he would have direct control over. That gives you, I believe, some of the Committee thinking regarding the attorney general being appointed by the governor.

PRESIDENT EGAN: Mrs. Nordale.

NORDALE: I would like to ask Mr. Rivers a question, if I may. Mr. Ralph Rivers, are the services of the attorney general available to the secretary of state in case he needs them?

R. RIVERS: Yes.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. President, I would like to ask Delegate Rivers a question through the Chair, if I may.

PRESIDENT EGAN: You may ask your question, Mr. Buckalew, if there is no objection.

BUCKALEW: Mr. Rivers, I notice that the proposal, that the caption is by Delegate Rivers. My question was whether this was a committee proposal or your separate individual proposal?

PRESIDENT EGAN: Mr. Rivers has already answered that question, Mr. Buckalew. He said that it was actually a proposal of his and of Mr. Harris, Mr. Victor Rivers.

V. RIVERS: In closing this discussion, I will make it brief. I just want to say, in my opinion it is no compromise opinion. If it had been a compromise we would not have this discussion on the floor. It has been pointed to as a compromise. Those of us who submitted this proposal honestly and actually think the attorney general should be screened. Now I wanted to clear up a point that Mr. McLaughlin made. He pointed out that certain appointive methods were used in the State of New Hampshire. They are. The attorney general is appointed by the governor and a council of five. In the State of Tennessee the attorney general is appointed for a period of eight years by the justices of

the supreme court. In four states, as I am able to count, the attorney general is appointed by the governor by and with the consent of the legislature. In three states the attorney general is appointed by the governor and in the balance he is elected by the people. So if you add that up you will find about 38 states in which he is elected; in these two states I have mentioned, Tennessee and New Hampshire, he is appointed under a similar plan, and in the balance of the states he is appointed by the governor with or without the approval of the legislature, as the case may be. It is my thought, and I have observed this rather closely from some contact with the legislature, that while the attorney general is in essence not a judge, he does interpret the law which governs people until somebody challenges his interpretation, and then his decisions oftentimes and most of the time do have the force of law until they are upset or turned over or otherwise disturbed by having somebody appeal to the courts.

It does not seem to me to be a bit out of line that the attorney general should be properly screened as to competence, and in the selection of the attorney general the governor should be relieved of the obligation to repay any favors or to make any particular discrimination in favor of any individual. It has been stated here that we tie the hands of the strong executive. Read this amendment over again. It does not say who the governor shall appoint. It says, "Two or more shall be screened by the judicial council and submitted to the governor for his appointment." He is not limited to the one man or two men or three men. If he can't make his choice he might even have four men, but he does have any obligation removed in making that appointment to any individual. It would be entirely free of a political aspect insofar as it affected the attorney general's competence. There is nothing in here that is counter to common practice, I refer to the State of New Hampshire, the State of Tennessee, and others, but it costs you money if you go to court to upset an attorney general or any other similar official's opinion.

That opinion as I have seen it many times, that opinion has the force of law and interpretation of any laws the legislature may have passed. While you might not view him as a judge, in essence he is a judge of what that law says until it's determined otherwise by the courts. In essence he is a judge of what certain things do that apply to the people. For that reason I think that he should be screened as to competence. I see nothing in that

which weakens the strong executive. The governor might say of the first two appointees named, "I am unable to make a choice; submit me another name." There is nothing that stops him from doing that in the proceedings of the council. It seems to me that some determination which would relieve this office of having to be filled by any repayment of political favor or obligation should be set up, and that is why we have introduced this amendment. It is no compromise.

PRESIDENT EGAN: Mr. Victor Rivers had stated he was closing. No one objected. Unless there is someone who has not spoken -- Mr. McLaughlin.

MCLAUGHLIN: I wanted to ask Mr. Rivers a question. Mr. Rivers, when you say the council in New Hampshire, you mean that five elected executive council who are elected by the people together with the governor?

V. RIVERS: I stated the council of five. The council of five is elected for two-year terms along with the governor and they determine with the governor the appointment of the attorney general.

MCLAUGHLIN: But that is not a judicial council at all, is it?

V. RIVERS: I don't know what their duties are. They are a council of five, but whether they are constituted as ours is, I do not know.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Victor Rivers and Mr. Harris be adopted by the Convention?"

HARRIS: I request a roll call.

PRESIDENT EGAN: Mr. Harris asks that we have a roll call. The Chief Clerk will call the roll on the question.

(The Chief Clerk called the roll with the following result:

Yeas: 18 - Barr, Collins, Cross, H. Fischer, Harris, Hinckel, Kilcher, Metcalf, Nerland, Nolan, Peratrovich, Reader, V. Rivers, Robertson, Rosswog, Smith, Taylor, VanderLeest.

Nays: 36 - Armstrong, Awes, Boswell, Buckalew, Coghill, Cooper, Davis, Doogan, Emberg, V. Fischer, Gray, Hellenthal, Hermann, Hilscher, Hurley, Johnson, King, Knight, Laws, Lee, Londborg, McCutcheon, McLaughlin, McNees, Marston, Nordale, Poulsen, Riley, R. Rivers, Stewart, Sundborg, Sweeney, Walsh, White, Wien, Mr. President.

Absent: 1 - McNealy.)

CHIEF CLERK: 18 yeas, 36 nays and 1 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 14? Mr. Ralph Rivers.

R. RIVERS: I have an amendment.

PRESIDENT EGAN: Mr. Ralph Rivers, you may offer your amendment. The Chief Clerk may read the proposed amendment.

R. RIVERS: May we have about a two-minute recess? I would like to consult with Mr. Londborg.

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for two minutes.

RECESS

ɔd rarely. Every one counts.

HJR 6

dollars a year by not allowing drug company lobby-

— Bennett F
Napa,

APRIL 8, 1907: *Birth of J. Gerald Williams*

Alaska State Librar

ɪrney General J. Gerald Williams, far right, swearing in a new territorial official in 1949.

ALASKA SCRAPBOOK

This week in Alaska history

J. Gerald Williams, Alaska's last territorial attorney general, was born April 8, 1907, in Fraser, Iowa, northwest of Des Monies. He lived in Wyoming as a youngster, and earned a bachelor's degree at the University of Washington in 1929. He came to Alaska in 1930 and taught school in several parts of the territory, including Southeast, the Interior and Southcentral.

He went back to the University of Washington to earn a law degree, returning to Anchorage in 1942 to serve as assistant U.S. Attorney. He went into private practice in 1943.

The attorney general was a four-year elected office in the territorial period. Williams ran for and won the office in 1949. He was re-elected twice.

Unlike in some other U.S. territories, Congress did not authorize a separate territorial court system for Alaska. A federal district court was created for the territory in 1884, and it remained the court of original jurisdiction throughout the territorial period. Congress did provide legal and criminal code for the territory in 1899. Thus, the federal code of procedure applied in the district court for federal, or district, matters, but the territorial code of civil and criminal procedure applied for "territorial" matters. The distinction was ambiguous, and sometimes confusing.

Williams traveled a great deal as attorney general, more than any other territorial attorney general and perhaps since. Interestingly, he played only a marginal role in the Alaska Constitutional Convention in 1955-56. The Alaska Statehood Committee instead contracted with several Outside research and consulting groups to prepare position and discussion papers on various constitutional provisions.

The new state constitution, adopted by Alaska voters in 1958 and effective with the official onset of statehood Jan. 3, 1959, provided for an appointed attorney general. Because he was elected by the voters in 1956 for a third four-year term, however, Williams was not sure that he should relinquish his office. Acknowledging the superseding jurisdiction of the state, prevailing legal opinion encouraged him to step aside, and he did. He did run unsuccessfully for the Democratic gubernatorial nomination in 1958.

Williams served as a federal bankruptcy referee for Alaska from 1962 until his retirement in 1974. He died May 13, 1992.

■ Alaska Scrapbook is compiled by Steve Haycox, a history professor at the University of Alaska Anchorage.

passed out by Rep Gruenberg Library

Alaska Bar Rules Provisions Applying to Attorneys General

Rule 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, transaction, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public. (SCO 1123 effective July 15, 1993)

ALASKA COMMENT

"Screening" is a procedure used to prevent intrafirm exchange of confidential information. Courts and commentators generally recognize two screening methods -- the "Chinese Wall" and the "cone of silence." When a firm establishes a Chinese Wall, the tainted lawyer is usually separated, both physically and organizationally, from attorneys working on the conflicting matter. The attorney is generally prohibited from having any connection with the case, from receiving any share of the fees attributable to it, and from having access to the files. Other members of the firm are not allowed to discuss the case or share documents with the attorney. Under the "cone of silence" method, the tainted attorney simply agrees not to share information about prior clients with members of the new firm. For a discussion of the "cone of silence" method, see **Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.,** 632 F. Supp. 418, 428 (D. Del. 1986).

COMMENT

This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional

functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing to severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Return to top

Rule 1.13. Organization as Client.

(a) Except as hereinafter provided, a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing a confidence or secret relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16, and shall act in accordance with the provisions of Rule 1.6.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client and that the lawyer's first duty is to the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. (SCO 1123 effective July 15, 1993; amended by SCO 1332 effective January 15, 1999)

ALASKA COMMENT

The additional phrase "except as otherwise hereinafter provided" was added to paragraph (a) in order to emphasize that the lawyer's first duty is to the organization and not to the organization's directors, officers, employees, members, shareholders or other constituents.

In paragraph (c) the Committee added the phrase "in accordance with the provisions of Rule 1.6" in order to specifically delineate the lawyer's options when faced with an act or refusal to act which is clearly in violation of the law and likely to result in substantial injury to the organization.

Paragraph (d) was amended to more clearly delineate the lawyer's obligation to clearly inform the organization's constituents with whom the lawyer is dealing that the lawyer's ultimate loyalty is to the organization.

COMMENT

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents a confidence or secret relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a

circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8 and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such

conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. *See* note on Scope.

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged based on the facts of the case.

Dual Representation

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Return to top

Section 4. Vacancies. A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.

Cross references. — For statutory provisions for filling vacancies, see AS 15.40.320—15.40.470.

Section 5. Disqualifications. No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

Revisor's notes. — Senate Joint Resolution No. 2, changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.

Opinions of attorney general. — The purpose of the prohibition is to remove temptation and improper motives from considerations of legislators in voting for increased salaries or the creation of new offices. June 29, 1976, Op. Att'y Gen.

Because prohibitions like this are contrary to general public policy which favors eligibility for office, they are usually given a literal construction and are rarely expanded beyond their literal terms. June 29, 1976, Op. Att'y Gen.

The prohibitions contained in this section are literally and strictly enforced. November 16, 1977 Op. Att'y Gen.

Under Warwick v. State ex rel. Chance, Sup. Ct. Op. No. 1252 (File No. 2712), 548 P.2d 384 (1976), a member of one house of the legislature may run for a seat in the other house, when the pay for that seat in the other house has been increased by the legislature in which the candidated served. June 29, 1976 Op. Att'y Gen.

Reading the prohibition purely literally it does not apply to a legislator's running for a seat in the other house of the legislature. His office, that of a "legislator," remains the same. While the term of office differs (four years for members of the senate, two years for members of the house) and the constituency may differ, the "office" of "legislator" is constant. June 29, 1976 Op. Att'y Gen.

While the supreme court has limited the exceptions to the operation of this section to those expressly made by the Alaska Constitution, no exception is required for a legislator's running for legislative office, because the prohibition has no application and should not be expanded to apply to that situattion. June 29, 1976 Op. Att'y Gen.

Neither a legislator nor the governor may sit as a regent of the University of Alaska while holding office. December 27, 1976 Op. Att'y Gen.

It would not be constitutional for the chairmen of the House and Senate finance committees to be members of the State Bond Committee. November 16, 1977 Op. Att'y Gen.

NOTES TO DECISIONS

The purpose sought to be accomplished by this section is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

The provisions of this section are unambiguous. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

"Appointment" is synonymous with "employment". Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), overruled, But see Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270, 119 L.R.R.M. (BNA) 2720 (Alaska 1985).

"Position of profit". — See Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

And its intent. — The term "position of profit" was intended to prohibit all other salaried nontemporary employment under the United States or the State of Alaska. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

Superintendents of state schools and state school teachers hold positions of profit within the prohibition of this section. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

Restriction not dependent on intent of legislator. — There is nothing in this section making its restriction dependent on the intent of an individual legislator in voting for the bill in question. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

Prohibition applies for the full statutory period regardless of the acts of subsequent legislatures. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

The supreme court does not look to events subsequent to the appointment but to the legality of the appointment itself. If illegal at the time it was made, no subsequent act of a later legislature can make the appointment legal. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

Subsequent action by legislature. — Salary increase enacted by a subsequent legislature did not render moot a case involving the issue of the legality of the original appointment of a legislator to an office the salary of which was increased by the legislature of which he was a member. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976).

Appointment of former legislator as commissioner of administration. — The clear language of this section proscribed the appointment of a member

Administrative Code. — For governor, see 6 AAC, part 8.

NOTES TO DECISIONS

Applied in State v. Fairbanks N. Star Borough, 736 P.2d 1140 (Alaska 1987).

Cited in Aspen Exploration Corp. v. Sheffield, 739 P.2d 150 (Alaska 1987).

Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

Revisor's notes. — Senate Joint Resolution No. 2, "changing the name of the secretary of state to lieutenant governor" in 16 sections of the Alaska Constitution, effective October 10, 1970, inadvertently omitted express amendment of this section.

Opinions of attorney general. — Neither custom nor law requires the governor to submit the names of the heads of principal departments to the legislature for confirmation when they carry over in office following a gubernatorial election. January 25, 1979 Op. Att'y Gen.

NOTES TO DECISIONS

Clear nature of provisions. — The provisions of this section and § 26 of this article are clear and unambiguous. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Purpose of section. — This section explicitly empowers the governor to appoint and dismiss the head of each principal department. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

This section subjects executive appointments to confirmation by a majority of the members of the legislature in joint session. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Confirmation is part of executive power of appointment. — Confirmation is not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Limitation on legislative checks on governor's power to appoint. — The lack of ambiguity in this section and § 26 of this article mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointive authority through the legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

This section and § 26 of this article mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

The quorum for a joint session of the legislature convened under Article III, §§ 25 and 26 of the Alaska Constitution is a majority of the members of the legislature, or 31 legislators from either house of the legislature. Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985).

Section 1, ch. 82, SLA 1975, is unconstitutional. — Section 1, ch. 82, SLA 1975, which amends AS 39.05.020 and purports to authorize legislative "meddling" in the exercise of an executive power, i.e., the appointment of executive officials, is unconstitutional because it is violative of separation of powers requirements. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Applied in Larson v. State, 564 P.2d 365 (Alaska 1977); Buckalew v. Holloway, 601 P.2d 240 (Alaska 1979); Kerttula v. Abood, 686 P.2d 1197 (Alaska 1984).

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

NOTES TO DECISIONS

Clear nature of provisions. — The provisions of this section and § 25 of this article are clear and unambiguous. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HJR006-OOG-EO-3-16-07
Bill Version: HJR6
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG

Title: Constitutional amendment relating to the office of attorney general
RDU: Executive Operations
Component: Executive Office

Sponsor: Representatives Crawford and Harris
Requester: House State Affairs Committee
Component No.: 6

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services				*****	*****	*****
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	*****	*****	*****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF				*****	*****	*****
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	*****	*****	*****

Estimate of any current year (FY2007) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This analysis emulates the organizational structure of the states of Washington, Oregon and Arizona. Each of these states has an elected attorney general, and each Governor has on-staff counsel to respond to general legal questions, public policy issues, internal matters, open meeting laws, ethics laws, revocation of appointments, to handle extraditions and petitions, prepare administrative orders, deeds relating to the state's natural resources, etc., and to carry-out the constitutional requirements of the Governor (i.e., executive clemency, messages to the Legislature, executive orders).

The constitutional amendment proposed by this resolution would be on the 2008 general election ballot. If approved by the voters, the first election of an attorney general would be with the next gubernatorial election in 2010. Fiscal impact to the Office of the Governor would begin in FY2011. A fiscal analysis for information purposes is attached.

Prepared by: Gail Fenumiai, Asst. Administrative Director
Phone 465-3885
Division: Division of Administrative Services
Date/Time 3/16/2007, 10:42am

Approved by: Linda J. Perez, Administrative Director
Date 3/16/2007
Agency: Office of the Governor, Division of Administrative Services

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HJR 6
2007 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

The fiscal impact below is for **illustration purposes** only and is based on 2007 costs and salaries. The fiscal impact associated with an elected attorney general would not be realized until FY2011, and accurate costs will need to be identified then. Additionally, if the voters approve the constitutional amendment calling for an elected attorney general, the functions and duties of the attorney general will need to be defined and may result in further fiscal impact.

