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Mike Nizich  
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550 West 7th Avenue, Suite 1700  
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Re: Analysis and Recommendations Concerning the Alaska  
Executive Branch Ethics Act

Dear Mr. Nizich,

We provide this legal analysis in response to questions about how to best implement the Alaska Executive Branch Ethics Act's goals to encourage high moral and ethical conduct and to improve public service, with a particular focus on (1) effective ways in which to minimize the disruptive effects of breaches of confidentiality, and (2) whether and how the state may defend public officers charged with ethics violations.

**I. Summary**

These are important issues for the state. They require consideration of laws that promote ethical conduct for public officials, the balance between First Amendment rights and a fair process for those accused of ethics violations, and holding public officials accountable while also encouraging qualified citizens to serve in state government. Because these issues have broader implications for public policy, I am issuing this analysis and advice as an attorney general's opinion.

Our analysis, conclusions, and recommendations fall into two categories. First, the confidentiality of the Ethics Act investigative process can be better protected in the future. As drafted, the Act provides an unnecessary opportunity

for a complainant to publicize a confidential report at a sensitive stage of the process. In addition, it imposes no consequences for citizens who abuse the Act by filing frequent, frivolous complaints, or filing complaints in bad faith. With statutory amendments, the ethics procedures can be changed in a manner that protects both the public interest in holding public officials accountable and the integrity of the process. We do not, however, recommend amendments that would impose sanctions for a citizen's disclosure of an ethics complaint that he or she has filed.

Second, the state has a well-established general policy of either defending or reimbursing executive and judicial branch officials for their legal defense when they are accused of inappropriate conduct or wrongdoing. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly and therefore should be defended by the state against allegations to the contrary. Reimbursing the reasonable expenses that exonerated public officers incur in successfully defending against ethics complaints is consistent with this policy and balances the state's interests in discouraging misconduct by public officers and encouraging public service.

Drawing on previous legal advice we have provided, we conclude that executive branch agencies have authority to pay or reimburse the legal expenses public officers incur in defending against ethics complaints, if four conditions are met: (1) the public officers are exonerated of violations of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred are reasonable; and (4) appropriate sources of funds are available to the agencies to pay the expenses. Where those four conditions exist, reimbursing officers for those expenses clearly serves a public purpose and the public interest.

## **II. Background – the Ethics Act Process**

Under the Ethics Act, anyone—including the attorney general or a member of the public—may file a complaint against a public officer.<sup>1</sup> For most ethics complaints, the attorney general is responsible for investigating the allegations and,

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<sup>1</sup> AS 39.52.310. “Public officers” include executive branch employees and officers, members of state boards and commissions, and state trustees. AS 39.52.960(20) and (21).

if appropriate, prosecuting the accused.<sup>2</sup> However, for ethics complaints against the governor, lieutenant governor, or attorney general, the attorney general is recused from involvement in the proceedings and the personnel board appoints independent counsel to act in place of the attorney general.<sup>3</sup> The attorney general is also charged with adopting regulations “necessary to interpret and implement” the Ethics Act.<sup>4</sup>

An Ethics Act investigation often results in the dismissal or settlement of the complaint. When it does not, the attorney general or independent counsel issues a public accusation against the subject officer, followed by an evidentiary hearing before the personnel board to determine whether a violation occurred and what remedies are appropriate.<sup>5</sup> In that hearing, the attorney general or independent counsel prosecutes the ethics charges against the public officer.<sup>6</sup>

A public officer accused of ethics violations is not required to have a lawyer represent him in ethics proceedings. But even a public officer who is confident he acted properly may decide that he does not want to handle the ethics complaint procedures on his own – especially given that the potential penalties include substantial fines, removal from office, or discharge from state employment.<sup>7</sup> A wrongly accused public officer might worry that, without a lawyer representing him in the process, the attorney general or independent counsel might misconstrue the officer’s actions or misinterpret the Ethics Act. An accused public officer might also want a lawyer’s advice on how to respond to media inquiries about an ethics complaint if the complaint prematurely becomes public knowledge.

