

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672
2806 SCOMM 122: COMMISSION ON PRIVATIZATION... , 1999

LAW OFFICES
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AVRUM M. GROSS
SUSAN A. BURKE

(907) 586-2777

November 29, 1999

Representative Cowdery
Senator Jerry Ward
Commission on Privatization
716 W 4th Avenue
Anchorage, AK 99501

Gentlemen:

Just a few days ago I received the sub-committee report on the Department of Law. Your Director, Mr. Pignalberi, offered me the opportunity to comment. I am more than pleased to do so. Since time is very short, I will not be able to discuss each recommendation that has been made but I can offer you some general comments that hopefully may assist you in your deliberations.

First of all, as a general matter, the problem of privatization is probably of less concern for the Department of Law than for nearly any other state department. As your sub-committee noted, unlike most state departments, the Department of Law provides services not to the general public but to state agencies. I have been associated with the Department in one capacity or another for a long time and I have never heard any consistent complaint by any of the agencies that they would be better served by private counsel. Sometimes, departments want their own public attorney within

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their own department, and occasionally departments need particular legal expertise from the private sector that is not found in the Department of Law, but generally the departments are satisfied with the present structure. There are a number of reasons for that acceptance of the present system. First, private counsel would be much more expensive. Second, there are very few lawyers in private practice who build up the kind of expertise developed in a government practice. The lawyers in the Department of Law, who work with Natural Resources or Health and Social Services build up a knowledge of the enormous regulatory framework that surround those agencies. It takes a long time to learn that -- money that would have to be paid over and over to private attorneys. Moreover, attorneys in the Department of Law carry institutional memories from one assistant Attorney General to another, which will be lost if different private firms are employed. Finally, and most important from a public standpoint, the Department of Law acts as one large law office, manifesting uniform legal policies of the State. The efforts of various assistant Attorney Generals are directed by their superiors in consistent directions. There are many ways that the State can be represented in legal disputes; many choices are involved about what positions to take and how they should be conveyed to a court or an agency. The policies of the department

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should be consistent and that is achieved by having the day to day work of the Assistants under the close supervision of the Attorney General and his or her deputies. It is a consistency that will inevitable be lost if the work is farmed out to private counsel.

Let me give a concrete example. One of your recommendations deals with OSPA, the Office of Special Prosecution and Appeals. This office was create by me when I was Attorney General. Prior to that office being created, the District Attorney's office, which was staffed with trial lawyers, had to handle appeals for which they had little time and no particular expertise. Second, to the extent appeals were handled out of the DA's office, the policies concerning the criminal law policies advanced in briefs by the State to the Supreme Court to lack consistency -- a problem made worse by the fact that the offices had little time to co-ordinate their efforts. As a result, in Fairbanks, assistant DA's were arguing one theory concerning search and seizures; in Juneau, different theories were used -- some which contradicted the arguments made in Fairbanks. Different offices had different standards for sentence appeals.

The whole effort during my tenure in the department was to establish uniform standards for the delivery of criminal justice services. That was very important for a department

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that has enormous discretion on such matters as screening, prosecution and sentencing. Privatization would tend to make policies less uniform and as previously noted, much more expensive. I know of no firms in Alaska that handle only criminal appeals. But if there were, I can assure you that their hourly rates would be substantially higher than those paid to state attorneys.

In a similar vein, I note that the Committee desires to have an outside firm audit the reasonableness of state litigation costs, particularly in reference to tort litigation. Few people can object to an audit, but I think the outcome is fairly obvious. When I became Attorney General, all tort defense was done by private firms under contract with the State. The costs were, in many instances, exorbitant. It was for that reason -- cost savings -- that we established "in-house" defense of tort cases. It is a system that has worked very well. The costs of litigation have clearly been reduced, and the Department of Law has developed a group of skilled litigators who deliver tort defense at reasonable rates.

Finally, I wanted to comment briefly on your concerns about the powers and duties of the Attorney General. Without attempting any extensive legal analysis let me just point out that the Attorney General has functioned as a cabinet officer

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appointed by the Governor ever since Statehood. Initially, when I was an assistant Attorney General in the early 60's, the legislature sought legal advice from the Department of Law, but legislative concern about the objectivity of the advice soon led to the legislature relying more and more on private counsel and Legislative Affairs. For years, legislators who have disagreed with particular actions on the Department have complained that the Attorney General acts for "political" reasons and that the department's powers should be curbed in some way. The most prevalent suggestion, of course, is that the Attorney General be elected -- certainly an interesting way to remove him from politics. The subcommittee expresses some similar concerns but suggests statutory curbs of different sorts -- more direct legislative control of the ability to settle cases.

I have had the opportunity to watch the actions of every single Attorney General that this State has ever had. Some have been very good and some have been terrible. All in all, no matter who was Attorney General, the Department generally has functioned with great integrity and has delivered competent legal services to the public and to state agencies at a very reasonable cost. I sincerely hope in the course of trying to improve the performance of all state agencies that this Committee does not fix something that is not broken. I

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know that there are people who can point to one case or another to back up their own personal view of what is wrong with the Department of Law, but the Department has handled thousands and thousands of matters over the years and has done well. I hope it will be allowed to continue without unwarranted interference.

Thank you for the opportunity to comment.

Yours very truly,

GROSS & BURKE

A handwritten signature in black ink, appearing to read 'Avrum M. Gross', with a long horizontal flourish extending to the right.

Avrum M. Gross

AMG:ddw

**FACSIMILE TRANSMISSION
COVER SHEET**

Office of the Attorney General
Dimond Courthouse, 123 Fourth Street, 4th Floor
P.O. Box 110300
Juneau, AK 99811-0300
PHONE: (907) 465-2133 FAX: (907) 465-2075

DATE: 11-15-99TO: Annette DealFAX: 907-269-0223for Comm. on PrivatizationFROM: Joan Kasson465-5370NUMBER OF PAGES INCLUDING THIS SHEET: 12MESSAGE: Attachments to Delaw response
sent via e-mail to youPlease confirm receipt.Thanks,

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(907) 465-6729 ASK FOR: BECKY WILMER**

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

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

Defendants.