This note assumes an increase in Governor's staff by three positions - an attorney, rg. 26, a paralegal, rg. 19, and an executive secretary, rg. 14. Fiscal note further assumes existing state-owned space would be available and does not include lease costs.

Personal services:	three PFTs	288.0
Contractual:	comm., phones, tolls courier svcs., subscipts, etc.	21.1
Supplies:	office/library supplies	10.8
	Total estimated annual costs:	319.9

Additional first year set-up costs:

Equipment:	office furniture,DP and communication equipment	43.5*

* 43.5 first year set-up costs only and not included in annual estimate

Legislative Research Agency

Alaska State Legislature

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

March 9, 1995

MEMORANDUM

TO:

FROM: Gordon S. Harrison, Director

RE: **Issue of An Elected Attorney General In Alaska**
Research Request 95.150

You asked for background information on the issue of electing the attorney general in Alaska, in contrast to the present practice of the governor appointing the attorney general. This memorandum briefly discusses the existing constitutional structure of the executive branch and the attorney general as an appointed department head; past efforts to change this constitutional scheme; a summary of the case for and against an elected attorney general; and the current controversy of the role of the attorney general in the recent withdrawal of the state's appeal in the *Babbitt* lawsuit against the federal government.

Constitutional Structure of the Executive Branch, and the Appointed Attorney General

Article III, Section 24 of the Alaska Constitution states, in full:

> Each principal department shall be under the supervision of the governor.

Article III, Section 25 states, in pertinent part:

> The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor . . . .

These two brief constitutional provisions create in Alaska a unified executive branch of government. Unlike the situation in most other states, in Alaska the heads of major executive

branch agencies are appointed and serve at the governor's pleasure: only the governor and lieutenant governor are popularly elected.[1]

The constitution gives to the legislature the power to determine the number of principal departments and the duties of each. It established the Department of Law as one of 16 principal departments in the executive branch, including the Office of the Governor (AS 44.17.005). The attorney general is the head of the Department of Law (AS 44.23.010), and therefore, the person serving in that position is appointed by the governor and serves at the governor's pleasure as do the other department heads.[2] The state constitution would have to be amended to select the attorney general by popular election.

This constitutional scheme was adopted by the delegates to the constitutional convention to avoid the fragmentation of executive authority that results from independently elected department heads. They wanted the executive branch to be *efficient* in its operation and the governor to be *accountable* to the voters for the performance of the executive agencies. They gave the governor the power necessary to manage the administrative agencies, and they expected the governor to answer for his or her management. The delegates were firmly committed to the principle of a strong and accountable governor, and they rebuffed several efforts to weaken the governor's control over the attorney general, including proposals to elect the attorney general. Speaking on the floor of the convention against such a proposal, delegate McLaughlin stated:

> If we yield in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory [of the strong executive]. . . .[3]

Delegate Ralph Rivers, who said he was initially inclined to support the idea of an elected attorney general, argued strenuously against it. He said he came to realize that:

> . . . if you are going to let the governor's administration be held responsible for the conduct of that administration, you have got to at least give the governor an attorney general of his own choice. Under [the proposal for an elected

---

[1]The lieutenant governor has no constitutional powers and few statutory powers.

[2]The Department of Education is an exception to this scheme. Under the grant of authority in Article III, Section 25, to determine *by law* whether the head of each department shall be a single executive or otherwise, the legislature has decided to place a board at the head of this department. The method of selecting the executive officer of this department is provided in Article III, Section 26.

[3]*Proceedings of the Alaska Constitutional Convention*, p. 2196. Both Delegate Rivers and McLaughlin were attorneys.

> attorney general] he might get an attorney of the opposite political faith. He might get one of his own party who is either inadequate or who is hostile to him. . . .In either case, the governor could say at the end of his term, if things haven't gone well, "We had a good program but that attorney general you foisted upon me wrecked our program."[4]

This proposal for an elected attorney general, which took the form of an amendment to the committee recommendation for appointed department heads, was defeated on the floor of the convention by a vote of 40 to 12. A subsequent proposal to have the judicial council screen candidates for the post of attorney general was defeated by a vote of 36 to 18. The delegates clearly wanted the state attorney general to be appointed by, and serve at the pleasure of, the governor.

Proposed Constitutional Amendments Creating an Elected Attorney General

Although the matter was settled in the constitution, it was not settled in the minds of some people, and support for an elected attorney has lingered. A resolution was introduced in the first state legislature to amend Article III of the constitution to elect the attorney general, and some 26 resolutions have been introduced over the years to the same end.[5] However, none of these measures has received the necessary two-thirds majority vote to be placed on the ballot for ratification.

Arguments For and Against An Elected Attorney General

Proponents of an elected attorney general believe that the independent legal judgment of an appointed attorney general is compromised by his or her political ties to the governor. Accordingly, an elected attorney general is thought to bring an objective legal perspective to the office. There are at least two sources of "political" pressures to which the appointed attorney general is susceptible. These are the pressures (tacit if not expressed) to treat favorably campaign contributors, special interests aligned with the governor, and various electoral allies, and the less insidious but more pervasive pressures to provide contrived legal support for the governor's

---

[4]*Proceedings*, p. 2198

[5]The most recent resolution proposing an elected attorney general was Senate Joint Resolution 12, 14th legislature (1985-86). At least one bill was introduced to hold a statewide advisory vote on the question of electing the attorney general (House Bill 456, 13th legislature, 1983-84). Resolutions have also been introduced from time to time to provide for the election of district attorneys.

programs, policies, and legislation. It should be noted that sensitivity of legislators to these concerns was far more acute in earlier years when the legislature did not have its own counsel and relied exclusively on the attorney general for legal advice. In this situation, when questioning the legality of a bill proposed by the governor, or when seeking defense of a legislator's bill that the governor alleges is illegal, legislators would have preferred to hear from an elected attorney general rather than a lawyer from the governor's cabinet. With their own legal staff to turn to, legislators today are no longer dependent upon legal advice from a source that has conflicting interests.

Defenders of the constitutional status quo point out that an elected attorney general would not be free from political influences but merely substitute his or her own for those of the governor. An elected attorney general is a politician no less than the governor, and must raise campaign funds for a statewide contest and cultivate electoral favor wherever it can be found. Furthermore, experience shows in states with an elected attorney general that the office is often a stepping stone for the governor's office. Thus, the elected attorney general is very likely to be an ambitious politician, and it is not unusual for an attorney general to run against the governor in whose administration he serves. Under these circumstances there is no reason to expect more objective and independent legal judgment from an elected attorney general than from an appointed one.

Defenders of the status quo also see wisdom in the original constitutional design of the executive branch, which does in fact result in efficient administration and political accountability. Under the current system, when things go awry the governor cannot dodge responsibility by blaming others. Finally, advocates of an appointed attorney general argue that the state is more likely to be served by a person of legal competence and talent if that person is appointed rather than elected.

An Elected Attorney General and the *Babbitt* Lawsuit

We presume that the current interest in the role of the attorney general in Alaska has been generated by the decision of Governor Knowles to withdraw the state's appeal in the lawsuit *Alaska v. Babbitt*. Questions arose about the duties and responsibilities of the attorney general in this case because the same person, Bruce Botelho, both filed the suit as attorney general for Governor Hickel and withdrew it as attorney general for Governor Knowles. It has been suggested by people who disagreed with the decision to drop the appeal that an elected attorney general would have been compelled to defend the state's vital interest and continue the appeal, notwithstanding the governor's desires. This proposition deserves some discussion, even though a definitive response is not possible. It is conceivable that an elected attorney general would have acted differently from Attorney General Botelho in the *Babbitt* suit, but there are strong reasons to think he might not have. The outcome in any particular hypothetical case would, of course, depend on many factors, including the political values of the elected attorney general as well as the precise terms of the constitutional and statutory provisions that established the elected office of attorney general in Alaska. Generally speaking, however, it is understood that elected attorneys

general defend the positions of executive officers and agencies if those positions are reasonable and formulated by a defensible process. In matters of public policy, where the best interests of the state are at issue rather than the legality of a position, the attorney general is usually expected to defer to the governor:

> There is no reason to assume that the attorney general can ascertain the public interest better than the governor, who is elected in the same statewide election but indisputably attracts more interest and attention than the attorney general.[6]

The California Supreme Court, in *The People ex rel. George Deukmejian v. Brown*, 624 P 2nd. 1206 (1981), held that, under state constitutional provisions similar to those in Alaska regarding the governor's supervisory powers over the executive branch:

> . . . if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

The court's decision in this case is attached. The majority decision and the dissent, although presented in the context of California constitutional law, are suggestive of the broader issue of the extent of the common law powers of attorneys general to safeguard the public interest.

One must bear in mind that governors and elected attorneys general have a mutual interest in avoiding public spats. Therefore, as a practical matter, potential for conflict over the *Babbitt* appeal would doubtless have been perceived by the governor and the elected attorney general and a contest between them avoided by negotiation (tacit or overt). Thus, the outcome in the *Babbitt* controversy under our hypothetical situation could have gone either way--appeal or not appeal--on the basis of political judgments by the two key players.

Questions concerning the powers and duties of elected attorneys general, and the advantages and disadvantages of an elected position versus an appointed position, are very complex, and they are treated only in cursory fashion in this memorandum. If you would like additional information, or additional reading material on the subject, please let us know.

Attachments

---

[6]Scott M. Matheson, Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy*, Fall, 1993, p. 15.

172 Cal.Rptr. 478

The PEOPLE ex rel. George DEUKMEJIAN, as Attorney General, etc., Petitioner,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24252.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Attorney General sought peremptory writ of mandate to compel State Personnel Board, Public Employment Relations Board, Governor, and Controller to perform their statutory and constitutional duties with regard to recently enacted State Employer-Employee Relations Act. The Supreme Court, Mosk, J., held that Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy.

Petition dismissed.

Richardson, J., dissented and filed an opinion.

See also Cal., 172 Cal.Rptr. 487, 624 P.2d 1215.

1. Attorney General ⇐6

Attorney General could not seek judicial determination of legality of State Employer-Employee Relations Act which was purportedly in derogation of California Constitution where Attorney General had represented state clients, given them legal advice with regard to pending litigation, and then withdrawn and sued same clients on next day on cause of action arising out of identical controversy. West's Ann.Gov. Code, § 3512 et seq.

2. Attorney General ⇐6

Attorney General cannot be compelled to represent state officers or agencies if Attorney General believes them to be acting contrary to law, and may withdraw from statutorily imposed duty to act as their counsel, but may not take position adverse to those same clients. West's Ann. Gov.Code, §§ 11040, 12512.

3. Attorney General ⇐6

Where a conflict between Governor and Attorney General develops over faithful execution of laws of the state, Governor retains supreme executive power to determine public interest; Attorney General may act only subject to powers of the Governor. West's Ann.Const. Art. 5, §§ 1, 13.

4. Attorney General ⇐6

Governor could raise issue of violation of rule of professional conduct by motion in case before court to enjoin adverse representation of Attorney General; overruling *People v. Johnson*, 6 Cal. 499.

George Deukmejian, Atty. Gen., Willard A. Shank and N. Eugene Hill, Chief Asst. Attys. Gen., L. Stephen Porter and Richard D. Martland, Asst. Attys. Gen., Talmadge R. Jones, George J. Roth, Robert Burton, Paul H. Dobson and M. Anthony Soares, Deputy Attys. Gen., for petitioner.

John C. Wakefield, Los Angeles, Larry C. Larsen, Gilles Attia, A. J. Weiglein, Sacramento, A. Roger Jeanson, Haas & Najarian, San Francisco, Thomas A. Farr and Rex H. Reed, Springfield, Va., as amici curiae on behalf of petitioner.

Tuttle & Taylor, Raymond C. Fisher, Barbara L. Stocker, Jeffery M. Hamerling, Los Angeles, J. Anthony Kline, San Francisco, Byron S. Georgiou, San Diego, Barbara T. Stuart, Sacramento, Jerome B. Falk, Jr., Steven L. Mayer, Howard, Prim, Rice, Nemerovski, Canady & Pollak, San Francisco, Barry Winograd, Salinas, Kristin Jensen, Robert Miller, William P. Smith, Terry

Filliman, Sacramento, Gerald Becker, Martinez, and Ronald Blubaugh, Sacramento, for respondents.

Loren E. McMaster, Bernard L. Allamano, Gary P. Reynolds, Sacramento, Richard Lobel, Van Bourg, Allen, Weinberg & Roger, Stewart Weinberg and Robert J. Bezemek, San Francisco, for intervenors.

Reich, Adell, Crost & Perry, Hirsch Adell, Charles P. Scully, Donald C. Carroll, Charles P. Skully, II, Donald H. Wollett, Ronald Yank, Franklin Silver, Carroll, Burdick & McDonough, Bodkin, McCarthy, Sargent & Smith, Timothy J. Sargent, Kevin W. Horan, Los Angeles, Gillin, Jacobson & Wilson, Ralph L. Jacobson and Cynthia T. Podren, Berkeley, as amicus curiae on behalf of intervenors.

MOSK, Justice.

Before reaching the merits of this litigation in either this case or the companion case of *Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 172 Cal.Rptr. 487, 624 P.2d 1215, we address a motion of the Governor to dismiss the petition of the Attorney General herein.

The chronology of events is significant. The 1977 Legislature adopted a State Employer-Employee Relations Act (SEERA). (Gov. Code, §§ 3512-3524.) While the Governor had the measure under consideration the then-Attorney General wrote to him under date of September 20, 1977, urging him to sign what he described as "a standard, well-accepted, existing method of resolving labor/management disputes . . . a good step forward." Ten days later the Governor signed the measure into law, and it became effective on July 1, 1978.

On January 23, 1979, the Pacific Legal Foundation and the Public Employees Service Association filed in the Court of Appeal an original petition for a writ of mandate to compel the Governor, the Controller, the Public Employment Relations Board, and the State Personnel Board to perform their constitutional and statutory duties without regard to provisions of SEERA, contending the legislation was unconstitutional.

On January 30, 1979, the present Attorney General, acting through two deputies, met with members of the State Personnel Board, which had been served with summons in the Pacific Legal Foundation suit. At the conference the Attorney General, as counsel to the board, outlined the legal posture of the board and described four legal options available to it. This was a classic attorney-client scenario.

At all times up to that point, the Attorney General was by law the designated attorney for the Governor and the State Personnel Board, as well as for the other state officers and agencies involved herein. Government Code section 12511 provides that the "Attorney General has charge, as attorney, of all legal matters in which the State is interested . . . ." Section 12512 provides that the "Attorney General shall . . . prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; . . . ." (See also Gov. Code, § 18656.)

On February 7, 1979, however, the Attorney General initiated the present proceeding by filing an independent petition for writ of mandate in the Court of Appeal against the Governor and other state agencies, asking for relief comparable to that sought by Pacific Legal Foundation.

[1] There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel. (Gov. Code, § 11040; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 15, 112 Cal.Rptr. 786.) The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

The rules of professional conduct to guide attorneys in their relationship with clients

and former clients are well established and generally understood by all attorneys in this state. Rule 5–102 of the State Bar Rules of Professional Conduct (3B West's Ann. Bus. & Prof. Code (1974 ed., 1980 cum. supp.) foll. § 6076, at p. 92) requires that before an attorney may represent interests adverse to a client, he must obtain his client's consent in writing. For violation of this principle with regard to a *former* client, an attorney has been disciplined by the State Bar. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 23 P.2d 291.) This court declared in *Galbraith* that "the subsequent representation of another against a former client is forbidden not merely when the attorney *will* be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he *may* be called upon to use such confidential information." (Italics in original; *id.* at pp. 332-333, 23 P.2d 291.)

We took similar disciplinary action in *Hawkins v. State Bar* (1979) 23 Cal.3d 622, 629, 153 Cal.Rptr. 234, 591 P.2d 524, despite the attorney's claim that his conflicting relationship with another person arose subsequently to the initial legal consultation with his client. The relationships, we found, "arose contemporaneously"; this is comparable in time span to the chronology here between the Attorney General's legal consultation with the Personnel Board and his filing of a lawsuit against the same board.

