

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672

1180 SCOMM 35: JOINT SPEC. COMMITTEE ON LEGISLATIVE REFORM 1983-84

(11) "family" includes mother, father, spouse, children, parents in law;

(12) "financial gain" means economic benefit resulting from salary, gratuity, gift, or other compensation or remuneration from any individual, partnership, organization or association, or resulting from ownership or interest in a business entity.

CODE OF ETHICS

Any public office holder in a free government is entrusted with the security, safety, health, prosperity and general well-being of those whom he serves. With such a trust, high moral and ethical standards which produce the public's confidence should be the goal of every legislator.

FREE recommends that a code of ethics or standards of conduct be added to the uniform rules. Parameters for acceptable and unacceptable behavior must be drawn so that legislators know what kind of behavior to expect from one another. It is difficult to confront and correct unethical activities until the guidelines are drawn and understood by all.

General aspects of the Code of Ethics should include, but not be limited to, the following.

1. Any conflict between private interests and official duties must be avoided. No state legislator should accept any employment which could impair his independence and integrity of judgment nor should he exercise his position of trust to secure unwarranted privileges for himself or others. (Ref. Maine Legislative Code of Ethics, New Jersey Legislative Code of Ethics 2:1.a, California Joint Rules 44.(a)). :

2. Members of the legislature should not directly or indirectly receive or agree to receive any compensation for any services which one knows or has reason to believe is given with the intent of influencing him in the performance of his duties as a legislator. (Ref. New Jersey Legislative Code of Ethics 2:1.6, California Joint Rules 44.(3)).
3. Legislators should be directly responsible for the ethical conduct of their staff. (Ref. California Joint Rule 44(f), Florida House Rule 5.11).
4. Legislators should notify the leadership prior to taking any action or voting upon any bill in which he or any member of his immediate family has a personal or professional interest which ensures his private gain or the gain of any principal by whom he is retained or employed. The legislator should disqualify himself from the vote in which he has a conflict of interest. (Ref. Florida House Rule 5.10, California Joint Rules 44.(s), Pennsylvania Senate Rule 22.2, Washington State Constitution Article 2, Sec. 30).
5. Legislative staffs should not be assigned to campaign or fund raising duties; legislative staff should not be considered to be political organizations.

6. Legislators should be prohibited from raising campaign funds during the legislative session.

(Ref. New Jersey Legislative Code of Ethics 2:10.)

New Jersey has developed a comprehensive manual entitled "Legislative Code of Ethics" which would serve as an excellent resource instrument. In addition, North Carolina includes with their General Statutes a thorough "Code of Legislative Ethics".

It follows that once a Code of Ethics is established, some sort of mechanism needs to be implemented to deal with alleged violations. Many states have detailed disciplinary procedures which would make excellent guidelines. (Ref. Pennsylvania Senate Rule 37, 38, Illinois House Rule 12, New Jersey Joint R. 19(a,b), California Joint Rule 45(a-p), North Carolina General Statutes Article 14, Part 3).

Introduced: 4/25/83
Referred: Judiciary

BY THE RULES COMMITTEE
BY REQUEST OF THE
SPECIAL COMMITTEE ON
LEGISLATIVE REFORM

1 IN THE HOUSE

2

HOUSE CONCURRENT RESOLUTION NO. 33

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

Proposing the addition of a preamble

6

relating to ethics to the Uniform Rules

7

of the Alaska State Legislature.

8

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

9

* Section 1. The Uniform Rules of the Alaska State Legislature are
amended by adding a preamble to read:

11

P R E A M B L E

12

Part 1. CONDUCT OF A LEGISLATOR. (a) A member of the legislature

13

shall at all times engage in conduct that reflects creditably on the legis-
lature.

15

(b) A member of the legislature shall adhere to the spirit and

16

the letter of these rules and to other rules and law that govern legisla-
tive or official conduct.

18

Part 2. GENERAL PRECEPTS OF ETHICAL CONDUCT. A person in the legis-

19

lative branch should

20

(1) put loyalty to the highest moral principles and to country

21

above loyalty to persons or party;

22

(2) uphold the constitution and laws of the United States and of

23

the State of Alaska and never be a party to their evasion;

24

(3) seek to find and employ more efficient and economical ways

25

of getting tasks accomplished;

26

(4) not discriminate unfairly by the dispensation of special

27

favours or privileges to anyone, whether or not for remuneration;

28

(5) never accept, either personally or for a family member,

29

favours or benefits under circumstances that might be construed by

1 reasonable persons as influencing the performance of official or assigned
2 duties;

3 (6) make no private promises of a kind binding on the duties of
4 office, since a public officer or employee has no private word that can
5 override public duty;

6 (7) engage in no business with the state, either directly or
7 indirectly, that is inconsistent with the conscientious performance of
8 official or assigned duties;

9 (8) use no information coming to the public officer or employee
10 in the performance of government duties as a means for making a private
11 profit;

12 (9) expose corruption wherever discovered;

13 (10) uphold these principles, ever conscious that public office
14 is a public trust.

15 Part 3. READING PREAMBLE. When a temporary presiding officer has
16 assumed the chair under Rule 1(b) the temporary presiding officer shall
17 have this preamble read to the members before calling for nomination of the
18 permanent presiding officer.

Introduced: 4/27/83
Referred: Rules

BY THE RULES COMMITTEE
BY REQUEST OF THE
SPECIAL COMMITTEE ON
LEGISLATIVE REFORM

1 IN THE SENATE

2

SENATE CONCURRENT RESOLUTION NO. 21

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

Proposing the addition of a preamble

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relating to ethics to the Uniform Rules

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of the Alaska State Legislature.

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New York State Assembly

Executive Director
Earl S. Mackey

April 26, 1983

The Honorable Randy Phillips
Co-Chair, Special Joint Committee
on Legislative Reform
House of Representatives
Pouch Y
Juneau, Alaska 99811

Dear Representative Phillips:

In response to your telephone call to Candace Romig, I am enclosing copies of all of the documents which the National Conference of State Legislatures has prepared thus far in its work for the Special Joint Committee on Legislative Reform. I apologize for the oversight, but I had assumed that copies were being routed to you. I routinely have been mailing six copies of every document to Senator Faiks office for distribution to the committee members. In the future, we will make sure that copies are sent to you directly.

Enclosed with the letter are:

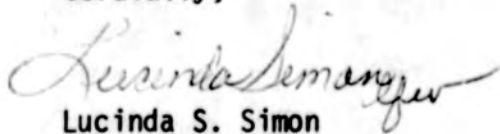
- an NCSL memorandum on legislative ethics to the committee;
- a workshop summary by NCSL staff of a committee discussion on March 22;
- a NCSL analysis of current Alaska law, pending litigation, and other states' ethics statutes prepared March 15, 1983;
- NCSL analysis of SB 198 and a bill submitted by the governor to the Rules Committee on legislative ethics; and
- the preliminary report by the NCSL to the Special Joint Committee on Legislative Reform.

As you know, in addition to the preparation of these documents, the NCSL staff has been in Juneau on three occasions for interviews and discussions with the committee. We currently are preparing the final project report for submission on May 15, 1983.

The Honorable Randy Phillips
Page 2
April 27, 1983

If you have any questions about the project and its progress,
please do not hesitate to call me. Again, I apologize for not
sending you these materials directly.

Cordially,

A handwritten signature in cursive script, appearing to read "Lucinda S. Simon".

Lucinda S. Simon
Program Director
Legislative Management

LSS/lw
Enclosures
cc: Candace Romig



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MEMORANDUM

TO: Special Committee on Legislative Reform
FROM: Candace Romig, NCSL
DATE: April 5, 1983
RE: REVIEW OF THE BILL SUBMITTED BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

AS 39.57.010. Perhaps the legislative findings should include a statement to the effect that high standards of ethical conduct in public office must be maintained and that public office must not be used for private gain. A statement might be included to emphasize that no public official can have any interest, business transaction or professional activity, or any obligation which would tend to impair the exercise of independent judgment in the conscientious performance of official duties.

AS 39.57.020.

(b) Prohibiting all conflicts of interest may be an untenable assertion, and describing an adequate mechanism to prohibit conflict of interest would be difficult. Conflict of interest legislation should be structured to minimize the instances in which a public official finds himself or herself confronted with a conflict of interest rather than to prohibit all such circumstances. The consensus of committee members and legislators who were interviewed is that a standing committee in each house would be the most acceptable form of control mechanism. Strong support has also been shown for having committee members from the public-at-large. Consequently, having an external body such as the APOC determine the appearance of potential conflicts would be a difficult position to champion. Definitions are needed for interests which are "relatively insignificant". The purpose of subsection (b) (2) is confusing and may actually be in conflict with the statement "All conflicts of interest are prohibited....."

AS 39.57.030.

(d) If the state and the municipalities were authorized to adopt policies to limit the extent to which officials could be awarded contracts, each governmental unit would have separate rules and regulations which could be confusing and conflicting. Who would adopt these policies with regard to the legislature?

(e) This section would proscribe contracts with the state or municipalities for individuals whose public employment had been terminated less than one year from the date of proposed contract which seems an unreasonable and an unworkable requirement.

AS 39.57.040. No comment.

AS 39.57.050.

(a) add: "in which the public official has input into the regulatory process affecting that interest." As the statute reads in its present form, public officials would be prohibited from owning stock in oil companies.

AS 39.57.060. Interests between public officials who are not in a supervisory capacity are not covered by this legislation. Early and complete disclosure of the potential conflict is not addressed. This section needs a mechanism to determine if an actual conflict exists similar to 39.57.030, 39.57.040, and 39.57.050.

Subsection (2) is unclear.

AS 39.57.070. Early and full disclosure provisions could minimize the potential conflicts of interest from gifts received or solicited by public officials from persons or groups who stand to benefit from action or inaction by the state or municipality.

AS 39.57.080.

(b) The purpose of this subsection is confusing. "Live-in" relationships are not covered by the definition of "relative".

AS 39.57.110.

(a) delete: "advise or assist a client for compensation", and substitute "represent a client for compensation."

(b) The meaning of this subsection is unclear.

AS 39.57.120. The general consensus of committee members is not to restrict employment of individuals after they leave the public's employ.

AS 39.57.130. This section seems superfluous in light of the other provisions. The purpose of this section is unclear.

AS 39.57.140. No comment.

AS 39.57.200. This section does not seem to apply to legislators. After a control mechanism is chosen to oversee the conflict of interest legislation with regard to the legislature, the powers of the ethics body must be delineated. Is the ethics body to have any enforcement power or will it be primarily an advisory group?

AS 39.57.210. No comment.

AS 39.57.220. General agreement seems to be that proceedings of the ethics body would be confidential under Rule 22 while the findings and ruling would be made public. The proposed legislation parallels one suggestion that proceedings be open to the public once it is determined by the ethics body that a probable violation exists. Consensus appears to be that the ethics body would have advisory powers only and would make recommendations to the appropriate legislative body for action.

AS 39.57.230. No comment.

AS 39.57.300. No comment.

AS 39.57.900. Definition of "person in close economic association" would seem instead to define "personal interest." The definition of "public official" appears to categorize relatives of officials as public officials. Add: definition for "sole source contract," "compensation," "fungible commodity," and "state and municipal agency."

WORKSHOP SUMMARY (prepared by NCSL staff)

Special Joint Committee on Legislative Reform
March 22, 1983

PARTICIPANTS

Senator Faiks
Representative Lacher
Representative Phillips
Jens Zehbe - Senator Faiks
Lewis Schnaper - Senator V. Fischer
Janet Seitz - Representative Phillips
Mike Ford - Representative Miller
Dianne Calvin - Attorney General
Candace Romig - NCSL
Ken Wonstolen - NCSL

I. SCOPE/COVERAGE

- A. Chair asked staff to concentrate on legislative ethics only at this time. AG representative indicated that the department was likely to suggest legislation covering other public officials.

II. CONTROL MECHANISM/POLICING BODY

A. Type

- 1) Standing committee in each house (5 in House; 3-5 in Senate). Most interviews confirmed this preference.
- 2) Rep. Phillips indicated preference for members from the public-at-large to be included for credibility purposes. Sen. Ray also preferred external participants and suggested that the Governor be allowed to appoint 2 representatives.

B. Selection process (no consensus from interview)

- 1) By presiding officers (guarantee of minority representatives).
- 2) By presiding officer and majority/minority leaders.
- 3) Few ideas on method of appointing citizen members.

C. Staff

- 1) Chair indicated preference for small staff initially (attorney/secretary) with no independent investigatory authority.

D. Publicity

- 1) Proceedings would be confidential (under Rule 22); findings and rulings to be made public. Consensus of interviews support this position.
- 2) Mike Ford suggested opening proceedings once determination of probable violation made, subsequent action to be public.

E. Powers

- 1) Advisory only; recommendations to full body for action.
- 2) Details of procedural powers (eg - subpoena ability) to be worked out later.

III. CONFLICT OF INTEREST

- A. High duty affirmed: legislator must conduct outside business to minimize impediments to conscientious performance of duties.
- B. Early disclosure is key element in dealing with conflicts. Suggested language: obligation to report arises as soon as the legislator is aware of a conflict or should reasonably be aware of such conflict (National Municipal League model).
- C. The legislator's duty is to represent constituents and vote on all matters, absent a unanimous vote of the body to excuse the member. Early and full disclosure serves to put the body on notice of potential conflicts and the exertion of undue influence.
- D. NCSL staff suggested that disclosures include a sworn statement that independent judgment will be exercised.
- E. Determination of the existence of a conflict of or vested interest in relation to size of class receiving detriment/benefit would be function of ethics committee in advisory role. Statutory determination is difficult in advance and would be arbitrary.