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

DEC 21 1999

Clerk of the Trial Courts
B S M/K Deputy

Case no. 1KE-97-117 CI

ORDER GRANTING ATTORNEY'S FEES

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

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

DATED: 12/21/99

[Signature]
Judge Thomas M. Johnson
SEAL OF THE TRIAL COURTS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT

This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record:

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

Michael Lessmeier, Esq.
Lessmeier & Winters
124 W. 5th Street
Juneau, AK 99801

(Attorney for Dr. Johnson)

Pamela Crodo-Hayes

CERTIFICATION

Copies Distributed

Date 12-21-99
To Gregory A. Shapley
Michael Lessmeier
State of Alaska
By S M/K

DATED: September 30, 1998

DEC 21 1999

ATTORNEY GENERAL, STATE OF ALASKA
DIAMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3800

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

vs.

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

Defendants.

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

SEP 14 1998

Clerk of the Trial Courts

By _____ Deputy

CASE NO. 1KE-97-117 CI

FINAL JUDGMENT

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

IT IS HEREBY ORDERED that final judgment is entered on the summary judgment motion in favor of David E. Johnson against Gregory A. Shapley. David E. Johnson shall receive after proper application an award of costs in the amount of \$1544.04 ^{PAID 9/21/98} and attorney fees in the amount of \$457.60 ^{PAID 9/21/98} plus interest accruing on said amounts at 10.5% per annum from August 10, 1998 until paid.

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

John
SUPERIOR COURT JUDGE

Approved/Disapproved as to form:

Gregory A. Shapley, Pro Se

CERTIFICATION

Copies Distributed

Ent: 12-21-98
To: G. Shapley
M. Johnson
S. Johnson
By: C. N. H.

Final Judgment

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

AUG 17 1998

Approved as to form:


Michael L. Lessmeier, Attorney for Defendant
ABA #7910082

The undersigned hereby certifies that on
the 12 of August, 1998, a copy of the
foregoing document was mailed to:

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

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


0023-050.fudform

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

CERTIFICATION

Copies Distributed

Date 9.21.98

By Gregory Shapley
Michael Lessmeier
Susan Cox

By [Signature]

Final Judgment

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

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

Defendants.

Cas : no. 1KE-97-117 CI

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

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

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

DATED: 9/30/98

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:

Susan D. Cox
Susan D. Cox

Assistant Attorney General

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

Fania Credo-Hayes
Fania Credo-Hayes

DATED: September 30, 1998

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

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

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

Defendants.

Case no. 1KE-97-117 CI

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

On August 10, 1998, this court granted defendant State of Alaska's Motion for Summary Judgment, dismissing the above captioned case against the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services (the state) with prejudice. The state is therefore the prevailing party in this action and, as such, moves for an award of attorney's fees pursuant to Civil Rule 82.¹

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

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

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

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

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

1
2 Although the Attorney General, as counsel for the state, bills client agencies
3 at a rate far below the market rate of attorneys in private practice, it is well settled that when
4 the state is the prevailing party, it may request reimbursement of attorney's fees at a
5 reasonable market rate. The Attorney General is not limited to recovering fees based on the
6 Department of Law's inter-agency billing rate.² There is clear authority for awarding
7 attorney's fees under Civil Rule 82 based on market rates instead of the department's
8 overhead rate. Atlantic Richfield Co. v. State, 723 P.2d 1249, 1251-52 (Alaska 1996)
9 (Alaska Supreme Court ruled it appropriate to use a average of hourly billing rates charged
10 by private attorneys to calculate fee award for legal work performed by assistant attorneys
11 general); Amfac Hotels v. State, Dept. of Transportation, 659 P.2d 1189, 1194 (Alaska
12 1983) (approved fee award based on "the average private billing rate" -- \$75 per hour, 14
13 years ago); Morrison-Knudsen Co., Inc. v. State, 515 P.2d 834, 844 (Alaska 1974) (Alaska
14 Supreme Court specifically rejected argument that state could not recover attorney's fees
15 at a rate higher than hourly salary of highest paid assistant attorney general who worked on
16 the case).

17 The Attorney General has worked to identify a uniform reasonable market
18 rate upon which to base attorney fee requests that will more fairly reimburse the State of
19 Alaska for its fees as a prevailing party. See Affidavit of Counsel. This was necessary
20 because the department's historic rate formulae and the newer universal blended rate
21 formula all produce figures far below the market rate and value of the services rendered,
22 and because Civil Rule 82 provides for only 20 percent reimbursement of actual fees where
23 there is no trial or money judgment and 30 percent where the case goes to trial. Based on
24 the recommendations of a working group tasked with assessing the Department of Law's
25 policy on attorney fee requests, the Attorney General established in 1997 a policy to request
26 \$150 per hour as the market rate for journey level attorneys (Attorneys III and above). *Id.*
This decision was based on the working group's review of attorney billing rates statewide,
a similar policy in the U.S. Attorney's Office, and the fact that the average rate (typically
reflecting a discount for the state) that the Department pays experienced private

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

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

1
2 practitioners to provide legal services to the state under contract exceeds \$150 per hour.
3 Id. The rate of \$125 per hour was approved for less experienced attorneys. Id.

4 In the case at bar, the court granted all defendants summary judgment,
5 dismissing the case with prejudice. In pursuing its defense, the state's attorney's fees,
6 calculated using the market rates described above, amount to \$8,325.00. Affid. Of Counsel.
7 A copy of the billing print-out detailing the work done and time spent relative to this case
8 is attached as Exhibit A. The state's counsel of record in this case, Susan Cox, holds an
9 Attorney VI position, and has been practicing law over 15 years. She consulted as needed
10 with Assistant Attorney General Shannon O'Fallon, who handled the guardianship
11 proceeding that was at issue in this case; her hours are also reflected in Exhibit A. The
12 attorney hours expended in defending this action total 56.1 hours: 52.5 for AAG Cox and
13 3.6 for AAG O'Fallon. The billing print-out reflects an attorney hourly billing rate of \$150
14 per hour for AAG Cox, and \$125 for AAG O'Fallon. The totals are 52.5 hours at
15 \$150/hour or \$7,875.00, and 3.6 hours at \$125/hour, or \$450.00, for the combined total of
16 \$8,325.00.

