicial branches of the Alaska government. Rust v. State, 582 P.2d 134, 138, n.11 (Alaska 1978).¹⁰ "Under the structure envisaged by Alaska's fundamental charter, the legislative power of the state is vested in the legislature, the executive power in the governor, and the judicial power in a supreme court, a superior court and such additional courts as established by the legislature." Bradner v. Hammond, 553 P.2d 1, 5 (Alaska 1976) (footnotes omitted).

There is no doubt that the countervailing principle of "checks and balances" allows each branch of the State government to directly and indirectly affect the other.¹¹ Thus, the legislature may enact laws that are to be executed by the executive and interpreted by the judiciary in accordance with legislative intent;¹² the executive may enforce those laws in accordance with its discretionary view of the public interest and governmental priorities; and the judiciary may review the actions of both the

⁹/(...continued)

Rotunda, and J. Young, Constitutional Law (1983), citing, J. Locke, Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government); Montesquieu, The Spirit of Laws (Nugent trans. 1949)

¹⁰/ See also Alaska State-Operated School System v. Mueller, 536 P.2d 99, 103 (Alaska 1975) ("Those who wrote our constitution followed the traditional framework of American government. The governmental authority of the State of Alaska was distributed among the three branches, the executive, the legislative and the judicial.").

¹¹/ See, e.g., Bradner v. Hammond, 553 P.2d at 5:

A problem inherent in applying the doctrine of 'separation of powers' stems from the fact that the doctrine is descriptive of only one facet of American government. The complementary doctrine of checks and balances must of necessity be considered in determining the scope of the doctrine of separation of powers.

¹²/ For purposes of the analysis presented below in this memorandum, it is important to bear firmly in mind that the legislature can restrict the executive's constitutional discretion to execute the law only by means of a lawfully enacted statute. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

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other branches in light of applicable constitutional and other legal constraints.^{13/}

However, the Alaska Supreme Court has embraced a strict view of the autonomy of the State's governmental branches, which precludes each branch from improperly interfering with the autonomy and discretion of the others with respect to their core constitutional powers. See, e.g., Bradner v. Hammond, 553 P.2d at 6-8 ("the separation of powers doctrine requires that the blending of governmental powers [between the branches] will not be inferred in the absence of an express constitutional provision").

**IV. THE GOVERNOR'S CONSTITUTIONAL AUTHORITY
TO EXECUTE AND ENFORCE THE LAWS**

"There is no dispute that our constitution was designed with a strong executive in mind." Bradner v. Hammond, 553 P.2d 1, 3 n.3 (Alaska 1976). See Alaska Constitutional Convention Proceedings 1102, 1741, 1986-88, 2038, 3103. Article III, Section 1 of the Constitution provides that "[t]he executive power of the State is vested in the governor."

Principal among the governor's express constitutional powers is his or her responsibility for executing and enforcing the laws. The constitutional provision concerning that power makes clear the governor's plenary authority to initiate and control litigation brought for that purpose:

Governor's Authority. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. ...

^{13/} See also, e.g., State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d 622 (Kan. 1984) (doctrine of separation of powers avoids dangerous concentration of power through checks and balances each branch of government has against other by assigning each branch powers and functions appropriate to it; generally, "legislative power" is power to make, amend or repeal laws, whereas "executive power" is power to enforce laws, and "judicial power" is power to interpret and apply laws in actual controversies).

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Alaska Const., Art. III, §16.^{14/}

The Constitutional Convention considered the discretion of the executive branch to enforce the law to be an essential element of the strong executive intended under the Alaska Constitution:

In order to enforce the strong executive and to bulwark his power we have given him power by appropriate actions or proceedings in the court, brought in the name of the state, to enforce compliance with any constitution [sic] or legislative mandate. That is specifically written into the constitution because we want to have a broad interpretation of the powers of the strong executive.

Alaska Constitutional Convention Proceedings 1986. Thus, the governor has the constitutional mandate to use his or her judgment in enforcing the law to best protect the public's interest. See State v. Lewis, 559 P.2d 630, 635 (Alaska), cert. denied, 432 U.S. 901 (1977).

