

LEGAL SERVICES

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MEMORANDUM

March 28, 2014

SUBJECT: HB 362: House Judiciary Committee questions
(Work Order No. 28-LS1538A)

TO: Senator Kevin Meyer
Attn: Edra Morledge

FROM: Kathleen Strasbaugh
Legislative Counsel

You have asked for answers to questions posed by members of the House Judiciary Committee concerning HB 362, which would prohibit the sale and marketing of illicit synthetic drugs. To the extent that a question raises legal issues, I have answered briefly below.

1. "Does there need to be the word "or" at the end of line 18 on page 2 to be clear that only ONE needs to be met from 17.21.010 (b) (2)?"

The answer is no. The lead-in language at page 1, line 14, clearly states that the synthetic drug must have "one or more of the following characteristics." While it is not needed, the insertion of "or" would probably not change the meaning or interpretation of the paragraph.

2. "Is the language on page 3, line 17, "(1) delegate the authority as appropriate;" too broad? Does it need to specify what is being delegated and to whom? Can the enforcement be delegated to another agency or department? Does this language present constitutional issues? Should we limit the delegation of authority?"

This language is the same language used in AS 17.20.132 with respect to the commissioner of health and social service's enforcement authority. Generally, it is assumed that a commissioner will delegate detailed execution of a statute to the appropriate subordinate officials within the commissioner's authority. This is a different sort of delegation than the unguided delegation of the legislature's appropriation authority that the Alaska Supreme Court found unconstitutional in *State v. Fairbanks North Star Borough*, 736 P. 2d 1140 (Alaska 1987).

3. "Can we make it clear in the penalty section (page 3, lines 21-22), that the violation is for each individual package?"

In my opinion, it is not necessary to clarify this, but it could be done if you wish. At times the legislature has done this. *See, e.g.*, AS 11.61.127(c), penalizing each unlawful image.

4. "Can we make it clear in the penalty section who is the "person" that violates AS 17.21.010? Is it the person that possesses it, the manufacturer, the packager, the retailer? Which is the person that is committing the crime?"

The use of the term "person" is standard in our statutes. In AS 17.21.010, a person who possesses, a person who offers, a person who displays, a person who advertises for sale, or a person who sells can be in violation of the law.

5. "Is there a definition for "false or misleading?" Should there be?"

The phrase "false or misleading" is used numerous times in statute, including in the AS 17.20 concerning the labelling and advertising of drugs, cosmetics, and devices, and in AS 45.50.471 - 45.50.561 concerning unlawful trade practices. The phrase is not defined, nor are the individual words. When a term is undefined, a court will use the common, ordinary meaning of the words to interpret the statute. In my opinion, these terms do not need to be defined.

6. "What prevents a person from possessing, offering, displaying, marketing, advertising, or selling a synthetic drug that does NOT meet one from both AS 17.21.010 (a) and (b)? Could a manufacturer/packager list exactly what is in the product and not be in violation of this new law?"

It is true that if a substance does not meet any of the criteria in AS 17.21.010(b)(1), the possession, offer, display, advertising for sale, or sale of an illicit synthetic drug would not be illicit under the statute. I believe there is some factual information in the record as to why the purveyors of these products find it disadvantageous to comply with such requirements. I would also note that a purveyor of a product may not be able to prove to the federal Food and Drug Administration that the product is safe for human consumption if it is labelled to disclose its real purpose or its true contents.

7. "Why is this a civil penalty rather than a misdemeanor or other criminal infraction? Why make it a violation?"

This is a policy choice. A violation is an offense under the criminal laws of the state. "Offense" is defined in AS 11.81.900(b)(40) as "conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation." And to

clarify, a violation technically is not a civil penalty.¹ A violation is defined in AS 11.81.900(b):

(65) "violation" is a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime; a person charged with a violation is not entitled

(A) to a trial by jury; or

(B) to have a public defender or other counsel appointed at public expense to represent the person;^[2]

A crime is an offense for which a sentence of imprisonment can be imposed and can be either a felony or a misdemeanor. AS 11.81.900(b)(11). While a violation is an offense and is prosecuted in the criminal justice system, it is not a crime and the Constitution of the State of Alaska does not require a jury trial. *State v. Dutch Harbor Seafoods, Ltd*, 965 P.2d 738, 739 and 741 - 42 (Alaska 1998) (finding no right to jury trial where potential fines of \$3000 or \$6000 not heavy enough to denote criminality) quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970).

In regard to the penalty, I would recommend that AS 17.21.030 be amended so that it simply notes that the penalty is a violation, punishable under AS 12.55, as we do with other similar offenses. This change will not convert the violation to a crime, but it will assure uniformity of treatment of violations, as provided in AS 12.55.035.

8. "Under AS 17.21.010 (b) (2) (G), beginning on page 2, line 19, do the words "the following street names" present a problem in proving such a "street name?" Would it be better to clarify that just the packaging/label must have the name on it?"

It may be that the purveyor of the product represents that the product has one of the listed street names but the product is not otherwise labelled - keeping the present language would allow either type of conduct to be prosecuted, in one case based on the labelling, and in the other, based on the marketing or representation. However, it might be useful to add "or packaging" to AS 17.21.010(b)(1) (page 1, line 8) to avoid a problem of interpretation with respect to whether the term "label" includes an image that conveys misleading information or, in this case, resembles a product with a street name.

¹ An example of a civil penalty scheme can be found in AS 17.20.315.

² Infraction is a term used in Title 28 (motor vehicles) for a non criminal offense. In AS 12.25 (citations) and AS 12.55 (sentencing) infractions are mentioned with violations, as in AS 12.25.180(b): "when a peace officer stops or contacts a person for the commission of an infraction or violation"

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9. "Under AS 17.21.010 (b) (2) (G), beginning on page 2, line 19, is there wording that could be crafted to include current and future names of synthetic drugs, instead of listing each one of the currently known names?"

As I expressed to you in an earlier memorandum, it is possible that the list of street names in AS 17.21.010(b)(2)(G) may become outdated. The other criteria listed in AS 17.21.010(b)(2) encompass the generic properties of the products the law is designed to prohibit. If the legislature would like to add to the statute, it must amend the law.

If I may be of further assistance, please advise.

KJS:ld

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