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

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

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

1
2 **II. CONCLUSION**

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

5 DATED: 9/30/98

6 **BRUCE M. BOTELHO**
7 **ATTORNEY GENERAL**

8 By: *Susan D. Cox*

9 **Susan D. Cox**
10 **Assistant Attorney General**
11 **Alaska Bar No. 8611136**

12 This is to certify that on September 30, 1998, a copy of the foregoing was mailed to the attorney or party of record: Gregory A.
13 Shapley, Pro Se, PO Box 85, Craig, AK 99921; Michael Lesmeier, Esq., Lesmeier & Winters, 124 W. 5th Street, Juneau, AK
14 99801 (Attorney for Dr. Johnson)

15 *Pamla Credo-Hayes*
16 **Pamla Credo-Hayes**

17 DATED: September 30, 1998

18
19
20
21
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23
24
25
26
ATTORNEY GENERAL, STATE OF ALASKA
EDMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

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

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

GREGORY A. SHAPLEY,

Plaintiff,

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

Defendants.

Case no. 1KE-97-117 CI

AFFIDAVIT OF COUNSEL

STATE OF ALASKA

FIRST JUDICIAL DISTRICT

ss.

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

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

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

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

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

AFFIDAVIT OF COUNSEL

1

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

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

1
2 3. I have determined both that the information presented in Exhibit A is
3 correct, and that the time listed was necessarily spent in defending this matter. I do not
4 believe that any of the work performed in this case was unnecessary or duplicative. I do
5 believe the total amount of time and money expended on behalf of the state is reasonable.

6 4. The attorney time set forth above was billed, for the purposes of this
7 motion, at market rates approved by the Attorney General. Although the state bills client
8 agencies at a rate far below the market rate of attorneys in private practice (the uniform
9 overhead billing rate was \$94.72 per hour in fiscal year 1998), the Attorney General
10 established in 1997 a policy which would more fairly reimburse the state for its fees as a
11 prevailing party. To that end the Attorney General approved the hourly rate of \$150 as the
12 market rate for journey level attorneys (Attorneys III and above). This rate was based on
13 the recommendations of a working group tasked with assessing the Department of Law's
14 policy on attorney fee requests. After reviewing attorney billing rates statewide, the policy
15 in place at the U.S. Attorney's Office, and the fees paid by the state to experienced private
16 practitioners who provide legal services to the state, the working group determined that
17 \$150 per hour was a reasonable rate which would more fairly reimburse the state for its
18 legal services. The rate of \$125 per hour was approved for less experienced attorneys.

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

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

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

AFFIDAVIT OF COUNSEL

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

5 Further your affiant sayeth naught.

6 DATED: 9/30/98

7
8 *Susan D. Cox*
9 Susan D. Cox

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



Susan D. Cox
Notary for the State of Alaska
My Commission expires: 2000

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

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

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

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

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

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

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

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

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

The Subcommittee obtained from the Department a copy of a solicitation from one of these types of review services. On balance, the Subcommittee believes that it may be useful to test the feasibility of the use of these types of services on a limited, experimental basis and recommends that a pilot project be developed by the Department and the Division of Legislative Audit. The Subcommittee does not endorse a particular outcome for this pilot project, but believes that it may be useful to explore whether the State should consider this matter further.

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

During the course of Subcommittee deliberations, a discrepancy was noted in the hourly rate charged by the Department of Law to client agencies and the rate that the Department utilizes when making presentations to the courts on the costs of litigation.

Any discussion on potential privatization of services will at some point consider and compare the cost of contracting representation out to private attorneys and the costs of retaining the matter in-house. The Subcommittee generally believes that fully comparable data regarding such costs is

needed and further that the Division of Legislative Audit is best equipped to gather, analyze and compare this information.

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

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

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

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

There was broad support on the Subcommittee for action by the Legislature on the "pay-to-play" issue. The American Bar Association has appointed a task force to consider this issue and the task force has forward proposed amendments to the rules of professional responsibility to the ABA House of Delegates. These materials are included with this Report. The Department told the Subcommittee that it was aware of this issue but did not elaborate as to what steps, if any, it may have taken to address the issue. In general, the Department has expressed confidence in the existing procurement rules and process.

The Subcommittee believes that the process for selection of outside counsel by the Department

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

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

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

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

While qualified and competent, the legal staff of the Department is by no means infallible and may, at times lack all the expertise which may be desirable for particular types of cases which pose the risk of significant financial liability to the State. At the same time those in supervisory roles are also advising or actually making decisions on litigation strategy. The Subcommittee believes that it may be prudent to install mechanisms which permit and perhaps even require the Department to consult with known litigation experts for cases with major liability.

The Subcommittee lacked the time to further develop suggestions on how to accomplish this result. One idea was to establish a consultation process through the Division of Legislative Audit.

The contracting procedures provided by the Department of Law include identification of the litigation plan and objective as part of the contract monitoring process. This definition of the litigation objective may be an appropriate requirement in each case and would provide a measure which legislature audit or any other audit or oversight body might utilize to evaluate the effectiveness of both the department of law and contract counsel.

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

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

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

...forward a recommendation to the Attorney General, or his designee, as appropriate, for consideration and action. All settlement decisions include the input of the state agency implicated by the settlement decision.

Final settlement authority rests with the Attorney General, who may delegate final approval based on departmental policy. (Emphasis added)

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

Status of the Attorney General

It is important to note that the Attorney General is not specifically provided for in the Alaska Constitution. Rather, the Attorney General by statute is but one of the heads of the departments

of state government appointed by the Governor. At the Constitutional Convention, the following was said about the status of the Attorney General:

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

Alaska Constitutional Convention Proceedings, Page 2221, comments of Delegate Davis. (Emphasis added)

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

The 1991 Opinion

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

The Subcommittee recommends that the 1991 Opinion be examined by the Commission but with reference to the statement of Delegate Davis regarding the status of the Attorney General. In the hands of the Department, the office of Attorney General is expanded from a statutorily created office into a broadly based¹ office with additional common law powers² which may not be

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

² See Opinion at page 13-14: "In that respect, the Attorney General has broad common law powers and responsibilities;" and page 15: "Alaska takes a similarly expansive view of the Attorney General's common law powers." These statements appear to be flawed. To the extent

limited.³ Fortunately, the 1991 Opinion cannot supercede the Alaska Constitution or rewrite the Alaska Statutes. The Alaska Supreme Court in *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975) notes that the basis for the Attorney Generals common law powers is statutory, AS 44.23.020 and that such common law powers exist "... except where they are limited by statute or conferred upon some other state official." *Id.*

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

The Subcommittee subscribes to the proposition that the duties and powers of the Attorney General should derive solely from the Alaska Constitution and legislative enactments. In the view of the Subcommittee, the effective, efficient and responsive delivery of governmental legal

that the Alaska Attorney General has common law powers, they are granted by the Legislature in AS 44.23.020 (b)(7).

