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it is not a denial of due process for a defendant to offer a plea of guilty while maintaining his innocence. The Court, however, has not yet specifically addressed the unique problem faced by aliens who offer pleas of guilty or nolo contendere in ignorance of potential deportation consequences resulting from their plea.

Conduct Leading to Deportation

The United States Immigration and Nationality Act specifies nineteen grounds for deporting aliens.[12] For purposes of this Comment, several are especially relevant since convictions for conduct in these delineated areas may cause the alien to be susceptible to later deportation proceedings with sometimes certain deportation consequences. These areas include crimes involving moral turpitude,[13] crimes relating to narcotic drugs,[14] crimes involving the illegal entry or the smuggling of aliens into the United States,[15] crimes connected with prostitution,[16] and certain weapons violations.[17]

When deportation does follow from a violation of one of the enumerated grounds, the ramifications for the alien can be severe, if not devastating. Justice Black, for example, emphasized that the alien "loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country."[18] An illustrative case is *Garcia-Gonzalez v. Immigration and Naturalization Service*.[19] The defendant, a self-supporting Mexican woman, had lived in the United States for nearly *fifty* years, having come to America when she was only nine years old. She pleaded guilty to a charge of unlawful possession of heroin and was sentenced to three years probation, six months incarceration and a fine of $1,000, an inconsequential penalty in light of the ensuing deportation order.[20]

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selves innocent.

12. Immigration and Nationality Act § 241(a)(1)-(19), 8 U.S.C. § 1251(a)(1)-(19) (1982).

13. 8 U.S.C. § 1251(a)(4) (1982).

14. *Id.* at § 1251(a)(11).

15. *Id.* at § 1251(a)(2), (13).

16. *Id.* at § 1251(a)(12).

17. *Id.* at § 1251(a)(14).

18. Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting).

19. 344 F.2d 804 (9th Cir.), *cert. denied*, 382 U.S. 840 (1965).

20. *Id.* at 805. The deportation order was upheld even though section 1203.4 of the California Penal Code allowed her to withdraw her guilty plea upon completion of the probation sentence, and provided for dismissal of the accusation and release from all penalties and disabilities resulting from the offense. *Id.* at 806. *See also* United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926), in which an alien was deported to Poland after spending the greater part of his life in the United States, even though he

Focus of Comment

Given the frequency of guilty pleas and the often harsh resulting consequences, several concerns unique to the alien defendant emerge. First, how should courts treat those instances when the alien, unaware of potential deportation consequences, offers a plea of guilty or nolo contendere? Second, how should courts approach those cases in which the alien has been misadvised or misinformed by his counsel regarding the deportation consequences of his plea? Five basic factors are involved in dealing with these two questions of increasing national concern: (1) the common law understanding of what constitutes a voluntary plea, (2) the requisites of a voluntary plea under the constitutional safeguard of due process, (3) the effect of direct and indirect consequences upon the voluntariness of the plea, (4) the possible manifest injustice in not allowing withdrawal of the plea, and (5) the constitutional entitlement to effective assistance of counsel. Unfortunately, American jurisdictions disagree as to the appropriate approach to take when confronted by an alien facing criminal charges. Moreover, considerable lack of consensus exists regarding the very nature of these factors themselves. This Comment will examine whether the alien's plea made without full information is truly voluntary, as well as the factors involved in allowing withdrawal of the plea when offered by an uninformed or misinformed defendant alien.

VOLUNTARINESS OF THE PLEA

Rule 11

In *Kercheval v. United States*,[21] the United States Supreme Court posited the oft-cited standard for the voluntariness of the guilty plea. The Court explained: "[O]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."[22] However, the Court provided the lower courts neither specific guidelines regarding what advice was required nor of what consequences the defendant needed an understanding. In *McCarthy v. United States*,[23] the Court pronounced its endorsement of the requirements of Federal Rules of Criminal

had no friends in that country and could not speak the language.

21. 274 U.S. 220 (1927).

22. *Id.* at 223. *See also* Brady v. United States, 397 U.S. 742, 748 (1970): "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. . . . Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnotes omitted).

23. 394 U.S. 459, 465 (1969).

Procedure Rule 11, as they existed under the 1966 amendment, which compelled the trial judge to personally address the defendant in ascertaining whether he understood the consequences of the plea. However, it was not until *Boykin v. Alabama*[24] that the Court gave constitutional dimensions to the minimum information a defendant had to be given before his plea could be accepted by a state trial court. Explaining that courts must exercise the greatest care to assure that the accused has a full understanding of the plea's implications and consequences,[25] the *Boykin* Court enumerated three basic constitutional rights waived by offering a plea of guilty: first is the privilege against self-incrimination; second, the right to trial by jury; and third, the right to confront one's accusers.[26] The requirement of *Boykin* that a defendant must be apprised that a plea of guilty waives these rights was subsequently codified by the 1975 amendment to the Federal Rules of Criminal Procedure, Rule 11(c).[27]

Rule 11(c) thus delineates the minimum advice a court must provide the defendant before accepting his plea. This minimum does not encompass, however, collateral consequences such as deportation. Indeed, the Advisory Notes to Rule 11 directly reject imposing a duty upon the trial courts to inform defendants of collateral consequences. Citing parole eligibility as an example, the Advisory Committee commented that it would be unrealistic to expect a judge to have a basis for advice regarding such collateral consequences of a guilty plea in a given case.[28] The Committee did, however, recognize the

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24. 395 U.S. 238, 243 (1969).
25. *Id.* at 243-44.
26. *Id.* at 243.
27. Advisory Notes, *supra* note 6, commenting on Rule 11(c), state: "The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirement of Boykin v. Alabama which held that a defendant must be apprised of the fact he relinquishes certain constitutional rights by pleading guilty." (Citation omitted).

Rule 11(c) requires the trial court to inform the defendant of, and ascertain that he understands, five specific points before accepting a plea of guilty or nolo contendere: (1) the nature of the charge and the maximum and minimum penalty possible, (2) the right of the defendant to be represented by counsel, who, if necessary, may be appointed by the court, (3) the right of a defendant to plead not guilty, the right to a trial by jury, and the right to confront and cross-examine witnesses against him, (4) the waiver of the right to a trial if the defendant so pleads, and (5) the right of the court to question the accused, and the possibility that the answers to any court questions may be used against him in prosecution for perjury or false statement. Section (d) requires the court to ascertain that the plea is voluntary; section (f) compels the court, before accepting a plea of guilty, to be satisfied that there is a factual basis for the plea; and section (g) requires a verbatim record of the court's advice and inquiry. FED. R. CRIM. P. 11(c), (d), (f), (g).
28. *Id.*

critical nature of some collateral consequences and added that what was required to conform to *Boykin* "is left to future case-law development."[29]

More problematic is section (d) of Rule 11, which requires the accused's plea to be fully voluntary. The language of the rule is vague and has generated much discussion regarding the requisites of a voluntary plea. *Brady v. United States*[30] formulated the presently well-accepted standard among the federal courts as to the parameters of voluntariness: a plea is voluntary if the defendant is "fully aware of the direct consequences."[31] On this basis, a trial court must advise the accused of all direct consequences, but has no such obligation to inform of collateral consequences. This, of course, does not resolve the problem, for no concise formulation exists concerning what constitutes a "direct consequence" and what constitutes a "collateral consequence."

Collateral consequences, of which a defendant need not be apprised to offer a valid plea, have variously included suspension from

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29. *Id. See also Federal Rules of Criminal Procedure: Hearing on Federal Rules and Criminal Procedure Amendments Before the Senate Comm. on the Judiciary.* 94th Cong., 1st Sess. 151-52 (1975) (statement of Prof. Wayne LeFave, on behalf of the Judicial Conference of the United States):

> The more fundamental point is that advice to the defendant at the time of his plea, in terms of its length and character, should be stated in a way which will be most meaningful to the defendant. *Boykin* mentions but three constitutional rights, but there are a great many more which are waived by a plea of guilty. . . . It is to be doubted that a litany of all these rights would be meaningful to the typical defendant. In the view of the Advisory Committee it is not desirable to mandate a judge to go through a long ritual which tends to get automatic and routine. Rather, within the limits allowed by the law, a judge should be given flexibility to accomplish *the objective of the rule, namely, that of ensuring that the defendant is making an informed plea.* In almost all cases, defendants are represented by counsel who should share with the judge the responsibility for informing the defendant of the consequences of his action. In the event that a judge, in an individual case, fails to inform a defendant on an important consequence of his plea, there is opportunity to raise the issue in the court of appeals. There is nothing in the rule, as proposed, which prevents the judge from adding other advice in appropriate cases. Indeed, the advisory note states: 'What is required, in this respect, to conform to *Boykin* is left to future case-law development.'

(Emphasis added).

30. 397 U.S. 742 (1970).

31. The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . . misrepresentations . . . or perhaps promises that are by their nature improper as having no relationship to the prosecutor's business.

Id. at 755 (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957), *rev'd*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958)).

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35. Meat
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36. Unite
37. Redw
38. Unite
39. Hutch
40. 212 F
41. *Id.* at
dure 32(d) and
42. *Id.*

one's position as a firefighter,[32] commitment to a mental institution,[33] possible imposition of consecutive sentences,[34] loss of the right to vote and to obtain a passport to travel abroad,[35] loss of voting rights in another state,[36] possible undesirable discharge from military service,[37] sentence enhancements,[38] and loss of good time credits.[39]

The Federal Standard: United States v. Parrino

Since 1954, *United States v. Parrino*[40] has been the controlling case on the right of aliens to be informed of possible deportation consequences arising from a conviction. From this case emerged two elemental principles that have had an enormous impact on the fate and lives of aliens: First, defendants need not be apprised of collateral consequences, such as deportation. Second, misadvice or misinformation by defense counsel regarding such consequences does not constitute an injustice such as would require a post-conviction withdrawal of the plea.[41]

In *Parrino*, the defendant pleaded guilty to a charge of conspiracy to kidnap in reliance on the assurance of his counsel, a former Commissioner of Immigration, that his plea would not subject him to deportation. Following his conviction, however, a deportation proceeding was initiated against him. Consequently, he filed a post-sentence motion under Rule 32(d) of the Federal Rules of Criminal Procedure to vacate the judgment and withdraw his earlier plea. The *Parrino* court rejected this claim, stating that a defendant's mere surprise at the severity of the sentence imposed after the plea does not present a manifest injustice that requires a court to vacate the judgment and to allow the defendant to withdraw the guilty plea.[42] Moreover, in this instance, the nature of the surprise was not the

32. United States v. Crowley, 529 F.2d 1066 (3d Cir. 1976), *cert. denied*, 425 U.S. 995 (1976).
33. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005 (1973).
34. United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).
35. Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965).
36. United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).
37. Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963).
38. United States v. Garrett, 680 F.2d 64 (9th Cir. 1982).
39. Hutchison v. United States, 450 F.2d 930 (10th Cir. 1971).
40. 212 F.2d 919 (2d Cir. 1954), *cert. denied*, 348 U.S. 840 (1954).
41. *Id.* at 921-22. See *infra* note 77 for the text of Federal Rule of Criminal Procedure 32(d) and discussion of the withdrawal of a guilty plea.
42. *Id.*

severity of the sentence directly flowing from the judgment of the trial court, but a collateral consequence of the judgment—deportation.[43] This reasoning assumes the alien's plea to be voluntary, even though he relied on the erroneous advice of his attorney, a presumed expert on immigration matters, that his plea would not result in deportation. The court, in rejecting both severity and surprise as factors to be considered, based its conclusion on the "collateralness" of a deportation proceeding. Indeed, the majority did not even discuss the issue of voluntariness. Nevertheless, *Parrino* has been controlling for the past thirty years.

Judge Frank, in his noted dissent, argued that the classification "collateral consequence" was rather arbitrarily employed.[44] His position was that while deportation was not technically a criminal punishment, it may nevertheless be more devastating upon the defendant than the actual sentence: "For all practical purposes, the court sentenced him to serve (a) two years in jail and (b) the rest of his life in exile."[45] The Judge even averred that Rule 32(d) might apply to such instances of deportation, even though such a penalty was not imposed directly by the judge in the criminal proceeding. This fact should not preclude, according to Frank, the existence of a "manifest injustice."[46]

The majority in *Parrino* conceded that deportation can have a severe impact on the defendant's life and family, but it drew a distinction between the criminal proceeding and the separate civil proceeding initiated under the Immigration and Nationality Act.[47] The *Parrino* majority insisted that notwithstanding the harsh inflexibility of the Act, it could not let sympathy encroach into the field of the criminal process.[48] Judge Frank responded that when a rule such as Rule 32(d) suggests in plain words to avoid "manifest injustice," courts should embrace the opportunity and "not extend earlier decisions to escape it."[49]

Judge Frank's second objection to the majority decision in *Parrino* was its failure to recognize a manifest injustice when the defendant entered his plea under misinformation provided him by his attorney. The majority held that surprise resulting from the defendant's own attorney did not constitute manifest injustice absent any clear show-

43. *Id.*

44. *Id.* at 924 (Frank, J., dissenting). "It has been said that (what my colleagues term) 'collateral consequences,' if of importance, constitute such injustice. My colleagues dispose of those statements as dicta. I am not sure of the propriety of that characterization." *Id.* (footnote omitted).

45. *Id.*

46. *Id.*

47. *Id.* at 922.

48. *Id.*

49. *Id.* at 926 (Frank, J., dissenting).

ing of unprofessional conduct.[50] Judge Frank took exception to this position, asserting that courts have reversed convictions when a defendant's counsel has been incompetent and when that incompetence has seriously prejudiced the defendant.[51] In the *Parrino* circumstance, Judge Frank regarded the defense counsel, who might easily have checked the appropriate statutes regarding deportation, as "egregiously derelict in the discharge of his duty to his client."[52]

Finally, the dissent questioned the value of a constitutional requirement that a defendant have counsel before pleading guilty if that counsel can then be utterly without legal competence to guide his client. Judge Frank considered the giving of an erroneous opinion by an attorney and the client's reliance on it in pleading guilty to be an obvious "manifest injustice."[53] Professor Moore concurs in this position and notes that "the vigorous dissent of Judge Frank more likely reflects the present attitude of the federal judiciary."[54] As is subsequently discussed in this paper, Judge Frank's views are currently embraced in many state and federal court opinions, as well as in legal commentary.[55]

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50. *Id.* at 921. *Contra*, Legomsky, *The Alien Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105, 136-37 (1977).

51. 212 F.2d at 925 (Frank, J., dissenting).

52. *Id.*

53. *Id.* at 926. *See also* Legomsky, *supra* note 50 at 136-37.

54. 8A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 32.07[3], (2d ed. 1983). Addressing the question of misinformation provided a defendant by his attorney, Professor Moore writes:

> [T]here is some confusion whether misrepresentations or misstatements of defense counsel including a plea, not chargeable to the court or prosecution, may justify withdrawal (though not serious enough to constitute ineffective assistance of counsel under the Sixth Amendment). Since a determination of voluntariness involves a subjective inquiry into the defendant's state of mind, the better rule would permit withdrawal in the case of defense counsel's misrepresentations, provided defendant reasonably relied upon them.

55. The small number of legal commentators that have dealt with deportation as a consequence of the guilty plea invariably distinguish the seriousness of deportation from lesser collateral consequences. *See, e.g.*, Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 376 (1955): "A rarely litigated, though frequent, problem arises when counsel fails to warn the defendant of collateral consequences of conviction such as loss of civil rights . . . and, perhaps more seriously, deportation or expatriation." (Footnotes omitted). The same article takes issue with the *Parrino* decision, noting that "[n]either the court not [sic] the dissent saw a constitutional issue in the case, but it seems that perhaps counsel was so incompetent that his client was denied the constitutionally guaranteed minimum due process." *Id.* at 377 (footnotes omitted). With regard to the burden of warning the defendant of collateral consequences, the same writer states, "This argument, however, is less persuasive where serious consequences, like deportation or expatriation, are involved." *Id.* at 378. Another author states:

> Collateral consequences, on the other hand, need not be understood for the entry of a voluntary plea. . . . The non-necessity of inquiry regarding a defendant's

Adherence to Parrino *Among Federal Courts*

The *Parrino* position has been followed steadfastly in several circuits. For example, in the Second Circuit this is demonstrated most notably by *United States v. Santelises*[56] and *Michel v. United States.*[57] *Michel*, following *Parrino*, considered it unrealistic to compel a trial court judge to compile a list of possible consequences or to anticipate the multifarious contingencies which may affect one's civil liberties. The *Michel* court, however, made no distinction between the deprivation of one's various societal benefits and the loss of the right to remain in the United States, but rather classified both as peripheral contingencies.[58]

The Seventh Circuit, in an older case, not only held that the court is not obligated to inform a defendant of possible deportation arising from a guilty plea, but also found the alien defendant's contention to the contrary "remarkable."[59] The Third Circuit, while not dealing directly with the question of deportation, has similarly referred to deportation as a collateral consequence.[60] Relying on *Parrino*, the court remarked that it would be impractical to compel a trial judge to inform an accused of such collateral eventualities.[61] Also, the Fourth Circuit, in its most recent decision in this area, has followed *Parrino* and *Michel* in calling deportation a civil consequence which is entirely collateral to the conviction.[62] The court stressed defense counsel's responsibility to inform the defendant of indirect and collateral consequences. The court did not, however, address the ques-

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appreciation for the collateral consequences of his plea seems well settled. What constitutes a 'collateral' consequence remains obscure. For example, parole eligibility is now characterized as a direct consequence, although once classified as a collateral consequence about which a defendant need not be informed. *Other collateral consequences, deportation conspicuously, have chimerical characteristics of 'directness' which may eventually lead to a similar shift in classification.*

Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, 1970 WASH. U.L.Q. 289, 320-21 (1970) (footnotes omitted) (emphasis added).