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<sup>2</sup> AS 39.52.310 – 39.52.390.

<sup>3</sup> AS 39.52.310(c).

<sup>4</sup> AS 39.52.950.

<sup>5</sup> AS 39.52.350 – 39.52.370.

<sup>6</sup> AS 39.52.360(c).

<sup>7</sup> *See* AS 39.52.410 – 39.52.460.

The Ethics Act designates as confidential an ethics complaint and all other documents and information regarding an ethics investigation unless (1) the accused waives confidentiality in writing or (2) the attorney general or independent counsel initiates formal proceedings by issuing a public accusation.<sup>8</sup> The Act also provides other ways in which confidential information from the proceedings can be made public.<sup>9</sup>

### **III. Preventing Breaches of Confidentiality**

Despite the Ethics Act's confidentiality provisions, over the past several months complaints against public officers regularly have been provided to the news media. In addition, a confidential recommendation by the personnel board's independent counsel recently was disclosed to the press, undermining the process by which ethics complaints are resolved. The Ethics Act does not grant the state authority to punish citizens who violate the confidentiality requirement, however, nor would that be advisable in many circumstances.<sup>10</sup> We conclude that the appropriate manner to prevent disclosure of information that may be harmful to the process of ethics investigations and the subject of the complaint is to improve protections to the process and to implement safeguards to prevent abuse of the Ethics Act.

#### **A. The State Can Take Steps to Protect the Integrity of the Process of Resolving an Ethics Act Complaint**

Confidentiality is important to the process of investigating and resolving an ethics complaint. The investigation may involve sensitive information about personnel matters that should be protected from the public eye. Further,

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<sup>8</sup> AS 39.52.340(a), (c).

<sup>9</sup> *See, e.g.*, AS 39.52.335(c), (f)-(h).

<sup>10</sup> The confidentiality provision is enforceable against state officers who are part of the process of evaluating, investigating, and deciding Ethics Act complaints. *See, e.g., Dixon v. Kirkpatrick*, 553 F.3d 1294, 1306 (10<sup>th</sup> Cir. 2009) (holding that disclosure by a clerical employee of information about an ongoing investigation by state veterinary board was a constitutionally sufficient basis for dismissal).

publicizing information may interfere with the investigator's ability to find witnesses willing to cooperate, invite retaliation, threaten the independence of the investigation, and prejudice the right of the subject to a fair process. The public does not have a right to access information about the evidence or course of an investigation as it proceeds.<sup>11</sup>

The state can protect its interest in the integrity of Ethics Act investigations by creating "careful internal procedures to protect the confidentiality of [the] proceedings."<sup>12</sup> Thus we recommend improving Ethics Act procedures to prevent a breach of confidentiality that could prejudice the subject of a complaint and interfere with the state's ability to judiciously resolve ethics matters.

For example, the Ethics Act provides that when the attorney general finds probable cause to believe that a past action has violated, or an anticipated action would violate the Ethics Act, but determines that a hearing is unwarranted, he recommends corrective or preventive action in a confidential report. The Ethics Act currently requires the attorney general to provide copies of this confidential report to both the complainant and the accused officer. The accused officer who receives a report of recommended action from the attorney general may want to negotiate an alternative corrective action or settlement with the state. In this situation, giving the recommendations to the complainant is unnecessary. The complainant has no role in negotiations and should not be permitted to interfere

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<sup>11</sup> The right of access to information is far narrower than the free speech right to publish information once it is received. *See First Amendment Coal. v. Judicial Inquiry and Review Bd.*, 784 F.2d 467, 472 (3<sup>rd</sup> Cir. 1986) ("[T]he right of publication is the broader of the two, and in most instances, publication may not be constitutionally prohibited even though access to the particular information may properly be denied.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

<sup>12</sup> *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 857 (D.R.I. 1989) (citing *Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *see also R.M. v. Supreme Court of N.J.*, 883 A.2d 369, 380 (N.J. 2005) (holding that state's interest in enabling disciplinary authorities to make a full and fair investigation can be more narrowly met by the use of subpoenas and the imposition of criminal sanctions for witness tampering, destruction of evidence, and attempts to unduly pressure officials)).

with or undermine discussions by publishing the report. This would compromise the proceedings at a critical stage. The complainant can be informed of the disposition of the case when the matter is resolved, corrective action is taken under AS 39.52.330, or an accusation is filed under AS 39.52.350. Thus, we recommend the Ethics Act be amended to eliminate the requirement that the attorney general serve the complainant with his predispositional recommendations, and to delay notification to the complainant until the matter is concluded.

