89 HJ: CONFLICT OF INTEREST-IMMUNITY OF HOSPITAL REVIEW

or decrease in revenue and/or cost to state and/or local government. The analysis shall be made of the measure as it is proposed to be adopted, without further implementing legislation, unless such implementing legislation has been enacted and will become effective by reason of the adoption of the measure by the voters. The analysis shall fairly portray the fiscal effects of the measure for the first full year of implementation and the first year when the last provisions to be implemented are fully effective. The title of the measure which appears on the ballot shall be amended to contain a summary of the Legislative Analyst's estimate of the net state and local government financial impact. The Legislative Analyst shall consult with the Director of Finance and the Chairman of the Committees on Revenue and Taxation of the Senate and of the Assembly, or their designees, in preparing the financial analysis. For purposes of this section, any measure which has no provisions which are self-executing shall be deemed to have no financial effect unless implementing legislation has been enacted which will become effective by reason of the adoption of the measure by the voters. The analysis shall be printed in the ballot pamphlet alongside the Legislative Counsel's detailed analysis and shall not exceed 750 words.

§ 3568. Contents of pamphlet

The ballot pamphlets shall contain:

(a) A complete copy of all measures submitted to the voters by:

(1) The Legislature.

(2) Initiative or referendum petition.

(b) A copy of the specific constitutional or statutory provision, if any, proposed to be affected.

(c) A copy of the arguments provided for by law.

(d) The following statement on the front cover of the ballot pamphlet:

"Arguments in support or opposition of the proposed laws are the opinions of the authors".

(e) A copy of the analyses provided for in this chapter.

(f) The Legislative Counsel's Digest of all statutes which become effective upon approval by the voters of a proposed constitutional amendment and [illegible] a notification to voters that the complete text of each bill is on file in the office of the Secretary of State in Sacramento and is also contained in the published statutes.

§ 3569. Division of pamphlet into two parts; form

[illegible]

§ 3570. Form of second part

[illegible]

§ 3571. Order and form of measures; ballot titles; certification

All measures submitted to the voters shall be printed in the ballot pamphlets, so far as possible, in the same order, manner and form in which they are designated upon the ballot. The ballot titles shall be numbered consecutively and printed in the ballot, complete, immediately prior to the particular measure to which each refers. There shall also be printed in the pamphlet the copy of the ballot title as it will appear on the ballots. The certification of the correctness of the pamphlet by the Secretary of State shall be printed therewith.

§ 3572. Contents of pamphlet

The ballot pamphlet need not contain:

(a) An index to the arguments;

(b) An index to the measures;

(c) A list of the ballot titles as they will appear on the ballot;

(d) A recapitulation of amendments to the Constitution, new laws and amendments to existing laws;

(e) A summary of measures submitted to electors; or

(f) A list showing the order of measures on the ballot and the page on which they appear in the pamphlet.

SECTION 7: Chapter 8(commencing with Section 9900) of Part 1 of Division 2 of Title 2 of the Government Code is repealed.

§ 9900. Definitions

As used in this chapter:

(a) The term "contribution" includes a gift, subscription, loan, advance or deposit of money or anything of value and includes a contract, promise or agreement, whether or not legally enforceable, to make a contribution.

(b) The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift of money or anything of value and [illegible] enforceable, to make an expenditure.

(c) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.

(d) The term * * * "committee" means the Joint Rules Committee.

(e) The term "legislation" means bills, resolutions, amendments, nominations, and other matters pending or proposed in either house of the Legislature, and includes any other matter which may be the subject of action by either house.

(f) The term "political committee" includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice-presidential electors, or any duly authorized committee or subcommittee of a political party whether national, state or local.

§ 9901. Contributions to organizations or funds; account by person soliciting or receiving; receipted bills for expenditures. (a) It shall be the duty of every person who shall in any manner solicit or receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of:

(1) All contributions of any amount or of any value whatsoever;

(2) The name and address of every person making any such contribution of one hundred dollars ($100) or more and the date thereof;

(3) All expenditures made by or on behalf of such organization or fund; and

(4) The name and address of every person to whom any item of expenditure exceeding twenty-five dollars ($25) is made and the date thereof.

(b) It shall be the duty of such person to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding twenty-five dollars ($25) in amount, and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

§ 9902. Contributions of one hundred dollars or more; rendition of account. Every individual who receives a contribution of one hundred dollars ($100) or more for any of the purposes hereinafter designated shall within five days after receipt [illegible] the person or organization for which such contribution [illegible] a detailed account thereof including the name and address of the person making such contribution and the date on which received.

§ 9903. Statement of contributions and expenditures; filing; contents; cumulation

(a) Every person receiving any contributions or expending any money for the purposes [illegible] of Section 9905 of this chapter shall file with the * * * committee between the 1st and 10th day of each calendar month [illegible] any part of which the Legislature was in session and at other times during the year between the 1st and 10th day of the month next following the close of each calendar quarter, provided that the statement filed in January shall be cumulative for the next preceding calendar year, a statement containing complete as of the day next preceding the date of filing:

(1) The name and address of each person who has made a contribution of one hundred dollars ($100) or more not mentioned in the preceding report, except that the first report filed pursuant to this chapter shall contain the name and address of each person who has made any contribution of one hundred dollars ($100) or more to such person since the effective date of this chapter;

(2) The total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

(3) The total sum of all contributions made to or for such person during the calendar year;

(4) The name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of twenty-five dollars ($25) or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

(5) The total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

(6) The total sum of expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

§ 9904. Statement of contributions and expenditures; manner of filing; preservation; statement as public record; public inspection

A statement required by this chapter to be filed with the * * * committee

(a) Shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the * * * committee, Sacramento, California, but in the event it is not received, a duplicate of such statement shall be promptly filed upon notice by the * * * committee of its nonreceipt;

(b) Shall be preserved by the * * * committee for a period of two years from the date of filing, shall constitute part of the public records of * * * the committee, and shall be open to public inspection.

§ 9905. Application of sections 9901 to 9903. The provisions of Sections 9901 to 9903, inclusive, shall apply to any person, except a political committee, who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly

used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Legislature of the State of California or the approval or veto of any legislation by the Governor of the State of California.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Legislature of the State of California or the approval or veto of any legislation by the Governor of the State of California.

§ 9906. Registration as legislative advocates; report; exceptions; compilation and printing of information; certificate of registration

(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Legislature of the State of California or the approval or veto of any legislation by the Governor of the State of California shall, before doing anything in furtherance of such object, register with the committee and shall give to such committee a recent [illegible] black and white photograph of himself and, in writing and under oath, his full legal name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. He shall also, at the time of registering, submit to the committee a written authorization from each person by whom he is employed to act in furtherance of such object. Such person shall again register at each succeeding regular session of the Legislature and again submit at that time the information and authorization required by this subdivision (a), unless he is at that time no longer engaged for pay or other consideration for the purposes hereinabove specified.

(b) Each such person so registering shall, between the 1st and 15th day of each calendar month, so long as his activity continues, file with the committee a detailed report under oath of all money received and such expenditures [illegible] twenty-five dollars ($25) or more during the preceding calendar month in carrying on his work; to whom paid; for what purposes; the total of all expenditures during the preceding calendar month; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any article or editorial; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Legislature of the State of California in support of or opposition to legislation; nor to any state official acting in his official capacity; nor to any elected public official acting in his official capacity; nor to the case of any newspaper or other regularly published periodical, radio or television station (including any individual who owns, publishes, or is employed by any such newspaper or periodical, radio or television station) which in the ordinary course of business publishes news items, editorials or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, radio or television station or individual engages in no further or other activities in connection with the passage or defeat of such legislation other than to appear before a committee of the Legislature of the State of California in support of or in opposition to such legislation; nor to a person when representing a bona fide church solely for the purpose of protecting the public right to practice the doctrines of such church.

(c) All information required to be filed under the provisions of this section with the committee and not previously published shall be compiled by the committee as soon as practicable after the close of the calendar month with respect to which such information is filed and shall be printed in the journal of the house of the chairman of the committee within the week immediately preceding final adjournment of each regular session.

(d) In addition to the requirements of subdivision (a), no person subject to that subdivision shall attempt to influence the passage or defeat of any legislation by the Legislature of the State of California or the approval or veto of any legislation by the Governor of the State of California, unless he shall have received the certificate of registration provided for by subdivision (a) of Section 9909.

§ 9906.05. Consideration contingent upon passage or defeat of legislation; prohibited agreements.

Registration within 30 days immediately preceding a [illegible] regular session of the Legislature shall be deemed a registration at that [illegible] regular session as required by Section 9906.

§ 9906.1 Employment of legislators, attaches, or state employees; statement, contents and filing. If any person registered or required to be registered under Section 9906 hereof employs or requests, recommends, or causes his employer to employ, and such employer does employ, any Member of the Legislature, or any attache of the Legislature, or any full-time state employee, in any capacity whatsoever, he shall file a statement under oath with the same officers with whom he registered under Section 9906, setting out the nature of the employment, the name of the person to be paid thereunder, and the amount of pay or consideration to be paid thereunder. If the Legislature is in session at the time of such employment, the statement shall be filed within five days after such employment, and if the Legislature is not in session, it shall be filed within 10 days after the convening of the next session of the Legislature.

§ 9906.2 Employment of unregistered persons. It shall be unlawful for any person to employ for pay or any consideration, or pay or agree to pay any consideration to, a person to engage in activities for the purpose of influencing the passage or defeat of any legislation or the approval or veto of any legislation who is not registered under Section 9906 except upon condition that such person register forthwith.

§ 9906.5 Consideration contingent upon passage or defeat of legislation; prohibited agreements. No person shall make any agreement whereby any compensation or thing of value is to be paid to any person [illegible]

approval or veto of any legislation by the Governor of California. No person shall agree or undertake to promote, advocate, oppose or influence legislation, or to communicate with Members of the Legislature, or to advocate approval or veto by the Governor of California for a consideration to be paid upon the contingency that any legislation is passed or is defeated.

§ 9907. Oath to reports and statements. All reports and statements required under this chapter shall be made under oath, before an officer authorized by law to administer oaths.

§ 9908. Offenses; penalties. (a) Any person who violates any of the provisions of the foregoing sections of this chapter, and any person who wilfully files any document provided for in this chapter that contains any materially false statement or material omission, or any person who wilfully omits to comply with any material requirement of the foregoing sections of this chapter, shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five thousand dollars ($5,000) or imprisonment for not more than 12 months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Legislature in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than ten thousand dollars ($10,000), or imprisonment for not more than five years, or by both such fine and imprisonment.

§ 9909. Certificates of registration as legislative advocates; revocation or suspension; investigations; appearance before legislature; amendments; reports of violations; failure to file reports

It shall be the duty and responsibility of the respective houses of the Legislature [illegible]

[illegible]

§ 9910. Obligations of legislative advocate. A legislative advocate has the following obligations, violation of which constitutes cause for revocation or suspension of a certificate of registration, but shall not unless otherwise provided by law subject a legislative advocate to any other civil or criminal liability:

1. Not to engage in any activity as a legislative advocate unless he be registered as a legislative advocate, and not to accept compensation for acting as a legislative advocate except upon condition that he forthwith register as a legislative advocate.

2. To abstain from doing any act with the express purpose and intent of placing any Member of the Legislature under personal obligation to him or to his employer.

3. Never to deceive or attempt to deceive any Member of the Legislature of any material fact pertinent to any pending or proposed legislation.

4. Never to cause or influence the introduction of any bill or amendment thereto [illegible]

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE ELECTORS

FINANCIAL DISCLOSURES AND LIMITATIONS AFFECTING POLITICAL CAMPAIGNS, PUBLIC OFFICIALS AND LOBBYISTS -- OTHER MATTERS. INITIATIVE. REQUIRES REPORTS OF RECEIPTS AND EXPENDITURES IN CAMPAIGNS FOR STATE AND LOCAL OFFICES AND BALLOT MEASURES. LIMITS EXPENDITURES FOR STATE-WIDE CANDIDATES AND MEASURES. PROHIBITS PUBLIC OFFICIALS FROM PARTICIPATING IN GOVERNMENTAL DECISIONS AFFECTING THEIR "FINANCIAL INTERESTS." REQUIRES DISCLOSURE OF CERTAIN ASSETS AND INCOME BY CERTAIN PUBLIC OFFICIALS. REQUIRES "LOBBYISTS" TO REGISTER AND FILE REPORTS SHOWING RECEIPTS AND EXPENDITURES IN LOBBYING ACTIVITIES. CREATES FAIR POLITICAL PRACTICES COMMISSION. REVISES BALLOT PAMPHLET REQUIREMENTS. PROVIDES CRIMINAL AND CIVIL SANCTIONS FOR VIOLATIONS. ENACTS AND REPEALS STATUTES ON OTHER MISCELLANEOUS AND ABOVE MATTERS. IF THE PROPOSED INITIATIVE IS ADOPTED, UNDEFINED ADDITIONAL FINANCING FROM STATE SOURCES WILL BE REQUIRED IN THE AMOUNTS OF $930,000 FOR FISCAL YEAR 1974-75, $1,630,000 IN EACH SUBSEQUENT FISCAL YEAR IN WHICH A GENERAL ELECTION IS HELD AND $1,100,000 IN EACH FISCAL YEAR IN WHICH NO GENERAL ELECTION IS HELD.

Off. Use	SIGNATURE (as registered)	DATE month/day	PRINT (last name)	PRINT ADDRESS (as registered)	CITY	ZIP	*Off. Use*
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	22.	-73					

(Do not sign as circulator until you send in petition. Petition need NOT be notarized.)

DECLARATION OF CIRCULATOR

I am registered to vote in the County(or City and County) of.....And of the State of California. Each of the signatures to this petition was signed in my presence. Each signature of this petition is, to the best of my knowledge and belief, the genuine signature of the person whose name it purports to be. I circulated the petition in the above County (or City and County) and no other County.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE OF PETITION CIRCULATOR _____ STREET ADDRESS _____ CITY OR TOWN _____ ZIP _____ DATE _____

Print Last Name_____

~~5. To abstain from soliciting any employment as a legislative advocate except on the basis of his experience, knowledge of the business or field of activity in which his proposed employer is engaged or is interested.~~

~~6. To abstain from any attempt to create a fictitious appearance of public favor or disfavor of any legislative proposal or to cause any communication to be sent to any member of the Legislature, the Lieutenant Governor, or the Governor, in the name of any fictitious person or in the name of any real person, except with the consent of such real person.~~

~~7. Not to encourage the activities of or to have any business dealings relating to legislation or the Legislature with any person whose registration to act as a legislative advocate has been suspended or revoked.~~

~~8. Not to represent, either directly or indirectly, through word of mouth or otherwise, that he can control or obtain the vote or action of any Member of committee of the Legislature, or the approval or veto of any legislation by the Governor of California.~~

~~9. Not to represent an interest adverse to his employer nor to represent employers whose interests are known to him to be adverse.~~

~~10. To retain all books, papers, and documents necessary to substantiate the financial reports required to be made under this chapter for a period of two years.~~

~~§ 9911. Legislative advocate; definition. For the purposes of Sections 9909 and 9910, the term "legislative advocate" includes any person registered or required to be registered under Section 9906.~~

BECAUSE OF THE PAPER SHORTAGE - WE ARE PLACING THESE BRIEF CHAPTER OUTLINES IN THIS SPACE FOR YOUR CONVENIENCE. FOR A LONGER, MORE DETAILED OUTLINE CONTACT ANY COMMON CAUSE OFFICE.