56. 476 F.2d 787 (2d Cir. 1973).

57. 507 F.2d 461 (2d Cir. 1974).

58. *Id.* at 466

59. United States *ex rel.* Durante v. Holton, 228 F.2d 827, 830 (7th Cir. 1956), *cert. denied*, 351 U.S. 963 (1956).

60. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1956).

61. *Id.* The facts of this case are arguably distinguishable from those involving deportation. Here, the defendant learned only after sixteen years that he would be deprived of the right to vote when he moved to a different jurisdiction. One can understand, under these circumstances, the court's rationale for exclaiming that "unsolicited advice concerning the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required." *Id.* Deportation, though, is hardly a peripheral contingency nor does it require clairvoyance or superhuman foresight to envisage such a possibility. *See infra* note 99.

62. United States v. Hillick, No. 75-1036, slip op. (4th Cir. Aug. 25, 1975) (available on LEXIS, Genfed Library, Cir file).

tion of what the remedy should be, if any, when the attorney fails to so inform his client.

Because the entire question of the voluntariness of the plea appears to depend on whether a consequence is characterized as direct or collateral, the Fourth Circuit's attempt to define what constitutes a direct consequence is instructive. In *Cuthrell v. Director, Patuxent Institution*,[63] the court stated that the distinction "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."[64] The *Cuthrell* court, however, made no attempt to reconcile its rejection of deportation as a collateral consequence with its own definition, for, as demonstrated, section 1251(a) of the Immigration and Nationality Act provides for what is often tantamount to definite, automatic and immediate deportation in a number of circumstances.[65] If the "largely automatic effect" or certainty were determining factors in characterizing a consequence as direct, courts would necessarily have to reclassify deportation—as well as other "so-called" collateral consequences—as direct consequences. The confusion in ascertaining what comprises a direct consequence is vividly reflected by the *Michel* court's explicit rejection of the *Cuthrell* court's definition. Although not referring to *Cuthrell* specifically, the Second Circuit indicated it did not think the distinction between a direct and a collateral consequence should depend upon the certainty with which the sanction is meted out to the defendant.[66]

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63. 475 F.2d 1364 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005 (1973). Though *Cuthrell* did not involve a deportation, the court noted that the failure to inform an accused of potential deportation consequences is merely a collateral factor which does not render the plea invalid.

64. *Id.* at 1366.

65. *See supra* notes 13-17 and accompanying text.

66. 507 F.2d at 466. The court probably took this position because the defendant had claimed that his deportation was, in fact, a direct consequence, not collateral. The government, in refuting this argument, responded that it was not a direct consequence because (1) deportation required a separate civil proceeding, and (2) deportation was not automatic because 8 U.S.C. § 1254(a)(2) provided that an alien could apply for "non-priority status" on the basis of humanitarian factors which might thus result in suspension of deportation. Because 8 U.S.C. § 1254(a)(2) requires that the alien have lived in the United States for a period of at least ten years *following* the deportable act, this eventuality suggested by the government is rather limited. It is not, therefore, surprising that the court in *Michel* rejected the "certainty" of the sanction criterion; deportation in such instances is a near certainty. It should be noted that what the government referred to as "non-priority status" is an entirely different remedy from 8 U.S.C. § 1254(a)(2), and it, also, provides only limited relief. *See, e.g.*, Hollander, *supra* note 4, at 65: "It [deferred or nonpriority status] is a little used and little known remedy which is generally handled as an internal matter within the INS." *See generally* Wildes, *The Nonpriority Program of the Immigration and Naturalization Services Goes Public: The Litiga-*

The question of deportation was one of first impression in *Fruchtman v. Kenton*,[67] a Ninth Circuit case. Attempting to provide some guidelines, the *Fruchtman* court reasoned that a consequence was direct if the actual sentence emanated from the court which had accepted the plea originally. Conversely, a collateral consequence was one originating under a different agency, beyond the control and responsibility of the trial court judge.[68] Accordingly, the Ninth Circuit held deportation a collateral consequence of which the trial court has no obligation to inform an accused.[69] Applying this standard, neither the severity nor the certainty of the consequence would be essential components affecting the voluntariness of the guilty plea. This fact poignantly illustrates the danger in placing too great an emphasis on the formal rubric under which specific consequences should fall, and too little on the effect these consequences have upon the voluntariness of the plea, which is, ultimately, the issue at hand.

The most recent decision holding against a defendant's right to be advised of potential deportation is a Fifth Circuit case, *Garcia-Trigo v. United States*.[70] The facts of the case are significant because of the severity of the "civil" consequences. On Friday, September 5, 1980, Fidel Garcia-Trigo was arrested by the United States Border Patrol while driving a vehicle in which several other aliens were passengers. On the following Monday, September 8, he was told he was to be charged only with the petty offense of "unlawfully entering the United States by wading the river,"[71] in violation of 8 U.S.C. § 1325, rather than the more serious offense of transporting undocumented aliens, which the officials had initially considered at the time of the defendant's arrest. Garcia-Trigo pleaded guilty to this lesser offense and was sentenced to sixty days in jail. The day after he entered his plea of guilty, his wife informed the Border Patrol that her husband was not an undocumented alien, but rather an authorized permanent resident who had lived in the United States for ten years. Nevertheless, he was subject to deportation under 8 U.S.C. § 1251(a)(2) which provides for deportation of any alien who enters the United States without inspection.

After serving his two month sentence, Garcia-Trigo sought to have

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tive Use of the Freedom Act, 14 SAN DIEGO L. REV. 42 (1976).

67. 531 F.2d 946 (9th Cir. 1976), *cert. denied*, 429 U.S. 895 (1976).

68. *Id.* at 949.

69. *Id.* The Ninth Circuit has recently reiterated this position in United States v. Garrett, 680 F.2d 64 (9th Cir. 1982) (enhancement of sentence by another court was a collateral consequence of a guilty plea).

70. 671 F.2d 147 (5th Cir. 1982). *See* United States v. Dayton, 604 F.2d 931, 935 (5th Cir. 1979) (voicing strong opposition to informing defendants of collateral consequences beyond those specifically enumerated by Rule 11, and holding Rule 11 requirements to be both "exclusive" and "inclusive").

71. 671 F.2d at 149.

his conviction vacated by way of a Writ of Error Coram Nobis,[72] asserting that the court had not strictly complied with the mandates of Rule 11. He specifically claimed that the nature of the offense had not been explained to him and that he had not been told of the consequences of his guilty plea. The record indicated, however, that the court had explained to him the dictates of Rule 11, translating them into Spanish.[73] The court rejected his arguments, asserting that collateral attacks must show that one's fundamental rights were violated and also that there existed some present or prospective adverse effect.[74] The court found that the defendant's rights were not violated, nor, presumably, did separation from his spouse constitute the requisite adverse effect. The court concluded that there had been neither a complete miscarriage of justice nor a result inconsistent with the rudimentary demands of fair procedure such as is required for collateral relief.[75] It held that Garcia-Trigo's rights were not seriously prejudiced and that "the possible effect that his conviction of this petty offense may have upon his immigration status is a collateral 'consequence' that need not have been the subject of an explanation to appellant at the time of arraignment and guilty plea."[76]

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72. The 1948 amendment to Rule 60(b) of the Federal Rules of Civil Procedure eliminated the use of the Writ of Error Coram Nobis in civil cases. Nevertheless, this writ is still employed in criminal cases, and may provide the alien defendant an avenue of attack in moving to withdraw an earlier guilty plea. *See, e.g.*, United States v. Taylor, 648 F.2d 565, 570 n.14 (9th Cir. 1981), *cert. denied*, 454 U.S. 866 (1981), which states: "The common-law writ of error *coram nobis* is available by statute, 28 U.S.C. § 1651(a) (1976) (All Writs Statute), to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid." In Cline v. United States, 453 F.2d 873, 874 (5th Cir. 1972) the court said, "As we indicated in United States v. Morgan, a writ of error coram nobis is an available remedy to correct fundamental errors in a criminal case, even though the sentence imposed has been served." In contrast to *Garcia-Trigo*, this writ was successfully employed in People v. Wiedersperg, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975) where the defendant was not aware that deportation would result from her plea. The court indicated that a Writ of Error Coram Nobis may be available when three requirements are met: (1) when there exists some fact, not presented to the court on its merits, where such facts would prevent such judgment, (2) when the newly discovered evidence does not go to the merits of the issues tried earlier, and (3) when this evidence was neither known to the defendant, nor could have been known at the time of making the plea. The court held that in the case of this Austrian alien, all three factors applied; the motion for withdrawal of the pleas was granted.

73. Mr. Garcia-Trigo conceded that the court had explained various rights to him, but because of confusion and embarrassment, he had not fully understood the nature of the rights he was waiving. 671 F.2d at 149.

74. *Id.*

75. *Id.* at 149.

76. *Id.* at 150.

Withdrawal of the Plea: Rule 32(d) and 28 U.S.C. § 2255

Although *Parrino* and its progeny held defendants need not be informed of deportation consequences prior to offering a plea, this stance has been recently challenged in several federal circuits. The greatest signs of erosion appear, however, not within the requirement of Rule 11 itself (although concerns are evident here also) but from the application of Rule 32(d) and 28 U.S.C. § 2255, which allow for withdrawal of pleas and vacating of judgments, respectively.[77]

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77. Rule 32(d) of the Federal Rules of Criminal Procedure provides: "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but *to correct manifest injustice* the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." (Emphasis added).

Professor Wright notes that there is little difference between these two remedies:

> There is considerable overlap between a post-sentence motion to withdraw a plea of guilty for manifest injustice under Rule 32(d) and a motion to vacate a sentence under 28 U.S.C. § 2255. Motions under the statute have been treated as if they were under the rule, and the standard for relief is usually treated as being the same. Although there are cases that suggest that relief might be available under the rule when it would not be granted under the statute, there is no indication that there is any actual difference in results.

3 WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 539 (2d ed. 1982) (footnotes omitted).

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in its preliminary draft, concurred with Wright's observation: "Indeed, it may more generally be said that the results in § 2255 and 32(d) guilty plea cases have been for the most part the same. Relief has often been granted or recognized as available via either of these routes for essentially the same reasons . . . ." THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (October, 1981), *reprinted in* 91 F.R.D. 289, 354 (1982). The Committee proposed the following amendment to Rule 32(d):

> PLEA WITHDRAWAL . . . If a motion . . . for withdrawal of a plea of guilty or . . . nolo contendere . . . is made . . . before sentence is imposed, . . . imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason . . . . At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

Id. at 348-49. (Ellipses represent Committee's proposed deletions from present rule).

The amendment would eliminate the "manifest injustice" standard and make applicable the standard that was formulated in Hill v. United States, 368 U.S. 424 (1962). 91 F.R.D. at 353. Accordingly, the standard for post-standard withdrawal of the guilty plea would be, under *Hill*, if it is "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with rudimentary demands of fair procedure." *Id.* at 354 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

The standard for withdrawing a plea before sentence is imposed would be, by this amendment, if is is "fair and just," which generally is the standard applied today. Professor Wright notes:

> All agree that withdrawal of a guilty plea, even before sentencing, is not an absolute right, but there is some disagreement on the standard to be applied at that stage. Many cases teach that leave to withdraw should be freely granted if it is before sentencing. This is often qualified, however, by saying that there must be a 'fair and just' reason for withdrawing the plea.

In a 1976 First Circuit case, *Cordero v. United States*,[78] the defendant sought to withdraw his guilty plea, claiming he did not know deportation would follow, and that his attorney had told him he was not guilty of the federal offense. The court regarded the standard for withdrawing a pre-sentence plea to be whether there existed a fair and just reason, and whether the trial court had abused its discretion in denying the withdrawal under that standard. Deportation, the court concluded, presented a close question and it thus expressed a willingness to consider two factors: First, there was here no indication that the defendant was simply testing the weight of his potential judgment; and second, there was a lack of evidence that the government had been prejudiced by reliance on the earlier plea. The First Circuit, in line with the *Parrino*, *Michel*, and *Fruchtman* courts, still denoted deportation a collateral consequence, the potential of which the court had no obligation to inform an accused, but, it stressed, grounds might nevertheless be present which would constitute a fair and just reason for withdrawing the plea. Accordingly, the *Cordero* court acknowledged that a trial court, in its discretion, could properly grant leave to withdraw the plea when, as here, the defendant was unaware of the ensuing deportation possibility.[79] At the same time, this court was cautious not to mandate a withdrawal, recognizing that in so doing, it would necessarily be adding a requirement to the judicial proceeding—namely, warning defendants of possible deportation—thereby diluting the effect of Rule 11.[80]

The most significant departure from *Parrino* has occurred in the District of Columbia Circuit, a change that has evolved perceptibly over the past thirteen years. In a case often cited by other circuits, *United States v. Sambro*,[81] both the defendant and his attorney drew erroneous conclusions concerning the potential consequences of deportation. The *Sambro* court followed *Parrino* and held that possible ancillary or consequential results flowing from a conviction on a guilty plea did not require a later withdrawal of that plea.[82] The defendant's erroneous conclusions about the effect probation would have on deportation did not alter the voluntariness of his plea.[83] Im-

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Wright, *supra* at 198-99 (footnotes omitted).

78. 533 F.2d 723 (1st Cir. 1976).

79. *Id.* at 725-26.

80. *Id. See infra* note 155.

81. 454 F.2d 918 (D.C. Cir. 1971).

82. *Id.* at 920.

83. *Id.* at 921. The *Sambro* majority considered it important that the defendant and his counsel were aware of deportation consequences prior to making the plea, but

portant, however, because it presents a position recently embraced by this same circuit,[84] is the vigorous dissent by Judge Bazelon. He considered the denial of the defendant's motion to withdraw his guilty plea a clear abuse of discretion. Emphasizing the American criminal justice system's dependence on guilty pleas, which largely come from plea bargains, the judge commented:

> So long as we depend on a system that encourages defendants to waive their constitutional rights, we have an obligation at least to ensure that defendants do not waive their rights through ignorance, without full understanding of the consequences. Surely poor, uneducated, or inexperienced people are entitled to at least as much protection in negotiating pleas to criminal charges, when liberty is at stake, as they are in negotiating ordinary commercial transactions.[85]

Judge Bazelon recognized that courts have distinguished, for purposes of Rule 11, between direct and collateral consequences and that deportation might be appropriately classified as collateral.[86] He asserted, however, that it was a close question whether a plea could be voluntary within the meaning of Rule 11 if the defendant did not understand the deportation consequences of his plea.[87] Consequently, even if no specific advisement were required because of deportation's collateralness, a court should still grant withdrawal of the plea under Rule 32(d) if the "interest of justice so required."[88] Agreeing with Judge Frank and Professor Moore, Judge Bazelon considered defense counsel's misinformation to his client regarding deportation consequences to present just such an interest of justice requiring withdrawal of the guilty plea.[89]

A year earlier, in *United States v. Briscoe*,[90] the same circuit addressed the question of misadvice by government counsel, but in that discussion, the *Briscoe* court created the strong inference that misinformation by defense counsel could subject the guilty plea to a collateral attack as well.[91] Citing the drastic measures involved in deportation, the *Briscoe* court concluded that considerations of such severe consequences may rightfully be included in one's decision to

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had merely drawn wrong conclusions; that the defendant did not claim innocence, rather a technical deficiency in the proceeding—lack of awareness of the deportation consequences; and that the decision by a trial court to grant withdrawal of a plea is discretionary. In this instance, no abuse of discretion was manifest.

