MEMORANDUM

State of Alaska
Department of Law

To: Laura A. Glaiser
Director, Division of Elections

Date: September 7, 2005

File No.: 663-06-0036

Tel. No.: 465-3600

From: Michael A. Barnhill
Assistant Attorney General
Labor and State Affairs – Juneau

Re: Review of Application for Recall of Senator Ben Stevens

You have asked for our opinion regarding the application for petition for recall of Senator Ben Stevens. AS 15.45.540 requires the director of the Division of Elections to review the application and either certify it or notify the recall committee of the grounds of refusal. Because the articulated grounds for recall do not satisfy the standards required of a recall summary, we recommend that the application not be certified.

I. BACKGROUND

On August 4, 2005, a group calling itself "Citizens for Ethical Government" filed a petition for recall of Senator Ben Stevens, elected from State Senate District N in 2002. The application provided the following 200-word summary of the grounds for recall:

> In 1999, VECO supported a $350,000 campaign seeking voter permission to redirect Permanent Fund Dividends to capital projects. The vote was 83% "NO."
>
> Since the 1999 vote, VECO has paid $400,000 to six lobbyists and $195,000 to Ben Stevens, seeking ways to fund government from Permanent Fund earnings, thereby reducing public pressure to demand world market value for Alaska's oil.
>
> Ben Stevens signed an oath, (a contract with Alaska), promising to uphold Alaska's constitution. Alaska's constitution requires Stevens to seek the highest possible payment for Alaska's resources. Stevens then contracted his advice and loyalty to a company seeking to extract Alaska's resources for as little as possible.

> Contracting to advocate the position of two clients on matters of each client's mutually shared but conflicting interest is generally considered fraudulent and corrupt. Due to the conflicting goals of such contracts, it is not possible for a single consultant to loyally advocate the goals of both clients. By necessity, one of any two such contracts was signed in bad faith.
>
> Stevens either doesn't understand his ethical boundaries and is therefore "unfit to serve" or he willingly engaged in "corruption" by contracting in conflict with his duties as Senator. Either scenario justifies recall.

We understand that the application was accompanied by: (1) a $100 deposit; (2) a statement that the sponsors are qualified voters (but not a statement that the sponsors are qualified voters who signed the application with the statement of grounds for recall attached); (3) a designation of a recall committee of three sponsors who shall represent all persons who signed the application; (4) signatures of at least 100 qualified voters who subscribed to the application as sponsors; and (5) signatures and addresses of qualified voters equal to 10 percent of those who voted in the last election in State Senate District N.

We shall review this application under applicable Alaska law, which we summarize next.

II. APPLICABLE LAW

The law of recall in Alaska consists of the Alaska Constitution, the statutes implementing recall, and court decisions from both the Supreme and Superior courts. Additionally, there are several opinions issued by this office that may be called upon for guidance. Our discussion of the applicable law begins with a review of the development of the constitutional provision governing recall.

A. Recall in the Constitution

In the fall of 1955, a committee of the Constitutional Convention, the Committee on Direct Legislation, Amendment and Revision, drafted a proposed Article on Initiative, Referendum and Recall. Section 6 of this proposal pertained to recall:

> Every elected public official in the State, except judicial officers, is subject to recall by the voters of the State or subdivision from which elected. Grounds for recall are malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude. The legislature shall prescribe the recall procedures.

Amendments to this proposal were taken up by the convention beginning on January 4, 1956. The principal source of debate on the proposal was the fact that the proposal specified grounds for recall. Delegate Hellenthal offered the first amendment to the section, seeking to strike the words "involving moral turpitude." He contended that any crime should be sufficient grounds for recall. 2 Proceedings of the Alaska Constitutional Convention at 1207-08. During the debate on this amendment, Delegate McCutcheon contended that the amendment had not gone far enough and that no grounds should be specified for a recall. *Id.* at 1209.

As the debate proceeded, however, it was clear that the majority of the delegates did not agree with Delegate McCutcheon's views. Delegate R. Rivers did not want to make lesser crimes grounds for recall. *Id.* at 1210. Delegate Johnson thought "there ought to be some protection for public officials." *Id.* at 1211. Delegate Hellenthal's amendment failed. *Id.* at 1212.

The next amendment, offered by Delegate V. Fischer, sought to strike the specified grounds from the recall provision. *Id.* at 1213-14. The question was then raised in debate whether constitutional silence on the grounds for recall would permit the legislature to prescribe grounds. Delegate R. Rivers insisted that grounds be prescribed either in the constitution or in statute. *Id.* at 1215. The convention approved the amendment striking the specified grounds the following day. *Id.* at 1222.

Delegate R. Rivers then offered an amendment requiring the legislature to prescribe the grounds for recall. *Id.* This amendment was held while the convention considered and rejected amendments extending recall to judicial officers and placing procedural requirements for recall in the constitution. *Id.* at 1223-37.