## **B. The State Can Take Steps to Prevent Abuse of the Ethics Act**

The Ethics Act process also could be changed to prevent another potential harm—abuse of the process. Some Alaskans have argued that the Ethics Act has been used inappropriately in some circumstances to politically damage the subject of the complaint.<sup>13</sup> This opinion does not examine or decide whether or to what extent citizens may have abused the Ethics Act process in the past. We focus instead on statutory changes that could provide a disincentive to abuse the Act in the future.

Our first suggested addition to the Ethics Act is a provision that is simple and commonly used in other jurisdictions. We recommend giving the personnel board authority to order reimbursement of fees and costs from a person who has filed a complaint in bad faith. The reimbursement could extend both to the subject of the complaint, for attorney's fees and costs of defending against the accusation, and to the state, for its actual costs associated with processing and investigating the complaint. The precise standard for ordering reimbursement is a policy decision beyond the scope of this opinion, but as a general matter the standard should not discourage speech protected by the First Amendment. A brief analysis of different standards used by other states follows.

Some state codes make knowingly false complaints subject to both reimbursement orders and criminal prosecution.<sup>14</sup> Others have similar provisions

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<sup>13</sup> See, e.g., "Our View: Abuse of Ethics Complaints Turns Good Law Into Bad Politics," Anchorage Daily News, May 3, 2009.

<sup>14</sup> See, e.g., Ala. Code § 36-25-27(a)(4) ("Any person who knowingly makes or transmits a false report or complaint pursuant to this chapter shall, upon conviction, be guilty of a Class A misdemeanor and shall be liable for the actual legal expenses incurred by the respondent against whom the false report or

but without criminal penalties, whereby reimbursement is warranted when the complainant knew that he or she was falsely alleging misconduct or providing false information.<sup>15</sup> In still other states, a less rigorous standard applies. Missouri law provides, for example, that “[a]ny person who submits a frivolous complaint shall be liable for actual and compensatory damages to the alleged violator for holding the alleged violator before the public in a false light.”<sup>16</sup> The same statute defines “frivolous” to mean “a complaint clearly lacking any basis in fact or law.” An even looser standard would be to assess the subject’s attorney’s fees against the complainant whenever a subject is found not to have violated the Ethics Act, regardless of the complainant’s knowledge or intent. We have found no state that applies such a standard, however, most likely because it would discourage most ethics complaints and undermine an important element of ethics laws.

We also recommend consideration of another safeguard to discourage habitual complaint filers who use the Ethics Act process to harass executive branch employees. Statutory amendments could provide authority to the personnel board to decline to process further complaints filed by a person who has abused the Act in this way. Again, the precise parameters of this authority would be a policy

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complaint was filed.”); *see also* 5 Ill. Comp. Stat. 430/50-5(d) (“Any person who intentionally makes a false report alleging a violation of any provision of this Act to an ethics commission, an inspector general, the State Police, a State’s Attorney, the Attorney General, or any other law enforcement official is guilty of a Class A misdemeanor.”).

<sup>15</sup> In West Virginia, for example, a person who files an ethics complaint in good faith “is immune from any civil liability that otherwise might result,” but a person who is found, by clear and convincing evidence, to have filed a complaint knowing that material statements are untrue can be ordered to reimburse both the subject and the ethics commission for costs and fees. W. Va. Code § 6B-2-4(u)(1)-(2); *see also* Fla. Stat. § 112.317(7) (giving ethics commission authority to require reimbursement of costs and fees “[i]n any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee ... with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part.”).