84. *See* United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982).
85. 454 F.2d at 925 (Bazelon, J., dissenting).
86. *Id.* at 925-26.
87. *Id.* at 925.
88. *See id.* at 925-26.
89. *Id.* at 926-27.
90. 432 F.2d 1351 (D.C. Cir. 1970).
91. In Briscoe v. United States, 391 F.2d 984, 988 n.2 (D.C. Cir. 1968) (*Briscoe I*), the court noted, without deciding, that a mistake attributable to defense counsel might provide for a plea's withdrawal on the basis that the defendant had been denied his constitutional right to effective assistance of counsel.

plead guilty.[92] The court held that a plea offered by a defendant misled regarding deportation consequences may in appropriate circumstances be subject to attack.[93] Concurring with both Judge Frank and Professor Moore—a fact Judge Bazelon noted in his *Sambro* dissent[94]—the *Briscoe* court expressly rejected the *Parrino* decision: "Insofar as a contrary view may be inferred from *United States v. Parrino* on the ground that deportability is only a 'collateral consequence' of conviction, we agree with Professor Moore: 'the vigorous dissent of Judge Frank [in *Parrino*] more likely reflects the present attitude of the federal judiciary.' "[95]

DRAMATIC SHIFT FROM THE *Parrino* TRADITION: *United States v. Russell*

The Bazelon dissent in *Sambro* and the *Briscoe* discussion provide a backdrop for *United States v. Russell*,[96] the most recent federal case dealing with deportation as a collateral issue. It also represents the most decided shift to date away from the *Parrino*-based holdings. The defendant in this case pleaded guilty to two misdemeanor counts in response to the government's agreement to drop two felony charges. He was subsequently sentenced to concurrent one-year jail terms and three years probation, with all but one month of incarceration being suspended.[97] One month after sentencing, the Immigration and Naturalization Service initiated deportation proceedings against him under 8 U.S.C. § 1251(a)(11).[98] The defendant immediately moved to have his sentence vacated and to withdraw his guilty plea under Rule 32(d). He argued that he had not understood the consequences of his plea, namely, that he would be subject to depor-

92. 432 F.2d at 1354.
93. *Id.* at 1353.
94. 454 F.2d at 926 (Bazelon, J., dissenting).
95. 432 F.2d at 1353-54 (citations omitted). Although this case appears to represent a dramatic shift away from the *Parrino* reasoning, the holding was limited because the misrepresentation came, in part, from the government's counsel and there was no showing that the defendant significantly relied upon the prosecutor's remarks regarding deportation. Moreover, the court noted, when the misadvice has come from his counsel, defendant cannot later claim involuntariness as long as the erroneous advice was "within the general bounds of reasonable competence." *Id.* at 1353. This conclusion produces the further problem of ascertaining what comprises "reasonable competence." *But see supra* text accompanying notes 50-51; *see also* Legomsky, *supra* note 50, at 136-37 which states: "Such findings [*Parrino*] are inexcusable. In an adversary system it is the obligation of the attorney to assure the client the best defense possible under the law."
96. 686 F.2d 35 (D.C. Cir. 1982).
97. *Id.* at 37.
98. *See supra* note 14 and accompanying text.

tation based on the misdemeanor convictions.

The *Russell* court pointed out that American jurists are sharply divided in their views concerning the penal nature of deportation.[99] The court also noted that similar tensions exist regarding the classification of deportation as a direct or collateral consequence.[100] The D.C. Circuit conceded that well-established Rule 11 principles do not require a court to inform a defendant of possible deportation. But, it added, decisions guided by Rule 11 have improperly influenced the application of Rule 32(d), which should be employed to withdraw a plea in the interest of justice, even if the plea is validly offered under the formal requirement of Rule 11.[101]

The court, in *Russell*, identified several considerations that should guide district courts in their exercise of discretion in applying Rule 32(d).[102] The first is whether the defendant is attacking the earlier plea on its merits, that is, whether the defendant is actually asserting

99. 686 F.2d at 38. *See, e.g.*, Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (Deportation "is not a punishment."). *Contra* Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families."); Galvan v. Press, 347 U.S. 522, 531 (1954) (Deportation is "close to punishment."); Jordan v. De George, 341 U.S. 223, 231 (1951) (Deportation is a "drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty."); Fong Tan v. Phelan, 333 U.S. 6, 10 (1948) (Deportation is a "penalty."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Deportation is the equivalent to the "loss of property and life; or all that makes life worth living."); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel."); United States *ex rel.* Brancato v. Lehmann, 239 F.2d 663, 666 (6th Cir. 1956) ("Although it is not penal in character . . . deportation is a drastic measure at times the equivalent of banishment or exile . . ."). Perhaps the most poignant description comes from Judge Learned Hand, who in United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630-31 (2d Cir. 1926) wrote:

> However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.

100. 686 F.2d at 38-39.

101. *Id.* at 39. Interestingly, the *Russell* court need not have addressed this question, for it was able to resolve the case by finding a core violation of Rule 11 itself, which requires that a defendant's plea be voluntary and not the product of misrepresentation by the prosecution. In *Russell*, the prosecutor had explained to the court that the defendant would not be subject to deportation if he pleaded guilty to the misdemeanor. *Id.* at 41. Nevertheless, the *Russell* court chose to address specifically the interrelationship of Rule 11 to Rule 32(d) and the issue of manifest injustice as it relates to deportation consequences. *Id.* at 40-41. *See also* Brady v. United States, 397 U.S. 742, 755 (1969) (misrepresentation included as a factor invalidating the voluntariness of a guilty plea); case cited *supra* note 31.

102. 686 F.2d at 40-41.

his innocence or a mere formal technicality of the rule's application. The second is whether a withdrawal of the plea and a subsequent trial would prejudice the government's case; for example, key government witnesses may no longer be available. Third is whether the government had any role in contributing to the defendant's misunderstanding of the consequences. While this final point repeats the already mandated non-misrepresentation on the part of the prosecution, further discussion by the *Russell* court reveals a willingness to designate as a "manifest injustice" even an accused's simple unawareness of the deportation consequences of his plea.[103]

Additionally, the *Russell* court suggested that lower courts, in considering withdrawal of pleas under Rule 32(d), should be sensitive to the possibility that the defendant has not received effective assistance of counsel.[104] In contrast to *Parrino* and its progeny, the *Russell* court questioned whether a defendant who enters a plea of guilty is actually "voluntarily" waiving his right to trial by jury. Such a defendant has a compelling reason to stand trial when all the consequences of his plea are known; a plea is voluntary only when such defendants know the "pandects under which they plead."[105] "Pandects" thus supplants the traditional classification of "direct" and "collateral" and includes, for this circuit at least, the consequence of deportation.

The *Russell* court went even one step further in its dictum. Accepting the uniqueness of deportation among the consequences of convictions, it questioned classifying deportation as a collateral consequence, saying:

> It is extremely troublesome that deportation has never been considered a direct consequence of guilty pleas of the sort that must be brought to the defendant's attention before his plea may be considered voluntary under Rule 11. Aliens form a discrete, easily recognized class of defendants. They are deported by the same branch of government that brings criminal charges against them, and in many cases their deportation is a more direct and automatic consequence of conviction than any other sanction. District courts need to remember that although they are not required to explain the possibility of deportation to alien defendants before accepting a plea under

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103. *Id.* at 40. "Finally, although deportation is not a 'direct' consequence of a plea for purposes of Rule 11, it is difficult to imagine a collateral consequence that would be more compelling for purposes of showing the 'manifest injustice' required by Rule 32(d)." *Id.*

104. *Id.* at 40 n.6.

105. *Id.* at 42. *See also* C. WHITEHEAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 410 (1980) ("Under the federal rule the judge is not required to inform a defendant about these matters, but for a plea to be intelligently given in any meaningful sense, it seems that all significant *collateral consequences* of the plea should be mentioned.") (Emphasis added).

Rule 11, nothing prohibits them from doing so. *The distribution of justice to alien defendants can only be enhanced if the trial courts make sure such defendants know the pandects under which they plead.*[106]

Further Federal Erosion—Attorney Misinformation

Recent erosion of the *Parrino* tradition has also occurred in the Fourth Circuit. In *Strader v. Garrison*,[107] the defendant was misinformed by his attorney about the effect of a guilty plea upon his parole eligibility date. Although parole is a collateral consequence, the court considered defense counsel's failure to apprise his client accurately of this eventuality to be a violation of his constitutional right, and it expressly rebuffed the *Sambro* and *Parrino* holdings for having ignored the constitutional issues involved. The court stated: "We regard those cases [*Sambro* and *Parrino*] as *aberrations*. In neither case was the problem approached in terms of the constitutional entitlement to the effective assistance of counsel."[108] *Strader* required the judgment of conviction to be vacated, when it was shown, as here, that the guilty plea would never have been tendered had the defendant been properly advised by his attorney.[109] When ignorance and misadvice by an accused's counsel improvidently lead him to enter a plea of guilty, the appropriate remedy is withdrawal of the plea.[110] The *Strader* court also pointed out that the Second Circuit itself came to the same conclusion in *Hill v. Ternullo*,[111] notwithstanding and without reference to *Parrino*, when it noted that the defense counsel was so ineffective as to amount to a denial of the constitutional right to counsel.[112]

State Expansion of Alien's Due Process Rights

Recent Statutory Trend

The status of the alien's right to be informed of possible deportation consequences is even more divergent among the states than it is at the federal level. Strong evidence is appearing to indicate a trend has begun on the state level to require warning defendants of possible deportation before courts accept guilty pleas. Since 1977 four states have enacted statutes—strikingly similar in wording—requiring the alien defendant to be advised of deportation consequences by trial courts. These states are California (1977),[113] Massachusetts

106. *Id.* at 41-42 (emphasis added).
107. 611 F.2d 61 (4th Cir. 1979).
108. *Id.* at 64 (emphasis added).
109. *Id.* at 65.
110. *Id.*
111. United States *ex rel.* Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975).
112. 611 F.2d at 64.
113. Cal. Penal Code § 1016.5 (Deering 1983).

(1978),[114] Oregon (1979),[115] and Connecticut (1982).[116] Typical of the four is section 1016.5(a) of the California Penal Code, which reads:

> Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law . . . the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.[117]

As the text of the statute indicates, the court is required to establish in the record that such a warning has been given to the defendant. Absent this record, the defendant is to be presumed not to have received the required advisement.[118]

Three of these four statutes—California, Massachusetts and Connecticut—go further than Rule 11 by explicitly providing for a remedy if the defendant is not given the warning by the court. California, for example, requires that when the defendant is not afforded this warning and demonstrates that the conviction of the offense to which he pleaded guilty or nolo contendere may have the consequence of deportation, exclusion, or denial of naturalization, the court shall, on his motion, vacate the judgment and permit the defendant to withdraw the guilty plea and to enter one of not guilty.[119]

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114. MASS. GEN. LAWS ANN. ch. 278 § 29D (West 1981).
115. OR. REV. STAT. § 135.385 (1981-1982).
116. CONN. LEGIS. SERV. § 82-177 (West 1982).
117. CAL. PENAL CODE § 1016.5(a) (Deering 1983).
118. CAL. PENAL CODE § 1016.5(b) (Deering 1983). A statement of legislative intent is included in the statute. The statement is important for its understanding and appreciation of the alien defendant's unique plight. It postulates that deportation is serious in nature, and that many aliens do, in fact, offer guilty pleas fully unaware of the dire consequences of deportation. Subsection (d) of section 1016.5 of the California Penal Code provides in pertinent part:

> The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.

CAL. PENAL CODE § 1016.5(d) (Deering 1983).
119. CAL. PENAL CODE § 1016.5(b). Connecticut and Massachusetts have identical provisions. *See* CONN. LEGIS. SERV. § 82-177(c) (West 1982); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1981).

None of these statutes requires the defendant to make a claim of innocence prior to withdrawing the guilty plea.[120] In addition, each of the three aforementioned statutes is drafted to avoid the danger of opening a floodgate of post-sentence appeals or collateral attacks. Although the statutes require the warning be given to each defendant, a remedy is available solely to those defendants who would actually be affected by one of the enumerated consequences. In practical terms, other non-alien defendants would have no basis for an attack if the court were technically remiss in offering the required advice.

The California case of *People v. Gloria* demonstrates this safeguard of judicial efficiency.[121] Here, the defendant pleaded guilty and then sought to have the judgment vacated because the court had not informed him of the consequences under Penal Code section 1016.5. The court ruled that this provision did not apply to such a defendant because he was not subject to deportation. In contrast, in *People v. Guzman*,[122] the defendant had not been appropriately advised of the possible deportation consequences. Though the government maintained the defendant failed to establish he would not have pleaded guilty had he been aware of the consequences, it was held a court cannot assume a defendant would or would not admit the truth of the allegations were he properly advised of the consequences. In this instance, there was no evidence that the defendant had been given the required warning and it was clear he was deportable as a consequence of his conviction. The defendant, therefore, was allowed to withdraw his guilty plea and enter one of not guilty.[123]

Legal Dilemmas Avoided by Statutory Provisions

These state statutes provide significant safeguards to aliens who, as the California Legislature noted,[124] frequently are unaware of deportation consequences of their plea. Judge Bazelon, in his *Sambro* dissent, similarly urged protection of this group who, through igno-

120. *E.g.*, Kercheval v. United States, 274 U.S. 220, 224 (1927), which, on the federal level, provides for withdrawal regardless of one's assertion of innocence:

> But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. . . .The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.

(Footnotes omitted). *See infra* note 126 and accompanying text (Court's acceptance of nolo contendere plea when defendant asserted innocence).

121. 108 Cal. App. 3d 50, 166 Cal. Rptr. 138 (1980).

122. 116 Cal. App. 3d 186, 172 Cal. Rptr. 34 (1981).

123. *Id.* at 192, 172 Cal. Rptr. at 38.

124. Cal. Penal Code § 1016.5(d) (Deering 1983). See *supra* note 118 for the text of this section.

rance of the laws and without fully understanding the consequences of their actions, waive their rights; such typically poor and uneducated people, he urged, are entitled to protection.[125] Moreover, providing such critical information to this discrete class of persons requires, at best, a mere few minutes of the court's time.

Other reasons exist, however, that warrant such statutory safeguards. For example in *North Carolina v. Alford*, the Court candidly conceded that it sometimes lies in one's best interest to plead guilty while asserting innocence, and that a court's acceptance of such a plea does not violate the defendant's right of due process guaranteed by the Constitution.[126] The likelihood of a suspended sentence might induce an alien to plead guilty or nolo contendere, especially if he or she is unaware of deportation eventualities.[127] The possibility thus arises that an alien—though innocent of any wrongdoing—may be banished from his home for life as the result of a plea, the ramifications of which he possessed little or no understanding. Such eventualities must create serious misgivings about the voluntariness of a plea so offered.[128]

Exacerbating the entire dilemma for the alien, federal deportation statute 8 U.S.C. § 1251(a)(4), predicated upon "moral turpitude," does not indicate precisely what constitutes moral turpitude,[129] leav-

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125. United States v. Sambro, 455 F.2d 918, 925 (D.C. Cir. 1971) (Bazelon, J., dissenting).

126. 400 U.S. 25 (1970). *See also* Brady v. United States, 397 U.S. 742 (1970) in which the court stated:

> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

Id. at 751. *See also* United States v. Bucio-Reyes, No. 80-3744, slip op. (6th Cir. June 11, 1981), *cert. denied*, 454 U.S. 941 (1981) (the Court refused to reconsider the alien's conviction which was based on a nolo contendere plea, although the defendant had asserted his innocence while offering the plea).

127. *See supra* note 9.

128. *See generally* Note, *Withdrawal of Guilty Pleas under Rule 32(d)*, 64 YALE L.J. 590 (1955).

> [T]here still exists the possibility of a guilty plea being entered by an innocent person relying on the security of a known outcome. This possibility is present whether the mistake concerns 'collateral' or 'direct' consequences. When the accused can prove that his counsel made conclusive statements to him about material consequences, it is reasonable to infer that these assertions were the cause of the plea. Hence, if it develops that the lawyer was wrong, withdrawal should be allowed.

Id. at 599 (footnotes omitted).

129. 8 U.S.C. § 1251(a)(4) (1976). For a compilation of what has been construed as a crime of moral turpitude, see 1A C. GORDON & H. ROSENFIELD, IMMIGRATION

ing considerable ambiguity as to which crimes may lead to deportation. An alien might conceivably plead guilty to a crime either he, or his attorney, felt was not one of moral turpitude, only later to learn that it had been so construed. In addition, whether a violation constitutes moral turpitude is solely a federal question, not to be determined by state interpretation.[130] Consequently, one must look to how specific crimes have been defined in federal cases.[131] This presents a difficult task for the attorney. It is not, therefore, surprising that alien defendants, as well as defense counsel—and even judges themselves—are frequently unaware of the deportation consequences that may arise from a guilty plea.[132] It seems unfair to hold the alien to such strict degrees of punishment when the legal system he encounters is fraught with such ambiguous complexities. Statutes, such as those implemented by the aforementioned states, eliminate the disturbing problems that arise from these gray areas of the legal system.