IV. LOANS

- A. "Non-discretionary" loans represent little difficulty. Consensus of working group and interviews.
- B. Views are split on discretionary (commercial) issues.
 - 1) Many feel that full public disclosure is adequate protection. Intent is to allow full participation by citizen (part-time) legislators.

- 2) Some feel that foregoing such loans is price of being legislator.
- 3) Chair suggested that agencies publish all loans to legislators, including loan status. Rep. Phillips wanted subsidized loans distinguished.

V. CONTRACTS

- A. "Sole-source" contracts would be prohibited, unless legislator was only party responding to a competitive bid. Advisory function of ethics body relevant to this possibility.
- B. Public, competitive bidding procedures are adequate protection.
- C. NCSL staff suggest that a statement be filed with ethics committee whenever legislator bids on contract and that all state contracts be subject to disclosure laws.
- d. Competitive requirement extends to contracts with persons/business entities in close economic association with legislators.

VI. APPEARANCES

- A. Representing constituents is recognized as valid legislative function; no separate compensation shall be involved.
- B. Appearing as principal is alright to preserve status quo regarding existing business interests, not to promote a new interest.
- C. Legislator/lawyers may represent clients in criminal and civil matters (where state is not a party) in courts but not before quasi-judicial agencies.
- D. Legislators should be restricted from employment as a lobbyist or representing clients before state agencies for one year after leaving legislature. Some interviewees object to a waiting period.

VII. MALICIOUS ACCUSATIONS

- A. Many interviewees expressed concern that mere leveling of charge was tantamount to public conviction. Some deserved a penalty, such as payment of costs for filing a false charge with malicious intent.

VIII. VEHICLE

- A. Staff to Sen. V. Fischer and Rep. Miller proffered SB 192 and HB 20.
- B. Rep. Phillips suggested that committee wait for AG proposal since they created issue.
- C. NCSL staff advised exercise of legislative prerogative rather than responding to executive initiative.



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March 23, 1983

Review of SB 198
Ken Wonstolen, NCSL

Statement of Purpose

- (a) add: Legislators and legislative staff must conduct their outside business affairs so as to minimize potential conflicts of interest with the conscientious performance of their duties and the exercise of independent judgement.
- (b)(3) delete: "enforce the provisions of the law"; substitute: "administer this chapter"; add: (b)(4) supersede the common law where it conflicts with any provision of this chapter.

24.60.010: no comment

24.60.020: note coverage of former legislators; add: coverage of staff not on personal staff of legislator (e.g. - Legislative Affairs, House Research Agency, Legal Services) by using term "legislative staff person: instead of "person on staff of a legislator" throughout the bill. Define "legislative staff" in appropriate section.

24.60.030/040: no comment

24.60.50: a number of issues (appearances, loans, contracts, voting) are included under this general "conflict of interest" heading. Perhaps each should receive its own heading and section, as follows (ideas suggested):

- o conflict of interest - A conflict of interest arises when a legislator has a personal interest* in a matter which is distinct from that of a member of a public-at-large and which would tend to impair the exercise of independent judgment. Legislators and legislative staff persons must avoid activities which tend to create even the appearance of a conflict of interest, and, further, must disclose any potential conflict of interest to (ethics body) at the earliest possible opportunity. This obligation to disclose arises as soon as the legislator or legislative staff person is, or reasonably should be, aware of a potential conflict.
- o Voting - The essence of the legislative function is to represent constituents in all legislative decisions. Therefore, a legislator must vote on all matters, unless excused by a unanimous vote of the members of his body. If the legislator feels that a conflict of interest may exist with regard to a particular matter, he shall disclose the relevant facts and

* Should be defined to include interests of family members and business associates.

sign a sworn statement that he will exercise independent judgment. If unable to sign such a statement, a legislator may ask the consent of the members of his body to abstain from voting.

- o Appearances - SB 198 would allow appearances before "quasi-judicial" agencies and courts, even where state is party. Substitute: Representing a constituent before a "state agency" (department, board, commission or instrumentality) is a traditional legislative function and is compatible with the ethical standards of this chapter, providing no compensation is solicited or received. Legislators and legislative staff persons may appear as a principal in such proceedings in order to preserve an existing business interest, but not to promote a new interest. Legislator/lawyers may represent clients before courts in matters to which the state is not a party. Legislators and legislative staff persons may not accept employment as a lobbyist or represent clients before state (agencies) for one year after the expiration of their term or employment.
- o Loans - SB 198 allows loans "available to the public at large"; instead, allow all loans providing disclosure is made and loans are published. Executive should promulgate strict rules for agencies to follow when dealing with legislative applicant.
- o Contracts - SB 198 allows competitive contracts; add: need to file statement of intent to pursue a state contract with ethics body and subject all contracts to disclosure. Also, personal interest should include business associations as employee, director/officer, as well as stock ownership.

24.60.060-090: These sections of SB 198 establish the Legislative Ethics Commission and its powers. Note that it would provide for 2 current legislators, 1 former legislator and 4 citizens who have not held an elected office. It allows the commission to determine staff needs. Other details of procedures and powers are reasonably close to ideas considered by committee and working group.

24.60.900: add: definitions of "legislative staff"; personal interest"; "state agency".

TO: Special Joint Committee on Legislative Reform
FROM: The National Conference of State Legislatures
RE: Preliminary Report on Work on Conflict of Interest Legislation
DATE: April 1, 1983

As required under the contractual agreement between the Alaska Legislature and the National Conference of State Legislatures, this report is submitted to the Joint Special Committee on Legislative Reform and will recap the work and findings to date in the NCSL's work on the issue of conflict of interest.

SUMMARY OF ACTIVITIES TO DATE

Following an initial on-site visit by NCSL staff to Juneau to determine the priorities and parameters of the overall project, the NCSL staff has devoted most of its efforts to the immediate concern over the development of conflict of interest legislation during the 1983 legislative session. To assist the Joint Special Committee on Legislative Reform in its deliberations on this issue, the NCSL staff has completed the following tasks:

- o a detailed search and analysis of statutory provisions dealing with conflict of interest and related legislative ethics issues in the other 49 states;
- o a review and analysis of legislative rules provisions dealing with voting procedures and conflict of interest in the other 49 state legislatures;
- o in-depth telephone interviews with legislative staff and ethics authorities in four states where similar legislative characteristics or ethics problems have been addressed;
- o analyses of current Alaska ethics statutes and four legislative proposals currently pending before the Alaska Legislature;
- o on-site interviews with legislators, legislative staff and others;
- o presentations before the Joint Special Committee on Legislative Reform on fundamental ethics questions; and
- o participation in a decision-making workshop designed to facilitate the committee's consideration of ethics legislation.

Attached are the background documents, bill analyses and research memoranda prepared by the NCSL staff for the committee.

DISCUSSION OF THE PROJECT TO DATE

Ethics issues are complex, requiring great balance between personal liberties, public service obligations and institutional legislative needs. The job of drafting appropriate legislation on this issue currently is complicated in Alaska by pressures of time in the current legislative session.

The NCSL staff has attempted to provide the Joint Special Committee on Legislative Reform with information which will further the understanding and discussion of legislative ethics issues. In addition, the NCSL staff has tried to help facilitate the process by identifying the major policy decisions which must be addressed in legislation. (The attached workshop summary from March 22, 1983, reflects the outline of decisions facing the committee.) In terms of these major policy decisions, the NCSL staff offers the following comments and findings on the process of developing a legislative ethics bill thus far.

Scope of Coverage

The legislature has before it proposals which would deal with only legislators and ones which would cover all public officials. There is no consensus on this issue.

Comment: Given the constraints of the legislative session, a bill covering only legislators and legislative staff persons is probably more realistic and feasible at this time. Conflict of interest statutes covering only legislators and legislative staff persons are in force in 33 states, and the separation of powers doctrine makes it appropriate for the legislature to deal with ethics issues for itself, independent of other government officials.

Control Mechanism/Policing Body

1. There seems to be a consensus that a legislative committee with public citizen members should be established to oversee and enforce provisions of a legislative conflict of interest or ethics bill.

Comment: The separation of powers doctrine and constitutional bases give credence to the concept of an internal legislative ethics committee. At the same time, the involvement of independent citizen members mitigates some of the difficult dynamics which legislative members face when judging and penalizing their peers. A selection process controlled by the presiding legislative officers is appropriate with safeguards for minority representation. To insure a balance of independence, citizen members probably should be appointed by some independent process, e.g., selection by the state judiciary or nominees by the state judiciary or the governor and selection by lottery.

2. The staffing of an ethics committee must be adequate to the powers assigned to do it.

Comment: If the powers of an ethics committee are primarily advisory and the principal enforcement strategy is for full and early disclosure, a limited legal and administrative staff may be adequate to serve the

committee. If, however, an ethics committee is vested with investigatory responsibilities, then a more substantial staff is required.

3. There seems to be a consensus that the proceedings of an ethics committee should be confidential until such time as findings and rulings are concluded and published.

Comment: Confidentiality in the preliminary stages of an investigation and in an advisory process is appropriate.

Conflict of Interest

1. There seems to be a consensus that early disclosure of potential conflicts of interest is essential, and that a legislator is obliged to report a potential conflict as soon as he or she is aware of such a conflict.

Comment: This approach is fundamental and appropriate.

2. A legislator must represent constituents and vote on matters before the legislative body.

Comment: Most state legislative rules prohibit members from voting on matters in which they have a direct personal or pecuniary interest, and the most common practice is to allow the member to state the reasons for not voting and then, without debate, to have the rest of the membership vote by simple majority to excuse the member. It is valid to balance quorum considerations with the process of minimizing potential conflicts of interests, however, Alaska's rules which require unanimous consent of the body to excuse a member from voting are among the most stringent. Only three other legislative bodies require unanimous consent to excuse a member. In a small legislative body, abstaining from a vote and legislative action may contribute to the conflict of interest. Consequently, the most equitable method to resolve these situations is by early and full disclosure of the potential conflict. Particularly in light of the unanimous consent provision, the NCSL staff suggests that disclosure include a sworn statement that independent judgment will be exercised.

Loans

1. Legislators should be eligible for non-discretionary state loans.

Comment: This is appropriate and reflects a consensus among the legislators.

2. There is no consensus on the question of whether state legislators should be eligible for discretionary loans.

Comment: Alaska represents a unique situation for which there is no ~~parallel~~ in other states. The dominant role of the state in the commercial loan market is not evident in other jurisdictions. At a minimum, a conflict of interest statute dealing with state loans should require full and early public disclosure of loans and loan applications by public officials.

Contracts

1. There seems to be consensus that legislators should be eligible for contracts with the state under competitive bidding procedures.

Comment: In 31 states, public official face some restrictions on entering into public leases or contracts. Fourteen states allow public officials to enter into contracts through a competitive bidding process. Again, as a minimum standard, the NCSL suggests that early and full disclosure be required of legislator bids on contracts and contract awards to lawmakers.

Appearances

1. There seems to be consensus that some restrictions would be appropriate on legislators representing constituents or themselves for compensation before state agencies.

Comment: Nineteen states require disclosure of compensation received by public officials who represent clients or constituents before state agencies, and 28 states restrict appearances by public officials. Disclosure is imperative in these instances, and public perceptions of undue influence may require more stringent safeguards.

CONCLUSION

To date, no specific piece of legislation before the legislature reflects a consensus view on conflict of interest. Opinions remain divided on major policy questions. Fundamental decisions must be addressed by the Joint Special Committee on Legislative Reform and by the legislature as a whole on this question. Given the time constraints of the legislative session, resolution at this time may not be possible, however, inaction on the part of the legislature must be balanced with public perceptions of the immediacy of this question.



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MEMORANDUM

TO: Alaska Legislature--Special Joint Committee on Legislative Reform

FROM: Ken Wonstolen, Esq., consultant to NCSL
Candace Romig, Staff Associate, NCSL

DATE: March 15, 1983

RE: Legislative Ethics

This memorandum is organized as follows:

- I. Background
 - NCSL assistance
 - purpose of memo
- II. Introduction and Overview
 - public trust doctrine
 - appearance of impropriety
 - practical code of ethics
 - public pressure/Attorney General's Opinion
 - policy rationale
 - Alaska situation
- III. Control Mechanisms
 - elective process
 - public exposure
 - partisanship
 - executive branch
 - judiciary
 - legislative commission
 - intramural
 - independent
- IV. Selected Issues
 - personal gain
 - conflict of interest
 - nature of duty
 - disclosure and abstinence
 - disclosure and excuse
 - voting/vested interest
 - state loans

- state contracts
- agency appearances

V. Legislative Guidance

- courses of action
 - legislative ethics bill
 - comprehensive legislation
 - interim study
- policy questions

I. Background

NCSL has been commissioned to assist the Committee in its deliberations. Three general areas have been identified for study: Legislative rules and procedures; the legislative budget process; and legislative ethics. Ethics have been identified as the area of most immediate and pressing concern, and this memo is part of NCSL's response. The purpose of this memo is to stimulate the thinking of interested legislators and staff and provide a vehicle for discussion by and guidance from the committee. NCSL is also preparing a detailed analysis that reviews current legislative initiatives on ethics vis-a-vis other state and model codes. In addition, NCSL staff will visit Alaska during the week of March 21 to communicate directly with the Committee, as well as other interested legislators and staff. The Committee's discussion of this memorandum on March 21 and a subsequent working session with Alaska legislative staff on March 22 are designed to result in a specific ethics proposal.