³ See Opinion at page 24-25: "Given the absence of any such express prohibition it is unnecessary to speculate concerning the issue whether and to what extent the Legislature might prohibit the Attorney General from so settling the litigation. However, it is clear that the separation of powers doctrine would restrict any legislative attempt to intrude on the executive branch's discretionary authority to conduct litigation in the State's interest." Contrast this view with the limited view of the Attorney General expressed by Delegate Davis during the Constitutional Convention. The Opinion's statement might be correct if it is referring to the Governor's constitutional power, but the issue is the Attorney General's power, not the Governor's. The Subcommittee does not believe it is as "clear" as the Department suggests.

See also page 26, footnote 27: "Some courts have held that the legislature may not restrict the attorney general's common law powers." The Opinion cites *Gust K. Newberg, Inc. v. Ill. St. Toll Hwy.*, 456 N.E.2d 50 (Ill. 1983) and *Murphy v. Yates*, 348 A.2d 837 (Md. 1975) for this last proposition. The Subcommittee read the cases and found the results revealing.

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

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

services will be obtained by reemphasizing the legislative basis for the Department's acts and the limited nature of the State's resources.

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

Sec. 44.23.010. Attorney general.

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

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

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

(b) The attorney general shall

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

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

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

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

(5) draft legal instruments for the state;

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

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

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

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

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

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

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

Approach of the Subcommittee

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

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

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

To a very considerable degree, each of the subjects inquired into on the part of the Subcommittee have, in one way or another, hinged on the exercise of discretion on the part of the leadership of the Department of Law. The Department of Law is also unique among the departments of state government in that with the exception of a handful of individuals, all of the professional employees of the Department are either exempt or partially exempt State employees who serve at the pleasure of the agency head, the Attorney General, and ultimately the Governor. There is clearly more discretion exercised in carrying out the functions assigned to the Department than in any other executive Department of State government. Any of a number of expressions may describe the situation: "Beauty lies in the eyes of the beholder;" "The glass may be half-empty or half-full;" "Where you stand depends on where you sit."

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

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

Subcommittee meetings and process

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

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

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

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

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

1. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting functions currently performed by the Office of Special Prosecutions and Appeals. In particular, the handling of appeals and the issuance of opinion letters should be examined.
2. The Legislative Finance committees should hold hearings to develop criteria and a process to assess the feasibility of contracting the misdemeanor prosecution function after intake screening.
3. The Subcommittee recommends that the Legislature conduct specific hearings on the issue of the allocation of the costs and responsibilities for criminal prosecution between the State and local governments. Such hearings could and perhaps should be expanded to address the provision of police services. The Subcommittee believes that the goal of these hearings should be to develop a consistent statewide approach to the delivery of criminal justice functions which recognizes the varying level of resources available to local governments.
4. The Subcommittee believes that it should be the policy of the Legislature that all privatization efforts which are undertaken regarding the Department of Law should result in commensurate reductions in staff.
5. The Subcommittee recommends that the Legislature develop and enact additional measures to ensure that the selection of legal services contractors by the State is as objective as possible. The Subcommittee believes that the use of the of a pre-qualified list of potential providers would be a useful tool.
6. The Subcommittee recommends that the Legislature require the Department to develop in consultation with the Division of Legislative Audit a pilot project to test the feasibility of the use of a outside audit firm to assess the costs incurred in litigation. Such firms are presently utilized in the private sector. The Subcommittee believes that the pilot project may be best tested in tort cases.
7. The Subcommittee recommends that the Legislature direct the Division of Legislative Audit to determine the full and fair value per billable hour of legal services rendered by the Department of Law and ensure that the rates are consistently applied in the budgeting process pertaining to the Department. Following completion of this task, the Subcommittee recommend to the Legislature that it examine whether legal services rendered by the Department should be billed at different rates for different services. The Subcommittee is generally of the view that the Department's

costs of service should distinguish between routine and complicated legal services.

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

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

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

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

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

(8) subject to the power of the legislature to make appropriations, settle cases for the collection of revenue, in which the state is a party and which involve a violation of state law; and

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

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After a description of the internal process utilized by the Department in evaluating proposed settlements, the Department states the local case assessment committee will

...forward a recommendation to the Attorney General, or his designee, as appropriate, for consideration and action. All settlement decisions include the input of the state agency implicated by the settlement decision.

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

It is important to note that the Attorney General is not specifically provided for in the Alaska Constitution. Rather, the Attorney General by statute is but one of the heads of the departments of state government appointed by the Governor. In this respect, the Attorney General holds no greater status than that of the heads of any other executive department. From a constitutional perspective, the Attorney General derives power from the Governor under Article III, Section 16, who is charged with the responsibility for the faithful execution of the laws. The Legislature has extended to the Attorney General by statute, AS 44.23.020, certain powers.

The Department of Law has added to the above framework

In responding to the Subcommittee, the Department described the legal authority of the Attorney General to enter into settlements and cites the case of *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950-51 (Alaska 1975) and AS 44.23.020. In the *Public Defender Agency* case, the Alaska Supreme Court stated that



FACSIMILE TRANSMISSION COVER SHEET

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DATE: September 30, 1999

FROM: JOAN KASSON
SPECIAL ASSISTANT
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Total number of pages including this cover sheet: 1;

Please deliver the following pages to: **SCOTT BRANNEN-ERICHSEN** c/o Ketchikan LIO; **BLAKE CALL, REP. JOHN COWDERY, MARK JOHNSON, RICHARD MCVEIGH, WILLIAM O'BRIEN, c/o Rep. Cowdery's Office; BETTY ROLLINS, BILL SATTEMBERG, c/o Fairbanks LIO**

FAX NO: (907) 225-8546
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(907) 456-3346

MESSAGE: Addressees are members of the Commission on Privatization and Government Services Subcommittee on the Department of Law. They will be attending the teleconferenced meeting of the subcommittee scheduled for 11:30 a.m., September 30, 1999. I would appreciate if you could provide copies of this transmission to them when they arrive at the meeting. A copy will be hand-delivered to Juneau member, Bruce Weyhrauch. Thank you for your help.

