

## **ETHICS COMMITTEE MEETING**

**January 21, 2015**

### **ITEM 12. Collection of Unpaid Fines**

This is a continuation of discussion from the Oct 28, 2014, Full Committee meeting.

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The committee requested a legal opinion on how to proceed on collecting unpaid fines.

- January 8, 2015 Legal Opinion from LAA Legal Director Doug Gardner.

**ACTION:** Discussion of issue. Determine course of action.

1. Seek assistance of Legislative Council.
2. Request that the attorney general file a complaint.
3. Consider amending AS 24.60.
4. Inquire of other states procedures.



# LEGAL SERVICES

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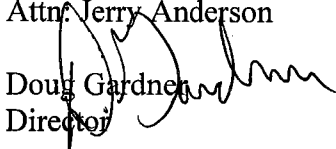
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## MEMORANDUM

January 8, 2015

**SUBJECT:** Collection of Unpaid Fines and Restitution by the Select Committee on Legislative Ethics (Work Order No. 28-LS1855)

**TO:** Gary J. Turner  
Chair of the Select Committee on Legislative Ethics  
Attn: Jerry Anderson

**FROM:** Doug Gardner   
Director

You asked that I provide an opinion on options available to the Select Committee on Legislative Ethics (committee), regarding the committee's ability to collect a civil penalty that the committee imposed under AS 24.60.174(a)(2) that was concurred by the body the legislator is a member of, or a civil penalty or restitution involving a violation of AS 24.60 by a legislative employee under AS 24.20.178(b).

### *Collection Options*

Collection of a civil penalty or restitution under AS 24.60 would require the statutory authority to file a complaint in the Alaska courts. Once a complaint is filed, in summary, a judgment will be entered by the court in the name of the complainant, if the defendant does not respond in the allotted period of time from the date of being served the complaint, or after a hearing, if the court decides in favor of the complainant.

The first issue, correctly spotted by Brent Cole in his most recent memorandum of October 22, 2014, is an impediment for the committee regarding the collection of fines, etc., in that the committee does not have the statutory authority to bring suit to receive judgment to enforce the above-referenced penalties. However, Legislative Council (Council) does have the statutory authority to bring suit in the name of the legislature. It is my opinion that if the committee requested by motion that Council sue in the name of the legislature and on behalf of the committee to seek a judgment to enforce final decisions on fines under AS 24.60.174 and AS 24.60.178, Council could do so, as discussed below, by a majority vote of the members of the committee (eight votes). Council could either instruct the legal services division, or to preserve the neutrality of the Division of Legal Services' attorneys, the committee's private counsel, to conduct the litigation necessary to the collection of fines, etc.

Council has specific authority under AS 24.20.060(4)(F) "to sue in the name of the legislature during the interim between sessions if authorized by a majority vote of the full membership of the council. . . ." Note that this is a grant of authority to the Council to act

during the interim, but not while the legislature is in session. While the statute does not address the question of whether the Council may also sue during a legislative session, the specific language of AS 24.20.060(4)(F) strongly suggests that this is the exclusive litigation power that the Council may exercise. The obvious reason for the grant of power to sue during the interim is to enable the legislative branch to respond to legal problems that arise when the legislature is not in session and able to act as a body.<sup>1</sup>

While AS 24.20.060(4)(F) does not address the power of the Council to take legal action on behalf of the legislature other than to sue, that power to sue on behalf of the legislature to enforce decisions of the committee would, I believe, be implied as part of the power to sue. The Council has a long history of involvement in litigation as an amicus or in response to a suit filed against a legislative entity, without objection from the legislature as a whole.

As previously noted, it is worth emphasizing that the exercise of delegated power to sue under AS 24.20.060(4)(F) requires approval by majority vote of the full Council. Even though the chair of the Council has authority to execute certain contracts without Council's review or approval, the chair does not have independent authority to sue in the name of the Council or on behalf of the legislature. In order to authorize the filing of a suit, the members must approve the action by majority vote at a meeting. It is a basic principle in parliamentary law that a committee may only act when it is properly constituted in a meeting. *Mason's Manual of Legislative Procedure*, secs. 520(1) and 625 (2010 ed.); AS 24.60.037, open meetings requirement.