V. THE ATTORNEY GENERAL'S SETTLEMENT AUTHORITY

The Attorney General is the State officer charged with implementing the executive branch's policies with respect to execution of the law.^{15/} In that respect, the Attorney General

^{14/} See, e.g., Alexander v. State By and Through Allain, 441 So.2d 1329 (Miss. 1983) ("Executive power" is the power to administer and enforce the laws; "execution" is at the core of executive power).

^{15/} The Alaska Constitutional Convention strongly rejected proposals offered by a minority of its Judiciary Committee members either to create an elected Attorney General's position in the Constitution (defeated by a 40-12 vote) or to have the Governor appoint the Attorney General, by a process similar to that adopted for judicial appointments, from candidates determined to be qualified by the Judicial Council (defeated by a 36-18 vote). In doing so, the Convention expressly reaffirmed the Constitution's intention to have a "strong executive" and made it clear that the Governor should have full authority to appoint his or her Attorney General, in order to assure that the Attorney General could work effectively in the executive department and would be compatible with the Governor and the Governor's programs. Alaska Constitutional Convention Proceedings 2193-2202, 2215-23 (Delegate McLaughlin stating that an elected Attorney General would put "a diverse and possibly a discordant element into the executive (continued...)

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has broad common law powers and responsibilities. For the historically inclined, the common law roots of the attorney general's powers were recently, tersely summarized by the Alabama Supreme Court:

The office of attorney general had its nascence in the *attornatus regis* of the thirteenth and fourteenth century England. The *attornatus regis* served as the sovereign's primary legal representative, with considerable power subject to limitation only by the King. The office was carried over to colonial America, where it eventually became the office of attorney general. All fifty states have an office of attorney general created either by constitution or statute. ...

The most far-reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, 'the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest.... [H]e may abandon, discontinue, dismiss or compromise it.' In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a

¹⁸/(...continued)

branch" undercutting the Attorney General's "attorney-client relationship" with the Governor, which "has to be based on faith and personal selection"; instead, Attorney General should be an "executive appointee" and "an attorney largely for the executive department"; Delegate Stewart stating that rather than giving independent advice to both the executive and the legislature, "the attorney general [should be] purely and simply the adviser for the executive"; Delegate Rivers, a territorial attorney general, agreeing that the Attorney General should not be expected to counsel both the governor and the legislature, and that an elected attorney general would undercut the constitutional intention to have a strong executive, because an elected attorney general might be of an "opposite political faith," otherwise not "see eye-to-eye" with the governor, or be "inadequate or hostile to [the governor]"; Delegate Buckalew opposing the Judicial Council proposal as inconsistent with the commitment to a strong executive). See also *id.* 2284 (Delegate Taylor explaining that by not making the attorney general a constitutional office, the Convention was recognizing that "it was a legal department of the executive branch and ... the governor would have the right ... to appoint the attorney general who sets up the legal department of the executive department").

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suit when he determines that continued litigation would be adverse to the public interest.

Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 677 (Ala. 1990) (footnotes omitted) (attorney general had authority to dismiss state insurance department's proceedings in appeals court despite objection of commissioner of insurance).^{10/}

Alaska takes a similarly expansive view of the Attorney General's common law powers. Because the nature and extent of those powers is fundamental to the issue addressed in this memorandum, the Alaska Supreme Court's seminal discussion of the subject deserves extended quotation:

Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. AS 44.23.020 indicates that the office of the Attorney General is to function with those powers and duties normally ascribed to it at common law:

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

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

When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers. Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. The state constitution is divided into a number of separate articles. Since Article III concerns the executive

^{10/} See also 6 W. Holdsworth, A History of English Law 467-68 (1924); National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 9-17 (1980); Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 Am.J. of Legal History 304 (1958).

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branch, it can fairly be implied that this state does recognize the separation of powers doctrine.

Both federal and state courts have consistently and carefully observed the line which divides their branch of government from that of the executive. They have held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding.

"In that field, the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state."

The order to prosecute by the Superior Court overstepped this line and was an infringement upon the discretionary powers residing in the executive branch. Such an order is not within the province of the court.

We conclude that, although we have jurisdiction to entertain this case and to find, as we have, the existence of legal authority, we do not have power to control the exercise of the Attorney General's discretion as to whether he will take action in any particular cases of contempt for non-support.

Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975) (footnotes and citations omitted) (emphasis added).^{17/}

It is thus entirely clear that, as an incident of both common law and statutory powers, the Attorney General has the discretionary authority to settle the State's litigation.^{18/}

^{17/} In addition to AS 44.23.020, which codifies certain of the Attorney General's inherent powers and provides other duties for him or her, other statutes, far too numerous for citation, expressly provide for the Attorney General to initiate or defend administrative and judicial proceedings. However, "[t]he duties of the office are so numerous and varied that it has not been the policy of state legislatures to attempt specifically to enumerate them." State ex rel. Olsen v. Public Service Commission, 283 P.2d 594, 598-99 (Mont. 1955).

^{18/} See also State of Oklahoma ex. rel. Wilson v. Blankenship, 308 F. Supp. 870, 875 (W.D. Ok. 1969), rev'd. on jurisdictional grounds, 447 F.2d 687 (10th Cir. 1971), cert. denied, 405 U.S. 918 (1972) ("Ordinarily, the Attorney General both under the common law (continued...)

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A. The Attorney General Has The Authority To Agree To
A Settlement That Includes A Joint Trust Fund

The Trust Fund settlement device agreed to by the Attorney General in the Exxon litigation is appropriate under both common law and state and federal statutes.

First, as part of the Attorney General's common law authority to initiate, participate in and settle litigation, the Attorney General may seek any available legal or equitable remedy, even if a particular remedy is not expressly provided by statute.^{10/}

^{10/}(...continued)
and by statutes, may control and manage all litigations in behalf of the state and is empowered to make any disposition of the state's litigation, which he deems for its best interest"); Island-Gentry Joint Venture v. State Through State Board of Land and Natural Resources, 554 P.2d 761 (Haw. 1976) (attorney general has exclusive authority to control and manage for state all phases of civil litigation in which state has an interest, and such authority necessarily includes control of settlement of actions); Sarkeys v. Independent School District, 592 P.2d 529, 536 (Okla. 1979) ("The authority of the Attorney General to settle or compromise the litigation in question, in the absence of fraud or collusion is exclusive."); State ex rel. Derryberry v. Kerr-McGee, 516 P.2d 813 (Okla. 1973) (attorney general had authority to settle and compromise asphalt price-fixing case; absent "fraud or collusion," court will presume that case settled for valid reasons, based on Attorney General's judgment as to the state's best interests); State v. Jones, 41 So.2d 280 (Ala. 1949) (attorney general had power to enter into good faith settlement, despite constitutional provision forbidding compromise or release of obligations owed the state).

^{10/} Attorneys general have been recognized to have numerous common law litigation powers, including: to institute and intervene in civil suits to protect the public interest, in their discretion; to challenge the constitutionality of legislative or administrative actions; to bring suits under federal law to protect members of the public; to intervene in regulatory rate cases; to litigate parens patriae (for the benefit of the state's citizens) in cases involving a wide range of matters; to bring proceedings against public officers; to sue for abatement of nuisances; to enforce charitable trusts; to intervene in will contests; to seek revocation of corporate charters; to represent state agencies; and to initiate criminal prosecutions, even where local prosecutors have not done so. See National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 36-71 (1980).

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Thus, in State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982), the Alaska Supreme Court held that the State's Consumer Protection Act did not regulate real property sales and that the State's Uniform Land Sales Practices Act would not apply retroactively to certain land purchases. However, the Court held that neither statute restricted "the court's traditional equity powers" to award restitution "at the instance of the State," as a remedy to benefit defrauded land purchasers. 660 P.2d at 416.²⁰/

Furthermore, the Court held that the Attorney General, on behalf of the State, had the authority to pursue the common law fraud claims of land purchasers and to seek restitution for them based on those claims. Quoting and reaffirming its recognition of the Attorney General's broad common law powers in the Public Defender case, discussed previously, the Court concluded:

We believe that the above language [from the Public Defender decision] forecloses any argument that the State is without authority to bring suit in the absence of express statutory authority. This view finds ample support in the decisions of other jurisdictions where the attorney general's common law powers are recognized. ... This authority has been held to confer standing on the attorney general to seek redress for common law fraud.