Conduct of attorneys has also been discussed in contexts other than State Bar discipline. In *Watchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573–574, 15 P.2d 505, this court declared that "an attorney is forbidden to do *either* of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (Italics added.) While the record here does not reveal whether the Attorney General acquired any knowledge or information from his clients, the prohibition is in the disjunctive: he may not use information *or* "do anything which will injuriously affect his former client." Unquestionably the Attorney General is now acting adversely to the position of his statutory clients, one of which consulted him regarding this specific matter.

In *Grove v. Grove Valve & Regulator Co.* (1963) 213 Cal.App.2d 646, 653, 29 Cal.Rptr. 150, the court enjoined an attorney from appearing against his former clients because "there can be no reasonable doubt that Flehr's present employment as attorney for appellant in this action is adverse to the interests of his former clients, since appellant is suing them over matters which are related to and which Flehr became conversant with during [illegible] period in which he represented respond[illegible] as their attorney." Here, too, the Att[illegible]y General is suing former clients over [illegible]tters that arose during the period when by law he was counsel for those same clients.

To the same effect is *Earl Scheib, Inc. v. Superior Court* (1967) 253 Cal.App.2d 703, 706, 61 Cal.Rptr. 386, in which the court declared "The rules which underlie our decision have long been written in the books so that he who runs might read. 'It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.' (Bus. & Prof. Code, § 6068.) 'A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.'" (See also *Anderson v. Eaton* (1930) 211 Cal. 113, 116, 293 P. 788.)

In *State of Ark. v. Dean Foods Products Co., Inc.* (8th Cir. 1979) 605 F.2d 380, 384, it was held that the "attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Disqualification of the Attorney General was upheld because of his prior representation of a litigant; whether he "did in fact receive

confidential information is irrelevant, the policy considerations of the Code precluding that inquiry." (*Id.*, p. 386.) The same doctrine was enunciated in *General Motors Corporation v. City of New York* (2d Cir. 1974) 501 F.2d 639, 648, and *Emle Industries, Inc. v. Patentex, Inc.* (2d Cir. 1973) 478 F.2d 562, 571. Also see Kramer, *Appearance of Impropriety* (1980) 65 Minn.L. Rev. 243, 255.

[2] But, contends the Attorney General, he is not bound by the rules that control the conduct of other attorneys in the state because he is a protector of the public interest. We have acknowledged "the Attorney General's dual role as representative of a state agency and guardian of the public interest." (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d at p. 15, 112 Cal.Rptr. 786.) The Legislature has impliedly recognized that a conflict might arise because of that duality by giving the Attorney General the right to withdraw from representation of his statutory clients and to permit them to engage private counsel. (Gov. Code, § 11040.) We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship. In short, the Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients.[1]

The Attorney General insists nevertheless that he has a common law right, undefined and unrestrained, to sue in his role as "the People's legal counsel" the Governor and other public officials and agencies. This claim presupposes that the Attorney General may determine, contrary to the views of the Governor, wherein lies the public interest. While there is no question that we may consider common law practices, we may do so only if they are not superseded by or in conflict with constitutional or statutory provisions. (*People v. New Penn Mines, Inc.* (1963) 212 Cal.App.2d 667, 28 Cal.Rptr. 337.) In this instance the Constitution—the highest indicator of the public interest—is both apposite and unambiguous.

[3] Article V, section 1, of the California Constitution provides that "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." Article V, section 13, defines the powers of the Attorney General inter alia in this manner: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." The constitutional pattern is crystal clear: if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the "supreme executive power" to determine the public interest; the Attorney General may act only "subject to the powers" of the Governor.

Consistent with the Constitution, Government Code section 12010 provides: "The Governor shall supervise the official conduct of all executive and ministerial officers." (*Spear v. Reeves* (1906) 148 Cal. 501, 504, 83 P. 432.) The Attorney General is an executive officer who "shall report to the Governor the condition of the affairs of his office" (Gov. Code, § 12522).

We recognize there are cases in other jurisdictions that permit their attorneys general to sue any state officer or agency, presumably without restriction. Such opinions arise, however, under the peculiarities of the prevailing law in those several states, and are not persuasive here. (See, e. g., *Conn. Com'n. v. Conn. Freedom of Information* (1978) 174 Conn. 308, 387 A.2d 533); *Feeney v. Commonwealth* (1977) 373 Mass.

1. *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 138 Cal.Rptr. 532, is not to the contrary. There the lawsuit was brought by the assessor but not as a public official; he sued the county supervisors "individually and as a taxpayer." (*Id.* at p. 27, 138 Cal.Rptr. 532.) Therefore the court held the county counsel could represent the supervisors in defending the lawsuit.

359, 366 N.E.2d 1262; *E.P.A. v. Pollution Control Bd.* (1977) 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

On the other hand, several jurisdictions have prevented the attorney general from acting without constitutional or statutory authority. A federal court found it incongruous for an attorney general, purporting to act for the people, to mount "an attack by the State upon the validity of an enactment of its own legislature." (*Baxley v. Rutland* (D.Ala.1976) 409 F.Supp. 1249, 1257; see also *Hill v. Texas Water Quality Bd.* (Tex.Civ.App.1978) 568 S.W.2d 738; *Motor Club of Iowa v. Dept. of Transp.* (Iowa 1977) 251 N.W.2d 510, 515; *People ex rel. Witcher v. District Court, etc.* (1976) 190 Colo. 483, 549 P.2d 778; *Garcia v. Laughlin* (1955) 155 Tex. 261, 285 S.W.2d 191, 194; *State v. Hagan* (1919) 44 N.D. 306, 175 N.W. 372, 374; *State v. Huston* (1908) 21 Okl. 782, 97 P. 982, 989.)

Arizona, the constitution of which, like ours, declares that its governor "shall take care that the laws be faithfully executed" (Ariz.Const., art. V, § 4), reached the same conclusion as we do herein. In *Arizona State Land Department v. McFate* (1960) 87 Ariz. 139, 348 P.2d 912, 918, the supreme court of that state declared in an unanimous opinion, "Significantly, these powers are not vested in the Attorney General. Thus, the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."

The Arizona court further observed, with regard to a suit by the attorney general against a state agency: "Two propositions flow generally from this conception, embodied in our statutes, of the basic role of the Attorney General as 'legal advisor of the departments of the state' who shall 'render such legal services as the departments require' [citation]: the assertion by the Attorney General in a judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor; and the initiation of litigation by the Attorney General in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of this role." (*Id.* 348 P.2d at p. 915)

We are not unmindful that the Attorney General may have injected himself into the litigation initiated by Pacific Legal Foundation with the public interest in mind as he perceives it. We discussed a comparable circumstance in *Anderson v. Eaton*, supra, 211 Cal. at page 116, 293 P. 788: "Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."

[4] Finally, we conclude that Governor has chosen a proper remedy. It has been held that one way "in which the issue of a violation of the rule [of professional conduct] may be raised is by a motion by the former client in the case before the court to enjoin the adverse representation." (*Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919, 927, 75 Cal.Rptr. 580, and cases cited.) To the extent *People v. Johnson* (1856) 6 Cal. 499, permitted the Attorney General to sue the Governor, it is disapproved.

For the reasons stated, we enjoin the Attorney General from proceeding in this matter and order that the alternative writ be discharged and the petition be dismissed.

BIRD, C. J., and TOBRINER and NEWMAN, JJ., concur.

RICHARDSON, Justice, dissenting.

I respectfully dissent, and regret today's majority opinion. It may well serve to de-

prive the office of the Attorney General of its traditional authority to initiate judicial proceedings which challenge the constitutional basis for procedures which are undertaken or threatened to be undertaken by public officials, including the Governor, when the Attorney General reasonably and in good faith believes such procedures to be defective. The Attorney General's traditional watch-dog function and his power to challenge questionable official conduct are important and necessary tools to assure the continued integrity of our system of government. Their loss would deprive the people of a first line of protection against improper executive conduct in appropriate cases. I trust that courts, including ours, will in the future narrowly limit the applicability of today's decision.

In the consolidated proceedings presently before us, petitioners have challenged the constitutional basis for the State Employer-Employee Relations Act (SEERA). (Gov. Code, § 3513.) In the instant cause—one of the consolidated proceedings—the Attorney General appears as petitioner on behalf of the People of the State of California. The majority do not reach in their opinion the substantive merits of the Attorney General's petition, but examine only a motion by respondent Governor to dismiss the petition on the ground that Attorney General is disqualified from filing it. Only that same limited issue is addressed in this dissenting opinion After the relief sought by petitioners in the consolidated cases was ordered by the Court of Appeal, the Governor petitioned this court for hearing and simultaneously moved "to have the Court ... dismiss the Attorney General's petition and to disqualify the Attorney General from any further participation in those proceedings." This issue was argued before the court in conjunction with argument on the substantive merits.

SEERA purports to provide for collective bargaining for state civil service employees as to wages, hours and other terms and conditions of state employment. However, it is also provided in California Constitution, article VII (formerly art. XXIV) that the State Personnel Board (SPB) shall administer a civil service system of appointments and promotions, the fixing of probationary periods and classifications, the adoption of rules authorized by statute, and the review of disciplinary actions affecting employees of the state. The substantive question thus at issue but not here examined is whether the constitutional role of the SPB preempts the setting of salaries of civil service employees and, if so, whether SEERA infringes on such constitutionally vested authority. It is the Attorney General's position that the jurisdiction of the SPB to prescribe classifications for civil service positions is so integrally bound up with the setting of salaries that the legislative attempt through SEERA to subject the salary-setting function to the bargaining process conflicts with article VII.

We have said recently that, "The Attorney General ... is the chief law officer of the State (Cal.Const., art. V, § 13). As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. [Citations omitted.] '[H]e represents the interest of the people in a matter of public concern.' [Citation omitted.] Thus, 'in the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.' [Citation omitted.] Conversely, he has the duty to defend all cases in which the state or one of its officers is a party. (Gov.Code, § 12512.) In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state or one of its agencies or officers." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14–15, 112 Cal.Rptr. 786.)

In view of our foregoing description of the Attorney General's unique representative capacities which clearly distinguishes him from attorneys generally, no claim is

now made by anyone that the Attorney General cannot seek a judicial declaration of the invalidity of SEERA on constitutional or other grounds. In fact, the Attorney General not only has the right but an obligation to present what he deems to be in the public interest in the face of potential conflicts with state agencies which he nominally represents. "In the exceptional case the Attorney General, *recognizing that his paramount duty to represent the public interest cannot be discharged without conflict may consent to the employment of special counsel by a state agency or officer.* (See Gov.Code, § 11040.)" (*D'Amico, supra*, at p. 15, 112 Cal.Rptr. 786, italics added.) Nor can there be any question but that the Governor is the chief executive officer of the state and that in the performance of the Governor's executive function the Attorney General is his subordinate.

However, a state Attorney General is more than a mere appendage to a Governor's office. As our description in *D'Amico* makes abundantly clear, the Attorney General is an independent constitutional officer vested with very broad powers derived from both common law and statutory origins. He is far more than a tail on the Governor's kite. It would be a serious breach on the part of an Attorney General if he or she failed to challenge a legislative enactment which he or she believed with good cause to lack constitutional basis, even though the enactment was then actively supported by a Governor. Such a challenge is not an act of insubordination proscribed by the language of article V, section 13 of the Constitution providing that as "chief law officer of the state" the Attorney General is "[s]ubject to the powers and duties of the Governor." All powers and duties, including those of the executive, are limited by the lawful exercise thereof, and the Attorney General cannot be constrained seeking a judicial pronouncement of the la... ilness of legislation which the Governor would implement. If the Governor could impose such limitations on the Attorney General—as in this case by precluding a constitutional challenge to SEERA—then the Attorney General would not be able to test or challenge any enactment without executive approval, and the system of checks and balances envisioned by the Constitution would fail. Such a conceptual paralysis is unthinkable, of course, and the majority, fortunately, do not urge this position.

Notwithstanding the foregoing, the majority concludes that in the particular circumstances of this case the Attorney General has conducted his office in a manner which disqualifies him, thus leaving the public interest without any representation in these proceedings. The disqualifying conduct is said to deny respondents a fair opportunity to litigate issues on the merits because of advantages gained by the Attorney General through his relationships to some or all of respondents. The challenged conduct consists of (1) a letter sent by the Attorney General on September 20, 1977, to the Governor urging him to sign the legislation (Sen. Bill No. 839) enacting SEERA into law, (2) a conference between deputy attorneys general and representatives of the SPB on January 30, 1979, at which the deputies urged the invalidity of SEERA and sought SPB support in seeking a judicial declaration thereof, and (3) utilization of those same deputies who had previously represented SPB to prosecute the instant proceedings.

The letter is of little significance. Although former Attorney General Younger urged the Governor to sign Senate Bill No. 839, it is clear that because the Governor had been active in procuring the legislation he would sign it independently of the Attorney General's recommendation. The content of the letter deals with continuing efforts by public employees to gain some participation in the determination of their working conditions and compensation, noting that "some public employees tend to believe their only effective tool to get proper attention is to strike." While the letter does not address constitutional or other legal issues, it concludes that the "bill will assist greatly in resolving [existing] grievances."

The letter may well be viewed as an effort finally to confront issues which must

be resolved in the event that collective bargaining by state employees is implemented. These proceedings are a step in such resolution. The Attorney General's letter seeks to move these long-standing issues toward a final resolution without addressing the issue of constitutional infirmities, if any, in the legislation.

The Attorney General-SPB conference of January 30, 1979, was called by the Attorney General's office following commencement by Pacific Legal Foundation (PLF) of the proceedings now consolidated with the instant cause. Present at the meeting were members of SPB and its executive officers. The Attorney General was represented by Deputies Talmadge Jones and Stephen Porter. Mr. Jones noted the PLF action in which SPB was named a respondent, and stated SPB had four options in response thereto: (1) to join PLF in urging the unconstitutionality of SEERA, (2) to remain a respondent but to agree nonetheless that SEERA is unconstitutional, (3) to remain a respondent but to take a "noncommittal" position as to the constitutionality of SEERA, or (4) to defend the constitutionality of SEERA. The deputies recommended the first option. They asserted this was the unanimous view of those in the Attorney General's office who had considered the matter, and that SPB's concurrence would add weight to that view in court proceedings because of SPB's administrative expertise in concerned areas.

SPB deliberated the matter in executive session. It unanimously concluded to remain a respondent and to continue to assert the constitutionality of SEERA. When so advised, the deputies suggested the Attorney General might initiate an independent action challenging the constitutionality of SEERA. While representatives of the Attorney General's office did not meet with other respondents, within a few days of the meeting with SPB the Attorney General informed by letters to the Governor, the Controller and the SPB that in the Attorney General's view SEERA was unconstitutional and that he would commence an independent action for a judicial declaration. The Attorney General consented in the letters to the use of other counsel by the addressees. (Gov.Code, § 11040.)

There was no impropriety in the conduct of representatives of the Attorney General in meeting with SPB. The representatives did no more than inform SPB of the Attorney General's opinion concerning the constitutional invalidity of SEERA, seek the support of SPB and advise of the possibility of an independent action by the Attorney General. Indeed, the Attorney General acted well within his duties and responsibilities in asserting an opinion that SEERA was unconstitutional. His nonjudicial opinions are "accorded great respect by the courts." (*Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 752, 493 P.2d 1154.) The most relevant court decision then appeared to support his conclusion. (See *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal. App.3d 52, 56, 143 Cal.Rptr. 393.) The merits of the constitutional issue were neither stated nor discussed. The Attorney General sought no information from, and none was given by, SPB other than its status as a party in the action or actions. The Attorney General forthrightly stated his position and reasons for approaching SPB. He gained no advantage and SPB suffered no disadvantage or prejudice. This has been conceded by all parties to the action.

The final claim of misconduct is likewise wholly without significance. The fact that deputies who had earlier represented SPB are active in prosecuting the Attorney General's action against SPB and others raises no issue of a breach of confidence. The Attorney General's position on the merits in these proceedings was made clear at the outset and we are referred to neither specific advantage gained nor confidence breached. Again, this has been conceded by the parties.

In asserting disqualification the Governor relies on rules 4-101 and 5-102(B), Rules of Professional Conduct. Rule 4-101 provides: "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client,

relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client." Certainly no one can claim in good faith that the Attorney General obtained confidential information by directing his September 20 1977, letter to the Governor. In requesting and attending the January 30, 1979, conference with SPB, and in utilizing the deputies who had participated in that conference to conduct these proceedings, the Attorney General neither sought to gain nor gained, directly or indirectly, any confidential information.