**Please inform us immediately
if you do not receive this transmission in full
(907) 465-2133 Ask for: Kathy**

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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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.

Mark K. Johnson
Attorney at Law

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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).

Mark K. Johnson
Attorney at Law

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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 judgment 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 2nd 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.

Mark K. Johnson
Attorney at Law

September 30, 1999
Page 4

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 Committee 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

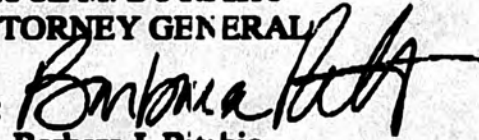
September 30, 1999
Page 6

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 EXPENDITURE :

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

JUDGMENTS/CLAIMS/SETTLEMENTS FOR PAYMENT

(Please Type)

****This form will be used for the purpose of standardizing the submission of claims to the Legislature. Complete and accurate information will expedite payment to the claimants, thereby reducing the amount of interest required to be paid by the state. If any of the information changes, please immediately advise the Director, Administrative Services Division, P.O. Box 110300, Juneau, AK 99811, or call (907) 465-3673.**

PART ONE

1. Case Name:
2. Case Number:
3. Judge/Justices:
4. Date Judgment entered:
5. Did the date of the cause of action accrue on or after August 7, 1997?
6. Amount to be paid:
7. Interest Rate: Effective Date:
8. Requested hourly rate and total compensation of attorneys to be paid:
9. Court approved/ordered hourly rate and total compensation of attorneys to be paid:
10. Payable to:
11. EIN: or SSN:
12. Send check to: _____ above address Departmental contact: _____
Departmental attorney contact: Departmental Approval:

Name_____
Deputy Attorney General_____
Telephone Number_____
Date

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:

Date:

Title

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); Koily 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
Biss & Holmes	Construction Claims; Investment Contract Litigation
Camey, 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 & Maaser	Oil & Gas; State's Rights
Douglas K. Mertz	Regulations
Foreman, Arch, Dodge, Volyn & Zimpo	Collections
Foster, Pepper & Shafelman	Bond/Investment Counsel
G. Thomas Koester	Mental Health Lands; Natural Resources; Oil & Gas; State's Rights
Gmh. Enders & Price	(See Gruis, 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
Hosle, Frost & Large	Consumer Protection/Antitrust; Oil & Gas
Hosle, Wes, Sacks & Breleford	(See Hosle, Frost & Large - firm name change)
Ikon Office Solutions	miscoded; printing charge
Jeff Kilip	Child Protection
Jensen, Harris, Roth	Construction Claims
Jermaln, Durnagan & 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
 Marvin S.C. Dang, Law Offices
 Michael A.D. Stanley
 Milton B. Barker
 Mooers & Associates
 Morrison & Foerster
 Mot, Inc.
 National Association of Attorneys General
 Owens & Turner, P.C.
 Pachulski, Stang, Ziehl et al
 Partnow, Sharrock & Tindall
 Partnow, Sharrock & Tindall (c/o trust account)
 Perkins Cole
 Preston, Gates & Ellis
 Price & Price
 Price & Swan
 Reid & Riege, P.C.
 Ringert Clark Chartered
 Robertson, Monagle & Eastaugh
 Ruddy, Bradley & Kolkhorst
 Sarah E. Gay
 Savage & Associates
 Simpson, Tillinghast, Sorensen et al
 Stephan H. Williams
 Susan M. Reiter
 Washburn, Briscoe & McCarthy
 Welborn, Sullivan, Meck & Tooley
 William Brian Prince
 Williams, Kastner & Gibbs, LLP
 Wilson-Epes Printing Co.
 Wohlforth, Argatsinger, Johnson et al.
 Wohlforth, Vassar, Johnson, et al.

miscoded; expert witness
 Collections
 State's Rights
 Commercial (paralegal services)
 Collections (investigator/paralegal services)
 Bond/Investment Counsel; Oil & Gas
 miscoded; expert witness
 miscoded; dues
 Employment; Technology/Patent
 Investment Contract Litigation
 Oil & Gas
 Oil & Gas
 (See Hsieh, Frost & Large - firm name change)
 Bankruptcy; Bond/Investment Counsel; Environmental; Oil & Gas; Consumer Protection/Antitrust; Employment
 Real Estate
 (See Price & Price - firm name change)
 Commercial
 Collections
 Criminal Prosecution; Environmental
 Environmental
 Regulations
 Collections
 Constitutional; Regulations
 Oil & Gas
 Collections
 Oil & Gas; State's Rights
 Oil & Gas
 miscoded; can't identify older vouchers
 Real Estate
 miscoded; printing charge
 (See Wohlforth, Vassar, Johnson, et al. - firm name change)
 Real Estate



and Delivery of Government Services

www.privatizealaska.org

NOTICE OF SUBCOMMITTEE MEETINGS

Subcommittee Name: **DEPARTMENT OF LAW**
Chairperson: Mark Johnson
Phone: 345-3850

Committee Members:

Mark Johnson	Scott Brant-Erichsen
John Cowdery	William Oberly
Betty Rollins	Bruce Weyrauch
Bill Satterburg	Joan Kasson
Richard McVeigh	Blake Call
Pete Kinneen	

Date: **THURSDAY, October 7, 11:30 AM**

Place: Legislative Information Office
716 W. 4th Avenue
Second Floor Conference Room
Juneau, Mat-Su, Ketchikan, Fairbanks & Anchorage
LIO Teleconference On-line

If you have any questions please call Representative John Cowdery's office at 269-0222 or Senator Wards office at 269-0106.

The web site has a current list of members and schedule of meetings posted daily!

www.privatizealaska.org

6 total pages

LAW OFFICES
WILLIAM R. SATTERBERG, JR.