II. Introduction and Overview

Both the American political tradition and Alaska's statutes hold that "public office is a public trust" (see footnote #1) in which independent judgement must be exercised to further the public welfare. The United States Supreme Court has recognized as fundamental the right to be governed by representatives whose judgements are untrammelled by considerations of personal gain. (See footnote #2)

This trust responsibility is imposed on legislators not just to safeguard the public welfare, but also to maintain public confidence in the system of government. Instances of corruption, influence peddling and personal gain-seeking undermine public faith in institutions. This means that even the appearance of impropriety and the "danger of conflict of interest" (see footnote #3) must be avoided. Legislators are held to a high standard, commensurate with their positions of influence and responsibility.

Recognizing these basic tenets, the next step is to devise and implement a practical code of ethics to govern day-to-day legislative affairs. This is a difficult and complex task. The goal should be to develop a set of guiding principles, supplemented by specific rules for recurring, clearly-defined situations. This must be coupled with a process whereby these principles and rules may be extended to novel situations. Finally, provision must be made for enforcement.

The Alaska legislature has engaged this challenge. Cases of actual or perceived misconduct have led to public pressure for reform. The

Attorney General has issued an opinion indicating the applicability of common law standards absent statutory controls. Since the common law is not well settled on the majority of ethical issues, confusion and uncertainty persist. The common law does have a role to play in guiding the practical application of statutory ethics, however. Almost all statutes acquire a judicial gloss over time, whereby the common law is created or supplemented. The advisory opinions of an enforcement body would be a valuable "common law" adjunct to an ethical statute.

Nevertheless, legislative enactment of an ethical code is a worthy goal. It would provide more definitive guidance than the common law. Public desires for reform would be accommodated. Most importantly, a process would be established for applying, extending and enforcing ethical provisions.

Alaska's special situation must be kept in mind in developing such legislation. That is, the state has a relatively small population and pool of potential legislators. The legislature itself is a compact body. Further, members are part-time legislators, retaining their varied outside business interests. Finally, state government is heavily involved in Alaska's economy. These factors call for sensitivity to the possibility of discouraging the pursuit of political office by capable, commercially active citizens.

III. Control Mechanisms

The fundamental control over legislative conduct is, of course, the elective process. Ironically, the elective process may also generate those personal obligations which tend to create potential conflicts. In addition, state legislative elections are more likely to turn on local issues or party affiliation than on subtle questions of ethics. Therefore, the elective process is an unreliable and unpredictable control mechanism.

Associated with the elective process is the effect of the light of publicity. Its power is dependent on open processes, active media and interested citizens. Alaska has disclosure requirements for certain public officials, including legislators (see footnote #4). It has also made provision for public notice and participation in its legislative processes. Any ethical control method adopted by the legislature must balance individual rights to privacy against the public right to know.

It has also been suggested that partisan considerations may operate as a control over legislative ethics. While it is true that disclosure of ethical violations might occur due to partisan motives, there are objections to relying on partisanship as an ethical control. First, there may be a temptation to use knowledge of a violation for partisan advantage, rather than disclosing the problem. Second, considerations of comity dictate against reliance on a mechanism which would tend to exacerbate partisan divisions. Finally, public accountability is minimal.

The executive branch may also exert some control over legislative ethics. The Attorney General is currently occupying the field. He asserts the right to advise on ethical issues and bring legal actions for ethical violations. The Governor might, by executive order, establish

ethical parameters for agency actions, including dealings with legislators. Conversely, the legislature may exert its authority over executive branch ethics by enacting a statute.

Courts are probably the ultimate arbiters of legislative ethics. For constitutional reasons (see footnote #5) plus a disinclination to deal with "political questions", courts play this role with reluctance. However, legal precedent indicates that legislative authority over intramural affairs may be limited by the public trust doctrine. (See footnote #6.) Nevertheless, statutory guidance is important to the judicial process as well.

Courts are less likely to assert jurisdiction over legislative ethics in the presence of some formal control mechanism established by statute. There is a natural desire to preserve legislative autonomy in this regard. The legislature has the constitutional authority to judge its members, and peer review is an accepted means of establishing ethical standards in many professions. An internal policing body may be taken more seriously by legislative members and has certain advantages in the advisory or consultative process involved in ambiguous or unclear ethical situations. However, exercising this prerogative is unlikely to assuage judicial or public concerns over legislative ethics. Practical difficulties are raised as to majority, minority and factional representation, as well as the small pool of legislators available. Partisanship would be a troubling element. Finally, the record of such intramural bodies is mixed. (See footnote #7.)

An independent legislative ethics commission is a concept worthy of consideration. It would have enhanced credibility vis-a-vis the other branches of government, the media and the public. It would minimize the practical and partisan concerns raised by intramural bodies. And, it would isolate the ethical arena from the vagaries of legislative attention. Members of such an independent commission might include former legislators, retired judges, university deans and corporate directors. The Attorney General might be an ex-officio member. Appointments might be made by the majority and minority leadership of each house, as well as the Governor, State Bar Association and Chamber of Commerce.

IV. Selected Issues

Whatever the control mechanism adopted, substantive statutory guidance will be essential. Several major issues will be considered here. Additional points will be covered in NCSL's detailed comparative analysis.

Ethical concerns may, perhaps, be summed up by two basic proscriptions. First, public office should not be used for personal gain. This includes such violations as accepting bribes or kickbacks, exerting improper influence, using or disclosing confidential information, and using state property for personal purposes. Second, office holders should not conduct outside business which conflicts with the conscientious performance of duties or the independent exercise of judgment. Conflict of interest implies an interest which is present and personal, and not shared by the general community. It includes the notion of vested interest, as well as the notion of division of loyalty.

Disclosure and abstinence are the proper courses of action regarding conflicts of interest. A higher duty is imposed, however. Legislators are elected to exercise their judgment on matters of public concern and should strive to conduct their outside business so as to minimize conflict situations (see footnote #8). Indeed, a legislator may not receive a personal benefit by declaring a conflict, abstaining and letting a "disinterested colleague" make the decision. (See footnote #9.)

This raises a concern relating to the current Alaska practice of allowing a single vote to prevent a legislator from abstaining on a decision after declaring a conflict. The possibilities for collusion and abuse are apparent. It is unlikely that the common law would excuse an ethical violation on this basis. Similarly, full disclosure and a sworn statement that independent judgment will be exercised may be insufficient to excuse a conflict. Quorum considerations are the only justification for such practices. They should be used with restraint and should be specifically covered in a statute.

The Attorney General's opinion raises three specific issues. One relates to the notion of vested interest. That is, a legislator may vote on a bill by which he benefits, as long as the benefit is not peculiarly personal. If the legislator is one of a small class of beneficiaries or if the bill affects a venture with which he is commercially connected, he must abstain.

A second issue relates to state loans to legislators. Here the relevant factors involve the size, availability and discretionary aspect of the loan in question. Loans with standard criteria as to qualification, amount, security and repayment, and general availability, are acceptable. Large commercial loans involving discretion in determining creditworthiness, terms and administration, and which are of limited availability, are more problematic.

A third issue relates to legislators contracting with the state. The Attorney General finds the common law to prohibit such contracts, with limited exceptions (see footnote #10). Some states allow legislator/state contracts which are "de minimus" (small in value or legislator has fractional interest). Others allow competitive contracting. The latter exception is problematic, raising concerns over improper influence, use of confidential information and discretion in the awarding and administration of such contracts. The course of action most consistent with the duty of legislators to avoid even the appearance of conflict would be a prohibition.

A final issue, not raised by the Attorney General's opinion, relates to legislator appearances before state agencies. While it is a traditional legislative function to intercede with state bureaucracies on behalf of constituents, this must be distinguished from appearing as a principal or in a representative capacity. Some states allow appearance as a principal to maintain the status quo regarding a business interest, but not to obtain a new franchise. Some allow representation of a client, even for compensation, if such compensation is disclosed and is not contingent on the agency action. Public perceptions should be considered in this regard.

V. Legislative Guidance

Three courses of action are suggested for legislative consideration:

- Enact a legislative ethics bill during the 1983 session. NCSL assistance, including this memo and a detailed comparative analysis, as well as on-site consultation is being provided under NCSL's contract with the Committee. Senator Fischer has prepared a working draft which could form the basis of a bill.
- Enact a companion bill for other state officers and employees, or a comprehensive statute covering all public officials. HB 20 (by Rep. Miller, et al) could serve as the basis for a comprehensive approach.
- Defer action on one or both of the above areas (legislators/other public officials) until the next session and conduct additional study during the interim. Such an interim study could be organized and staffed by NCSL as a follow-on to its existing contract, consistent with its commission to assist the enhancement of Alaska's legislative process.

If immediate action is chosen as a course of action, legislative guidance would be useful on a number of specific policy areas:

- What kind of control mechanism or policing body is preferred?
 - intramural/independent
 - publicity of proceedings, remedies
 - advisory/enforcement function
- How broadly or narrowly should conflict of interest be construed?
 - nature of duty
 - role of disclosure
 - excuses: collegial; sworn statement; quorum issues
 - vested interests: peculiar benefit; degree of connection
- How should state loans be dealt with in legislation?
 - specific consideration of existing programs
 - general principles/advisory opinions
- How should legislator contracts with the state be handled?
 - prohibition/allowance
 - exceptions: de minimus; only source; common goods
 - competitive processes: role of disclosure
- To what extent should legislator appearances before state agencies be regulated?
 - for constituents

--as principal
--as client

- What additional or related ethical issues should be addressed?
 - lobbyist controls
 - open meetings
 - campaign finance

These areas all call for the exercise of legislative policy judgment, in the light of the ethical principles and concerns raised in this memo. Specific guidance will be essential to staff in drafting legislation.

FOOTNOTES

1. AS 39.50.010 (b)(1)
2. Tool Co. v. Norris, 69 U.S. 45, 54-55 (1865)
3. AS 39.50.010 (b)(1)
4. AS 39.50.030
5. Alaska Constitution Article II, Section 12
6. U.S. v. Ballin, 144 U.S. 1, 5 (1892); ct. U.S. v. Smith 286 U.S. 6 (1932)
7. See 76 Harv. Law Rev. 1209 (1963)
8. See AG Opinion pp. 37-38
9. See AG Opinion p.2
10. See footnote 14, p. 26 of AG Opinion

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Scope of Statutes	The statute covers: • All legislators • Judicial officials • All candidates for state and municipal elective offices • The governor, lieutenant governor, and selected state agency officers.	The legislation would cover: • All legislators and legislative employers • All municipal officers and employers • The governor and lieutenant governor.	Legislation would apply to: • All legislators • Legislative staff working with committees and legislators • Legislative members-elect • Former legislative members.	• Idaho, Vermont, and West Virginia have no disclosure laws or restricted activities • Public officials, including legislators (14 states) • Specific legislation for legislators (33 states)
Disclosure Requirements	Requires disclosure of: • All income over \$100 by official or family • Business interests and ownership • Real property • Trusts • Loans or loan guarantees, and • Contracts or offers to contract with the state. Assets or liabilities under \$500 need not be disclosed Disclosure statement filed annually; sworn statements required of some officials. Blind trusts are acceptable but must be reported.	Requires disclosure of: • All items required under AS 39.50.020 • Specific conflicts require preparation of a separate statement by certain state executive officials and municipal officers • Other public officials required to state a conflict at the time of official action.	Legislation would require disclosure of the following: • Direct interest in an enterprise affected by a vote on proposed legislation • Financial benefit derived from a close economic association with an individual with direct interest in an enterprise affected by a vote on proposed legislation • Financial benefit derived from a close economic association with a person lobbying, or who hires a lobbyist, to propose legislation or to influence legislators' votes • Gifts, loans, or payments in the aggregate amount of \$100 or more from anyone with an interest in an enterprise affected by a vote on proposed legislation • Fees and honorariums received in excess of \$100 • Financial transactions involving legislators and staff in excess of \$1000 • All contracts with the state	States require disclosure for: • Source of income (34) • Income of business if partnership or shareholder (23) • Investments (29) • Real estate interests (33) • Offices and/or directorships (31) • Creditor indebtedness (24) • Leases or contracts with public agencies (14) • Gifts (19) • Compensated representation before state agencies (19) • Fees or honorariums (23) • Reimbursement of travel expenses by private sources (10) • Professional or occupational licenses held (8) • Deposits in financial institutions (10) • Retainers (4) • Cash surrender value of insurance (5) • Nature of outside employment (22)

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Disclosure Requirements (continued)			Recommended procedures for disclosure: ● Legislator declares conflict of interest on the floor of the legislative body and requests to be disqualified from voting ● A written statement submitted to the committee describing conflict bars legislator or staff from further action on the legislation in question, unless the statement asserts to the satisfaction of the committee the objective ability of the party to participate in the legislative action.	● Professional services rendered (11) ● Identification of trusts by trustee (11) ● Identification of trusts by beneficiary (18) ● Financial interests of official's spouse and dependents (33) Reports and statements are generally required to be filed within a specified time period.
Conflicts of Interest: General	The statutes prohibit public officials from: ● Using his office for financial gain to himself, business or family ● Soliciting money for legislative advice or other assistance relating to his public employment ● Representing a client before a state agency for a fee (Municipal officers similarly are barred from representing a client before their municipal body.).	The bill would prohibit public officials from: ● Soliciting gifts to influence or reward an official action ● Using public office to seek employment, contracts or compensation benefiting the official or his household ● Using public time, equipment or facilities for private or political purposes ● Soliciting financial transactions in businesses an official supervises ● Using confidential information for personal gain ● Participating in actions affecting a business or property in which a public official has a personal financial interest ● Representing a person before a state agency for compensation (legislators and staff)	Legislation would proscribe the following as conflicts of interest: ● Undue influence exerted as a result of public office ● Participation in outside business or professional activity inconsistent or in conflict with official duties ● Misuse of state property or funds ● Owning capital stock in a corporation in excess of \$1000 ● Acting as an officer, director, or agent of a corporation ● Representation for pay of a client before any state or local agency ● Nepotism, excepting unpaid relatives ● Confidential information not available to general public and obtained in the course of official duties used for personal benefit.	States have restrictions on the following: ● Use of public position to obtain personal benefits (40) ● Giving benefits to influence public officials and/or public employees (33) ● Use of confidential information (37) ● Post-governmental employment (22) ● Receipt of gifts (31) ● Public officials representing clients before public bodies (28) ● Receipt of fees and honorariums (23) ● Nepotism (15) ● Public official's outside employment or business activity (28)

