MEMORANDUM

State of Alaska
Department of Law

TO: Janet Kowalski, Director
Division of Elections
Office of the Lieutenant Governor

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SUBJECT: Party Nominee for Governor without Running Mate
REVISED[1]

You have asked whether a candidate for governor nominated in a party primary can run in the general election without a running mate, where no candidate ran in the primary. The short answer is yes, and we have recommended an emergency regulation, which you have filed.

I. Discussion

The candidate for Republican Moderate nominee for governor ran unopposed in the primary. No candidate ran for lieutenant governor on the Republican Moderate ticket. Write-ins are not permitted in the primary. AS 15.25.070. Accordingly, the Republican Moderate nominee had no formal nominee for lieutenant governor for the general election.

The Alaska Constitution contemplates that a governor and lieutenant governor will run jointly:

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[1] We originally issued this opinion on August 28, 2002. We have updated it to reflect subsequent events, and to address an error. If you have distributed the prior version of this opinion to anyone, it would be a good idea to provide them with this revision.

> . . . The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him. *The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor*.

Article III, section 8, Alaska Constitution (e*mphasis supplied*).

The minutes of the Alaska Constitutional Convention reflect that the intent of the section was to assure a strong executive:

> In order to enforce and bulwark the strong executive, it was felt that we should provide some means by which he would come from the same political party which the governor came from, so, in the manner in which the President and Vice President is elected, we selected the joint ballot type of thing. They run jointly on the ballot and are elected jointly as is done for the President and Vice President of the United States. We also find that is the practice in the State of New York. Other states use different methods. Now the matter of other elective officials was discussed at considerable length. As you realize, the ideal of the strong executive is the one efficient head of government, the governor sitting there elected by the people and responsible to the people for the functioning of the executive department. Now, in theory, that is a strong executive and a very strong talking point. However, we felt there should be at least one other elective official and many of the committees felt there should be possibly two more elected officials. However, we show the elected official in second place here to be the secretary of state, as I have mentioned, elected in the manner and jointly with the governor.

3 Proceedings of Alaska Constitutional Convention 1985-1986 (January 13, 1956; Remarks of Delegate V. Rivers). *See also* 3 Proceedings of the Alaska Constitutional Convention 2128 (January 14, 1956; Remarks of Delegate Boswell) To the same effect

is the information provided to the voters in the report of the convention which accompanied the constitution's ratification election[2]:

> . . . The secretary of state will be nominated in the primaries, but, in order to insure a secretary of state and a governor of the same party, a vote for governor in the general election is a vote for the candidate for secretary of state on the same ticket.

Proposed Constitution for the State of Alaska: A Report to the People of Alaska Constitutional Convention (published in papers statewide in February 1956).

Other post-primary provisions of AS 15 address the constitutional requirement for a running mate. For example, AS 15.25.105(b) provides that if a write-in candidate is running for the office of governor in the general election, the candidate must file a joint letter of intent together with a candidate for lieutenant governor, and that both candidates must be of the same political party or group. No mention is made of a write-in candidacy for lieutenant governor. The constitutional provision and the laws enacted under it do not contemplate that a candidate for governor will proceed without a running mate, and thus there is no allowance for the situation presented here.

However, that is not the end of the inquiry. Law, like nature, abhors a vacuum. We must examine the constitutional provisions and statutes to determine if there is sufficient guidance to answer the question, or a method of remedying the situation if there is no such guidance.

II. Alternatives

There are five potential answers to the question raised by the Republican Moderates' lack of a running mate, two of which can't be considered seriously at this time. We address each in turn.

Alternative 1. The first alternative is to interpret the statute under which party nominees who are unable to proceed to the general election are replaced, AS 15.25.110, to include the situation where no candidate is nominated in the primary. This is problematic given the plain wording of the statute:

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[2] In construing a constitutional provision, it is necessary to review the intent of the voters as well as the framers. *State v. Lewis*, 559 P.2d 630, 638 (Alaska 1977).

> Sec. 15.25.110. Filling vacancies by party petition. If a candidate of a political party *nominated at the primary election dies, withdraws, resigns, becomes disqualified from holding the office for which the candidate is nominated,* or is certified as being incapacitated in the manner prescribed by this section after the primary election and 48 days or more before the general election, the vacancy may be filled by party petition. The central committee of any political party or any party district committee may certify as being incapacitated any candidate nominated by their respective party by presenting to the director a sworn statement made by a panel of three licensed physicians, not more than two of whom may be of the same political party, that the candidate is physically or mentally incapacitated to an extent that would in the panel's judgment prevent the candidate from active service during the term of office if elected. The director shall place the name of the person nominated by party petition on the general election ballot. The name of a candidate disqualified under this section may not appear on the general election ballot.

