

MEMORANDUM

State of Alaska

Department of Law

TO: Designated Ethics Supervisor

DATE: May 14, 1996

FILE NO.: 661-96-0694

TELEPHONE NO.: 269-5172

FROM: John L. Steiner
Assistant Attorney General

SUBJECT: Outside Activities of Public
Officer

Mr. X, Commissioner of Department Q has requested an advisory opinion under AS 9.52.240 whether he may, under the Executive Ethics Act, assist and testify on behalf of a former employer in its federal administrative claim and receive compensation for his services. This response is directed to you in your capacity as the governor's delegate for ethics responsibilities.

Background

Several years prior to his employment as a departmental commissioner for the State of Alaska, Mr. X was directly in charge of a substantial project performed by his employer under contract to the United States. In that capacity, he prepared and submitted on behalf of his employer numerous claims against the United States government. After moving on to other full-time employment, he continued, on a compensated part-time basis, to assist his former employer in pursuit of its claims.

Counsel for the current holder of the claims he prepared for his former employer has notified Mr. X that those claims will be litigated, and that his assistance will be essential. Mr. X's written request for advice contemplated that his assistance might entail both compensated consultation and testimony. In a subsequent telephone conversation, he has advised us that he now understands that he would not be paid for consultation services, but would receive only reimbursement for any expenses he might incur as an unpaid fact witness.

Mr. X notes that he is aware of no conflict between himself and the owner of the claims. We understand that he believes both that he has no personal conflict and that the holder of the claims has no relationship with either his department or any other state unit that might pose a real or perceived conflict. Mr. X notes that he is aware of no litigation involving his department and counsel representing the holder of the claims.

In his written request for advice, Mr. X states that his assistance with the claims would be upon the following conditions:

- (1) Any time he spends on the claims would be during off-duty hours or during periods of personal leave.
- (2) None of his work on the claims would distract from any of his duties as Commissioner of Department Q.

In our telephone conversation, Mr. X estimated the time he expects to devote to the claims as probably one weekend deposition within the next six months and several days of out-of-town testimony thereafter, totaling less than one week over the next year and one-half, together with a number of ten-minute telephone conversations "here and there" over that period.

The Executive Ethics Act

The Executive Ethics Act (the "Act") poses no bar to a state employee's "independent pursuits" as long as they "do[es] not interfere with the full and faithful discharge of an officer's public duties and responsibilities. . . ." AS 39.52.110(a). A public employee may provide services for personal or financial benefit or engage in employment outside his or her public employment unless the outside service or employment is "incompatible or in conflict with the proper discharge of official duties," and as long as any outside service or employment for compensation is reported annually by July 1 to the employee's designated supervisor. AS 39.52.170. An administrative regulation clarifies the proper analysis:

For purposes of AS 39.52.170, a public employee's outside employment or service, including volunteer service, is incompatible or in conflict with the proper discharge of official duties if the public employee's designated supervisor reasonably determines that the outside employment or service

- (1) takes time away from the employee's official duties;
- (2) limits the scope of the employee's official duties; or
- (3) is otherwise incompatible or in conflict with the discharge of the employee's official duties.

9 AAC 52.090. A commissioner's "designated supervisor" for purposes of the Act is the governor. AS 39.52.960(8)(E).

Discussion

We assume Mr. X has correctly determined that the state has no relationship with the holder of the claims or its attorneys. Although his department maintains a close funding relationship with an agency of the United States government, it is not the same agency that is the target of the claims. We therefore see no basis for an actual or perceived incompatibility or conflict based upon the parties. Should Mr. X become aware of any relationship between the state and any party, it may be necessary to revisit this conclusion.

Mr. X's request for ethics advice does not identify the nature of the claims upon which he will testify. Because his duty of loyalty now runs to the state rather than to those claims, he should be conscious whether advocacy for a particular claim theory, beyond mere factual testimony, might conflict with his department's interests as a significant purchaser of services. As long as he will not be advocating novel and precedent-setting theories incompatible with the substantive interests of his department, there would be no conflict in testimony in support of claims against a government agency.

The Act does not establish different degrees of loyalty or commitment for public officers at different levels of authority. All officers must fully and faithfully discharge their official duties. However, the high level of authority and responsibility entrusted to a commissioner arguably requires, and creates a public expectation of, greater commitment of professional time and energy in order to fully discharge that high level of public duty than may be required or expected of lower level state employees. A commissioner's duties are not preclusive of outside activities. *See* 1991 Inf. Op. Att'y Gen. (Apr. 24; 663-91-0429)(finding no ethical prohibition to commissioner's service as a compensated senior advisor to a foundation). However, the relatively recently adopted 9 AAC 52.090, quoted in full above, clarifies that time demand is a key consideration in the evaluation of the possibility of incompatibility. Mr. X's request for advice reflects his sensitivity to the need to avoid interference with the full and faithful discharge of his duties as a department commissioner.

Mr. X's stated condition that his activities with regard to the claims would be limited to off-duty hours and periods of personal leave theoretically avoids all interference with his public duties. However, at the commissioner level, identification of on-duty and off-duty hours may depend as much on the immediate demands of his office as on the clock or calendar. Based upon the scope of the proposed activity, any risk of interference may well be resolved by his further condition that none of his work on the claims would distract from his official duties. It is critical to note, however, that 9 AAC 52.090 and AS 39.52.960(8)(E) place responsibility for reasonable determination whether outside employment or service of a commissioner is incompatible or in conflict

with the commissioner's duties in the hands of the governor. This advisory opinion may inform the governor's evaluation, but cannot substitute for the governor's judgment.

Both of Mr. X's "conditions" appear to be as much commitments as to how he will carry out his assistance with the claims as they are predictions of the demands the claims will likely make on his time. The amount of time he states that he expects to devote to the claims - less than one week over one and one-half years - would not appear to threaten his ability to fulfill the conditions he has imposed or his official duties. Assuming the governor is satisfied with his commitment and ability to abide by those conditions, the Executive Ethics Act poses no further limitation upon Mr. X's uncompensated assistance with the claims.¹

Although he has advised us that he does not now anticipate receiving compensation, because Mr. X's original request for advice asked specifically whether he would be permitted to receive compensation, we will briefly address that issue. Subject to the discussion above concerning avoidance of incompatibility or conflict with the proper discharge of his official duties, and the duty to report compensated employment or service annually by July 1 to the governor as his designated supervisor, compensation for consultation services is permitted under AS 39.52.170 and would raise no independent ethical concerns. A public official's employment as a compensated expert witness under circumstances that pose no conflict with the official's public duties has previously been deemed permissible under the Act. *See* 1992 Inf. Op. Att'y Gen. (Jan. 1; 663-91-0381).

JLS:sb

¹ It seems appropriate to note that to the extent the forum reviewing the claim has subpoena power, Mr. X may in any event be subject to compelled appearance to testify under subpoena. Compliance with a properly issued subpoena, being involuntary, would further reduce any ethical concern, even if interference with the commissioner's official duties becomes a real possibility. In the event the claim holder should demand more of Mr. X's time than would be consistent with the conditions he has imposed, it is expected that he would refuse to violate the conditions unless compelled under a legal subpoena.