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Conflicts of Interest: General (continued)		- Assisting persons for compensation to pass or defeat legislation or secure a contract, claim or transaction before the legislature, a state or municipal agency. Former officials would be prohibited from: - Using confidential information for personal gain - Representing persons in transactions in which the official was involved. (12 mos. time period)		
Conflicts of Interest: Contracts and Loans	The statutes do not prohibit public officials from receiving state loans or contracts.	The bill would <u>not</u> prohibit public officials from receiving state loans or contracts. The bill would prohibit public officials from assisting for compensation other persons who are seeking to obtain contracts, claims, etc.	Legislation would proscribe the following activities with regard to contracts and loans: - Contracts made with state and local government without public competitive bid process; non-bid contracts may be awarded at the discretion of the committee provided no undue influence is exerted to obtain the contract and it does not conflict with the conscientious performance of official duties - Discretionary state benefits not available to the general public such as loans and land disposals in which the decision-making process does not safeguard against the appearance of improper influence.	Specific restrictions pertaining to contracts and loans: - Public officials entering into public leases or contracts (31) - Competitive bidding (14)
Activities Not Restricted	No unrestricted activities are specifically identified.	No unrestricted activities are specifically identified.	Proposed legislation specifically allows: Outside employment and business opportunities, provided an advisory opinion of the committee is sought in cases of potential conflict	Kansas, Maine, and Missouri are three states which allow a state officer to contract with the state in a process of competitive bidding or for which the price or rate is fixed by law

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Activities Not Restricted (continued)			Former legislators and staff may lobby or work for state agencies immediately upon leaving the legislature subject to the constitutional ban on legislators taking a position with a salary increase created while the legislator was a member.	In Maine, legislators may serve on public boards, commissions or other authority created by the legislature provided no consideration is paid.
Control Authority	The statute is administered by the Alaska Public Offices Commission, an independent commission within the Department of Administration. The commission duties and powers include a provision to: Maintain records, reports and disclosure statements and establish reporting procedures The commission is <u>not</u> authorized to initiate or conduct investigations relative to violations. All disclosure statements and reports are public records.	The bill would assign new duties to the already existing Alaska Public Offices Commission, an independent commission within the Department of Administration. The commission duties and powers would include to: - Issue advisory opinions and publish edited versions of opinions to maintain confidentiality - Accept, initiate and investigate complaints - Subpoena witnesses, take testimony and hold hearings on complaints - Maintain necessary records, reports, forms and establish reporting procedures - Make determinations of appropriate action - Assess civil penalties for violations - Refer impeachable offenses to other state officials for subsequent action - Refer determinations warranting removal to the appropriate appointing authority. Advisory opinions may be edited for confidentiality. Complaints and a determination by the commission are public record.	Proposed legislation provides: - Creation of a standing ethics committee in each house - Duties --investigate complaints of ethics violations --issue findings --issue advisory opinions and statements of policy --make reports to the legislature and the public - Powers --initiate complaint alleging ethics violation --hold hearings --subpoena witnesses and documents --take testimony under oath --appoint special investigator when needed --issue a private reprimand --make recommendations to the legislative body for remedies. Advisory opinions may be made public at any time by agreement of the committee and the person requesting the opinion.	8 states have standing legislative ethics committees - No state has a joint legislative ethics committee 28 states have external commissions, agencies or boards with responsibility for conflict of interest; it is uncertain what jurisdiction over the legislature all of the agencies have - All external agencies but three were created by statute.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Penalties	Penalties for violation of reporting requirements include: • Fines, imprisonment or both for false or misleading reports • Fines for late filings • Removal from office for failure to file • Barring a candidate from assuming office for failure to file. Penalties for violation of conflict of interest requirements include: • A misdemeanor punishable by fine and/or imprisonment.	Penalties would include: • Impeachment • Removal from office • Fines not to exceed twice the economic benefit derived by the official or a fine of not more than \$2000 where no benefit is received • Contracts entered into in violation of these provisions are voidable by the state or a municipality.	Legislation provides the following penalties: • Violations are subject to private written reprimand from the committee • Upon the recommendation from the committee the legislative body may act to censure or expel the member or may recommend that the attorney general prosecute under criminal statutes • Attorney general may bring a civil action to recover compensation for damages • Members of the committee or their staff found guilty of disclosing the identity of anyone requesting an advisory opinion may have a civil action brought against them for damages • Staff found guilty of violating these provisions are terminated from employment • Any agreement contracted illegally is voidable • It is a violation of law to take any punitive or retaliatory action against a person who has initiated or assisted in the investigation of an ethics violation subject to the specified penalties of this legislation.	Information is not available for all states, however: • Maine provides that anyone convicted of filing a false charge of conflict of interest with the commission will be guilty of a Class E crime. • Maryland provides that the legislature may, by resolution, require compliance, issue a reprimand, or censure the guilty member • Wisconsin provides that the ethics board can make a recommendation to the district attorney in whose jurisdiction the violation occurred to commence criminal prosecution.
Other	The statutes allows a "qualified Alaska voter" to bring a civil action to enforce the provision.	The bill would allow legislators and other public officials to participate in an action or decision even in the case of a conflict if: • Participation is necessary to constitute a quorum • The official has filed a disclosure statement	Other features of the proposed legislation are: • Transferrable promotional benefits resulting from official business become the property of the state • When circumstances prevent the divestiture of property or contracts to meet the requirements of law, disclosure must be made and an advisory opinion requested of the committee	• California defines financial interest as having an investment or interest of over \$1000, having any source of income over \$250 within 12 months or being employed as management in a business entity.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Other (continued)		• The official announces the nature of the conflict when action is taken. The attorney general is counsel to the commission, but the chief justice of the supreme court may appoint a special counsel if requested by the commission.	• Meetings of the committee are covered by the open meetings law, but any meeting which may tend to prejudice the reputation and character of any person may be closed. Privacy of anyone mentioned in a committee opinion will be protected. • Specific definitions prescribed: household, business associate, compensation, personal financial interest.	• Kansas provides that legislators cannot be litigants in legal proceedings involving constitutionality of law enacted while he or she was a legislator. • In Maryland legislators may participate in legislative action provided their vote is needed to obtain a quorum and they have submitted a signed statement identifying conflict; the commission is required to compile a list of business entities doing business with the states. • Missouri and Oklahoma restrict the sale, rent or lease of property to the state. • Montana legislators are prohibited from participating on legislation affecting a business competitive with their own. • Nevada legislators are prohibited from suppressing documents and disclosing confidential information for money. • All New York legislators must receive, read, and understand the ethics code.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Other (continued)				● South Carolina legislators must put assets in a blind trust to avoid conflicts of interest and may not appear before a board on rate- on price-fixing matters; statement declaring a conflict of interest delivered to presiding officer within 24 hours of action or decision is in compliance with the law. ● The Wisconsin ethics board must report the identity of person seeking information from a statement of economic interests to the person who filed the information; no orders become effective until 20 days after it is issued.

NCSL Staff has asked for the Committee's guidance on a course of action in these specific policy areas:

- * What kind of control mechanisms or policing body is preferred?
 - intramural/independent
 - publicity of proceedings, remedies
 - advisory/enforcement function
- * How broadly or narrowly should conflict of interest be construed?
 - nature of duty
 - role of disclosure
 - excuses: collegial; sworn statement; quorum issues
 - vested interest: peculiar benefit; degree of connection
- * How should state loans be dealt with in legislation?
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 - competitive processes: role of disclosure
- * To what extent should legislator appearances before state agencies be regulated?
 - for constituents
 - as principal
 - as client
- * What additional or related ethical issues should be addressed?
 - lobbyist controls
 - open meetings
 - campaign finance

These areas all call for the exercise of legislative policy judgement, in light of the ethical principles and concerns raised in this memo. Specific guidance will be essential to staff in drafting legislation.

STATE OF ALASKA THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM

April 19, 1983

SUBJECT: Letter of Intent

TO: Senator Jan Faiks
Representative Randy Phillips
Co-Chairmen, Joint Special Committee on
Legislative Reform

FROM: Richard A. Bradley 
Legislative Counsel

You have requested a Letter of Intent for use with the legislative reform package of bills. I suggest the following:

Letter of Intent
for
SB 257 (or HB 362)

The Special Committee on Legislative Reform considered but has not recommended substantive language providing for a waiver of legislative immunity (Article II, section 6, Alaska Constitution) for a violation of the provisions of legislation proposed in HB 362 and SB 257. The committee is aware of the complex and difficult constitutional and policy arguments on this question made both on behalf of the state by the attorney general's office and by counsel for former Senator M. E. Dankworth. The committee was unwilling to appear to support either position in the adoption of language dealing with these questions. But the members of this committee will recommend substantive language dealing with these issues when a final decision has been entered in the Dankworth case.

RAB:ljb
15/015

REPRESENTATIVE RANDY
Phillips
HOUSE DISTRICT 15

HAND DELIVER

TO: REP. MIKE MILLER
FROM: REP. RANDY PHILLIPS *Rep*
DATE: APRIL 20, 1983
RE: LETTER OF INTENT FOR HB 362

Please review the attached memorandum from Richard Bradley concerning the letter of intent for HB 362 and let me know if it meets with your approval.

If you have suggested changes or you approve of the proposed wording, please let me or my office know as soon as possible in order that we can get this letter of intent ready for signature and filing. My office phone numbers are 4949/4931/4932.

RP:jss

REPRESENTATIVE RANDY
PHILLIPS
HOUSE DISTRICT 8 15

HAND DELIVER

TO: REP. MIKE MILLER
FROM: REP. RANDY PHILLIPS *Rep*
DATE: APRIL 20, 1983
RE: LETTER OF INTENT FOR HB 362

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RP:jss



OFFICIAL BUSINESS

Alaska State Legislature

POUCH V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

April 15, 1983

The Honorable Joe Hayes
Speaker, Alaska House of Representatives
Pouch V, Mail Stop 3100
Juneau, AK 99811

Dear Speaker Hayes:

The Special Committee on Legislative Reform has completed the work assigned to it in the authorizing resolution and we are submitting this letter and the proposed legislation discussed herein as our final report and recommendations.

CONFLICT OF INTEREST

House Bill No. 362, "An Act relating to standards of conduct of legislators and legislative employees and establishing a Legislative Ethics Commission; and providing for an effective date." has been filed with the office of the Chief Clerk for introduction.

The committee held many hearings concerning the various aspects of the legislation and this bill represents the committee's consensus on the items contained therein.

One of the items not included in this conflict of interest legislation is a proposal concerning legislative immunity under the provisions of the Alaska Constitution. The letter of intent prepared for this bill and adopted by the committee reflects the committee's view on this question.

CODE OF ETHICS

The committee has requested that Legal Services draft a House Concurrent Resolution to include a Code of Ethics. After much discussion, the committee members felt that this Code properly belonged as a preamble and part of the Uniform Rules.

UNIFORM RULE CHANGES

The committee has requested that Legal Services draft a House Concurrent Resolution concerning recommended changes to the Uniform Rules.

An item not included in the committee's proposed legislation on Uniform Rule changes is a definition of the term "minority." We would like to assure you that the committee did discuss this item at length; however, no consensus could be reached. We would urge that the committee of referral take this matter into consideration as the resolution is before them.

NATIONAL CONFERENCE OF STATE LEGISLATURES' REPORT

Under the terms of the contract with NCSL, the final report from NCSL will be submitted by May 15, 1983. This report is to include "the Consultant's findings and recommendations on the legislative budget process and legislative rules and procedures. . .". A copy of this report will be provided to each member of the Legislature and the office of the Chief Clerk.

Respectfully submitted, .

Representative Randy Phillips
Co-Chair

Representative Barbara Lacher

Representative M. Mike Miller

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 11, 1983

The Honorable Jan Faiks
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

The Honorable Randy Phillips
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Faiks and Representative Phillips:

My staff and I have reviewed the latest draft of proposed conflict of interest legislation that is currently pending before your committee. I would like to congratulate you for the progress you have made in codifying what I know is a difficult area of the law.

However, we do have a number of comments to make about this proposed legislation and we will list a few of them in this letter. Our views have already been expressed by us either in testimony before the committee, or in informal meetings with one or more of the members of the committee. We would be prepared to detail our concerns either in writing or in testimony before the committee. Alternatively, our views can be presented to the standing committees to which the legislation will be referred in each body.

Although we advocated for a single agency to review potential conflicts of interest, the committee's choice of a system with separate procedural mechanisms for each branch of government does have its advantages. We feel very strongly, however, that it is inappropriate to have different substantive provisions for each branch. Conduct that constitutes a conflict for one branch of government will almost invariably be a conflict if committed by a person in another branch.