<sup>16</sup> Mo. Ann. Stat. § 105.957 (4).

matter. One model is the provision for “Multiple complaints by a single complainant” in the Rules for Judicial Council and Judicial Disability, which govern the United States Court of Appeals for the Ninth Circuit. These rules provide that a complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints.<sup>17</sup> The rule allows the complainant an opportunity to demonstrate why the judicial council should not limit the complainant’s right to file further complaints, and gives the council authority to prohibit, restrict, or impose conditions on the complainant’s future use of the procedure.<sup>18</sup>

We believe that these recommendations for changes to the Ethics Act maintain an appropriate balance between protecting the integrity of the process and encouraging responsible use of the Act to expose and correct unethical conduct. As discussed further below, we do not suggest any changes that might inhibit public discussion, debate, or criticism of the government.

### **C. The State Should Not Discourage Public Discourse on Government Actions**

Creating safeguards to keep Ethics Act investigations confidential is categorically different than restricting citizens from speaking out about government conduct. Because public dialogue about government actions is speech at the core of the First Amendment, we do not recommend imposing sanctions on a citizen for disclosing information about an ethics complaint he or she has filed. Speech by a citizen charging government officials with breach of a code of official conduct is political speech accorded First Amendment protection. The United States Supreme Court has adhered to the bedrock principle that expression on public issues rests “on the highest rung of the hierarchy of First Amendment values,”<sup>19</sup> and thus that “debate on public issues should be uninhibited, robust, and

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<sup>17</sup> U. S. Ct. of App. 9th Cir. Jud Miscon, Rule 10(a) (2008).

<sup>18</sup> *Id.* West Virginia’s ethics act contains a similar provision, *see* W. Va. Code § 6B-2-4(u)(2)(C) (“[T]he commission may decline to process any further complaints by the complainant, the initiator of the investigation, or the informant.”).

<sup>19</sup> *Carey v. Brown*, 447 U.S. 455, 467 (1979).



wide-open.”<sup>20</sup> The Supreme Court has also made clear that protected political speech goes far beyond intellectual argument about political theory; it includes vigorous debate about the qualifications and official conduct of public officials.<sup>21</sup> Open discussion of official conduct is accorded the broadest protection available in our political system despite the fact “that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”<sup>22</sup>

Alaska’s Ethics Act does not inhibit this type of debate, because it does not impose penalties on individuals who are not engaged in the investigative or decision-making process. As we have considered ways to protect the confidentiality of the ethics investigations, we have been mindful that penalizing public discourse about the actions of government officials might threaten First Amendment rights. Courts have consistently found that confidentiality provisions applicable to ethics complaints restrict the content of speech.<sup>23</sup> Because they

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<sup>20</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

<sup>21</sup> *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. at 268 (citing with approval *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (“public men, are, as it were, public property” and “discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled”)).

<sup>22</sup> *Id.* at 270.

<sup>23</sup> “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 643 (1994). Cases finding the confidentiality provisions of ethics laws to impose content-based restrictions include *Lind v. Grimmer*, 30 F.3d 1115, 1118 (9<sup>th</sup> Cir. 1994) (holding unconstitutional the confidentiality provision applicable to investigations conducted by Hawaii’s campaign spending commission); *Baugh v. Judicial Inquiry and Review Comm’n*, 907 F.2d 440, 444 (4<sup>th</sup> Cir. 1990) (finding that confidentiality requirement of Hawaii’s Judicial Inquiry and Review Commission was not content-neutral and remanding for further analysis under strict scrutiny); *Doe v. State of Florida Judicial Qualifications Comm’n*, 748 F. Supp. 1520, 1525 (S.D.

govern the content of speech, these restrictions will survive scrutiny only if narrowly drawn and necessary to serve a compelling state interest.<sup>24</sup> Courts generally have rejected states' interests in ethics code confidentiality provisions as insufficient to justify restrictions on citizens' speech.<sup>25</sup>