An additional complication faced by the alien is the nolo contendere plea. This plea is not regarded as an express admission of guilt, but as a consent by the defendant to be punished as if he were guilty; it is a prayer for leniency.[133] For deportation purposes, however, the plea of nolo contendere is the equivalent of a guilty plea.[134]

LAW AND PROCEDURE § 4.14(a)-(c) (rev. ed. 1982).

130. *See* Hollander, *supra* note 4, 48-49.

131. *Id.*

132. *See* Legomsky, *supra* note 50, at 105-06:

> It is an anomaly of American immigration law that the sentencing judge—in federal and state courts alike—frequently makes the real decision on whether an alien convict is to be deported. Because the anomaly is largely unrecognized, this decision is often made unwittingly, without regard to whether such a sanction is desirable in the individual case.

Professor Legomsky also points out that deportation law itself possesses anomalies that are sometimes surprising, if not startling. For example, he notes, possession of one "joint of marijuana" may lead to deportation, whereas a conviction for first degree murder may not. *Id.* at 62 n.6. Bastone relates an equally troubling hypothetical situation:

> [U]nder § 1251(a)(4) a non-citizen defendant convicted of a brutal rape-kidnapping may not incur the collateral consequences of vulnerability to deportation . . . [while] another non-citizen defendant, after pleading nolo contendere and being only minimally fined following each of two unsuccessful and unpremeditated attempts at shoplifting items of marginal value, could be the subject of deportation proceedings, notwithstanding long-term residence and otherwise exemplary conduct in the community.

Bastone, *supra* note 4 at 19.

133. North Carolina v. Alford, 400 U.S. 25, 36 n.8 (1970). Troublesome, too, is that while Rule 11(f) of the Federal Rules of Criminal Procedure requires the court to satisfy itself that there is a factual basis for the guilty plea, it makes no such demand for the acceptance of the plea of nolo contendere.

134. "It is settled that a plea of *nolo contendere*, when accepted by the court, becomes for all practical purposes the full equivalent of a plea of guilty . . . ." *In re* Fortis, 14 I. & N. Dec. 576, 577 (1974). *See also* Rubis-Rubio v. INS:

> While it may be true . . . that a guilty judgment following a nolo contendere plea cannot be used as an admission in a subsequent action, it has been held

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Difficulties can thus arise in this area depending on how a particular state employs the plea. California, for example, provides that guilty and nolo contendere pleas have the same legal effect in regard to felonies, but when the charge is a non-felony, the plea cannot be used against the defendant as an admission in any civil suit.[135] This can present a portentous conflict between jurisdictions, because an alien defendant, as well as his counsel, might be induced to offer a nolo contendere plea to a charge of some non-felony, in reliance on the state statute ensuring no civil ramifications, such as deportation. Nevertheless, the alien may be subject to a deportation proceeding, because 8 U.S.C. § 1251(a) becomes effective by virtue of a conviction, regardless of whether it stems from a plea of guilty or nolo contendere.[136] Again, the recent state statutes avoid this problem by requiring the defendant charged with any crime to be notified of potential deportation consequences whether offering a plea of guilty or nolo contendere. The alien defendant is safeguarded from any federal contingency, known or unknown.

Expansion of Aliens' Due Process Rights by State Case Law

In addition to the growing legislative trend among states to provide alien defendants greater safeguards from the hazards of unexpected deportation, recent state case law also reflects a trend in granting withdrawals of guilty pleas when the consequences of deportation were not known at the time the plea was offered. *Parrino*, however, is still followed in some jurisdictions, and is relied on especially in those cases where deportation is not the actual consequence at issue.[137] In a 1972 Indiana case,[138] for example, the defendant

that the conviction may be noticed for purposes of deportation where the fact of the conviction is itself the only thing that is relevant.

380 F.2d 29, 29-30 (9th Cir. 1967), *cert. denied*, 389 U.S. 944 (1976); Farrington v. King, 128 F.2d 785, 786 (8th Cir. 1942). (Though the defendant alleged that he accompanied his plea of nolo contendere with an explanation that he was innocent of the charge, the court held that the "plea of nolo contendere was, for all practical purposes, the full equivalent of a plea of guilty"). *See supra* note 5 (guilty plea is a conviction).

135. CAL. PENAL CODE § 1016 (Deering 1983).

136. *See supra* note 134 (nolo contendere as the equivalent of conviction for deportation purposes).

137. *See* People v. Thomas, 42 Ill. 2d 122, 242 N.E.2d 177 (1968) (addressing specifically the failure of a judge to inform the defendant that his conviction would deprive him of the right to vote and hold public office); Reponte v. State, 57 Hawaii 354, 556 P.2d 577 (1976) (defendant unaware at the time of his plea that he would thereby lose the right to hunt or hold a gun).

138. Lovera v. People, 152 Ind. App. 377, 283 N.E.2d 795 (1972); *accord* People v. Garcia, 53 Misc. 2d 303, 279 N.Y.S.2d 288 (1967).

pleaded guilty to possession of marijuana and was sentenced to *five days* in jail and fined $300. Although the trial court judge himself admitted that he was unaware that deportation would follow the defendant's conviction,[139] the court ruled that a trial judge has neither an obligation to determine that a defendant is an alien nor to advise him of the effect of his plea regarding deportation.[140]

One of the strongest positions taken among the states (along with an equally forceful dissent) is *Tafoya v. State*.[141] In deciding whether to allow the defendant to withdraw his guilty plea because of his unawareness of the deportation consequences at the time the plea was made, the Alaska court in this case followed *Parrino*, holding deportation to be merely a collateral consequence. The defendant's ignorance of this consequence did not render his plea void.[142] The court also addressed the question of whether the defense attorney's failure to inform the accused of the potential deportation constituted a deprivation of effective counsel such as is guaranteed by the Constitution. In contrast to a similar and more recent Pennsylvania decision,[143] the Alaska court agreed with the majority of the federal circuits that the failure of counsel to inform the accused of possible deportation did not constitute a denial of the right to effective assistance of counsel.[144] The applicable standard in determining whether the defendant has had effective counsel, the court asserted, was whether the counsel was so incompetent as to make the trial a mockery and a farce. Only then would the defendant be entitled to a new trial.[145]

Judge Rabinowitz, agreeing with Judge Frank, strongly dissented on two major issues: First, he rebutted the view that deportation was "only" a collateral consequence; and second, he expressed satisfaction that under the circumstances of this case, the "manifest injustice" criterion of Rule 32(d) had been met.[146] He felt the defendant Tafoya would not have pled guilty to the charge of rape had counsel advised him that he was deportable by virtue of his plea.[147] He also

139. If judges themselves are unaware of deportation consequences, it is not surprising that attorneys, not to mention their clients, are also frequently unaware. On the one hand this supports the position that judges can't be accountable to foresee such remote consequences—at least from their perspective; on the other hand, it demonstrates the necessity of compelling dissemination of such critical information. The resolution must center around the quintessential issue of the voluntariness of the alien defendant's plea.

140. 152 Ind. App. at 379, 283 N.E.2d at 798.

141. 500 P.2d 247 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1973).

142. *Id.* at 250-51.

143. Commonwealth v. Wellington, 451 A.2d 223 (Pa. Super. 1982).

144. 500 P.2d at 252.

145. *Id.* at 251.

146. *Id.* at 254 (Rabinowitz, J., dissenting). Alaska's Criminal Rule 32(d) is identical to Rule 32(d) of the Federal Rules of Criminal Procedure. *Id.* at 253 n.3.

147. *Id.* at 255.

posited what the District of Columbia Circuit later pronounced in *Russell* and what state court decisions have recently held, namely, that though a court's failure to advise a defendant of deportation consequences does not technically violate Rule 11, there need be no violation of this rule to invoke Rule 32(d).[148]

The two most recent state decisions dealing with notification to aliens of the consequences of their pleas reflect the reasoning of the *Russell* court and mark a dramatic turn from the *Parrino* holdings. In *Commonwealth v. Wellington*,[149] the Pennsylvania court conceded that a trial judge has no obligation to advise a defendant of the collateral consequences, and thus on this basis a plea could not be withdrawn. However, when defense counsel fails to advise the accused of such a consequence, a plea is not knowingly and intelligently offered. Describing deportation as a significant consequence of certain convictions, this court explained, "Counsel's ineffectiveness in failing to advise a defendant before a guilty plea of the significant legal consequences may therefore require that the plea be withdrawn."[150]

This holding does not compel a trial court itself to inform an accused of the deportation consequences; rather, it considers this to be the obligation of defendant's counsel.[151] Lack of such information, this Pennsylvania court asserts, affects the voluntariness of the alien's plea, as well as denies him the constitutionally guaranteed effective assistance of counsel. Consequently, breach of this duty by defense counsel requires the guilty plea to be withdrawn.[152] The practical effect of this holding, then, logically suggests that a guilty plea offered by a defendant alien unaware of deportation consequences—albeit as a result of his own counsel's ineffectivenss—is

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148. Judge Rabinowitz asserted:

> While there may be considerable overlap, the concept of 'manifest injustice' under Rule 32(d) permits the judge greater latitude than the requirements of constitutional 'due process.' The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done.

Id. at 255 n.7 (quoting Pilkington v. United States, 315 F.2d 204, 209 (4th Cir. 1963)) (footnotes omitted).

149. 451 A.2d 223, 224 (Pa. Super. 1982).

150. *Id.* at 224.

151. *Id.* at 225.

152. The Wellington court stated:

> Consequently, we now hold that counsel has a duty to an alien client to inquire and advise her of the possible deportation consequences of a contemplated plea. Because counsel's failure to undertake such actions could have no reasonable basis designed to effectuate appellant's interests he was ineffective, and appellant must be permitted to withdraw her guilty plea.

Id. (citations omitted).

rendered invalid because involuntarily made.

In a 1981 Florida case, *Edwards v. State*,[153] the court took this same position. Here the defendant claimed his plea of guilty was involuntary because (1) the trial judge had failed to inform him of possible deportation, and (2) his attorney had failed to advise him of such consequences. Relying on *Fruchtman* and *Michel*, the Florida court here, too, held that the trial court is not required to advise the defendant of federal consequences before accepting a guilty plea. However, a court could not accept a plea that is not offered voluntarily and knowingly, "that is, upon advice which enables the accused to make an informed, intelligent, and conscious choice to plead guilty or not."[154] The court in *Edwards* emphasized that for a waiver of constitutional rights to be acceptable, the plea must be made with an awareness of the relevant circumstances and likely result.[155] It then concluded that "ignorance of the potential consequences of deportation cannot, in our view, make for an intelligent waiver."[156] This view comports fully with the mandates of *Kercheval*[157] and *Boykin*[158] that a defendant be made aware of the implications and

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153. Edwards v. State, 393 So. 2d 597 (Fla. 1981).

154. *Id.* at 599.

155. *Id.* The Edwards dissent accurately pointed out that by requiring counsel to advise the client of deportation possibilities, it, in effect, places the burden back upon the court to be satisfied that the defendant has been so advised, since if the defense attorney is remiss in his obligation, the judgment becomes subject to appeal or collateral attack. The point is well taken. Judicial efficiency speaks in favor of a rule requiring the court to inform the defendant of such consequences prior to accepting the plea, for as courts increasingly allow withdrawal of pleas under Rule 32(d), the frequency of collateral attacks necessarily increases. In California, for example, prior to the legislative enactment requiring courts to advise defendant aliens of deportation consequences, the state supreme court held the lack of defendant's awareness of potential deportation to be grounds for withdrawing the earlier plea. In People v. Giron, the California Supreme Court held that a court could grant a motion to withdraw a plea when justice would be promoted: "[W]here an extrinsic fact operated so as to cause an over-reaching of the free will and judgment of the accused so as to deny him a trial on the merits . . . the court may, even after judgment, permit him to withdraw the plea and stand trial." 11 Cal. 3d 793, 797 n.5, 523 P.2d 636, 639, n.5, 114 Cal. Rptr. 596, 599 n.5 (1974) (quoting People v. Savin, 37 Cal. App. 2d 105, 108, 98 P.2d 773, 774 (1940)). The *Giron* court also recognized that ignorance about deportation consequences was a constriction of the defendant's voluntary plea, saying, "As a general rule, a plea of guilty may be withdrawn for mistake, ignorance or inadvertence or any other factor over-reaching the defendant's free and clear judgment." *Id.* at 797, 523 P.2d at 639, 114 Cal. Rptr. at 599. *See also* People v. Wiedersperg, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975) (withdrawal of the plea granted because both counsel and court were unaware of the deportation potentiality); *but cf.* People v. Flores, 38 Cal. App. 3d 484, 113 Cal. Rptr. 272 (1974) (no abuse of discretion); People v. Martinez, 154 Cal. App. 2d 233, 316 P.2d 14 (1957) (due process met, defendant fully represented by counsel, court had no responsibility to see that accused received sound advice from his attorney).

156. 393 So. 2d at 599. "While we may not impose upon the trial court the obligation to advise the accused of this consequence because 'collateral,' its 'collateralness' is immaterial in measuring the effective assistance of counsel." *Id.*

157. *See supra* text accompanying note 21 and note 22.

158. *See supra* text accompanying note 25.

consequences of his guilty plea, thereby facilitating the constitutionally guaranteed voluntariness of that plea.

CONCLUSION

The standard to be applied in the United States to alien defendants who offer pleas of guilty or nolo contendere while unaware of possible deportation consequences is unsettled. While some disagreement exists as to its nature, it is mere rhetoric to deny the penal aspect of deportation. All, in fact, do agree that the ultimate consequences of deportation are often considerably more severe than the actual punishment meted out by the trial court. Deportation can and does have a most devastating impact not only on the alien himself, but also on spouses, children, relatives, friends, and on other ancillary benefits such as employment, property, responsibilities, and contract benefits and obligations. Indeed, possibly the most traumatic impact is the deprivation of what to the alien has become home and fatherland.

The major objection to providing the alien defendant with notice regarding possible deportation appears to be the fear of burdening trial courts by requiring them to inform defendants of numerous and often unforeseeable collateral consequences.[159] There is, of course, considerable merit to these fears, for the entire gamut of collateral consequences is certainly not ascertainable. Deportation, however, is not only ascertainable, it is a common and predictable eventuality, singular in import among the various collateral consequences. In the words of Judge Learned Hand, it would be a "national reproach"[160] not to make this distinction.

Requiring courts to advise alien defendants of possible deportation would not impinge on judicial efficiency; rather it would enhance it by reducing the number of potential collateral attacks. The United States Supreme Court in *McCarthy v. United States* emphasized this by remarking: "Thus the more meticulously the Rule [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous

159. Joseph v. Esperdy, 267 F. Supp. 492, 494 (S.D.N.Y. 1966) reflects this in summation: "[I]t seems onerous and absurd to expect a judge to explain to each and every defendant who pleads guilty the full range of *collateral* consequences of his plea, and indeed, to anticipate what those collateral consequences are." The *Cariola* court in United States v. Cariola, 323 F.2d 180, 182 (3d Cir. 1963), echoes a similar fear when it decried placing burdensome demands on the trial courts requiring clairvoyance of a superhuman kind. *See supra* note 61.

160. *See supra* note 99.

post-conviction attacks on the constitutional validity of guilty pleas."[161]

In reality, very little court time is required to advise a defendant of the pertinent consequences of his plea.[162] The *McCarthy* Court stressed: "It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking."[163]

The recently enacted statutes by California, Oregon, Massachusetts and Connecticut, as well as the increasing number of judicial decisions, both state and federal, reflect a growing willingness to extend to the alien defendant a due process that is more appropriate to his unique plight. From the standpoint of fairness and justice this is a commendable and necessary trend. Both judicial efficiency and the special circumstances presented by the alien defendant call for a national standard for determining the voluntariness of entering a plea of guilty or nolo contendere—one that is not enmeshed in the definitional confusion of directness and collateralness. Courts should be required to make the relatively simple effort of assuring themselves that the alien understands that deportation may result from his plea, thereby mooting the controversy surrounding the nebulous concepts of manifest injustice and effective assistance of counsel. Only then can an alien's plea be regarded as voluntary.

