Attorney General Hal Brown:

Sovereignty and the Legal System

The following remarks were presented to the Anchorage Bar Association last week by Alaska Attorney General Hal Brown.

I want to talk to you, not about the legal issue of sovereignty, but about how we as lawyers approach those issues.

In recent months there has been a sizeable increase in litigation over sovereignty and other Native rights issues. In part, this is an attempt to use the courts to redress individual perceived wrongs or to secure individuals' claimed rights. This is a traditional valid use of the judiciary.

But we are also seeing the courts used to promote a social movement, i.e., to change laws or the ways laws are applied, so as to achieve a particular social goal.

This is also a traditional use of the judiciary. It was used in the civil rights movement, and is a valid and respectable tactic if exercised in a thoughtful and responsible way.

I have always believed, as does this administration, that the best decisions on public policy questions come from rational debate in public forums followed by clear legislative action. But sometimes there does exist a need for judicial action before the legislative branch reacts. As Attorney General, I am aware of this need and of the role my office can play in such instances, through well thought-out and calmly conducted test litigation.

But as a lawyer and a former president of the Alaska Bar Association, I am keenly aware of our duty as attorneys to insure that test litigation over a highly emotional subject is done responsibly and with the greatest attention to the effect which the very process of litigation has on the public.

What am I talking about? Consider these facts about litigation:

Litigation drives people to extremes and hardens their positions at those extremes...it makes it harder to publicly debate the issues in a way which emphasizes common ground;

Extreme litigation claims can raise false expectations when the nature of litigation and of the lack of precedents on many of these issues is not explained; and

Extreme litigation claims may make it impossible to work out practical case-by-case solutions to village problems, especially when every problem is viewed as an occasion for promoting those litigation positions.

I am not suggesting that anyone refrain from bringing test litigation over matters related to Native sovereignty. As attorneys, we have an obligation to represent persons whose legal claims we believe to be valid and just. But what I am saying is that, at the same time we engage in test litigation, we must constantly remind ourselves to consider the real practical interests of our clients. This is as true for the State as for private litigants. As attorneys for the State, we must be able to step back from our role as professional litigators and examine whether there are legal options which might accommodate greater degrees of village self-determination and which are in the public interest. If so, it is our duty to advise our client agencies about those options.

Likewise the private bar has a duty, I believe, to represent its clients in a way which considers both the larger social values the client wishes to pursue, and the client's other practical interests. For example, it is easy, when your cause is one you believe in, to express your confidence to your clients in a way that inadvertently leaves them believing that a) the government is knowingly and in bad faith trying to deprive them of their rights, and b) that they can violate existing laws with impunity, because they are sure to win the test case. The result is an increase in hostile feelings and the possibility that people will needlessly put their own selves at risk. We all know that the lack of precedents in Alaska Native law makes predicting the outcome of test cases speculative, to some degree. Your clients, and ours, should know this from the start and should not be led into unrealistic expectations or overly confrontative images of their opponents' positions. Nor should the clients be inadvertently given the wrong impression when the courts do rule. It does no one any

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good to be told that a preliminary decision is final or that extraneous comments by a judge have decided substantive issues once and for all.

It is also important to bear in mind that even when you are litigating crucial questions of Native rights, not all village problems need to be — or should be — approached the same way. For the vast majority of legal problems encountered in villages, solutions can be worked out which do not implicate the larger legal issues surrounding sovereignty. Test cases are important, but not every legal issue should be a test case. When a practical solution exists that avoids confronting a sovereignty issue, clients should at the very least be made aware that the option exists. Save your ammunition for the real fights, and let ordinary problems be solved in ordinary ways.

An example: a legal controversy presently exists over whether certain Native village councils may issue adoption decrees. In at least one case we understand attorneys have told clients who wanted an adoption that the attorneys will not do a state court adoption for them unless they have first asked their Native council for a decree. But since the validity of state adoption is unquestioned while the authority of Native councils is in dispute, the result is that the clients were in effect being put into a position of jeopardy — where they might or might not have a valid adoption decree — because the attorneys felt it would compromise their own claim of council authority to utilize the alternative of a state court adoption. There are many opportunities to pursue sovereignty claims and there is no need to pursue them by putting the practical interests of individual clients at risk.

In the end sovereignty can be a terribly divisive issue which pits Alaskan against Alaskan to everyone's detriment. Or it can be an important issue which is approached, and hopefully solved, by responsible people who respect each other. The manner in which we litigate the issue, and the manner in which we each advise our clients, will do a lot to determine how constructive or destructive the sovereignty debate becomes.