CHAPTER 1. Statement of Purpose. Government has become unresponsive to the needs of the people, largely as a result of the domination of well-financed special interests. To reduce the excessive influence of money on the political process and to return politics to the citizen are primary goals of this initiative. This measure requires regulation, on state and local levels, of lobbyist activities, disclosure and disqualification of specified officials with conflicts of interest, campaign finance disclosure and ceilings on upward-spiraling campaign spending, and the reduction of incumbents' advantage. All reports are public. Chapter 8 is enacted immediately. All other sections are enacted January 7, 1975. Amendments require two-thirds vote of both houses of the legislature.

CHAPTER 2. Definitions.

CHAPTER 3. Fair Political Practices Commission. The Commission shall be a five member, multi-partisan, independent administrative and investigatory body. The Governor appoints the chairman and an additional member from a different political party. The Attorney General, Secretary of State, and Controller will each appoint one member. The Commission is empowered to subpoena records and witnesses, publicize information, investigate violations, issue injunctive relief and levy fines. The Commission will receive $1 million for each fiscal year.

CHAPTER 4. Campaign Disclosure. All campaign contribution and expenditures of $50 or more must be reported by all candidates for state and local elective office, with the name, address, occupation and employers' name of the contributor. This information must be filed 40 and 12 days prior to, and 65 days after election day and every six months while in office. Committees supporting or opposing candidates or ballot measures must also file under similar rules. All statements will be filed with the Secretary of State and audited by the Franchise Tax Board.

CHAPTER 5. Limitations of Expenditures. Candidates for Governor will be limited to spending 7¢ times the number of voting age citizens in a primary election ($980,000), and 9¢ in a general election ($1.26 million). The other six state Constitutional officers will be limited to 3¢ per voting age citizen in each election ($420,000). For incumbents, amounts are reduced by 10%. In addition, independent committees each may spend up to $10,000. The state central committee of a political party and the committees it controls may spend up to $420,000. Proponents of statewide initiatives are limited to spending $ 0,000 to qualify a measure. Supporters and opponents of ballot measures are restricted to spending 8¢ per voting age citizen during the campaign ($1.12 million). No side in an initiative campaign may outspend the other by more than $500,000. All figures will be adjusted for cost-of-living changes.

CHAPTER 6. Lobbyists. Lobbyists are prohibited from making or arranging any political contributions or from making gifts to state officials of more than $10 per month. Lobbyists must submit monthly statements to the Secretary of State detailing all expenditures made, including the name of the beneficiary, in attempting to influence legislative or administrative action. The employers of lobbyists and anyone spending over $250 in a month to influence legislation must also register and file monthly reports. Lobbyists must make all expenditures through a special account and can be audited by the Franchise Tax Board. All reports are public.

CHAPTER 7. Conflict of Interest. Covers all state and local officials whose financial interests could be affected by their decision-making. They must file annual statements of their financial interests which could be affected, including sources of income, investments and property. They must report the nature of the interest and whether the interest is more than $10,000 and more than $100,000. Every candidate for these offices must file a similar statement with their declaration of candidacy. All state and local agencies must adopt precise conflict of interest codes governing their employees. Public officials, as specified, may not participate in any decisions that affect any business or property in which the official has more than a $1,000 interest, or from which the official receives more then $250 within 12 months before the decision, or in which the official holds a major management position.

CHAPTER 8. Ballot Pamphlet Reform. The ballot pamphlet mailed to all voters before each statewide election will be revised to be understandable and easily readable. It will be written in simple and concise language, advoiding technical terms. Type size and page size of the booklet will be increased. The booklet will be available to the public prior to final printing, and perceived inaccuracies may be challenged in court by any voter.

CHAPTER 9. Incumbency. No legislative newsletter or other mass mailing shall be sent at public expense by an elected state officer after the officer has filed a declaration of candidacy. The order of candidate names on the ballot shall be determined without regard to whether the candidate is an incumbent.

CHAPTER 10. Auditing. To insure the accuracy and completeness of all reports filed in connection with this act, the Franchise Tax Board shall make audits and field investigations of campaign statements and lobbyist reports. The Commission may also audit and investigate these reports. Any violation of law will be reported to the Fair Political Practices Commission and the Attorney General.

CHAPTER 11. Enforcement. Any person who violates a provision of this measure is guilty of a misdemeanor and is subject to fines up to triple the amount of the violation for improper reporting or unlawful contributions or expenditures. No person convicted of a violation can be a candidate for elective office or act as a lobbyist for four years following the date of conviction. The Fair Political Practices Commission and appropriate local officials in whose jurisdiction violations occur can bring civil action to stop violations or recover damages. If these officials fail to act, any private citizen can sue. If a citizen wins, they may be reimbursed for court costs.

COMMON CAUSE OFFICES

SAN FRANCISCO – 2152 Union Street, 94123 (415) 346-7600 LOS ANGELES – 601 N. Vermont Ave. #105, 90004 (213) 664-9135

SAN DIEGO – 3469 Noell, 92110 (714) 299-3760

OUR ONLY FINANCING IS THROUGH YOUR PERSONAL SUPPORT!

MAKE CHECKS PAYABLE TO "COMMON CAUSE" [illegible]

November 18, 1974

Mr. Norman Gorsuch, Attorney General
Department of Law
Pouch K
Juneau, Alaska 99801

Dear General:

The Legislative Council, one of the permanent interim arms of the Legislative branch of government, held a regular business session in Anchorage on November 8. One of the matters discussed at that meeting was Initiative No. 2 approved by the voters on August 27, 1974, relating to conflict of interest of public officials. During the course of the discussions concerning the ramifications for the affected officials, it became evident that there is much confusion and trepidation concerning exactly what is required under the provisions of the act and it became equally clear that definitive answers are needed as to how certain provisions of the act are to be applied and interpretated. The end result of the Council's deliberations was that this office, on behalf of the Legislature and all other persons within the purview of the act, was directed to request a formal opinion from the Attorney General concerning many questions surrounding the provisions of the act. The questions posed to you at this time are by no means intended to be all inclusive, but are illustrative of the questions and concerns of the members of the Legislature and most likely of all other persons covered by the act. Some of the specific questions which the Council desires an opinion on are the following.

One of the most important issues to be determined concerns the effective date of the act and who is covered. The actual effective date of the act is December 11, 1974. However, AS 39.50.150 requires that every person who is a public official on the effective date of the act must file the required statements within 60 days of the effective date which would appear to be by February 9, 1975. What effect does the latter provision have on newly elected officials who will not be "public officials" on December 11? Are they exempt from this provision? Equally, does the section require incumbent legislators who are "public officials" on December 11, but will not be on February 9 to file the required statements?

Further confusing the issue is the fact that AS 39.50.060(b) states in effect that no covered person may be seated (in the case of legislators who have failed to comply with the provisions of the act). If the reports are not due until February 9, can legislators take office on January 20 in lieu of this provision?

Again, a subsidiary issue raised by the latter section is what effect does it have on the well-established principal that the Legislature alone is the sole judge of the qualifications of its members?

The above seemingly conflicting provisions are among the most important issues to be decided, i.e. when and who must file. In addition to the above, a myriad of other questions present themselves, some of which are as follows:

1. Must a person's assets and liabilitiesbebe listed in toto or must they be itemized?

2. Hypothetically, would a grocery store owner have to list all of his customers who have made purchases over $100 in value?

3. It was the feeling of the Council that the guidelines pertaining to covered officials who may have professional dealings with the state require clarification.

4. The question arises as to the law requiring professional persons to violate confidentiality agreements.

5. As a hypothetical case, would an attorney be permitted to sue the state on behalf of a client, or vice versa, could an attorney represent the state, or likewise, could a covered official appointed by the state or a private individual act as an arbitrator in a dispute between a private party and the state?

6. To what degree must investments, debts, etc. of family members be disclosed?

7. Must assets such as a painting which has more than a $500 value be declared even if it cost the person nothing, i.e. a gift?

8. When declaring the value of household articles, etc., may the official make his own assessment or must he have them appraised? If the latter, is he to bear the cost of the appraisal?

9. If land is involved, may the assessed value be utilized, your own evaluation, or an independent appraisal, or any of the above?

10. What responsibility does a covered official have if his or her spouse should refuse to divulge the information required under the act?

11. What date is appropriate for evaluating items whose value might fluctuate greatly from day to day or week to week, etc.?

12. To what extent must sources of income be itemized, i.e. must an attorney list his clients by name and/or those of his partners? What if there is a conflict between a professional person's canon of ethics and the requirements of the law? Again, hypothetically, would a banker legislator reveal the names of all of his depositors and borrowers when over $100 is involved?

13. Do the reporting requirements apply to adult children who may be living in the home?

The above questions are not meant by any means to be exhaustive of all of the questions that could or might be raised concerning the implementation of Initiative No. 2, but are certainly illustrative of the many uncertainties and dilemmas facing those public officials covered by the act. In view of the time element involved, it is respectfully requested that an opinion covering the above questions and all other matters that should be known to all officials covered by the act be issued as expeditiously as possible and that the opinion receive the widest immediate dissemination possible to all officials covered by the act and to the public as well.

Equally important from the Council's point of view is that along with definitive answers to the various questions posed, the opinion contain a list of things that need not be done, accounted for, etc.

Your immediate attention to this request is greatly appreciated.

Very truly yours,

John M. Elliott
Executive Director

JME:pmk

cc: Legislative Council members

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

November 29, 1974

Mr. John M. Elliott
Executive Director
Alaska Legislative Council
Pouch Y
Juneau, Alaska 99811

Re: AS 39.50, Conflict of Interest

Dear Mr. Elliott:

We will attempt to answer, point by point, the questions raised by the Legislative Council concerning the Conflict of Interest Initiative, which you have forwarded to us in your letter of November 14, 1974.

Attached hereto is a copy of an opinion given to the lieutenant governor concerning the first reporting date for newly elected legislators, which opinion answers your introductory inquiry concerning whether newly elected legislators can be deemed incumbent public officials. (With respect to a person who is a public official on December 11, 1974, but not on February 9, 1975, such person must file the necessary reports.) By this time, you probably have also received from the lieutenant governor a copy of the reporting forms and instruction and the reporting regulations.

We will consider now your numbered questions, and the answers we have been able to arrive at.

1. Assets and liabilities should be itemized to the extent of identification of each interest so far as source, description, or obligee is concerned. The Act requires disclosure of persons and organizations, not the amount of involvement.

2. The conclusion is inescapable that the owner of a grocery store, if unincorporated, would be required to list the names of his customers who have paid over $100.

3. It is certainly true that AS 39.50.090(c), for example, which prohibits a "public official" from representing a client before a state regulatory agency for a fee, appears to be extremely restrictive, but once again the language is not ambiguous.

4. As the Act now reads, only the Supreme Court can exclude certain disclosures because of professional ethical considerations. AS 39.50.030(c).

5. AS 39.50.090 contains only the prohibition in subsection (c) we mentioned in our comment on your third numbered question, although a real conflict of interest could be present in the situations you hypothesize.

6. Financial interests of family or "household" members must be disclosed as fully as those of the official, insofar as they can be ascertained by the public official.

7. Generally the existence of an interest, not its basis, would be the controlling factor. The painting you hypothesize would probably be considered among household goods, which by AS 39.50.030(a) need not be identified even if over $500. But the ownership of an inherited lot may have significance even though it cost the official nothing.

8. Household articles are not required to be reported. Assessments of other items would be necessary only to determine the $500 cut-off. Professional appraisal in such instances would not seem to be required. The thrust of the Act is disclosure of interests over $500 and not the value of such interests.

9. No evaluation is required.

10. AS 39.50.030(a) would seem to require a good faith effort on the part of the official or candidate, as an interest of a household member must be listed "to the extent that it is ascertainable".

11. Again, no value need be disclosed.

12. Sources of income (i.e., clients) received by a partnership or a professional corporation must be reported by a member public official. With the exception of professional corporations, the source of income for a corporate employee is the corporation.

13. We have interpreted "household" as including all who live in the official's home, except domestic employees.

If you have any further questions, we remain available.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Richard L. Peter
Richard L. Peter
Assistant Attorney General

RLP:md

November 19, 1974

The Honorable H. A. "Red" Boucher
Lieutenant Governor
Office of the Governor
Pouch AA
Juneau, Alaska 99811

Re: Time for Filing Reports
Under AS 39.50.010 et seq.

Dear Lieutenant Governor Boucher:

Recently you have asked if legislators elected in the recent November election are to be deemed incumbent public officials for purposes of determining when such legislators must file their conflict of interest information. It is the opinion of this department that such legislators should be considered incumbent public officials, and thus their conflict of interest statements are not due until February 9, 1975. The rationale for such a conclusion is set forth below. The time at which a legislator is supposed to file a conflict of interest statement is set forth in AS 39.50.020(a), which reads as follows:

> The governor, the lieutenant governor, each legislator, each judicial officer, each commissioner, chairman or member of a state commission or board, and each person hired or appointed as head of a department in the executive branch shall file a statement giving his income sources and business interests, under oath and on penalty of perjury, within 30 days before the time he is hired, appointed, certified, confirmed, or approved and becomes a public official and assumes his duties. Each candidate or incumbent for or in state elective office shall file such a statement at the time of filing a declaration of candidacy within 20 days of the filing of any nominating petition, or within 20 days of becoming a candidate by any other means. Refusal or failure to file within the time pre-

> scribed shall require that the lieutenant governor refuse to accept the candidate's filing fee or his filing for office, or to return the filing fee and remove the name of the candidate from the filing records. A statement shall also be filed no later than April 15 or 15 days after the person files his federal income tax return in each following year whichever shall come first, by all persons named in this subsection. (Emphasis added.)

Because the conflict of interest statute was not in effect at the time of declaration of candidacy of the legislators who ran in the recent November election, the reporting provision which deals specifically with legislative officials is inapplicable. The question then becomes what time for filing conflict of interest information is appropriate for such legislators. This department concludes that the incumbent filing date is the appropriate filing date. The justification for such conclusion is simply that the results of the legislative election will have been certified by the Lieutenant Governor prior to the effective date of the conflict of interest statute, and thus, the legislators can be viewed as having a vested interest in office. Also, the incumbent filing provision - AS 39.50.150 - was meant to provide for an orderly implementation of the conflict of interest law. 1/ Any interpretation of the conflict of interest law which would require new lawmakers to file conflict of interest information 30 days before the legislature convenes on January 20, 1975, would not promote an orderly implementation of the law in view of the extremely complex provisions of the statute. Finally, the goals of the conflict of interest statute are not undermined in anyway by use of the incumbent filing date in this instance.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:
Richard L. Peter
Assistant Attorney General

RLP:md

1/ AS 39.50.150 reads as follows:

> Every person who is a public official as defined in this chapter on the effective date of this chapter shall file the required statements required by the chapter within 60 days of the effective date of this chapter.

