

MEMORANDUM

State of Alaska

Department of Law

TO: Designated Ethics Supervisor DATE: October 28, 1993

FILE NO.: 661-94-0267

TEL. NO.: 269-5171

SUBJECT: Restrictions after service as
commissioner; AS 42.05, AS
39.52

FROM: Virginia A. Rusch
Assistant Attorney General

You have asked for advice whether, after the expiration of your term as a member of the commission, you will be prohibited from engaging in certain speaking, writing, and advocacy activities related to the commission. The explicit statutory restrictions imposed on former commission members or employees are set out in AS 42.05.131(b),³ and you should also consider AS 39.52.180, a provision of the Alaska Executive Branch Ethics Act that imposes restrictions on a public officer's employment and use of information after leaving state service.⁴ In general, the conduct these statutes prohibit is the use, on behalf of an

³ AS 42.05.131(a) and the corresponding provision in the Pipeline Act, AS 42.06.605, restrict certain interests or activities during a member or employee's tenure with the commission; once the membership or employment is terminated, these sections no longer apply. The Pipeline Act does not contain a provision restricting representation of or employment by a pipeline company after the termination of membership or employment with the commission, but AS 39.52.180 is applicable.

⁴ AS 39.52.140 also prohibits use of certain information gained in performing official duties. This statute provides:

Sec. 39.52.140. Improper use or disclosure of information.

(a) A current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public.

(b) A current or former public officer may not disclose or use, without appropriate authorization information acquired in the course of official duties that is confidential by law.

interested party in a matter that was under consideration by the former public officer's agency, of some case-specific knowledge, inside insight, or confidential information the former public officer may have gained on the job. The restrictions in both statutes relate to matters under consideration during the former employee's tenure; therefore, the purpose is not to preclude a former public official from making use of general expertise, knowledge, and skills acquired during the state service.

The pertinent parts of AS 42.05.131 and AS 39.52.180 are as follows:

Sec. 42.05.131. Restrictions on members and employees.

. . . .

(b) A member or employee of the commission may not, after leaving the position as a member or employee of the commission, act as agent for or on behalf of a public utility in any matter before the commission that was before the commission during the employee's employment or the member's term of office. A violation of this subsection is a class A misdemeanor.

Sec. 39.52.180. Restrictions on employment after leaving state service. (a) A public officer who leaves state service may not, for two years after leaving state service, represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action. For the purposes of this subsection, "matter" includes a case, proceeding, application, contract, or determination, but does not include the proposal or consideration of legislative bills, resolutions and constitutional amendments, or other legislative measures; or the proposal, consideration, or adoption of administrative regulations.

It will be helpful, before addressing your specific questions, to analyze and compare the elements of the conduct prohibited by each of these statutes. The elements of the conduct prohibited by AS 42.05.131(b) are:

- 1) acting as agent for or on behalf of
- 2) a public utility
- 3) in any matter before the commission
- 4) that was before the commission during the member's term.

The elements of the conduct prohibited by AS 39.52.180 are:

- 1) within two years after you leave [the commission]
- 2) representing, advising or assisting
- 3) a person (as defined in AS 39.52.960)
- 4) for compensation
- 5) regarding a matter (an adjudication or contract award, but not a legislative measure or regulations)
- 6) under consideration by [the commission]
- 7) in which you participated personally and substantially
- 8) through the exercise of official action.

The elements of AS 42.05.131(b) are both narrower and broader than the elements of AS 39.52.180. AS 42.05.131(b) is narrower in that the prohibited activity is only acting on behalf of a public utility in a matter before the commission. In contrast, AS 39.52.180 prohibits representing any person, ("person" is defined in AS 39.52.960(17) and (15) to include a non-profit group), in any forum regarding a matter as that term is defined in the statute. On the other hand, AS 42.05.131(b) is broader than AS 39.52.180 in that the restriction is not limited to two years, and does not depend on personal and substantial participation in the agency proceeding.⁵

With this background, I turn to the specific questions you asked. Your questions are set out below with the answers following.

