LEGAL SERVICES

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

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

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

Corrected memo: October 21, 2019, moved Assistant Attorney General Steven Slotnick quote from page 3 to page 2 and edited paragraph.

MEMORANDUM October 17, 2019

SUBJECT: Executive Branch Ethics Act — proposed regulations
(Work Order No. 31-LS1206)

TO: Senator Bill Wielechowski
Attn: Nate Graham

FROM: Daniel C. Wayne
Legislative Counsel

You have asked two questions pertaining to recently proposed regulations, which are addressed below. On October 1, 2019, the Department of Law (department) posted notice of three proposed regulations relating to the Executive Branch Ethics Act (the Act), and invited public comment during a 30-day period before they are adopted. The proposed regulations read:

> 9 AAC 52.140 is amended by adding new subsections to read:
>
> (f) If a person brings a complaint alleging a violation under AS 39.52.110-39.52.190 or this chapter by the governor or the lieutenant governor, the Department of Law may provide legal representation to the governor or lieutenant governor to defend against the complaint if the attorney general makes a written determination, in the attorney general's sole discretion, that the representation is in the public interest.
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> (g) If a person brings a complaint alleging a violation under AS 39.52.110-39.52.190 or this chapter by the attorney general, the Department of Law may provide legal representation to the attorney general to defend against the complaint if the governor makes a written determination, in the governor's sole discretion, that the representation is in the public interest. (Eff. 4/24/94, Register 130; 12/22/2010, Register 196; am __/___/___, Register ___)
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> Authority: AS 39.52.310 AS 39.52.330 AS 39.52.950 AS 39.52.320 AS 39.52.350
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> 9 AAC 52.160 is amended by adding a new subsection to read:
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> (h) Notwithstanding (a) - (g) of this section, information received by the Department of Law and the attorney general related to the defense of a complaint alleged under 9 AAC 52.140(f) and (g) is confidential.

(Eff. 4/24/94, Register 130; am __/___/___, Register ___)
Authority: AS 39.52.340 AS 39.52.420 AS 39.52.950

(1) Do the proposed regulations raise issues under the Constitution of the State of Alaska?

The following three constitutional issues are raised by the proposed regulations.

(A) Public purpose required.
Article IX, sec. 6 of the Alaska Constitution states that no "appropriation of public money [may be] made, or public property transferred . . . except for a public purpose."[1] The proposed use of state resources to defend the governor, the lieutenant governor, and the attorney general against ethics complaints, regardless of the outcome, under the Act would confer a private benefit on those three public officers.[2]

The benefit conferred under the proposed regulations is unprecedented. In a 1994 informal opinion from the Office of the Attorney General, Assistant Attorney General Steven Slotnick concluded:

> [A]n expense incurred in defense of an Ethics Act complaint, or any penalty levied as a result of that complaint, is the responsibility of the public officer who was the subject of the complaint. The State will not provide a defense or indemnification for actions under the Executive Branch Ethics Act.[3]

In 2009, Governor Sarah Palin was the subject of several ethics complaints, some of which were dismissed. In a letter to Governor Palin's chief of staff, Attorney General Dan Sullivan acknowledged that the state apparently had never defended or covered the legal expenses of an accused public officer in an Ethics Act proceeding.[4] He

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[1] *See also 1994 Inf. op. Att'y Gen. (Jan. 1; 663-94-0147).*

[2] The financial value of the benefit would be substantial, as it saves the cost of hiring a lawyer. Moreover, the intrinsic value of a defense provided by the Department of Law in a complaint proceeding under the Act, considering that the duties of the Department of Law have traditionally included interpreting and administering the Act and assisting and advising the personnel board during complaint proceedings, would be more than nominal.