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

December 24, 1974

The Honorable Jay S. Hammond
Governor
State of Alaska

Re: Conflict of Interest
Initiative,
AS 39.50

Dear Governor Hammond:

You have requested from the Department of Law an opinion on the construction and constitutional validity of AS 39.50, an initiated act relating to conflict of interest of public officials. Specifically, you have asked:

(1) Whether the disclosure requirements are constitutional.

(2) Whether those provisions of the Act (AS 39.50.090(a), (b) & (c)) which prohibit public officials from engaging in certain areas of activity are valid constitutional restrictions.

(3) Whether the Act can legally require attorneys and accountants to disclose the identity of their clients.

(4) Whether members of all state boards and commissions are subject to the Act.

It is the opinion of this department that:

(1) The disclosure requirements of AS 39.50 are constitutional.

(2) The prohibitions contained in AS 39.50.090 are valid.

(3) The initiative's requirement that attorneys and accountants disclose their clients' identity does not violate the professional ethics of those groups.

(4) Members of all state boards and commissions are subject to AS 39.50, specifically including members of advisory, regulatory and professional licensing boards.

Discussion

On August 27, 1974, 71.1% of those voting on Initiative No. 2 approved it. Initiative No. 2 was codified as AS 39.50 and became effective December 11, 1974. This opinion will refer to sections of the codified law.

In construing that law, it is important to keep in mind that there is no essential difference between measures enacted by initiative and those created through the usual legislative process. 1/ In both cases, if the law is ambiguous, the primary aim of construction is to give effect to the intent of the legislative body. 2/ When the legislative body is the people, their collective intent becomes the object of any search for legislative intent. 3/

With those general principles in mind, we now turn to an analysis of AS 39.50.

(1) The Disclosure Requirements of AS 39.50 Are Constitutional.

The principal constitutional challenge to the disclosure requirements of AS 39.50 is that they invade rights of privacy guaranteed by Article I, §22, of the Alaska Constitution and certain provisions of the United States Constitution applied to the states by the Fourteenth Amendment of the United States Constitution. It is established, both in Alaska and at the federal level, that when a state law encroaches upon fundamental personal liberties, the state must show that the law serves a state interest that is "compelling" and necessary to the accomplishment of a permissible state policy. 4/ The Alaska Supreme Court has specifically noted that where a law impinges upon the constitutionally guaranteed right of privacy, the statute may be upheld only if it is necessary to further a "compelling" state interest. 5/

Comprehensive disclosure statutes similar to Alaska's, challenged upon similar grounds, have been upheld by the Supreme Courts of California, 6/ Illinois, 7/ and Washington. 8/

1/ Washington State Department of Revenue v. Hoppe, 512 P.2d 1094 (Wash.1973); Anthony v. Veatch, 221 P.2d 575 (Ore.1950), appeal dismissed, 340 U.S. 923 (1951).

2/ Concerned Citizens of So. Kenai Pen. Bor. v. Kenai Pen. Bor., 527 P.2d 447 (Alaska 1974).

3/ Washington State Department of Revenue, 512 P.2d 1096.

4/ Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

5/ Gray v. State, 525 P.2d 524 (Alaska 1974).

6/ County of Nevada v. MacMillen, 522 P.2d 1345 (Cal.1974).

7/ Stein v. Howlett, 289 N.E. 2d 409 (Ill.1972); Illinois State Employees Assn. v. Walker, 315 N.E. 2d 9 (Ill.1974), cert. denied, Dec. 9, 1974, N. Y. Times, Dec. 10, 1974, at 26 col. 3.

8/ Fritz v. Gorton, 517 P.2d 911 (Wash.1974), appeal dismissed, U.S. ___, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974).

The United States Supreme Court dismissed an appeal from the Washington decision for want of a substantial federal question 9/ and denied certiorari recently on an appeal from a decision upholding the Illinois statute. 10/ These decisions have justified disclosure laws on a dual basis. First, courts have recognized that the state interest involved is in fact "compelling". Second, it has been generally held that an individual makes at least a partial waiver of his right to privacy when he becomes a public official or a candidate for public office. These justifications will be discussed separately.

(a) Compelling State Need.

The public's need for an honest and impartial government has been held to be "compelling" by those state courts that have recently upheld California's 11/, Illinois' 12/, and Washington's 13/ disclosure laws. The compelling need for voters to gain as much knowledge as possible about candidates for office was also noted recently by the Alaska Supreme Court when it upheld a three-year residency requirement for candidates. 14/

Initiative No. 2 was proposed and voted upon in what can be best described as "the age of Watergate". Public opinion polls frequently show the public's low level of confidence in government and government officials at this time. Confidence is dependent not only on avoiding actual conflict of interest, but upon avoiding even the appearance of conflict of interest by public officials. 15/ It is elementary that confidence in government is essential to the very fabric of our society, and accordingly, measures to restore that confidence through disclosure are readily held to constitute a compelling state interest.

9/ Id.

10/ Illinois State Employees Assn. v. Walker, 315 N.E. 2d 9.

11/ County of Nevada v. MacMillen, 522 P.2d 1353.

12/ Illinois State Employees Assn. v. Walker, 315 N.E. 2d 17.

13/ Fritz v. Gorton, 517 P.2d 924.

14/ Gilbert v. State, 526 P.2d 1131,1136 (Alaska 1974).

15/ Canon 9, Code of Professional Responsibility, states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety".

Both the Alaska Supreme Court 16/ and the United States Supreme Court have indicated that the right to privacy is not absolute. 17/ For instance, the Court noted in Roe v. Wade, 410 U.S. 113 (1973) (apropos of abortion) that the state interest at some point becomes sufficiently compelling to interfere with a woman's right to privacy. 18/ In the specific context of disclosure laws, the Illinois Supreme Court has said that:

> [I]n the balancing of the individual employee's fundamental right to privacy and the state's compelling need for efficient, ethical government, the state's interest predominates. To promote its interest, the state is requiring complete financial disclosure. Such a means is substantially related to the end and is not overbroad. While full financial disclosure is burdensome, anything less would be ineffective in accomplishing the goal. 19/

AS 39.50.030 of course requires not merely the disclosure of an individual's finances but the disclosure of the finances of members of his family. It might be alleged, accordingly, that while the public need for disclosure of the finances of a public official is compelling, the need for disclosure of the finances of his family or household is not. This claim was considered and rejected by the California Supreme Court which noted that such provisions ". . . are reasonably necessary to promote the act's underlying purposes, for otherwise an official could defeat the disclosure provisions by the simple means of transferring record title to his spouse or dependent children. . . . [T]he Act serves the legitimate purpose of assuring that the official disclose the fact that his spouse or dependent children own property which might be materially affected by his official actions." 20/ The California Supreme Court went on to note that "[a]lthough the 1973 act may, to some extent, invade the privacy of the official's spouse or dependent children, we think the public's interest in an honest and impartial government outweighs the interest of such persons in maintaining complete privacy in their financial affairs." 21/

16/ Gray v. State, 525 P.2d 524.

17/ Roe v. Wade, 410 U.S. 113.

18/ Id. at 154.

19/ Illinois State Employees Assn. v. Walker, 315 N.E. 2d 17.

20/ County of Nevada v. MacMillen, 522 P.2d 1353.

21/ Id., at 1353 fn. 10.

The need for disclosure of financial information in order to reveal possible conflicts of interest has been recognized by a number of other governmental units. 22/ At least seven states presently have statutory disclosure provisions for public officials. 23/ One of the seven states has gone so far as to incorporate the disclosure requirement into its state constitution. 24/ The judiciary in Alaska is already subject to disclosure requirements. 25/ Finally, it is worth noting that the United States Supreme Court has recently upheld rather sweeping bank recordkeeping and disclosure requirements, despite a challenge that the provision violated the customer's right of privacy, suggesting that when the public need for disclosure is substantial, the right of privacy must give way. 26/ So, in our opinion, must rights of privacy give way in this instance, for the need for disclosure is clear.

(b) Waiver of Right to Privacy.

The Washington Supreme Court recently noted in upholding Washington's disclosure statute that "the candidate who enters a public arena voluntarily presents or thrusts himself forth as a subject of public interest and scrutiny." 27/ The Washington Court's decision was but the latest of a series of decisions holding that a public personality substantially waives (or loses) his right to privacy by entering public office or becoming a public personality. 28/ Each of the cases indicates a growing awareness of the loss of privacy for public or noteworthy persons and a corresponding interest of the public in obtaining information about those persons. This of course does not mean that a public official or candidate for office waives all rights of privacy. The public here is not intruding upon the official's right of privacy as to those matters which embrace solely his personal as opposed to his official or public life. The public does require, however, that the financial affairs of persons who seek or occupy positions of high public trust be disclosed. Admittedly, one's finances are personal, but not solely personal. Possible financial conflicts

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22/ See for example Executive Order No. 11222, 18 U.S.C. §201.

23/ Arkansas Stat. Ann. (1973 ed.) §§12-3001--12-3008; California Gov. Code §3600 et seq.; Illinois, S.H.A. ch. 127, §§601-101 et seq., 607-101; Kansas Stat. Ann. §§75-4301--75-4306; Tennessee Code Ann. §§8-4125--8-4129; Rev. Code of Washington ch. 42.17; West Virginia Ann. Code ch. 6B.

24/ Illinois, S.H.A. Const. 1970, art. 13, §2.

25/ Alaska Code of Judicial Conduct, Canon 6.

26/ California Bankers Assn. v. Shultz, 416 U.S. 21 (1974).

27/ Fritz v. Gorton, 517 P.2d 923.

28/ Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times v. Sullivan, 376 U.S. 254 (1964).

of interest clearly touch one's official or public life. They relate to one's qualifications for public office. Accordingly, the law can require candidates and office holders to waive their rights of privacy in this area.

(2) The Prohibitions Contained in AS 39.50.090 Are Constitutional.

AS 39.50.090 provides that: (a) No public official may use his official position or office to obtain financial gain for himself, a member of his family or business with which he is associated or owns stock.

(b) No person may offer or pay to a public official, and no public official may solicit or receive money for legislative advice or assistance, or for advice or assistance given in the course of the public official's employment or relating to his employment.

(c) No public official may represent a client before a state regulatory agency for a fee.

(d) Violation of this section is a misdemeanor, punishable upon conviction by a fine not less than $1,000, nor more than $10,000, by imprisonment up to one year, or by both.

AS 39.50.090(a)

AS 39.50.090(a) is basically a codification of the common law rule that public officers are not permitted to place themselves in a position in which personal interests may come into conflict with the duty owed to the public. 29/ However, because AS 39.50.090(d) makes a violation of the prohibition a crime, the statute must be scrutinized more carefully to insure that constitutional safeguards applicable to criminal statutes generally are equally applicable here.

Specifically, it has been suggested that there is a problem of vagueness within AS 39.50.090(a). The section, on its face, appears to prohibit both innocent and wrongful acts, with the result that a public official must act at his peril, exposing himself to criminal penalties for actions he might not understand to be prohibited. For example, a commissioner of revenue might wish to testify favorably before a legislative committee which is considering a cost-of-living pay raise for all state employees

29/ See generally 67 C.J.S. Officers §116.

(governor, commissioners and legislators included). A governor might wish to approve a similar act if it were passed by the legislature. Some "financial gain" would obviously flow to both officials if the pay raise was enacted. Therefore, both a governor and a commissioner of revenue might be reluctant to act, since a literal reading of AS 39.50.090(a) and (d) would indicate prohibition of and penalty for such action. 30/ Similarly, a member of the Fish and Game Board might wish to vote for a regulation which he considered beneficial to the majority of Alaskans, but which would also incidentally benefit him.

Although AS 39.50.090(a) may be read literally to prohibit the actions contemplated by the public official in all three examples, it is unlikely that those voting in favor of Initiative No. 2 intended to penalize seemingly innocent actions that provide only incidental benefit to the official. 31/ This logical conclusion is buttressed by the existence of established legal principles of statutory interpretation, which require a limitation of such an apparently broad criminal statute. 32/

The Alaska Supreme Court has stated that "[p]enal statutes which provide for serious penalties are generally construed to require criminal intent." 33/ Therefore, a reasonable construction

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30/ Legislators voting for such a pay raise might also appear subject to penalty. However, Alaska Const. art II, §6 would prohibit holding a legislator criminally liable for his vote in the legislature.

31/ Contrast with these, the actions prohibited by AS 39.50.090(b) and (c). Those prohibited actions would clearly provide financial benefit to the public official intentionally, rather than incidentally.

32/ CSC v. Letter Carriers, 413 U.S. 548 (1973). The Court has stated in Harriss that, "...no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612,617 (1954). However, the Court in Harriss did note that "...if the general class of offenses to which the offense is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." Id. at 618.

33/ Thomas v. State, 522 P.2d 528,530 (Alaska 1974). Although the United States Supreme Court has indicated that mens rea (criminal intent) is not required for certain regulatory violations, this is not thought to be such a provision. See, e.g. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

needs to be placed on AS 39.50.090(a) in order to make it constitutionally acceptable. 34/ Due to the apparent sweeping application of the section and the corresponding lack of evidence that strict criminal liability was intended, this office has concluded that a requirement of "wrongful or improper" use of a public official's office or position must be read into the statutory prohibition. We mean by this that AS 39.50.090(a) must be understood to prohibit the "corrupt" use of an official's office or position to intentionally benefit himself, family member or business. An innocent action by an official which incidentally benefits him, but only as part of the general benefit conferred upon the public would not be prohibited. For example, in Commonwealth v. McSorley 35/ (alleged misfeasance of office by official who provided state-paid chauffeur for former official), the court searched for evidence of a "corrupt motive" by examining the facts to see if the motive could be inferred from the surrounding circumstances. After noting the presumption that a public official acts with good faith and proper motive, the court in McSorley recognized that the state had benefited by the official's act, and therefore, in the absence of evidence of personal benefit to the official, held that there was no "corrupt motive." We believe a similar investigation of motive is implied by AS 39.50.090(a). 36/

AS 39.50.090(b)

AS 39.50.090(b) (prohibition on payment for legislative advice by public official) does not appear subject to significant constitutional challenge since, as will be seen in the following discussion of AS 39.50.090(c), the relationship between the action prohibited and the state interest to be protected is sufficiently clear to avoid a problem of overbreadth.

AS 39.50.090(c)

In analyzing the constitutional validity of AS 39.50.090(c) (prohibition on public officials practicing before state agencies), we commence with the established proposition that there is no absolute legal right to serve in public office. Once one becomes a public official, he may be subject to various limitations and

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34/ Similarly, a requirement of "criminal intent" should be read into AS 39.50.140, a felony provision. The word "corruptly" is used to supply the criminal intent element in AS 11.30.050, from which AS 39.50.140 was drafted.