The debate then turned to the issue of whether the legislature would have the power to specify grounds for recall. Delegate White offered an amendment providing that "[g]rounds for recall shall be set forth in a recall petition." *Id.* at 1237. In so doing, Delegate White explained that this would remove the legislature's power to prescribe specific grounds for recall. *Id.* In response, Delegate R. Rivers reiterated his view that the legislature should prescribe the grounds for recall. *Id.* at 1238. Delegate Hurley joined Delegate R. Rivers and expressed his concern that if no grounds for recall were specified,

> [I]t does create a nuisance value to which public officials should not be subjected. I recognize that they should be subject to recall, but I think that the grounds should be sincere and they should be. I think it is fair to leave it to the legislature to prescribe the grounds under which a recall petition should be circulated so as to prevent circulation of recall petitions for petty grounds in local jurisdictions by some recalcitrant officer who was not elected, which I have seen happen in my own community.

2 Proceedings at 1238-39. Delegate White's amendment failed.

The convention then took up Delegate R. Rivers' amendment that required the legislature to specify grounds for recall. Without further debate, the convention approved the amendment, on a vote of 39-11. *Id.* at 1240.

In summary, the convention had serious concerns with the pure "political" model of recall that permits the recall of an elected official for any reason or no reason. As a consequence, the convention soundly rejected this model in favor of a model that required the legislature to specify the grounds for recall that must be met before a recall could be placed on the ballot. The final provision adopted by the convention provides: "[a]ll elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature." AK Const., art. XI, § 8.

B. Recall Statute

In 1959, the newly created Alaska Legislature directed the Alaska legislative council to prepare an election code along with a report for introduction in the 1960 legislative session. *See* 1st Legis., 1st Sess., HCR 6. As requested, legislative council prepared a comprehensive election code, and included sections implementing the constitutional provision on recall. *See* 1st Legis., 2nd Sess., HB 252.

Review of the report by legislative council reveals that the election laws of Michigan and Ohio were the source for many of the procedural provisions pertaining to recall. *See* Legislative Council, *Suggested "Alaska Election Code,"* (1/20/60) at 66-71. Moreover, legislative council made efforts to align the procedure for recall with the procedures for initiative and referendum. *Id.* at 66-67.

The specific grounds for recall were selected from a list of grounds set forth in a Library of Congress reference book on state government. *Id.* at 67 (citing W. Brooke Graves, American State Government 151 (Heath 1953)). The reference book gave a lengthy list of bases for recall that had been utilized to that date: "Among the charges noted are unfitness, favoritism, carelessness, extravagance, incompetence, inability, no benefit to public, selfishness, neglect of duties, and corruption." *Id.* Perhaps notably, the legislative council drafters did not select the entire list. Instead, they picked only four of the grounds mentioned: unfitness, incompetence, neglect of duties and corruption. The drafters' decision not to include lesser or perhaps more subjective grounds such as "no benefit to the public" and "selfishness" appears to be consistent with the constitutional convention's desire to provide at least "some protection for public officials" from "nuisance" and "petty grounds." 2 Proceedings at 1211, 1238-39.

Since the enactment of the Alaska Elections Code in 1960, the legislature has amended the requirements for filing a recall application only slightly. Today, a valid application for recall must meet the following requirements:

1. It must name a public official subject to recall: governor, lieutenant governor or state legislator. AS 15.45.470.

2. It must be accompanied by a deposit of $100. AS 15.45.480.

3. It must be filed after the first 120 days in office and 180 days before the last day in office of any official subject to recall. AS 15.45.490; AS 15.45.550(2).

4. It must be in the proper form. AS 15.45.500. Proper form requires:

    a. the name and office of the person to be recalled;
    b. the grounds for recall described in particular in not more than 200 words;
    c. a statement that the sponsors are qualified voters who signed the application with the statement of grounds for recall attached;
    d. the designation of a recall committee of three sponsors who represent all the sponsors and subscribers;
    e. the signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation; and
    f. the signatures and addresses of qualified voters equal to 10 percent of those who voted in the preceding applicable general election.

5. It must articulate at least one of the four grounds for recall (lack of fitness, incompetence, neglect of duties, corruption). AS 15.45.510.

You, as director for the division of elections, are tasked with review of the application and shall either certify it or notify the recall committee of the grounds for refusal to certify. AS 15.45.540. There are four grounds for refusal to certify:

1. the application is not substantially in the required form;

2. the application was not filed in the required time frame, i.e. after 120 days of taking office or within less than 180 days of the end of the term of office of any official subject to recall;

3. the person named is not subject to recall; and

4. there are not enough qualified subscribers.

AS 15.45.550. The statute does not specify a timeframe in which this application review process is to take place.

The Division has no regulations in place to further implement these statutes. The courts however, have had several opportunities to interpret the provisions in the constitution and statutes related to recall. We discuss those next.