We therefore hold that the State has the authority to bring suit in the public interest on the basis of common law fraud to obtain restitution for defrauded land purchasers. ... [I]t is not the court's function to pass upon the Attorney General's determination of what is or is not in the "public interest"

660 P.2d at 420-21.

²⁰/ In reaching this conclusion, the Court found "persuasive" the California Supreme Court's reasoning in a case involving a substantially similar issue. In that case, People v. Superior Court, 507 P.2d 1400 (Cal. 1973), the Court ruled that while a California statute only expressly authorized the California Attorney General to sue to enjoin misleading advertizing, that statute "did not restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference'" Therefore, the California Court held that courts retained their "inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the consumers found to have been defrauded." 507 P.2d at 1402 (citations omitted and emphasis added). The Alaska Supreme Court's First National Bank opinion noted that "a number of analogous federal cases ... had reached the same conclusion." 660 P.2d at 416.

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The trust, used as the vehicle for the Exxon settlement, is an ancient equitable creature. Litigants have long asked courts to infer or create trusts as a way to remedy legal or equitable wrongs. See, e.g., Klondike Industries Corp. v. Gibson, 741 P.2d 1161, 1171 (Alaska 1987) (court may impose constructive trust where it concludes that holders of legal title to property should be considered to have duty to act consistently with the equitable interests of other persons in property); Avers v. Jackson Township, 525 A.2d 287, 314 (N.J. 1987) (citing authorities in support of creation of equitable fund so that 1) damages from toxic discharge would not have to be estimated in advance; 2) recovery could be used for medical monitoring; and 3) trustees could make decisions on disbursements on equitable grounds). See also Milliken v. Bradley, 433 U.S. 267, 281 (1976) (courts have "broad" "equitable powers to remedy past wrongs").^{21/}

For almost 40 years, environmental trusts have been created, by settlements and court orders, as a method to use monies paid by a polluter to benefit the resource damaged by the polluter's activities. See For Land's Sake 1 (New Jersey Conservation Foundation, Morristown, N.J., 1990). Such trusts have been established with both private plaintiffs and governmental trustees making the decisions about expenditures of trust monies.^{22/}

^{21/} The creation of common or trust funds for recoveries in class action litigation is one notable and well-established example of the courts' willingness to create such funds as a remedy. See generally 2 H. Newberg, Newberg on Class Actions §§10.01 et seq., 11.15 - .21, 12.01 et seq. (2d ed. 1985) (classwide damage awards and lump sum fund settlements).

^{22/} Some examples gleaned from research done by the National Wildlife Federation as a result of the Exxon litigation:

The Chesapeake Bay Foundation and Natural Resources Defense Council sued Bethlehem Steel for polluting the Chesapeake Bay in violation of its clean water permit. The resulting consent decree gave them extensive oversight powers in administering a \$1.1 million trust fund, with monies to be spent on projects which "further the goals of the Clean Water Act by contributing to the restoration and protection of the Chesapeake Bay and its resources," consistent with the "mitigation project criteria" set forth in the EPA's Clean Water Act settlement policies. Chesapeake Bay Foundation v. Bethlehem Steel Corp., Civ. No. Y-84-1620 (D.Md., July 14, 1987).

The Hudson River Foundation was the result of a protracted case brought by environmental organizations and Hudson River fishermen opposed to the construction of the Storm King power plant. The settlement established a \$12 million endowment for scientific research on the ecology of the Hudson River.

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22/(...continued)

Representatives from the state and federal government, from the different plaintiff groups, and from New York utilities sit on a panel which recommends projects for a trustee panel. Final authority for administration of funds rests with the trustee panel, comprised of ten distinguished persons independent of government. See generally R. Sandler and D. Schoenbrod, The Hudson River Plant Settlement (New York University, 1981).

The Virginia Environmental Endowment began with a \$13.2 million deposit from Allied Chemical Corporation which had been found guilty of polluting the James River with the toxic chemical kepone. The presiding federal judge approved Allied's suggestion that instead of paying a fine, it would create an environmental trust. The judge appointed independent, prominent citizens to administer the Endowment. Projects undertaken range from educating citizens to tackling pollution problems in the Virginia area. See Virginia Environmental Endowment, Annual Report (1987).