#### **IV. As a General Policy, the State Either Defends or Reimburses Public Officers for Their Legal Expenses When They are Accused of Inappropriate Conduct or Wrongdoing**

The state routinely defends public officers against claims of inappropriate conduct or wrongdoing. For example, unless engaged in willful misconduct or gross negligence, the state defends public officers against claims that they violated others' constitutional rights while acting within the course and scope of their official duties.<sup>26</sup> Similarly, the Department of Law offers in-house legal

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Fla. 1990) (invalidating confidentiality provision of Florida Constitution, applicable to complaints against judges); *Providence Journal Co. v. Newton*, 723 F. Supp. at 853 (invalidating confidentiality provision of Rhode Island Ethics Commission); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) (finding confidentiality provision of Florida State Ethics Commission unconstitutional); *In re Warner*, \_\_\_ So.3d \_\_\_, 2009 WL 1025823 at \*9 (La. 2009) (invalidating confidentiality requirement in attorney disciplinary proceedings).

<sup>24</sup> *Boos v. Barry*, 485 U.S. 312, 321 (1988).

<sup>25</sup> *See Lind v. Grimmer*, 30 F.3d at 1119-20; *Stilp v. Contino*, \_\_\_ F. Supp.2d \_\_\_, 2009 WL 1842087 at \*6-11 (M.D. Pa. 2009); *Providence Journal Co. v. Newton*, 723 F. Supp. at 856-57; *S.D. v. Supreme Court of Florida*, 723 F. Supp. 690, 693-94 (S.D. Fla. 1988); *In re Warner*, 2009 WL 1025823 at \*22-27; *R.M. v. Supreme Court of New Jersey*, 883 A.2d 369, 377-78 (N.J. 2005); *Doe v. Doe*, 127 S.W.3d 728, 736 (Tenn. 2004); *Petition of Brooks*, 678 A.2d 140, 144-45 (N.H. 1996).

<sup>26</sup> *See, e.g., Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d 573, 577 (Alaska 2007). The Department of Law recently—and successfully—defended three Alaska State Troopers against claims under 42 U.S.C. § 1983, which provides, in part, that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

representation to its attorneys when complaints of professional misconduct are filed against them with the Alaska Bar Association.<sup>27</sup> The Department of Law represents its attorneys so long as the allegations of misconduct arise in the course and scope of their official duties and the attorneys did not engage in willful misconduct or gross negligence.<sup>28</sup>

In some cases, when the Department of Law does not defend public officers against claims of inappropriate conduct, the state will instead reimburse them for the legal expenses they incur in successfully defending themselves. For example, if a Department of Law attorney hires private counsel to defend against professional misconduct claims before the Alaska Bar Association, the department may reimburse the attorney for costs and fees incurred if the attorney successfully defends against the claims and the claims arise out of the course and scope of the attorney's work with the department.<sup>29</sup> The state also reimburses Alaska judges and judicial officers for legal expenses they incur in disciplinary proceedings before the Alaska Commission on Judicial Conduct.<sup>30</sup> This commission serves a function for the judicial branch that is analogous to the personnel board's function for the executive branch under the Ethics Act.

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be liable to the party injured in an action at law.” This statute therefore authorizes a person to bring a civil action for a public official's putative violation of the person's constitutional rights. The department also is defending former Governor Palin in a § 1983 action involving a clerical error in the Governor's Office that resulted in the failure to issue a proclamation.

<sup>27</sup> Memorandum from Attorney General Bruce Botelho at 2 (Nov. 8, 2002) (announcing the department's policy on reimbursement and defense of employees).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Letter of Agreement between the State of Alaska, Dep't of Admin., Div. of Risk Mgmt. and the Alaska Ct. Sys. at 2 (undated). The state also has agreed to reimburse state employees for legal defense of allegations of wrongdoing in occupational licensing investigations before the Board of Psychologists and the State Medical Board, if the employees are exonerated.