1. Is there any prohibition against testimony before the legislature?

Under AS 42.05.131(b), the answer to this is clearly "No" because the second element (the commission as forum) would be absent in legislative testimony. Under AS 39.52.180, however, the answer is not so clear. For a two year period this statute prohibits a former state official from representing, advising or assisting for compensation in any forum on the subject of a case,

⁵ The Executive Branch Ethics Act was enacted more recently than AS 42.05.131(b), but there is no indication that the legislature intended to supersede any existing statutory restrictions on former public officers. Therefore, when both AS 42.05.131(b) and AS 39.52.140 or AS 39.52.180 are applicable, the more restrictive provision controls.

application or other adjudication in which that official personally and substantially participated. Lobbying or testimony before a legislative committee on a specific docket-related or adjudicative matter that you had considered as a commissioner would therefore be prohibited.

On the other hand, this statute certainly does not prohibit testifying before the legislature on the general subject of utility or pipeline policy, on regulations considered by the commission, legislation affecting the commission or any other matter not related to a specific commission proceeding in which you participated. In previous interpretations of this statute, the Attorney General's Office has quoted the legislature's explanation and advised that AS 39.52.180 is to be interpreted narrowly. See, e.g., 1993 Info. Op. Att'y Gen. (June 18; 663-93-0387); 1991 Inf. Op. Att'y Gen. (Fed. 25; 663-91-0291).

2. Is there any prohibition against writing for either the popular or trade press?

As discussed in answer to your first question, the answer is "No" under AS 42.05.131(b), but AS 39.52.140 and AS 39.52.180 may prohibit use of some limited types of information in your writing.

3. Is there any prohibition against writing reports for clients, either non-public utility or public utility? For example, writing a background report for a utility, but not sponsoring it before the commission.

AS 42.05.131(b) makes a distinction between work of certain kinds for a public utility, and for all others. Only the former is prohibited, so this statute would not bar you from writing reports for nonutilities. This statute also would not bar you from writing a report for a utility unless it was a submittal in a commission proceeding that was ongoing during your term. Whether this statute would prohibit you from writing a background report for a utility's submittal in a commission proceeding that was ongoing during your term, depends on whether you would be "acting as agent for or on behalf of" the utility. I think there is a spectrum of possible activities here. At the one end, simply supplying information to a utility would not violate the statute.

At the other end of the spectrum, arguing a position for the utility to advocate might well violate this statute.

In addition, in writing any report, whether for a utility or a nonutility, you must consider the same AS 39.52.180 bar on use of case-specific knowledge that is discussed in the answer to your first question, above.

4. Is there any prohibition against appearing before the commission on behalf of a public interest group? Does it matter

Ethics Supervisor
661-94-0267

October 28, 1993

Page 5

if the public interest group receives funding from public utilities?

AS 42.05.131(b) does not prohibit any activities on behalf of a public interest group. In contrast, AS 39.52.180 applies equally to activities on behalf of nonprofit groups. AS 39.52.960(17) and (15). Therefore, if other elements of the conduct prohibited by AS 39.52.180 are present, having a nonprofit organization as a client does not avoid the prohibition of this statute.

Your question also mentioned several specific nonprofit groups, and noted that one of them might be "tainted" by receiving funding from public utilities. This advice memorandum will not attempt to judge whether any particular nonprofit group might be "tainted." If this question arises for you, you should consider whether the utility contribution is a significant amount, and whether, as a consequence of the funding, the utility has significant influence on the nonprofit group's activities. If you need further advice regarding a specific potential client, the Attorney General's office can assist you by examining the specific circumstances.

5. Finally, could you appear before the commission representing an Alaskan public utility on any potential application for a certificate of public convenience and necessity by AT&T?

We understand, for purposes of this answer, that you mean an application by AT&T for a certificate of public convenience and necessity to provide intrastate interexchange telephone service. We also understand that AT&T has not yet filed an application to be certified for this service, although its intent to do so has been widely reported in the news media. AT&T role in Alaska telecommunications services has also been discussed extensively in commission proceedings regarding the "Master Agreement," and in deliberations of the FCC and the Joint Board on Alaska Telecommunications. You participated in the "Master Agreement" debate, but that proposal was eventually withdrawn by the parties.

On these facts, nothing in either AS 42.05.131(b) or AS 39.52.180 would prohibit you from acting on behalf of any Alaska utility that may wish to participate in proceedings on intrastate certification of AT&T. A certificate application by AT&T would be a different "matter" or proceeding from anything that the commission has considered during your term as a member.

Please feel free to contact me if you have any further questions about these interpretations.

VAR:rmg