[3] *1994 Inf. Alaska Op. Atty. Gen.* at *2 (June 3, 663-94-0289)

[4] *2009 Op. Alaska Att'y Gen.* at *6 (August 5).

recommended then that the state reimburse private legal expenses incurred by a public officer who *successfully* defends against an ethics complaint.[5] He explained as follows:

> Public service should not subject public officers, who are assumed by law to be acting ethically, to personal financial liabilities when ethics proceedings confirm that they acted appropriately. Therefore, in examining whether the state may defend or pay the legal expenses for public officers in ethics proceedings, *the critical question is whether there is an approach that ensures that a public purpose is advanced while at the same time encouraging compliance with the Ethics Act by public officers.*[6]

Subsequently the attorney general adopted regulations 9 AAC 52.040(c) and (d), allowing the state to pay, and a public officer to receive, reimbursement of private legal expenses in ethics complaints, in some instances, if the public officer is exonerated.

The proposed regulations authorize a state funded defense by the Department of Law — before a finding of the validity of the complaint and in the "sole discretion" of the attorney general — rather than authorizing reimbursement for defense expenses after a finding of no violation of the law as proposed in 2009 and allowed by 9 AAC 52.040(c) and (d).

According to the Act, "compliance with a code of ethics is an individual responsibility."[7] If a court were to find that using state resources to shield one or more of the three public officers from the potential consequences of a complaint under the Act has a public purpose, the court may also find that purpose is outweighed by the public purpose of the Act itself, because otherwise, as discussed further elsewhere in this memorandum, the proposed regulations would significantly undermine the goals of the Act.[8] In considering

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[5] As noted later in this memorandum, the letter advises against having the Department of Law directly defend public officers who are subject to ethics complaints.

[6] *2009 Op. Alaska Att'y Gen.* at *6 (August 5) (emphasis added).

[7] AS 39.52.010(a)(7).

[8] The purpose of the Act is discernible from AS 39.52.010(a), which reads:

> **Sec. 39.52.010.** Declaration of policy. (a) It is declared that
>
> (1) high moral and ethical standards among public officers in the executive branch are essential to assure the trust, respect, and confidence of the people of this state;
>
> (2) a code of ethics for the guidance of public officers will
>
> (A) discourage those officers from acting upon personal or financial interests in the performance of their public responsibilities;

whether it serves a public purpose to relieve the three public officers from the burdens associated with defending against frivolous ethics complaints, for example, a court may note that the legislature has already addressed that purpose with provisions throughout the Act that require or allow complaints with insufficient merit to be dismissed, at multiple stages of the complaint procedure.[9]

(B) Separation of powers.

The power to enact and change the law of the state is a legislative power.[10] The separation of powers doctrine is implied in the Constitution of the State of Alaska,[11] and it precludes any exercise of the legislative power of state government by the executive branch of government, except as provided by the Constitution of the State of Alaska.[12] To the

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(B) improve standards of public service; and

(C) promote and strengthen the faith and confidence of the people of this state in their public officers;

(3) holding public office or employment is a public trust and that as one safeguard of that trust, the people require public officers to adhere to a code of ethics;

(4) a fair and open government requires that executive branch public officers conduct the public's business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest;

(5) in order for the rules governing conduct to be respected both during and after leaving public service, the code of ethics must be administered fairly without bias or favoritism;

(6) no code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to every situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate corruption, or eliminate bad judgment; and

(7) compliance with a code of ethics is an individual responsibility; thus all who serve the state have a solemn responsibility to avoid improper conduct and prevent improper behavior by colleagues and subordinates.

[9] *See*, AS 39.52.320 and 39.52.370.

[10] Article II, sec. 1, Constitution of the State of Alaska: "The legislative power of the State is vested in a legislature . . . ."

[11] *Bradner v. Hammond*, 553 P.2d 1, 4 - 5 (Alaska 1976) (separation of powers doctrine implied in state's constitution).

[12] *Id.* The Attorney General has no power to declare a law unconstitutional. In *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995), the Alaska Supreme Court noted:

extent that the Constitution of the State of Alaska does provide for the exercise of a legislative power by the executive branch, that power will be narrowly construed. "[T]he separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."[13]

Article III, sec. 1 of the Constitution of the State of Alaska vests the executive power of the state in the governor, and the governor's authority to exercise that power is further described in art. III, sec. 16 of the Constitution of the State of Alaska.[14] Those constitutionally created executive powers do not include the power to adopt regulations without legislative authority. The power of the executive branch to adopt regulations is delegated to the executive by the legislature through enactment of legislation, either explicitly, as in AS 39.52.950, or implicitly.

