MEMORANDUM

State Of Alaska

Department of Law

To:	David W. Márquez Attorney General	Date:	August 23, 2005
Through:	Scott Nordstrand Deputy Attorney General	File No.:	#661-05-0132
		Tel. No.:	(907) 269-5274
From:	Craig J. Tillery, Environmental Section Chief Gail Voigtlander, Torts & Workers' Compensation Section Chief James E. Cantor, Transportation SectionChief	Subject:	Indemnification Agreements by State Officials

Question

You have asked whether a state official may legally agree, on behalf of the state, to indemnify another person or entity for a specified liability. As a general rule, a state official may not enter into indemnification agreements.

Analysis

The fundamental question to be resolved is whether there are restrictions on the authority of a state official to enter into an agreement containing a provision that requires the state to indemnify another party to the agreement. Such restrictions may arise under the state constitution, statutes, or regulations. In this instance, a provision of the Alaska Constitution, implemented by a statute, provides the basis for our conclusion that the authority of state officials to enter into indemnification agreements is very limited.

The restriction on indemnification arises from the operation of article IX, section 13, of the Alaska Constitution ("Section 13"). That section provides, "[n]o money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law." The first clause of Section 13 generally demands that expenditures can only be made from legislative appropriations, while the second clause proscribes state employees from incurring future liabilities (such as liabilities arising from indemnity provisions) without statutory authorization. During debate at the Alaska Constitutional Convention, Section 13 was described as "a standard section providing that money shall not be withdrawn

from the treasury except in accordance with appropriations made by law." 2A Proceedings of Alaska Constitutional Convention 1011 (December 19, 1955). A delegate to the Alaska Constitutional Convention fleshed this out during debate over Article IX, stating, "[y]ou contract administratively after the legislature has authorized such a contract." 5A Proceedings of Alaska Constitutional Convention 3406 (January 28, 1956). This statement supports the view that the constitutional provision requires that legislative authorization precede any action by the executive to obligate monies from the state treasury.

Article IX, section 13 is implemented by AS 37.05.170. See Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270, 1277 (Alaska 1985). That statute provides in relevant part that "obligations may not be incurred against a fund unless . . . an appropriation or expenditure authorization has been made for the purpose for which it is intended to incur the obligation."

No Alaska case law directly construes the application of either Section 13 or AS 37.05.170.[1] However, these provisions have been addressed twice in Attorney General opinions. In each instance, we said that these provisions of law prohibit state officials from providing indemnification. We first addressed this question in 1992 Inf.

Constitution. *See, e.g.*, 2003 Inf. Op. Att'y Gen. at 3 (Nov. 18; 883-03-0044) (The payment of a debt to which the state is not a party confers no benefit on the public, and "failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 9 of the Alaska Constitution."); 2002 Inf. Op. Att'y Gen at 6 (June 28; 883-02-0058) ("Use of state money to pay a litigation-based settlement, in which the state was not a party, raises significant legal questions as to whether the expenditure would be for a public purpose.").

Third, a qualified indemnification agreement may morally obligate the legislature to pay for the financial obligation. 1994 Inf. Op. Att'y Gen at 2 (Jan. 25; 663-94-0390). As such, a qualified indemnification agreement could have the effect of pressuring the legislature to appropriate money when it would not do so if its decision was unfettered.3

Thus, a qualified indemnification agreement should only be given in those rare cases where it is absolutely necessary and would be a benefit to the public. The decision of whether to agree to a qualified indemnification should be made at a high level of state government (such as by a deputy commissioner) and then, only with the concurrence of the attorney general or the deputy attorney general. Lastly, if qualified indemnification is given, it should clearly state that the legislature has unfettered discretion as to whether to appropriate the money. In the past, some state officials have signed agreements in which the state agrees to indemnify a party "to the extent permitted by law" or "subject to appropriation." These simple qualifications should be expanded to ensure that other

> that enactment of an appropriation in the future to fund a payment under this provision remains in the sole discretion of the legislature and the legislature's failure to make such an appropriation creates no further liability or obligation of the [agency].

Conclusion

For the reasons stated, a state official is without authority to sign an unqualified indemnity agreement unless there is an existing appropriation sufficient to cover the full amount of any potential liability. Although the state may agree to indemnify if the indemnification is qualified in accordance with this opinion, a qualified indemnification agreement should (1) clearly explain that the decision of whether to appropriate funds necessary to pay the liability is within the unfettered discretion of the legislature, and (2) be entered only with the approval of high level state officials and the concurrence of the attorney general or deputy attorney general.