

Item 9


Alaska State Legislature

Select Committee on Legislative Ethics

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TO: Dan Wayne
LAA Legal

FROM: Joyce Anderson
Administrator 

DATE: February 3, 2014

RE: AO 89-06, Subject: Gifts – Travel/Hospitality

The House Subcommittee met on January 23, 2014. The subcommittee requests a legal opinion to determine whether the committee's conclusion in AO 89-06 is applicable today based on current statutory language in AS 24.60. The conflict of interest section in the Act, AS 24.60.030, has had significant changes since 1989.

The committee believes the opinion is in direct conflict with recent actions by the committee concerning activities in the area of partisan political activity. The opinion states a disclosure for a gift of travel/hospitality for attending a partisan political meeting [the 1988 biennial convention of the state Democratic Party] is categorized as a gift "primarily for the purpose of obtaining information on matters of legislative concern."

What options would be available to the committee? The committee is concerned legislators and/or staff may rely on the opinion when performing activities in the area partisan political activity. Could the committee rescind AO 89-06 without issuing a new opinion? Must the committee issue a new advisory opinion that would supersede 89-06? Or are there other options?

We are in no hurry for a response. Sometime after the conclusion of the 2014 legislative session is fine.

Enc AO 89-06
AO 84-04 Binding Effect of Opinions

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MEMORANDUM

February 11, 2014

SUBJECT: Rescinding a past advisory opinion by the Select Committee on Legislative Ethics (Work Order No. 28-LS1418)

TO: The Select Committee on Legislative Ethics
Attn: Joyce Anderson, Administrator

FROM: Dan Wayne 
Legislative Counsel

You have asked whether, after changes to the Legislative Ethics Act since 1989, the advice in AO 89-06 is still reliable. In my opinion the answer is no. AO 89-06 advises that the Act permits a person to accept a gift with a value greater than the annual dollar limit on gifts, in the form of reimbursement of expenses related to attending a political party's state convention as an elected convention delegate. The current version of AS 24.60.080 prohibits the acceptance of gifts, from "the same person," that have a cumulative value of \$250 or more in a calendar year; there is no exception in AS 24.60.080, or elsewhere in the Act, for reimbursement of expenses for partisan political activity.¹

You have also asked whether the committee can rescind prior advisory opinions. The answer is yes. The committee has rescinded at least one prior opinion shortly after it was approved. At a meeting on June 16, 2010, a majority of the committee voted to rescind AO 10-01, after at least one member of the committee who had voted to approve the opinion on May 27, 2010, asked for reconsideration of his vote because he believed the opinion was legally flawed.² In this instance, the opinion AO 89-06 was approved by the committee under law in effect at the time, and was applied until the law was changed. In this instance, a better alternative to rescinding the opinion may be to note in the opinion database that it was decided under prior law and should not be relied upon.

Please do not hesitate to contact me if you have additional questions or concerns.

DCW:ray
14-059.ray

¹ However, AS 24.60.080(e) might apply as an exception in some circumstances. It says that "[A] political contribution is not a gift under this section if it is reported under AS 15.13.040 or is exempt from the reporting requirement under AS 15.13.040(g)."

² Minutes from June 16, 2010 meeting of the full Select Committee on Legislative Ethics.

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January 6, 1990

ADVISORY OPINION 89-06

Subject: Gifts - Travel/Hospitality

RE: Acceptance and disclosure of reimbursement for expenses incurred in attending state party convention as delegate

As a person covered by the legislative ethics code (AS 24.60), you have asked for an advisory opinion, under AS 24.60.160, on whether you may accept an offer of reimbursement of certain expenses you incurred and whether, if you may accept this reimbursement, it must be disclosed.

According to your opinion request, you were elected to be a delegate from your district to the 1988 biennial convention of the state Democratic party, and did attend the convention. The union of which you are a member has a policy that it will pay, out of its political and education segregated fund, for the travel, food and lodging expenses of any union member who attends a state political convention. You previously attended these biennial conventions in 1982, 1984 and 1986, before you were subject to the legislative ethics code, and presumably were reimbursed for your travel, food and lodging expenses by the union's fund. You now wish to know if you may request and accept reimbursement under your union's policy for the expenses you incurred in 1988. You would be requesting reimbursement of expenses in excess of \$100.

The committee finds that you may accept this reimbursement, and that you must disclose it under AS 24.60.080(d), which requires disclosure of "a gift of travel and hospitality primarily for the purpose of obtaining information on matters on legislative concern" when the value of the gift is \$100 or more.