Significantly, AS 39.52.950 expressly limits the attorney general's regulatory authority. It reads:

> **Sec. 39.52.950. Regulations.** The attorney general may adopt regulations under the Administrative Procedure Act *necessary* to interpret and implement this chapter. (Emphasis added).

In addition, the *Drafting Manual for Administrative Regulations,* (*the Manual*) published by the State of Alaska, Department of Law, similarly limits the attorney general's regulatory authority. The Alaska Supreme Court has held that "[A]gency action taken in the absence of *necessary* regulations will be invalid."[15] The Alaska Supreme Court has

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> For an attorney general to stipulate that an act of the legislature is unconstitutional is a clear confusion of the three branches of government; it is the judicial branch, not the executive, that may reject legislation. . . . An attorney general can have no authority to be the binding determiner that legislation is unconstitutional.

[13] *Id.* at 7.

[14]

> **SECTION 16. Governor's Authority.** The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the State, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right by any officer, department, or agency of the State or any of its political subdivisions. This authority shall not be construed to authorize any action or proceeding against the legislature.

[15] *U.S. Smelting, Ref. & Mining Co. v. Local Boundary Comm'n,* 489 P.2d 140, 142 (Alaska 1971) (Emphasis added).

said that the use of *the Manual* is required in formulating administrative regulations.[16] According to *the Manual*, "[T]he APA and case law require that a regulation be "consistent with the statute," "reasonable," and "reasonably necessary." It is unlikely that a court would find the proposed regulations "necessary to interpret and implement" the Act. First, nothing like the representation allowed by the regulations has ever existed in connection with Act, which has been interpreted and implemented for decades. Second, it is virtually indiscernible how the statutes cited by the Department of Law as authority for the proposed regulations allow, create a perceived need for, or suggest that state resources may or should be used to provide or pay for defending a public officer in an ethics complaint under the Act. There are only two references in the Act to representation. Under AS 39.52.340(b) the subject of an ethics complaint has the right to contact an attorney if they choose. Under AS 39.52.360(d) the subject of an ethics complaint may (or may not) be represented by counsel. It is not likely a court would find that adoption of the proposed regulations is necessary to interpret and implement these two provisions. Therefore, they may find that the regulations are invalid.

According to *the Manual*,

> When an agency adopts a regulation, it is acting in place of the legislature, usually by virtue of the legislature's general delegation of that power in a specified area. A regulation cannot waive or disregard a statutory requirement.[17]

And,

> to determine whether a regulation conflicts with statute, the court will use a reasonable and common-sense construction consonant with the objective of the legislature. The intent of the legislature must govern and the policies and purposes of the statute should not be defeated.[18]

The proposed regulations do not meet these requirements. AS 39.52 does not contain a single provision that explicitly or implicitly authorizes the department to adopt the regulations it has proposed. The absence of a provision that prohibits adoption of a regulation does not imply a delegation of authority to adopt one; a delegation that broad would be unconstitutional, even if it were explicit. According to one past attorney general, "delegations of legislative authority are only permissible where the legislature establishes an 'intelligible principle' to guide and confine administrative decision

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[16] *The Manual*, page 101, (2018), citing *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, 1181 n.7 (Alaska 1977).

[17] *The Manual*, page 101, (2018), citing *E.g., Crawford & Co. v. Baker-Withrow*, 73 P.3d 1227, 1229 (Alaska 2003), and *Rutter v. State*, 668 P.2d 1343, 1349 (Alaska 1983).

[18] *The Manual*, page 103, (2018) citing *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety,* 91 P.3d 240, 248 (Alaska 2004).

making."[19] A statute allowing adoption of any regulation not otherwise prohibited by that statute, or an interpretation of a statute that reaches a similar conclusion, does not meet that requirement. The legislature has in fact provided guidance, including AS 39.52.010, AS 39.52.110, and AS 39.52.950, to inform decision making by the attorney general with respect to regulations.