DAVID M. MCKINNEY

161. McCarthy v. United States, 394 U.S. 459, 465 (1969).

162. *Proposed Amendments to Fed. Rules of Criminal Procedure: Hearing Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary*, 93rd Cong., 2d Sess. 188 (1974) (Statement of Herbert Semmell, on behalf of the Nat'l Assn. of Criminal Defense Lawyers and the Wash. Council of Lawyers). "The entire process [Rule 11 warnings] usually takes about five minutes, particularly if the defense counsel has discussed these matters with his client in advance of the hearings . . . ."

163. 394 U.S. at 472.

b. Example / Checklist Contact Sheet

LEGISLATIVE SPONSOR: House State Affairs

TC DATE/DAY: Wed, Feb 22

Pub. Hear (circled) Work Ses. Inv. Hear (crossed out)

TIME: 8:30-10:00

LEGISLATIVE REFERENCE: HB142

JUNEAU ROOM: C-102

SUBJECT: Consequence of Guilty Pleas by Aliens

BRIDGE:

OF PORTS:

CONTACT: Ann PH: 4931

DATE TAKEN/BY: 2/17 Peggy

****

TELECONFERENCE SITES:

LIO'S

Anchorage
Barrow *
Bethel
Delta Junction *
Dillingham *
Fairbanks
Glennallen *
Juneau
Ketchikan
Kodiak
Kotzebue
Mat-Su
Nome
Petersburg *
Sitka
Soldotna
Valdez *

LTC'S

Homer
Wrangell

ALL LIO'S

OTHER SITES WELCOME WITH PRIOR NOTIFICATION

VTS'S

See List on Reverse Side

OFFNETS: Jana Stewart Court System 264-8237 (calling in from her office) Wants to keep listening - LIO will call her.

CHAIRING SITE: Juneau

CHAIRPERSON: Rep. Boucher

[ ] CONFORMS TO LEGISLATIVE COUNCIL POLICY 4/85

SIGNATURE OF SPONSOR/CONTACT PERSON DATE

****

SPECIAL INSTRUCTIONS

* SESSION ONLY

HB
150

House Committee on State Affairs

RECAP OF
HB 150

Representation of Others by Public Officials

Received February 3, 1989
by Reps. Goll and Koponen

Heard March 2, 1989
Heard March 8, 1989

Committee Substitute adopted March 8, 1989

Passed Out of Committee March 8, 1989
1 Do Pass
3 No Recommendation

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HB 150: Representation of Others by Public Officials

Item 1: HB 150 by Goll and Koponen

CS HB 150 (SA)

Item 2: Fiscal Note

Item 3: Letter to Rep. Goll from Alaska Public Offices Commission

Item 4: HB 150 File Contents from Rep. Goll
February 28, 1989

Item 5: Memorandum from Tam Cook
Division of Legal Services
March 7, 1989

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 3, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: ________

The STATE AFFAIRS Committee recommends that:

HOUSE BILL NO. 150 [REPRESENTATION OF OTHERS BY PUB OFFICIAL]
"An Act relating to representation of others by legislators and certain legislative employees before state agencies."

[X] be replaced with CSHB 150(SA) [✓] the same title
[ ] a new title

[ ] have attached amendment(s)

[ ] do pass
[ ] do not pass
[X] no recommendation
[ ] individual recommendations
[ ] additional referral to the ________ Committee

ADOPTS: ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[X] zero fiscal note LAA
[ ] zero with analysis

APPROVES PREVIOUS:

[ ] fiscal note(s) published: ________

[ ] zero fiscal notes(s) published: ________

SIGNING DO PASS:

[signature]

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

David Dooley (NO REC)
[signature] (No Rec)
[signature] (No Rec)

[signature]
Chairman's signature

Item 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION HB 150
PUBLISH DATE

FISCAL NOTE

REQUEST:
Revision Date:
Title: An Act relating to representation of others by legislators and certain legislative...
Sponsor: Representative Goll
Requestor: House State Affairs

Affect Agency: Legislative Affairs Agency
BRU: Legislative Council
Components: Council and Subcommittees

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
General Fund						
Federal Fund						
Other						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

No Fiscal Impact

Prepared By: Pamela Stoops, Director Pamela Stoops
Phone: 465-3850
Division: Administrative Services
Date: 2/27/89

Approved By: Warren Endicott, Executive Director Warren W Endicott
Agency: Legislative Affairs Agency
Date: 2/27/89

DISTRIBUTION (BY PREPARER)
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
OFFICE OF MANAGEMENT & BUDGET
AGENCY (IES)

STATE OF ALASKA

STEVE COWPER, GOVERNOR

Item 3

ALASKA PUBLIC OFFICES COMMISSION

REPLY TO:

☑ 2221 E. Northern Lights, Room 128
Anchorage, AK 99508
(907) 276-4176

☐ Juneau Branch Office
Box CO
Juneau, AK 99811-0222
(907) 465-4864

February 24, 1989

Representative Peter Goll
P.O. Box V
Capitol Room 122
Juneau, Alaska 99811

Dear Representative Goll:

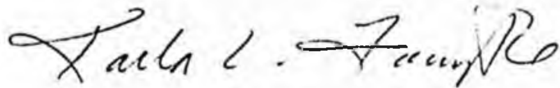
You asked the commission to indicate its position regarding HB 150, an act relating to representation of others by legislators and certain legislative employees before state agencies.

The commission discussed this measure at its February 22, 1989 commission meeting. The commission strongly endorses this bill. As you are aware, the current version of AS 24.60.100 is inconsistent with the conflict of interest law. Under AS 39.50.090(c), a public official may not represent a client before a state agency for a fee. The commission believes the two laws should be made consistent, and strongly favors the broad prohibition contained in the conflict of interest law.

I hope this information is helpful. If you have additional questions, please let me know.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION



Karla L. Forsythe
Executive Director

cc: APOC Members
Dean Gottehrer, Special Assistant, Commissioner of Administration

Item 4

HB 150

FILE CONTENTS

HB 150.

Fiscal Note.

Memorandum from Representative Goll to Committee Chairman Boucher.

Letter from Alaska Public Offices Commission.

Copies of the following Alaska Statutes:

(1) AS 39.50.090(c)
(2) AS 24.45.171(8)
(3) AS 24.45.041
(4) AS 24.45.051
(5) AS 24.45.061.

Memorandum from Richard Bradley, Legislative Counsel, to Representative Pat Pourchot regarding representation before a board.

Copy of the relevant sections of the November, 1988, draft Model Ethics Law from the Council on Governmental Ethics Laws.

Copies of the relevant sections of the ethics laws of:

(1) Connecticut
(2) Massachusetts
(3) New Jersey
(4) New York.

REPRESENTATIVE
PETER GOLL

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4925

STATE OF ALASKA
HOUSE OF REPRESENTATIVES

MEMORANDUM

TO: Representative H. A. "Red" Boucher, Chair
House State Affairs Committee

FROM: Representative Peter Goll Peter

RE: HB 150, "An Act relating to representation of others by legislators and certain legislative employees before state agencies."

DATE: February 28, 1989

HB 150 prohibits legislators and legislative employees covered under AS 24.60 (Legislative Ethics Act) from engaging in lobbying on behalf of a client for a fee before an agency, board or commission of the state.

This bill is an attempt to provide a reasonable solution to a conflict between two statutes, AS 24.60.100 and AS 39.50.090(c).

The relevant portion of AS 39.50.090 (c) provides:

(c) A public official may not represent a client before a state agency for a fee. . . .

The term public official is defined in AS 39.50.200(a)(8) and provides in part:

(8) "public official" means . . . a member of the legislature . . .

AS 24.60.100, however, provides:

Sec. 24.60.100. REPRESENTATION. A person to whom this chapter applies who represents another person for compensation before an agency, board, or commission of the state shall disclose the name of the person represented, the subject matter of the representation, and the body before which the representation is to take place in the journal of the appropriate body or if the legislature is not in session to the committee. The committee shall maintain a public

record of the disclosure and forward the disclosure to the respective house for inclusion in the journal by the fifth day of the session.

Legislative Affairs Legal Services has provided one resolution to the conflict by stating that AS 24.60.100 takes precedence over AS 39.50.090(c) because AS 24.60 was passed subsequent to AS 39.50 and is thus a repeal by implication to the extent of a conflict between the two laws. (See attached memorandum from Richard Bradley to Pat Pourchot, dated December 22, 1988.)

I feel that that result, while it may be legally correct, is not in the public interest.

In fact, AS 39.50 is the public officer and employee conflict of interest law, and was initiated by the people in Initiative Proposal No. 2 in 1974. One of the stated purposes of the initiative, as codified in AS 39.50.010, was "to discourage public officials from acting upon a private or business interest in the performance of a public duty". In the same section the "people of the state declare that...public office is a public trust that should be free from the danger of coflict of interest..."

The position of a legislator is one of influence over state agencies, and it is inappropriate for that influence to be used, or even appear to be used, in the service of a private client for a fee.

The November, 1988, Model Ethics Law from the Council on Governmental Ethics Laws suggests a prohibition on public official lobbying or representation similar to HB 150. In the commentary on that section, the council states that the section prohibits:

> "a public official or employee from appearing before other government entities as an advocate or attorney for another person. This limitation is imposed to remove the appearance of impropriety that may arise when an official or employee seeks to influence the actions of other government officials who may be more prone to side with the official or employee than with an adversary unknown to them."

Sec. 39.50.090. Prohibited acts. (a) A public official may not use the official position or office for the primary purpose of obtaining personal financial gain or financial gain for a spouse, child, mother, father, or business with which the official is associated or in which the official owns stock.

(b) A person may not offer or pay to a public official, and a public official may not solicit or receive money for legislative advice or assistance, or for advice or assistance given in the course of the official's public employment or relating to the public employment. However, this prohibition does not apply to a chairman or member of a state commission or board or municipal officer if the subject matter of the legislative advice or assistance is not related directly to the function of the commission, board, or municipal body served by the municipal officer; this exception from the general prohibition does not apply to one whose service on a state commission or board constitutes the person as a full-time state employee under AS 39.

(c) A public official may not represent a client before a state agency for a fee. However, this prohibition does not apply to a municipal officer, or chairman or member of a state commission or board except with regard to representation before that commission or board; this exception from the general prohibition does not apply to one whose service on the commission or board constitutes the person as a full-time state employee under this title.

(d) A municipal officer may not represent a client for a fee before the municipal body the officer serves.

(e) Violation of this section is a misdemeanor, punishable upon conviction by a fine of not less than $500 nor more than $2,000, by imprisonment up to one year, or by both.

(f) In this section, "public official" includes, in addition to the persons specified in AS 39.50.200(a), chairmen and members of all commissions and boards created by statute or administrative action as agencies of the state. (1974 Initiative Proposal No. 2, § 1; am § 12 ch 25 SLA 1975; am § 1 ch 40 SLA 1975; am §§ 2, 3 ch 211 SLA 1975)

Opinions of attorney general. — Subsection (f) of this section does not cover a municipal officer or employee who, as part of his official duties, represents his department before boards, committees, or the assembly of the same government. The rule which forbids the simultaneous holding of incompatible offices would, however, prohibit a person from being both an employee-advocate of a municipal department and a member of the municipal assembly evaluating the advocate's position. November 26, 1984 Op. Att'y Gen.

An official may be in violation of the common law of conflict of interests even though he is not in violation of this section. November 26, 1984 Op. Att'y Gen.

The commission's power to investigate violations of this section derives from AS 39.50.050, which authorizes the commission to administer AS 39.50 and promulgate regulations to implement the chapter. In carrying out this responsibility, the commission staff should immediately notify the chief prosecutor whenever commission records, files, and inquiries reveal a possible criminal violation of this section. November 26, 1984 Op. Att'y Gen.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

-576(2/77)

record of the disclosure and forward the disclosure to the respective house for inclusion in the journal by the fifth day of the session.

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"a public official or employee from appearing before other government entities as an advocate or attorney for another person. This limitation is imposed to remove the appearance of impropriety that may arise when an official or employee seeks to influence the actions of other government officials who may be more prone to side with the official or employee than with an adversary unknown to them."

Problem: Det LOBBs - 10 Prevent
Admin action -

Go before Admin Hearing -

Att. before -

- Admin process is problem
- As long has been for equal protection - chief component - tied with a FCE

-

Official Admin Leave without appeal process.

Leave that Gov. can use Power -

-

Failure

Sec. 39.50.090. Prohibited acts. (a) A public official may not use the official position or office for the primary purpose of obtaining personal financial gain or financial gain for a spouse, child, mother, father, or business with which the official is associated or in which the official owns stock.

(b) A person may not offer or pay to a public official, and a public official may not solicit or receive money for legislative advice or assistance, or for advice or assistance given in the course of the official's public employment or relating to the public employment. However, this prohibition does not apply to a chairman or member of a state commission or board or municipal officer if the subject matter of the legislative advice or assistance is not related directly to the function of the commission, board, or municipal body served by the municipal officer; this exception from the general prohibition does not apply to one whose service on a state commission or board constitutes the person as a full-time state employee under AS 39.

(c) A public official may not represent a client before a state agency for a fee. However, this prohibition does not apply to a municipal officer, or chairman or member of a state commission or board except with regard to representation before that commission or board; this exception from the general prohibition does not apply to one whose service on the commission or board constitutes the person as a full-time state employee under this title.

(d) A municipal officer may not represent a client for a fee before the municipal body the officer serves.

(e) Violation of this section is a misdemeanor, punishable upon conviction by a fine of not less than $500 nor more than $2,000, by imprisonment up to one year, or by both.

(f) In this section, "public official" includes, in addition to the persons specified in AS 39.50.200(a), chairmen and members of all commissions and boards created by statute or administrative action as agencies of the state. (1974 Initiative Proposal No. 2, § 1; am § 12 ch 25 SLA 1975; am § 1 ch 40 SLA 1975; am §§ 2, 3 ch 211 SLA 1975)

Opinions of attorney general. — Subsection (f) of this section does not cover a municipal officer or employee who, as part of his official duties, represents his department before boards, committees, or the assembly of the same government. The rule which forbids the simultaneous holding of incompatible offices would, however, prohibit a person from being both an employee-advocate of a municipal department and a member of the municipal assembly evaluating the advocate's position. November 26, 1984 Op. Att'y Gen.

An official may be in violation of the common law of conflict of interests even though he is not in violation of this section. November 26, 1984 Op. Att'y Gen.

The commission's power to investigate violations of this section derives from AS 39.50.050, which authorizes the commission to administer AS 39.50 and promulgate regulations to implement the chapter. In carrying out this responsibility, the commission staff should immediately notify the chief prosecutor whenever commission records, files, and inquiries reveal a possible criminal violation of this section. November 26, 1984 Op. Att'y Gen.

(5) "judicial officer" means a person appointed as a justice to the supreme court or as a judge to the court of appeals, superior court, district court, or magistrate court;

(6) "mother or father" includes a biological parent, an adoptive parent, and a step-parent;

(7) "municipal officer" includes a borough or city mayor, borough assemblyman, city councilman, school board member, elected utility board member, city or borough manager, members of a city or borough planning or zoning commission within a home rule or general law city or borough, or a unified municipality;

(8) "public official" means a judicial officer, a member of the legislature, the fiscal analyst of the legislative finance division, the legislative auditor of the legislative audit division, the executive director of the Legislative Affairs Agency and the directors of the divisions within the Legislative Affairs Agency, the governor, the lieutenant governor, a person hired or appointed as the head or deputy head of, or director of a division within, a department in the executive branch, and assistant to the governor, chairman or member of a state commission or board, and each appointed or elected municipal officer;

(9) "source of income" means the entity for which service is performed or which is otherwise the origin of payment; if the person whose income is being reported is employed by another, the employer is the source of income; but if the person is self-employed by means of a sole proprietorship, partnership, professional corporation, or a corporation in which the person, the person's spouse or children, or a combination of them, hold a controlling interest, the "source" is the client or customer of the proprietorship, partnership or corporation, but if the entity which is the origin of payment is not the same as the client or customer for whom the service is performed, both are considered the source;

(b) In this chapter "state commission or board" means the
(1) Agricultural Revolving Loan Fund Board (AS 03.10.050);
(2) Alaska State Council on the Arts (AS 44.27.040);
(3) Alcoholic Beverage Control Board (AS 04.06.010);
(4) State Assessment Review Board (AS 43.56.040);
(5) *[Repealed, § 1 ch 54 SLA 1981.]*
(6) Board of Education (AS 14.07.075);
(7) Alaska Public Broadcasting Commission (AS 44.21.256);
(8) Alaska Public Offices Commission (AS 15.13.020);
(9) Employment Security Advisory Council (AS 23.20.025);
(10) Alaska Commercial Fisheries Entry Commission (AS 16.43.020);
(11) Fishermen's Fund Advisory and Appeals Council (AS 23.35.010);
(12) Alaska State Building Authority (AS 18.55.020);
(13) State Commission for Human Rights (AS 18.80.010);

seeking to do the same with respect to any legislative or administrative action by means including but not limited to the provision or use of information, statistics, studies, analyses in written or oral form or format;

(7) "legislative action" means the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, defeat or rejection of any bill, resolution, amendment, motion, report, nomination, appointment or other matter by the legislature, or by a standing, interim or special committee of the legislature, or by a member or employee of the legislature acting in an official capacity; it includes, but is not limited to, the action of the governor in approving or vetoing a bill or the action of the legislature in considering, overriding or sustaining that veto and the action of the legislature in considering, confirming or rejecting an executive appointment of the governor;

(8) "lobbyist" means

(A) a person who is employed and receives payments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislative or administrative action if a substantial or regular portion of the activities for which the person receives consideration is for the purpose of influencing legislative or administrative action; or

(B) a person who represents oneself as engaging in the influencing of legislative or administrative action as a business, occupation or profession;

(9) "payment" means the disbursement, distribution, transfer, loan, advance, deposit, gift or other rendering or tendering of money, property, goods or services or anything else of value;

(10) "payment to influence legislative or administrative action" means any of the following:

(A) a direct or indirect payment to a lobbyist whether for salary, fee, compensation for expenses, or any other purpose, by a person employing, retaining or contracting for the services of the lobbyist separately or jointly with other persons;

(B) a payment in support of or assistance to a lobbyist or the lobbyist's activities, including but not limited to the direct payment of expenses incurred at the request or suggestion of the lobbyist;

(C) a payment which directly benefits a public official or a member of the immediate family of that official;

(D) a payment, including compensation, payment or reimbursement for the services, time or expenses of an employee for or in connection with direct communication with a public official;

(E) a payment for or in connection with soliciting or urging other persons to enter into direct communication with a public official;

Article 3. Disclosure: Registration and Reports.