In addition, we have particular concerns over some of the proposed substantive provisions, whether or not they are applied to all three branches of government. For example, the sections on contracts and loans are not consistent in their

The Honorable Jan Faiks and
The Honorable Randy Phillips

April 11, 1983
Page 2

treatment of a legislator's business relationships, although both contracts and loans are very business oriented. Records for state loans are made public, but not state contracts.

Of more concern, however, are provisions which impliedly legitimize conduct that has been prohibited in the criminal code. For example, contrary to AS 11.56.860, the provision on confidential information suggests that such information can be used if it is not used for financial gain. More importantly, the section covering gifts allows a legislator to solicit or receive a bribe, as long as it is less than \$100. Presumably this provision would allow several people to offer a succession of \$100 "gifts" in order to influence official action. I doubt that this result was intended, and it needs to be reconsidered.

The legislation should also contain provisions that describe the available remedies in more detail and whether the commission has authority to review the conduct of legislative employees. For example, the range of recommendations that the commission can make should not be limited to monetary penalties, but should include divesting the interest, establishing a blind trust, repaying profits, censure, removal from committee assignments, termination of legislative privileges or employment, or expulsion. In addition, it should be made clear whether the attorney general has authority to seek remedies in a court of law at any time, or whether he must wait for a decision by the commission.

Finally, there is the question of how this legislation effects any available criminal remedies and whether the committee will consider adopting the changes to the criminal law that we suggested in our letter to Senator Faiks of April 8, 1983.

Please let me know how the committee wishes to proceed in this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Norm C. Gorsuch", written in a cursive style.

Norman C. Gorsuch
Attorney General

NCG:DJG:1b-54

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

BILL SHEFFIELD, GOVERNOR

POUCH KC - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3428

April 8, 1983

The Honorable Jan Faiks
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

The Honorable Randy Phillips
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Faiks and Representative Phillips:

My staff and I have reviewed the latest draft of proposed conflict of interest legislation that is currently pending before your committee. I would like to congratulate you for the progress you have made in codifying what I know is a difficult area of the law.

However, we do have a number of comments to make about this proposed legislation and we will list a few of them in this letter. Our views have already been expressed by us either in testimony before the committee, or in informal meetings with one or more of the members of the committee. We would be prepared to detail our concerns either in writing or in testimony before the committee. Alternatively, our views can be presented to the standing committees to which the legislation will be referred in each body.

Although we advocated for a single agency to review potential conflicts of interest, the committee's choice of a system with separate procedural mechanisms for each branch of government does have its advantages. We feel very strongly, however, that it is inappropriate to have different substantive provisions for each branch. Conflict that constitutes a conflict for one branch of government will almost invariably be a conflict if committed by a person in another branch.

In addition, we have particular concerns over some of the proposed substantive provisions, whether or not they are applied to all three branches of government. For example, the sections on contracts and loans are not consistent in their

treatment of a legislator's business relationships, although both contracts and loans are very business oriented. Records for state loans are made public, but not state contracts.

Of more concern, however, are provisions which impliedly legitimize conduct that has been prohibited in the criminal code. For example, contrary to AS 11.56.860, the provision on confidential information suggests that such information can be used if it is not used for financial gain. More importantly, the section covering gifts allows a legislator to solicit or receive a bribe, as long as it is less than \$100. Presumably this provision would allow several people to come offer a succession of \$100 "gifts" in order to influence official action. I doubt that this result was intended, and it needs to be reconsidered.

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Please let me know how the committee wishes to proceed in this matter.

Sincerely,



Norman C. Gorsuch
Attorney General



OFFICIAL BUSINESS

Alaska State Legislature

POUCH V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

LETTER OF INTENT FOR HB 362

The Joint Special Committee on Legislative Reform considered but has not recommended substantive language providing for a waiver of legislative immunity (Article II, Section 6, Alaska Constitution) for a violation of the provisions of legislation proposed in HB 362. The committee is aware of the complex and difficult constitutional and policy arguments on this question made both on behalf of the State by the Attorney General's office and by counsel for former Senator M. E. Dankworth. The committee was unwilling to appear to support either position in the adoption of language dealing with these questions. But the members of this committee will recommend substantive language dealing with these issues when a final decision has been entered in the Dankworth case.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Randy Phillips".

Representative Randy Phillips
Co-Chairman

A handwritten signature in cursive script, appearing to read "Barbara Lacher".

Representative Barbara Lacher
Member

A handwritten signature in cursive script, appearing to read "Mike Miller".

Representative M. Mike Miller
Member

Alaska State Legislature

OFFICE OF THE MINORITY



POUCH V
JUNEAU, ALASKA 99811

House of Representatives

April 7, 1983

DRAFT CONFLICTS LEGISLATION REVISIONS

by Rep. Mike Miller

1. Delete AS 24.60.030(a), and insert the following;
Adopted "(a) No individual subject to this chapter shall use his public office for private advancement or gain."
Source - Model State Law, section 11(a).
- ✓ 2. Delete AS 24.60.030(b), and insert the following;
"(b) a conflict does not exist if the commission ^{if} ~~determines~~ ~~that~~ no benefit or detriment accrues to the individual subject to this act, beyond that which accrues uniformly to members of the profession, occupation, group, or public at large.
Source - HB 20
3. Delete AS 24.60.060(e)
4. Amend AS 24.60.110 as follows;
Pg. 6, Ln.26, delete "a person to whom this chapter applies" and insert "a member of the legislature".
5. Amend AS 24.60.170 as follows;
Pg. 12, Ln. 1, delete "three" and insert "four".

MEMORANDUM

State of Alaska

TO: Norman C. Gorsuch
Attorney General

DATE: April 6, 1983

FILE NO:

TELEPHONE NO:

FROM: Dean J. Guaneli
Assistant Attorney General

SUBJECT: Analysis of Proposed
Bill to Expand Criminal
Conflicts of Interest

Senator Faiks asked that I prepare a brief sectional analysis of a proposed bill drafted by the "Free Committee". A copy of the proposed bill is attached to this memorandum.

Sections 1 and 2 of the proposed bill are amendments to the financial disclosure provisions of AS 39.50 and do not present any real problem.

The problem comes in section 3 of the bill which makes a much wider range on conduct criminal under AS 39.50.090. The bill breaks AS 39.50.090 into thirteen subsections, most of which will be discussed below.

(a) Subsection (a) prohibits a public official from using his position for the primary purpose of obtaining "special privileges, exemptions, or compensation" in addition to "financial gain", which is prohibited under current law. This subsection doesn't present any particular problem except that it lacks any definition for special privileges, exemption or compensation. What is more troublesome is that the conduct has been escalated to a class C felony, as opposed to the class A misdemeanor penalties that exist today. The type of conduct that is likely to arise under this subsection simply does not justify felony penalties. Present provisions under the criminal code would likely cover the more egregious examples of conflicts of interest, i.e., bribery, theft, or scheme to defraud. (The Dankworth case could have been charged as a felony offense but was not because of the unique factual circumstances.)

(b) Subsection (b) covers the same conduct that is currently prohibited under AS 11.56.860 (misuse of confidential information). Under the criminal code that conduct is a class A misdemeanor and there appears to be no good reason for changing it to a class C felony, as proposed in this legislation.

(c) Subsection (c) establishes the class C felony penalty provisions for subsections (a) and (b).

(d) Subsection (d) is a common exemption for official legislative conduct that effects the public generally or a class of people of which the legislator is a member.

(e) Subsection (e) covers the same conduct that is currently prohibited in AS 39.50.090(b) and AS 11.56.120 (receiving unlawful gratuities).

(f) These subsections would constitute new crimes under the law. There are a number of reasons why these new criminal provisions are not appropriate in the area of conflicts of interest. I'll try to set out a few of these reasons:

(1) From a philosophical standpoint it is not appropriate to expand the criminal law when civil or administrative remedies are sufficient to regulate certain conduct. Many common conflict of interest situations are not per se wrongful; rather, they are potential conflicts of interest depending upon the factual circumstances and certain policy decisions. It is therefore appropriate that policy questions be addressed by an administrative agency that would review these matters and issue advisory opinions. The courts are much less responsive to public opinion and changes in social policy and the issues would often be subject to the delays that are inherent in the criminal justice system. In order to deal with this area in an expeditious and comprehensive manner, we should proceed administratively and rely on criminal remedies, only in the most serious circumstances.

(2) Some of these provisions, particularly subparagraph (h), are so broad that it is not clear what conduct is being made criminal. The statute may therefore be void for vagueness.

(3) Subsections (i) and (j) would make it a crime to apply for a state loan or a state contract without simultaneously filing a copy of the application to the APOC. It seems to me that conduct of this sort would happen only if somebody forgot to file the proper forms and it clearly seems inappropriate to make such conduct criminal.

(4) Subsection (k) makes it a crime for a legislator or person acting on his behalf to raise campaign funds during a legislative session. Although I have not analyzed the situation carefully, it strikes me that an equal protection claim could be raised. Incumbent legislators would be at a disadvantage compared to non-legislators. Moreover,

April 6, 1983

other people of influence, such as high executive branch officials, would be allowed to campaign while in office. The only way around this problem would be to prohibit all campaigning during a legislative session, which may potentially raise First Amendment questions.

In general, there does not appear to be anything in these new provisions which ought to be punished as a criminal act. A subsidiary issue, and one that is not addressed at all in the proposed legislation, is the question of legislative immunity. As you know, a criminal prosecution against a legislator raises constitutional questions that have not as yet been addressed. Although we have taken the position in the Dankworth matter that legislative immunity has no application to the unique circumstances presented in that case, that doctrine will often preclude prosecutions against legislators. The legislative immunity problems does not, however, arise if the ethics agency reviewing the conduct of a legislator is within the legislative branch.

Section 4 of this proposed legislation permits public officials to request an attorney general's opinion to determine whether a violation exists. The attorney general would be required to issue an opinion within 30 days. It seems to me that the policy decisions underlying conflict of interest issues should come from the particular ethics agency that is going to be scrutinizing any conduct. If that agency has legal questions, it could then seek the opinion of the attorney general.

The remainder of the legislation presents no particular problem.

In conclusion, this proposed legislation does not present the type of comprehensive set of guidelines and procedures that everyone believes is required. In addition, the reliance on criminal penalties is inappropriate and overlooks the difficulties posed by criminal prosecutions in these types of cases.

If I can be of further assistance, please let me know.

13-0599
Bradley
2/2/83✓

FREE COMMITTEE
SHERMY JACOBUS
JAN BAUMIDFF

1 IN THE SENATE

BY THE RULES COMMITTEE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to financial disclosure; and provid-
7 ing for an effective date."

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

9 * Section 1. AS 39.50.030(a) is amended to read:

10 (a) Each statement shall be an accurate representation of the
11 financial affairs of the public official or candidate and shall con-
12 tain the same information for each member of the [HIS] family and of
13 the household of the public official or candidate, as specified in (b)
14 of this section, to the extent that it is ascertainable by the public
15 official or candidate. An asset or liability under \$1,000 [\$500],
16 household goods, and personal effects need not be identified.

17 * Sec. 2. AS 39.50.030(b) is amended to read:

18 (b) Each statement filed by a public official or candidate under
19 this chapter shall include:

20 (1) the source of all income over \$500 [\$100], including
21 capital gains, whether or not taxable, received by the public official
22 or candidate or by a member of the family or of the household of the
23 public official or candidate [HIM OR HIS SPOUSE OR DEPENDENT CHILD OF
24 HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH HIM,] during the
25 preceding calendar year;

26 (2) the identity, by name and address, of each business in
27 which the public official or candidate or a member of the family or of
28 the household of the public official or candidate [HE OR HIS SPOUSE OR
29 DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH

HIM] was a stockholder, owner, officer, director, partner, proprietor, or employee during the preceding calendar year;

(3) the identity and nature of each interest owned by the public official or candidate or a member of the family or of the household of the public official or candidate [HIM OR HIS SPOUSE OR DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH HIM,] in any business during the preceding calendar year;

(4) the identity and nature of each interest in real property, including an option to buy, owned by the public official or candidate or by a member of the family or of the household of a public official or candidate [HIM OR HIS SPOUSE OR DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH HIM, AT ANY TIME] during the preceding calendar year;

(5) the identity of each trust or other fiduciary relation in which the public official or candidate or a member of the family or of the household of a public official or candidate [HE OR HIS SPOUSE OR DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH HIM,] held a beneficial interest during the preceding calendar year, a description and identification of the property contained in each trust or relation, and the nature and extent of the beneficial interest in it;

(6) any loan or loan guarantee made to the public official or candidate or a member of the family or of the household of the public official or candidate [HIM OR HIS SPOUSE OR DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH HIM,] and the identity of the maker of the loan or loan guarantor and the identity of each creditor to whom the public official or candidate or a member of the family or of the household of a public official or candidate [HE OR HIS SPOUSE OR DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF

1 HIS WHO IS LIVING WITH HIM] owed \$500 or more;

2 (7) a list of all contracts and offers to contract with the
3 state, or an instrumentality of the state, during the preceding calen-
4 dar year, held, bid or offered by the public official or candidate or
5 a member of the family or of the household of the public official or
6 candidate [HIM, HIS SPOUSE, DEPENDENT CHILD OF HIS OR NONDEPENDENT
7 CHILD OF HIS WHO IS LIVING WITH HIM, HIS MOTHER OR FATHER] or a part-
8 nership or professional corporation of which the public official or
9 candidate or a member of the family or of the household of the public
10 official or candidate [HE] is a member, or a corporation in which the
11 public official or candidate or a member of the family or of the
12 household of the public official or candidate [HE OR HIS SPOUSE OR HIS
13 CHILDREN,] or a combination of them, hold a controlling interest; and

14 (8) a list of all mineral, timber, oil, or any other
15 natural resource lease held, or lease offer made, during the preceding
16 calendar year by the public official or candidate or a member of the
17 family or of the household of a public official or candidate [HIM, A
18 DEPENDENT CHILD OF HIS OR NONDEPENDENT CHILD OF HIS WHO IS LIVING WITH
19 HIM, HIS MOTHER OR FATHER] or a partnership or professional corpo-
20 ration of which the public official or candidate or a member of the
21 family or of the household of the public official or candidate [HE] is
22 a member, or a corporation in which the public official or candidate
23 or a member of the family or of the household of a public official or
24 candidate [HE OR HIS SPOUSE OR HIS CHILDREN,] or a combination of
25 them, hold a controlling interest.

