

# MEMORANDUM

# State of Alaska

Department of Law

TO: Designated Ethics Supervisor

DATE: March 24, 1997

FILE No.: 661-97-0495

TEL. NO.: 269-5255

SUBJECT: Outside Employment as  
an Assistant Attorney General  
Engineer (Executive Branch  
Ethics Act, AS 39.52)

FROM: Robert E. Mintz  
Assistant Attorney General  
Oil, Gas & Mining - Anchorage

You have asked for advice under AS 39.52.210 regarding an employee's proposed outside employment. The employee is an engineer and proposes to do contract engineering work on a part-time basis, on evenings and weekends. This memorandum follows our previous oral advice.

## **GENERAL LEGAL PRINCIPLES RELEVANT TO OUTSIDE EMPLOYMENT**

In enacting the Alaska Executive Branch Ethics Act ("Ethics Act"), AS 39.52, the legislature recognized that "people who serve as public officers retain their rights to interests of a personal or financial nature," AS 39.52.110(a)(2), and that "so long as it does not interfere with the full and faithful discharge of an officer's public duties and pursuits," the Ethics Act "does not prevent an officer from following other independent pursuits," AS 39.52.110(a). However, the Ethics Act prohibits a public employee from "engag[ing] in or accept[ing] employment outside the agency which the employee serves, if the outside employment or service is incompatible or in conflict with the proper discharge of official duties." AS 39.52.170(a). Thus, the central inquiry in evaluating proposed outside employment is whether the employment would be "incompatible or in conflict" with the employee's state job.

In addition, the Ethics Act establishes several other specific prohibitions of which one must be particularly mindful when examining potential outside employment. Alaska Statute 39.52.120 bars public officers from, among other things, "seek[ing] other employment or contracts through the use or attempted use of official position," "accept[ing], receiv[ing], or solicit[ing] compensation for the performance of official duties or responsibilities from a person other than the state," or "us[ing] state time,

property, equipment, or other facilities to benefit personal or financial interests." Alaska Statute 39.52.140(a) bars public officers from "disclos[ing] or us[ing] 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 been disseminated to the public." Information is not considered to have been "disseminated to the public" merely because it is available to the public; the information must have been "published through newspaper publications; broadcast media; a press release; a newsletter, a legal notice; a non-confidential court filing; a published report; a public speech; or public testimony before the legislature, a board, or a commission." 9 AAC 52.070.

The Ethics Act further prohibits public officers from unauthorized use or disclosure of "information acquired in the course of official duties that is confidential by law." AS 39.52.140(b). Finally, the Ethics Act prohibits public officers from representing, advising, or assisting a person for compensation in any matter pending before the administrative unit that the officer serves. AS 39.52.160(a).

### **WHEN IS OUTSIDE EMPLOYMENT INCOMPATIBLE OR IN CONFLICT WITH THE PROPER DISCHARGE OF OFFICIAL DUTIES?**

The regulations interpreting the Ethics Act provide the following guidance as to the incompatibility-or-in-conflict standard:

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 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 proper discharge of the employee's official duties.

9 AAC 52.090. All of these issues are highly dependent on the specific facts of the situation and ultimately require you, as the designated ethics supervisor, to apply your

judgment in determining whether the outside employment or service would have any of the prohibited results.<sup>1</sup>

## **Time Conflicts**

The question of taking time away from the employee's official duties is self-explanatory, and there is little legal guidance we can provide. In one previous memorandum of advice under the Ethics Act, this office has advised that

if [the employee] only does the proposed five to ten hours of work outside of his normal working hours for the state, it would appear reasonable to conclude that the outside employment is not interfering with his state duties.

1995 Inf. Op. Att'y Gen. at 6 (July 14; 661-95-0777, 661-95-0817). In another memorandum of advice, this office stated, "We believe that 30 hours of outside work, in addition to 37.5 hours as a state employee per week, may be deemed excessive." 1989 Inf. Op. Att'y Gen. at 4 n.3 (Aug. 7; 663-889-0588). I note that your employee is proposing to spend "5-10 hours per week" on outside employment.

## **Limiting Scope of Official Duties**

On the question of limiting the scope of the employee's official duties, no clear impact of this sort appears from the facts provided. However, it is not difficult to imagine scenarios under which doing contract engineering work for a third party might have the effect of limiting the scope of the official duties of an engineer.

The employee has provided as examples of possible contract work, "Peer review of engineering assumptions and judgments," "Provide knowledge and experience in [specialized] engineering functions and operations," and "Verify facts and critique methods." He has explained the "relationship to current duties" as the following, among others: "[Specialized] engineering principles are used to study [technical] issues in the normal course of agency duties." If, for example, the engineer's outside work involved providing peer review and knowledge in the specialized engineering functions, verifying facts, and critiquing methods for an entity on a technical issue that later came before your agency for decision, due process considerations might bar your agency from relying on the engineer for assistance, and in any event the engineer's objectivity in advising your agency would likely be compromised.