C. Recall Cases

Several court cases have addressed issues related to recall. The first such case was *Meiners v. Bering Strait School District*, 687 P.2d 287 (Alaska 1984). *Meiners* involved an attempt to recall an entire REAA school board.[1] At the outset of its opinion, the Alaska Supreme Court charted the history of recall in Alaska and summarized briefly the development of recall during the Alaska Constitutional Convention. *Id.* at 294-96.

The *Meiners* court described a spectrum of types of recall processes. At one end of the spectrum is the legalistic recall process that construes recall grounds and procedures strictly and in favor of the officeholder. At the other end of the spectrum is

[1] As such, the case involved a different set of recall statutes related to the recall of local officials. *See* AS 14.08.081 and former AS 29.28.130 -- .250 (repealed ch. 74, SLA 1985). The current statutes governing local recall are set forth at AS 29.26.240 -- . 360. The local recall statutes have a slightly different list of grounds for recall: misconduct in office, incompetence or failure to perform prescribed duties. AS 29.26.250.

the political recall process in which there are no grounds required for recall, and doubts are resolved in favor of getting the recall on the ballot. The *Meiners* court suggested that historically, Alaska "appears" to have fallen in the middle of this spectrum. *Id.* at 294.

In the context of a recall of a local official, the court was mindful of the possibility that recalls could be initiated in remote parts of the state by voters with limited access to legal resources. Accordingly, the court was reluctant to interpret the recall statutes in a strict manner. Thus, the court held that recall statutes, like initiative and referendum statutes, "should be liberally construed so that 'the people [are] permitted to vote and express their will . . . ." *Id.* at 296 (citations omitted). The court concluded that:

> the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute.

Id.

Because the recall statute at issue required the grounds for recall to be stated with particularity, the *Meiners* court reviewed two of the asserted grounds for sufficiency. The court emphasized that it was not proper to determine the truth of the recall allegations. Rather, the court assumes that the alleged facts are true and rules upon them similar to a court ruling on a motion to dismiss for failure to state a claim. *Id.* at 300 n.18. The court reviewed the asserted grounds to determine whether they sufficiently stated a claim for "failure to perform prescribed duties," one of the specified grounds in the recall statute.

In the first ground, the recall committee claimed that the board failed to control the district superintendent who had allegedly spent money on non-district purposes. The court held that the board was statutorily required to "employ" the superintendent, and that this duty implied that the board would exercise a certain amount of non-discretionary control and supervision over the superintendent. Therefore, the court held that this ground sufficiently stated a claim for failure to perform prescribed duties. *Id.* at 300.

In the second ground, the recall committee alleged various infractions of laws relating to open meetings. The court held that these allegations also stated a claim for failure to perform prescribed duties and were sufficiently particular. *Id.* at 301-02. The court additionally held that inaccurate legal statements or lack of legal citation would not invalidate the application. The court wanted to avoid "wrapping the recall process in such a tight legal straitjacket that a legally sufficient recall petition could be prepared only by an attorney who is a specialist in election law matters." *Id.* at 301.

The court then went on to consider whether any of the grounds should be deleted. The court first held that the Division of Elections could not rewrite the grounds. *Id.* at 302. But the court concluded that insufficient grounds should be deleted to avoid "abuse" and "the drafting of recall petitions with little regard for the statutory grounds of recall." *Id.* The court authorized the Director of Elections to "delete severable individual charges from a recall petition if those charges do not come within the grounds specified by statute. *Id.* at 303. Thus, the third ground (which the parties agreed was insufficient) could be deleted from the summary.

In *Von Stauffenberg v. Committee for an Honest and Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995), the court again addressed a recall attempt against several school board members. In two of the allegations, the recall committee alleged that board members committed misconduct and failed to perform prescribed duties by going into executive session to consider the continued retention of an elementary school principal. Applying the standards set forth in *Meiners*, the court concluded that it was legal to consider "sensitive personnel matters" in executive session. The court held that the legal exercise of discretion by a public official cannot be a ground for recall. Moreover, because the allegations did not describe why going into executive session violated the law, the court held that they were not sufficiently particular. These allegations failed to state a claim and therefore were insufficient. *Id.* at 1060.

There are two superior court decisions on recall. Both of these cases considered recall applications targeting state officials under AS 15.45. The first, *Coghill v. Rollins, et al.*, No. 4FA-92-1728 Civil (Alaska Sup. Ct. 1993), involved a recall application targeting Lieutenant Governor Coghill. Judge Savell applied the *Meiners* standard for reviewing the two grounds at issue in the case.

In the first ground, the recall committee alleged that Lieutenant Governor Coghill was incompetent because he had not read the election laws and had made contradictory statements regarding the recall process. In reviewing this allegation for sufficiency, Judge Savell first sought to define "incompetence." After reviewing various definitions, Judge Savell concluded that the liberal construction and common sense meaning of the term was "lack of ability to perform the official's required duties." *Id.* at 20-21. Judge Savell then determined that knowledge of election laws is part of the lieutenant governor's statutorily required duties. As such, Judge Savell concluded that the allegation regarding failure to read the election laws was sufficient. With respect to the allegation regarding contradictory statements, however, Judge Savell concluded that the allegation was insufficient standing alone, but nevertheless supported the allegation regarding failure to read the election laws. Thus, Judge Savell sustained the entire allegation. *Id.* at 22-23.