26 * Sec. 3. AS 39.50.090 is repealed and reenacted to read:

27 *BRANDER* Sec. 39.50.090. PROHIBITED ACTS. (a) The official position or
28 office of a public official may not be used for the primary purpose of
29 obtaining financial gain, special privileges, exemptions, or compensa-

tion for the benefit of the public official or for the benefit of a member of the family or of the household of the public official or for the benefit of a business with which the public official or a member of the family or of the household of the public official is associated or owns stock.

AS 11.56.860 (b) A public official and a former public official may not disclose information that by law or regulation is not available to a member of the public and that the public official or employee of the legislature acquired during the course of official duties for the personal gain or benefit of the public official or anyone else.

(c) Violation of a provision of (a) or (b) of this section is a class C felony.

(d) The provisions of (a) and (b) of this section do not preclude a member of the legislature from introducing, advocating, or voting for legislation that affects the public generally or that affects a specific class of individuals of which the member of the legislature or a member of the family or of the household of a member of the legislature is a member.

AS 11.56.120 (e) A person may not offer or pay to a public official and a public official may not solicit or receive money for advice or assistance given in the course of the public office or employment of the public official. Each member of a state commission or board who is a full-time public official of the state and each municipal officer who serves as a full-time employee with the municipality may not solicit or receive money for advice or assistance if the subject matter of the advice or assistance is related to the function of the commission, board, or municipality.

NEW CRIME (f) A full-time public official of the state may not represent a client before a state agency for a fee. Each member of a state

1 commission or board who is not a full-time employee of the state may
2 represent a client before a different commission or board for a fee.

3 *NEW CRIME* (g) A municipal officer may not represent a client for a fee
4 before the municipal body that the municipal officer serves.

5 *NEW CRIME* (h) A former public official may not within 12 months after
6 termination of office or employment assist any person or act in a
7 representative capacity for a fee or other consideration on a matter
8 in which the public official personally participated as a public
9 official. This subsection does not prohibit any agency from contract-
10 ing with a former public official and does not prevent a public offi-
11 cial from appearing before the public agency in ² regard to the office
12 or employment.

13 *NEW CRIME* *REQUIRES KNOWLEDGE OR RECEIPT* (i) A public official may not apply for a loan from a state
14 *WHO COMMIT?* agency unless the application is simultaneously filed with the commis-
15 sion. A state agency may not approve a loan to a public official who
16 fails to file the application with the commission and a state agency
17 may not grant special consideration to the application of a public
18 official.

19 *NEW CRIME* *KNOWING OR RECEIPT* (j) A public official, a member of the family or of the house-
20 *WHO COMMIT?* hold of a public official, and a business with which the public offi-
21 cial or the member of the family or of the household of a public
22 official is associated may not enter into a contract with the state
23 valued at \$100 or more unless the contract is awarded under competi-
24 tive bidding. A member of the legislature shall simultaneously file
25 the offer to contract with the commission; if the offer to contract is
26 a sealed bid, the commission may not open the offer to contract until
27 after the offer to contract has been opened by the agency receiving
28 the offer to contract. A state agency may not award a contract to a
29 public official or to a person known to be a member of the family or

1 of the household of a public official or to a business that is asso-
2 ciated with the public official or with a member of the family or of
3 the household of a public official unless the offer to contact is
4 filed with the commission.

5 **EQUAL PROTECTION** (k) A member of the legislature and a person acting on behalf of
6 a member of the legislature and a member of the family or of the
7 household of a member of the legislature may not solicit or accept
8 funds for political contributions to the campaign treasury of the
9 member of the legislature during a legislative session.

10 (l) A violation of AS 39.50.090(e) - (k) is a class A misde-
11 meanor.

12 (m) In this section, "public official" includes, in addition to
13 the persons specified in AS 39.50.200(a)(1), each member of a commis-
14 sion or board established by law as an agency of the state.

15 * Sec. 4. AS 39.50 is amended by adding a new section to read:

16 **MORE ATTYS** Sec. 39.50.095. **ADVISE FROM ATTORNEY GENERAL.** A public offi-
17 cial, a member of the family or of the household of a public official,
18 **WHAT IF NOT ENOUGH PAGES ?** ~~and~~ ^{OR} a business with which the public official is associated, ^{who} ~~that~~ is
19 concerned whether action may constitute a violation of this chapter
20 may request the attorney general to determine whether a violation
21 would exist under the situation presented in the request. The attor-
22 ney general shall issue the determination within 30 days of the re-
23 ceipt of the request; if the attorney general does not issue a deter-
24 mination within 30 days of the request, the situation as presented in
25 the request does not constitute a violation of this chapter.

26 * Sec. 5. AS 39.50.200(a)(8) is amended to read:

27 (8) "source of income" means the entity for which service
28 is performed or which is otherwise the origin of payment; if the
29 person whose income is being reported is employed by another, the

1 [HIS] employer of the person is the source of the [HIS] income; but if
2 the person [HE] is self-employed by means of a sole proprietorship,
3 partnership, professional corporation, or a corporation in which the
4 person or a member of the family or of the household of the person [HE
5 OR HIS SPOUSE OR HIS CHILDREN], or a combination of them, hold a
6 controlling interest, the "source" is the client or customer of the
7 proprietorship, partnership or corporation, but if the entity which is
8 the origin of payment is not the same as the client or customer for
9 whom the service is performed, both are [CONSIDERED] the source;

10 * Sec. 6. AS 39.50.200(a) is amended by adding new paragraphs to read:

11 (10) "member of the household" means

12 (A) a person whose permanent address is the same as
13 the permanent address of the public official; and

14 (B) a person who actually resides in the household of
15 the public official;

16 (11) "member of the family" means a spouse, mother, father,
17 a mother or father of a spouse, child, and brother or sister of a
18 public official.

19 * Sec. 7. This Act takes effect immediately in accordance with AS 01.-
20 10.070(c).
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REPRESENTATIVE DON CLOCKSIN

Alaska House of Representatives

ASSISTANT MINORITY LEADER

1527 H STREET
ANCHORAGE, ALASKA 99501
(907) 278-4188

WHILE IN JUNEAU:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3704

TO: Members, Special Committee on Legislative Reform

FROM: Rep. Don Clocksin

DATE: April 4, 1983

Thank you for the opportunity to testify before you on Thursday, March 31, 1983, regarding the "Speech and Debate Clause" of the Alaska Constitution. I have now received the legal opinion I requested on the immunity of a legislator from punishment for his or her activities during a legislative session.

That opinion, which is attached, appears to indicate it is difficult to hold legislators responsible for actions taken during a session, even if they are unethical. This is consistent with the recent ruling in State v. Dankworth, also attached.

I encourage you to carefully review this problem. If it is not addressed, we run the risk of passing legislation which exceeds our authority and which may be viewed by the public as a facade.

Several specific points should be addressed regarding our "speech and debate clause". That provision provides as follows:

Legislators may not be held to answer before any tribunal for any statement made in the exercise of their legislative duties while the legislature is in session....

First, does the language "may not be held to answer" prohibit even an investigation with subpoena powers? The Dankworth opinion addresses this on page 9.

Second, does the language "before any other tribunal" allow a legislative committee to investigate a legislator? What if some members of that committee were not legislators?

Page 2

Third, does the language "for any statement made in the exercise of their legislative duties" protect actions taken in committees or in the budget process? See the discussion in the Dankworth opinion at pp. 6-8.

Fourth and most important, can the Legislature waive the constitutional immunity? It would seem that a waiver may not be possible. See the Dankworth opinion, at pp. 9-13. Even if it is, substantial policy reasons exist for protecting legislators from politically motivated harassment which interferes with their ability to represent their constituents. The issue is where the line is drawn between the public's right to expect honest legislators and the voters' right to have their legislator free to act in their interests. The history of this constitutional immunity, and the federal counterpart, is replete with examples of politically motivated interference with honest legislators and illegal actions by dishonest legislators.

Good luck with your work!

enclosures:

Called Bernier
2-24-83

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT JUNEAU
3 STATE OF ALASKA,)
4 Plaintiff,)
5 vs.)
6 MILTON EDWARD DANKWORTH,)
7 Defendant.)
8 (C)) No. 1JU-S82-1705 CR

9 MEMORANDUM OF DECISION
10 AND ORDER RE MOTION TO
11 DISMISS INDICTMENT

12 Defendant has moved to dismiss both counts of a two count
13 misdemeanor ^{1/} indictment on the grounds that neither count is
14 supported by sufficient evidence as required by Crim. R. 6(q).
15 Defendant's motion regarding Count II is combined with an attack
16 on the admissibility of most if not all of the evidence presented
17 to the grand jury in support of Count II. For the reasons set
18 out below, ^{2/} the motion to dismiss as to Count I will be denied
19 and the motion to dismiss as to Count II will be granted.

20
21
22 1. The State notes in passing that "the defendant is
23 probably not entitled to a judicial review of the evidence
24 presented to a grand jury which returned an indictment for
25 misdemeanor offenses," State's Memorandum in Opposition to Motion
26 to Dismiss Indictment [hereinafter "Opposition Memo"] 37. None-
27 theless, it declines to rely on that point. Id.

28 2. Especially as to Count I, the reasons for the court's
29 decision are not set out in great detail. There has been insuf-
30 ficient time to do so. Oral argument was held on February 4,
31 1983 and, at the request of counsel (who need to know whether to
32 prepare for an estimated three-week trial with more than 50
witnesses), a decision was promised by February 11. In fact,
this decision will issue on February 14. Every court day be-
tween argument and decision has been entirely consumed by other
matters. Hence, review of the memoranda, authorities cited by
counsel, transcript and exhibits has been relegated to other
times, and the time remaining for the written decision necessarily
has been quite brief.

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COUNT I

Sufficiency of the Evidence

Crim. R. 6(q) provides in relevant part:

The grand jury shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant.

Upon a challenge to an indictment, the State must show that it has presented admissible evidence supporting each of the elements of the offense, Adams v. State, 598 P.2d 503, 508 (Alaska 1979), which is "adequate to persuade reasonable minded persons that if unexplained or uncontradicted it would warrant a conviction of the person charged." State v. Parks, 437 P.2d 642, 644 (Alaska 1968). Because there is a presumption that a grand jury "acted on sufficient evidence," State v. Shelton, 368 P.2d 817, 819 (Alaska 1962), and because a motion to dismiss tests sufficiency of evidence reviewed on a cold record, all reasonable inferences from the evidence must be drawn in favor of the non-moving party. ^{3/}

Count I of the indictment charges that the defendant used his official position as a State senator for the primary purpose of obtaining financial gain for himself, in several ways:

(1) by receiving information from Alyeska Pipeline Services Company that Isabel Pass Pipeline Camp was available for purchase by the State;

(2) by communicating to Alyeska that the State was most probably not interested in purchasing the camp;

(3) by promoting an interest in the purchase of the camp by the State from him for approximately \$3,000,000, knowing at the time that the camp was still available for purchase by the State directly from Alyeska;

3. Defendant conceded this standard of review at oral argument.

1 (4) by participating in the subsequent purchase of the
2 camp for \$900,000, knowing at the time that the camp was still
3 available for purchase by the State directly from Alyeska; and
4 (5) by further promoting the sale of the camp to the State
5 for approximately \$3,000,000.

6 Defendant concedes that he was a public official at the
7 time in question and that his activities concerning his purchase
8 of and attempted sale of Isabel Camp were undertaken primarily
9 to obtain financial gain for himself. He vigorously disputes,
10 however, that he used his office in any way in undertaking these
11 activities. He analyzes, in close detail, each of the allegations
12 of use of office. The State responds with a similar analysis.

13 This court has reviewed the evidence. Drawing all reason-
14 able inferences in a light most favorable to the State, the
15 evidence would be adequate to persuade a reasonable minded person
16 that, if unexplained or uncontradicted, it would warrant a con-
17 viction of the defendant. That of course is not to say that there
18 are not other, reasonable inferences which might be drawn which
19 would be favorable to the defendant. Indeed, counsel for the
20 defendant have drawn such inferences and presented them in their
21 memoranda. But it is not for this court to decide which view of
22 the evidence is correct. It can only determine if, at this stage,
23 the evidence is sufficient to go forward. ^{4/} In the view of
24 this court, it is.

25
26
27
28 4. Specific examples of relevant and probative evidence
29 which support this conclusion are not provided, for the reason
30 that the trier of fact should not be potentially exposed to the
31 court's specific drawing of inferences -- this case has received
32 intensive pretrial publicity -- nor does the exposure of the
court's weighing process to counsel serve any apparently useful
purpose. Generally, the evidence and inference urged by the
State (Opposition Memo 5-21, 81-84) appear sufficient to defeat
the motion to dismiss.