The reason for the foregoing meeting becomes clear from a communication to the Court of Appeal by the Attorney General four days before the meeting with SPB. In seeking an extension of time to respond to the PLF petition, the Attorney General stated that the petition raised potential conflicts of interest among the various respondents, and that neither these conflicts nor representations by the Attorney General of the various respondents, had been resolved. The SPB meeting was essential to the Attorney General's determination of which, if any, agencies and offices he could represent. The office of the Attorney General approached SPB first as most likely to agree with PLF because SPB had only one year earlier forcefully argued its exclusive constitutional right to deal with the fixing of salaries for state employees. (See *Fair Political Practices Com. v. State Personnel Bd.*, supra, 77 Cal.App.3d at p. 56, 143 Cal. Rptr. 393.) The Attorney General thus had sound reason to believe SPB would join him in rejecting SEERA.

I find it significant that SPB itself raises no claim that—because of the conference or the prior representation by certain deputies—a confidence has been breached or that there is any impropriety in the Attorney General's conduct and participation in these proceedings. The Governor's reliance on cases dealing with disqualification of private attorneys pursuant to rule 4-101, is misplaced. When a public attorney is required by law to fulfill his legal duty of representing public officials or agencies in exercising exclusive control of civil litigation, the usual attorney-client relationship does not prevail within the reasonable meaning of rule 4-101. (*Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 34, 138 Cal. Rptr. 532.) In similar fashion it has been held that a county counsel was not disqualified from representing in their official capacities county officials sued by the county assessor—whom the county counsel had previously represented—for defamation and violation of civil rights. (*Ward v. Superior Court*, supra, at p. 34, 138 Cal.Rptr. 532.)

As an *alternative ground* for the holding in *Ward* that "no attorney-client relationship existed between the county counsel and [the county assessor] within the meaning of rule 4-101," the court further observed: "The purpose of rule 4-101 forbidding an attorney from accepting employment adverse to a former client is to protect the former confidential relationship. Thus the rule does not apply where an attorney accepts employment adverse to a former client if the matter bears no relationship to confidential information acquired by the attorney as a result of the former attorney-client relationship." (*Id.*, at p. 34, 138 Cal.Rptr. 532.) Accordingly, the Governor's complete failure to establish that any confidences obtained by the Attorney General in his former attorney-client relationships bear on the merits in these proceedings is thus fatal to the motion for disqualification pursuant to rule 4-101. In fact, the issues raised on the merits of these proceedings are pure issues of law, the only question being whether a legislative enactment infringes on a constitutional proscription. There is no "confidential information" in the possession of respondents which—whether or not conveyed to the Attorney General—might have any bearing on resolution of these constitutional issues.

For reasons similar to those which render inapplicable rule 4-101 in the circumstances of these proceedings, rule 5-102(B) is also not controlling. This latter rule provides that a "member of the State Bar shall not represent conflicting interests, except with the written consent of all parties con-

cerned." The Attorney General is not, of course, representing conflicting interests in these proceedings. While it is true that he has represented or now represents clients whose interests are in conflict with those of the Attorney General as representative of the public interest, such conflicts are inherent in the applicable law pursuant to which the Attorney General must conduct himself. In his "dual role as representative of the state agency and guardian of the public interest" (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d 1, at p. 15, 112 Cal.Rptr. 786), he may be called upon to make determinations and decisions which, while consistent with the interests of one "client," are in conflict with those of another. In such a case he must serve "his paramount duty to represent the public interest," withdraw from his other representations and consent to their employment of special counsel. (*Id.*) The Attorney General has conducted himself accordingly. Indeed, it is difficult to chart a course of conduct more consistent with legal requirements than that engaged in by the Attorney General whom the Governor seeks to disqualify.

The Governor's assertion that rule 5-102(B) is applicable to the Attorney General in these circumstances, if correct, would result in the disqualification of the Attorney General in every instance where he had—prior to taking action against a public official or agency guilty of some illegal or misfeasance—represented or counseled that official or agency on an independent matter. It is manifest that rule 5-102(B) is not intended to so handcuff the official who is constitutionally described as the "chief law enforcement officer of the state" and who frequently is the sole representative of the public interest. The Attorney General's role, being grounded in the common law (*D'Amico v. Board of Medical Examiners*, supra, 11 Cal.3d, at p. 14, 112 Cal.Rptr. 786), is thus similar to that role fully recognized in sister states. Thus, the Supreme Court of Massachusetts has held that the Attorney General, in exercising his "'common law duty to represent the public interest'" in a manner contrary to dictates of a public agency he normally represents, is not to be "constrained by the parameters of the traditional attorney-client relationship." (*Feeney v. Com.* (1977) 373 Mass. 359, 366 N.E.2d 1262, 1266; see also *Conn. Com'n v. Conn. Freedom of Information* (1978), 174 Conn. 308, 387 A.2d 533, 537 ["This special status of the attorney general—where the people of the state are his clients—cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office."]; *E. P. A. v. Pollution Control Bd.* (1977), 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50; *Commonwealth ex rel. Hancock v. Paxton* (Ky.1974) 516 S.W.2d 865.)

The record establishes that the Attorney General has conducted himself with the professionalism required of his office, particularly in view of the usual difficulties attending a transition which occurred in that elective office in January 1979. No cause appears for his disqualification, which would thereby deprive the people of any legal representation in these important proceedings.

The Governor's motion should be denied.

Rehearing denied; RICHARDSON, J., dissenting.

172 Cal.Rptr. 487

PACIFIC LEGAL FOUNDATION et al., Petitioners,

v.

Edmund G. BROWN, Jr., as Governor, etc., et al., Respondents;

California State Employees' Association et al., Interveners.

S.F. 24168.

Supreme Court of California, In Bank.

March 12, 1981.

Rehearing Denied April 22, 1981.

Public interest law organization and employee organization sought peremptory

Volume 4, Number 1 Spring 1988 Price $5.00

The Alaska PUBLIC AFFAIRS JOURNAL

A Quarterly

UNIVERSITY OF ALASKA SOUTHEAST

The Alaska Attorney General: Elected or Appointed?

by Norman C. Gorsuch

The office of state attorney general can either strengthen or check the executive branch. The Alaska attorney general plays a significant role in public policy-making. Currently, Alaska's governor appoints the state attorney general, and until the argument about the range of executive power is settled, the controversy about the the office's election or appointment will persist.

A History and Description of the Office of the Attorney General

The first office of the attorney general was created in 1461 when the King of England appointed a person to direct all of his representatives who appeared in the royal courts. The common law decisions of these courts defined the attorney general's duties, which, in essence, were to protect the royal property, prerogatives, and revenue, and to prosecute those persons accused of committing crimes. Examples of these duties included recovering for damages done to royal property, regulating public charities and trusts, repealing grants and patents, and prosecuting misdemeanor and felony crimes. By 1700, the attorney general was accorded membership in Parliament to explain crown legislation. [1]

When the American Colonies were settled, colonial attorneys general were appointed by the royal governors and were deemed to exercise all of the common law powers inherent in the office of the attorney general of England. After the Revolutionary War, the new state courts decided that the common law powers exercised by the Attorney General of England and discussed above were an inherent part of the office of state attorney general. In addition, most states ratified this grant of powers in state constitutions or statutes. [2]

The method of selecting state attorneys general evolved in stages. Prior to Andrew Jackson's presidency, most states provided for the appointment of the attorney general by the governor or legislature. With the advent of Andrew Jackson's presidency, the concept of sovereign democracy emerged. The people were seen as the source of sovereign power, and they exercised it through popularly elected officials. In the late nineteenth century, states began to require the election of the attorney general. Today, 44 states elect the attorney general. Of the six states that appoint the attorney general, most provide for appointment by the governor, and some by the legislature or the state supreme court. [3]

With the evolution of sovereign democracy, state courts decided that state attorneys general now represented the rights, prerogatives, and interests of the general public in carrying out their common law duties of office. In effect the courts substituted the public for the king as the client of the attorney general, thus giving the attorney general the power to protect public prerogatives, property and revenue. Indeed, there are several state supreme court opinions which hold that an attorney general may bring any action in court deemed necessary to enforce or protect any public right or interest and as a corollary power may exercise virtually plenary discretion in the disposition of such action. However, while state attorneys general possess these common law powers, state constitutions or statutes may limit or preclude the exercise of some or all of them. [4]

Another development in the United States has been the expansion of the

powers of state attorneys general through the delegation of direct statutory grants of authority by the various state legislatures. For example, in most states, there are anti-trust and consumer protection trade regulation laws and the power to enforce them is delegated by most legislatures to the attorney general. [5]

Finally, the office of the state attorney general has been strengthened as an advocate for the people on a broad range of issues for reasons relating to its institutional characteristics. First, the office possesses a firm place in the tradition of English and American institutions; second, the office is a statewide one and, therefore, it has the advantages and disadvantages of statewide exposure and argument; third, the office is also closely connected to the state's political chief executive through the powers to give legal counsel to state agencies and to represent them in litigation; fourth, the office has a close connection to the judicial system; and fifth, the office is staffed by attorneys, and thus, a natural power base exists in the legal community of the state based upon the professional relationship among members of the Bar. [6]

The Role of State Attorneys General in Public Policy Decisions

It is practically impossible to make any public decision without knowing first, the legal parameters within which the agency or public official may act; and second, the adverse legal consequences of proposed courses of action within those parameters. For example, actions outside the scope of a public official's statutory powers could expose the official to personal liability for any damages caused as a result of the action.

Frequently, the practical boundaries of these legal parameters are determined by political constraints. Thus, in many public decisions involving legal issues, attorneys general play a significant indirect role through furnishing legal advice to help public officials balance the adverse legal consequences of their decisions within those politically imposed parameters. An example of this balancing occurs when deciding what can constitutionally be done to ensure local Alaskan hire by out-of-state companies when the most direct way to do so through mandating it by statute is unconstitutional based on cases decided by the Alaska and U.S. supreme courts. In this area, the legislature enacted a bill allowing the Alaska commissioner of labor to designate economically distressed zones based on economic and employment characteristics and require local hire on public projects within those zones. The bill was drafted with the state attorney general's advice. It was not totally politically acceptable, but was the best legal position constitutionally permitted based upon U.S. Supreme Court opinions. Even this new one has been challenged by a contractor as unconstitutional. Therefore, this issue will once again be reviewed by the appellate courts.

The legal advice given to state officials engaged in making these public decisions is frequently found in advisory opinions, a written memorandum from the attorney general which answers a question of law posed by any public official in the state executive or legislative branch of government. This mechanism, next to oral advice, is the most frequently utilized tool in public legal practice and plays an important role in policy decisions.

The legal status of opinions by attorneys general has been interpreted frequently by the courts. This status varies from state to state. The judiciary and the legislature generally treat them as persuasive, but not controlling on the legal issues they address. Several state courts and some state statutes provide that public officials of the executive branch are bound by them. Even where they are not recognized as binding on executive branch officials, most recipients follow them. The advantages in complying with them are, first, it can shield the official from the political consequences of a decision; and second, it allows the public official to retain official immunity from any personal liability for actions taken in reliance on the opinion. [7]

The Powers, Duties and Role of the Attorney General in Other States

The powers and duties of other state attorneys general range from a maxi-

In Support of Election:
"An elected attorney general would be 'the people's attorney' and function as an ombudsman and watchdog for them."

mum of highly centralized, exclusive authority to provide legal counsel to the state, litigate on behalf of the state and prosecute crimes to a minimum of shared state legal authority with no statewide criminal prosecution jurisdiction. For example, state attorneys general do not possess statewide criminal prosecution jurisdiction with the exception of Delaware, Rhode Island, and Alaska. In other states criminal prosecution is conducted by elected or appointed municipal, county or city district attorneys.

In addition, attorneys general usually do not have exclusive authority to represent the state in litigation or to be the exclusive legal advisor to state agencies. In many states, the governor's office has its own general counsel and many state agencies have their own house counsel. In those states, the attorney general represents the governor or agencies only in court. Legal advice to the governor or agency prior to litigation is furnished frequently by house counsel. In most states, while the attorney general issues official opinions upon request and thus, can influence public policy decisions; frequently, the attorney general does not play a significant policy making role within the state administration because the attorney general is a competing elected official. Exceptions to this situation exist when the governor and attorney general are political allies, share the same philosophy, or are personal friends. [8]

The Powers, Duties and Role of the Attorney General of Alaska

In Alaska, the attorney general is a member of the governor's cabinet. As such, he performs such advice functions as the general counsel to the governor and state officials. Thus, the attorney general plays a constant role in the development and formulation of public policy on a wide range of issues.

In addition, the Alaska Supreme Court has stated that the attorney general has the exclusive authority in the state government to make any and all decisions relating to the disposition of any state litigation and the exercise of this discretion by the attorney general within constitutional bounds is not subject to judicial review. However, in order to maintain good attorney-client relations, the attorney general rarely exercises such authority without consultation with and concurrence by the state agencies involved. In major cases, the attorney general also consults with the governor and, if necessary, the legislature. [9]

The Alaska attorney general is appointed by the governor, confirmed by the legislature, and serves at the pleasure of the governor. In Sections 44.23. 010-060 of the Alaska Statutes, the legislature created the Office of the Attorney General as Chief of the State Department of Law and vested that department with certain powers. Those powers are as follows:

1. Possession of authority as the exclusive legal advisor to the state executive branch of government, exercising this power through the drafting or reviewing of all executive branch legal instruments and legislation, and the rendering of legal opinions;
2. Representation of the state in all civil litigation;
3. Prosecution of all violations of state criminal laws;
4. Initiation of actions to collect state revenue;
5. Recommendation to the legislature of necessary changes in the laws;
6. Promotion of uniform laws adoption;
7. Preparation of information on landlord and tenant rights;
8. Possession of exclusive authority to enforce the consumer protection and anti-trust laws; and
9. Possession of all common law powers generally inherent in the office of the attorney general. Thus, the Alaska attorney general is an example of the highly centralized exclusive legal authority model.

Arguments in Support of Electing the Attorney General

The theme in the arguments supporting the election the attorney general is a simple one focusing on the independence that direct election would give the office. An elected attorney general would be "the people's attorney" and function as an omsbudsman and watchdog for them. Independent

election would mean that the attorney general was not the creature of a particular administration. As such, the attorney general would be free to render legal opinions solely on the basis of the law and not as a legal advocate for the administration. In addition, it is argued that an elected attorney general would be free to oppose policies of the state government that are considered inconsistent with the law and to investigate and prosecute apparent wrongdoing both in and out of government without fear or favor. [10]

Also, it is argued that the attorney general is elected in 44 states and the concept appears to be working in those jurisdictions. Some also argue that the attorney general's work is in areas where the governor has little or no interest, such as consumer protection, antitrust enforcement, and criminal prosecution. Thus, much of the work does not interfere with the executive responsibilities of the governor's office so that the results of the electoral competition are not as severe as supporters of the appointment process argue. It is also argued that if a governor wants house counsel to furnish legal advice to the governor's office, most governors can appoint such staff counsel. Furthermore, proponents of election argue it is not even necessary for the attorney general to act as general counsel to the governor's office. In addition, some also argue that because of the legal power of the office, an attorney general's duties are of a higher order, similar to that of a judge, and therefore, the attorney general should have the elected independence of a judge. [11]

Arguments In Support of Appointing the Attorney General

The arguments in opposition to the election of the attorney general and in support of appointment by the governor are more complex because of the need to discuss how an appointed attorney general impacts the structure and relationships within the executive branch of state government. The focus of the argument is based upon the need to strengthen the executive branch of government through the appointive power of the chief executive. [12]

Proponents of the appointment process believe that good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive, and unified team to carry out the responsibilities of the executive branch of government. Thus, the political accountability for actions of the executive branch and the executive responsibility for those actions are lodged in the office of the governor. It is clear where the responsibility lies and the governor is the one answerable to the public. [13]

In addition, they argue that when governors are forced to deal with a competing elected attorney general, there may be some question as to whether or not the advice, no matter how wise or legally sound, will be taken or looked upon with suspicion and hostility, thus giving rise to conflict. This is because the governor and attorney general would be bringing different policy perspectives to the same public issue. These perspectives may be rooted in different constituency bases. As both are elected, neither one can be considered a final authority to resolve the issue.