In the second ground, the recall committee alleged that lieutenant governor Coghill was unfit for office because he made unfounded public accusations of criminal activity of recall staff and had used his office to intimidate individuals who had challenged his nomination and election. Judge Savell concluded that this allegation was both factually and legally insufficient. The allegation contain no details about the accusations such as when, to whom or about whom they were made. The allegation did not describe how the lieutenant governor used his office to intimidate others. Thus, it was insufficient. *Id.* at 23-24.

Most recently, the superior court rendered a decision in a recall case involving Senator Scott Ogan. *Valley Residents for a Citizen Legislature v. State of Alaska,* No. 3AN-04-6827 CI (Alaska Sup. Ct. 2004). In that case, Judge Gleason applied the Alaska Supreme Court's standards of recall from both *Meiners* and *Von Stauffenberg*.

The recall committee in that case first alleged that Senator Ogan demonstrated corruption by "actively promoting legislation, directly benefiting business interests of his employer." *Id.* at 2. The summary of grounds went on to specifically identify the legislation at issue, HB 69. *Id.* In reviewing the claim, Judge Gleason adopted the definition of corruption submitted by Division of Elections:

> [T]he parties have agreed that "corruption" in the context of recall of a legislator means (1) intentional conduct, (2) motivated by private self-interest, (3) in the performance of work as a legislator, and (4) that violates one or more provisions of the Legislative Ethics Act (AS 24.60.030 *et seq.*) or other statutes intended to guard against corruption.

Id. at 8.[2] Judge Gleason concluded that a claim was stated because a provision of the Legislative Ethics Act, AS 24.60.100, prohibits a legislator from representing another person for compensation before the legislative branch. *Id.* at 8-9.

Next, the recall committee alleged that Senator Ogan neglected his duties by promoting his employer in legislative committee and by failing to recognize an obvious conflict between his duties to his employer and his duties to his constituents. Judge Gleason concluded that the Legislative Ethics Act (AS 24.60.030(a)(1)) prohibits legislators from accepting a benefit other than official compensation for performance of

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[2] This definition was devised by Bankston, Gronning, independent counsel retained by the Department of Law to advise the Division of Elections in the matter. *See* Letter from Sedor to Glaiser of 4/8/04 at 17-18.

public duties. Because the allegation stated a violation of the Legislative Ethics Act, Judge Gleason concluded that the recall committee had stated a claim for neglect of duty. *Id.* at 9-10.

Judge Gleason then considered the final ground at issue, lack of fitness. Once again, she adopted the Division's definition, which was "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office." *Id.* at 10. Judge Gleason concluded that the allegations of undertaking official conduct for private gain and thereby creating a conflict of interest stated a claim for lack of fitness. *Id.*

These four cases provide a good perspective on how courts in Alaska review recall applications. As a matter of policy, the courts appear to start from a position of wanting to maintain relatively open access to the ballot in matters related to recall.[3] Notwithstanding this, however, the courts have demonstrated a willingness to prohibit such access when a recall committee alleges activity that is legal (*Von Stauffenberg*), or fails to provide sufficient detail in an allegation (*Von Stauffenberg, Coghill*).

We next turn to a brief overview of this office's opinions, before reviewing the Stevens recall application.

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[3] While the issue may at this point be academic, we question whether the court's liberal standard of statutory interpretation in *Meiners* should be automatically applied to recalls involving state officials under AS 15.45. First, the context is different. In *Meiners*, the court was concerned about the impact of a strict interpretation approach on voters in remote communities. While certain legislators are elected from remote communities, most are not. Indeed, attempts at recalling a state legislator are rare, and the only two to date were not from remote communities. Thus, the court's concern about the lack of access to legal resources does not appear to be much of an issue in the recall of a state official. Second, as noted above, review of the constitutional minutes demonstrates that the constitutional convention soundly rejected the pure political model of recall. Such a rejection may suggest that the convention favored adoption of the legalistic model of recall that construes statutes more strictly. Finally, as a matter of election policy, we note that application of a standard that de-emphasizes or fails to adequately enforce technical election requirements runs the risk of creating or increasing voter confusion. In *Storer v. Brown*, the U.S. Supreme Court observed that "there must be a substantial regulation of elections if they are to be fair and honest and if some order, rather than chaos, is to accompany the democratic processes." 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974). In sum, we suggest that there is a legitimate question regarding whether adoption of a liberal approach to construction of recall statutes is appropriate in the recall of a state official.