More generally, the Department of Law was recently asked whether a state agency may reimburse a public officer for legal expenses incurred in defending against a complaint that the officer violated the professional code of conduct covering his duties and responsibilities. We concluded that the agency could reimburse such legal expenses if: (1) a decision exonerates the officer of any violations of the law or any wrongdoing; (2) the officer acted within the course and scope of his office or employment; (3) the attorney's fees are reasonable; and (4) an appropriate source of funds is available for that purpose.<sup>31</sup>

As these examples show, the state adheres to a general policy of either defending or reimbursing public officers for their legal expenses when they are accused of inappropriate conduct or wrongdoing, particularly when such accusations are unfounded. Underlying this general policy is the legal presumption that state officers carry out their duties ethically and responsibly,<sup>32</sup> and therefore should be defended by the state against allegations to the contrary.

#### **V. May the State May Defend or Cover the Legal Expenses of Public Officers in Ethics Proceedings**

Despite this widespread practice of defending or reimbursing public officials when accused of wrongdoing, the state apparently has never defended or covered the legal expenses of an accused officer in an Ethics Act proceeding. Alaska

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<sup>31</sup> Confidential Letter from Acting Attorney General Richard Svobodny (May 4, 2009).

<sup>32</sup> See, e.g., *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) (“[a]dministrative agency personnel are presumed to be honest”); *Earth Resources Co. v. State, Dep’t of Revenue*, 665 P.2d 960, 962 n.1 (Alaska 1983) (“agency personnel and procedures are presumed to be honest and impartial”).

statutes are silent on this issue with regard to ethics proceedings.<sup>33</sup> But existing law provides ample authority and guidance for covering these legal expenses without the need for statutory changes.

#### **A. A Public Purpose is Critical**

The state may not spend public money for public officers' defense in ethics matters unless doing so serves a public purpose and appropriations exist for the expenditures.<sup>34</sup> Defending officers accused of ethics violations or covering their legal expenses when they are exonerated clearly has a public purpose: citizens may be reluctant to serve in state government—or be inhibited in performing their

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<sup>33</sup> We concluded in an informal 1994 opinion that defense or indemnification of public officers for expenses or penalties incurred in ethics proceedings was unavailable in part because a complaint under the Ethics Act is not a suit for money damages. 1994 Inf. Op. Att'y Gen. at 2 (June 3; 663-94-0289). To the extent that the informal 1994 opinion emphasizes that public officers are not legally entitled to defense and indemnification of fines levied against them in ethics proceedings, the reasoning of this informal opinion is sound, particularly for public officers found guilty of wrongdoing. To the extent that the opinion suggests that the state may not pay the legal expenses of exonerated public officers, it is inconsistent with the state's practice in other contexts and with the public interest. While ethics proceedings are not suits for money damages, ethics allegations usually arise out of public officers' performance of their official duties, and penalties for violating the Ethics Act may include monetary fines. *See* AS 39.52.440 – 39.52.450. Moreover, the potential damage to a public officer's reputation is a cost to the individual, and recent experience demonstrates that public officers may incur substantial legal expenses even with regard to meritless ethics complaints.

<sup>34</sup> *See* Alaska Const. art. IX, § 6 (“No . . . appropriation of public money [shall be] made, or public property transferred, . . . except for a public purpose.”); Alaska Const. art. IX, § 13 (“No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.”); *see also* AS 37.07.080(d) (“A state agency may not increase the salaries of its employees . . . or expend money or incur obligations except in accordance with law and [a] properly approved operations plan.”).

official duties—if they must bear the cost of defending themselves against unfounded ethics charges related to their state duties.<sup>35</sup> Indeed, the Ethics Act itself underscores the importance of ensuring that the Act not only encourages “high moral and ethical standards among public officers in the executive branch,” but also “improve[s] standards of public service.”<sup>36</sup> 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. This question is examined in more detail below.