In considering how much deference to give to an interpretation of law by the attorney general that the Act authorizes the proposed regulations, a court may also take the Department of Law's past practice into account. The Alaska Supreme Court has stated that "if agency interpretation is neither consistent nor longstanding, the degree of deference it deserves is substantially diminished."[20] In this instance, the proposed regulations are inconsistent with the Department of Law's longstanding interpretation and practice as reflected in the Sullivan attorney general opinion, discussed above.

(C) Equal protection.
The regulations raise a constitutional issue under the equal protection clause in art. I, sec. 1 of the Constitution of the State of Alaska. The Alaska Supreme Court has said, "[I]n considering state equal protection claims based on the denial of an important right we ordinarily must decide first whether similarly situated groups are being treated differently."[21] Whether two entities are similarly situated is generally a question of fact.[22] The governor, lieutenant governor, and the attorney general are three of many public officers who are subject to the Act.[23] Since the Act first became law, all public officers faced with ethics complaints have had to rely on their own private resources to defend against the complaints.

The proposed regulations would allow the state to provide, and the governor, lieutenant governor, and the attorney general to receive, state resources for the purpose of defending against ethics complaints; however, all other public officers would not be eligible for that benefit. If facts show that the remaining public officers are at a lesser risk of ethics complaints by virtue of the offices they hold, irrespective of their individual conduct, a

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[19] *The Honorable Frank Rue*, 1995 WL 848549, at *5, citing *State v. Fairbanks North Star Borough,* 736 P.2d at 1143.

[20] *Totemoff v. State*, 905 P.2d 954, 968 (Alaska, 1995) (citing *Bowen v. American Hosp. Ass'n,* 476 U.S. 610, 646 n. 34, 106 S. Ct. 2101, 2122 n. 34).

[21] *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 966 (Alaska, 2005) (internal footnotes omitted).

[22] *Id.* at 967.

[23] Under AS 39.52.960(21), public officers covered by the Act include all employees and officers in the exempt, partially exempt, or classified service in the executive branch.

court may determine they are not similarly situated as the governor, lieutenant governor, and attorney general. The Court has said:

> [I]n "clear cases" we have sometimes applied "in shorthand the analysis traditionally used in our equal protection jurisprudence." If it is clear that two classes are not similarly situated, this conclusion "necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."[24]

However, because individual conduct with respect to the Act may determine the number and type of ethics complaints against a public officer, regardless of whether they are elected, appointed, or hired based on merit, a court may not be able to distinguish the governor, lieutenant governor, and attorney general from the remaining public officers covered by the Act, for purposes of an equal protection analysis.

The Alaska Supreme Court applies a sliding scale in reviewing challenges under the equal protection clause and is more protective of the right than federal courts are. At a minimum, the state must provide a rational justification for treating similarly situated individuals differently.[25]

In *Malabed v. North Slope Borough,* the Court summarized the equal protection test as follows:

> [T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. 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 classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit. An appropriation that cannot be justified under this minimum standard would likely violate the equal protection clause of the Alaska Constitution.[26]

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[24] *Id.* (internal footnotes omitted).

[25] *See Underwood v. State*, 881 P.2d 322 (Alaska 1994).

[26] *Malabed v. North Slope Borough,* 70 P.3d 416, 420 - 421 (Alaska 2003).

Under this test, as the importance of the individual rights affected increases, so does the burden on the state to show that the state's goal justifies the intrusion on the individual's interests in equal treatment and that the state's goal is rationally related to the means chosen to achieve the goal. A person's interest may be accorded a low level of protection from discrimination under the state equal protection clause, if the court determines that the discrimination implicates only an economic interest.[27] However, a court would probably find that the interest of the remaining public officers covered by the Act is not purely economic because, from the governor down to public officers at the lowest level of government, a public officer's personal and professional reputations are both on the line when an ethics complaint is filed against that officer. If the court finds the interest at stake for the public officers denied free representation by the state is not purely economic, the state's burden under the second and third parts of the three-part sliding scale equal protection test increases.

(2) Does the Act permit representation of the Governor, the Lieutenant Governor, or the Attorney General as proposed by the pending regulations?