The Ohio Fund was established pursuant to a consent decree between the EPA and parties responsible for the administration of the Hamilton County municipal sewer system, the Metropolitan Sewer District of Greater Cincinnati, which failed to comply with its NPDES permit. The purpose of the trust is to fund "environmentally beneficial project(s)" for enumerated purposes in accordance with certain criteria. The project(s) are required 1) to further the statutory goals of the Clean Water Act, 2) to address the kinds of environmental problems caused by the defendants' noncompliance, 3) to supplement any existing legal requirements, and 4) to benefit the general public rather than any of the defendants or any governmental unit. U.S. v. Bd. of County Commissioners of Hamilton County, Ohio, et al., C-1-89-0693 (S.D. Ohio, March 11, 1985).

The Whooping Crane Trust is a \$7.5 million "trust in perpetuity" created in a consent decree between an electric power company and plaintiffs, the State of Nebraska and the National Wildlife Federation. Each of the three parties to the agreement (the power company, the governor of Nebraska, and the National Wildlife Federation), appoint one trustee who may be replaced at the pleasure of the party who appointed him. The purpose of the trust is "to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska;" the trustees may choose to fund "programs, activities, and acquisitions ... formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life support system for the whooping crane and other migratory species which utilize it." Platte River Whooping Crane Maintenance Trust, Trust Declaration. See also U.S. v. Metropolitan District Commission, No. 85-0489-MA (D.Mass. 1988) (establishing Boston Harbor Massachusetts Bay
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Trust funds have often been created by consent decrees entered in Clean Water Act actions for injunctive relief and other remedies.^{22/} See, e.g., PIRG v. Powell Duffryn, 913 F.2d 64, 82 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991) ("in a Clean Water Act case, a court may fashion injunctive relief requiring a defendant to pay monies into a remedial fund, if there is a nexus between the harm and the remedy"; district court can create trust fund as part of equitable relief, but civil penalties must be paid into U.S. Treasury).

The environmental trust fund most analogous to that created under the Exxon Settlement Agreement was established as a result of litigation relating to the Shell Oil Company's discharge of oil from its Martinez, California complex. That discharge affected lands and waters, including wetlands around the Shell Marsh and Peyton Slough, and entered into the Carquinez Strait and Suisun Bay, near San Francisco.

^{22/}(...continued)

Trust). Cf., United States v. Browning-Ferris Industries Chemical Services, Inc., 704 F.Supp. 1355 (M.D. La. 1988) (attorney general had defendant pay a portion of recovery to university to endow environmental research program).

^{23/} The remedies expressly available under the CWA also arguably exist at common law. The courts have long recognized common law "public trust" and "parens patriae" doctrines, under which a government is entitled to seek damages and injunctive relief in order to protect land or water resources in which it has a "public trust" interest. See, e.g., Maine v. M/V Tamano, 357 F.Supp 1097, 1101 (D.Me. 1973) (state can seek both injunctive relief and damages for oil discharge under public trust and parens patriae theories); Aerojet-General Corp. v. San Mateo County Superior Court, 257 Cal.Rptr. 621 (Cal.App. 1989) (State's public trust interest in navigable portions of river was sufficient for standing to claim damages caused by environmental pollution). See generally 1 V. Yannacone, B. Cohen, S. Davison, Environmental Rights and Remedies §2.1 et seq. (1972) (discussing development of trust doctrine). Under common law theory then, the State might seek as an equitable remedy, and a court might order created, a fund to benefit damaged resources. See, e.g., Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 495-96 (1971) (fund sought for restoration of waters polluted by mercury); State v. Levi Strauss & Co., 715 P.2d 564 (Cal. 1986) (settlement fund for class members created in parens patriae consumer action brought by Attorney General). See also 1 W. Rodgers, Environmental Law §2.13D (1986) (range of equitable remedies possible in environmental cases is "virtually unlimited").