The committee first finds that reimbursement by the union would constitute a gift subject to the provisions of the ethics code. The term "gift" is broadly defined in AS 24.60.080(a) to include money, services, loans, travel, entertainment, hospitality and promises. However, notwithstanding that broad definition, it will frequently not be a gift when a person covered by the code is a member of a board or a delegate to

a convention and has his or her expenses to attend the board meeting or convention paid for by the organization sponsoring the meeting or convention. Thus, for instance, it is not a "gift" when the federal government pays travel and per diem to a legislator who is a member of a federal commission (insofar as such membership is consistent with Article II, Section 5 of the Alaska constitution), and it would not be a gift for a corporation to pay the meeting expenses for a legislator who was a member of the corporation's board or for a union to pay a legislator's expenses to attend a union convention as a delegate (assuming in both cases that non-legislators were treated in the same way).

The committee finds that that exception to the "gift" definition does not apply to this case, for two reasons. First, the committee believes that political meetings, such as party conventions or meetings of all the legislators of a party, are substantially different from meetings of government bodies or corporate boards. Those latter meetings are essentially divorced from the legislative process, whereas meetings of partisan bodies necessarily affect the legislators of those parties or their aides. Second, even if the committee did not hold this view, it would conclude that the payment of your expenses by the union, and not directly by the party, would create a gift situation.

Since the union's reimbursement does constitute a gift, and is worth over fifty dollars, AS 24.60.080(b) prohibits you from accepting it, unless it falls within some exception to that statute. In the committee's opinion, the reimbursement does fall within an exception, namely AS 24.60.080(c)(4). That exception allows the acceptance of "travel and hospitality primarily for the purpose of obtaining information on matters of legislative concern."

A person receiving gifts of travel and hospitality usually is present only as an observer: inspecting oil spills in Prince William Sound, for instance, or attending a seminar on some legislative topic. One attending a political convention as a delegate obviously plays a far more active role, and can possibly be viewed as not attending the convention in order to obtain information. The committee does not share this view. Because party conventions, caucuses and meetings generate a party's position on issues, and because the party's positions are clearly of interest to legislators of that party, the committee believes that AS 24.60.080(c)(4) is applicable here.

Because the reimbursement from the union would exceed \$100, you must disclose the reimbursement under AS 24.60.080(d).

Adopted by the Select Committee on Legislative Ethics on January 6, 1990.

Members present and concurring in the opinion were: Sen. Pat Pourchot, Chairman; Rep. Mike Davis; Rep. Walt Furnace; Rep. C.E. Swackhammer; Margie MacNeille; and Judge Thomas Stewart.

JG:mi
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December 19, 1984
Advisory Opinion 84-04

Subject: Advisory Opinion Parameters; Campaigning

Re: Use of legislative stationary for campaign purposes; binding effect of one legislator's advisory opinion on the conduct of another; binding effect of the opinions of one session's ethics committee on the opinions of a subsequent session's ethics committee.

You have submitted a request for an advisory opinion to the committee, in order to determine whether a contemplated course of conduct would constitute a violation of ethical standards. Specifically, you wish to know if you were to endorse a candidate for legislative office and use your official stationary (i.e., the type of stationary your request for an advisory opinion was written on) and have your campaign pay for the actual postage and printing, would such conduct be a violation of AS 24.60? You advise that this stationary is purchased with funds from the \$4,000 expense allowance provided each legislator at the beginning of each session and bears your title ("Representative"), your session address, your home address, and a replica of the Seal of the State of Alaska. It also contains the words "Alaska State Legislature" and identifies your House district. This proposed letter of endorsement would be a letter encouraging voters in a district in the state to cast their votes for certain candidates. As the actual cost of printing the letter and the postage to mail the letter or other delivery costs would be borne by your reelection committee, a disclaimer (i.e., Paid for by, etc.) would appear at the bottom of the letter.

In determining whether or not a violation of ethical standards would occur if you were to use your stationary in the manner set forth above, the pertinent sections of AS 24.60 must be considered. The first of these, AS 24.60.030, provides:

- (a) A person to whom this chapter applies may not use public office for private advancement or gain.
- (b) A conflict of interest exists when a person to whom this chapter applies takes or withholds official action or exerts official influence that could substantially benefit or harm a financial matter in which the person has a direct or indirect private interest.

Taking the facts you have outlined together with the language of these paragraphs, the committee believes that no violation of ethical standards would occur. Assuming for the sake of argument

that a political endorsement written on your legislative stationary could be considered an official action or the exertion of official influence, (not an automatic assumption, since your stationary does not contain the words "Official Business") there occurs no substantial benefit or harm to a financial matter in which you have a direct or indirect private interest. Generally, in order for a person to be deemed as having a private interest in a financial matter, some immediate or potential pecuniary benefit to that person must exist. While the person you endorse has a clear financial interest in this matter, you would receive no pecuniary benefit from the election of that person. Therefore you cannot be said to have a private interest in a financial matter and your endorsement would not conflict with the paragraphs cited.