"When a regulation conflicts with a statute, the regulation must yield."[28] As discussed in (A) - (D), below, the proposed regulations conflict with several statutes and, as discussed more specifically in (E) below, they may also raise significant ethical conflicts of interest.

(A) The proposed regulations conflict with the Act's prohibitions on favoritism and self-enrichment.

The proposed regulations conflict with AS 39.52.010(a)(5), which reads, "in order for the rules governing conduct to be respected both during and after leaving public service, the code of ethics must be administered fairly without bias or favoritism." As noted elsewhere in this memorandum, the proposed regulations would provide a significant benefit — free representation by the agency that interprets and administers the Act in concert with the personnel board, the body responsible for determining the outcome of ethics complaints — to only three of the many public officers who are covered by the Act. This may or may not violate the equal protection clause of the Constitution of the State of Alaska, but it clearly constitutes favoritism.[29]

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[27] *See Underwood v. State*, 881 P.2d 322 (Alaska 1994).

[28] *The Manual,* page 112, (2018), citing *Frank v. State*, 97 P.3d 86, 91 (Alaska App. 2004).

[29] "Favoritism" is not defined by the Act. When interpreting a statute in the absence of a statutory definition for a term, a court gives the term its commonly understood definition, and may rely on a dictionary. *Alaskans for Efficient Government, Inc. v. Knowles*, 91 P.3d 273, 276 n. 4 (Alaska 2004), quoting *2A Norman J. Singer, Sutherland Statutory Construction* sec. 47.28 (6th ed. 2000). According to *Webster's New World Dictionary of the American Language, Second College Edition*, "favoritism" means "the showing of more kindness and indulgence to some person or persons than to others."

The proposed regulations conflict with AS 39.52.120(b)(3), which provides that a public officer may not "use state time, property, equipment, or other facilities to benefit personal or financial interests." Authorizing the use of state time for the defense of a public officer in an ethics complaint proceeding, or using state time for defense of that public officer, would be contrary to this rule.

The proposed regulations conflict with AS 39.52.120(b)(4), which provides that a public officer may not take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest. The proposed regulations would at the very least shield the governor, the lt. governor and the attorney general from public scrutiny in connection with an ethics complaint, regardless of the outcome. They would also give the attorney general sole discretion over whether state resources can be used to defend the governor against an ethics complaint, and vice versa. It would be surprising if a governor or attorney general, when deciding how to exercise that discretion, did not give some weight to how their decision might affect a similar calculation by their counterpart, if in the future their discretion-exercising roles are reversed.

The attorney general serves at the pleasure of the governor, and depends on the governor's good will for employment. And because the attorney general is a political appointee of the governor's and the governor's top legal advisor, the governor has a vested personal interest in the attorney general's success; an attorney general whose reputation is damaged by a successful ethics complaint may weaken the governor's chances of being reelected or, increase the chances that a governor is recalled by the electorate. In exercising the sole discretion described in the proposed regulations, the governor and the attorney general would each be faced with a choice between taking or withholding official action that will affect a matter in which they have a personal interest.

The proposed regulations conflict with AS 39.52.120(b)(5), which provides that a public officer may not "attempt to benefit a personal or financial interest through coercion of a subordinate or require another public officer to perform services for the private benefit of the public officer at any time." A decision under the proposed regulations that the department of law will provide a defense of the governor, lt. governor, or attorney general amounts would be contrary to this rule. Regardless of whether some aspect of the decision may or may not advance a public purpose, it is beyond debate that a public officer who receives a free defense in an ethics complaint matter, while shielded from public scrutiny behind a cloak of confidentiality made impenetrable by a regulation that only applies to them, is in receipt of a substantial private benefit.[30]

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[30] For purposes of the Act, "benefit" is defined under AS 39.52.960(3), as follows:

> (3) "benefit" means anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to

(B) The proposed regulations may conflict with a prohibition on the use of state assets or resources for a partisan political purpose.