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The Consent Decree in that case, a copy of which is available to the Legislature, resolved the claims of the United States Government, as well as those of numerous California state and local governmental entities and agencies that were also plaintiffs. U.S. et al. v. Shell Oil Company, Civ. No. C-89-4220 (N.D. Cal., Nov. 29, 1989). Like the present case, the Consent Decree used a Clean Water Act trust as the mechanism for collectively resolving claims for natural resources and other damages sought under various state and federal statutes, as well as common law theories. See Shell-Martinez Consent Decree ¶¶I(D)-(J), V.

Prominent among its settlement payment provisions, the Consent Decree provides for approximately \$11 million to be placed in a joint trust fund.^{24/} A Memorandum of Agreement incorporated into the Consent Decree provides for decisions concerning disbursement and management of the trust fund to be made by a Committee comprised of representatives of federal, California and local governmental entities. See Shell-Martinez MOA ¶I. While the Shell-Martinez MOA enumerates various uses to which the fund monies may be devoted, the Committee is to "be guided by the primary objectives of restoring, rehabilitating and acquiring the equivalent of the natural resources adversely affected by the Oil Spill." See Shell-Martinez MOA ¶II.

Cooperation with the Federal government and the creation of a joint trust fund is clearly appropriate under the circumstances of the Exxon litigation, as it was in the Shell-Martinez case.

B. The Clean Water Act Trust Remedy

The Clean Water Act ("CWA") provides that the State and Federal governments are to act as "trustees" in seeking recovery for natural resource damages and that all recoveries by the trustees are to be used for restoration and resource acquisition purposes. See 33 U.S.C. §1321(f)(5) ("The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.").

^{24/} Like the Exxon Settlement Agreement, the Shell-Martinez Consent Decree, though dedicating the majority of the recovery to an environmental trust fund, also provided for significant monies to be paid directly to the numerous governmental parties as reimbursement for their costs and clean-up efforts, as well as penalties. See Shell-Martinez Consent Decree ¶IV(A).

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Consistent with the trustee status under which the governments may recover natural resource damages, the statute is interpreted to require that such recoveries be held in trust for the damaged resources. See Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 675 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981) (requirement that recoveries be used to benefit damaged resource is "[i]n accordance with the trust analogy"). See also W. Fratcher, Scott on Trusts §5170, 192 (4th ed. 1987) (trustee's duty is to act with respect to trust property in the interests of the trust's beneficiaries).

The regulations promulgated under the CWA concerning such trusts expressly address only the situation where a single sovereign recovers money. "All sums recovered ... by the Federal government acting as trustee shall be retained by the trustee, without further appropriation, in a separate account in the U.S. Treasury." 43 C.F.R. §11.92(a)(1). "All sums ... recovered ... by a State government acting as trustee shall either: (i) be placed in a separate account in the state Treasury; or (ii) be placed by the responsible parties in an interest bearing account payable in trust to the state agency acting as trustee." 43 C.F.R. §11.92(a)(2). These sums must be spent "out of the account ... only for those actions described in the Restoration Plan" 43 C.F.R. §11.92(c). The regulations further provide the State trustee responsible for the Restoration Plan and spending trust proceeds in accordance with that Plan is to be an "agency designated by the governor". 43 C.F.R. §11.14(rr).

However, relevant to the joint Trust Fund created by the Exxon Settlement Agreement, the regulations also provide that the state and federal trustees should cooperate to "[d]evise and carry out a plan" for restoration and resource acquisition where the affected resources are "contiguous," or under joint trusteeship. 40 C.F.R. §§300.615(a), (b)(4).^{25/} The CWA and its accompanying regulations therefore strongly support the conclusion that joint recoveries should be placed in a joint trust fund and administered cooperatively. See also Alaska Const., Art. XII, §2 ("The state ... may cooperate with the United States ... on matters of common interest.").

Based on these statutory and regulatory provisions, a joint trusteeship was considered the appropriate basis for the Consent Decree in the Shell-Martinez oil spill litigation,

^{25/} See also 43 C.F.R. §§11.32(a)(1)(ii), (a)(1)(iii) (trustees encouraged to cooperate in assessing inseparable damages and required to cooperate in pursuing such damages); 40 C.F.R. §§300.73-.74 (requiring trustee coordination and cooperation in fulfilling duties which, under 33 U.S.C. §1321 (f)(5), include pursuing damage claims and implementing restoration plan).