(e*mphasis supplied*)

Alternative 2. Another option is suggested by our opinion on withdrawal of the candidate for lieutenant governor running with a non-party candidate. 1982 Op. Att'y Gen'l No. 10 (August 27; 366-103-82) On that occasion, a gubernatorial candidate's running mate withdrew after the deadline for filing for office had passed Because by definition a non-party candidate is not nominated at party primary, the party nominating method set out in AS 15.25.110 was unavailable to the candidate. We recommended that this apparent gap in legislation be remedied with an emergency regulation to permit the candidate to nominate a substitute candidate for lieutenant governor under the regulatory authority set out in AS 15.15.010. In the 1982 case, the candidate for governor had no statutory options at all. Here, although someone could have filed for lieutenant governor, no one did, leaving the candidate without a running mate. Since the problem before you is an unanticipated situation not addressed by the statute, it is possible that you could meet it as we recommended in 1982 for the non-party candidate, by an emergency regulation.

Alternative 3. The party has suggested that it could sponsor a write-in candidate. It has not proposed a legal theory to accompany this suggestion. As noted above, lieutenant governor candidates are mentioned only as running mates in the write-in statute, AS 15.25.105. However, if the party sponsors and promotes a particular candidate as a write-in, and most voters for the party's candidate complied, it could be

argued, if they were elected, that the candidates for office appeared on the ballot jointly within the meaning of article III, section 7. We considered this possibility in a 1978 opinion in which we had been asked to consider the possibility that lieutenant governor candidates might be written in. 1978 Op. Att'y Gen'l No. 29 (November 6; 663-79-0256). However, we reached no conclusion.

Alternative 4. In the 1998 election, the Alaska Independence Party candidate for governor ran without a running mate, as the running mate timely withdrew and apparently the party did not petition to fill the vacancy. It was assumed that had the candidate been successful, the succession procedures set out at AS 44.19.040 - 44.19.042 (as required by Alaska Constitution article III, section 13) would apply. Here again, the statutes were enacted on the assumption that a lieutenant governor was elected and later unable to serve, rather than there being no candidate at all. We cannot recommend this option where it is still possible to employ others. As we noted in our 1982 opinion, the constitution mandates the election of a team, and all of the other options above are in keeping with that mandate.

Alternative 5. A strict reading of the constitution and AS 15 might suggest a requirement that a candidate for governor must have a running mate on the ballot or be disqualified. This alternative would not be consistent with our past advice or the rule of construction favoring ballot access, which we discuss briefly below.

In determining which of the options above to recommend, we examined two principles of construction applicable to election law compliance. The first is that strict compliance with mandatory election statutes is essential to avoid confusion and chaos in the administration of elections. *Falke v. State*, 717 P.2d 369, 375 (Alaska 1986); *Silides v. Thomas*, 559 P.2d 80, 87 (Alaska 1977). The fact that the party did not nominate a candidate for lieutenant governor by party primary when it had an opportunity to do so could as easily be characterized as a failure to comply with the nomination statutes as it could be characterized as an unanticipated event. However, in a case where your decision affects access to the ballot of a candidate whose own noncompliance is not directly at issue, the other rule, liberal construction to assure ballot access, is the more apt. *O'Callaghan v. State*, 826 P.2d 1132, 1137 (Alaska 1992) (where statute did not contemplate that party nominee would withdraw from candidacy for one party and accept nomination by petition for another party, under policy favoring open access to ballot, it was not appropriate to search for a prohibition against the nominee's conduct); *Vogler v. Miller*, 660 P.2d 1192, 1193-1194 (Alaska 1983) (ballot access an issue of the right to vote and the freedom of association for voters and candidates, only the least restrictive means should be used to advance any government interest advanced to restrict it, *citing Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).) *See also Warwick v. ex rel. Chance*, 548

P.2d 384, 389, n. 11, n. 12 (Alaska 1976) (law favors eligibility for elective office, free choice of candidates to advance fundamental rights).

III. Recommendations and Conclusion

In the earlier version of this opinion, we recommended an emergency regulation adopting the party petition procedure set out in AS 15.25.110 for this circumstance, Alternative 2 above. The first alternative was not really consistent with the text of AS 15.25.110, and the third left too much to chance. Further, we believe a remedy that has as its result the appearance of the party's team jointly on the ballot is more in keeping with the constitution than a remedy that does not.

You adopted the regulations on September 11, 2002, in time for the party to meet the deadline imposed by AS 15.25.110, and to avoid any disruption of the election schedule, including printing of the ballot and printing of the OEP.

We note that the finding of emergency contains an error, which was also included in the earlier version of this opinion, the suggestion that the repeal of AS 15.25.205, a statute prohibiting the placement on the general election ballot of a candidate for governor or lieutenant governor without a running mate, applied to this situation. It did not - it applied only to candidates nominated by petition. However, it is the lack of a statutory remedy and the constitutional running mate requirement, not the repeal of AS 15.25.205, that compelled the adoption of the regulations on an emergency basis, and thus the error is not material to the emergency finding.