Some argue that electing the attorney general can delay the policy resolution process. They point out that in many states with an elected attorney general, governors appoint their own general counsel and, in addition, house counsel are appointed frequently by state agencies accountable to the governor. These house counsel may provide conflicting legal advice to that of the elected attorney general. The effect of this conflicting advice can be to delay resolution of those issues within the executive branch. In addition, whenever there is litigation involving state agencies, house counsel may file friend of the court briefs or otherwise intervene in court asserting a position on legal issues different from that of the elected attorney general. Proponents of the appointment process argue that those different positions can confuse the legislature, the public, and the courts on the executive branch policy. [15]

Advocates of appointing the attorney general also argue that electing the attorney general will increase state operating budgets. First, the governor

In Support of Appointment:
"Good management requires an appointed attorney general so that the governor can have a philosophically compatible, cohesive and unified team . . . "

will insist on a general counsel and house counsel fo. agencies that are responsible to the governor's office. Thus, it will be necessary to pay for an additional layer of attorneys in the executive branch. Second, in order to maximize the perceived benefits of election, the elected attorney general must have additional, duplicate, independent support staff, not answerable to the governor, to execute personnel, budget, and other administrative policy or the governor could unfairly infringe on the attorney general's independence of action.

In response to the argument that only an elected attorney general can investigate and prosecute wrongdoing in state government with the appropriate degree of independence, proponents of the appointment process argue that the attorney general is not the governor's personal lawyer but the attorney for the institution of the governor's office.

Also, they point out that as a member of the legal profession, the attorney general is affiliated with the judiciary and functions as an officer of the court. Thus the appointed attorney general possesses the pre..quisite professional independence from the governor. They believe that the appointed attorney general is capable of investigating all officials of the executive branch of government, including the governor, and prosecuting wrongdoing if necessary.

This is because of constraints placed upon the holder of the office by the statutes, regulations, rules of court, and canons of professional and prosecutorial ethics which require the attorney general to act in these criminal matters based only upon the evidence, the law, and the canons. They also believe that to make decisions in these matters based upon personal and political reasons exposes the appointed attorney general to charges of obstruction of justice and the possibility of suspension or disbarment from the legal profession.

Subsidiary arguments in support of appointing the attorney general can also be made. Some argue that appointed attorneys general do "represent the public" and the misperception that they do not is created because they have no need to generate favorable publicity by constantly calling attention to external achievements in order to create an image as "the people's attorney." It is also argued that the appointed attorney general acts just like an omsbudsman through the rendering of legal advice to state officials as a member of the governor's team. This advice helps to ensure that these officials comply with the statutes and regulations governing their programs, and enforce fairness and impartiality in government dealings with the public.

Another argument in support of appointment is that an elected attorney general must allocate time to fund raising and other political activities, thus detracting from that required to manage the attorney general's office and resulting in a reduced credibility for the office because it will be perceived to be too "political." Legal opinions issued by an appointed attorney general are likely to be more professional because there is no need to pay attention to political polls when considering legal issues.

Some argue that interpreting the law and running a large law office are essentially technical tasks and it is not necessary that the official charged with these duties be elected. Also, it is believed that highly qualified attorneys would not become attorneys general if they had to run in a statewide election.

Finally, those who argue for appointment also have some tradition on their side. They state that no one has ever seriously suggested electing the United States attorney general. They believe that the people do participate in the selection of the appointed attorney general through their legislator when the legislature conducts the confirmation process, not unlike the advice and consent of the U.S. Senate over presidential nominees for attorney general. [16]

Conclusion

The underlying issue in these arguments is how the election of the Alaska attorney general affects the balance of power among the branches of state government and the policy-making process within the executive branch of government. In essence the argument revolves around whether one believes in a strong or weak executive branch

of government. The current strength of the Alaska executive in exercising its authority is its ability to speak with one voice. When the attorney general is elected, the ability of the executive branch to speak with one voice to the legislature, the judiciary and the public is altered and the accountability for executive branch actions is split. If one believes that the power of the executive branch should be divided or decentralized through direct electoral accountability of some of its parts, then one generally supports election of the attorney general.

An elected attorney general has specific constitutional and statutory duties of an executive nature. Those duties may include litigating civil law suits to enforce compliance with state law and to protect state interests and prosecuting violations of state criminal law. Both civil and criminal enforcement are based on the police power to protect the health, welfare and safety of society. These enforcement functions are a key element of executive authority, in essence, the power to force compliance with the law.

If the attorney general is elected, this power to enforce state law will be split between two elected officials. Those who support election believe this split serves to check potential abuses of executive power and makes the executive more responsive. Those who support appointment believe this system leads to frustration, delay, and a lack of responsiveness by the executive branch of government. Thus, depending on one's philosophy of government, the same facts are viewed quite differently. As the discussion demonstrates, this debate is really about two different views of state government and is not new in our history. The historical development of state constitutions in the country reflects this quandary of a strong versus a weak executive. Debate over the election of the attorney general is only a part of this larger issue. *-APAJ-*

References and Notes

(1) *See generally* State v. Finch, 280 P. 910 (Kan. 1928); A. Sill (Attorney General of New Jersey), *Common Law Powers of the Attorney General* 1-6 (1967); 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8 (1980). In addition, the common law powers of the attorney general eventually were summarized in Blackstone. Blackstone concluded that the attorney general could investigate and prosecute actions necessary to protect the real property of the King, review lands and chattels that should be held by the King, repeal royal grants or patents, recover for damages done to royal property, possess unclaimed property, examine the basis of an individual's claim to office, franchise, or privilege, compel admission and remission of a properly appointed official to his office, ensure proper maintenance of public charities and trusts, and initiate, without prior indictment by grand jury, misdemeanor; criminal prosecutions and, after grand jury indictment, felony prosecutions. 3 W. Blackstone, *Commentaries* 27, 257-64, 427; *see* A. Sills, *supra*.

(2) People v. Kramer, 68 N.Y. Supp. 383, 386 (1900); National Association of Attorneys General, *Powers, Duties and Operations of the State Attorneys General* 77-79 (1977). A partial listing of the common law powers found to be inherent in the office of the attorney general by several state court decisions can be summarized.

Attorneys general have the power to: 1) Recover damages for unlawfully removed sand and gravel from state tidewater lands; 2) Abate public nuisances through equitable actions; 3) Intervene in lawsuits over contested wills when the state has a possible interest; 4) Challenge a reduction of state tax assessments; 5) Institute actions to collect unpaid taxes and premiums for a state worker's compensation fund; 6) Seek removal of public officials for misconduct in office; 7) Proceed in equity to cancel the fraudulent registration of voters; 8) Enforce the restricted provisions of a deed from the state; 9) Enforce public and charitable trusts; 10) Bring suit to cancel a fraudulently procured United States patent for either land or an invention; 11) Intervene when the constitutionality of a state statute is attacked; 12) Challenge the constitutionality of a state statute; 13) Investigate criminal activities and appear

"In essence the argument revolves around whether one believes in a strong or weak executive branch of government."

before a grand jury; 14) Institute and dismiss criminal proceedings; 15) Supercede the local district attorneys in criminal prosecutions; 16) Make any bona fide disposition of these actions that in his or her judgment would be in the best interest of the public. A. Sills, *supra*, at 8-9.

(3) NAAG, *supra*, at 77-79.

(4) 7 Am. Jur. 2d *Attorney General* Sec. 9, at 7-8; Sec. 18, at 22-23. See Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975); State ex rel. Shevin v. Yarborough, 257 S.2d 891 (Fla. 1972); State v. Finch, 280 P. 910, 911-12 (Kan. 1929); Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 149 A. 263 (N.J. 1930).

(5) *See, e.g.*, AS 45; *see generally* National Association Of Attorneys, *Powers, Duties and Operations of State Attorneys General* (1977)

(6) *See generally* T. Morris and W. Thompson, *The Attorney General as Public Advocate* 2 (1985).

(7) National Association of Attorneys General, *Representing State Agenies* (1979); 7 AM. Jur. 2d *Attorney General* Sec. 11, at 10-12.

(8) *See generally* National Association of Attorneys General, *The Structure of State Legal Services* 20-38 (1977)

(9) Public Defender Agency v. Superior Court, 534 P.2d 947, 950-51 (Alaska 1975).

(10) Report of Maryland Attorney General Francis B. Birch to the Constitutional Convention of Maryland (Sept. 29, 1967); Position Paper by New York Attorney General Lewis J. Lefkowitz, Constitutional Convention Committee on the Executive Branch (June 1, 1967); *Attorney General Should Be Elected–Not Appointed*, Attorney General Clarence A.H. Meyer, Outline of Remarks, Nebraska Constitutional Convention. *See generally* National Association of Attorneys General, *Powers, Duties and Operations of State Attorneys General* (1977); transcript of testimony House State Affairs Committee on HB 456 ("an Act authorizing advisory vote by the qualified voters of the state on the question of the election of the attorney general") (Jan. 20, 1984).

(11) *See* note 10, *supra*.

(12) National Municipal League, *Model State Constitution* 65-66 (6th ed. 1963.

(13) *See generally* letter from Attorney General Norman C. Gorsuch to Senator Patrick Rodey, Chairman of Senate Judiciary Committee, discussing SJR 9 ("Elected Attorney General") (Apr. 23, 1985); transcript of testimony, House State Affairs Committee, on HB 456 (Jan. 20, 1984).

(14) National Governors Conference, Center for Policy, Research, and Analysis, *Legal Advice for the Governor* (1976).

(15) *See* note 13, *supra*.

(16) *Id.* 4

Mr. Gorsuch is a visiting Associate Professor at the University of Alaska Southeast, School of Business and Public Administration.

-APAJ-

HJR

7

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: January 30, 2007

FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 4-10-07

The STATE AFFAIRS Committee considered: **HJR 7**

HOUSE JOINT RESOLUTION NO. 7 **CONST AM: GENDER-NEUTRAL REFERENCES**

Proposing amendments to the Constitution of the State of Alaska to avoid the use of personal pronouns and similar references that denote masculine or feminine gender in that document.

Recommends it be replaced with | | **HCS** *or* |X| **CS** *for* HJR 7 (STA)
*For Senate Bills with new title: / / Technical Title / / New Title: HCR*_____ | | Same Title | | New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
OOG		X		

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Johnson			X	
	JOHANSEN			X	
	ROSES	X			
	Gruenberg	✓			
	Coghill			✓	
	Dull	✓			
Chair:	LYNN	X			
Chair:					

library

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 5101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 4, 2007

SUBJECT: Does HJR 7, proposing amendments to the Constitution of the State of Alaska to avoid the use of personal pronouns and similar references that denote masculine or feminine gender in that document, constitute a "revision" of the state constitution? (Work Order No. 25-LS0429\A)

TO: Representative John Coghill Jr.

FROM: Jack Chenoweth
Assistant Revisor

The inquiry from Carol Beecher of your staff to Tam Cook asking for an answer to the above-captioned question has been referred to me for preparation of a response.

Any proposal for a constitutional amendment raises a question as to whether or not the proposed amendment would survive scrutiny under *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). The decision in *Bess* established that the legislature's power to propose a change in the text of the state constitution is limited to amendments that are "few, simple, independent, and of comparatively small importance."[1] The legislature lacks authority, the court concluded, to propose changes to the document's "substance and integrity." Changes of that magnitude would have to be prepared and offered by a constitutional convention as revisions. The standard that the court fashioned relates that:

> . . . an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof [while] even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.

---

[1] The court prefaced its analysis by noting that, in its view, the framers' distinction between an amendment and a revision was intended to be substantive, and concluded that:

> a revision is a change which alters the substance and integrity of our Constitution in a manner measured both qualitatively and quantitatively.

Bess, 985 P.2d at 982.

> The process of amendment, on the other hand, is proper for those changes which are "few, simple, independent, and of comparatively small importance." The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole.

Bess, 985 P.2d at 987 (notes omitted).[2]

The *Bess* standard spoke of evaluating an amendment's qualitative and quantitative effects.

Quantitatively, the material in the proposed amendment arguably fails at least part of the standard. The proposed changes are, admittedly, not clearly "few," nor, it may be contended, are they "independent." On the other hand, the material proposes changes that are "simple" -- the amendment is confined to a series of technical changes affecting singular masculine personal pronouns and a handful of gender-related terms. At least when compared to the much more significant questions of assigning powers among the branches of government, limiting the exercise of institutional authority, or providing protection of individual rights, for example, HJR 7 does not propose to make fundamental changes in the scheme or plan of operation of the state government. Indeed, in that context, the modifications set out are of relative unimportance.

Qualitatively, it is my observation that nothing in the accompanying document would "substantially alter the substance and integrity of the state Constitution as a document of independent force and effect." *Bess*, 985 P.2d at 987, quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990) (note omitted). The material in the resolution is arguably wholly technical and not intended to make a substantive change in a matter of constitutional law.

On balance, I am satisfied that, if challenged, the court could conclude that the absence of qualitative change within the proposed amendments as set out and, despite the number of sections affected, the relatively insignificant incidental effect on the integrity of the document as a whole would allow the material to be treated through the amendment process rather than as a revision.

JBC:lmb
07-097.lmb

---

[2] The court's preliminary opinion in the *Bess* matter looked at the qualitative standard from a different perspective, indicating that changes that are "few and simple and independent" are permissible amendments while "sweeping change" requires revision. In that preliminary opinion, the court identified four factors that suggest that a particular proposal is a valid amendment: it (1) "is simple to express and understand"; (2) "is complete within itself"; (3) "relates to only one subject"; and (4) "does not substantially affect numerous other sections of the constitution . . . ." Preliminary Opinion and Order, at paragraphs 10 and 12. The four factors identified by the court in the preliminary opinion amount to a first effort to frame a quantitative analysis.

Alaska State Legislature

Interim:
600 E. Railroad Ave
Wasilla, AK 99654

Phone: (907) 376-3725
Fax: (907) 376-4768

Session:
Alaska State Capitol, Rm 108
Juneau, AK 99801-1182

Phone: (907) 465-3743
Fax: (907) 465-2381
Toll Free: (800) 565-3743
Rep_Carl_Gatto@legis.state.ak.us

Representative Carl Gatto

Co-Chair, House Resources Committee
District 13 - Palmer

SPONSOR STATEMENT
HJR 7

"Proposing amendments to the constitution of the State of Alaska to avoid the use of personal pronouns and similar references that denote masculine or feminine gender in that document."

HJR 7 removes all masculine or feminine terms from the Constitution of the State of Alaska. This resolution deletes the terms "his," "him," and "himself" and replaces them with terms as "oneself," "Governor," "Governor-elect," "Lieutenant Governor," "Legislator," "members," "executive," "justice or judge," "voter," "person's," "auditor," and "accused." Other changes that occur make the sentences grammatically correct.

Some of our oldest and youngest states in the union such as New York and Hawaii have amended their constitutions to reflect gender neutrality. The framers of our constitution went to great lengths in the construction of the Constitution to recognize gender equality and it is in that spirit and as a continuation of their leadership that we seek to modify our constitution in recognition of the progress in our society and culture.

This resolution is before us now because it is time for us to recognize a significant moment in Alaska history, a time when we elected our first female Governor. The administration fully supports this effort.

I ask for your support.

TOP STORY

THURSDAY, APRIL 03, 2003

States Balance He's And She's

By Kathleen Murphy, Staff Writer

Michigan's governor is a woman but the state constitution refers to Democrat Jennifer Granholm as "he."

Michigan Rep. Lisa Wojno, D-Warren, wants to change the constitution to gender-neutral language, following the lead of Rhode Island, Maine, Vermont, New York, California, Florida and Hawaii. New Hampshire lawmakers are also considering the change.

Women won the right to vote through the 19th Amendment to the U.S. Constitution in 1920, and many had secured full voting rights by constitutional action in states such as Colorado much earlier. But many state constitutions never envisioned that women would hold political office.

Making these constitutions more inclusive has been unwelcome in places where it's seen as political correctness run amok. Nebraska voters rejected adding gender-neutral language to the state constitution in 2000. Minnesota lawmakers considered the change in 2001 but didn't adopt it.

In New Hampshire, gender-neutral reform failed in 1998 and has met resistance this year. Critics said changing the constitution is unnecessary because legally it's already interpreted to include men and women. They said the constitution is a sacred historical document that shouldn't be reworded.

Theresa de Langis, executive director of the New Hampshire Commission On The Status Of Women, said women's role in state government is made invisible by the constitution's non-inclusive language.

"State constitutions are living historical documents that need to reflect the day and time in which they are protecting their citizens. Sexism in any form, just like racism and slavery, is wrong and should be struck from our governing documents," de Langis said.

New York voters approved gender-neutral language in 2001. In 170 places, "she" was added where there had only been a "he." Terms such as fireman and policeman were changed to firefighter and police officer. "Mankind" changed to "humankind."

New York's ballot measure overcame opposition from the Conservative Party which urged voters to reject it as frivolous "feel-good legislation" that accomplishes nothing.