FAX (907) 452-3988

ATTORNEY AT LAW
709 FOURTH AVENUE
FAIRBANKS, ALASKA 99701
(907) 452-4454

October 4, 1999

Mark Johnson, Chairperson
Legislative Subcommittee
13631 Windwood Circle
Anchorage, AK 99516

Dear Mr. Johnson:

This letter is being written due to the fact that I may not be available for the meeting which is scheduled to take place on October 7, 1999. Might you please circulate this letter to the other committee members?

I wish to memorialize some thoughts and concerns which I currently have.

I believe that procurement is a major issue to be considered by the Privatization Subcommittee. Issues involving procurement should include not only the "pay for play" issues regarding campaign donations, but expanding that concept to include non-economic payment by various individuals or firms to members of administrations. For example, one may find that close personal friendships exist. One may also find that political support was given in the form of endorsement ads or activity to an individual's campaign. Other types of support which did not show up in the economic arena may also exist. All of these matters should be disclosed during any procurement process.

A second issue to be considered, as discussed on September 30, 1999, is that there is a natural friction between having the Department of Law monitor outside contractors, cost control, and selection of contractors. Needless to say, there are concerns which I have expressed that State employees, for bureaucratic reasons, may wish to make outside contractors look non-economically beneficial in order to justify continuing in-house work. One can accomplish this objective by allowing large bills to go through unchallenged, thus justifying the argument that it is cheaper to do litigation internally. This is why an outside bill review company is necessary - to provide impartiality of billing review.

An outside audit company also removes much of the possibility of any political patronage being utilized to secure payment of the bills in the event that a law firm has received an assignment from the Department of Law. For example, if Attorney

Mark Johnson, Chairperson
October 4, 1999
Page 2

A has been a strong supporter of the governor, or is a close personal friend of a member of the Department of Law, Attorney A may play upon that "connection" to secure payment of an inordinately large bill.

I understand that insurance company USAA currently is utilizing a company to evaluate billings on the basis of a legal audit. Hopefully, the Department of Law will furnish us in the near future with companies which have approached the Department of Law on the issue. I cannot understand why such companies will agree to only perform these services in large cases. In point of fact, it would appear to me that there should be many companies out there that would be happy to have the business. Two such companies, I understand, are LAS (Law Audit Services) and Examen.

I believe that privatization is a good concept, but controls need to be established to avoid excess overpayments, political patronage, and selection of contractors on the basis of considerations other than quality of work, and objective standards.

I should also suggest to the committee that we consider the possibilities of cost cutting with respect to the Department of Law by requiring various municipalities which have prosecutors' offices in place to handle those cases which are a misdemeanor level and referred for prosecution by the police arms of those municipalities. Although I recognize that not all municipalities have prosecuting authority, or the mechanisms in place to do prosecution, the fact of the matter is that significant crimes could be prosecuted in cities such as Anchorage and Fairbanks (and probably Juneau), by the municipal prosecutors, thus resulting in a significant cost savings to the State of Alaska in what proposes to be an increasingly tight budget situation. Although this is not privatization in the absolute sense, it nevertheless is a significant step of divesting the State of Alaska of significant expenses in criminal prosecution.

Otherwise, I concur with the Department of Law that criminal prosecution should remain with the government as opposed to the private sector. Special exceptions could, of course, always exist. One of the primary concerns would again be the runaway prosecutor, and the ability to litigate someone into submission.

Economics are a sad fact of life. To the same degree that many criminal defendants must curtail their defense due to economic sanctions, so, should the State of Alaska be held to the

Mark Johnson, Chairperson
October 4, 1999
Page 3

same considerations and burden. Although discussion was had of this matter on September 30, discussion does not necessarily mean that a practice of controlling cost of prosecution actually is in place.

With respect to cost control measures, it is my personal opinion that the only way that one can successfully cut a budget is to establish a spending limit first, rather than afterwards. In short, the Department of Law is told how much money it has available in its budget, and is limited to that amount of money. The Department then has to make the appropriate adjustments with respect to what cases it does or does not handle, and to what degree. It is called "triage." The private sector is no different. If a law firm has only \$1,000 available to purchase various supplies, decisions have to be made with respect to what supplies will or will not be purchased.

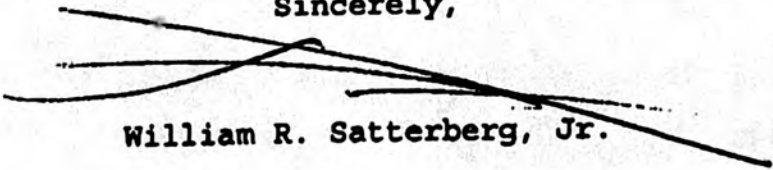
One suggestion which was made during the September 30, 1999, meeting was that private contractors should be told how much the State of Alaska is willing to pay for a particular service, and then allow themselves to bid into that service, as opposed to simply taking a request for proposals in issuing contracts. A similar consideration would be a "do not exceed" limit, which some insurance companies are now considering whereby outside fee counsel must agree that the legal services in a case cannot exceed a particular set amount of funds, computed at an hourly rate. Once again, controls are established.

To wrap it up, I believe that privatization generally is a good concept, and is even more compelling given the budget crunch. Controls should be established in privatization, however, to insure not only quality of service, but propriety of the contracting process with respect to "pay for play" and political patronage. Limitations must be set on the amount of money which can be spent by either the Department of Law, internally, or outside contractors. Consideration should also be given to utilizing municipalities to engage in prosecution of criminal cases, where dual authority exists, and where municipal police agencies are performing the arrests. Finally, establishing contractual limits on the amounts that an outside contract legal firm can spend in a case would do much to restrict unlimited, "blank-check" types of litigation, which, it is

Mark Johnson, Chairperson
October 4, 1999
Page 4

submitted, has occurred in the past, and will most likely continue to occur.

Sincerely,


William R. Satterberg, Jr.

WRS/ml

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

August 6, 1999

Mr. Bruce Botello
Attorney General
State of Alaska
Juneau, Alaska 99811

Dear Attorney General Botello:

As you know, Governor Knowles recently signed into law Chapter 61, SLA 1999, which establishes the Commission on Privatization and Delivery of Government Services. Public and legislative members of the Commission have been appointed and the Commission has conducted an initial organizational meeting.