35/ Commonwealth v. McSorley, 189 Pa. Super. 223,150 A.2d 570 (1959).

36/ Although potentially vague statutes may be made constitutionally acceptable by a reasonable construction, this is an area appropriate for consideration (and possible amendment) by the legislature.

prohibitions, which are valid if reasonably related to the state interest to be protected. 37/ For example, Art. II, §5 of the Alaska Const. has been held to prohibit a legislator from serving as superintendent of a state-operated school district during his term as legislator. 38/ Similarly, no employee of the Alaska court system may engage directly or indirectly in the practice of law in any Alaskan court during his term of employment. 39/ Somewhat more analogous to AS 39.50.090(c) is 18 U.S.C. §205 which provides, in part, that:

> Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties--
>
> (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest--
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both. 40/

37/ E.g., 18 U.S.C. §§201-208; Alaska Const., art. II, §5; art. IV, §14; Ill. S.H.A. ch. 127, §§602-104, 603-105; N.Y.C.L.S. Pub. Officers L. §73.

38/ Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

39/ Alaska Admin. Rule 2(d).

40/ The federal statute does distinguish between full-time and part-time employees, placing lesser burdens on the latter. Such a distinction with respect to members of advisory boards might well be the subject of an amendment to the initiative.

Accordingly, a prohibition on a public official's engaging in private practice before public agencies or in otherwise engaging in activities which may create a conflict of interest or the appearance of a conflict is not unusual and has been judicially upheld. It follows that AS 39.05.090(c) (and to somewhat the same extent, AS 39.05.090(b)) should be similarly upheld. 41/

In two recent cases 42/, the United States Supreme Court has upheld federal and state authority to prohibit all classified (civil service) employees from engaging in all forms of partisan political activity. The Court upheld the government prohibitions in the face of attacks for vagueness, denial of equal protection, and infringement on First Amendment freedoms. The Court's reasoning is instructive:

> It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress. . . .They are expected to enforce the law and execute the programs of the Government without bias or favoritism. . . .Forbidding activities like these will reduce the hazards to fair and effective government.
>
> # # # #
>
> There is another consideration in this judgment: It is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent. 43/

In these two cases, the Court upheld sweeping prohibitions on otherwise constitutionally protected activities against a single class of persons, civil servants. The prohibitions of AS 39.05.090(b) and (c) are not nearly so broad and their application is limited solely to those public officials who, because of their positions, are able to shape public policy, establish or amend the law, and regulate the affairs of the public. The prohibitions are, in our

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41/ See Petition of Moody, 524 P.2d 1261 (Alaska 1974) (lawyer-employee of judicial system totally prohibited from practice of law).

42/ CSC v. Letter Carriers, 413 U.S. 548 (1973) and Broadrick v. Oklahoma, 413 U.S. 601 (1973).

43/ CSC v. Letter Carriers, 413 U.S. 564-565 (Emphasis added).

opinion, constitutional. 44/

(3) The Initiative's Requirement That Attorneys and Accountants Disclose Their Client's Identity Does Not Violate the Professional Ethics of Those Groups.

A review of the rules of professional ethics for attorneys and accountants has led this office to conclude that they permit the disclosure of a client's identity when required by law. 45/ Specifically, "a lawyer may reveal confidences or secrets when permitted under disciplinary rules or required by law or court order." 46/ Similarly, "[u]nless required by law or court order, an accountant shall not violate a confidence of his client." 47/

This issue is also resolved from another viewpoint. Courts have generally held that the identity of a client is not included in the attorney-client privilege since it is not confidential information. 48/ Moreover, no confidential accountant-client privilege is recognized under federal or Alaska law. 49/ Accordingly, in our view, the disclosure act may validly require attorneys and accountants to list their clients.

44/ Cf. Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). See also Sugarman v. Dougall, 413 U.S. 634 (1973) (distinction on equal protection rights, general civil service as opposed to policy-making positions).

45/ Since this opinion concludes that professional privilege does not prevent compliance with AS 39.50, it is not necessary to consider whether AS 39.50.030(c) violates Alaska Const., art. XI, §7 by limiting the jurisdiction of superior courts.

46/ Code of Professional Responsibility, Disciplinary Rule 4-101(C)(2).

47/ 12 AAC 04.020. Somewhat differently, Rule 301, Rules of Conduct, American Institute of Certified Public Accountants, provides that, "a member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client." This rule does not alter the conclusion reached in this opinion since, by analogy to the court rulings on attorney-client privilege, the client's identity is not "confidential information".

48/ Frank v. Tomlinson, 351 F.2d 384 (5th Cir. 1965), cert. denied, 382 U.S. 1028 (1966); Colton v. United States, 306 F.2d 633 (2nd Cir. 1962); United States v. Pape, 144 F.2d 778 (2nd Cir. 1944), cert. denied, 323 U.S. 752 (1944); United States v. Dickinson, 308 F.Supp. 900 (D. Ariz. 1969), affd. mem. 421 F.2d 702 (9th Cir.1970); State v. Alexander, 503 P.2d 777 (Ariz.1972).

49/ Couch v. United States, 409 U.S. 322 (1973); Alaska R. Civ. P. 43 (h).

(4) Members of All State Boards and Commissions Are Subject to AS 39.50, Specifically Including Members of Advisory, Regulatory and Professional Licensing Boards.

Expressio unius est exclusio alterius. 50/ AS 39.50.020 requires that "each" member of a state commission or board file a statement. The statute does not exclude part-time members or draw distinctions between members of advisory boards, members of regulatory and licensing boards and commissions or any other boards or commissions. The logical inference is that all are included. While the wisdom of coverage this sweeping may be open to question, that is a subject not open for review in this opinion.

Should any ambiguity arise in applying the statute to a particular set of circumstances, the overriding concept is that the general intent of the act be followed. 51/ It seems clear that AS 39.50 was intended to promote as much disclosure by as many board and commission members as possible. 52/

It has been suggested that there is an ambiguity in the coverage of the act because AS 39.50.020(a) requires "each" member of a state board or commission to file, while AS 39.50.200(1) defines board or commission members covered by the Act if they are "hired or appointed" by the state. Examples of members of boards or commissions who are not directly "hired or appointed" by the state include the Board of Governors of the Alaska Bar Association 53/, the Judicial Council (attorney members), and Fish and Game advisory

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50/ "Generally, when people say one thing they do not mean something else." 2A Sutherland, Statutory Construction §§47.23, 47.24 (4th ed. 1973).

51/ See Concerned Citizens of So. Kenai Pen. Bor. v. Kenai Pen. Bor., 527 P.2d 447 (Alaska 1974).

52/ Although its weight as an indicator of legislative intent is open to question, it is worth noting that Initiative No. 2 is basically SB 82 (8th Alaska Legislature) with only a few wording changes. One of the wording changes is found in the section comparable to AS 39.50.020(a) where SB 82 required "full time" members of commissions or boards to file. The omission of "full time" seems to indicate that broader coverage was desired, including part-time board and commission members.

53/ It should be noted that the Board of Governors does not appear to differ significantly from other state licensing and regulatory boards listed in AS Title 8. While the Board of Governors also operates under mandates from the Alaska Supreme Court, this is not viewed as a substantial difference since the justices are also subject to AS 39.50.

committees. In our opinion, these board or commission members are covered by AS 39.50 for several reasons. First, each board or commission is a creation and instrumentality of the State of Alaska. 54/ Although members of most boards and commissions are appointed by the governor, the appointment power for these particular bodies has been delegated to another group. Appointment by such another group would nonetheless represent state action. 55/ Second, even if we assume an ambiguity exists (i.e. one section includes certain persons within the act while another section excludes them), we would still conclude that the broader coverage is the rule. Faced with a determination of which section should prevail, we choose the section that would carry out the overall intent of the initiative 56/, i.e., comprehensive coverage. 57/

We recognize that we have not in this opinion covered every conceivable question which could arise under the conflict of interest measure. Many of those questions will have to be treated on a case by case basis. Nor have we attempted to identify, except in isolated cases, areas where we feel the initiative lends itself to amendment. The entire question of amendment, whether the initiative should be amended at all and, if so, to what extent, involve policy questions which are beyond the scope of this opinion. We will of course be happy to indicate our opinion on the validity of such amendments if and when they are proposed either by your office or by the legislature directly.

Yours very truly,

AMG:as

Avrum M. Gross
Attorney General

54/ The Board of Governors is created by AS 08.08.040; the Judicial Council is created by Alaska Const. art. IV, §8; the Fish and Game Advisory Committees are authorized by AS 16.05.260.

55/ See Lathrop v. Donohue, 367 U.S. 820,824 (1961).

56/ 2A Sutherland, Statutory Construction §45.05 (4th ed. 1973). Comparison of SB 82 on this point reveals that Initiative No. 2 added to the definition of public official by including board and commission members. This again appears to represent a desire to obtain disclosure by as many public officials as possible.

57/ In preparing this opinion it was noted that AS 39.50.060(b) (prohibiting officials, who fail to file, from running for or taking office) may be construed as imposing a qualification for office beyond those set forth in the Alaska Constitution. E.g., Alaska Const., art. II, §2; art. III, §§2,7,25,26. If construed as an additional qualification, it may be invalid. See 1963 Op. Att'y. Gen., No. 6. However, even if this provision (AS 39.50.060(b)) is considered invalid as to constitutional officials, those officials would remain subject to the criminal penalties of the act if they failed to file the required information, and accordingly, the coverage of the act is still clear.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

December 9, 1974

M E M O R A N D U M

TO : Members and Members-Elect of the Alaska Legislature

FROM : Frances A. Ulmer, Legislative Counsel FU

SUBJECT: Conflict of Interest - AS 39.50

At the direction of John Elliott, Executive Director of the Legislative Affairs Agency, I am sending to you all of the information regarding AS 39.50 (Conflict of Interest), which this office has received from the executive branch to date.

Hope that this information is useful to you.

FAU:hg
Enclosures

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

November 29, 1974

M E M O R A N D U M

TO: Members of the Legislative Council

FROM: John M. Elliott, Executive Director

SUBJECT: AS 39.50, Conflict of Interest

Enclosed please find the Attorney General's response to my letter of November 14 to him regarding implementation of the new conflict of interest legislation, together with an opinion issued on November 19 regarding the time for filing reports. Also enclosed are copies of proposed regulation changes for the Office of the Governor and copies of the forms which will be used.

JME:pmk

Enclosures

November 14, 1974

Mr. Norman Gorsuch, Attorney General
Department of Law
Pouch K
Juneau, Alaska 99801

Dear General:

The Legislative Council, one of the permanent interim arms of the Legislative branch of government, held a regular business session in Anchorage on November 8. One of the matters discussed at that meeting was Initiative No. 2 approved by the voters on August 27, 1974, relating to conflict of interest of public officials. During the course of the discussions concerning the ramifications for the affected officials, it became evident that there is much confusion and trepidation concerning exactly what is required under the provisions of the act and it became equally clear that definitive answers are needed as to how certain provisions of the act are to be applied and interpretated. The end result of the Council's deliberations was that this office, on behalf of the Legislature and all other persons within the purview of the act, was directed to request a formal opinion from the Attorney General concerning many questions surrounding the provisions of the act. The questions posed to you at this time are by no means intended to be all inclusive, but are illustrative of the questions and concerns of the members of the Legislature and most likely of all other persons covered by the act. Some of the specific questions which the Council desires an opinion on are the following.

One of the most important issues to be determined concerns the effective date of the act and who is covered. The actual effective date of the act is December 11, 1974. However, AS 39.50.150 requires that every person who is a public official on the effective date of the act must file the required statements within 60 days of the effective date which would appear to be by February 9, 1975. What effect does the latter provision have on newly elected officials who will not be "public officials" on December 11? Are they exempt from this provision? Equally, does the section require incumbent legislators who are "public officials" on December 11, but will not be on February 9 to file the required statements?

Further confusing the issue is the fact that AS 39.50.050(b) states in effect that no covered person may be seated (in the case of legislators who have failed to comply with the provisions of the act). If the reports are not due until February 3, can legislators take office on January 20 in lieu of this provision?

Again, a subsidiary issue raised by the latter section is what effect does it have on the well-established principal that the Legislature alone is the sole judge of the qualifications of its members?

The above seemingly conflicting provisions are among the most important issues to be decided, i.e. when and who must file. In addition to the above, a myriad of other questions present themselves, some of which are as follows:

1. Must a person's assets and liabilities be listed in toto or must they be itemized?

2. Hypothetically, would a grocery store owner have to list all of his customers who have made purchases over $100 in value?

3. It was the feeling of the Council that the guidelines pertaining to covered officials who may have professional dealings with the state require clarification.

4. The question arises as to the law requiring professional persons to violate confidentiality agreements.

5. As a hypothetical case, would an attorney be permitted to sue the state on behalf of a client, or vice versa, could an attorney represent the state, or likewise, could a covered official appointed by the state or a private individual act as an arbitrator in a dispute between a private party and the state?

6. To what degree must investments, debts, etc. of family members be disclosed?

7. Must assets such as a painting which has more than a $500 value be declared even if it cost the person nothing, i.e. a gift?

8. When declaring the value of household articles, etc., may the official make his own assessment or must he have them appraised? If the latter, is he to bear the cost of the appraisal?

9. If land is involved, may the assessed value be utilized, your own evaluation, or an independent appraisal, or any of the above?

10. What responsibility does a covered official have if his or her spouse should refuse to divulge the information required under the act?

11. What date is appropriate for evaluating items whose value might fluctuate greatly from day to day or week to week, etc.?

12. To what extent must sources of income be itemized, i.e. must an attorney list his clients by name and/or those of his partners? What if there is a conflict between a professional person's canon of ethics and the requirements of the law? Again, hypothetically, would a banker legislator reveal the names of all of his depositors and borrowers when over $100 is involved?

13. Do the reporting requirements apply to adult children who may be living in the home?

The above questions are not meant by any means to be exhaustive of all of the questions that could or might be raised concerning the implementation of Initiative No. 2, but are certainly illustrative of the many uncertainties and dilemmas facing those public officials covered by the act. In view of the time element involved, it is respectfully requested that an opinion covering the above questions and all other matters that should be known to all officials covered by the act be issued as expeditiously as possible and that the opinion receive the widest immediate dissemination possible to all officials covered by the act and to the public as well.

Equally important from the Council's point of view is that along with definitive answers to the various questions posed, the opinion contain a list of things that need not be done, accounted for, etc.

Your immediate attention to this request is greatly appreciated.

Very truly yours,

John M. Elliott
Executive Director

JME:pmk

cc: Legislative Council members

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

November 29, 1974

Mr. John M. Elliott
Executive Director
Alaska Legislative Council
Pouch Y
Juneau, Alaska 99811

Re: AS 39.50, Conflict of Interest

Dear Mr. Elliott:

We will attempt to answer, point by point, the questions raised by the Legislative Council concerning the Conflict of Interest Initiative, which you have forwarded to us in your letter of November 14, 1974.