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discussed previously in this memorandum. A joint trusteeship will almost certainly be upheld by the courts as an appropriate settlement mechanism, authorized by federal law, in the Exxon case as well.

C. No Statutory Provision Expressly Precludes
The Trust Fund Settlement

The Attorney General's authority to enter into the joint Trust Fund settlement with Exxon and the Federal government is certainly subsumed within the Attorney General's broad, inherent settlement powers. Because of the inherent nature of those powers, "[i]t is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law," the Attorney General retains all his or her common law powers "in the absence of express restrictions" imposed by constitution or statute. Hansen v. Barlow, 456 P.2d 177, 178 (Utah 1969) (emphasis added).^{26/}

No Alaska statutory provision expressly precludes the Attorney General from settling litigation like the EXXON VALDEZ case by means of a settlement which includes a joint Trust Fund.^{27/}

^{26/} Accord, Weaver v. Blue Cross and Blue Shield of Alabama, 570 So.2d 675, 684 (Ala. 1990); Olsen v. Public Service Commission, 283 P.2d 594 (Mont. 1955); Lund ex rel. Wilbur v. Pratt, 308 A.2d 554, 558 (Me. 1973) (attorney general "may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights"); Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987) ("[i]n the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every civil suit instituted by him in his official capacity ..., and his authority extends as well to control of defense of civil suits against the state, its agencies, and officers"); State ex rel. Derryberry v. Kerr-McGee Corporation, 516 P.2d 813 (Okla. 1973). See also National Association of Attorneys General Committee on the Office of Attorney General, Common Law Powers of State Attorneys General 24 (1980) ("In states which recognize common law powers, codification does not affect such powers unless the statutes expressly state so.")

^{27/} 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
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27/(...continued)

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. See Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) (appointment of executive officers clearly an executive function, and legislature could not require legislative confirmation of lesser executive officers in addition to those made subject to confirmation by the Alaska Constitution); In re Mackay, 416 P.2d 823 (Alaska 1965), cert. denied, 382 U.S. 803 (1965) (inherent power of Supreme Court over suspension and disbarment of attorneys cannot be defeated by legislative branch of government). Cf., Granato v. Occhipinti, 602 P.2d 442 (Alaska 1979) (superior court could not constitutionally require State executive agency to perform home-study in private child custody dispute); Rust v. State, 582 P.2d 134 (Alaska 1978) (sentencing court could recommend that defendant be incarcerated in particular facility, but ultimate responsibility for classification and placement of defendant was vested in Division of Corrections, and court lacked authority to order defendant incarcerated in a designated facility); State v. Carlson, 555 P.2d 269 (Alaska 1976) (separation of powers principles precluded trial court from accepting guilty plea to lesser charge of manslaughter over the opposition of the prosecution). See also Bowsher v. Synar, 478 U.S. 714 (1986) (powers vested in the Comptroller General under "reporting provisions" of Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws); State Board of Ethics for Elected Officials v. Green, 545 So.2d 1031 (La. 1989) (to extent statute authorized Supervisory Committee on Campaign Finance Disclosure to file civil proceedings to collect penalties for violation of Campaign Finance Disclosure Act, it unconstitutionally violated separation of powers; Committee members were legislatively appointed, and thus could not constitutionally be authorized to enforce the law); In re Opinion of the Justices, 532 A.2d 195 (N.H. 1987) (once legislature has made appropriation for executive branch, requirement of fiscal committee approval of contracts made pursuant thereto is unconstitutional intrusion into executive branch of government); State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) (constitutional provision that duties of state executive "shall be prescribed by law" does not allow the legislature to transfer inherent or core functions of executive officers); General Assembly of State of New Jersey v. Byrne, 448 A.2d 438 (N.J. 1982) (any legislative action which excessively interferes with executive's ability to faithfully execute the laws passed by Legislature violates separation of powers); Aiken County Bd. of Ed. v. Knetts, 262 S.E.2d 14 (S.C. 1980) (legislature may not, consistent with separation of powers, undertake to both pass laws and execute them by its own members); State ex rel. Guste v.
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