The legislation requires that the Commission examine a number of aspects of the delivery of services to the public and make recommendations designed to provide for the more efficient and effective delivery of those services, including the transfer of functions to entities outside of government. The legislation also calls for a review state contracting policy and procedures, including competitive bidding procedures;

Chapter 61 SLA 1999 also provides for the formation of advisory councils to assist the Commission in carrying out the tasks assigned by law. I have been appointed by the Commission to chair the Subcommittee to examine the Department of Law.

The Department of Law is somewhat unique among State agencies insofar as a significant number of matters have been assigned to outside counsel over the years.

To assist the Subcommittee in making a quick start on our tasks, we would appreciate a summary of the following information for the past six years:

Matters Assigned to Outside Counsel

Subject	Number of matters	Fees paid
Bankruptcy		
Debt Collection		
Liability		
Natural Resources		
Oil & Gas Taxation		
Other Civil (categorize as appropriate)		
Other		

In order to ease the Department's workload, the Subcommittee would be amenable to reviewing previously produced reports that contain the above data.

In addition to the above, the Subcommittee would like to request the Department's responses to the following questions:

1. What non-legal services does the Department acquire from outside sources?
2. Does the Department have a written selection process for outside counsel? If so, please provide copies.
3. As to legal matters, what criteria are used to determine if civil matters are to be handled by outside counsel?
4. Does the department have written policies setting out those criteria? If so, please provide copies.
5. What safeguards exist to ensure an objective selection process for selection of outside counsel?
6. Has the Department (or reviewing agencies such as OMB) conducted studies on effectiveness of inside and outside counsel?
7. Has the Department analyzed and compared damage awards in cases handled by outside counsel and compared those awards to matters handled in-house?
8. As philosophical matter, Is there any room for the selection of outside counsel for certain criminal matters? If so, would statutes have to be amended?

9. What procedures exist for monitoring work of outside counsel?
(A) As to matters of substance? (B) Financial administration of outside cases.
10. Very significant amounts of money have been expended in past years for the retention of outside counsel for oil and gas taxation matters. What is the approach of this Administration to such matters?
11. Is the Department aware of the "pay to play" issue which has been the subject of an ABA task force?
12. Does the Department perform any functions which would not be considered the rendering of legal services to the State — that is are there any functions which could be viewed as "general government" services?

The Subcommittee would like to obtain the Department's responses to the above inquiries by the end of August. We may have additional and follow-up questions. We would also invite the Department to submit any other information which it believes may be of assistance to Subcommittee during this process.

The Subcommittee plans on meeting four or five times before issuance of recommendations to the Commission in mid-October. We anticipate two sessions for the taking of testimony. We would appreciate an appearance by a representative of the Department at one or possibly both of those sessions. We have been informed that the State's teleconference network will be available for this purpose and two members of the Subcommittee are from Juneau.

At this writing, most if not all of the members of the Subcommittee are members of the Alaska Bar and I would anticipate that all of our work will reflect the time demands of our membership as well as those of the Department. We expect to spend little, if any, time on specific matters which are the subject of active litigation. Our focus is legislative — that is most concerned with policy. Your cooperation in making this process both expeditious and smooth will be appreciated.

An organizational meeting of the Subcommittee will occur before the end of August. We look forward to working with the Department in the weeks ahead.

Sincerely,

Mark K. Johnson
Chairman
Subcommittee on the Department of Law



HOME
ABOUT US
MEMBERS
SUBCOMMITTEES
SCHEDULE
NEWS
RESOURCES
CONTACT

Suggested Outline for Subcommittee Reports

I. Agency & Department Name

II.. BRU and Component Names as listed in state budget

III Total Budget, all funds

- Identify fund sources

IV. Total Revenue derived

- Net cost/income to state

V. Identify Constitutional and Statutory Provisions Governing Agency Operation

VI. Agency Mission, Goals and Objectives

- Do reality check

VII. Number of Employees

- Identify Specialized Expertise Needed for Mission

VIII. Describe Technology Used to Perform Mission

- Identify Specialized Equipment Needed for Mission

IX. List Existing Agency Contracts including amount, contractor, purpose, term, and procurement method

X. Identify Existing Privatization Practices, if any. Evaluate them for effectiveness and public accountability

XI. Make Recommendations per Section 5 in SB 33, including suggestions for new legislation.

XII. Explain rationale for each recommendation, the number of votes for and against it.

XIII. List problems or barriers to implementing proposed privatization.

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The Commission on Privatization and Delivery of Government Services.

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PRACTICE AREAS

SECURITIES LAW

Compromise Pay-to-Play Rule Adopted

ABA Delegates Request New Ethics Restriction

New York Law Journal
August 5, 1998

BY DOMINIC BENCIVENGA

TORONTO -- The American Bar Association's House of Delegates yesterday took the first steps toward prohibiting attorneys from giving political contributions to obtain work by overwhelmingly adopting a resolution calling for a new ethics rule, but shifting a key battle on how to limit contributions to the states.

The compromise resolution to eliminate the contributions-for-work arrangements known as "pay to play," closely followed recommendations put forward last month by the ABA Task Force on Lawyers' Political Contributions.

TEXT OF RESOLUTION -- PAGE 3

The measure urges state and local bar associations to condemn pay to play and directed the Ethics and Professional Responsibility committee to develop a new ABA model rule -- which will be considered at next year's annual meeting -- making clear that lawyers and law firms shall not contribute or solicit for political campaigns to obtain legal work. It recommended that state and local governments, or local bar groups, establish "full and effective" disclosure of lawyers' contributions, and encourages governments to use competitive selection processes for legal work.

No Outright Ban

The resolution, 301A, is weaker than the task force proposal in one important respect: it stopped short of adopting an outright ban on lawyers who donate more than \$500 or raise more than \$3,000 for candidates from working for those municipalities for two years. The task force proposal presumed that any donation above those limits is made for the purpose of obtaining work, and shifted the burden to the attorneys to explain the contributions.

Instead, the ABA resolution calls on state groups governing attorneys to consider their own rules to prohibit lawyers from contributing to obtain work.