Attached hereto is a copy of an opinion given to the lieutenant governor concerning the first reporting date for newly elected legislators, which opinion answers your introductory inquiry concerning whether newly elected legislators can be deemed incumbent public officials. (With respect to a person who is a public official on December 11, 1974, but not on February 9, 1975, such person must file the necessary reports.) By this time, you probably have also received from the lieutenant governor a copy of the reporting forms and instruction and the reporting regulations.

We will consider now your numbered questions, and the answers we have been able to arrive at.

1. Assets and liabilities should be itemized to the extent of identification of each interest so far as source, description, or obligee is concerned. The Act requires disclosure of persons and organizations, not the amount of involvement.

2. The conclusion is inescapable that the owner of a grocery store, if unincorporated, would be required to list the names of his customers who have paid over $100.

3. It is certainly true that AS 39.50.090(c), for example, which prohibits a "public official" from representing a client before a state regulatory agency for a fee, appears to be extremely restrictive, but once again the language is not ambiguous.

4. As the Act now reads, only the Supreme Court can exclude certain disclosures because of professional ethical considerations. AS 39.50.030(c).

5. AS 39.50.090 contains only the prohibition in subsection (c) we mentioned in our comment on your third numbered question, although a real conflict of interest could be present in the situations you hypothesize.

6. Financial interests of family or "household" members must be disclosed as fully as those of the official, insofar as they can be ascertained by the public official.

7. Generally the existence of an interest, not its basis, would be the controlling factor. The painting you hypothesize would probably be considered among household goods, which by AS 39.50.030(a) need not be identified even if over $500. But the ownership of an inherited lot may have significance even though it cost the official nothing.

8. Household articles are not required to be reported. Assessments of other items would be necessary only to determine the $500 cut-off. Professional appraisal in such instances would not seem to be required. The thrust of the Act is disclosure of interests over $500 and not the value of such interests.

9. No evaluation is required.

10. AS 39.50.030(a) would seem to require a good faith effort on the part of the official or candidate, as an interest of a household member must be listed "to the extent that it is ascertainable".

11. Again, no value need be disclosed.

12. Sources of income (i.e., clients) received by a partnership or a professional corporation must be reported by a member public official. With the exception of professional corporations, the source of income for a corporate employee is the corporation.

13. We have interpreted "household" as including all who live in the official's home, except domestic employees.

If you have any further questions, we remain available.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Richard L. Peter
Richard L. Peter
Assistant Attorney General

RLP:md

November 19, 1974

The Honorable H. A. "Red" Boucher
Lieutenant Governor
Office of the Governor
Pouch AA
Juneau, Alaska 99811

Re: Time for Filing Reports
Under AS 39.50.010 et seq.

Dear Lieutenant Governor Boucher:

Recently you have asked if legislators elected in the recent November election are to be deemed incumbent public officials for purposes of determining when such legislators must file their conflict of interest information. It is the opinion of this department that such legislators should be considered incumbent public officials, and thus their conflict of interest statements are not due until February 9, 1975. The rationale for such a conclusion is set forth below. The time at which a legislator is supposed to file a conflict of interest statement is set forth in AS 39.50.020(a), which reads as follows:

> The governor, the lieutenant governor, each legislator, each judicial officer, each commissioner, chairman or member of a state commission or board, and each person hired or appointed as head of a department in the executive branch shall file a statement giving his income sources and business interests, under oath and on penalty of perjury, within 30 days before the time he is hired, appointed, certified, confirmed, or approved and becomes a public official and assumes his duties. Each candidate or incumbent for or in state elective office shall file such a statement at the time of filing a declaration of candidacy within 20 days of the filing of any nominating petition, or within 20 days of becoming a candidate by any other means. Refusal or failure to file within the time pre-

> scribed shall require that the lieutenant governor refuse to accept the candidate's filing fee or his filing for office, or to return the filing fee and remove the name of the candidate from the filing records. A statement shall also be filed no later than April 15 or 15 days after the person files his federal income tax return in each following year whichever shall come first, by all persons named in this subsection. (Emphasis added.)

Because the conflict of interest statute was not in effect at the time of declaration of candidacy of the legislators who ran in the recent November election, the reporting provision which deals specifically with legislative officials is inapplicable. The question then becomes what time for filing conflict of interest information is appropriate for such legislators. This department concludes that the incumbent filing date is the appropriate filing date. The justification for such conclusion is simply that the results of the legislative election will have been certified by the Lieutenant Governor prior to the effective date of the conflict of interest statute, and thus, the legislators can be viewed as having a vested interest in office. Also, the incumbent filing provision - AS 39.50.150 - was meant to provide for an orderly implementation of the conflict of interest law. 1/ Any interpretation of the conflict of interest law which would require new lawmakers to file conflict of interest information 30 days before the legislature convenes on January 20, 1975, would not promote an orderly implementation of the law in view of the extremely complex provisions of the statute. Finally, the goals of the conflict of interest statute are not undermined in anyway by use of the incumbent filing date in this instance.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:
Richard L. Peter
Assistant Attorney General

RLP:md

1/ AS 39.50.150 reads as follows:

> Every person who is a public official as defined in this chapter on the effective date of this chapter shall file the required statements required by the chapter within 60 days of the effective date of this chapter.

Guidelines for State Legislation on Government Ethics *and* Campaign Financing

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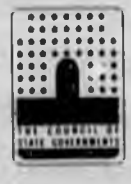

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National Legislative Conference Committee on Legislative Ethics and Campaign Financing 1973–74

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Representative Victor H. Ashe, Tennessee
Senator William S. Ballenger, Michigan
Representative Audrey Beck, Connecticut
Representative Harry C. Geisinger, Georgia
Speaker E. L. Henry, Louisiana
Senator S. H. Runyan, Arizona
Representative Harry A. Sieben, Jr., Minnesota
Mr. Patrick Flahaven, Secretary of the Senate, Minnesota

Karl T. Kurtz, Committee Staff

Contents

Introduction

Recent public opinion surveys reveal what any legislator who goes from door-to-door in his district already knows: that public trust and confidence in government officials is at an all-time low. The attitude of many citizens toward the revelations surrounding the Watergate break-in seems to be, "So what? This is little different from what politicians have always done." Thus, the current crisis of public confidence seems to be more widespread than just the current problems of the Administration in Washington.

One of the results of the Watergate revelations has been a focusing of public attention on how elections are won and on how legislation and administrative regulations are enacted at all levels of government. The news media appear to be delving into every election from mayor to state legislator to President in the hope of uncovering some peccadillo worthy of page one coverage. Public-spirited and reform-minded lobbying organizations are renewing their calls for stronger laws concerning government ethics and campaign financing as a partial means of removing the worst ills and restoring public confidence.

One practical result of this furor is that virtually every Legislature which meets in 1974 will be faced with a barrage of legislative proposals on ethics and campaign financing. Recognizing this fact, the National Legislative Conference's Committee on Legislative Ethics and Campaign Financing (LECF) felt there was a need for a set of guidelines and recommendations concerning the key points of legislation in this field, drafted not by persons who have never run for office, but by a committee of legislators with years of experience in the legislative and electoral processes, representing all political points of view, and from all parts of the country. Therefore, the LECF Committee submits the following recommendations concerning the subjects of campaign financing, open government, conflict of interest, and lobbying to all of the States for their consideration.

In the drafting of these guidelines, two considerations were uppermost in the minds of the Committee members. One consideration, which differentiates these recommendations from those of many other reform groups, was that, as practical politicians, the Committee members did not wish to recommend legislation (like the Federal Corrupt

Practices Act of 1925) so restrictive that even the most honest and forthright public officials would seek every loophole in the law and the courts would often overlook the violations made necessary by the unrealistic strictures of the law. The second consideration was the belief that the best check on potential abuses of the public trust lies with the public disclosure of information. The Committee feels that the line between legitimate and illegitimate, moral and immoral behavior by public officials is frequently so fine that the distinction is difficult to write into law. But if all relevant information is disclosed and made available, the public will have the opportunity to make its own judgments.

The four subject areas of these guidelines—campaign financing, open government, conflict of interest, and lobbying—are obviously very broad. The LECF Committee did not attempt to cover every aspect, to draft specific legislative language, or to resolve those problems and customs which vary substantially from State to State and region to region. Even with the broad guidelines here, however, each State will find it necessary to respond to each recommendation based upon its own unique customs and traditions. Virtually all issues which were regarded as key to the drafting of good legislation are addressed in the guidelines. One exception to this is the subject of public financing of elections at the state level, which is pending further study.

The guidelines which follow should be regarded as the preliminary rather than the final output of the NLC Committee on Legislative Ethics and Campaign Financing, brought about by the pressure of time and public events. In the future, the Committee intends to carry out an evaluation of the impact of existing legislation on ethics and campaign financing in several sample States, leading to a publication containing noteworthy and recommended pieces of legislation from across the country. This project, however, can be carried out only over a longer period of time.

Finally, I should note that these guidelines are the result of the consensus which could be achieved within the NLC Committee on Legislative Ethics and Campaign Financing, and do not necessarily reflect the position of the entire National Legislative Conference, since the Conference has not yet had the opportunity to vote on them.

Representative Joe Clarke, Kentucky
Chairman, National Legislative Conference Committee on Legislative Ethics and Campaign Financing
January 1974

1. Campaign Financing

Recommendation 1.1

All campaign finance legislation should be written in such a manner as to encompass all political activities, including all primary and general elections, ballot propositions, constitutional amendments, recall, initiative, referendum, etc.

Recommendation 1.2

Each State should adopt an overall limitation on campaign spending based upon [ ] cents per capita in each electoral district, or $ [ ], whichever is more.

Comment: The LECF Committee feels that the most equitable system for limiting campaign expenditures is on a size-of-district basis. Some consideration, however, should be given to those very small electoral districts in which, if a per capita ceiling were set, candidates would be prohibited from spending even a minimal amount of money on their campaigns. The Committee therefore recommends that each State adopt specific monetary limitations based upon local campaign expenditure costs, traditions, and attitudes.

Recommendation 1.3

Each candidate for political office or political committee should be required to designate a treasurer through whom all expenditures or contributions are required to be made.

Comment: This provision is not meant to exclude the candidate from designating himself as treasurer, in the event that his campaign is small enough that he chooses to manage it himself. States which are considering adoption of this accounting mechanism for expenditure limitations should take note of a recent U.S. District Court for the District of Columbia's decision (*American Civil Liberties Union, Inc.* v. *Jennings*, November 13, 1973), which held that it is unconstitutional to impose a prior restraint on the right of freedom of expression by requiring political committees and organizations (or at least nonpartisan ones like the ACLU) to receive permission from any political candidate whose name is mentioned before they are permitted to place an advertisement in the news media. This case referred to the Federal Elections Campaign Act of 1971 and will almost certainly be appealed to the U.S. Supreme Court.

Recommendation 1.4

Each candidate or political committee should be required to report the amount and purpose of all aggregate expenditures of $100 or more in statewide campaigns or $25 or more in less than statewide campaigns.

Comment: The term "aggregate" is used in this and the succeeding recommendation to prevent a series of expendi-

tures or contributions of $24 which would not otherwise have to be reported.

Recommendation 1.5

Each candidate or political committee should be required to report the source and amount of all contributions in the aggregate of $25 or more, made for the purpose of election to office or for influencing an election, including the name, address, and occupation of the contributor.

Comment: The LECF Committee does not recommend limitations on campaign contributions, feeling instead that thorough disclosure provisions are an adequate check on excessive campaign-giving.

Recommendation 1.6

"Contribution" should be defined in such a manner as to include loans and "anything of value."

Recommendation 1.7

The reports on expenditures and contributions should be required at a minimum of three different times: between 30 and 40 days prior to any election, between 5 and 10 days prior to the election, and within 30 days after the election.

Comment: In considering the proper dates for reporting requirements, States may wish to take into account the requirements of federal law so as not to overburden candidates for federal office in the State with conflicting reporting dates.

Recommendation 1.8

The reports should be made to a designated state central agency (see Recommendation 1.9) for statewide races or to a designated county central agency for smaller districts with a copy sent to the state central agency. In less than statewide races with multicounty districts, reports should be filed with all counties contained in the district.

Recommendation 1.9

Each State should set up an independent Elections Commission with full-time paid staff whose responsibilities should include preparing forms for reports by candidates, preparing and publishing a manual on the requirements of the law, and otherwise informing and advising candidates concerning the requirements of the law. The Elections Commission should also be the agency responsible for receiving, preparing summaries of, and making available to the public the reports that are filed on statewide races.

Recommendation 1.10

Each State should adopt stringent and effective penalty provisions for failure to comply with the law in the above areas.

Comment: In this and all succeeding sections of the guidelines, enforcement mechanisms have not been spelled out, partly because of the diversity of state traditions and partly because the LECF Committee wishes to make a thorough study of this problem before making specific recommendations.

2. Open Government

Recommendation 2.1

"Meeting" should be defined as the convening of a governing body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.

Recommendation 2.2

"Governing body" should be defined in such a manner as to include any board, commission, department, committee, or agency within the executive or legislative branches of the state, regional council, city, county, and district governments, but to exclude the political caucuses of a Legislature.

Recommendation 2.3

Except in certain circumstances (see Recommendation 2.6), all meetings of a governing body should be open to the public, and all persons should be permitted to attend any meeting.

Recommendation 2.4

Except in certain circumstances (see Recommendation 2.6), no quorum of a governing body should be permitted to meet in private for the purpose of deciding on or deliberating toward a decision on any matter.

Recommendation 2.5

All governing bodies should be required to give public notice, reasonably calculated to give actual notice to interested persons, of the time and place of public meetings.

Recommendation 2.6

All exceptions to the rule of open meetings should be clearly specified in the law and should be reserved primarily for sensitive issues such as: the acquisition of public property; the employment, evaluation, discipline, or dismissal of public employees; and security personnel and devices.

Recommendation 2.7

All information collected, assembled, or maintained by governmental bodies should be declared public information and available to the public, with the exception of certain specifically defined information involving sensitive issues, matters sub-

ject to judicial or executive decree, or drafts and working papers involved in the preparation of proposed legislation.

Recommendation 2.8

Accurate records should be required of all meetings of a governing body. The records may be kept by means of a full transcription, a recording, or written minutes which give a true reflection of the matters discussed at the meeting and the views of the participants.

3. Conflict of Interest

Comment: The recommendations which follow touch only on those aspects of conflict of interest which the Committee feels should be written into law, irrespective of the codes of ethics adopted by most Legislatures which may go considerably further than these provisions.

Recommendation 3.1

Conflict of interest regulations should apply to all state and local public officials, including the legislative, executive, and judicial branches.