Section
41. Registration
51. Reports
61. Reports by employers of lobbyists
71. Certification of reports
81. Reporting periods
91. Publication of reports
101. Public records
111. Preservation of records
116. Disclosure of contributions

Sec. 24.45.040. [Repealed, § 1 ch 167 SLA 1976.]

Sec. 24.45.041. Registration. (a) Before engaging in lobbying, a lobbyist shall file a registration statement on a form prescribed by the commission.

(b) The registration form prescribed by the commission shall include

(1) the lobbyist's full name and complete permanent residence and business address and telephone number, as well as any temporary residential and business address and telephone number in the state capital during a legislative session;

(2) the full name and complete address of each person by whom the lobbyist is retained or employed;

(3) whether the person from whom the lobbyist receives compensation employs the person solely as a lobbyist or whether the person is a regular employee performing other services for the employer which include but are not limited to the influencing of legislative or administrative action;

(4) the nature or form of the lobbyist's compensation for engaging in lobbying, including salary, fees or reimbursement for expenses received in consideration for, or directly in support of or in connection with, the influencing of legislative or administrative action;

(5) a general description of the subjects or matters on which the registrant expects to lobby or to engage in the influencing of legislative or administrative action;

(6) the full name and complete address of the person, if other than the registrant, who has custody of the accounts, books, papers, bills, receipts and other documents required to be maintained under this chapter.

(c) At the option of the registrant, the registration form may be accompanied by four two and one-half inch by two and one-half inch black and white photographs of the lobbyist. The photographs may not be more than five years old. These photographs shall be included in the directory published under (e) of this section.

(d) If a change occurs in any of the information contained in a registration statement filed under (a) of this section, or in any accompanying document, an appropriate amendment shall be filed with the commission within 10 days after the change.

(e) Within 45 days after the convening of each regular session of the legislature, the commission shall publish a directory of registered lobbyists, containing the information prescribed in (b) of this section for each lobbyist and the photograph, if any, furnished by a lobbyist under (c) of this section. From time to time thereafter the commission shall publish those supplements to the directory that in the commission's judgment may be necessary. The directory shall be made available to public officials and to the public at the following locations: a public place adjacent to the legislative chambers in the state capitol building, the office of the lieutenant governor, the legislative reference library of the Legislative Affairs Agency and the commission's central office.

(f) Each lobbyist shall renew the registration annually by filing a new registration statement together with a new authorization to act as a lobbyist before engaging in lobbying. The lobbyist also shall file any reports or statements the lobbyist has failed to file for a previous reporting period. The commission may not renew lobbying credentials until this provision is complied with. (§ 2 ch 167 SLA 1976)

Sec. 24.45.050. [Repealed, § 1 ch 167 SLA 1976.]

Sec. 24.45.051. Reports. Each lobbyist registered under AS 24.45.041 shall file with the commission a report concerning the lobbyist's activities during each reporting period prescribed in AS 24.45.081, so long as the lobbyist continues to engage in lobbying activities. The report shall be made on a form prescribed by the commission and filed in accordance with AS 24.45.071 and 24.45.081. The report also shall include any changes in the information required to be supplied under AS 24.45.041(b) and the following information for the reporting period, as applicable:

(1) the source of income, as defined in AS 39.50.200(a) and the monetary value of all payments, including but not limited to salary, fees, and reimbursement of expenses, received in consideration for or directly or indirectly in support of or in connection with influencing legislative or administrative action, and the full name and complete address of each person from whom amounts or things of value have been received and the total monetary value received from each person;

(2) the aggregate amount of disbursements or expenditures made or incurred during the period in support of or in connection with influencing legislative or administrative action by the lobbyist, or on behalf of the lobbyist by the lobbyist's employer in the following categories:

(A) food and beverages;

(B) living accommodations;

(C) travel;

(3) the date and nature of any gift exceeding $100 in value made to a public official and the full name and official position of that person;

(4) the name and official position of each public official, and the name of each member of the immediate family of any of these officials, with whom the lobbyist has engaged in an exchange of money, goods, services or anything of more than $100 in value and the nature and date of each of these exchanges and the monetary values exchanged;

(5) the name and address of any business entity in which the lobbyist knows or has reason to know that a public official is a proprietor, partner, director, officer or manager, or has a controlling interest, and whom the lobbyist has engaged in an exchange of money, goods, services, or anything of value and the nature and date of each exchange and the monetary value exchanged if the total value of these exchanges is $100 or more in a calendar year; and

(6) a notice of termination if the lobbyist has ceased the lobbying activity which required registration under this chapter and if this report constitutes the final report of the lobbyist's activities. (§ 2 ch 167 SLA 1976)

Sec. 24.45.060. [Repealed, § 1 ch 167 SLA 1976.]

Sec. 24.45.061. Reports by employers of lobbyists. (a) Within 15 days after employing, retaining or contracting for the employment or retention of a lobbyist, the person who employs, retains or who contracts for the services of a lobbyist shall file a statement with the commission authorizing or verifying that employment, retention or contract for lobbying services.

(b) A person who employs, retains or who contracts for the services of one or more lobbyists, whether independently or jointly with other persons, and who directly or indirectly makes payments to influence legislative or administrative action shall file a quarterly report containing

(1) the full name, complete business address and telephone number of the person making the report;

(2) information sufficient to identify the nature and interests of the person making the report;

(3) the total amount of payments made to influence legislative or administrative action during the period, and the name and address of each person to whom these payments have been made during the period by the maker of the report, together with the date and amount;

(4) the date and nature of any gift exceeding $100 in value made to any public official and the full name and official position of the recipient of each gift;

(5) a general description of the legislative or administrative action which the person making the report has attempted to influence;

(6) the name of each lobbyist employed or retained by the person making the report, together with the total amount paid to each lobbyist and the portion of that amount, if any, which was paid for specific purposes, including salary, fees, and reimbursement for expenses; and

(7) a notice of termination if the person filing a report has ceased employing or retaining a lobbyist registered under this chapter and if this report constitutes the final report of the lobbyist's activities on behalf of the maker of the report. (§ 2 ch 167 SLA 1976)

Legislative history reports. — For explanation of legislative intent, see report on CSHB 522. 1976 House Journal, p. 470.

Sec. 24.45.070. [Repealed, § 1 ch 167 SLA 1976.]

Sec. 24.45.071. Certification of reports. Every statement or report required to be filed under this chapter shall identify the full name of the person preparing it, the person's complete address and telephone number, and shall be certified as complete and correct, both by the person preparing it and by the person on whose behalf it is filed. (§ 2 ch 167 SLA 1976)

Sec. 24.45.080. [Repealed, § 1 ch 167 SLA 1976.]

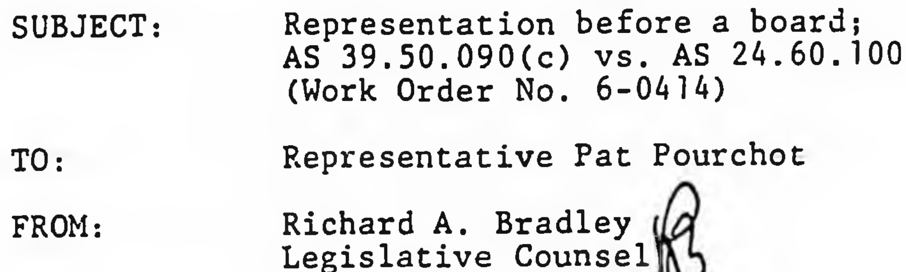
Sec. 24.45.081. Reporting periods. Reports required under this chapter shall be filed during the calendar month following each calendar month during any part of which the legislature was in session and during the month following each calendar quarter when the legislature was not in session. However, if a lobbyist registered under this chapter has declared that the lobbyist seeks only to influence administrative action and not legislative action the lobbyist need only file a report required under this chapter for each calendar quarter. The period covered shall be the calendar month or the calendar quarter, as applicable, and shall in any event cover the period from the date of the last report filed under this chapter to the date of the end of the calendar month or quarter, as applicable, for which the report is being filed. The period covered shall not include any months covered in previous reports filed by the same person. When total amounts are required to be reported, totals shall be stated both for the period covered by the statement and for the entire calendar year to date. (§ 2 ch 167 SLA 1976)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V, STATE CAPITOL
JUNEAU, ALASKA

MEMORANDUM December 22, 1988



SUBJECT: Representation before a board; AS 39.50.090(c) vs. AS 24.60.100 (Work Order No. 6-0414)

TO: Representative Pat Pourchot

FROM: Richard A. Bradley
Legislative Counsel

Theda Pittman has asked that we comment on the conflict between AS 39.50.090(c) and AS 24.60.100; a person covered by AS 24.60 receives instructions under AS 24.60.100 that directly conflict with AS 39.50.090(c).

The relevant portion of AS 39.50.090(c) provides:

> (c) A public official may not represent a client before a state agency for a fee. * * *

The term "public official" is defined at AS 39.50.200(a)(8). It provides, in part:

> (8) "public official" means * * * a member of the legislature * * *

Theda Pittman believes that AS 24.60.100 is inconsistent with AS 39.50.090(c); the former provision provides:

> Sec. 24.60.100. REPRESENTATION. A person to whom this chapter applies who represents another person for compensation before an agency, board, or commission of the state shall disclose the name of the person represented, the subject matter of the representation, and the body before which the representation is to take place in the journal of the appropriate body or if the legislature is not in session to the committee. The committee shall maintain a public record of the disclo-

sure and forward the disclosure to the respective house for inclusion in the journal by the fifth day of the session.

In our view, AS 24.60.100 takes precedence over AS 39.50.090(c) to the extent of the conflict; while AS 39.50.090(c) applies to public officials, AS 24.60.100 only applies to legislators and legislative employees. This occurs because we believe that AS 24.60.100 was carefully considered by the legislature and constitutes a subsequent inconsistent amendment of substantive law and thus a repeal by implication of the earlier law to the extent of the conflict. While repeals by implication are not favored, the legislative history is clear.

The early versions of SB 257 were consistent with AS 39.50.090(c); as introduced, SB 257 provided:

> Sec. 24.60.100. REPRESENTATION BY LEGISLATORS. (a) Except as provided in this section, a member of the legislature or a person employed by an agency of the legislature established under AS 24.20 may not represent another person for compensation before an agency, board, or commission of the state.
>
> (b) A member of the legislature may represent a client in
>
> > (1) an action before a court of the state; or
> >
> > (2) a matter which was pending at the time a person to whom this chapter applies assumed office or in employed.
>
> (c) A legislator cannot avoid a conflict of interest under this section by waiving compensation for representing another person under circumstances where compensation would ordinarily be expected.

CSSB 257(SA) varied the provisions:

> Sec. 24.60.100. REPRESENTATION BY LEGISLATORS. Except as provided in this section, a member of the legislature or a person employed by an agency of the legislature established under AS 24.20 may not represent another person for compensation before an agency, board,

> or commission of the state unless acting in an official capacity.
>
> (b) A qualified member of the legislature may represent a client in a criminal action before a court of the state or in a civil action where the state is not a party.
>
> (c) A legislator cannot avoid a conflict of interest under this section by waiving compensation for representing another person under circumstances where compensation would normally be expected.
>
> (d) Disqualification under this section of an attorney who is a member of the legislature does not disqualify a law firm in which the legislator is a member.
>
> (e) A person to whom this chapter applies may represent another person for compensation if the ethics commission determines that the representative will not involve improper influences.

The next version (CSSB 257(Jud)) was simpler:

> Sec. 24.60.100. REPRESENTATION. A person to whom this chapter applies who represents another person for compensation before an agency, board, or commission of the state shall disclose to the committee the name of the person represented, the subject matter of the representation, and the body before which the representation is to take place in the journal of the appropriate body . . . .

The next version in our files (CSSB 257(Jud)am) approximates the section that was eventually adopted:

> Sec. 24.60.100. REPRESENTATION. A person to whom this chapter applies who represents another person for compensation before an agency, board, or commission of the state shall disclose the name of the person represented, the subject matter of the representation, and the body before which the representation is to take place in a journal of the appropriate body or if the legislature is not in session to the committee. The committee shall maintain a public record of the disclosure and forward the disclosure to the respective house for in-

clusion in the journal for the first day of the session.

In commenting on February [illegible], 1984 to the conference committee on the conference committee version of SB 257 as well as the Senate and House versions, Billy Berrier noted the conflict:

> Sec. 24.60.100 [of the conference committee version] requires that a person who represents another person before an agency of the state for compensation shall disclose the representation in the journal if the legislature is in session and, if not, to the committee. The committee must maintain a record of the disclosures and send them to the house involved for inclusion in the journal for the first day of the session.
>
> The Senate version is identical. The House version prohibits representation before an agency of the state for compensation except in court actions and actions which were pending at the time the person was elected or employed.

It was, of course, the Senate version that was adopted.

What seems uncontrovertably clear in the evolution of AS 24.60.100 is that, at least within the context of SB 257, the legislature considered the question carefully and the provision finally adopted is clear that it permits a legislator to represent a client for compensation before an agency of the state.

I am aware from earlier work on this conflict that Theda Pittman, when she was executive director of the Public Offices Commission, has stated that she or staff of the commission discussed the conflict between AS 24.60.100 and AS 39.50.090(c) with the drafters of SB 257. I am certain that her statement is accurate but I cannot explain the failure of SB 257, as enacted, to resolve the conflict.

But it is clear that AS 24.60.100 is <u>in pari materia</u> to AS 39.50.090(c). Each law deals with the concern of the legislature with "conflict of interest" as that concerns affects legislators in a particular area: the representation by attorney-legislators of clients who have cases on matters involving executive agencies of the state.

In my view, the subsequent enactment of AS 24.5[illegible].[illegible]0 constitutes a pro tanto repeal by implication of the provisions of AS 39.50.090(c) as the latter section applies to legislators.

The matter could, of course, be addressed by legislation.

If I may be of further assistance, please advise.

RAB:gc
WRG5/033

230 Restraints on Public Official and Employee Representation of Clients Before Government Entities

230.01 Appearance as an Advocate

(1) A public official or employee shall not appear as the advocate of another person before a state or local entity.

(2) A public official or employee may appear in an advocacy role before a state or local entity on behalf of:

(A) the public official or employee in the public official or employee's personal capacity;

(B) a member of the public official's immediate family; or

(C) the government entity that is the public official or employee's principal employer.

(3) This section does not limit a public official or employee from appearing before a state or local entity on a purely ministerial matter which does not require discretion on the part of the state or local entity.

230.02 Appearance as an Attorney

(1) A public official or employee shall not appear as an attorney for another person before a state or local entity.

(2) A public official or employee may appear in an advocacy role before a state or local entity on behalf of:

(A) the public official or employee in the public official or employee's personal capacity;

(B) a member of the public official's immediate family; or

(C) the government entity that is the public official or employee's principal employer.