The proposed regulations may conflict with AS 39.52.120(b)(6), which provides that a public officer may not "use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes." Under AS 39.52.120(b)(6), "for partisan political purposes"

> (A) means having the intent to differentially benefit or harm a
> (i) candidate or potential candidate for elective office; or
> (ii) political party or group;
> (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

The proposed regulations provide a free legal defense for only three of the thousands of public officers who are subject to the Act. Because those three hold political positions (two are elected, and one of those two appoints the third), and most of the public officers excluded by the regulations do not, the proposal that they receive a free defense presumably has to do with a concern that they may be more vulnerable to politically-motivated attacks in the form of meritless ethics complaints. If so, the purpose of the regulations is political, and, depending on applicable facts, using or authorizing the use of state services to defend a public officer who is a candidate or potential candidate for public office may constitute a partisan political use of state resources contrary to this ethics rule.

(C) The proposed regulations conflict with statutes that make ethics complaint proceedings public.

The proposed regulations also conflict with AS 39.52.335, AS 39.52.340(a), and AS 39.52.350(a), which provide that records of an ethics complaint hearing are public, at certain stages of the complaint procedure. While confidentiality aids investigation and resolution of complaints, "the state can protect its interest in the integrity of Ethics Act investigations by creating careful internal procedures."[31] The proposed regulations would shroud ethics complaint hearings with secrecy when the subject of the complaint is the governor, lt. governor, or attorney general, but not when other public officers are the subject of a complaint. Transparency in the hearing process may reassure the public that the Act is being applied fairly and without bias and favoritism, to all public officers; the absence of transparency may have the opposite effect on public perception. Because the proposed regulation regarding confidentiality conflicts with statutes enacted by the legislature, a reviewing court may determine that the proposed regulation regarding

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> pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value;

[31] *2009 Op. Alaska Att'y Gen.* *3 (August 5).

confidentiality is invalid.[32]

(D) Unwarranted benefits or treatment and improper motivation.
Under AS 39.52.110(a), "[T]he legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust." Under AS 39.52.120(a), "a public officer may not . . . intentionally secure or grant unwarranted benefits or treatment for any person."[33] Under 9 AAC 52.040(a) and (b), "unwarranted benefits or treatment" as used in AS 39.52.120 includes:

> (1) *a deviation from normal procedures for the award of a benefit, regardless of whether the procedures were established formally or informally, if the deviation is based on the improper motivation;* and
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> (2) an award of a benefit if the person receiving the benefit was substantially less qualified, in light of the formal or informal standards set out for the award, than another person who was or reasonably should have been considered for the award if the award is based on an improper motivation.
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> (b) A public officer may not grant or secure an unwarranted benefit or treatment, *regardless of whether the result is in the best interest of the state.* (Emphasis added).

The proposed regulations seem to create an exception allowing an otherwise prohibited use of state resources when the attorney general or the governor, in their "sole discretion," determine the use would be in the public interest. The legislature did not create a "public interest" exception in the Act, or grant authority for the attorney general to adopt a regulation creating one. Past attorneys general may have recognized this when they adopted and enforced 9 AAC 52.040(b), prohibiting unwarranted benefits or treatment.

Similarly, 9 AAC 52.020 provides that:

> A public officer may not take or withhold official action on a matter if the action is based on an improper motivation.

Adoption of a the proposed regulations allowing the attorney general or the governor, in their sole discretion, to require the department of law to represent an elected or politically appointed public officer in an ethics complaint under the Act allows the taking or

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[32] As noted above, "[I]f a regulation conflicts with a statute, the regulation must yield." *The Manual,* page 112, (2018), citing *Frank v. State*, 97 P.3d 86, 91 (Alaska App. 2004).

[33] AS 39.52.120(a).

withholding of official action that in each instance would beg the question, "was it based on an improper motivation?"