D. Department of Law Opinions

The Department of Law has rendered many opinions regarding the sufficiency of recall applications.[4] Additionally, the Department of Law has retained independent counsel to advise the Division in the Hickel/Coghill and Ogan recalls. Outside counsel rendered opinions in both cases. *See* Letter from Brown to Thickstun of 8/24/92; Letter from Sedor to Glaiser of 4/8/04.

In its opinions, this office typically first reviews whether the application is technically sufficient, *i.e.*, whether all the ministerial requirements set forth in statute have been met. For instance, we have recommended rejection of applications where the signatories had failed to affirmatively indicate they were signing as sponsors. 1998 Inf. Op. Att'y Gen. (Feb. 25; 663-98-0213); 1996 Inf. Op. Att'y Gen. (Sept. 25; 663-97-0101); 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393). We have also recommended in such cases that the recall committee be given the opportunity to correct the technical errors and resubmit the application.

We then review the summary of grounds to determine whether under existing law the summary is both factually and legally sufficient. Our review of factual sufficiency typically focuses on whether the allegation is sufficiently particular or detailed. Our review of legal sufficiency then focuses on whether the facts alleged state a claim under a ground for recall.

The following are examples of allegations that we advised were factually and legally sufficient:

- holding closed and unnoticed school board meetings (misconduct)[5]
- prohibiting the making of a motion by shouting "shut up" at a meeting (incompetence)[6]

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[4] 1977 Inf. Op. Att'y Gen. (April 12); 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504); 1988 Inf. Op. Att'y Gen. (April 22; 663-88-0462); 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496); 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009); 1989 Inf. Op. Att'y Gen. (Sept. 26; 663-90-0102); 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393); 1993 Inf. Op. Att'y Gen. (July 26; 663-93-0419); 1996 Inf. Op. Att'y Gen. (Sept. 25; 663-97-0101); 1998 Inf. Op. Att'y Gen. (Feb. 25; 663-98-0213).

[5] 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504).

[6] 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496).

- forcing a board member to vote against his wishes (incompetence)[7]
- contracting to pay for a decertified superintendent (misconduct and failure to perform prescribed duties)[8]
- becoming involved in personnel matters related to family member (misconduct)[9]
- threats against employees and school board related to family members (misconduct)[10]
- refusing to take oath of office (failure to perform prescribed duties)[11]

The following are examples of allegations that we advised were not sufficient:

- no intention to vote as the public preferred (not unlawful)[12]
- defending a superintendent in an investigation (not unlawful)[13]
- paying teachers more money to avoid unfavorable negotiation result (not unlawful)[14]
- unspecified abuse to audience members (not particular)[15]
- unwillingness to work with district employees and administration and unspecified shortfall re ethics code and board policy (not particular)[16]
- unspecified use of position for personal gain (not particular)[17]

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7 *Id.*

8 *Id.*

9 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009).

10 *Id.*

11 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393).

12 1987 Inf. Op. Att'y Gen. (May 28; 663-87-0504).

13 1988 Inf. Op. Att'y Gen. (April 22; 663-88-0462).

14 *Id.*

15 1988 Inf. Op. Att'y Gen. (May 2; 663-88-0496).

16 1989 Inf. Op. Att'y Gen. (Sept. 25; 663-90-0009).

17 *Id.*

- involvement in negotiations without regard for the board's position (not unlawful)[18]
- calling a board meeting while certain administrators were out of town (not unlawful)[19]
- school board members entered a district office and reviewed district financial records without authorization from superintendent (not unlawful)[20]
- changing the wording of a letter in an effort to be misleading (not particular)[21]
- making false and damaging statements about an administrator (not particular)[22]
- failure to have full and open communication (not particular)[23]
- unspecified harassment, lack of judgment, abuse of travel privileges (not particular)[24]

As can be seen, this office has frequently recommended rejection of allegations that are so lacking in particulars that they are factually insufficient. In order for an allegation to be valid, it must allege particular grounds—in other words it must provide at least some detail in order to give the officeholder the chance to adequately respond and the voters something more than a vague idea of what the recall is about.

Moreover, this office has also recommended rejection of allegations that merely allege conduct that is lawful or proper. They fail to state a claim and therefore are legally insufficient.

We now turn to the Steven's recall application.

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18 *Id.*

19 1989 Inf. Op. Att'y Gen. (Sept. 26; 663-90-0102).

20 *Id.*

21 1991 Inf. Op. Att'y Gen. (Jan. 15; 663-90-0393).

22 *Id.*

23 1993 Inf. Op. Att'y Gen. (July 26; 663-93-0419).

24 *Id.*

III. ANALYSIS

AS 15.45.550 sets forth four bases for denying certification of an application:

1. the application is not substantially in the required form;

2. the application was not filed in the required time frame, i.e. after 120 days of taking office or within less than 180 days of the end of the term of office of any official subject to recall;

3. the person named is not subject to recall; and

4. there are not enough qualified subscribers.

We shall consider each in turn.