(3) This section does not limit a public official or employee from appearing as an attorney before a state or local entity on a purely ministerial matter which does not require discretion on the part of the state or local entity.

COMMENT:

The preceding two sections prohibit a public official or employee from appearing before other government entities as an advocate or attorney for another person. This limitation is imposed to remove the appearance of impropriety that may arise when an official or employee seeks to influence the actions of other government officials who may be more prone to side with the official or employee than with an adversary unknown to them.

Excerpt, Model Ethics Law, November 1988, Council on Governmental Ethics Laws

345, 348; P.A. 83-249, S.6, 14; 83-270, S.3; 83-586, S.3, 14; P.A. 84-21, S.1,5; 84-335, S.2, 4; 84-546, S.141, 173; P.A. 87-524, S.5, 7, amending subsection (b) effective July 7, 1987.)

Sec. 1-84. (Formerly Sec. 1-66). Prohibited activities. (a) No public official or state employee shall, while serving as such, have any financial interest in, or engage in, any business, employment, transaction or professional activity, which is in substantial conflict with the proper discharge of his duties or employment in the public interest and of his responsibilities as prescribed in the laws of this state, as defined in section 1-85.

(b) No public official or state employee shall accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.

(c) No public official or state employee shall wilfully and knowingly disclose, for financial gain, to any other person, confidential information acquired by him in the course of and by reason of his official duties or employment and no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated.

(d) No public official or his employee or state employee or his employee shall agree to accept, or be a member or employee of a partnership, association, or a professional corporation which partnership, association or professional corporation agrees to accept, any employment, fee or other thing of value, or portion thereof, for appearing, agreeing to appear, or taking any other action on behalf of another person before the banking department, the claims commissioner, the commission on hospitals and health care, the insurance department, the department of liquor control, the department of motor vehicles, the state insurance purchasing board, the department of environmental protection, the department of public utility control, the connecticut siting council, the division of special revenue within the department of revenue services, the gaming policy board within the department of revenue services or the Connecticut real estate commission; provided this shall not prohibit any such person from making

inquiry for information on behalf of another before any of said commissions or commissioners if no fee or reward is given or promised in consequence thereof. For the purpose of this section, partnerships, associations or professional corporations refer only to such partnerships, associations or professional corporations which have been formed to carry on the business or profession directly relating to the employment, appearing, agreeing to appear or taking of action provided for in this subsection. Nothing in this subsection shall prohibit any employment, appearing, agreeing to appear or taking action before any municipal board, commission or council. Nothing in this subsection shall be construed as applying (1) to the actions of any TEACHING OR RESEARCH professional employee of a public institution of higher education if such actions are not in violation of any other provision of this chapter, (2) TO THE ACTIONS OF ANY OTHER PROFESSIONAL EMPLOYEE OF A PUBLIC INSTITUTION OF HIGHER EDUCATION IF SUCH ACTIONS ARE NOT COMPENSATED AND ARE NOT IN VIOLATION OF ANY OTHER PROVISION OF THIS CHAPTER OR (3) to any member of a board or commission who receives no compensation other than per diem payments or reimbursement for actual or necessary expenses, or both, incurred in the performance of his duties.

(e) No legislative commissioner or his partners, employees or associates shall represent any person subject to the provisions of part II concerning the promotion of or opposition to legislation before the general assembly, or accept any employment which includes an agreement or understanding to influence, or which is inconsistent with, the performance of his official duties.

(f) No person shall offer or give to a public official or state employee or candidate for public office or his spouse, his parent, brother, sister or child or spouse of such child or a business with which he is associated, anything of value, including but not limited to, a gift, loan, political contribution, reward or promise of future employment based on any understanding that the vote, official action or judgment of the public official, state employee or candidate for public office would be or had been influenced thereby.

(g) No public official or state employee or candidate for public office shall solicit or accept anything of value, including but not limited to, a gift, loan, political contribution, reward or promise of future employment based on any understanding that the vote, official action or judgment of the public official or state employee or candidate for public office would be or had been influenced thereby.

(h) Nothing in subsection (f) or (g) of this section shall be construed (1) TO APPLY TO ANY PROMISE MADE IN VIOLATION OF

MASSACHUSETTS

involved is one:

1. in which he or she participated at any time as a state employee or special state employee;
2. which is or has been (within the preceding year) the subject of the employee's official responsibility; or
3. which is pending in the state agency in which the employee is serving -- if the employee serves more than 60 days in any 365 day period. To serve more than 60 days means to perform work on more than 60 days; work on any part of a day will be considered work for one full day. The employee is responsible for keeping accurate records in this regard.

Example: A lawyer consults with the Department of Public Health (DPH) for 45 days spread out over a year; she is a special employee. Her work relates exclusively to the DPH lead-paint program. The lawyer could also represent a community health center in a funding application before DPH because she does not have official responsibility for or participate in DPH funding decisions and she worked less than 60 days for DPH during the previous year.

c. Application to Legislators

Like "special" state employees, Legislators have more leeway under the restrictions of Section 4. Since members of the state Legislature are expected to speak and act on behalf of their constituents, a member of the General Court may act as the unpaid representative of a constituent before any state agency.

In addition, a Legislator may receive compensation from, or act as the paid agent or attorney for, someone other than the commonwealth or a state agency if the particular matter involved is:

1. ministerial in nature (ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents); or

2. an appearance before a court of the commonwealth; or

3. an appearance in a quasi-judicial proceeding. A proceeding is considered quasi-judicial if the action of the state agency is adjudicatory in nature, is appealable to the courts and both sides are entitled to legal representation (Note: The Legislator's opposing counsel may neither be the attorney general

NEW JERSEY

P.L. 1987, c. 432, s. 3, eff. Feb. 14, 1988

52:13D-16. **Representation, appearance or negotiation on proceeding pending before particular office, bureau, etc., or state agency**

ALL ROMAN

5. a. No special State officer or employee, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before the particular office, bureau, board, council, commission, authority, agency, fund or system in which such special State officer or employee holds office or employment.

b. No State officer or employee or member of the Legislature, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before any State agency; provided, however, this subsection shall not be deemed to prohibit a member of the Legislature from making an inquiry for information on behalf of a constituent, if no fee, reward, or other thing of value is promised to, given to or accepted by the member of the Legislature, whether directly or indirectly nor shall anything contained herein be deemed to prohibit any such partnrship, firm or corporation from appearing on its own behalf.

c. Nothing contained in this section shall be deemed to prohibit any legislator, or any State officer or employee or special State officer or employee from representing, appearing for or negotiating on behalf of, or agreeing to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any proceeding:

(1) Pending before any court of record of this State,

(2) In regard to a claim for compensation arising under chapter 15 of Title 34 of the Revised Statutes (Workers' Compensation),

(3) In connection with the determination or review of transfer inheritance or estate taxes,

(4) In connection with the filing of corporate or other documents in the office of the Secretary of State,

(5) Before the Division on Civil Rights *or any successor thereof,*

(6) Before the New Jersey State Board of Mediation or *any successor thereof,*

(7) Before the New Jersey Public Employment Relations Commission *or any successor thereof,*

(8) Before the Unsatisfied Claim and Judgment Fund Board *or any successor thereof* solely for the purpose of filing a notice of intention pursuant to to P. L. 1952, c. 174, § 5 (C. 39:6-65), or

(9) Before any State agency on behalf of a county, municipality or school district, or any authority, agency or commission of any thereof except where the State is an adverse party in the proceeding and provided he is not holding any office or employment in the State agency in which any such proceeding is pending.

52:13D-17. Representation on matter in which directly involved during state service

P.L. 1987, c. 432, s. 4, eff. Feb. 14, 1988

6. No State officer or employee or special State officer or employee, subsequent to the termination of his office or employment in any State agency, shall represent, appear for →, negotiate on behalf of, or *provide information* → *not generally available to members of the public or services to,* or agree to represent, appear for, → negotiate on behalf of, *or provide information* → *not generally available to members of the public or services to,* whether by himself or through any partnership, firm or corporation in which he has an interest or through any partner, officer or employee thereof, any person or party other than the State in connection with any cause, proceeding, application or other matter with respect to which such State officer or employee or special State officer or employee shall have made any investigation, rendered, any ruling, given any opinion, or been otherwise substantially and directly involved at any time during the course of his office or employment. Any person who willfully violates the provisions of this section is a disorderly person, and shall be subject to a fine not to exceed $500.00 or imprisonment not to exceed six months, or both.

ALL ROMAN

. mment. The measure prohibits legislators and ,r law partners and party chairs from representing ,ents before state agencies. It prohibits the New York City party chairs from representing clients before city agencies. The new law's postemployment provision restricts for 2 years an official's appearances before an agency with which the official was formerly associated. It prohibits a legislative employee from lobbying the Legislature during the same session for which the person had worked for the Legislature. The new law requires the City of New York to adopt disclosure reports and financial reporting for its officials. The law also establishes a temporary state committee on local government ethics to review standards of conduct for local governments.

For additional information consult Evan Davis, Counsel to the Governor of New York (212/587-2100 or 518/474-8343).

2. Legislation proposed: Early in 1987 New York's Legislature had passed a law that included these provisions:

a. Creation of ethics code: New York's Legislature passed a law that would have these results:

(1) Prohibited state officials and legislators from appearing before most state officials. Those who are attorneys could appear before some "quasi-judicial" proceedings, but would be required to disclose their appearances. Law partners of legislators, state officials, and legislative employees were required to disclose appearances before state agencies.

(2) Require state officials and legislators who earn more than $30,000 to file lengthy financial disclosure statements detailing their own investments, as well as those held by their spouses and dependent children. Candidates for state office would be required to also file the statements.

(3) Establish two ethics commissions, one to oversee state employees and a second to oversee the legislature.

(4) Make all disclosure information and lists of appearances before state agencies available for public scrutiny.

(5) Bar legislators and state officials who are attorneys from sharing the profits earned by legal partners who represent cases before state agencies.

(6) Prohibit legislative employees who leave government service from lobbying the legislature until the next election.

Legis regula No adopt No politic The relatin The Execu state, devel C. So Octob in tow inclu Bar to inf in the if the tinge ding Bar with Bar ing p judg Pro decid state with Ne ed th thing inter B. C. Pete wou Ethic Th five the cil, the to th vice the of t

Items

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM March 7, 1989

SUBJECT: Representation by legislators and certain employees (HB 150)

TO: Representative Peter Goll

FROM: Tamara Brandt Cook TBC
Director
Division of Legal Services

You have asked whether a system could be established to permit legislators and employees covered by AS 24.60 to represent clients before an agency in adjudications or quasi-judicial hearings that avoids having the matter considered by the commissioner. It is my understanding that the proposal would involve having the matter heard by a court, a person appointed by the court, or by another independent (non-agency) person.

Under AS 44.62.450 and AS 44.62.500 of the Administrative Procedure Act, an issue that is the subject of an adjudicatory hearing is decided by the agency. I have been informed that, in some cases, the role of the agency in making an initial determination is filled by the commissioner. Apparently, there is some concern about having an attorney from the legislative branch represent a client before a commissioner.

The problem with having this role filled by the court or a person appointed by the court is that the agency role (and expertise) in making initial determinations is circumvented as to some, but not all, matters depending upon who is representing the person involved in the adjudication. In addition, AS 44.62.560 provides for judicial review of an agency decision on the record. If the court determines the matter in the first place, that independent judicial review process is distorted. If someone else outside the agency makes the initial determination, the agency does not bring its expertise to the matter and it seems hard to justify the requirement of judicial review on the record rather than de

novo. In addition, I believe that providing for two different administrative procedures, one for people represented by attorneys who are members of the legislative branch and another for everyone else, raises due process questions.

If it is the desire of the legislature to permit attorneys who are members of the legislative branch covered by AS 24.-60 to represent clients before administrative agencies in adjudicatory matters, but not to permit them to represent clients before commissioners, I believe the Administrative Procedure Act should be amended to prevent commissioners from deciding any adjudications. Instead these matters could be decided by other agency members. In any case, people should be subject to the same procedures in administrative hearings regardless of who represents them.

TBC:kb
wkk2/110

Introduced: 2/3/89
Referred: State Affairs and
Judiciary

6-0634A

1 IN THE HOUSE BY GOLL AND KOPONEN

2 HOUSE BILL NO. 150

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to representation of others by
7 legislators and certain legislative employees before
8 state agencies."

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

10 * Section 1. AS 24.60.100 is amended to read:

11 Sec. 24.60.100. REPRESENTATION. A person to whom this chapter
12 applies may not represent [WHO REPRESENTS] another person for compen-
13 sation before an agency, board, or commission of the state. However,
14 a person to whom this chapter applies who is an attorney may represent
15 a client before a court [SHALL DISCLOSE THE NAME OF THE PERSON REPRE-
16 SENTED, THE SUBJECT MATTER OF THE REPRESENTATION, AND THE BODY BEFORE
17 WHICH THE REPRESENTATION IS TO TAKE PLACE IN THE JOURNAL OF THE APPRO-
18 PRIATE BODY OR IF THE LEGISLATURE IS NOT IN SESSION TO THE COMMITTEE.
19 THE COMMITTEE SHALL MAINTAIN A PUBLIC RECORD OF THE DISCLOSURE AND
20 FORWARD THE DISCLOSURE TO THE RESPECTIVE HOUSE FOR INCLUSION IN THE
21 JOURNAL BY THE FIFTH DAY OF THE SESSION].

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197

Dennis B.

Official Business

Alaska State Legislature

Select Committee on Legislative Ethics

P.O. Box V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

DATE: March 10, 1989

TO: All Persons Covered by Legislative Ethics Code

FROM: Senator Pat Pourchot, Chair Pat
Select Committee on Legislative Ethics

SUBJECT: Advisory Opinions

On March 8, 1989 the Select Committee on Legislative Ethics adopted two advisory opinions that will likely have wide application for legislators and other persons covered by the legislative ethics code.

Opinion 89-1 clarifies that persons covered by the code must disclose, under AS 24.60.080(d), gifts of travel and hospitality of $100 or more for the purpose of obtaining information on matters of legislative concern, that are accepted from corporations, associations, local governments, etc., in addition to individuals.

Opinion 89-2 deals with the requirement in AS 24.60.100 that a person covered by the code who represents another person for compensation before an agency, board or commission of the state must disclose that representation. The opinion concludes that the requirement does not require disclosure of representations of partners or attorneys who work in the same law firm as a person covered by the code.

Copies of these two opinions are attached.

PP:jbg:jl

Attachments

MARCH 8, 1989

Advisory Opinion 89 - 1

RE: Disclosure of travel and hospitality gifts from entities other than individuals

You have requested an advisory opinion, under AS 24.60.160, as to whether certain gifts of travel and hospitality in excess of $100.00 that you have received must be disclosed under AS 24.60.080(d). Specifically you have asked whether that statute requires disclosure of two trips funded by an organization made up of state legislators, including Alaska legislators (and to which Alaska pays a membership fee), and of another trip funded in part by an agency of the federal government (and in part by legislative funds). We have concluded that you must disclose these trips.

The first sentence of AS 24.60.080(d) states that a person covered by the legislative ethics code "who accepts a gift of travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern shall disclose the gift if it has a value of $100 or more." The next sentence requires the disclosure to include the "name and occupation of the person making the gift." You have suggested that this second sentence limits the duty to disclose to gifts given by individuals. We do not read the statute this way.

AS 01.10.060(8) provides, "In the laws of the state, unless the context otherwise requires . . . 'person' includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." We see no reason why "person" in the second sentence of AS 24.60.080(d) should not be interpreted accordingly. Perhaps it can be argued that the use of "occupation" along with "person" limits the term to individuals. But in our opinion a better reading of the second sentence is to treat "occupation" when applied to corporations, companies, etc., as requiring disclosure of the nature or purpose of the entity.

Moreover, a narrow reading of "person" would greatly weaken AS 24.60.080(d). Gifts of travel and hospitality covered by that subsection are frequently given by companies or organizations; indeed, probably only a small percentage of such gifts come from individuals. We do not think that the subsection was meant to cover only this small percentage.

The state legislator organization clearly falls under the definition of "person" incorporated into subsection 080(d) by AS 01.10.060(8). The federal agency does not. Nevertheless, we believe that disclosure of the trip funded by that agency is still necessary.

First, we note that the initial sentence of AS 24.60.080(d) stands alone, and contains no limit on the duty to disclose based on the nature of the donor. The second sentence, the one with "person making the gift," should in our opinion be read as specifying what is required in the disclosure statement, and not as any limit on the duty. Thus the duty still exists, even though the second sentence does not specifically apply to a governmental entity.