---

<sup>1</sup> Under AS 39.52.210, a designated ethics supervisor may reassign an employee's duties to avoid a potential violation of the Ethics Act or may order divestiture of the interest that creates the potential conflict.

## Other Forms of Incompatibility or Conflict

The residual category of "incompatible or in conflict with the proper discharge of the employee's official duties" is obviously a broad one, and incompatibility or conflict could arise for many different reasons. On the other hand, the Ethics Act itself cautions against acting on the basis of a merely "insignificant or conjectural effect," AS 39.52.110(b), so a determination that outside employment would be incompatible or in conflict with the proper discharge of official duties should be based on facts that indicate a significant problem.

For example, this office has advised that it is permissible for an employee responsible for field operations in a state park to own and operate a private retail store (not, apparently, in the park) even though "some of the customers in the employee's store are also individuals the employee will deal with officially." 1989 Inf. Op. Att'y Gen. at 1 (April 28; 663-89-0426). However, it is important to note that there is a difference between "conjectural" and "potential." Outside employment that generates a *potential* conflict of interest between the employee and the state can be considered incompatible, if the conflict itself -- were it actually to occur -- would have more than an insignificant or conjectural effect. 1988 Inf. Op. Att'y Gen. (May 25; 663-88-0482).

One set of factors that has often been considered important in previous memoranda of advice on outside employment is whether the outside work involves the same or similar tasks, issues, or members of the public served as in the employee's state work. See 1990 Inf. Op. Att'y Gen. at 2 (Aug. 14; 663-90-0389). In the case of a state insurance financial examiner who also prepared tax returns for outside clients, the outside employment was acceptable as long as the clients were not in the insurance industry.

In this case, there is no overlap in the persons that Mr. X deals with as a state employee and those that he deals with as an employee of his spouse's firm. Thus, Mr. X does not have an opportunity to act toward a person in a way that satisfies his public obligations but is detrimental to a continued business relationship between that person and "X and Company," or conversely, in a way that is detrimental to the state's interest and beneficial to the business.

1989 Inf. Op. Att'y Gen. at 2 (Dec. 5; 663-89-0487). But there would be a conflict of interest if the employee served a client regulated by Mr. X's division. *Id.* A state employee who worked at a state salmon hatchery was allowed to operate his own business raising shellfish, since his state job did not deal with the shellfish growing industry and his public duties -- supervising daily operations of a finfish hatchery -- have nothing in common with his raising shellfish in his free time. 1990 Inf. Op. Att'y Gen. at 2 (Aug. 14; 663-90-0389).

At the other end of the spectrum, an employee of the Division of Mining whose state job largely involved providing advice to miners and reviewing mining applications wanted to start a private business to "assist miners with various aspects of their mining applications" -- tasks "that are almost identical to [those of his] current job." 1987 Inf. Op. Att'y Gen. at 1 (Dec. 23; 665-88-0080). Our office concluded that this situation would "create a serious potential conflict between the employee's public duties and the proposed private business activities." *Id.* at 2. We also found that there would be a violation of AS 39.52.160(a)(1) (assisting for compensation a person in a matter pending before the officer's agency) and that there was a strong potential for violation of AS 39.52.120(b) (use of official position to seek other employment).

Somewhat similar circumstances existed in the case of a state hydrologist involved with groundwater investigation projects statewide who proposed also to work with a private consultant to investigate sites where contamination might have occurred. Our office observed that, in performing private duties similar to those performed in his state job, "the employee might be faced with a situation in which the client's interest was not the same as the state's interest." We concluded that this potential for conflict made the outside employment "incompatible or in conflict with official responsibilities within the meaning of AS 39.52.170." 1988 Inf. Op. Att'y Gen. at 3-4 (April 25; 663-88-0482). We also noted that, since the agency frequently comments on the types of studies the employee proposed to do with the private consultant, "[i]t would create a rather difficult situation for a subordinate employee to have to comment on a study or report prepared by his or her supervisor" -- i.e., the employee seeking the outside work. *Id.* at 3.

A closer question was found in the case of a state real estate loan examiner who wished to pursue outside employment as a real estate agent. Although the examiner's specific job responsibilities for the state appear to have been different from those of a real estate agent, our office was concerned with the fact that his state job required him to be in "daily contact with real estate brokers and agents, title companies, and lending institutions," and that he would "undoubtedly be in contact with some, if not all, of these entities in the course of" his private real estate transactions. 1989 Inf. Op. Att'y Gen. at 3 (Aug. 7; 663-89-0588). However, the examiner argued that the loans administered by his agency were almost entirely on "rural" properties, while his private real estate work would involve only "urban" properties. We agreed that under those facts, the potential for a 'direct' conflict . . . is probably remote." *Id.*

Nonetheless, we saw a substantial potential for violation of AS 39.52.120(b), in that the intensive contacts between the examiner and real estate entities in his daily work for the state could easily lead to seeking employment or contracts through the use of official position or to conducting private business on state time. While not concluding that the proposed private activity would "automatically" violate the Ethics Act, we counseled that it would be prudent for the employee to avoid it and deferred to the ethics supervisor the decision whether to prohibit outside employment. *Id.* at 4.