1 Requirement of Consciousness of Wrongdoing

2 In his Reply to State's Opposition to Motion to Dismiss
3 [hereinafter Reply Memo], defendant raises the issue whether a
4 person, to be convicted, must be shown to have committed acts
5 proscribed by law with some consciousness of wrongdoing. (Reply
6 Memo 4) He argues forcefully that unless such a scienter re-
7 quirement is an element of the crime of conflict of interest, the
8 statute would be unconstitutionally void for vagueness.

9 The argument appears well-founded, and the State at oral
10 argument, in arguing that the record contained much evidence from
11 which the defendant's consciousness of guilt could be inferred,
12 appears to have accepted the defendant's thesis that a con-
13 sciousness of guilt must be shown. (Additionally, the State
14 argues that this scienter requirement is satisfied by a showing
15 that a conflict of interest defendant used his office for the
16 primary purpose of realizing personal gain.) At any event,
17 taking all reasonable inferences arising from the evidence in a
18 light most favorable to the State, there is sufficient evidence
19 to conclude that the defendant acted with a consciousness of
20 wrongdoing. Again, this conclusion merely tests the sufficiency
21 of the evidence, not its final effect on the trier of fact.

22 COUNT II

23 Defendant has moved for dismissal of Count II of the
24 indictment on alternate grounds. He argues first that the
25 evidence presented to the grand jury was insufficient as a
26 matter of law to support the indictment. Alternatively, he
27 contends that "the very allegations of Count [II] of the indict-
28 ment, together with all of the evidence put forth to prove
29 these allegations[, are barred by the speech [or] debate clause".
30 (Defendant's Memo 58, emphasis in original) For the reasons
31 discussed below, this court concludes that what both parties
32 refer to as the "speech or debate clause" of the Alaska

1 Constitution prohibits prosecution of Count II. For this reason,
2 Count II must be dismissed.

3 Legislator Immunity Under Art. II, § 6

4 Art. II, § 6 of the Alaska Constitution reads in relevant
5 part as follows:

6 Legislators may not be held to answer
7 before any other tribunal for any statement
8 made in the exercise of their legislative
duties while the legislature is in session.

9 The parties agree that this is a case of first impression ^{5/} in
10 Alaska. (Defendant's Memo 40, Opposition Memo 63) They there-
11 fore frame their arguments around federal decisions outlining
12 the contours of the federal constitution's "speech or debate
13 clause" -- the defendant arguing that the immunity resulting
14 from the Alaska Constitution should be identical to the immunity
15 provided by the federal constitution, while the state argues
16 that the Alaska Constitution provides a much narrower grant of
17 immunity.

18 The federal constitutional provision is similar but by no
19 means identical to the Alaska provision set out above. It reads:

20 [F]or any speech or debate in either house,
21 [members of Congress] shall not be questioned
in any other place.

22 U. S. Const., Art. I, § 7. The most striking difference between
23 the two provisions is the activity which is protected: Alaska
24 protects "any statement made in the exercise of . . .

25
26
27 5. The term "first impression" is used in the sense that
28 the Alaska Supreme Court has not had the application of Art. II,
§ 6 before it in the context of a criminal case. The only
29 prior judicial expression on Art II, § 6 located by the parties
was the set of instructions to the grand jury in State v.
30 Hohman, No. 1JU-81-464 CR, given by Judge Thomas B. Stewart. The
parties vigorously dispute the proper interpretation of those
31 instructions and their application to this case. No appellate
decision, much less a trial court decision, concerning Art. II,
32 § 6 has been brought to this court's attention.

1 legislative duties," while the federal provision, textually at
2 least, ^{6/} covers only "speech or debate in either house."

3 Although the parties have not argued it, this difference
4 appears to be important. The development of federal law under
5 the federal speech or debate clause has largely been the process
6 of defining the concept of "legislative acts" so as to accommodate
7 the Supreme Court's concern that the literal statement of the
8 immunity found in the text was too narrow to serve the great
9 historical purposes of the framers. While that development may
10 well support the result reached herein (see the defendant's
11 arguments at Defendant's Memo 31-40, Reply Memo 18-19 and the
12 analysis below at 15-19), it is not strictly necessary to the
13 interpretation of the Alaska constitutional provision which
14 protects "any statement made in the exercise of . . . legislative
15 duties." It seems beyond question that the proper function of
16 this court is to examine the acts charged in the indictment and
17 the evidence of those acts, and determine if the defendant is,
18 by virtue of this prosecution, being held to answer for any
19 statement made in the exercise of his legislative duties. If
20 the answer is in the affirmative, Count II cannot stand.

21 The indictment charges, in Count II, that the defendant
22 used his position for the primary purpose of obtaining financial
23 gain for himself "by taking action to assure that an appropri-
24 ation source was enacted during the 1982 session of the Alaska
25 State Legislature" from which a pipeline camp owned by defendant
26 could be purchased by the State of Alaska. That is, the action
27 which is the subject of the indictment is that of taking steps
28

29
30 6. It is true that the federal cases have expanded the
31 immunity to cover acts necessary to the legislative function.
32 But, as the U.S. Supreme Court has noted, and as the State
emphasizes, "The heart of the Clause is speech or debate in
either House." Hutchinson v. Proxmire, 443 U.S. 111, 126, 61
L. Ed. 2d 411, 426 (1979), quoting Gravel v. United States, 408
U.S. 606, 625, 33 L. Ed. 2d 583, 602 (1972).

1 to create a legislative appropriation (for a particular, and
2 allegedly unlawful, purpose).

3 The evidence of those acts largely consisted of telephone
4 calls. One was made by the defendant to Jerry Reinwand, executive
5 assistant to the governor, concerning language in the governor's
6 budget. The others were with William Hudson, Commissioner of
7 the Department of Administration, concerning language in the
8 budget allowing for the purchase of a pipeline camp and con-
9 cerning alternate sources of funding for other Department of
10 Administration expenses (which sources might free other
11 Department of Administration appropriations to purchase a pipe-
12 line camp).

13 In comparing the indictment and the evidence under it with
14 the provisions of Art. II, § 6, the first inquiry is whether
15 the act of assuring (or creating) a funding source is a legis-
16 lative duty. The answer is yes. Art. IX, § 13 of the Alaska
17 Constitution provides in relevant part:

18 No money shall be withdrawn from the
19 treasury except in accordance with ap-
20 propriations made by law.

21 It has been said that the power to control the expenditure of
22 state monies is the supreme legislative power. A classic state-
23 ment is found in Colbert v. State, 39 So. 65, 66 (Miss. 1905):

24 Under all constitutional governments recog-
25 nizing three distinct and independent
26 magistracies, the control of the purse
27 strings of government is a legislative
28 function. Indeed, it is the supreme
29 legislative prerogative, indispensable to
30 the independence and integrity of the
31 Legislature, and not to be surrendered or
32 bridged, save by the Constitution itself,
without disturbing the balance of this
system and endangering the liberties of the
people. The right of the Legislature to
. . . determine . . . the objects upon
which [public revenue] shall be expended
. . . is firmly and inexpugnably estab-
lished in our political system.

1 No one could seriously contend that activity related to the
2 creation of the budget is not legislative activity.

3 Not only was the formulation of the budget clearly legis-
4 lative business, but the defendant's role in the process was
5 central: He was co-chair of the Finance Committee in the Senate.
6 While his role as Finance co-chair is not critical to this
7 analysis, it serves to reinforce the conclusion that his par-
8 ticipation in putting together the budget was a part of his
9 legislative duties.

10 The next inquiry is whether any statements of the defendant
11 which were made in the performance of these duties are at
12 issue. There is no question of this. At oral argument counsel
13 for the State was asked what evidence would remain under Count
14 II if the defendant's interpretation of the Alaska "speech or
15 debate clause" were applied. In a supplemental pleading filed
16 after the argument, the State has conceded that "if . . .
17 evidence of the defendant's phone conversations with Jerry
18 Reinwand and William Hudson is suppressed, there will not be
19 sufficient evidence to uphold Count II of the indictment."
20 (State Supplemental 3, emphasis in original)

21 The next inquiry is whether this prosecution is tantamount
22 to holding legislators "to answer before any other tribunal".
23 The answer is clearly yes. A grand jury and a court are "other
24 tribunal[s]" as the Alaska Constitution uses that term. Every
25 U.S. Supreme Court case construing similar language in the federal
26 speech or debate clause, ("[members of Congress] shall not be
27 questioned in any other place") has dealt either with a grand
28 jury proceeding, e.g., Gravel v. United States, supra, 408 U.S.
29 at 615, 33 L. Ed. 2d at 597, [grand jury subpoena at issue, held:
30 Senator protected from criminal or civil liability or from
31 questioning "elsewhere than in the Senate"], or a trial, e.g.,
32 United States v. Johnson, 383 U.S. 169, 173, 15 L. Ed. 2d 681,

1 684 (1966) [conviction at issue, held: certain evidence utilized
2 at trial barred by speech or debate clause]. Likewise, it is
3 clear that the defendant legislator is "held to answer" by the
4 instigation of charges (and perhaps by the mere investigation by
5 the grand jury), and that there need not literally be the putting
6 of questions to him or her.

7
8 The final inquiry is whether the constitutional injunction
9 against holding legislators to answer in any other tribunal may
10 have been (or may be) waived in this case. The State offers two
11 theories of waiver. Neither is persuasive.

12 The State first argues that AS 39.50.090(a) waives legis-
13 lative immunity. The argument is based on a similar argument
14 made by the government in United States v. Helstoski, 442 U.S.
15 477, 61 L. Ed. 2d 12 (1979). The defendant there was a congress-
16 man accused of bribery, a violation of 18 U.S.C. § 201. The
17 Court set out, and dispatched, the government's argument as
18 follows:

19 The Government also argues that there
20 has been a sort of institutional waiver by
21 Congress in enacting § 201. According to
22 the Government, § 201 represents a collective
23 decision to enlist the aid of the Executive
24 Branch and the courts in the exercise of
25 Congress' powers under Art. I, § 5 to discipline
26 its Members. This Court has twice declined
27 to decide whether a Congressman could, con-
28 sistent with the Clause, be prosecuted for a
29 legislative act as such, provided the prosecution
30 were "founded upon a narrowly drawn statute
31 passed by Congress in the exercise of its
32 legislative power to regulate the conduct of
its members." Johnson, supra, at 185, 15 L
Ed 2d 681, 86 S Ct 749. United States v.
Brewster, 408 US, at 529 n 18, 33 L Ed 2d 507,
92 S Ct 2531. We see no occasion to resolve
that important question. We hold only that
§ 201 does not amount to a congressional
waiver of the protection of the Clause for
individual Members.

Id. at 492, 61 L. Ed. 2d at 25. Significantly, the Court noted
that there was a question whether the Congress had the power at
all, -even if acting through a "narrowly drawn statute", to strip

1 members of the protection of the speech or debate clause. It
2 quoted from Coffin v. Coffin, 4 Mass. 1, 27 (1808), to the effect
3 that "the privilege . . . is not so much the privilege of the
4 house . . . as of each individual member composing it, who is
5 entitled to this privilege even against the declared will of the
6 house." Id. The Court concluded that even "[a]ssuming [for the
7 purpose of argument] that the Congress could constitutionally
8 waive the protection of the Clause for individual Members, such
9 waiver could be shown only by an explicit and unequivocal
10 expression." Id. at 493, 61 L. Ed. 2d at 26 (emphasis added).
11 The statute in the instant case is no stronger for the prosecution
12 here than were the federal statutes involved in Helstoski,
13 Brewster and Johnson. AS 39.50.090(a) contains no explicit and
14 unequivocal waiver of Art. II, § 6 of the Alaska Constitution
15 (again assuming for the sake of argument that the Legislature
16 had the power to do that). Indeed, it contains no waiver
17 language whatsoever. It is clearly insufficient to accomplish
18 the "institutional waiver" which the State urges this court to
19 find. ^{7/}

20 The State next argues that the defendant waived his pro-
21 tection under the Alaska speech or debate clause by voluntarily
22 testifying before the grand jury. ^{8/} The defendant responds
23

24
25 7. The State's primary argument in regard to its theory
26 that AS 39.50.090(a) waives speech or debate clause protection
27 is based on its perception of what is good policy. (Opposition
28 Memo 73-78) Thus, the State argues extensively that there are
29 sound reasons not to apply legislative immunity to criminal
30 cases, that at the least the level of immunity protection should
31 be less in criminal than in civil cases, that the need for
32 honest government requires that speech or debate immunity be
limited, etc. While these arguments may have merit, this court
is not free to construe the Alaska Constitution according to what
it believes to be good policy. It must read and apply the
words of that document in an attempt to carry out the intent
of its authors.

8. The State contends that this waiver makes admissible
the defendant's grand jury testimony and any other testimony
concerning it, though the State concedes that the waiver would
not extend to trial.

1 that, under the applicable law, no waiver occurred here.

2 The facts in this regard were as follows: The defendant
3 voluntarily appeared before the grand jury, was given a "target
4 warning", ^{9/} and was represented by counsel. He was not
5

6 9. The warning read as follows:

7 GRAND JURY TARGET WARNING

8 To: M. E. Dankworth

9 1. You are and have been the subject
10 of an investigation conducted by the State
11 of Alaska and by a grand jury sitting in
12 Juneau, Alaska, investigating allegations
13 of criminal misconduct in connection with
14 the acquisition of the Isabel Pass Pipeline
15 Camp by a business entity in which you are
16 a principal and efforts to sell the camp
17 to the State of Alaska. There is at this
18 time probable cause to believe that your
role in the acquisition of the camp and
in efforts to sell it to the State of
Alaska constituted a criminal offense
and there exists the possibility at the
conclusion of the Grand Jury proceedings
that sufficient evidence may have been
presented upon which criminal charges
could be returned.