**B. A Policy of Payment or Reimbursement After Exoneration Would Best Balance the Public Interest in Encouraging Public Service and Compliance with the Ethics Act**

A policy allowing payment of legal expenses of exonerated public officers who hire private lawyers to defend them against ethics complaints would promote and “improve standards of public service”<sup>37</sup> while encouraging compliance with the Ethics Act. The public purpose for paying legal expenses is clearest for those

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<sup>35</sup> See, e.g., *Snowden v. Anne Arundel County*, 456 A.2d 380, 385 (Md. 1983) (upholding an ordinance allowing reimbursement of fees and recognizing that reimbursement serves the public interest in encouraging the recruitment and retention of high-risk officers, maintaining morale, and providing necessary protection to those whose line of work exposes them to the financial burdens of defending baseless criminal charges); *Thorner v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (holding that Florida common law requires publicly paid legal representation for public officials defending against litigation arising from their performance of official duties while serving a public purpose; the requirement’s purpose “is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently”) (citing *Nuzum v. Valdes*, 407 So. 2d 277 (Fla. Dist. Ct. App. 1981)).

<sup>36</sup> AS 39.52.010 (a)(1) and (a)(2)(B).

<sup>37</sup> AS 39.52.010(a)(2)(B).

who are exonerated.<sup>38</sup> As noted above, the reimbursement of legal fees for those who are exonerated in ethics matters also is consistent with the state's general practice in other contexts. Those situations, all of which concern professional ethics codes, involve issues very similar to Ethics Act matters. Such an approach also appears to be the common practice among the majority of state governments in the country.<sup>39</sup>

The recent advice we provided to an executive branch agency on reimbursement of legal expenses in code-of-conduct proceedings offers an appropriate model for payment of legal expenses in Ethics Act matters. Based on that model, public officers may have expenses they incur in defending against ethics complaints covered if

(1) the officers are exonerated of any violation of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred were reasonable; and (4) there are appropriate sources of funds to pay the expenses.<sup>40</sup> As we stated in that opinion, "these conditions ensure that the spending will serve a public purpose."<sup>41</sup>

Although agencies could wait and reimburse public officers for their legal expenses once the ethics complaints against them are resolved, allowing state

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<sup>38</sup> See *Snowden*, 456 A.2d at 385.

<sup>39</sup> See Letter from James McPherson, Executive Director of the National Association of Attorneys General 2 (July 31, 2009) ("In conclusion, the reimbursement for reasonable attorney's fees and costs incurred by state officials during the course of an investigation or adjudication of alleged ethics violations where those allegations were found unsubstantiated or unfounded appears to be a common practice among a majority of the states. Such common practice, while not specifically provided by any state statutory or regulatory scheme, is premised upon a broad interpretation of risk management programs, formal ethics programs, or sound public policy protecting state officials from frivolous lawsuits which could discourage citizens from engaging in public service or seeking elected office.").

<sup>40</sup> Confidential Letter from Acting Attorney General Richard Svobodny, *supra* n.31.

<sup>41</sup> *Id.*

officers the option of having their legal expenses paid as they are incurred helps serve the public interest of not discouraging public service. Logistically, reimbursement may be simpler. But if public officers must shoulder the financial burden of legal expenses while they await resolution of unfounded complaints against them, qualified individuals may be reluctant to accept positions in state service and public officers may be inhibited in carrying out their duties. Public officers must agree, however, to repay any amounts they receive if they are not exonerated.<sup>42</sup>

The Alaska Supreme Court has not addressed the issue of reimbursement, but other court decisions suggest that this approach strikes an appropriate balance between the public's interest in encouraging individuals to accept positions in state

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<sup>42</sup> Pursuant to AS 39.52.950, the Department of Law will soon promulgate regulations addressing procedures for payment of expenses incurred in Ethics Act proceedings.



service and its interest in holding public officials accountable and discouraging misconduct under the Ethics Act.<sup>43</sup>

### **C. Conflict of Interest Issues Prevent the Department of Law from Directly Representing State Officials in Ethics Act Proceedings**

Another possible approach would be to have the Department of Law defend public officers against ethics complaints. As noted above, the Department of Law regularly defends public officials when they are accused of wrongdoing under federal civil rights statutes. However, having the Department of Law directly defend public officers against ethics complaints could present conflict-of-interest