A. Required Form

Whether an application is substantially in the required form involves three inquiries. First, the Division must determine whether the application is technically sufficient, that is, whether the recall committee has complied with all of the ministerial requirements of a recall application. Next, the Division must determine whether the summary of grounds for recall is factually sufficient, that is, whether the factual statements are sufficiently particular or detailed. Finally, the Division must determine whether the summary of grounds is legally sufficient, that is, assuming the alleged facts to be true, whether they state a claim for one of the specified grounds for recall. We begin with technical sufficiency.

1. Technical Sufficiency

As noted above, AS 15.45.480 -- .500 sets forth several requirements that must be satisfied with respect to a recall application. We understand that the recall committee has complied with all of these but one.

The application was accompanied by a $100 deposit as required by AS 15.45.480. The application sets forth the name and office of the person to be recalled as required by AS 15.45.500(1). The application contains a summary of grounds for recall that is not more than 200 words as required by AS 15.45.500(2).[25] The application contains a

[25] Whether that summary of grounds is factually and legally sufficient, however, is discussed in the next subsections.

designation of a recall committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the recall as required by AS 15.45.500(4). The application contains signatures of at least 100 qualified voters who subscribe to the application as sponsors for purposes of circulation as required by AS 15.45.500(5).[26] The application contains the signatures and addresses of qualified voters equal in number to 10 percent of those who voted in the preceding general election in the relevant senate district as required by AS 15.45.500(6).

While the application does contain a statement that the sponsors are qualified voters who signed the application, that statement does not go on to say that the statement of grounds for recall is attached as required by AS 15.45.500(3). However, as a matter of fact, the statement of grounds for recall was indeed attached to all the sponsor signature sheets. Thus, while the application is technically deficient, we do not believe that this technical deficiency is sufficiently material to warrant rejection of the application. *See, e.g.*, 1993 Inf. Op. Att'y Gen. (Nov. 29; 663-94-1083) (same result in initiative context).

In sum, we conclude that the application is technically sufficient. Since we do recommend rejection of the application for the reasons set forth below, we suggest that your office advise the recall committee that this technical deficiency be corrected if they intend to submit a new application at a later date.

2. Factual Sufficiency

The specific grounds identified by the recall committee are found at the end of the summary. The committee states them in the alternative: "Stevens either doesn't understand his ethical boundaries and is therefore 'unfit to serve' or he willingly engaged in corruption by contracting in conflict with his duties as a Senator." We assume that by "unfit to serve," the recall committee means "lack of fitness," one of the grounds identified in AS 15.45.510.

Accordingly, we evaluate whether the allegations are factually sufficient with respect to the grounds of lack of fitness and corruption. In other words, we review whether they provide sufficient particulars and details. As noted above, the Division does not determine the factual accuracy of allegations. *Meiners*, 687 P.2d at 300 n.18.

Reading the grounds for recall of Senator Stevens as a whole, one is immediately struck by the fact that the summary contains very few factual allegations that pertain to Senator Stevens' conduct. In fact, there are as many factual allegations pertaining to the

[26] Note that this item is also a separate basis for denial of certification under AS 15.45.550(4).

conduct of a third party, VECO. Moreover, much of the summary is not in the form of factual allegations at all, but rather in the form of argument and conclusion. As set forth in further detail below, when we look at the summary as a whole, we learn precious little about the alleged conduct of Senator Stevens. Particularity requires factual details. But all we learn is that Senator Stevens was allegedly paid some money by VECO, and that he allegedly entered into a contract with VECO. The remainder of the summary is mostly argument regarding why the recall committee thinks such conduct is improper.

The summary begins as follows:

> In 1999, VECO supported a $350,000 campaign seeking voter permission to redirect Permanent Fund Dividends to capital projects. The vote was 83% "NO."
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> Since the 1999 vote, VECO has paid $400,000 to six lobbyists and $195,000 to Ben Stevens, seeking ways to fund government from Permanent Fund earnings, thereby reducing public pressure to demand world market value for Alaska's oil.

The first paragraph has nothing to do with Senator Stevens and does not allege conduct by him. Rather it alleges conduct by VECO and the results of an election. The second paragraph goes on to allege further conduct by VECO, but in this paragraph, Senator Stevens is the object of VECO's conduct.

The significance of this is illuminated by the language used in the Ogan recall summary. There, while frequent reference was made to a third party (Evergreen), only conduct by Senator Ogan was described. Evergreen was always the alleged object of Senator Ogan's conduct:

> Ogan . . . actively promot[ed] legislation, directly benefiting . . . Evergreen. . . .
>
> Ogan's legislative activities enabled Evergreen . . . .
>
> Ogan . . . promot[ed] Evergreen in legislative committee.

Valley Residents, No. 3AN-04-6827 CI at 2. In the Stevens recall summary, however, VECO is not the object of a legislator's actions. VECO is the subject.