New York Assemblywoman Sandy Galef, D-Ossining, a driving force behind the changes, said, "My response to people who said that was, what would happen, as a man, if the constitution was written all about women? Wouldn't you want it changed to reflect that there are men involved too in the state? Then they'd come along on board."

In Michigan, Rep. Wojno's gender-neutral resolution could be on the statewide ballot this year if two-thirds of the House and Senate approve it.

But Michigan's Gov. Granholm is more concerned with the state's bottom line than gender-neutral words.

Granholm press secretary Liz Boyd said, "We don't have a position on that as long as a change in the constitution doesn't cost us any money."

Contact Kathleen Murphy at kmurphy@stateline.org

ISSUES AND TOPICS

Issues: Politics

COMMENTS

There are no comments yet, would you like to add one?

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HJR007-OOG-DOE-4-02-07
Bill Version: HJR 7
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG

Title: Constitutional Amendment to avoid the use of personal pronouns and similar references...
RDU: Elections
Component: Elections

Sponsor: Representative Gatto
Requester: House State Affairs Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		1.5				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

If this amendment appears on the 2008 ballot, the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, is $1.5. Should the addition of this question require the printing of an 8-1/2 by 18-inch ballot, the cost will increase to $22.0.

Prepared by: Gail Fenumiai, Asst. Admin. Director
Phone 465-3885
Division: Division of Administrative Services
Date/Time 4/2/2007, 8:57am

Approved by: Whitney Brewster, Director
Date 4/2/2007
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/18/2006 OMB)

ALASKA STATE LEGISLATURE

Rep. Carl Gatto

MEMORANDUM

TO: Rep. Lynn Chair House State Affairs Committee
FROM: Rep. Gatto
DATE: March 1, 2007
RE: Request for Hearing
CC:

Enclosed you will find a committee packet for HJR 7 "Proposing amendments to the Constitution of the State of Alaska to avoid the use of personal pronouns and similar references that denote masculine or feminine gender in that document." I have included a sponsor statement, the most recent version of the bill, and other supplemental information.

I would appreciate a committee hearing before the House State Affairs committee at your earliest convenience. I appreciate your time and look forward to your reply.

Please contact my staff member Sandra Wilson at ext 3163 with any questions or comments regarding this request.

Thank you

HJR

9

HOUSE COMMITTEE REPO[illegible]T

(7)
Date Referred to Committee: February 12, 2007

FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 3-27-07

The STATE AFFAIRS Committee considered: **HJR 9**

HOUSE JOINT RESOLUTION NO. 9 **CONST. AM: BENEFITS & MARRIAGE**

Proposing an amend[illegible]ent to the section of the Constitution of the State of Alaska relating to marriage.

Recommends it be replaced with | | HCS *or* **| | CS** *for* _____(_____)
For Senate Bills with new title: / / Technical Title / / New Title: HCR_____ **| | Same Title | | New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
OOG		X		

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	JOHNSON	Y			
[signature]	JOHANSEN	X			
[signature]	ROSES			X	
[signature]	DOLL		X		
[signature]	COGHILL	-			
[signature]	STOLTZE		-		
Chair: [signature]	LYNN	X			
Chair:					

ALASKA STATE HOUSE OF REPRESENTATIVES

Contact:
Interim Address:
3340 Badger Road
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4271

Session

(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 204

REPRESENTATIVE JOHN COGHILL

HJR 9 Constitutional Amendment Relating to Marriage

SPONSOR STATEMENT

HJR 9 is offered in response to the Supreme Court ruling of October 28, 2005. The Court ruled that same sex couples are similarly situated making them equal to married couples with regard to receiving health benefits from public employment. The conclusion of the Court is that spousal limitations are unconstitutional.

The people of Alaska in a constitutional amendment vote in November 1998 by a 68% margin thought the issue of marriage and its benefits for same-sex couples was settled. The plaintiffs in Brause v. Bureau of Vital Statistics treated marital status and marital benefits as inseparable, thereby recognizing that marriage is a special relationship is society and law.

AS 25.05.013(b) passed by the Alaska Legislature in 1996 prohibits any public employer from extending marriage benefits to same-sex partners so the constitutional language in HJR 9 is consistent with the will of the legislature, which is consistent with the 1998 vote of the people of Alaska.

AS 18.80.220(c) is a law ignored by the court. It is under "unlawful Employment Practices" which grants an exception to employers who "provide greater health and retirement benefits to employees who have a spouse or dependent children" enacted into law in 1996. My intent is to show the public good of a policy preserving marriage benefits as a societal value for the health of families in Alaska.

As a Representative Democracy it falls upon us to refer this to those who answer to the principle "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." Alaska Constitution, Article 1, Sec.2.

Amending our constitution is a weighty matter and should not be done lightly in my view. My interest is asking the people of Alaska if they agree with their Supreme Court, and if not, should we amend the constitution to better reflect the people's view. I appeal to you with Article 1, Section 2. This is our only recourse in answering this huge sociological question for those of us who disagree with the Court's conclusion.

STATUTE CITES FROM SPONSOR STATEMENT FOR HJR 9

Sec. ⏩25.05.013⏪. Same-sex marriages.

(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.

(⏩b⏪) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Sec. ⏩18.80.220⏪. Unlawful employment practices; exception.

(⏩c⏪) Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section,

(1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees;

(2) a labor organization may, without violating this chapter, negotiate greater health and retirement benefits for employees of an employer who have a spouse or dependent children than are provided to other employees of the employer.

Ballot Measure 2
Constitutional Amendment Limiting Marriage

BALLOT LANGUAGE

This measure would amend the Declaration of Rights section of the Alaska Constitution to limit marriage. The amendment would say that to be valid, a marriage may exist only between one man and one woman.

SHOULD THIS AMENDMENT BE ADOPTED?
Yes [ ]
No [ ]

Votes cast by members of the Twentieth Alaska Legislature on final passage:

House: 28 yeas, 12 nays, all members present
Senate: 14 yeas, 6 nays, all members present

LEGISLATIVE AFFAIRS AGENCY SUMMARY

This measure would add a new section about marriage to the state constitution. To be valid or recognized by the state, a marriage would have to be between one man and one woman.

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

[HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 42 (RLS)]

* **Section 1.** Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

> **Section 25. Marriage.** To be valid or recognized in this State, a marriage may exist only between one man and one woman.

* **Sec. 2.** The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

STATEMENT IN SUPPORT

Do you believe that marriage requires both a man and a woman? Is this a reasonable question that you should be

allowed to decide? If so, vote "YES" on the Marriage Amendment.

Ballot Measure No. 2 reaffirms and protects existing Alaska law that states that marriage is a union of "one man and one woman." This is also the law in every state in the U.S. and in all other countries.

More than two-thirds of Alaskans agree with this definition of marriage. So do most of your elected representatives. An overwhelming majority of the U.S. Congress, including all three members of Alaska's delegation, has voted to preserve marriage as a union of one man and one woman.

But a small group of lawyers and liberal activists wants to change all that. In 1995, two Anchorage men who describe themselves as homosexuals sued the State of Alaska because they were not granted a marriage license. Last February, Anchorage Superior Court Judge Peter Michalski issued a preliminary ruling in their case. Judge Michalski ruled that Alaska's "one man, one woman" marriage law may be unconstitutional because it supposedly violates the "right to privacy." No judge in America has ever before issued such a bizarre ruling.

The state Attorney General then asked the Alaska Supreme Court to reconsider Judge Michalski's ruling, and they refused to do so. So here we are. The Legislature had no choice but to place this subject before you in the form of a Marriage Amendment.

Just remember: the people of Alaska did not pick this fight. Ballot Measure No. 2 does not "target" anybody or "deny" anybody their rights. You'll hear that, but don't believe it. All Alaskans are equal before the law. But that's not what this debate is about. This debate is about who should define marriage: the people, or a handful of non-elected judges.

The activists who want to change the meaning of marriage certainly have a right to make their case. They made it before the Legislature. They lost. But instead of waiting to fight another day, they filed two unsuccessful lawsuits trying to stop this amendment from even appearing on the ballot. They don't trust the voters of Alaska.

Most Alaskans believe that marriage is a natural institution that must be preserved. Marriage is recognized by Alaska civil law, but it was not created or "invented" by Alaska law. And it shouldn't be arbitrarily redefined by non-elected judges.

We urge you to vote "YES" on Ballot Measure No. 2 and protect the institution of marriage in our society.

Senator Loren Leman
Alaska State Legislature
(907) 258-8189

STATEMENT IN OPPOSITION

Three good reasons exist for Alaskans to VOTE NO on this proposed Constitutional amendment.

It would amend Alaska's Declaration of Rights and begin to tear away at citizens' rights, making exception to the liberties, including the right of privacy, protected by our Alaska Constitution.

It would deny some groups of Alaskan citizens rights enjoyed by other citizens.

It would undercut a recent Superior Court finding which maintains the basic privacy rights of Alaska citizens.

1. We Should Not Tamper With The Alaska Constitution, Article I, Declaration Of Rights, By Proposing To Limit

Individual Liberties And Rights. Alaska's Constitution is one of the newest state constitutions and is considered a model document throughout the nation. The League of Women Voters of Alaska is extremely concerned about ballot measures, such as this one, which propose amendments to Alaska's Constitution that limit citizens' individual liberties and right to privacy.

Protect the minority from the tyranny of the majority. This is one of the most profound reasons why constitutions exist.

Ballot Measure 2 would, for the first time, write discrimination into our state Constitution. Voting NO on this measure protects the integrity of our Declaration of Rights in Alaska's Constitution against discriminatory amendments such as this. There is nothing in the Constitution that requires the State to recognize marriage between individuals of the same sex. The Constitution, as it stands now, treats all persons equally.

2. We Must Protect The Rights Of All Alaska's Citizens. The League of Women Voters of Alaska believes this proposed Constitutional amendment is in conflict with ARTICLE I, Sections 1, 2 and 22 of the Constitution as currently written. The Alaska Constitution, ARTICLE I, Declaration of Rights, provides:

Section 1. Inherent Rights. (reads in part) This constitution is dedicated to the principles that . . . all persons are entitled to equal rights, opportunities, and protection under the law . . .

Section 3. Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.

Section 22. Right to Privacy. The right of the people to privacy is recognized and shall not be infringed.

This ballot measure would weaken or abridge these critical sections of the Alaska Constitution. A NO vote would ensure that our liberties and right to privacy are protected.

3. The Checks And Balances Of Our Three-Part System Of Government (Legislative, Executive, Judicial) Must Be Preserved. A recent attempt to restrict marriage to "one man and one woman" has been found unconstitutional by a Superior Court ruling under Alaska's right to privacy law. The judicial process should be respected and the balance of powers should be maintained.

Vote No On Ballot Measure No. 2. The League of Women Voters promotes an open governmental system that protects individual liberties and right to privacy as established by Alaska's Constitution. Join us in protecting these rights for ALL citizens by voting NO on Ballot Measure No. 2.

League of Women Voters of Alaska
Wilda Hudson, President

Alaska Division of Elections Home Page

1998 Official Election Pamphlet Introduction Page

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HJR009-OOG-DOE-3-22-07
Bill Version: HJR 9
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: Constitutional Amendment relating to marriage
RDU: Elections
Component: Elections
Sponsor: Representatives Coghill, Harris, Kohring, et al
Requester: House State Affairs Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	1.5	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		1.5				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	1.5	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

If this amendment appears on the 2008 ballot, the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58 is $1.5. Should the addition of this questions require the printing of an 8-1/2 by 18-inch ballot the cost will increase to $22.0.

Prepared by: Linda Perez, Administrative Director
Phone: 465-3885
Division: Division of Administrative Services
Date/Time: 3/22/07 4:25 PM
Approved by: Whitney Brewster, Director
Date: 3/22/2007
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/18/2006 OMB)

THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA CIVIL LIBERTIES UNION, DAN CARTER and AL INCONTRO, LIN DAVIS and MAUREEN LONGWORTH, SHIRLEY DEAN and CARLA TIMPONE, DARLA MADDEN and KAREN WOOD, AIMEE OLEJASZ and FABIENNE PETER-CONTESSE, KAREN STURNICK and ELIZABETH ANDREWS, THERESA TAVEL and KAREN WALTER, CORIN WHITTEMORE and GANI RUTHELLEN, and ESTRA BENGUSSEN and CAROL ROSE GACKOWSKI,	Supreme Court No. S-10459
Appellants,	Superior Court No. 3AN-99-11179 CI
v.	OPINION
STATE OF ALASKA and MUNICIPALITY OF ANCHORAGE,	[No. 5950 - October 28, 2005]
Appellees.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Stephanie Joannides, Judge.

Appearances: Allison E. Mendel, Mendel & Associates, Anchorage, Kenneth Y. Choe, American Civil Liberties Union Foundation, New York City, New York, and Tobias B. Wolff, Davis, California, for Appellants. John B. Gaguine,

Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska. Neil T. O'Donnell, Atkinson, Conway & Gagnon, Anchorage, for Appellee Municipality of Anchorage. James M. Gorski, Hughes, Thorsness, Gantz, Powell, Huddleston & Bauman LLC, Anchorage, for Amicus Curiae The Alaska Catholic Conference. Rebecca L. Maxey, Law Offices of Rebecca L. Maxey, L.L.C., Anchorage, and Jennifer Middleton, Lambda Legal Defense and Education Fund, Inc., New York City, New York, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc. Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Amici Curiae North Star Civil Rights Defense Fund, Inc. and Marriage Law Project.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

The State of Alaska and the Municipality of Anchorage offer valuable benefits to their employees' spouses that they do not offer to their unmarried employees' domestic partners. Essentially all opposite-sex adult couples may marry and thus become eligible for these benefits. But no same-sex couple can ever become eligible for these benefits because same-sex couples may not marry in Alaska.[1] The spousal limitations in the benefits programs therefore affect public employees with same-sex domestic partners differently than public employees who are married. This case requires us to determine if it is reasonable to pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their co-workers who are married. In making this determination, we must decide whether the

---

[1] Alaska Const. art. I, § 25.

spousal limitations in the benefits programs violate the rights of public employees with same-sex domestic partners to "equal rights, opportunities, and protection under the law."[2]

The Alaska Constitution dictates the answer to that constitutional question. Irrelevant to our analysis must be personal, moral, or religious beliefs — held deeply by many — about whether persons should enter into intimate same-sex relationships or whether same-sex domestic partners should be permitted to marry. It is the duty of courts "to define the liberty of all, not to mandate [their] own moral code."[3] Our duty here is to decide whether the eligibility restrictions satisfy established standards for resolving equal protection challenges to governmental action.

We do not need to decide whether heightened scrutiny should be applied here because the benefits programs cannot withstand minimum scrutiny. Although the governmental objectives are presumably legitimate, the difference in treatment is not substantially related to those objectives. We accordingly hold that the spousal limitations are unconstitutional as applied to public employees with same-sex domestic partners, and we vacate the judgment below. We ask the parties to file supplemental memoranda addressing the issue of remedy.

II. FACTS AND PROCEEDINGS

The State of Alaska and the Municipality of Anchorage offer health

---

[2] Alaska Const. art. I, § 1. As the issue is framed in this case, we need not reach any separate question of the independent right to benefits of a same-sex domestic partner of a public employee.

[3] *Lawrence v. Texas*, 539 U.S. 558, 559 (2003) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

insurance and other employment benefits to the spouses of their employees.[4] These benefits are financially valuable to employees and their spouses. Only couples who are married are eligible to receive these benefits; unmarried couples are not eligible. The state and the municipality have offered some form of these employment benefits since 1955 and at least 1985, respectively.

The Alaska Civil Liberties Union and eighteen individuals who alleged that they comprised nine lesbian or gay couples (collectively, the "plaintiffs") filed suit against the state and the municipality in 1999, complaining that these benefits programs violated their right to equal protection under the Alaska Constitution. They alleged that at least one member of each same-sex couple was an employee or retiree of the state or the municipality, that the eighteen individual plaintiffs were involved in "intimate, committed, loving" long-term relationships with same-sex domestic partners, and that, as gay and lesbian couples, they are excluded by state law from the institution of marriage. Members of eight of the couples asserted in affidavits that they are in

---

[4] The plaintiffs' opening brief states that the benefits available for spouses of state employees include those provided by AS 39.20.360 (death benefits); AS 39.30.090 (life and health insurance); AS 39.35.450 (joint and survivor annuities); AS 39.35.535 (post-retirement health insurance); AS 14.25.010-.220 (benefits for retired teachers); and AS 22.25.010-.900 (benefits for retirees of state judiciary). These statutes do not expressly deny benefits to unmarried domestic partners, but each contains a clause expressly conferring them on an eligible employee's "spouse." The state refers to such clauses as "spousal limitations." We will sometimes use that terminology in this appeal.