I should emphasize that, although some of the opinions referred to above address violations of various provisions of the Ethics Act other than AS 39.52.170(a), outside employment may be "incompatible . . . with the proper discharge of official" duties even if it does not involve any independent violations of the Ethics Act. For example, where a state employee conducting a private business bid against vendors with whom he also dealt in his official capacity, the fact that his business activity "created an opportunity for coercion" of the vendors was held sufficient to make the activity incompatible with his official duties irrespective of whether he actually took advantage of that opportunity. "[I]t is unseemly for an [agency] employee to be bidding against a vendor when the employee must frequently take official action concerning the vendor." *In the Matter of Paul Skvorc*, Alaska Personnel Bd. Hearing Officer Findings of Fact, Conclusions of Law, and Recommended Penalties, at 49 (Jan. 24, 1996), *adopted in relevant part*, Alaska Personnel Bd. Order (April 10, 1996). Similarly, where the employee rented equipment for his private business from a vendor with which he also dealt in his official capacity, the possibility that the employee could be offered favorable private terms in return for favorable official treatment made the business activities incompatible with state employment because they "created, at a minimum, an appearance of wrongdoing" -- whether or not the employee actually abused his position. *Id.* at 51.

#### **APPLICATION OF THE GENERAL INCOMPATIBILITY STANDARD TO FACTS PRESENTED**

In light of these examples and analyses, it seems clear that if your engineer were to perform work for entities that your agency regulates on matters to be addressed by the agency, such work would be incompatible and in conflict with the proper discharge of his official duties. However, I understand that the particular work the engineer proposes to do in the immediate future is with a private consultant who in turn would be working, not for a regulated entity, but for a local government authority. This would seem to present less of a potential for conflict of interest, but you would need to consider whether the local government is nonetheless a consumer of your agency's products or services and how similar the engineer's private work would be to his state work.

For instance, I note that the proposed outside work may include performing analyses of the same or a similar type to those he performs as part of his official duties. As with the case of the hydrologist summarized above, you may be concerned with the possibility that the interests of the ultimate client in the outcome of such analyses and forecasts diverge from those of your agency. And in any event it would be a violation of AS 39.52.120 for the engineer to be paid by a private client to perform work that it is his official duty to carry out. Another consideration would be whether the engineer's choice of projects in his work for your agency could be influenced by the subjects of his outside work.

I also understand that the proposed outside work for the private consultant may include certain tasks that are further removed from the consultant's ultimate client (the local government) and from the engineer's duties with your agency. One task would be training the consultant in the use of commercially available computer software with which the engineer has become familiar in the course of his state work. At least in the abstract, this task would appear to present little potential for incompatibility with the discharge of his official duties. This would depend, however, on the extent to which the training involved actual issues or tasks that could create conflicts of the sort discussed above or involved the use of information acquired by the engineer in the course of his state employment that has not been publicly disseminated -- which, as pointed out above, is prohibited. (Expertise in using the software itself is not "information" subject to this prohibition. See 1997 Inf. Op. Att'y Gen. (Jan. 24; 663-97-0181).) Another relevant factor would be whether providing software training to others outside the agency is also a part of the employee's official duties.

In addition, you should consider the extent to which providing private software training might give the appearance that the employee studies software on the job in order to sell his expertise privately -- whether or not that is actually his motivation. As indicated above, the appearance of or the opportunity for impropriety may sometimes be sufficient to make outside employment incompatible with one's official duties. In this regard, it may be relevant whether the proposed software training would be a one-time project or a recurring business activity.

The second proposed task would be providing "peer review" to the outside consultant, which I understand means the employee would use his professional judgment to evaluate aspects of the consultant's engineering work. It is not clear to me how such peer review would be distinguished from other forms of collaboration in the consultant's engineering work, for the purposes of the Ethics Act. You would therefore need to assess the extent to which the work that the employee would review involves issues, tasks, or clients whose relationship with the employee's official duties could generate conflicts of the sort discussed above.

In addition, you may wish to consider whether the employee's contacts with entities such as the consultant in the course of his official duties are so intensive that *any* outside employment involving such entities would raise concerns about the potential for violating AS 39.52.120(b), as addressed in the case of the real estate loan examiner discussed above.

REM:ars