In addition to the process discussed above, where the committee requests assistance of the Council in collecting fines, it is possible that the committee could, pursuant to AS 44.23.030(b)(2), (b)(3), and (b)(4), provide the final decision of the committee to the attorney general for the collection of a civil penalty or restitution. AS 44.23.020(b)(2 - 4) provide:

(b) The attorney general shall

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<sup>1</sup> The legislature can, of course, decide to use the Council for litigation during a session. In one instance, while in session, the legislature adopted a concurrent resolution to direct the Council to institute a civil action to challenge the constitutionality of appointment of a resigned legislator as commissioner. See, SCR 36, Ninth Legislature, First Session (1975); *Warwick v. State ex rel. Chance*, 548 P.2d 384 (Alaska 1976), at 386). By way of caution it should be recognized that the legislature, as the real party, could also take action to terminate the delegation of authority to the Council to litigate and direct a lawsuit itself or, even, direct the Council to drop litigation it has already commenced. The fact that the limited authority to sue is delegated to the Council by statute will not, in itself, prevent the legislature from using a procedure other than statutory amendment to accomplish a termination of that delegation. *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987).

- (2) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;
- (3) represent the state in all civil actions in which the state is a party;
- (4) prosecute all cases involving violation of state law, and file information and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

### *Justicability Concerns*

The concern that may arise is how the court system may view a proceeding initiated in court by the Council, or by the attorney general. Assume a hypothetical where a former legislator defendant asserts in court, as a defense to a collection action brought as discussed above, that the defendant's constitutional right to due process was violated during hearings before the committee, or that the evidence presented before the committee was insufficient to support the imposition of a civil penalty, etc. What then?

It is unclear how the court system may view this particular proceeding. However, it is possible that the court might decide that it cannot be placed in a situation where it would be required to review a determination made by a legislative committee, based on separation of powers concerns. *Malone v. Meekins*, 650 P.2d 351 (1982); *Aboud v. League of Women Voters*, 743 Alaska P.2d 333 (1987). The attorney general has taken the position that, at least with respect to the enforcement of the open meetings provision of AS 24.60 (enforced through a proceeding brought before the committee in AS 24.60.170), that enforcement through the courts of a decision of the committee would likely not be enforceable. 1992 Alaska Op. Atty. Gen. (Inf.) 257 (July 10, 1992). See *Berry v. Crawford*, 990 N.E.2d 410, 421 (Ind. 2013) (where discipline of members of the legislature has been committed to the sole discretion of legislative bodies, and there is no express constitutional provision or qualification to that authority, court found litigation involving a fine imposed against legislative salaries for non-attendance of legislative meetings non-justiciable).

Furthermore, the court might view an action filed in court to collect a civil penalty or restitution like some courts have viewed the civil enforcement of a legislative subpoena, by ordering enforcement of the subpoena. See *Office of the Governor v. Select Committee of Inquiry*, 858 A.2d 709 (Conn. 2004), finding that the separation of powers doctrine did not prevent Connecticut courts from exercising jurisdiction over complaints that impeachment investigation violated constitutional guarantees, but that the doctrine also did not shield the governor from the duty to comply with the subpoena despite the questions that arose about adequate notice of the scope of the inquiry. In two other state civil enforcement actions of legislative subpoenas, both courts reversed trial court injunctions and ordered compliance with the subpoenas. See *Gray V. Gienapp* (Supreme Court of South Dakota, January 19, 2007); *Marina Management Svcs. v. Kentucky Cabinet for Tourism*, 906 S.W.2d 318 (KY 1996) (allowing legislative audit without public disclosure).

*Conclusion*

In summary, it seems to me that the committee has the following options:

- Seek the assistance of the Council to file a complaint in court to enforce a finding of the committee, accepting the risk that dismissal of the action may be the result;
- Request that the attorney general file a complaint to reduce the decision of the committee to a judgment in court, and see what happens -- the attorney general may proceed, may respond in an opinion explaining the risks of proceeding with an enforcement action allowing the committee to decide if those risks are acceptable, or the attorney general may decline to proceed;
- Consider amending AS 24.60, and possibly other state statutes or court rules to allow the committee the authority to enter a final judgment regarding civil penalties and restitution, enforceable as any other judgment is under Alaska law, etc;
- Inquire of other states how they are addressing this issue and evaluate whether there are other options not identified in this memorandum (see enclosed articles).

Please advise if you have questions regarding this memorandum.

DDG:lem  
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Enclosures