Proponents of the rule noted that any recommendations from the ABA would have to be approved by the states, and that the compromise was essential for the measure's approval.

"It's a major step," said Harvey J. Goldschmid, who was a task force member before becoming general counsel of the Securities and Exchange Commission. "There is more to do ... but this was a very important step."

City Bar Reaction

Representatives of the Association of the Bar of the City of New York, who have been working on a pay to play ban since 1995, hailed the vote, even without the proscriptive rule. They pointed out that a new Model Rule would establish that giving contributions to obtain work is unethical. The City Bar presented its own plan to end pay to play at last year's annual meeting, working with the Securities and Exchange Commission, which prompted the ABA to condemn the practice and appoint the task force.

"I'm elated," said Michael A. Cardozo, former City Bar president and a partner at Proskauer Rose LLP. "We're going to have an ethical rule. That's critical."

The compromise, which was completed Monday, capped a week of intense negotiations over the task force report. ABA Immediate Past President Jerome J. Shestack, the task force members, and representatives of the Association of the Bar of the City of New York, supported a stricter standard. Opponents included members of the ABA's State and Local Government Section, which proposed amending existing model rules to address pay to play, and representatives of the Administrative Law and Natural Resources sections.

Critics of the proposal tried unsuccessfully several times during the 90-minute debate to amend the resolution, arguing that there is little solid evidence that attorneys give donations to obtain work. Attorneys should not have to carry the burden of proof on giving donations, nor should they have to explain why they choose to donate to a candidate, they said.

Alternative Defeated

Incoming Ethics Chairman Peter M. Moser argued that the Ethics Committee should not be directed to create a rule until it was clear one is needed. Task Force member David E. Cardwell, a partner at Holland & Knight in Orlando, sought to give the Ethics Committee the option of rewriting existing Model Rules, a measure that was narrowly defeated, 158-151.

But the resolution's supporters, including Mr. Shestack, Mr. Goldschmid, Mr. Cardozo and John W. Martin Jr., the task force chairman, repeatedly and forcefully urged the delegates to end the debate and approve the resolution.

"How long should we consider this?" Mr. Shestack said. "The word 'consider' here is a cop-out ... We need a rule here."

The resolution will be sent to the ABA Ethics Committee, which will draft a model rule. The House of Delegates must approve the rule before it is sent to the states for adoption. Consideration of task force recommendations to limit lawyer contributions to judicial races was postponed until February.

Debate Continues

The loss on the immediate adoption of the rule does not mean the end of the debate over pay to play. Any proscriptive rule would have to be adopted by states, and City Bar officials contend that most of the problem will be resolved if large states including New York, California, Illinois, Texas or Florida agree to some type of rule.

"If we get any major state, the others will be hard-pressed not to fall in line," Mr. Cardozo said. "If the changes have to be approved by a legislature, though, it will be much harder than in New York, where the

Administrative Board can do it with the stroke of a pen."

The New York State Bar Association appointed its own task force to study pay to play, which is scheduled to report in November and is closely monitoring the ABA debate, said task force chairman A. Thomas Levin, a partner at Meyer, Suozzi, English & Klein P.C. The state Administrative Board of the Courts is awaiting the results of the State Bar study before it takes action on the City Bar's pay to play proposal, he said.

City Bar officials have not decided whether to leave their proposal with the Administrative Board, or submit the ABA rule for consideration.

Following is the text of the resolution:

Text of Resolution

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:

1) All state, territorial and local bar associations should unequivocally condemn any arrangement under which the selection or consideration of lawyers to be retained for government legal engagements depends, in whole or in part, on whether the lawyer had made or solicited campaign contributions.

2) States, territories and local government entities should create, establish and maintain full and effective systems for the reporting and disclosure of campaign contributions to candidates for elective public office so that the public may have reasonable notice of contributions made by lawyers or law firms, and where they have not, bar and disciplinary authorities should adopt rules that require disclosure of campaign contributions by lawyers and law firms to government officials in a position to influence the award of legal engagements to the contributor.

3) Merit procurement processes should be adopted for the selection of lawyers performing legal services for government agencies as a means of ensuring that no political contribution or solicitation has influenced the selection.

4) 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 that declares that a lawyer or law firms 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 urges that a rule be considered for adoption that would limit or prevent 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.

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Center for Professional Responsibility

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/cprP2PFINIS.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, Tennessee 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 (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 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 under 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 Justice Scalia's concurring opinion, 500 U.S. at 276, the Court held that the Hobbs Act should not "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 for 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 from 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 retained 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 discourage 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 of 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 urg 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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August 31, 1999

Mr. Mark K. Johnson
Attorney at Law
13631 Windward Circle
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Dear Mr. Johnson:

The Attorney General has asked me to respond to your information request of August 6, 1999. The following information has been compiled by a number of people in the department¹, and I hope it will assist you and the subcommittee in your work.

Joan Kasson is the Attorney General's appointment as Department of Law contact for the subcommittee. She will be attending all meetings to provide what assistance she can. Depending on the nature of the testimony the subcommittee desires, other representatives of the department may be necessary. Cindy Cooper, the Deputy Attorney General for the Criminal Division, and I look forward to providing the subcommittee with an initial overview of the Department of Law, its organization, and functions, at your September 9th meeting.

I would also like to suggest that the members of the subcommittee take the time to look at some of the department's monthly newsletters, posted on our web site at www.law.state.ak.us. They provide snapshots about the kinds of issues we deal with on a daily basis in both the civil and criminal divisions.

The responses to your questions are listed in the same order as your letter posed them. However the first item you requested was a summary of matters assigned to outside counsel by subject, with the total amount of fees paid, for the past six years. A summary is attached which lists, by subject, the number of outside counsel contracts the department entered into between July 1, 1993, and June 30, 1999, and the total amount paid. Contracts are further subdivided by how many are still active and whether the

¹ Cindy Cooper, Deputy Attorney General for the Criminal Division; Barbara Ritchie, Deputy Attorney General for the Civil Division; Dean Guaneli, Chief Assistant Attorney General, Criminal Division; Kathryn Daughette, Director, Division of Administrative Services; Bob Meiners, Deputy Director, Administrative Services Division; and Joan Kasson, Special Assistant to the Attorney General.