(E) Ethical conflicts of interest.[34]
As former Attorney General Dan Sullivan advised:

> [H]aving the Department of Law directly defend public officers against ethics complaints could present conflict-of-interest challenges because of the attorney general's role in interpreting, enforcing, and prosecuting violations of the Ethics Act.
>
> . . .
>
> It could also create difficulties under the Alaska Rules of Professional Conduct because of the conflicting obligations of the state attorneys and their supervisors.[35]

AS 44.23.020(a) states: "The attorney general is the legal advisor of the governor and other state officers." A court would probably find that this role is limited to advising the governor and state officers in their official capacity, not as individuals. The public may perceive that a person representing or authorizing representation of the governor, the lt. governor, or the attorney general in an ethics complaint puts the represented person under an obligation to the person providing or authorizing the representation. Conversely, it may seem to the public that a person in a position to provide or authorize the representation may not be able to refuse to provide or authorize it, because of their professional or political relationship with the person who is the subject of the complaint. This runs counter to the purposes of the Act set forth in AS 39.52.010 and cited elsewhere in this memo. There is also a conflict between the statutory duties of the attorney general and assistants attorney general, and the new duties imposed on them by the proposed regulations. For example, under AS 39.52.310(a) the attorney general may initiate an ethics complaint against the governor or lt. governor, and, under AS 39.52.335(a), is required to forward complaints to the personnel board. This conflicts with the power, under the proposed regulations, to decide whether the governor or lt. governor may be defended by the Department of Law.

Beyond being the legal advisor to the governor and other state officers in their official capacities, the attorney general has other statutory duties, including duties under

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[34] Ethical conflicts of interest under the Alaska Rules of Professional Conduct (ARPC) are outside the scope of this memo. However, defending ethics complaints under the proposed regulations may create a conflict of interest under the ARCP 1.7 and 1.8, for an attorney general or assistant attorney general charged with providing that defense, because it requires that person, as a lawyer, to balance their duty to one client (the State of Alaska) and another client (the governor, the lt. governor, or the attorney general).

[35] *2009 Op. Alaska Att'y Gen.* at *7 (August 5) (footnote omitted).

AS 44.23.020(b),[36] but those duties do not include a duty to defend matters, like ethics complaints, that are prosecuted by the state; in fact, they include the opposite. The attorney general has a statutory duty to "represent the state in all civil actions in which the state is a party,"[37] and the duty to "prosecute all cases involving violation of state law."[38] A violation of the Act is a violation of state law, and the Act explicitly requires, in hearings to determine the outcome of ethics complaints under the Act, that "the attorney general shall present the charges before the hearing officer."[39] At the hearing, the attorney general has the additional burden of demonstrating by a preponderance of the evidence that the subject of the accusation has, by act or omission, violated the Act.[40]

Because of these statutory requirements, an attorney general or assistant attorney general who elects or is directed to defend a public officer in an ethics proceeding under the Act would have a conflict of interest. Moreover, the regulations create a situation where the governor, attorney general, and assistant attorneys general are all likely to have to weigh the potential personal consequences—on themselves and on each other—of authorizing or not authorizing the representation, or undertaking or refusing to undertake the representation. That may be especially difficult to weigh objectively and professionally, with the best interests of the state in mind, when the personal goodwill of a supervisor or appointing authority is at stake.

Finally, the entire Department of Law may be in a legally and ethically untenable predicament if the proposed regulations are adopted. As noted by former Attorney General Dan Sullivan regarding whether the Department of Law should defend the governor, lt. governor or attorney general in ethics complaints:

> . . . the role of the attorney general and Department of Law is to interpret, implement, and enforce the Act, with the goal of promoting the Act's purposes.

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[36] The attorney general also has an ongoing duty, under AS 44.23.020(h), to review federal statutes, regulations, presidential executive orders and actions, and secretarial orders and actions that may be in conflict with and that may preempt state law, and submit a report to the legislature on or before January 15th of each year. Although U.S. Supreme Court decisions are not on this list of items requiring review, it is reasonable to assume that the attorney general would review relevant federal court decisions and render advice regarding their effect on laws in Alaska.

[37] AS 44.23.020(b)(3).

[38] AS 44.23.020(b)(5).

[39] AS 39.52.360(b).

[40] AS 39.52.360(c).

. . .

> Defending individual officers against ethics complaints would therefore create an *unacceptable conflict* between the Department of Law's duty to provide them zealous representation and its general duty to promote the purposes of the Ethics Act in interpreting, implementing, and enforcing the Act.[41]

If I may be of further assistance, please advise.

DCW:mjt
19-334.mjt

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[41] *2009 Op. Alaska Att'y Gen.* at *8 (August 5) (emphasis added).