The second section of AS 24.60 which might be considered pertinent is AS 24.60.120. This section reads as follows:

STATE PROPERTY AND FUNDS A person to whom this chapter applies may not use state property, excepting property under lease from the state, or state funds for private gain.

The argument that the conduct you propose is made unethical by this section would be that your use of your office expense allowance to endorse candidates is the use of state funds for private gain. The committee disagrees with the argument. The allowance is made by AS 24.15.030, which reads as follows:

ADDITIONAL ALLOWANCES In addition (to the annual legislative salary), each member of the legislature is entitled to an annual allowance prescribed in accordance with AS 39.23 for postage, stationary, stenographic services and other expenses.

Since the repeal of AS 39.23, the legislature has been fixing the amount of the annual allowance. Currently it is \$4,000. The committee believes that this allowance does not constitute state funds. The annual payment is an allowance in a sum certain to which each legislator is entitled in its entirety. There is no provision in the law that any unexpended funds be returned to the state. At the time the allowance is transferred to the legislator, it ceases to be state funds, and becomes the property of the legislator, to be used at his or her discretion as an operating budget. It is common practice among legislators to use their stationary to send letters which are not, in the strictest sense, official business. Letters of recommendation, thank you notes, and personal press releases are but a few examples. This, however, is an activity which is within the parameters of the discretionary operating budget granted each legislator and does not constitute unethical conduct.

Moreover, the committee believes that the "private gain" spoken of in AS 24.60.120 is the same type of private gain mentioned in AS 24.60.030. That is, personal private gain. It cannot be said that you would reap a personal private benefit from the use of your stationary to endorse another person. Therefore, no violation of AS 24.60.120 would occur.

In your request for an advisory opinion, you have also asked that the committee state its understanding of the scope of the advisory opinion. You are interested in two areas: First, is an advisory opinion issued to one legislator binding on another legislator in similar circumstances? Second, is an advisory opinion issued by one ethics committee binding on subsequent ethics committees in later sessions?

In answer to your first question, the statute does not provide that a person requesting an advisory opinion is bound to comply with its terms. Should a person, in response to that person's own request for an opinion, be advised by the committee that a violation of ethical standards has occurred, then presumably the person will take the recommended steps to rectify the violation. If the person does not, at its option the committee may file a complaint against the person under AS 24.60.170, hold the necessary investigation and hearings, and then order the person to rectify the violation. The committee's authority to order a person to rectify violations of ethical standards only arises after the filing of a formal complaint, not after the filing of a request for an advisory opinion.

Since the person requesting an advisory opinion is not technically bound to comply with it, it cannot be said that one legislator is "bound" to comply with the advisory opinion issued to another legislator. Summaries of advisory opinions are published twice each year in order to provide guidance to covered persons. Because each opinion is written solely on the basis of facts submitted to the committee by the requester, and because identical sets of facts would probably be the exception rather than the rule, a covered person must use his or her best judgment in determining if guidance should be taken from the opinion issued to another. If there is a question as to the applicability of a particular opinion, clarification should be sought from the committee.

In answer to your second question, the committee believes that in issuing an advisory opinion, a subsequent ethics committee may interpret the ethics legislation differently than did an earlier committee. For purposes of interpreting AS 24.60, the committee sits as a judicial body. In issuing advisory opinions over the years, the committee will gradually build up a body of decisions which can provide guidance to covered persons in a wide variety of circumstances.

However, much as a supreme court can overturn a precedent set by itself in the past, a future ethics committee may issue advisory opinions which overturn the principles set forth in earlier opinions. Courts overturn precedents for numerous reasons. Frequently the letter of the law will remain static, while the social circumstances which existed at the time it was enacted have changed. Occasionally, isolated principles elucidated in various cases over the years come into conflict, and must be changed in order to bring the cases into harmony. These factors, among others, are equally applicable to the committee's task of interpreting the ethics statute as the years pass. Thus, a subsequent ethics committee may reject an interpretation of the law made by an earlier committee, and issue an advisory opinion based on a different view of the statute.

However, the committee believes that an advisory opinion issued by one session's ethics committee is binding on future ethics committees as it relates to action taken by a committee against a specific person to whom an opinion was previously issued. AS 24.60.160 states that an "opinion issued is binding on the committee in any subsequent proceedings concerning the facts and circumstances of a particular case..." Thus, if the ethics committee for the 14th Session of the legislature were to issue an advisory opinion to a specific person that certain conduct was acceptable, the ethics committee for the 15th Session could not take sanctions against that person for having relied on the opinion, merely because the current committee believed that the earlier committee was mistaken in its views.

Adopted by the Select Committee on Legislative Ethics on December 19, 1984.