In our view, factual allegations regarding the conduct of third parties has the danger of confusing the voting public and putting the recall target in the unfair, difficult and perhaps impossible position of having to refute allegations pertaining to the conduct of a third party. While initially we might be inclined to recommend deletion of any allegation relating to the conduct of a third party, we remain mindful of Judge Savell's conclusion that an insufficient allegation could remain in a summary if it provided support to a sufficient allegation (*Coghill*, No. 4FA-92-1728 Civil at 22-23).[27] Thus, we look to see whether these allegations provide support to a sufficient allegation.

As described in further detail below, however, we do not find any statements that are sufficient in this summary. So we recommend deletion of the first paragraph as factually insufficient—it alleges no details regarding conduct by Senator Stevens.

The second paragraph also alleges conduct by VECO, but one could fairly imply that the allegation asserts (albeit indirectly) that Senator Stevens accepted $195,000 from VECO. Recognizing that the courts refrain from "wrapping the recall process in such a tight legal straitjacket" (*Meiners*, 687 P.2d at 301), for purposes of our analysis of factual sufficiency, we will leave in the language regarding VECO's payment to Senator Stevens for now. The balance of the allegation pertains to VECO's apparent objective to "fund government from Permanent Fund Dividends, thereby reducing public pressure to demand world market value for Alaska's oil."[28] The allegation is silent with respect to Senator Stevens' intent or objective. Thus, the latter part of this sentence is factually insufficient. We recommend deletion of the insufficient material as follows:

> Since ~~the~~ 1999 ~~vote~~, VECO has paid ~~$400,000 to six lobbyists and~~ $195,000 to Ben Stevens~~, seeking ways to fund government from Permanent Fund earnings, thereby reducing public pressure to demand world market value for Alaska's oil~~.

The legal sufficiency of what remains will be discussed in the next section.

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[27] An example of this might be: "Mr. Williams paid $100,000 to Representative Smith, intending to influence her to vote for HB 956. Representative Smith accepted the payment and in return took official action by voting for HB 956 that directly benefited Mr. Williams' business." While the first sentence alleges conduct by a third party, it supports the sufficient allegation set forth in the second sentence.

[28] While VECO's alleged objective is irrelevant to the validity of this recall application, we note that there is nothing illegal or even improper with the objective of funding government from permanent fund earnings. Disagreement on a political issue cannot be grounds for recall. *Coghill*, No. 4FA-92-1728 at 24.

The next statements in the summary read:

> Ben Stevens signed an oath, (a contract with Alaska), promising to uphold Alaska's constitution. Alaska's constitution requires Stevens to seek the highest possible payment for Alaska's resources.

The first sentence of this paragraph makes a factual allegation regarding Senator Stevens signing an oath. It also makes a legal argument or characterization that the oath constitutes a contract. But this statement does not allege any details that would support a ground for recall. Likewise, the second sentence in the paragraph makes a legal argument regarding the Alaska constitution. It does not allege a factual ground for recall. We do not believe it is appropriate for these statements to appear in the summary.

The next statement in the summary provides:

> Stevens then contracted his advice and loyalty to a company seeking to extract Alaska's resources for as little as possible.

The factual content regarding Senator Stevens in this statement is that he contracted his advice and loyalty to a company. The statement offers no further factual details regarding how that might have been improper. We do not believe this statement is factually sufficient and should probably be deleted. But in interests of again not wrapping this analysis in a "legal straightjacket" we will leave the first clause in for purposes of this section.

This sentence then goes on to characterize the company as one that seeks to extract Alaska's resources for as little as possible. Once again, the drafters of this summary appear to be preoccupied with the conduct and intentions of third parties. We do not think that this insufficient statement supports any sufficient statement in the summary and therefore it should be deleted. Consequently, the sentence should read:

> Stevens ~~then~~ contracted his advice and loyalty to a company~~ seeking to extract Alaska's resources for as little as possible~~.

The next statements in the summary provide:

> Contracting to advocate the position of two clients on matters of each client's mutually shared but conflicting interest is generally considered fraudulent and corrupt. Due to the conflicting goals of

> such contracts, it is not possible for a single consultant to loyally advocate the goals of both clients. By necessity, one of any two such contracts was signed in bad faith.

These statements make no factual allegations regarding Senator Stevens' conduct. They are simply legal argument, characterization and conclusion. They should be stricken from summary.

The final paragraph of the summary sets forth the grounds:

> Stevens either doesn't understand his ethical boundaries and is therefore 'unfit to serve' or he willingly engaged in corruption by contracting in conflict with his duties as a Senator.

This paragraph is again conclusionary in nature. It does not provide any facts regarding how Senator Stevens fails to understand his ethical boundaries. It does not explain how he contracted in conflict with his duties as a Senator. Accordingly, the conclusionary statements should be deleted as follows:

> Stevens either ~~doesn't understand his ethical boundaries and~~ is ~~therefore~~ 'unfit to serve' or he willingly engaged in corruption ~~by contracting in conflict with his duties as a Senator~~.