More important, we believe that not requiring disclosure of travel and hospitality gifts from governmental entities would be undesirable from a policy standpoint. Certainly many such entities, such as municipalities and school districts, are as interested in influencing legislative action as private companies, and should have their gifts of travel and hospitality on matters of legislative concern subject to the same public scrutiny. And since AS 24.60.080 does not ban such gifts, but only requires their disclosure, we are inclined to interpret it to require maximum disclosure.

Adopted by the Select Committee on Legislative Ethics on March 8, 1989. Members present and concurring in the opinion were: Sen. Pat Pourchot, Chairman; Sen. Jack Coghill; Sen. Dick Eliason; Rep. Mike Davis; Rep. C.E. Swackhammer; Margie MacNeille; Irene Peyton; and Judge Thomas Stewart.

MARCH 8, 1989

Advisory Opinion 89 - 2

RE: Reporting representation by other attorneys in law firm

You have requested an advisory opinion, under AS 24.60.160, as to the scope of AS 24.60.100, requiring disclosure of representation for compensation by persons covered by the ethics code. Specifically you have asked whether you, as a member of a law firm with you and one other attorney as partners and one salaried associate, must disclose representations by your partner and by the associate. It is our opinion that you do not need to disclose these representations, provided that you are in no way involved in handling the cases.

We would first note that disclosure is not required if the representation is before a court. AS 24.60.100 requires disclosure only of representations "before an agency, board or commission of the state." Based on this plain language, we cannot construe the statute as applying to judicial bodies. Moreover, our construction is supported by the legislative history of ch. 36, SLA 1984, the chapter enacting the ethics code.

We also conclude, based on the plain language of AS 24.60.100, that disclosure of representation before agencies, boards and commissions by your partner and associate is not mandated. The statute speaks to "[a] person to whom this chapter applies," i.e., a legislator or legislative employee. We cannot read this language to expand it to other individuals associated with you in the practice of law but not associated with you in your legislative duties.

Moreover, practical considerations dictate this result. Some law firms have forty or fifty attorneys in the state, sometimes in several different cities, and any one attorney may have no idea what agencies, boards or commissions all of his or her colleagues are appearing before. It would not be reasonable to expect the attorney covered by the code to try to keep track of all of these other attorneys' activities.

We stress, however, in keeping to our commitment to maximize reasonable disclosure under AS 24.60, that if you have any role whatsoever in the representation (other than sharing in the profits derived therefrom), it must be disclosed.

Adopted by the Select Committee on Legislative Ethics on March 8, 1989. Members present and concurring in the opinion were: Sen. Pat Pourchot, Chairman; Sen. Jack Coghill; Sen. Dick Eliason; Rep. Mike Davis; Rep. C.E. Swackhammer; Margie MacNeille; Irene Peyton; and Judge Thomas Stewart.

HB
157

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF
HB 157

Appropriation: Arctic Winter Games

Received February 8, 1989
by Reps. Gruenberg and M. Davis

Heard March 8, 1989

Committee Substitute adopted March 8, 1989

Passed Out of Committee March 8, 1989
2 Do Pass
2 No Recommendation

TABLE OF CONTENTS

HB 157: Appropriation: Arctic Winter Games

Item 1: HB 157 by Reps. Gruenberg and M. Davis

CS HB 157 (SA)

Item 2: Memorandum from Rep. Gruenberg re: HB 157
February 13, 1989

Item 3: Memorandum from Rep. Gruenberg
re: Proposed CS HB 157
February 25, 1989

Item 4: Background Information for 1990 Arctic Winter Games

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 8, 1989 FURTHER REFERRALS: FINANCE

Date of Committee Action: ________

The STATE AFFAIRS Committee considered: HB 157

HOUSE BILL NO. 157 [APPROP: ARCTIC WINTER GAMES]
"An Act making a special appropriation to the Office of the Governor for the Arctic Winter Games; and providing for an effective date."

RECOMMENDS:

[X] replacing with CSHB157(SA) [ ] the same title / [X] a new title
[ ] the attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the ________ Committee

ADOPTS: ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):
[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS:
[ ] fiscal note(s) published: ________
[ ] zero fiscal notes(s) published: ________

SIGNING DO PASS:

[signature]
[signature]

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

[signature] (NO REC)
[signature] (NO REC)

[signature]
Chairman's signature

Item 2

Alaska State Legislature

House of Representatives
House Judiciary Committee

P. O Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

February 13, 1989

MEMORANDUM

TO: Rep. Red Boucher

FROM: Rep. Max Gruenberg

RE: House Bill 157

HB 157 authorizes a special appropriation of $225,000 in support of the Arctic Winter Games.

The Games are an annual event, bringing together sports people from Alaska and the Yukon and Northwest Territories for sporting competition and cultural and social interaction. They have been held annually since 1969 and are an important contribution to cooperation and understanding among the widely separated inhabitants of the North Country.

The State of Alaska has contributed funding for the Games since their inception. This bill continues that commitment. In order to ensure that planning for the Games can proceed, I am requesting the you schedule the bill for a hearing at an early date.

Please contact Andy Hemenway of my staff if we can be of any assistance. Thank you very much for your consideration.

Item 3

Alaska State Legislature

House of Representatives

House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

February 25, 1989

MEMORANDUM

TO: Representative Red Boucher

FROM: Representative Max Gruenberg

RE: Proposed CS for HB 157 (STA)

I am sending to you with this memorandum a proposed committee substitute for HB 157, which makes a special appropriation for the 1990 Arctic Winter Games.

The proposed committee substitute was drafted at the request of the organizers of the Games. It makes three changes in the bill introduced:

1. The total appropriation of $225,000 is specifically targeted for two separate grants: one to cover the costs of participation in the Games ($200,000), and the other to cover the annual dues of the Arctic Winter Games Corporation of Alaska to the international sanctioning body (the Arctic Winter Games Corporation -- a Canadian corporation).

2. The appropriation is made to the Department of Community and Regional Affairs, rather than to the Office of the Governor. In prior years, The Department of Community and Regional Affairs has been the granting agency.

3. A new Section 2 has been added to return the unspent portion of the appropriation to the general fund.

With the changes incorporated in this proposed committee substitute, the bill is ready for hearing. Please have the bill placed on your calendar as soon as a time spot is available.

Thank you for your cooperation.

WORK DRAFT WORK DRAFT WORK DRAFT

6-0756E
Cramer
2/23/89

Original sponsors: Gruenberg, M. Davis, and Koponen

Funding Information
General Fund $225,000
Other Funds -0-
$225,000

Rep. Gruenberg

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 157 ( )

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act making a special appropriation for grants
7 related to the 1990 Arctic Winter Games; and provid-
8 ing for an effective date."

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

10 * Section 1. The sum of $225,000 is appropriated from the general fund
11 to the Department of Community and Regional Affairs for payment as a grant
12 under AS 37.05.316 in the amount of $200,000 to the Arctic Winter Games
13 Corporation of Alaska for expenses of Team Alaska participation in the 1990
14 Arctic Winter Games in Yellowknife, Northwest Territories, Canada, and a
15 grant under AS 37.05.316 in the amount of $25,000 to the Arctic Winter
16 Games Corporation of Alaska for payment of annual dues.

17 * Sec. 2. The unexpended and unobligated portion of the appropriation
18 made by this Act lapses into the general fund June 30, 1990.

19 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

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21 AK corp

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Item 4

Foot the Tryout Bill too -

TEAM ALASKA BUDGET
1990 ARCTIC WINTER GAMES
PAGE 1

TOTAL SPORTS	NUMBER OF ATHLETES	ATHLETE'S EQUIP. COST	TEAM OPERATIONS BUDGET	INTERNATIONAL DUES
17	320	$92,313	$294,282	$25,000

TRANSPORTATION:		
Charter to Yellowknife	$219,000	
Instate	$ 11,532	
Overnite and Meals	$ 1,650	
		$232,182
TEAM UNIFORM AND ADMINISTRATIVE COSTS		
Athlete Team clothing	$48,100	
Pins & Flags	$ 5,500	
Insurance For Team	$ 2,500	
Administration	$ 6,000	
		$ 62,100
TOTAL TRANSPORTATION, UNIFORM & ADMINISTRATION		$294,282
REQUESTED STATE SHARE OF BUDGET Two-thirds of $294,282		$196,188
ANNUAL INTERNATIONAL DUES		$25,000
TOTAL OF STATE FUNDS REQUESTED		$221,188

ATHLETES SHARE OF BUDGET		
One-third of $294,282	$98,094	
Personal uniform & equipment cost	$92,313	
TOTAL PAID BY ATHLETES		$190,407

TEAM ALASKA BUDGET
1990 ARCTIC WINTER GAMES
PAGE 2

Explanation of request.

TRANSPORTATION:*

Charter to Yellowknife - cost of the aircraft to fly the team from Anchorage and Fairbanks to Yellowknife, NWT. and return.

Instate - air fare for athletes that must be brought to Anchorage or Fairbanks from other areas in the state to meet the charter aircraft.

Overnight and Meals - some team members connecting flights require them to overnight so they can catch the charter flights.

TEAM UNIFORM AND
ADMINISTRATIVE COSTS:

Athlete team clothing - the team uniform that will be worn by the team members, mission staff, VIP's and cultural participants. The team is required to wear this uniform for opening and closing ceremonies, this is also their main outer wear during the games.

Pins & Flags - Team, Coaches and Mission Staff pins, Alaska flags in two sizes (small for the team and large for each venue location) and team hats.

Insurance for Team - Medical insurance will be purchased for the team for the period of the games.

Administration - Freight and postage, telephone, office supplies, 60 day rental for warehousing clothing, facility rental for sports tryouts, sanction fees, etc.

ANNUAL DUES

Dues in the amount of $25.000 are paid by each governmental entity belonging to the Arctic Winter Games Corporation (International).

* Should the Soviets accept the invitation for some of their people from Siberia to participate in the 1990 games, we may be asked to contribute to the costs of transporting them to and from Yellowknife from Anchorage.

BACKGROUND INFORMATION FOR 1990 TEAM ALASKA BUDGET

TRANSPORTATION:

I requested and received "ballpark" prices from the following:

1. Markair, using 737's with 109 seats each
   $26,500 per trip from Fairbanks
   $27,662 per trip from Anchorage
   (each weekend would see 4 round trips)

1 round trip from Fairbanks	$26,500
3 round trips from Anchorage	$82,986
total per weekend	$109,486
2 weekends equals	$218,972

   This gives us 436 seats total with a per seat cost of $502.00

2. Alaska Airlines using:
   1 737 with 111 seats
   2 727's with 136 seats each
   Total seats 383
   Price quoted $226,000 with a per seat cost of $590.00

3. Canadian Air Int'l. using 737's
   3 aircraft with 111 seats each total 333 seats, (which is not a sufficient number of seats), using Whitehorse equipment $180,138 (Canadian) or using Vancouver equip. $198,816 (Canadian) which gives a price per seat of $540.00.

If the price per seat stays the same with the addition of 1 more 737 flight and if the Canadian / US dollar exchange rate stayed the same they would be low but because you can't count on what the dollar will be worth 10 to 12 months down the road and also trying to use a local carrier, I have based my request on the Markair prices. I also feel that because Markair does the majority of its business in the state their equipment is located here and not where it would have to be ferried to Fairbanks and Anchorage, thus the lower price from them.

INSTATE TRANSPORTATION

I used the figures from the 88 Games (Plane tickets prices from 20 different locations in Alaska)

OVERNIGHT AND MEALS

I figured 33 athletes and allowed $ 50.0[illegible] h. (the Barrett Inn in Anchorage always gives me a go[illegible] al for lodging and food)

TEAM UNIFORM

For the 88 Games we spent $120.00 per participant.

POINT OF INTEREST:

Northwest Territories spent $ 165.00 per participant
Yukon Territory spent $175.00 per participant
Northern Alberta spent $ 230.00 per participant

I don't think I did too bad. I've set a price of $130.00 per participant.

Team members, staff, VIP and Cultural all get clothing. The extra clothing after everyone is outfitted is sold during the games to help off set unexpected expenses that come up.

Pins and Flags:

We order 2000 team pins (4 pins for each athlete), 200 Mission Staff and 200 Coaches pins. We use a US source and for a 1" square pin the price runs approx.. $.75 each. I've had quotes from Alaskan sources but they run $1.75 to $ 2.00 per pin.

Alaska State flags, we get the small hand flags for opening ceremony (330) at approx .75 to $1.00 each and then also furnish the large State flags for each sport venue (17 locations at approx $35.00 each)

Hats for the team, I order 350 and they run approx. $4.50 for the corduroy with the logo embroidered on them.

INSURANCE

I think everyone knows how high insurance is. I've always been able to use an Alaskan broker.

ADMINISTRATION

This covers a lot of items. long distance phone calls, freight for shipping team clothing to the teams after selection, postage for the mass mailings to the team and others. Rental of warehousing for a couple of months to hold the team clothing from the time of arrival until it can be distributed. Facility rental for tryouts such as gyms, ice time at arenas, ect. Misc. office and computer supplies for the Mission office as well as work before hand. The Chef de Mission's travel to the mandatory chefs meetings with the Host Society. (approx. $2,000.00).

If you are wondering what the Mission Staff is: that is the administrative staff that takes care of the team before and during the games. I have a team Doctor and 3 others. They

work the office from 6AM until 2AM (20 hours) and pull 6 to 7 hour shifts and when not on duty in the office they lend support in the field to the sports that have been assigned to them. My sta[illegible] including myself is all voluntary.

The athletes put in a fair amount towards their participation. Total personal equipment $92,313.

The average total per athlete for personal equipment is $238 each, this is for the skates, skis, dogs, rifles, snowshoes and the like. I gathered this info from the various teams and between the 88 & 90 games we figured 05% for inflation.

The athlete also pays a registration fee. The 84 Yellowknife games saw a $200.00 fee & for the 90 games I've set the fee at $250.00. 320 athletes x $250.00 equals $80,000. the athletes have to come up with $98,094 to cover their portion of the budget. I have approx. 65 extra seats on the charters and will sell spectator seats to help towards the athletes portion. I'm trying to keep the athletes registration fee down so it is affordable to all.

FUNDING FOR TEAM ALASKA
1980 - 1990

YEAR	GAME LOCATION	ATHLETE FEES	TEAM SIZE	STATE GRANT
1990	YELLOWKNIFE	$98,094	329	$196.188
1988	FAIRBANKS	$30,200	302	$ 60,000
1986	WHITEHORSE	$29,700	297	$120,000
1984	YELLOWKNIFE	$70,000	284	$130,000
1982	FAIRBANKS	$29,700	297	$ 41,000
1980	WHITEHORSE	$23,400	262	$ 65,000

The increase in the team budget for 1990 compared to 1984 is mainly due to the size of the team. In order to transport 329 people it will be necessary to charter four Boeing 737's instead of three as we did in 1984. Mark Air has quoted a price from Anchorage to Yellowknife of $27,662 per plane per trip. Two trips (one going to & one the next week coming home) for the extra plane will cost $55,324.

In comparison:

1990 Yellowknife charter cost	$219,000
1984 Yellowknife charter cost	$160,272
increase	$ 58,700

The $58,700 comes close to the price of $55,324 for the additional aircraft.

The larger team will also mean more in state travel and over night expenses, along with additional uniform and try out costs. The addition of dog mushing to the games will also mean increased transportation and coordination costs.

We are trying to keep the athlete's registration fee down to $250.00 each. Part of the difference between the total of the registration fees and the athlete's share will come from selling approximately sixty spare seats on the charters. If it is necessary to transport some Siberian athletes and cultural participants it will reduce the number of seats available for sale.

ARCTIC WINTER GAMES 1990

SPORTS SUMMARY

DRAFT

EVENT	CLASSIFICATION	ATHLETES	COACHES	TOTAL
1. Arctic Sports	a. Eskimo Games			
	Open Men	8		
	Open Women	4		
	Junior Men	4	1	
	Junior Women	4	1	
	b. Indian Games			
	Open Men	4	1	
		24	3	27
2. Badminton	Open Men	2		
	Open Women	2		
	Junior Men	2		
	Junior Women	2		
	Juvenile Men	2	1	
	Juvenile Women	2	1	
		12	2	14
3. Basketball	Junior Women	8	1	
	Junior Men	8	1	
		16	2	18
4. Cross Country Skiing	Open Men	4		
	Open Women	4	1	
	Junior Men	4		
	Junior Women	4	1	
	Juvenile Men	4		
	Juvenile Women	4	1	
	Open Marathon	2		
		26	3	29
5. Curling	Junior Men	4	1	
	Junior Women	4	1	
	Open Women	4		
	Open Mixed	4		
		16	2	18
6. Dog Mushing	Junior (3 days)	2	1	
		2	1	3

OCTOBER 1988