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<sup>43</sup> See, e.g., *Guenzel-Handlos v. County of Lancaster*, 655 N.W.2d 384, 389-90 (Neb. 2003) (concluding that, absent specific legislative authorization, public bodies are not obligated to pay attorney's fees their officials incur in successfully defending against criminal charges arising out of performance of their official duties); *Triplett v. Town of Oxford*, 791 N.E.2d 310, 315-16 (Mass. 2003) (same); *Hart v. County of Sagadahoc*, 609 A.2d 282, 283-84 (Me. 1992) (concluding that the common law permits, but does not require, a public body to pay fees its officials incur in those circumstances); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (recognizing a common law duty of a governmental body to pay attorney's fees that its officials incur in defending against litigation arising out of performance of their official duties while serving a public purpose); *Chavez v. City of Tampa*, 560 So.2d 1214, 1214-19 (Fla. Dist. Ct. App. 1990) (holding that, where a city council member received advice from the city attorney that voting on a matter involving her personal interest would be a conflict of interest but nonetheless voted on that matter to break a tie vote, she was not entitled by statute or common law to reimbursement of the legal expenses she incurred in successfully defending against related charges before the state ethics commission); *Ellison v. Reid*, 397 So. 2d 352, 354 (Fla. Dist. Ct. App. 1981) (upholding the use of public funds to pay attorney's fees that a county appraiser incurred in successfully defending against charges of official misconduct before the state ethics commission); *Bd. of Chosen Freeholders of Burlington v. Conda*, 396 A.2d 613, 615, 620 (N.J. Super. Ct. Law Div. 1978) (holding that a county had neither the duty nor the authority to reimburse a county surrogate for legal fees incurred in defending against disciplinary proceedings before an advisory committee on judicial conduct, where the proceedings led to censure of the surrogate as a judicial officer).

challenges because of the attorney general's role in interpreting, enforcing, and prosecuting violations of the Ethics Act. If the Department of Law directly defended public officers in Ethics Act proceedings, the result would be that—for ethics complaints against most public officers—the defense counsel and the lawyer investigating and prosecuting the complaint would be in the same department and be supervised by the same attorney general and, perhaps the same deputy attorney general. In essence, the attorney general, through attorneys in the Department of Law, would be both prosecuting and defending against the ethics complaints. That could not only create an appearance of impropriety, but could also prejudice the interests of the accused officers and diminish the officers' confidence in the representation they receive. It could also create difficulties under the Alaska Rules of Professional Conduct because of the conflicting obligations of the state attorneys and their supervisors.<sup>44</sup>

Those conflict difficulties would not exist if the Department of Law represented only the governor, lieutenant governor, and attorney general against ethics complaints, because the attorney general is recused from investigating and prosecuting complaints against those three officers.<sup>45</sup> But Department of Law representation of even those three officers would still raise significant concerns.<sup>46</sup>

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<sup>44</sup> See Alaska R. Prof'l Conduct 1.7, 1.10 (providing that a lawyer should generally not represent a client if the representation of that client will be directly adverse to another client of that lawyer or the lawyer's firm). *But see* Alaska R. Prof'l Conduct 1.7 cmt. ("government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.").

<sup>45</sup> AS 39.52.310(c).

<sup>46</sup> As a general rule, the Ethics Act makes clear that the attorney general has no role in the investigation and prosecution of an ethics complaint against the governor, lieutenant governor, or attorney general. In all other situations involving the Ethics Act, 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. But if the Department of Law were defending an individual officer against an ethics complaint, the goal would be different: to defend that officer zealously, regardless of the implications for the long-term implementation of the Ethics Act. For example, zealous representation of an accused officer might involve asserting that a provision of the Ethics Act is unconstitutional—an

Please contact me if we can be of further assistance with this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Daniel S. Sullivan", with a long horizontal flourish extending to the right.

Daniel S. Sullivan  
Attorney General

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assertion that the Department of Law would likely resist in carrying out its general responsibility to implement and enforce the Ethics Act. 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.