19 2. In addition, in accordance with
20 prior communications made to your attorney,
21 you should be aware that the Grand Jury
22 may consider charges other than that in-
23 cluded within the conflict of interest
provision contained in AS 39.50.090(a).
Evidence before the Grand Jury may support
other criminal charges, including felony
offenses.

24 3. You have agreed to appear and
25 testify before the Grand Jury without a
26 subpoena upon the conditions that you are
27 afforded an opportunity at the conclusion
28 of your testimony to give a brief statement
29 to the Grand Jury and that your attorney
30 be afforded an opportunity after the
31 presentation of evidence to review that
32 evidence with prosecuting attorneys and to
set forth reasons why an indictment should
not be returned prior to the final presentation
of this matter to the Grand Jury.

4. You have the right to refuse to
answer any question put to you before the
grand jury that might incriminate you.
(continued)

1 advised of his privilege under the speech or debate clause, and
2 he did not make any statement waiving the protection of that
3 provision. Under these facts no waiver has been shown.

4 As noted by the defendant, the situation in United States
5 v. Helstoski, supra, was much stronger for the government, yet
6 the court there rejected the government's claim of waiver. In
7 Helstoski the defendant congressman had appeared voluntarily ten
8 times before the grand jury, each time being warned of his
9 fifth amendment privilege against self-incrimination. At his
10 ninth appearance, the congressman for the first time mentioned
11 his speech or debate clause privilege and declined to answer a
12

13 9. (continued)

14 5. You have the right to be represented
15 by an attorney before the grand jury, and
16 while an attorney may not enter the grand
17 jury room with you, he may be present im-
18 mediately outside the grand jury room and
19 you have the right to interrupt the pro-
20 ceedings at any point in time to confer
21 with your attorney and obtain his advice.

22 6. If you cannot afford an attorney
23 to represent you, you may apply to the
24 Superior Court of the State of Alaska to
25 request the court to appoint an attorney
26 to represent you. If the court finds you
27 cannot afford an attorney it will appoint
28 an attorney for you.

29 I have read the above Grand Jury
30 Target Warning and understand the rights
31 set out therein.

32 DATED at Juneau, Alaska, this 26th day
of October, 1982.

/s/ M. E. Dankworth

/s/ Avrum M. Gross
Witness
Attorney for M. E. Dankworth
Oct. 26, 1982

1 question on the basis of it. The trial court found, however,
2 that he was aware of the privilege from before his first
3 appearance: He had recently concluded litigation in which he had
4 relied on the speech or debate clause, and the attorney who
5 represented him in that case was the same attorney who represented
6 him before the grand jury. Nonetheless, the Supreme Court held
7 that "waiver can be found only after explicit and unequivocal
8 renunciation of the protection." ^{10/} 442 U.S. at 491, 61 L. Ed.
9 2d at 24. Finding no such renunciation, it rejected the waiver
10 theory. In the instant case, the defendant did not even talk
11 about his speech or debate privilege, and there is no showing
12 that he was even aware of it. Certainly there was no "explicit
13 and unequivocal renunciation" of it. Under these circumstances,
14 there can be no finding that the defendant waived his protection
15 under the Alaska Constitution.

16 The conclusion of this analysis of the scope and effect of
17 Art. II, § 6 of the Alaska Constitution is that it bars prose-
18 cution of Count II of the indictment, both because the indictment
19 itself attempts to hold the defendant to answer before a court
20 for statements made in the exercise of his legislative duties
21 and because the evidence presented to the grand jury in support
22 of the indictment is barred by Art. II, § 6. Because the
23 constitutional language seems clear on its face, it is not
24 strictly necessary to address the following issues. However,
25 both because the parties disputed them at length and because they
26 serve to lend additional support to this court's conclusion,
27

28
29 10. Significantly, the Court found that the standard for
30 waiver of speech or debate clause protection is even higher than
31 the ordinary standard for determining waiver of a constitutional
32 right set out in Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed.
2d 1461, 1464 (1938): "intentional relinquishment or abandonment
of a known right or privilege." 442 U.S. at 491, 61 L. Ed. 2d at
24. This is of significance because this court does not believe
even the Johnson v. Zerbst standard could be satisfied on the
facts of this case.

1 they are considered here, at least briefly. They include: (1)
2 the significance of drafting changes made at the Constitutional
3 Convention concerning Art. II, § 6 and comments by the convention
4 delegates concerning that section; (2) the instructions given to
5 the grand jury in State v. Hohman, 1JU-81-464 CR; and (3) federal
6 case law developed under the speech or debate clause of the
7 federal constitution.

8 The Alaska Constitutional Convention. The State places great
9 significance on the fact that Art. II, § 6 originally provided
10 that no legislator should be held to answer "for any statement
11 made or action taken" in the exercise of his legislative
12 functions. The underlined language was later deleted, and the
13 State urges that this deletion suggests a narrowing of the pro-
14 tection. Whether such an inference is properly drawn, it is not
15 important in the context of this case. The defendant does not
16 seek immunity for "actions" he has taken, but for statements
17 which he has made.

18 The State also argues that the Alaska provision "is narrower
19 because its protection applies only 'while the legislature is in
20 session.'" (Opposition Memo 62) Again, even if the inference
21 is warranted, it is not relevant here: All of the statements of
22 the defendant which concern Count II occurred while the legis-
23 lature was in session.

24 The State relies on a statement made by Delegate McCutcheon,
25 who was the chair of the Committee on the Legislative Branch.
26 Delegate McCutcheon said:

27
28 There is also an immunity clause which provides
29 a legislator will not be held liable for any-
thing he says during a session.

30 Alaska Constitutional Convention Proceedings 1099. The State
31 reads this comment (and one made concerning the privilege from
32 arrest, which is not relevant to this case) as suggesting that
"the protection in Alaska was intended to apply only to the type

1 of conduct that the United States Supreme Court refers to as
2 'pure speech or debate.'" (Opposition Memo 61) This court can
3 draw no such conclusion from the discussion referred to. "[A]ny-
4 thing [a legislator] says" is clearly broader than "pure speech
5 or debate". There is simply no basis for concluding, as the
6 State attempts to do, that the history of the Alaska Constitutional
7 Convention supports the conclusion that the Alaska constitutional
8 protection for legislators is as narrow as the State would find
9 it.

10 Instructions Given in State v. Hohman. The State contends
11 that the instructions given by Judge Thomas B. Stewart in
12 State v. Hohman, supra, support its view of the proper scope
13 and effect to be given to Art. II, § 6 of the Alaska Constitution.
14 This court cannot agree, and adopts the analysis of the defendant
15 concerning the Hohman instructions, which is found at Reply 22-23.

16 Federal Cases Interpreting the Federal Constitution. At
17 the outset, it should be remembered that there are relatively
18 few United States Supreme Court cases interpreting the speech or
19 debate clause of the federal constitution. ("The Speech or
20 Debate Clause has been directly passed on by the Court relatively
21 few times in 190 years." Hutchinson v. Proxmire, supra n.6, 443
22 U.S. at 124, 61 L. Ed. 2d at 424.) There are, of course, an
23 almost limitless number of factual situations in which the speech
24 or debate clause could be implicated. Therefore, there is a
25 substantial amount of extrapolation required in attempting to
26 find guidance from the federal cases. With this caveat in mind,
27 certain general principles can be drawn from the cases.

28 The first is that, contrary to the State's assertion that
29 the clause properly has more to do with protecting legislators
30 against civil liabilities, the great historical purpose of the
31 speech or debate clause was to protect legislators against the
32 executive and the judiciary:

1 There is little doubt that the instigation
2 of criminal charges against critical or
3 disfavored legislators by the executive in
4 a judicial forum was the chief fear prompting
5 the long struggle for parliamentary privilege
6 in England and, in the context of the American
7 system of separation of powers, is the pre-
8 dominate thrust of the Speech or Debate Clause.

9 United States v. Johnson, 383 U.S. 169, 182, 15 L. Ed. 2d 681,
10 689 (1966). It is true that the Court retreated slightly from
11 this position in United States v. Brewster, 408 U.S. 501, 508,
12 33 L. Ed. 2d 507, 515-16 (1972), when it noted that "the English
13 system differs from ours in that the Parliament is the supreme
14 authority not a coordinate branch", and suggesting that "our
15 history does not reflect a catalog of abuses at the hand of the
16 Executive that gave rise to the privilege in England." None-
17 theless, it cannot be denied that the primary purpose of the
18 clause was "to prevent intimidation by the executive and account-
19 ability before a possibly hostile judiciary". Johnson, supra,
20 383 U.S. at 181.

21 From the earliest decisions, the scope of the privilege has
22 been found to be broader than speech or debate on the floor of
23 the Congress. Kilbourn v. Thompson, 13 Otto. 168, 26 L. Ed. 377
24 (1881), quoted approvingly from Coffin v. Coffin, 4 Mass. 1 (1808),
25 which it referred to as "the most authoritative case in this
26 country on the construction of the provision". 26 L. Ed. at 391.
27 In Coffin, Chief Justice Parsons stated:

28 [T]he article ought not to be construed
29 strictly, but liberally, that the full
30 design of it may be answered. I will not
31 confine it to delivering an opinion, uttering
32 a speech, or haranguing in debate, but will
33 extend it to the giving of a vote, to the
34 making of a written report, and to every other
35 act resulting from the nature and the
36 execution of the office. And I would define
37 the article as securing to every member
38 exemption from prosecution for everything
39 said or done by him as a representative,
40 in the exercise of the functions of that
41 office, without inquiring whether the
42 exercise was regular, according to the
43 rules of the House, or irregular and against

1 those rules.

2 4 Mass. 1, 27 (emphasis added). After quoting extensively from
3 Coffin, the Supreme Court in Kilbourn concluded that "[i]t would
4 be a narrow view of the constitutional provision to limit it to
5 words spoken in debate. The reason of the rule is as forceable
6 in its application to [various actions]. In short, to things
7 generally done in a session of the House by one of its members
8 in relation to the business before it." 26 L. Ed. at 391-92.

9 Later cases have refined the standard, but have not retreated
10 from it. Thus, in Tenney v. Brandhove, 341 U.S. 367, 95 L. Ed.
11 1019 (1950) the Court said, against the argument that the state
12 legislative committee involved was acting improperly, that "[t]he
13 claim of an unworthy purpose does not destroy the privilege."
14 341 U.S. at 377, 95 L. Ed. at 1027. The Court in Tenney
15 emphasized that a court may not "inquire into the motives of
16 legislators", a holding which has remained unquestioned in this
17 country from earliest times.

18 In United States v. Johnson, supra, the Court affirmed the
19 reversal of a conspiracy conviction of a member of Congress,
20 because the prosecution had inquired into the defendant's motive
21 in making a particular speech:

22 The essence of such a charge in this context
23 is that the Congressman's conduct was im-
24 properly motivated, and as will appear that
25 is precisely what the Speech or Debate Clause
 generally forecloses from executive and
 judicial inquiry.

26 Id. at 180, 15 L. Ed. 2d at 688.

27 In United States v. Brewster, supra, the Court denied a
28 speech or debate clause challenge to a bribery indictment. Its
29 reasoning, while perhaps not totally consonant with its earlier
30 decisions, lends no support to the State's position here. The
31 Court distinguished Johnson on the ground that it held that the
32 privilege "protected Members from inquiry into legislative acts

1 or the motivation for actual performance of legislative acts",
2 408 U.S. at 509, 33 L. Ed. 2d at 516, whereas the taking (or
3 agreeing to take) money for a promise to act in a certain way is
4 not a legislative act. Moreover, since the illegal conduct is
5 shown by proof of taking or agreeing to take money for a promise
6 to act in a certain way, there is no need for the government to
7 show that the defendant actually fulfilled the alleged illegal
8 bargain. Thus, there is no need to inquire into any legislative
9 act or the motivation for any legislative act. While the
10 exception carved out by Brewster was vigorously disputed by the
11 three dissenters in that case, it does not affect the analysis
12 here. The case does, however, provide another definition for
13 "legislative act", which is of assistance in the instant case:

14 A legislative act has consistently been
15 defined as an act generally done in Congress
16 in relation to the business before it. In
17 sum the Speech or Debate Clause prohibits
18 inquiry only into those things generally
 said or done in the house or the senate in
 the performance of official duties and into
 the motivation for those acts.

19 408 U.S. at 512, 33 L. Ed. 2d at 517-18.

20 Gravel v. United States, 408 U.S. 606, 33 L. Ed. 2d 583
21 (1972) was decided the same day as Brewster. It concerns
22 primarily whether a legislative aide is protected by the speech
23 or debate clause. However, it contains the following language
24 describing legislative acts:

25 Legislative acts are not all-encompassing.
26 The heart of the Clause is speech or debate
27 in either House. Insofar as the Clause is
28 construed to reach other matters, they
29 must be an integral part of the deliberative
30 and communicative processes by which Members
 participate in committee and House proceedings
 with respect to the consideration and passage
 or rejection of proposed legislation or with
 respect to other matters which the Constitution
 places within the jurisdiction of either House.

31 408 U.S. at 625, 33 L. Ed. at 602.

32 As noted above, this court views the Alaska "speech or debate