Recommendation 3.2

All public officials should be required to file a statement disclosing: (a) the names of all offices, directorships, and salaried employment of the official and his immediate family (defined as spouse and dependent children); (b) all financial interests of the public official and his immediate family in excess of $1,000, by type; (c) the names of all financial interests held by the public official and his immediate family which do business with the State; (d) the names of all entities which do business with the State for which the public official, his immediate family, his firm, or partnership has rendered compensated services within the last year in excess of $500 in value.

Comment: The Committee's intent in this recommendation is to find some compromise between the right of privacy which belongs to all citizens and the special duties and responsibilities which attend service as a public official. Thus, (a) does not require the amount of a public official's income to be disclosed and (b) does not require either the specific amount or the specific name of his financial interests to be disclosed; but, (c) does require the names of his financial assets, and (d) the names of his clients to be disclosed whenever state business is involved.

Recommendation 3.3

The financial disclosure statements should be required to be filed once a year by office-holders. Candidates for public office should be required to file a statement within 10 days of filing for office.

Recommendation 3.4

The penalties for these provisions should be the same as those applying to the regulation of lobbying and the reporting of campaign expenditures, and all filings should be open to public inspection.

Recommendation 3.5

No penalties (such as divestment of interest or removal from office) should be imposed for holding conflicting interests other than the penalties for failure to disclose.

Comment: The LECF Committee feels that the line between legitimate interest and conflict of interest is frequently so fine that the best check is that of the public's judgment based upon full disclosure.

Recommendation 3.6

No legislator, or his firm, should be permitted to practice law before a state agency.

Comment: States may wish to adopt exceptions to this rule for agencies like workmen's compensation boards or other quasi-judicial bodies which may be within the executive branch.

Recommendation 3.7

No legislator should be permitted to serve as paid lobbyist with the Legislature or any state agency or to receive a retainer to introduce, to influence, or to vote upon legislation.

Recommendation 3.8

No public official should be permitted to disclose or use confidential information acquired in the course of his official duties to further his own economic interests or those of anyone else.

Recommendation 3.9

Effective and appropriate penalty provisions should be adopted for violations of Recommendations 3.6 through 3.8.

Comment: See comment to Section 1.10.

Recommendation 3.10

Any legislator who holds an obvious major financial interest in a piece of legislation should be required to disqualify himself from voting on the issue.

Recommendation 3.11

The majority of the members of any standing legislative committee should not be permitted to be legislators with a substantial financial interest in the subject matter of the committee.

Recommendation 3.12

Each State should establish an Ethics Commission or Board consisting of both legislators and other public officials and citizens. The Ethics Commission should be responsible for drafting rules and

regulations regarding the disclosure of financial information and for receiving and filing financial disclosure statements. The commission should be empowered to initiate, receive, and consider charges of alleged violations of codes of conduct or appropriate statutory provisions. It should be authorized to render advisory opinions on these allegations.

4. Lobbying

Recommendation 4.1

The following persons should be required to register as lobbyists: (a) a person who makes a total expenditure in excess of $200 in a calendar quarter, not including travel expenses, for communicating directly with member(s) of the legislative or executive branch to influence legislation or administrative regulations; (b) a person who receives compensation or reimbursement from another to communicate directly with member(s) of the legislative or executive branch to influence legislation or administrative regulations; (c) a person, other than a member of the judicial, legislative, or executive branch, who, in the pursuit of official duties and as part of his regular employment, communicates directly with member(s) of the legislative or executive branch to influence legislation or administrative regulations, whether or not any compensation in addition to regular salary is received for the communication.

Recommendation 4.2

Exceptions to the above should be made for newspaper and television reporters, owners, publishers, and editors, so long as they are pursuing normal reportorial and editorial duties.

Recommendation 4.3

All registered lobbyists should be required to file a quarterly report, including the names and addresses of all clients or principals for whom lobbying is done, the fields of legislation and specific measures which are the object of lobbying activity, the form and amount of compensation received from each client or principal, the total amount expended during the period in pursuit of lobbying activities, and the object and amount of all expenditures in excess of $25.

Recommendation 4.4

All files on lobbying should be open to public inspection.

Recommendation 4.5

All contingency-fee lobbying should be prohibited.

Comment: **The Committee feels that the practice of paying lobbyists a fee contingent upon the passage or defeat of legislation is one which leads particularly to efforts to buy and sell votes and should be outlawed.**

Recommendation 4.6

A "gift" should be defined as a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received.

Recommendation 4.7

No person should be permitted to give a gift to a public official under circumstances in which it could reasonably be inferred that the gift would be made to influence him in his official duties.

Recommendation 4.8

Appropriate and effective penalty provisions should be adopted for any violations of these regulations.

Comment: See comment to Section 1.10.

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Oregon, Senate Bill No. 5, 1973.

Texas, House Bill No. 1, 1973.
——, House Bill No. 2, 1973.
——, House Bill No. 3, 1973.
——, House Bill No. 4, 1973.
——, House Bill No. 6, 1973.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

December 31, 1974

Representative Terry Gardiner
Box 1092
Ketchikan, Alaska 99901

Dear Terry:

In response to your recent note, please find enclosed a copy of Norm Gorsuch's opinion on the Conflict of Interest Law; Av Gross' opinion on the same law; and copies of of the Washington and California conflict of interest laws, both of which were also passed by the initiative process. The California and Washington laws are all inclusive, i.e. they include both conflict of interest laws and campagin limitation laws but I believe you will be able to separate the two. Other states have recently passed conflict of interest laws but Washington and California are typical.

Finally, also enclosed is a booklet published in recent months which contains, in part, recommendations by the National Legislative Conference's Committee on Legislative Ethics and Campaign Financing on recommended provisions for conflict of interest laws which you may find interesting.

Best regards,

John M. Elliott
Executive Director

JME:pmk

Enclosures

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS
OF THE OFFICE OF THE LIEUTENANT GOVERNOR
IN THE OFFICE OF THE GOVERNOR

Notice is hereby given that the Office of the Lieutenant Governor, under authority vested by AS 39.50.050(b), proposes to adopt regulations in Title 6 of the Alaska Administrative Code to implement AS 39.50.010 - 39.50.200 as follows:

6 AAC 29.010. MEMBERS OF ADVISORY BOARDS AND COMMISSIONS. (Exempts members of advisory boards and commissions from the conflict of interest statute.)

6 AAC 29.020. MEMBER OF FAMILY OR HOUSEHOLD. (As used in AS 39.50.030 and AS 39.50.090 defines member of household or family to be a person living in the home of the public official.)

6 AAC 29.030. SOURCE OF INCOME. (As used in AS 39.50.030 (b)(2) defines source of income to mean the person or institution for whom a service is performed. For self employed persons, including professional corporations, the client is the source of income. For rental income, the name of the renter has to be listed.)

6 AAC 29.040. IDENTITY OF INTEREST IN A BUSINESS. (As used in AS 39.50.030(b)(3) means the name and address of the business.)

6 AAC 29.050. NATURE OF INTEREST IN A BUSINESS. (As used in AS 39.50.030(b)(3) means the nature of ownership.)

6 AAC 29.060. ILENTITY OF INTEREST IN REAL PROPERTY. (As used in AS 39.50.030(b)(4) means the location and brief description of real property.)

6 AAC 29.070. NATURE OF INTEREST IN REAL PROPERTY. (As used in AS 39.50.030(b)(4) means the quality and extent of the proprietary interest in the real property.)

6 AAC 29.080. NATURE AND EXTENT OF BENEFICIAL INTEREST IN A TRUST. (As used in AS 39.50.030(b)(5) means the share due the public official or member of his household.)

6 AAC 29.090. LOANS. (As used in AS 39.50.030(b)(6) means any lending transaction.)

6 AAC 29.110. LIST OF CONTRACTS. (As used in AS 39.50. 030(b)(7) means a general description of the goods or services which are the subject of each individual contract.)

6 AAC 29.120. OFFER TO CONTRACT. (As used in AS 39.50.030(b)(7) includes bids.)

6 AAC 29.130. STATE OR INSTRUMENTALITY OF THE STATE. (As used in AS 39.50.030(b)(7) means any state department or agency, the University of Alaska and the Alaska State Housing Authority.)

6 AAC 29.140. LIST OF LEASES. (As used in AS 39.50.030 (b)(8) means identification of the particular type of resource which is the subject of lease, location and description of lease tract and official designation of lease.)

6 AAC 29.150. TIME OF FILING. (For judicial officer at least 30 days prior to appointment to office; for department head or board or commission member, at least 30 days prior to legislative confirmation; for legislative or gubernatorial candidate, on filing declaration of candidacy or within 20 days after filing nominating petition; for all public officials, April 15 of each year or within 15 days after filing federal income tax return.)

6 AAC 29.160. DEFINITIONS.

Notice is also given that any person interested may send written statements or written arguments relevant to the action proposed to the Office of the Lieutenant Governor, Capitol Building, Pouch AA, Juneau, Alaska 99811. To be considered, such statements must be received before 4:30 p.m. on December 27, 1974. Copies of the regulations and of the reporting forms and instructions can be obtained by writing the Lieutenant Governor at the foregoing address or by personal pickup at the Office of the Governor in Anchorage or Fairbanks. The Office of the Lieutenant Governor, upon its own motion or at the instance of an interested person, may thereafter

adopt the above proposals substantially as set out above without further notice.

DATE NOVEMBER 20, 1974

H. A. Boucher
Lieutenant Governor

WHO	WHEN	WHERE
Justices, Judges, and Magistrates	Within 30 days before appointment	Administrator of Courts
Department Heads, Board and Commission Members and Chairmen	Within 30 days before confirmation	Lieutenant Governor's Office
Legislative Candidates	On filing declaration of candidacy or within 20 days after filing nominating petition.	Lieutenant Governor's
Candidates for Governor and Lieutenant Governor	On filing declaration of candidacy or within 20 days after filing nominating petition.	Alaska Legislative Council
The above individuals, except unsuccessful candidates, must also report each April 15, or 15 days after they file their federal income tax returns, whichever comes first. THE FIRST REPORT FOR INCUMBENTS IS DUE BEFORE FEBRUARY 9, 1975.		

TITLE 6. GOVERNOR'S OFFICE

CHAPTER 29. CONFLICT OF INTEREST

6 AAC 29.010. MEMBERS OF ADVISORY BOARDS AND COMMISSIONS. A member of an advisory board or commission is not subject to the requirements of AS 39.50.010 - .220. (Eff. / / , Register)

AUTHORITY: AS 39.50.010
AS 39.50.050(b)

6 AAC 29.020. MEMBER OF FAMILY OR HOUSEHOLD. As used in AS 39.50.030 and AS 39.50.090, "member of family" or "member of household" means a relative or other person, not a domestic employee, living in the home of the public official. (Eff. / / , Register)

AUTHORITY: AS 39.50.030
AS 39.50.090
AS 39.50.050(b)

6 AAC 29.030. SOURCE OF INCOME. (a) As used in AS 39.50.030(b)(2), "source of income" means the person or institution for whom a service is performed or who is otherwise the origin of payment.

(b) If the person for whom the report is made is employed by another, his employer is the source of his income, but if he is self-employed, the source must be listed as the name of the client or customer.

(c) For rental income, the name of the renter shall be listed as well as the address of the rental property. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(2)
AS 39.50.050(b)

6 AAC 29.040. IDENTITY OF INTEREST IN A BUSINESS. As used in AS 39.50.030(b)(3), "identity of interest in a business" means the name and address of the business. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(3)
AS 39.50.050(b)

6 AAC 29.050. NATURE OF INTEREST IN A BUSINESS. As used in AS 39.50.030(b)(3), "nature of interest in a business" means the nature of ownership such as shareholder, partner or sole proprietor. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(3)
AS 39.50.050(b)

6 AAC 29.060. IDENTITY OF INTEREST IN REAL PROPERTY. As used in AS 39.50.030(b)(4), "identity of interest in real property" means the location and a brief description of the real property. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(4)
AS 39.50.050(b)

6 AAC 29.070. NATURE OF INTEREST IN REAL PROPERTY. As used in AS 39.50.030(b)(4), "nature of interest in real property" means the quality and the extent of the proprietary interest in the real property which the public official or member of his household has. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(4)
AS 39.50.050(b)

6 AAC 29.080. NATURE AND EXTENT OF BENEFICIAL INTEREST IN A TRUST. As used in AS 39.50.030(b)(5), "nature and extent of beneficial interest" is the share due to the public official or member of his household as a beneficiary. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(5)
AS 39.50.050(b)

6 AAC 29.090. LOANS. As used in AS 39.50.030(b)(6), "loan" means any lending transaction including both secured and unsecured transfers of funds or other property. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(6)
AS 39.50.050(b)

6 AAC 29.110. LIST OF CONTRACTS. As used in AS 39.50.030(b)(7), "list of contracts" means a general description of the goods or the work or services which are subject of each individual contract or offer to contract and the official designation of the contract. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(7)
AS 39.50.050(b)

6 AAC 29.120. OFFER TO CONTRACT. As used in AS 39.50.030(b)(7), "offer to contract" includes bids. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(7)
AS 39.50.050(b)

6 AAC 29.130. STATE OR INSTRUMENTALITY OF THE STATE. As used in AS 39.50.030(b)(7), "state or instrumentality of the state" means any state department or agency, the University of Alaska and the Alaska State Housing Authority. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(7)
AS 39.50.050(b)

6 AAC 29.140. LIST OF LEASES. As used in AS 39.50.030(b)(8), "list of leases" means identification of the particular type of resource which is the subject of the lease, the location and description of the tract containing the resource, and the official designation of the lease. (Eff. / / , Register)

AUTHORITY: AS 39.50.030(b)(8)
AS 39.50.050(b)

6 AAC 29.150. TIME OF FILING. (a) A judicial officer shall file the information required by AS 39.50.010 - .220 at least 30 days prior to appointment to office.

(b) A department head or board or commission member shall file the information required by AS 39.50.010 - .220 at least 30 days prior to confirmation by the legislature of the appointment.

(c) A legislative, gubernatorial or lieutenant governor candidate shall file the information required by AS 39.50.010 - .220 on filing declaration of candidacy or within 20 days after filing a nominating petition.

(d) A public official, except an unsuccessful candidate, shall also file the information required by AS 39.50.010 - .220 by April 15 of each year or within 15 days after filing his federal income tax return, whichever comes first. (Eff. / / , Register)

AUTHORITY: AS 39.50.020(a)
AS 39.50.050(b)

6 AAC 29.160. DEFINITIONS. In this chapter,

(1) "advisory board or commission" means any board or commission which does not exercise quasi-legislative or quasi-judicial functions or a regulatory function.

(2) "judicial officer" means a person appointed as a justice to the supreme court or as a judge to the superior court, district court or magistrate court.

(3) "public official" means a judicial officer, a member of the legislature, the governor, the lieutenant governor, a person hired or appointed as a head of a department in the executive branch, a person hired or appointed as chairman or member of a board, or commissioner or member on the Alaska Transportation Commission, Alaska Public Utility Commission, or the Alaska Pipeline Commission, or any other state commission or board where the state makes such appointment, or a person who becomes a candidate for a state elective office.