No party has identified a Municipality of Anchorage ordinance containing an equivalent spousal limitation, but it is undisputed here that an unmarried domestic partner of a municipal employee is not eligible for employment benefits.

We variously refer to the challenged state statutes and municipal benefit plans as "benefits laws" or "benefits programs."

"committed relationships."[5] Their amended complaint alleged that because they are prohibited from marrying each other by Alaska Constitution article I, section 25, they are ineligible for the employment benefits the defendants provide to married couples, resulting in a denial of the individual plaintiffs' right to equal protection.

Article I, section 25 was adopted by Alaska voters in 1998. Commonly known as the Marriage Amendment, it provides: "To be valid or recognized in this State, a marriage may exist only between one man and one woman." It effectively prohibits marriage in Alaska between persons of the same sex.[6] The plaintiff employees consequently cannot enter into the formal relationship — marriage — that the benefits programs require if the employees are to confer these benefits on their domestic partners.

Put another way, the plaintiff employees and their same-sex partners are absolutely precluded from becoming eligible for these benefits. Although all opposite-sex couples who are unmarried are also ineligible for these employment benefits, by marrying they can change the status that makes them ineligible.

The plaintiffs did not challenge the Marriage Amendment in the superior court (nor do they on appeal). Instead, their amended complaint asked the superior court

---

[5] We use the phrases "domestic partnership" and "committed relationship" interchangeably to refer to relationships between adult couples who reside together in long-term, interdependent, intimate associations. We use the phrase "domestic partners" to refer to persons in these relationships. The phrase includes both same-sex and opposite-sex couples. For our purposes, "domestic partners" also includes all married couples.

[6] Section 25 does not contain express words of prohibition, but it confers validity or recognition in Alaska only on a marriage between one man and one woman. It therefore effectively prohibits marriage, or recognition of marriage, between persons of the same sex in Alaska.

AS 25.05.011(a), enacted in 1996, defines "marriage." It provides in part: "Marriage is a civil contract entered into by one man and one woman . . . ."

to declare that denying employment benefits to same-sex domestic partners violates, among other things, article I, section 1 of the Alaska Constitution, which states in part: "This constitution is dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law."

All parties moved for summary judgment. The superior court denied the plaintiffs' motion and granted the defendants' motion. The court first rejected plaintiffs' assertion that it was necessary to apply heightened scrutiny in considering their equal protection challenge; the court reasoned that heightened scrutiny was unwarranted because the state and the municipality were discriminating between married and unmarried employees, not between opposite-sex and same-sex couples. The court also determined that the only right at issue was a right to employee benefits, which it ruled was not a fundamental right. Because the court found that no suspect class or fundamental right was involved, it applied the lowest level of scrutiny to the governmental action. The court ruled that the defendants had a legitimate interest in reducing costs, increasing administrative efficiency, and promoting marriage. It then ruled that granting benefits only to spouses of married employees bore a fair and substantial relationship to those interests.

The plaintiffs appealed. Briefing on their appeal was completed and oral argument took place before the United States Supreme Court decided *Lawrence v. Texas*.[7] With our permission, the parties filed supplemental briefs discussing *Lawrence*.

---

[7] *Lawrence v. Texas*, 539 U.S. 558 (2003).

III. DISCUSSION

A. Standard of Review

We review a grant or denial of summary judgment de novo.[8] Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[9] Deciding the applicable standard of scrutiny in an equal protection challenge to an allegedly discriminatory statute presents a question of law.[10] Likewise, identifying the nature of the challenger's interest and assessing the importance of the governmental interest and the fit between that interest and the means chosen to advance it, present questions of law.[11] We will apply our independent judgment to questions of law and adopt the rule of law most persuasive in light of precedent, reason, and policy.[12] We apply our independent judgment when interpreting constitutional provisions or statutes.[13] A constitutional challenge to a statute must overcome a presumption of constitutionality.[14]

---

[8] *City of Kodiak v. Samaniego*, 83 P.3d 1077, 1082 (Alaska 2004); *Powell v. Tanner*, 59 P.3d 246, 248 (Alaska 2002).

[9] *Odsather v. Richardson*, 96 P.3d 521, 523 n.2 (Alaska 2004).

[10] *See Reichmann v. State, Dep't of Natural Res.*, 917 P.2d 1197, 1200 & n.6 (Alaska 1996); *Sonneman v. Knight*, 790 P.2d 702, 704 (Alaska 1990).

[11] *See Sonneman*, 790 P.2d at 704-06.

[12] *Hickel v. Southeast Conference*, 868 P.2d 919, 923 (Alaska 1994); *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

[13] *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 956 (Alaska 2004); *State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 858 (Alaska 2003).

[14] *Brandon v. Corr. Corp. of Am.*, 28 P.3d 269, 275 (Alaska 2001).

B. Effect of the Marriage Amendment on Plaintiffs' Equal Protection Arguments

The plaintiffs, in challenging the spousal limitations in the benefits programs, rely on article I, section 1 of the Alaska Constitution, which guarantees the right to equal treatment. It states that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[15] Often referred to as the "equal protection clause," this clause actually guarantees not only equal "protection," but also equal "rights" and "opportunities" under the law.[16]

But Alaska Constitution article I, section 25, the Marriage Amendment, states that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman." It effectively prohibits same-sex domestic partners from marrying in Alaska and denies recognition in Alaska to foreign marriages between same-sex couples.[17] We must decide as a threshold matter whether, as contended by the municipality and amici curiae North Star Civil Rights Defense Fund, Inc. and the Marriage Law Project, the Marriage Amendment precludes challenges by same-sex

---

[15] Alaska Const. art. I, § 1.

[16] *See* Alaska Const. art. I, § 1; *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003) ("We have long recognized that the Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."); *Schafer v. Vest*, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, C.J., concurring, noting that this textual difference from the Federal Constitution emphasizes that the framers meant all three guarantees).

[17] *See* Alaska Const. art. I, § 25.

Alaska voters adopted this amendment in 1998. *See* OFFICE OF THE LIEUTENANT GOVERNOR, *Alaska Constitution: Alaska Constitutional Amendment Summary*, *at* http://www.gov.state.ak.us/ltgov/akcon/summary.html. The amendment took effect January 3, 1999. *See Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001).

couples to government policies that discriminate between married and unmarried couples.

We must give effect to every word, phrase, and clause of the Alaska Constitution.[18] "[S]eemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution."[19]

The Alaska Constitution's equal protection clause and Marriage Amendment can be harmonized in this case because it concerns a dispute about employment benefits. The Marriage Amendment effectively precludes same-sex couples from marrying in Alaska, but it does not explicitly or implicitly prohibit public employers from offering to their employees' same-sex domestic partners all benefits that they offer to their employees' spouses. It does not address the topic of employment benefits at all.[20]

---

[18] *See Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 496 (Alaska 1988); *State v. Ostrosky*, 667 P.2d 1184, 1191 (Alaska 1983); *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974); CHESTER JAMES ANTIEAU, CONSTITUTIONAL CONSTRUCTION § 2.06, at 18-20 (1982).

[19] ANTIEAU, *supra* note 18, § 2.15, at 27; *see also Ostrosky*, 667 P.2d at 1190 (holding that constitutional amendment "cannot, in turn, be challenged as unconstitutional under preexisting clauses in the same document").

[20] Explicitly denying benefits to public employees with same-sex domestic partners would arguably offend the Federal Constitution. In *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court struck down on federal equal protection grounds an amendment to the Colorado Constitution that repealed all local and statewide laws prohibiting discrimination based on sexual orientation. The Court explained that in addition to merely repealing state and local laws, the amendment "prohibits all legislative, executive, or judicial action at any level of state or local government designed to protect the named class . . . ." *Id.* at 624. The Court invalidated the amendment under the rational basis standard of judicial review, reasoning that the amendment could not satisfy even the minimal level of scrutiny. *Id.* at 632. It explained that the amendment's

(continued...)

Nor have we been referred to any legislative history implying that, despite its clear words, the Marriage Amendment should be interpreted to deny employment benefits to public employees with same-sex domestic partners.[21] The Marriage Amendment could have the effect of foreclosing the present challenge only if it could be read to prohibit public employers from offering benefits to their employees' same-sex domestic partners. But nothing in its text would permit that reading, and indeed the state and the municipality implicitly assume on appeal that governments are free to offer employment benefits to their employees' unmarried, domestic partners, including same-sex domestic partners.

Because the public employers' benefits programs could be amended to include unmarried same-sex domestic partners without offending the Marriage Amendment, that amendment does not foreclose plaintiffs' equal protection claims here. That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them.

---

[20](...continued)
"disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence . . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

[21] *See Brooks v. Wright*, 971 P.2d 1025, 1028 (Alaska 1999) (stating that court looks to plain language, purpose, and framers' intent in interpreting constitution); *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999) (same); *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992) (same).

The state equal protection clause cannot override more specific provisions in the Alaska Constitution.[22] But the plaintiffs do not contend that the Marriage Amendment violates Alaska's equal protection clause. They argue not that they have a right to marry each other, but that the benefits programs discriminate against them by denying them benefits that the programs provide to others who, plaintiffs claim, are similarly situated.

Because the Marriage Amendment does not resolve this appeal, we turn to the merits of plaintiffs' equal protection arguments.

C. Challenge to the Spousal Limitations Under the Equal Protection Clause of the Alaska Constitution

Article I, section 1 of the Alaska Constitution "mandates 'equal treatment of those similarly situated;' it protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause."[23] "We have long recognized that [this clause] affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."[24]

"To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed

---

[22] *Cf. Bess v. Ulmer*, 985 P.2d 979, 988 n.57 (Alaska 1999) ("[A] specific amendment controls other more general [constitutional] provisions with which it might conflict."); ANTIEAU, *supra* note 18, § 2.16, at 27-28.

[23] *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (footnote omitted) (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984)).

[24] *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003); *see also Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 272 & n.15 (Alaska 2003).

classification and the nature of the governmental interest at stake . . . ."[25]

1. The benefits programs' distinctions between same-sex and opposite-sex domestic partners

A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently.[26] Absent disparate treatment of similarly situated persons, the law as applied to the aggrieved group does not violate the group's right to equal protection.[27] We first consider whether, as the municipality contends, there is no evidence of differential treatment, making it unnecessary to engage in a sliding-scale analysis.[28]

The plaintiffs assert that the defendant governments treat same-sex and opposite-sex couples differently. The defendants argue that their programs differentiate on the basis of marital status, not sexual orientation or gender. The municipality asserts that all married employees can confer benefits on their spouses, and no unmarried employees can confer benefits on their partners. It therefore argues that it treats same-sex couples no differently than any other unmarried couples, and that there is consequently no basis for an equal protection claim. Several courts examining similar programs have reached this conclusion.[29]

---

[25] *Malabed*, 70 P.3d at 420-21.

[26] *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 966 (Alaska 2005); *Lawson v. Helmer*, 77 P.3d 724, 728 (Alaska 2003).

[27] *Lawson*, 77 P.3d at 728; *Brandon v. Corr. Corp. of Am.*, 28 P.3d 269, 275-76 (Alaska 2001).

[28] *Cf. Shearer v. Mundt*, 36 P.3d 1196, 1199 (Alaska 2001).

[29] *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 596-97 (Cal. App. 1992); *Hinman v. Dep't of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Cal. App. 1985); *Ross v.* (continued...)

We must therefore decide whether there is a classification that results in different treatment for similarly situated people.

We agree with the plaintiffs that the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners.[30] In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs

---

[29](...continued)
Denver Dep't of Health & Hosps., 883 P.2d 516, 519 (Colo. App. 1994); *Phillips v. Wisconsin Pers. Comm'n*, 482 N.W.2d 121, 129 (Wis. App. 1992).

[30] Some heterosexual couples, such as consanguineous couples, are also prohibited from marrying and are consequently prevented from obtaining benefits. But in those instances, the relationship itself is illegal, not merely the marriage. AS 11.41.450 classifies incest as a class C felony. No Alaska statute criminalizes homosexual relationships or homosexual conduct between consenting adults, nor could it. *See Lawrence v. Texas*, 539 U.S. 558 (2003). Moreover, as discussed below, just because some other, smaller group of people is also excluded does not mean that the plaintiffs here cannot have a valid claim.

consequently treat same-sex couples differently from opposite-sex couples.[31]

2. Intent to discriminate

The state argues that an intent to discriminate is, or should be, an essential element of a state equal protection claim in Alaska. Both defendants contend that there was no discriminatory intent, or evidence of animus against gays and lesbians. Plaintiffs respond that Alaska's equal protection clause does not require a showing of discriminatory intent.

We need not resolve this dispute here because we conclude that the benefits programs are facially discriminatory. When a "law by its own terms classifies persons for different treatment," this is known as a facial classification.[32] And when a law is discriminatory on its face, "the question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory."[33]

To determine whether the benefits programs make a facial classification, we must therefore examine the meaning of the term "spouse." The United States Supreme Court, in *Personnel Administrator v. Feeney*, considered whether a state statute

---

[31] *See Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435, 442-43, 447 (Or. App. 1998) (determining that denial of employment benefits to unmarried domestic partners of employees had "disparate impact" on homosexuals).

[32] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.4, at 711 (7th ed. 2004) (emphasis added).

[33] *Hamlyn v. Rock Island County Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1133 (C.D. Ill. 1997); *see also Cook v. Babbitt*, 819 F. Supp. 1, 14 (D.D.C. 1993) ("In cases where a law or regulation makes an explicit reference to a suspect characteristic, purposeful discrimination is self-evident, and the measure is subject to challenge on its face without any evidentiary inquiry into the motives of the relevant government actors.").

granting a hiring preference to veterans violated equal protection on the basis of gender.[34] The Court concluded in part that the statute was gender-neutral because the "definition of 'veterans' in the statute ha[d] always been neutral as to gender" and that "Massachusetts ha[d] consistently defined veteran status in a way that ha[d] been inclusive of women who ha[d] served in the military . . . ."[35]

But unlike the neutral definition of "veteran" in *Feeney*, Alaska's definition of the legal status of "marriage" (and, hence, who can be a "spouse") excludes same-sex couples.[36] By restricting the availability of benefits to "spouses," the benefits programs "by [their] own terms classif[y]" same-sex couples "for different treatment."[37] Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of "marriage," the partner of a homosexual employee can never be legally considered as that employee's "spouse" and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.[38]

The next question is whether the disparate treatment is permitted under the

---

[34] *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

[35] *Id.* at 275.

[36] Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

[37] *See* NOWAK & ROTUNDA, *supra* note 32, § 14.4, at 711.

[38] We recognize that the benefits programs became discriminatory only after the legislature acted in 1996 and 1998 and the electorate adopted the Marriage Amendment in 1998. But, in our view, allowing a discriminatory classification to remain in force is no different than giving it the force of law in the first place.

sliding-scale analysis for equal protection challenges in Alaska.[39]

3. Sliding-scale analysis under the Alaska Constitution

Having resolved these preliminary issues by determining (1) that it cannot be said as a matter of law that the benefits programs do not treat public employees with same-sex domestic partners differently, and (2) that the benefits programs are facially discriminatory, we turn to the three-step, sliding-scale analysis applicable to equal protection challenges under the Alaska Constitution. This approach involves the following process:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be

---

[39] In the case of a facial classification, "there is no problem of proof and the court can proceed to test the validity of the classification by the appropriate standard." NOWAK & ROTUNDA, *supra* note 32, § 14.4, at 711.

> much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[40]

The plaintiffs advance four alternative arguments to support their equal protection challenge to the spousal limitation in the benefits programs. The first three ask us to apply a heightened level of scrutiny because the programs allegedly (1) discriminate on the basis of sexual orientation; (2) discriminate on the basis of gender; or (3) significantly burden at least one of several important personal interests. The plaintiffs alternatively contend that the programs cannot withstand even the minimum level of scrutiny, either because the governmental interests advanced are not legitimate, or because the eligibility restrictions do not bear a fair and substantial relationship to advancing those interests.

