MEMORANDUM

October 21, 2013

SUBJECT: Mandatory Meetings of the Controlled Substances Advisory Committee; AS 11.71.100(e) (Work Order No. 28-LS1055\A)

TO: Senator Fred Dyson
Attn: Chuck Kopp

FROM: Doug Gardner
Director

Please find enclosed a bill amending AS 11.71.100(e) to clarify that the minimum of two meetings a year of the Controlled Substance Advisory Committee are mandatory, rather than directory. In your drafting request, which I understand was a response to the litigation in *State of Alaska v. Daemion Patillo*, 3AN-12-00820 CR, and the position that the state argued in the State's Opposition to Motion to Declare AS 11.71.140 - 190 Invalid or Unconstitutional, you provided me the latitude to consider including a provision in AS 11.71.100 providing for a criminal (or other) penalty for failure of the Controlled Substance Advisory Committee to meet at least twice a year as provided in AS 11.71.100(e).[1]

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[1] I note that currently, AS 11.71.100(e) provides:

(e) The committee may not meet less than twice a year.

Whether this language is mandatory or directory has been raised by the parties in the *Patillo* case, and it is not my intention to comment on the arguments of the parties. However, please review the following section from the *Manual of Legislative Drafting*, pp. 64 - 65 (2013 ed.), which discusses the interpretation courts have given to the legislature's use of "may," "shall," and "must," with examples:

(h) "May," "shall," "must"

Use the word "shall" to impose a duty upon someone. The Alaska Supreme Court has stated that the use of the word "shall" denotes a mandatory intent. Fowler v. Anchorage, 583 P.2d 817 (Alaska 1978).

Use the word "must" when describing requirements related to objects such as forms or criteria. (Use "must" sparingly, however, because most sentences using it can probably be written more clearly to impose a duty

My recommendation is not to include a penalty to assure at least two annual meetings of the committee. I chose instead to use the term "shall" to make two meetings of the committee a year mandatory. There is no restriction in AS 11.71.100 that limits the attorney general from calling additional meetings of the committee if the attorney general deems additional meetings necessary.

Please review the bill draft, and make sure that the draft achieves the senator's legislative goals for this statute.

DDG:ray
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Enclosure

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upon a person, in which case "shall" would be the proper word.) Use the word "may" to grant a privilege or discretionary power. Rutter v. State, Alaska Board of Fisheries, 963 P.2d 1007 (Alaska 1998), p.5. Use the words "may not" to impose a prohibition upon someone. For a further discussion, see Martineau, Drafting Legislation and Rules in Plain English (1991), pp. 81 - 82. For example:

The commissioner shall issue a license . . ., i.e., it is the commissioner's duty to do so.

The information on the form must include . . ., i.e., the form is required to have something in particular on it.

The commissioner may inspect records . . ., i.e., the commissioner may if it is necessary or proper, but the commissioner is not obligated to do so.

The commissioner may not issue a license . . ., i.e., under the defined circumstances, it is beyond the power of the commissioner to issue the license.

A person may not operate a . . . without a license . . ., i.e., under the circumstances, a person is not permitted to do the specified act without a license.

Do not use "must not" or "shall not." Also, do not use the "No . . . may" construction; use "may not." For instance, avoid "No fish trap may be . . .," and use "A fish trap may not be . . ."

When drafting a constitutional provision, however, follow the style of the provision you are drafting.