(4) "self-employed" means a person who engages in business or a profession by means of a sole proprietorship, partnership or professional corporation. (Eff. / / , Register)

AUTHORITY: AS 39.50.020(1)
AS 39.50.020(2)
AS 39.50.050(1)

WILLIAM A. EGAN
GOVERNOR

H. A. BOUCHER
LIEUTENANT GOVERNOR

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

November 20, 1974

TO: ALL STATE OF ALASKA LEGISLATORS
DEPARTMENT HEADS

For your information in regard to the recently approved Conflict of Interest initiative, the following information is enclosed:

(1) Copy of Alaska Statutes re Conflict of Interest
(2) Notice of proposed regulations regarding this subject
(3) Copy of proposed regulations to be adopted

Should you be required by these statutes to file reports, please note that the first report for incumbents is due before FEBRUARY 9, 1975. (The attached form indicates when and where those affected must file reports. Reporting forms can be obtained by writing to the Lieutenant Governor, or by personal pickup at the Office of the Governor in Anchorage or Fairbanks.)

Should you have further questions, feel free to contact this office.

Sincerely yours,

Lawrence W. Jones

Lawrence W. Jones
Administrative Assistant

Enclosure

INSTRUCTIONS TO TRUSTEE

1. This report must be accompanied by a copy of the trust instrument.

2. If confidentiality is breached, or the trust is terminated before the trustor has left public office, the trustee must notify the same office to which this report is made.

3. Blind trusts established by candidates, legislators, heads of state departments, and members of boards and commissions, must be reported to the lieutenant governor; those of judicial officers to the Administrator of Courts; and those of the governor and lieutenant governor to the Alaska Legislative Council.

4. Failure of the trustee to report a Blind Trust will subject the official who is the trustor to the penalties provided by statute.

REPORT OF TRUSTEE OF BLIND TRUST

_____ of _____
(Bank or other trust institution) (Address)

_____, is the Trustee of a Blind

Trust established on _____, 19___ by

_____ of _____
(Official) (Address)

who is _____
(Office)

The original assets transferred by the Trustor to the Trustee consisted of the following property:

(Nature)	(Identity)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Signed: _____
(Trust Officer)

DATED: _____, 19___.

SUBSCRIBED and SWORN to before me this ____ day of

_____, 19___.

_____
Notary Public
My commission expires:_____

(FORM COI-2)

JAY S. HAMMOND
GOVERNOR

LOWELL THOMAS, JR.
LIEUTENANT GOVERNOR

File in conflict of interest

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

February 20, 1975

Representative Hugh Malone
State House of Representatives
Pouch V
Juneau, Alaska 99811

Dear ~~Representative~~ Hugh Malone:

Many thanks for the timely filing of your financial statement. In reference to your comment that there is no statutory requirement for disclosure of assets over $500, you are correct. The Department of Law recently informed me that page eleven had been included by mistake. As you stated, AS 30.50.030 (b) (1)--(8) refer to the areas which must be disclosed. No mention of assets over $500 is indicated.

I appreciate your comments on this matter. If I can be of additional assistance, please contact me.

Sincerely yours,

Lowell

Lowell Thomas, Jr.
Lieutenant Governor

COPIES TO ALL LEGISLATORS

Hm

BACKGROUND INFORMATION AND INSTRUCTIONS
FOR CONFLICT OF INTEREST FORMS

An Act "relating to conflict of interest of public officials" was enacted into law by the people of Alaska as Initiative No. 2 on August 27, 1974. (The initiative has been codified as AS 39.50.010-.220). The outcome of the initiative election was certified by the Lieutenant Governor on September 12, 1974. The effective date of the measure is 90 days after certification - i.e., December 11, 1974. Persons who are public officials on the effective date must submit their first financial report within 60 days, which means not later than February 9, 1975.

The conflict of interest law describes the persons who must file financial reports as follows:

> "Public official" means a judicial officer, a member of the legislature, the governor, the lieutenant governor, a person hired or appointed as a head of a department in the executive branch, a person hired or appointed as chairman or member of a board, or commissioner or member on the Alaska Transportation Commission, Alaska Public Utility Commission, or the Alaska Pipeline Commission, or any other state commission or board where the state makes such appointment, or a person who becomes a candidate for a state elective office. 1/ AS 39.50.200(1)
>
> "Judicial Officer" means a person appointed as a justice to the supreme court or as a judge to the superior court, district court or magistrate court. AS 39.50.200(2)

Enter the title of public office sought or held, and the length of dates of term if applicable. If the length or dates of the term is not known, indicate "indeterminate".

1/ The above language has been construed not to encompass members of advisory boards and commissions. See, 6 AAC 25.010.

"Member of household" means a relative or other person, not a domestic employee, living in the home of the public official.

Reporting period refers to the twelve months preceding the filing of the report.

(Page 2)

"Source of income" means the person or institution for whom a service is performed or who is otherwise the origin of payment. If the person for whom the report is made is employed by another, his employer is the source of his income, but if he is self-employed, the source must be listed as the name of the client or customer. A person is self-employed if he engages in business or a profession by means of a sole proprietorship, partnership or professional corporation.

For rental income, the name of the renter must be listed, not merely the address of the rental property.

All capital gains in excess of $100 must be listed, even if they are not taxable.

Every source of income over $100 must be reported, if it is from an otherwise unreported source. For example, if A receives $600 in two $300 payments from B, B should be listed only once as a source. However, if A receives $200 each from B, C and D, each of these sources must be identified.

(Page 3)

"Nature of ownership" means a shareholder, partner or sole owner. For example, shareholder in IBM corporation . . ..

(Page 4)

"Nature of involvement" means non-ownership participation in the affairs of a business such as officer, director or employee. A person listed on this page as a director who

is also a shareholder will be required to furnish appropriate information on page three also.

(Page 5)

"Identity of property" means the location and a brief description, such as "one quarter acre at northwest corner of Wise and Girdwood Road, Anchorage."

"Nature of interest" means the quality and the extent of the proprietary interest in the described property which the person for whom the report is made has, such as "undivided one half interest in the southeast one quarter", or "option to buy southeast one quarter".

(Page 6)

"Trustor" is the person who has established the trust.

"Property" means the assets of the trust.

"Extent of interest" is the share due to the public official or member of his household as a beneficiary.

Other trust ini rmation required: If the public official has transferred marketable assets into a blind trust, for which the trustor is a bank or other institutional fiduciary, for the duration of his government service, the trustee must report the nature of the original assets on the appropriate form available from the Lieutenant Governor. Failure to do so will cause a penalty to be imposed on the official.

(Page 7)

"Loan" means any lending transactions including both secured (e.g., home mortgages) and unsecured transfers of funds or other property.

(Page 8)

"Other financial obligations" means debts of $500

or more owed to another.

(Page 9)

"State or instrumentality of the State" means any state department or agency, the University of Alaska, and the Alaska State Housing Authority.

"Offer to contract" includes bids.

"Other contracting party" means the State or instrumentality of the State with whom the contract has or would have been entered.

"Identity of contract" means a general description of the goods or the work or services which are the subject of the contract or the offer to contract; for example, "paving Totem Road extension, Ketchikan" or "providing nursing home services". The appropriate official designation of the contract should also be provided.

(Page 10)

"Identity" means identification of the particular type of resource (e.g., timber, gas, or gold) and location and description of the tract containing the resource.

(Page 11)

"Other assets" are those which do not fit in any of the previous categories and are worth much more than $500. Household goods and personal effects are not to be counted.

(Page 12)

The initiative provides for penalties as follows:

> A person required to file a report of financial or business interests under this Act who refuses or fails to disclose required information within the time required in the Act, or who provides false or misleading information is guilty of a misdemeanor and upon conviction is punishable by a fine not less than $500, nor more than $5,000, or by imprisonment for up to one year, or both. AS 39.50.060(a)

Other sections of the conflict of interest law also penalize refusal or failure to file reports by forfeiture of nomination, election, confirmation, or possession of office, as well as by loss of salary, per diem and travel expenses which would otherwise be due the public official.

January 24, 1975

Mr. William J. Fullan
320 Bawden St., Suite 313
Box 975
Ketchikan, Ak. 99901

Dear Mr. Fullan:

Thank you for the copy of the letter sent to Governor Hammond. From talking to many of the legislators it seems that there is a general concensus that something must be done to work out the rough spots in the conflict of interest initiative. In Governor Hammond's State of the State message he outlined several amendments that the administration would propose to the conflict of interest statute. Of course, until the bill is submitted we do not know exactly what these amendments are.

As a person who supported the purpose of conflict of interest it was not my intention to force persons to violate individual members rules of ethics. I am hopeful that the legislature will be able to iron out the problem areas of the conflict of interest statute.

Sincerely,

Terry Gardiner
Representative

(907)-225-4410

WILLIAM J. FULLAN
CERTIFIED PUBLIC ACCOUNTANT
320 Bawden Street, Suite 313, Box 975
KETCHIKAN, ALASKA 99901

January 9, 1975

The Honorable Jay S. Hammond
Governor
State of Alaska
Juneau, Alaska 99811

Sir:

The purpose of this letter is to comply with a request of Mr. J. Ray Roady in his letter of December 30, 1974, a photocopy of which is enclosed, in which he requests that I reconsider my recent resignation from the Board of Public Accountancy.

It was with extreme reluctance that my resignation from the Board was made as I thoroughly enjoyed the privilege of having served on the Board. My resignation was made necessary by the provisions of the so called "conflict of interest bill"; particularly these areas:

(1) Having to make financial disclosures which would have made compliance contrary to the rules of professional ethics

(2) Having to limit my practice to preclude representing clients before state regulatory agencies

It appears highly improbable that the legislature intended for members of state boards to commit any acts in violation of individual members' rules of ethics; moreover, it is highly unlikely that the electorate intended for any individual members to suffer a loss of income when it passed Initiative #2. Nevertheless, those are the results of the passage of Initiative #2, which situation left me no alternative but to resign.

However, if the legislature can enact some sort of enabling legislation, or if a favorable court decision were handed down which would alleviate the objections listed above, I would by most happy to reconsider my decision and would be highly honored to accept reappointment to the Board.

As a member of only one board, I realize the seriousness of the problems created for your administration by the passage of Initiative #2 and I trust some fair and workable solution can be accomplished.

Mrs. Fullan joins me in congratulating you upon your election and we wish you much success in your administration.

Respectfully yours,

William J. Fullan, CPA

WJF:ebm

cc: Mr. J. Ray Roady
Senator Robert Ziegler
Representative Oral Freeman
Representative Terry Gardiner

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF COMMERCE

DIVISION OF OCCUPATIONAL LICENSING / POUCH D – JUNEAU 99801

Phone 907/465-2535

December 30, 1974

William J. Fullan, CPA
P.O. Box 975
Ketchikan, Alaska 99901

Dear Mr. Fullan:

We have your resignation from the Board of Accountancy on hand. We would, however, be very happy to have you re-consider your decision and send a letter to the Governor indicating that you might consider re-appointment.

The expertise you have gained during your service is of considerable value in carrying out the business of licensing and regulating of the Accountancy profession in Alaska. It is a shame to waste the background knowledge of procedures that you have gained in board functions.

Considerable time and experience will be necessary to develop and orient a new board member to the point of effectiveness that you have already acquired.

A letter to the Governor with a copy to this office indicating your willingness to accept re-appointment would be very much appreciated. We need you with your expertise and judgment on the board.

Very sincerely,

J. Ray Roady

J. Ray Roady
Director

Immunity of Hospital Review Commission

JERNBERG & TAYLOR
ATTORNEYS AT LAW
(A PROFESSIONAL CORPORATION)
111 STEOMAN
P. O. BOX 1769
KETCHIKAN, ALASKA 99901

ROBERT L. JERNBERG
ROBIN L. TAYLOR
WILLIAM G. ROYCE

TELEPHONE 225-2147
AREA CODE 907

November 6, 1974

Hon. Terry Gardiner
Alaska House of Representatives
P. O. Box 1092
Ketchikan, Alaska

Dear Terry:

Enclosed is material regarding the immunity of hospital review committees.

I would appreciate it very much if you would institute legislation for the purposes outlined therein.

Sincerely yours,

JERNBERG & TAYLOR

By Robin L. Taylor

RLT/mh
Enclosure

PASSED Immunity

ALASKA STATE MEDICAL ASSOCIATION

RESOLUTION No. 19-74

SUBJECT: Subpoena Immunity

SUBMITTED BY: James Wilson, M. D.

BE IT RESOLVED, to continue to ask our Legislative Committee to work towards legislation making Hospital and Medical Society Committees' reports immune from legal action to subpoena. This is essential if these committees are ever to function effectively.

ALASKA STATE
MEDICAL ASSOCIATION
1135 W. Eighth Avenue • Anchorage, Alaska 99501 • (907) 277-6891

October 29, 1974

M E M O

To: Legislative Committee Members

From: carolyn Brown, Chairperson

Subject: Subpoena Immunity

Resolution 19-74 of the 1974 ASMA House of Delegates is attached.

As a follow up to Legislative Committee activity, attached is an excellent report put out by the Joint Commission on Accredition of Hospitals which summarizes the various states' legal attitude toward liability, immunity, and discoverability of hospital and association records and committee reports. The report is quite detailed but I thought members would like to review this in some depth.

It may be that after the legislators get to Juneau, we can take this information and push very hard for similar legislation in Alaska.

Minesota appears to have the broadest legislation surrounding this matter and this may very well serve as a model for Alaska.

You may want to keep this in your files as we attempt to deal with this throughout this legislative year.

That's all. Thank you very much.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

Session Laws, Ch. 295

PUBLIC HEALTH—REVIEW ORGANIZATIONS

CHAPTER 295

S.F.No.3175

[Coded in Part]

An Act relating to health; providing for limitations on liability of review organizations; providing for confidentiality of records of review organizations; amending Minnesota Statutes 1971, Sections 145.61, Subdivision 5, and by adding a subdivision; 145.63; and 145.64.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1971, Section 145.61, is amended by adding a subdivision to read:

Subd. 4a. "Administrative staff" means the staff of a hospital or clinic.

Sec. 2. Minnesota Statutes 1971, Section 145.61, Subdivision 5, is amended to read:

Subd. 5. "Review organization" means a committee whose membership is limited to professionals and administrative staff, except where otherwise provided for by state or federal law, and which is established by a hospital, by a clinic, by one or more state or local associations of professionals, by an organization of professionals from a particular area or medical institution, by a health maintenance organization as defined in Minnesota Statutes, Chapter 62D, by a nonprofit health service plan corporation as defined in Minnesota Statutes, Chapter 62C or by a professional standards review organization established pursuant to 42 U.S.C., Section 1320c–1 et seq. to gather and review information relating to the care and treatment of patients for the purposes of:

(a) Evaluating and improving the quality of health care rendered in the area or medical institution;

(b) Reducing morbidity or mortality;

(c) Obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illness and injuries;

(d) Developing and publishing guidelines showing the norms of health care in the area or medical institution;

(e) Developing and publishing guidelines designed to keep within reasonable bounds the cost of health care;

(f) Reviewing the quality or cost of health care services provided to enrollees of health maintenance organizations;

(g) Acting as a professional standards review organization pursuant to 42 U.S.C., Section 1320c–1 et seq.; or

(h) Reviewing, ruling on, or advising on controversies, disputes or questions between:

(1) health insurance carriers or health maintenance organizations and their insureds or enrollees;

(2) professional licensing boards acting under their powers including disciplinary, license revocation or suspension procedures and health providers licensed by them when the matter is referred to a review committee by the professional licensing board;

(3) professionals and their patients concerning diagnosis, treatment or cure, or the charges or fees therefor;

(4) professionals and health insurance carriers or health maintenance organizations concerning a charge or fee for health care services provided to an insured or enrollee; or

(5) professionals or their patients and the federal, state, or local government, or agencies thereof.