Because we conclude that the benefits programs cannot survive minimum scrutiny, we need not address plaintiffs' alternative arguments.

a. Nature of plaintiffs' interests: level of scrutiny

The first step of our analysis requires us to determine what weight to give the individual interests affected by the benefits programs.[41] Plaintiffs contend that the spousal limitations significantly burden important personal interests, such as the right to intimate association, and are therefore subject to heightened scrutiny. But because minimum scrutiny is sufficient to resolve this case, we do not need to decide whether the plaintiffs' interests are "important" or whether a "fundamental right" is affected.[42]

---

[40] *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396-97 (Alaska 1997) (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984)).

[41] *Id.* at 396.

[42] *Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003) (continued...)

Government action affecting an economic interest receives minimum scrutiny,[43] and the employment benefits at issue here are undeniably economic.

b. The governmental interests and the relationship between those interests and the means chosen to advance them

The second step of the sliding-scale analysis requires us to consider the governmental interests advanced by a challenged law.[44] Under minimum scrutiny, these interests need only be legitimate.[45] The third step requires us to evaluate the means chosen to advance the interests identified from the second step. Minimum scrutiny requires a "fair and substantial relation" between the means (i.e., the classification) and the "object of the legislation."[46]

The state and the municipality contend that they have three legitimate interests — cost control, administrative efficiency, and promotion of marriage — in limiting employment benefits to spouses and dependent children. We must therefore consider whether these interests are legitimate and, if so, whether the classification bears a fair and substantial relationship to those interests.

Cost control. The state and the municipality argue that cost control is a

---

[42](...continued)
(applying "close" scrutiny to enactment affecting "important" interest); *State , Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (observing that "strict" scrutiny is applied to enactments affecting "fundamental rights").

[43] *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999).

[44] *Planned Parenthood*, 28 P.3d at 909.

[45] *Matanuska-Susitna Borough*, 931 P.2d at 396-97 (quoting *Alaska Pac. Assurance*, 687 P.2d at 269-70).

[46] *Planned Parenthood*, 28 P.3d at 911 (quoting *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976)).

primary purpose of limiting the availability of benefits to spouses of married employees. The state explains that it must offer health insurance to attract and retain a qualified work force and that "the legislature should be entitled to take reasonable measures to control the cost of that offering." As the number of program participants increases, so does the cost.

The state also asserts that the legislature "wanted to limit participation to that small group in a truly close relationship with the employee." The municipality asserts that it decided "to limit employee benefits to a small, readily ascertainable group of individuals closely connected to the employee." These assertions indicate to us that the governmental interest here is more specific than just "cost control." Indeed, if the governments were interested in simply saving money, the companion goal of promoting marriage would seem to do the opposite. As the benefits programs succeed in convincing couples to marry or to stay married, the governments have to provide benefits to more people. This apparent tension between cost control and promotion of marriage can be harmonized by more appropriately describing the governments' interest in cost control as an interest in controlling costs by limiting benefits to those people in "truly close relationship[s]" with or "closely connected" to the employee.

We assume that limiting benefit programs to those in truly close relationships with the employee is a legitimate governmental goal. But we do not see how an absolute exclusion of same-sex domestic partners from being eligible for benefits is substantially related to this interest. Many same-sex couples are no doubt just as "truly close[ly] relat[ed]" and "closely connected" as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so. Although limiting benefits to "spouses," and thereby

excluding all same-sex domestic partners, does technically reduce costs, such a restriction fails to advance the expressed governmental goal of limiting benefits to those in "truly close relationships" with and "closely connected" to the employee.

Administrative efficiency. The state and the municipality argue that the need to efficiently administer the benefits programs justifies the spousal limitations. They argue that marriage provides a bright-line distinction that is easily applied, and that allowing employees to designate beneficiaries other than spouses will make it more difficult to administer the programs. The director of the benefits section of the Alaska Division of Retirement and Benefits explained during deposition the potential administrative difficulties that could arise if employees were allowed to designate benefits recipients other than spouses. She discussed theoretical burdens of determining who other than a spouse might be eligible for coverage. The municipality anticipates difficulty in deciding how long a same-sex relationship must last, whether the partners must reside in the same house, whether the relationship must be of a sexual nature, and when the relationship ends.

We have recognized that administrative efficiency is a legitimate governmental interest.[47] There is no doubt that making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens. But Alaska's Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be substantial.[48]

---

[47] *Wilkerson v. State, Dep't of Health & Soc. Servs.*, 993 P.2d 1018, 1024 (Alaska 1999); *State v. Albert*, 899 P.2d 103, 115 (Alaska 1995).

[48] *See Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (approving of "less speculative, less deferential, more intensified means-to-end inquiry" for traditional (continued...)

It is significant that other agencies, political subdivisions, and states provide, or have provided, employment benefits to their employees' same-sex domestic partners. The state does not dispute the plaintiffs' contention that the University of Alaska does or did so and that it adopted qualifying criteria.[49] Likewise, other states[50] and municipalities,[51] including the City and Borough of Juneau,[52] offer the same health

---

[48](...continued)
rational basis test).

[49] Under the university's plan, an employee and the employee's partner submit an affidavit stating that they are financially interdependent partners and meet certain criteria of commitment and dependency. They must meet eight criteria including: having an exclusive personal relationship with each other for at least the last twelve consecutive months and an intention to continue the relationship indefinitely; residing together at the same primary residence for at least the last twelve consecutive months and intending to reside together indefinitely; considering themselves members of each other's immediate family; being responsible for each other's common welfare; and sharing financial obligations. They must also attest that they meet at least five of a second set of eight criteria, including: jointly purchasing or leasing real property; jointly owning an automobile; sharing a joint bank or credit account; naming each other as life insurance beneficiaries; and naming each other as primary beneficiaries in each other's wills. UNIVERSITY OF ALASKA, *Explanation of Availability of Benefits Based on Financially Interdependent Relationship*, *at* http://info.alaska.edu/hr/ forms/PDF/B140-FIPExplanation.pdf (last visited June 13, 2003).

[50] *E.g.*, CAL. GOV'T CODE § 22818, *amended by* 2005 Cal. Legis. Serv. 418 (West); OR. ADMIN. R. 101-015-0005(c); WASH. ADMIN. CODE § 182-12-260. A more complete list of states that provide health benefits to domestic partners can be found in a database maintained by the Human Rights Campaign. The database can be accessed through the organization's website at http://www.hrc.org (last visited October 21, 2005).

[51] According to the Human Rights Campaign's database, 130 cities and counties offer domestic partner benefits. As of October 21, 2005, the cities and counties included, for example, Atlanta, Broward County, Chicago, Denver, and New York City. *See* ATLANTA, GA., CODE OF ORDINANCES § 2-858; BROWARD COUNTY, FL., CODE § 16 1/2-156; CHICAGO, ILL., MUNICIPAL CODE ch. 2-152-072; DENVER, CO., REV. MUNICIPAL
(continued...)

benefits to domestic partners, per their eligibility standards, that they offer to married couples.

We do not assume, as plaintiffs assert, that the state and the municipality can simply adopt the methodology the University of Alaska adopted to administer its programs. The state has many more employees than the university. Nonetheless, that many other agencies, municipalities, and states offer employment benefits to their employees' same-sex domestic partners suggests that the governments' legitimate administrative concerns can be satisfied. The availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided. We therefore conclude that the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency.

Promotion of marriage. The state and municipality assert that they have a legitimate interest in the promotion of marriage. To support this assertion, the municipality points to "the ancient cultural and legal status of marriage" and the place of a marriage between one man and one woman as "the historic foundation of society." Amicus curiae Alaska Catholic Conference also contends that the promotion of marriage is a legitimate state interest. It cites in support several United States Supreme Court decisions that have recognized the right to marry as "involv[ing] interests of basic

---

(...continued)
CODE § 18.321(4)-18.328; NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 3-244(f).

[52] *See* http://www.juneau.lib.ak.us/cbj/risk_management/pdfs/2005/Enrollment Guide2005.pdf (last visited June 6, 2005).

importance in our society."[53] The Supreme Court has also explained that "marriage is a social relation subject to the state's police power."[54]

We have never considered whether the promotion of marriage is a valid governmental interest.

Plaintiffs argue that whether or not the promotion of marriage is a legitimate governmental interest, the state is not truly interested in promoting marriage, because, if it were, it would not have prevented gays and lesbians from entering into married relationships. This argument has little merit. The state rightly argues that just because the legislature did not want to promote same-sex marriage does not mean it did not have a sincere interest in promoting "traditional" marriage.

Plaintiffs also challenge the legitimacy of any interest in promoting marriage. They argue that the state and municipality "may not assert an interest in promoting married relationships for its own sake." They claim that the government "may not favor a class simply because it favors the class," and that discrimination is never a legitimate interest. That proposition is certainly correct, but the promotion of marriage in and of itself is not necessarily discriminatory. And it is not irrational. Among other things, it can encourage family stability (an undeniably valid public goal), as the Alaska Catholic Conference argues.

---

[53] *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as "one of the vital personal rights essential to the orderly pursuit of happiness" by free people); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("one of the basic civil rights of man"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("essential to the orderly pursuit of happiness").

[54] *Loving*, 388 U.S. at 7; *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.").

As to this issue, plaintiffs' true challenge is to the decision to promote family stability among opposite-sex couples but not among same-sex couples. They argue that the social good from family stability in same-sex relationships is just as important and valuable as the social good from stable opposite-sex relationships. Assuming plaintiffs' argument is correct, it would not establish that an interest in promoting marriage is not legitimate. Given the social benefits potentially inherent in marriage and the Supreme Court's statement that marriage is subject to state regulation,[55] we conclude that the promotion of marriage is at least a legitimate governmental interest.

We accept the state's contention that providing employment benefits to spouses of its employees may encourage persons to marry or stay married. Such benefits are financially valuable and their availability may be an important or even critical factor to persons deciding whether to marry. But the question here is whether the means chosen to advance the interest are substantially related to the governments' interest.

The first part of the chosen means — providing a benefit to spouses — is directly related to advancing the marriage interest. But the second part of the chosen means — restricting eligibility to persons in a status that same-sex domestic partners can never achieve — cannot be said to be related to that interest. There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not

---

[55] *See Loving*, 388 U.S. at 7.

seem to advance any valid reasons for promoting marriage. In short, there is no indication that the programs' challenged aspect — the denial of benefits to all public employees with same-sex domestic partners — has any relationship at all to the interest in promoting marriage. To repeat: making benefits available to spouses may well promote marriage; denying benefits to the same-se domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage.

The municipality raises several other arguments that justify brief response. It asserts that it can properly limit eligibility because the Marriage Amendment sanctions the marriage relationship. We discussed above the effect of the Marriage Amendment and rejected a contention that it altogether forecloses plaintiffs' equal protection claims. See Part III.B. Moreover, the marriage relationship sanctioned by the amendment cannot justify unequal treatment unless the means relate to the purpose. No one has suggested that the Marriage Amendment would permit the municipality to double the pay of only its married employees or permit it to hire only married persons.

The municipality seems to imply that accepting the plaintiffs' arguments would require defendants to extend marriage benefits to members of "other non-traditional marriages," such as persons in polygamous relationships. But polygamy is illegal in Alaska,[56] as are incestuous relationships.[57] Even though same-sex domestic relationships are not marriages in Alaska,[58] they are not illegal. And, following

---

[56] AS 11.51.140.

[57] AS 11.41.450.

[58] Alaska Const. art. I, § 25.

Lawrence v. Texas, they could not be made illegal.[59] Nothing we hold here would require public employers to extend to members of polygamous or incestuous relationships the employment benefits they provide to their employees' spouses.

d. Equal protection conclusion

The governmental interests of cost control, administrative efficiency, and promotion of marriage are legitimate, but the absolute denial of benefits to public employees with same-sex domestic partners is not substantially related to these governmental interests.

In this case, because the programs at issue govern the governments' actions in their specific capacities as public employers, rather than in their broader governmental capacities, the programs' marital preferences would have difficulty meeting the means-to-end fit requirement unless they had a fair and substantial relationship to the governments' roles as public employers. When the state or a political subdivision acts in this capacity, it is subject to the overarching principles set out in article I, section 1, and article XII, section 6, of the Alaska Constitution. Those sections guarantee all Alaskans "the rewards of their own industry" and require public employment to be based on merit.[60] Programs allowing the governments to give married workers substantially greater compensation than they give, for identical work, to workers with same-sex partners cut against these constitutional principles yet further no legitimate goal of the governments as public employers. However legitimate these programs' broader policy goals may be, then, the means they employ would not be fairly and substantially related

---

[59] *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that states may not criminalize private, consensual homosexual relations).

[60] Alaska Const. art. I, § 1 ("This constitution is dedicated to the principle[] that all persons have a natural right to . . . the enjoyment of the rewards of their own industry. . . ."); Alaska Const. art. XII, § 6.

to furthering those goals.

We therefore conclude, applying minimum scrutiny, that the challenged programs violate the individual plaintiffs' right to equal protection of the law.

D. *Trombley v. Starr-Wood Cardiac Group* Does Not Control Here.

The state argues that comments we made in *Trombley v. Starr-Wood Cardiac Group, P.C.*[61] "should be dispositive" of the constitutional issues now before us.

Trombley did not address constitutional issues. The Trombleys appealed the dismissal of their malpractice claims arising out of Barbara Trombley's medical care. One issue was whether Dale Trombley could bring a loss-of-consortium claim. While Barbara was being treated, she was cohabiting with Dale Trombley but was married to Keith Bradick. Some months later she divorced Bradick and married Dale Trombley. The superior court rejected Dale's consortium claim on summary judgment. In considering Dale's appellate contention that an unmarried cohabitant could claim loss of consortium, we said that "[w]hether spousal consortium claims should be extended to unmarried cohabitants as a general matter is not an easy issue to resolve. There are reasonable arguments on both sides."[62] We did not decide whether, "as a general matter," unmarried cohabitants could ever claim loss of consortium. We instead affirmed the denial of the consortium claim because one of the cohabitants was actually married to someone else when the alleged malpractice occurred.[63]

The state contends that it follows from our quoted characterization of the

---

61 *Trombley v. Starr-Wood Cardiac Group, P.C.*, 3 P.3d 916 (Alaska 2000).

62 *Id.* at 923 (emphasis added).

63 *Id.*

argument limiting consortium claims to legal spouses as "reasonable" that the legislature's choice in denying employment benefits to unmarried cohabitants must also be "reasonable and hence constitutional." It asserts that both areas "concern simply the right to receive money."

And of course, because they were not a same-sex couple, nothing prohibited Dale and Barbara from marrying as soon as Barbara divorced her prior spouse. Plaintiffs correctly observe that this court there "analyzed distinctions between married heterosexual couples and unmarried heterosexual couples, who *can* marry. It did not analyze distinctions between heterosexual couples [and] lesbian and gay couples, who *cannot* marry." (Emphasis in original.) That we stated in dictum that it was "reasonable" not to allow consortium claims by unmarried cohabitants does not mean that the government can treat unmarried couples of the same sex differently than it treats unmarried couples of the opposite sex.

E. Remedy

Plaintiffs do not contend that finding an equal protection violation would require that the benefits programs themselves must end; they simply seek the same benefits and opportunities potentially available to opposite-sex couples. Only the spousal limitations in the programs are unconstitutional, and they are invalid only to the extent they deny benefits to persons who are absolutely precluded from becoming eligible for those benefits, even though their domestic relationship is not illegal.

Therefore, one possible remedy would be to give the state and the municipality a reasonable opportunity to adopt standards for making these benefits available to persons deemed eligible. Many other public employers now have programs

that may be useful models,[64] and private employers may also.[65] Having held unconstitutional the exclusion of same-sex couples from access to civil marriage, the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, vacated the department's summary judgment and remanded for entry of judgment consistent with its opinion. But it stayed entry of judgment on remand for 180 days to permit the legislature "to take such action as it may deem appropriate in light of this opinion."[66]

Because the parties have not addressed the issue of remedy, or how the state and municipality may comply, we invite supplemental briefing on this issue.

IV. CONCLUSION

We conclude that the public employers' spousal limitations violate the Alaska Constitution's equal protection clause. We therefore VACATE the judgment below. After hearing from the parties about the issue of remedy, we will REMAND. Until we resolve the issue of remedies, the disputed benefits programs remain in effect.

---

[64] *See supra* notes 49-52.

[65] According to the Human Rights Campaign's database, 247 Fortune 500 companies offer domestic partner benefits. The database can be accessed through the organization's website at http://www.hrc.org (last visited October 21, 2005).

[66] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003); *see also Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). In *Baker*, the Vermont Supreme Court deferred to the prerogatives of the legislature "to craft an appropriate means of addressing this constitutional mandate." It therefore left the current statutory scheme in effect "for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion." *Id.* at 887.