When the clearly insufficient factual statements are removed, what is left reads as follows:

> Since 1999, VECO has paid $195,000 to Ben Stevens.
>
> Stevens contracted his advice and loyalty to a company.
>
> Stevens either is "unfit to serve" or he willingly engaged in "corruption."

We think that this summary should fail entirely on factual sufficiency grounds. It is completely vague and devoid of any detail. Accordingly, further discussion of legal sufficiency is arguably unnecessary. Nevertheless, to the extent that a court may disagree with our review of factual sufficiency, we will review whether this is a legally sufficient summary, to which we now turn.

3. Legal Sufficiency

Under legal sufficiency, courts seek to first define the grounds of recall upon which the application relies. This recall summary is based on two grounds: lack of fitness and corruption. We begin with lack of fitness.

In *Coghill*, Judge Savell used the Black's law dictionary definition of "unfitness," which reads: "Unsuitable; incompetent; not adapted or qualified for a particular use or service; having no fitness." *Coghill*, No. 4FA-92-1728 Civil at 23. In *Valley Residents*, Judge Gleason adopted the Division's definition of lack of fitness: "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office." *Valley Residents*, No.3AN-04-6827 CI at 10. This definition was taken from independent counsel's recommendation to the Division that a specific violation of the Legislative Ethics Act was not necessary in order to allege lack of fitness. *See* Letter of Sedor to Glaiser of 4/8/04 at 21.

Under either definition of lack of fitness, the recall summary is legally insufficient. The only facts alleged pertain to the payment of money to Senator Stevens by VECO and the contracting of advice and loyalty to a company, presumably VECO. These facts do not state a claim for unfitness. The Alaska Legislature is frequently referred to as a "part-time citizen legislature." *See, e.g.*, AS 24.60.010(4). As such, there is the expectation that legislators will be permitted to seek outside employment. *Id.* Recognizing that such outside employment may at times place legislators in conflict of interest situations, the Legislative Ethics Act was enacted to provide a mechanism for avoiding such conflicts. But the mere acceptance of outside employment, and presumably the contracting of "advice and loyalty" that goes along any employment, is not improper. Allegation of lawful conduct is legally insufficient. *Von Stauffenberg*, 903 P.2d at 1060.

In order to state a claim for lack of fitness, the recall committee would need to state specific facts regarding Senator Stevens' conduct in office that illuminate why the outside employment was improper. In the Ogan recall, the summary alleged that Senator Ogan supported specific legislation benefiting his outside employer and promoted his outside employer in committee. *See Valley Residents*, No. 3AN-04-6827 CI at 2. In the Stevens' recall, the summary only says that Senator Stevens had outside employment, a fact that, if true, is not unlawful. The summary of grounds with respect to lack of fitness is legally insufficient.

With respect to corruption, Judge Gleason adopted the following definition:

> "[C]orruption" in the context of recall of a legislator means (1) intentional conduct, (2) motivated by private self-interest, (3) in the performance of work as a legislator, and (4) that violates one or more provisions of the Legislative Ethics Act (AS 24.60.030 *et seq.*) or other statutes intended to guard against corruption.

Valley Residents, 3AN-04-6827 CI at 8. Again, this definition was taken from independent counsel's recommendation to the Division in the Ogan recall. *See* Letter of Sedor to Glaiser of 4/8/04 at 17-18.

Under this definition, the Steven's recall summary does not state a claim for corruption. All it says is that Senator Stevens got paid by VECO and contracted his advice and loyalty to VECO. Such facts would be true of every legislator who is employed by a third party. While obviously any outside employment is intentional and motivated by self-interest, there is nothing in the summary that implicates Senator Stevens' performance of work as a legislator and there is no allegation that constitutes a violation of Legislative Ethics Act or any other statute intended to guard against corruption. Accordingly, with respect to the grounds of corruption, the recall summary is legally insufficient.

By way of conclusion, the summary of grounds is entirely insufficient, both factually and legally. We do not recommend that the application be certified. We nevertheless review the remaining three bases for denial under AS 15.45.550.

B. Required Time Frame

The application was filed on August 5, 2005. Senator Stevens' term of office began on January 21, 2003, and will end on January 16, 2007. Thus, the application was filed more than 120 days after the beginning of his terms and not within 180 days of the end of a term of any public official subject to recall. Accordingly, the application was filed within the required time frame. This is not a basis for denial of certification.

C. Subject to Recall

Senator Stevens, as a state legislator, is a person subject to recall under AS 15.45.470. This is not a basis for denial of certification.

D. Number of Subscribers

As noted above, at least 100 qualified voters subscribed to application. This is not a basis for denial of certification.

IV. CONCLUSION

For the reasons given above, we do not recommend certification of the application for recall of Senator Stevens because the summary of grounds is neither factually nor legally sufficient and therefore not substantially in the required form as required by AS 15.45.550(1).

If you decline to certify this application, you should advise the recall committee that it has the right to seek judicial review under AS 15.45.720 within 30 days of the date of the notice of your determination.

Please contact us if you would like further advice in this matter.

MB/ba