No party shall be bound by a ruling of a review organization pursuant to this clause on a controversy, dispute or question unless he agrees in advance, either specifically or generally, to be bound by the ruling.

[42 U.S.C.A.§ 1320c.

Sec. 3. Minnesota Statutes 1971, Section 145.63, is amended to read:

145.63 Limitation on liability for members of review organizations

No person who is a member or employee of, who acts in an advisory capacity to or who furnishes counsel or services to, a review organization shall be liable for damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by a review organization, by reason of the performance by him of any duty, function or activity of such review organization, unless the performance of such duty, function or activity was motivated by malice toward the person affected thereby. No person shall be liable for damages or other relief in any action by reason of the performance of him of any duty, function, or activity as a member of a review committee or by reason of any recommendation or action of the review committee when the person acts in the reasonable belief that his action or recommendation is warranted by facts known to him or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made.

Sec. 4. Minnesota Statutes 1971, Section 145.64, is amended to read:

145.64 Confidentiality of records of review organization

All data and information acquired by a review organization, in the exercise of its duties and functions, shall be held in confidence, shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization, and shall not be subject to subpoena or discovery. No person described in section 145.63 shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization. The proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization. Information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within his knowledge, but a witness cannot be asked about his testimony before a review organization or opinions formed by him as a result of its hearings.

Approved March 27, 1971

SECON

DAKOTA COUNTY—

An Act relating to Dakot appointees to the Dakot

Approved March 27, 1974.

GENEI

An Act relating to the adr sota Statutes, 1973 Sup Subdivision 1; 245A.18 tion 32.

Be it enacted by the Legis

Section 1. Minnesota St vision 1, is amended to read

245A.01 Declaration of pol

Subdivision 1. The obje Sections 1 to 30 are to pr assistance programs; to n sistance purposes; to pror grated public assistance pro income or resources to m decency and health.

It is hereby declared to provide for themselves an the eligibility requirement not refuse suitable employ general assistance and su subsistence reasonably com of such assistance and ser in promoting the public hea

A principal objective is be to aid those persons w attain self-care. To achi minimum standards of n standard for cash payment 100 percent of the actual maximum established for a and old age assistance pro tary items, 50 percent, of

51. Matchett v. Petway, 115 Cal.Rptr. 317, 320-321 (Ct. App. 1974). To assist it in determining whether the staff committees fit the required purpose of "...having the responsibility of evaluation and improvement of the quality of care rendered in the hospital...," the court took judicial notice of the Joint Commission's Standards and *Guidelines* (note 13 *supra*) describing the organization and functions of the various committees involved.

> ...[A] court must have before it facts which allow it to match the staff committee's mission and functions against the specifications of the statute....*The burden of establishing entitlement to nondisclosure rested with the party resisting discovery, not the party seeking it*....(Emphasis added.)

52. Gillman v. United States, note 36 *supra*.

53. Banks v. Lockheed-Georgia Company, 53 F.R.D. 283, 285 (N.D.Ga. 1971).

54. *See e.g.*, N.Y. Education Law Sec. 6900 *et seq.* (McKinney Supp. 1973); Pa. Session Laws of 1974, Act No. 151; Rev. Code of Wash. Ann. Sec. 18.88.010 *et. seq.* (Supp. 1973). Nursing and other professional evaluation activities may be brought within the ambit of nondiscovery statutes whose language cannot be stretched to cover nonphysician review by combining all professional quality review activities into a joint activity under the aegis of a medical staff committee. Indeed, the Joint Commission already endorses the integration of nursing service audit and medical audit into a total plan of patient care audit. On this latter point, see J. D. Porterfield, *Accreditation Clinic*, The Hospital Medical Staff, Sept. 1974, at 33.

Revised 10/7/74

THE LIABILITY MYTH EXPOSED:
HOSPITAL REVIEW ACTIVITIES POSE NO RISK

by

Charles M. Jacobs, J.D. and Susan Weagly

I. INTRODUCTION

There are important reasons why a hospital must be able to demonstrate that it takes all reasonable steps to assure that the professional care rendered to its patients is of optimal achievable quality: namely, to gain accreditation, to obtain third-party reimbursement, to assure the community's continued support and confidence in its operations, and to use as a defense in malpractice actions.

To make this demonstration requires that the hospital have ongoing programs of performance review and medical staff credentialling.[1] Although by law ultimate responsibility for quality care rests with the hospital corporate board,[2] direct review of the efficacy and economy of health care services by its nature must be a peer activity. Hence, authority to conduct it must be delegated to the professionals who render the services.

The JCAH Standards, and more recently state licensure and federal reimbursement provisions, require that the physicians and dentists who provide professional care in a hospital must be constituted as an organized medical staff. It is to this hospital medical staff organization that the quality review authority is delegated.

By itself, this delegation to the medical staff of specific quality review functions does not relieve the hospital corporation of its ultimate legal and moral responsibility to the patients and community served for the appropriateness of care provided in the hospital. Indeed, the modern view is that such review involves administrative, not clinical, activities, and that in performing them, the medical staff organization acts as the agent of the hospital.

Three recent cases are illustrative. Two of them hold that the bare assertion by the hospital that it has delegated quality assurance functions to its medical staff does not relieve the institution of liability if, in fact, the medical staff fails to perform these functions or performs them negligently.[3] A third holds the hospital liable when it could and should have detected the incompetence of a staff physician but did not because the review procedures followed by the medical staff were inadequate.[4]

The holding in a fourth case is not so clear, but it can be interpreted as saying that when reliance on the review activities and recommendations of its staff is reasonable under the circumstances, the hospital will be relieved of liability.[5]

Thus, not only accreditation but legal requirements as well mandate well-defined and effective hospital procedures to assure proper adherence to and accountability for maintenance of quality and economy.

The chief review responsibilities that a hospital *delegates to* its medical staff and holds the staff *accountable for* performing properly are:

- *First,* reviewing the quality (through performance evaluation or "audit") and economy (through utilization review) of the patient care rendered at the hospital; and
- *Second,* evaluating the credentials and competence of professional peers in connection with staff appointment, reappointment, and the delineation of clinical privileges.

Documentation is essential to any system requiring accountability. Therefore, the medical staff's credentials recommendations and reports of medical care evaluation reviews must be supported by documentation of sufficient detail to permit the hospital board to make decisions and policies in reliance on them.

In turn, the board's decisions and policies must be supported by documentation sufficient to demonstrate to the public and to the Joint Commission that it is meeting its corporate duty to its patients.

II. PHYSICIAN PARTICIPATION

Hospital systems for evaluating health provider performance and for internal medical staff credentialling must rely on the active involvement of the current medical staff. Unfortunately, such involvement is often inhibited and even foreclosed by deeply rooted concerns about the potential professional and legal sanctions thought to flow from participation in such activities.

The actual fears are probably socioeconomic: loss of referrals and of friends, ostracism, and other peer retaliation.

However, the fears most often expressed are of a legal nature, especially liability arising from claims of conspiracy or defamation and potential malpractice exposure through use, in litigation, of the records and results of the review process.

These liability fears, although based almost entirely on myth, are commonly advanced as reasons for physician unwillingness to conduct or to submit to effective review. Therefore, it is critical that the myth be exposed.

III. CONSPIRACY

When a hospital, by action of its medical staff and board, excludes a practitioner from staff membership or restricts or reduces his clinical privileges, the hospital and the responsible board or staff members may have to defend against a claim that they conspired to violate the practitioner's civil rights, to restrict competition, to interfere with advantageous professional or economic relations, or to further some other unlawful end.

Allegations of conspiracy are easily made but very difficult to prove. When there are legitimate grounds for exclusion or restriction and these are explicitly demonstrated, the possibility of monetary liability based on a charge of conspiracy is farfetched and fanciful, especially if some basic precautions are observed:[6]

- Avoid even the appearance of conspiracy by faithfully following bylaw credentialling, review, and corrective action provisions;
- Provide notice, hearing, and other elements of procedural due process; and
- Restrict all deliberations to formal proceedings.

The cases demonstrate two lessons: that failure to afford due process is perhaps more indicative of conspiratorial action than any other nonspecific factor, and that a case based primarily on a conspiracy allegation is a sign of desperation in seeking a cause of action.

IV. DEFAMATION AND IMMUNITY

When a physician's medical staff membership status or competence to exercise clinical privileges is being investigated,

evaluated, and decided at a hospital, the physician's qualifications, competence, ethics or character may, of necessity, be discussed orally and in writing. Accordingly, lawsuits asserting slander (oral defamation) or libel (written defamation) may result.

Proportionate to the number of credentials determinations made, however, very few such lawsuits actually are initiated; and even when initiated, they rarely, if ever, establish liability. The reasons for this are:

- Statements of medical staff members participating in quality review activities are protected at common law by a "qualified privilege." When the quality activity is deemed quasi-judicial, the statements of participants are covered by an "absolute privilege" that provides total immunity from liability.

- Properly drafted medical staff bylaws and application forms for medical staff appointment, reappointment, and the delineation of clinical privileges are effective protective measures against liability.

- Many states provide medical staff members and others with statutory immunity from liability arising from hospital quality review activities conducted in good faith.

- Insurance protection against this liability risk is available to hospital board and administrative personnel and to members of the medical staff.

A. QUALIFIED OR ABSOLUTE PRIVILEGE

A well-established common law rule, called "qualified privilege," provides protection from liability to those involved in reviewing a practitioner's competence, qualifications, and conduct for purposes of hospital appointment, reappointment, delineation of clinical privileges, or disciplinary action. Thus, medical staff committee members and those who communicate information to them are protected from liability for defamation in what they say or write if these conditions are met:

- The communication is made in good faith and without malice.

- Reasonable care is exercised to ascertain the truth of the matter communicated.

- The information is reported accurately and fairly.

- The communication is made only to others with legitimate interest in the quality or economy of patient care.

The qualified privilege doctrine was an effective barrier to liability in three of the four known, reported cases in which it was asserted.[7] The unusual factual situation in the fourth case--an action against a hospital trustee whose alleged defamatory statements were communicated to other trustees to effect denial of a surgeon's reappointment--warranted a trial to allow a jury to decide whether the trustee was maliciously motivated by a belief that his mother was overcharged for an operation performed by the surgeon.[8]

The moral: When credentials and audit activities are used for improper purposes--to satisfy personal rather than institutional and patient care needs--the subterfuge is easily recognized by the courts and the qualified privilege is lost. But when the motives of participants in these activities are proper, the qualified privilege is an effective barrier to liability.[9]

When "absolute" privilege applies, total protection is provided, because the presence of malice or of any of the other limitations to qualified privilege is immaterial. Absolute privilege attaches in judicial and legislative proceedings, in administrative hearings, and in other quasi-judicial or quasi-legislative activities.

The courts in California have ruled that hearings by the board of a public hospital and by a medical staff committee of a private hospital are quasi-judicial proceedings and that communications made in connection with them, even if malicious or unfair, are absolutely privileged.[10] A similar ruling was recently obtained in New Mexico when a committee of osteopathic and medical association officers, established to review allegations of incompetence and unethical conduct, was held to be a quasi-judicial body, thus clothing alleged defamatory statements made to it with an absolute privilege.[11]

On the other hand, a private hospital's medical staff

executive committee is not a quasi-judicial body, according to a Wisconsin court; so absolute privilege did not apply to the charges made to the committee by one staff physician against another. Probably because of the factual circumstances, no claim of qualified privilege was asserted, and the plaintiff was held entitled to a jury determination on the issues of maliciousness and unfair reporting of the true facts.[12]

In balance, reliance on the availability of absolute privilege as a defense is probably somewhat wishful. Instead, observance of the common law requirements for qualified privilege should provide the necessary immunity against liability in medical staff defamation actions.

B. BYLAW RELEASE PROVISIONS

Medical staff applicants and staff members should be required to specifically release committee members and other hospital personnel from civil liability for alleged harm resulting from the performance of official quality maintenance duties. The Joint Commission's *Guidelines for the Formulation of Medical Staff Bylaws, Rules and Regulations --1971* suggests the following language for incorporation in medical staff bylaws and in membership and clinical privileges application forms:

> By applying for appointment to the medical staff, each applicant...authorizes the hospital to consult with members of medical staffs of other hospitals with which the applicant has been associated..., consents to the hospital's inspection of all records and documents that may be material to an evaluation of his professional qualifications and competence...[and] of his moral and ethical qualifications..., releases from any liability all representatives of the hospital and its medical staff for their acts performed in good faith and without malice in connection with evaluating the applicant and his credentials, and releases from any liability all individuals and organizations who provide information to the hospital in good faith and without malice concerning the applicant's competence, ethics, character and other qualifications for staff appointment and clinical privileges, including otherwise privileged or confidential information.[13]

Article XIV of the *Guidelines* incorporates additional authorization, consent, and release provisions and makes them applicable to all hospital quality activities.

Although there has been no definitive test by litigation on the legal effectiveness of such bylaw provisions, they should be helpful in the defense of defamation charges arising from nonmalicious hospital quality maintenance activities.[14] It is true, however, that lawyers are concerned about what is known as the "adhesion contract" issue.

An adhesion contract is one that is forced upon one party by another party in a superior position and is usually invalid by law. A hospital with release and immunity provisions in its application forms and bylaws possibly could be considered a superior party. Local counsel will be able to say whether or not this may be a problem in the various jurisdictions.[15]

C. PROCEDURAL PROTECTION

Protection against potential liability for defamation is also offered by incorporating a provision into medical staff bylaws requiring that the physician seeking a hearing on an adverse credentials decision must first request in writing a specification of the charges. For example, where defamation was claimed in connection with a reduction in privileges, the court held that the physician, by such written request, consented to disclosure of potentially derogatory but relevant information.[16] The Joint Commission's *Guidelines* includes this procedural device by providing that grounds for denial, reduction, or other adverse committee actions are disclosed only after a hearing is specifically requested.[17]

D. IMMUNITY STATUTES

Laws that offer varying degrees of protection against liability to those engaged in hospital quality maintenance activities are now in force in 36 states.[18] Statutory immunity is provided in 32 of these states, although six limit their coverage only to "utilization review" activities.[19] A seventh state has two immunity