

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

February 17, 2020

1:07 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Harriet Drummond
Representative Louise Stutes
Representative Gabrielle LeDoux
Representative Laddie Shaw
Representative David Eastman

MEMBERS ABSENT

Representative Chuck Kopp

COMMITTEE CALENDAR

HOUSE BILL NO. 201

"An Act relating to legal representation of public officers in ethics complaints."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 201

SHORT TITLE: DEFENSE OF PUB. OFFICER: ETHICS COMPLAINT

SPONSOR(S): REPRESENTATIVE(S) LEDOUX

01/21/20	(H)	PREFILE RELEASED 1/17/20
01/21/20	(H)	READ THE FIRST TIME - REFERRALS
01/21/20	(H)	JUD, FIN
02/10/20	(H)	JUD AT 1:00 PM GRUENBERG 120
02/10/20	(H)	Heard & Held
02/10/20	(H)	MINUTE(JUD)
02/17/20	(H)	JUD AT 1:00 PM GRUENBERG 120

WITNESS REGISTER

NANCY MEADE, General Counsel
Office of the Administrative Director
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: Answered questions pertaining to HB 201.

DAN WAYNE, Attorney
Legislative Legal Counsel
Legislative Affairs Agency
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Answered questions pertaining to HB 201.

ACTION NARRATIVE

[1:07:22 PM](#)

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Representatives Claman, Drummond, Stutes, LeDoux, Shaw, and Eastman were present at the call to order.

HB 201-DEFENSE OF PUB. OFFICER: ETHICS COMPLAINT

[1:08:01 PM](#)

CHAIR CLAMAN announced that the only order of business would be HOUSE BILL NO. 201, "An Act relating to legal representation of public officers in ethics complaints."

[1:08:14 PM](#)

CHAIR CLAMAN stated that in the previous House Judiciary Standing Committee meeting, members had asked for answers to two specific questions in the case of an ethics complaint against a judge: First, what happens? Second, who pays?

[1:08:54 PM](#)

NANCY MEADE, General Counsel, Office of the Administrative Director, Alaska Court System, answered questions pertaining to HB 201. She stated that the Alaska Commission on Judicial Conduct handles ethics complaints filed against a judge, which any citizen can file. She explained that the commission has three attorneys, three public members, and is staffed by an executive director. When a complaint is filed, the executive director looks at the complaint to determine whether it is frivolous and within the jurisdiction of the commission, meaning it alleges an ethical violation and not something else. She stated that the executive director will either dismiss the complaint and notify the individual who filed it or start a preliminary investigation if it is determined that the complaint

is not frivolous. Following that, the case could either be dismissed and the complainant notified, or more investigation could be undertaken if needed. She remarked that these decisions by the executive director go through the commission to ensure that the process is being undertaken properly. She explained that, thereafter, the case could be dismissed, or it could go to a formal hearing in which a judge is called to defend himself/herself of the allegation(s). In this situation a judge is entitled to hire an attorney at any point; the judge must pay the attorney's fees himself/herself, as there is no provision for any reimbursement.

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REPRESENTATIVE LEDOUX asked at what point the judge is notified that a complaint has been filed against him/her.

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MS. MEADE replied that notification would happen during the third stage, which happens if the executive director and commission determine that further investigation is necessary, not during the preliminary determination of frivolousness and jurisdiction, or the preliminary investigation. In response to a follow up question, she clarified that a judge is not even aware that a complaint has been filed against him/her until the process reaches the third stage. She added that the reason for this is that complaints often come from litigants in active cases, and it is a "better policy" that the judge does not know of a frivolous complaint brought against him/her in a live case.

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CHAIR CLAMAN asked whether the general thinking around this policy is that if a litigant were to make an ethics violation complaint against a judge, and it resulted in getting a new judge for that case, litigants might start commonly using this as a means to switch out a judge that might be perceived to be unfavorable.

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MS. MEADE answered that this is likely part of the consideration for why the process occurs the way it does.

CHAIR CLAMAN asked whether the fees incurred by judges when they retain counsel are disclosed to the Judicial Conduct Commission.

MS. MEADE replied that she does not think the court ever has occasion to learn the amount of money someone spent on an attorney to defend himself/herself against an ethics complaint.

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REPRESENTATIVE LEDOUX asked how often a case is dismissed once it has made it past the first two stages of the process.

MS. MEADE answered that she thinks it is extremely rare for a case to be dismissed once it has made it to the point that it is public knowledge. She expressed that the executive director on the commission has approximately 25 years of experience in the judicial field, and it is known to be quite disruptive to have a public complaint against a judge. She stated that once a complaint becomes public it has been well examined and screened; an exoneration is very rare after that has occurred.

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CHAIR CLAMAN asked how often judges have retained counsel to represent them in proceedings, once the process has reached the public complaint stage.

MS. MEADE replied that to her knowledge judges always retain counsel if the process has reached the public complaint stage, unless there is a case which she has not heard of in which a judge chose to represent himself/herself. She added that these proceedings are quite rare.

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CHAIR CLAMAN stated that there are three main issues he thinks the committee should discuss: First, should the proposed provisions apply to legislators? Second, should there be a standard exoneration rate requirement for the state to pay the fees, as in does the accused public official have to be the prevailing party in all the allegations or just a percentage? Third, should the state advance legal fees for private counsel and require the public official to pay those fees back if he/she is not exonerated on the claim; should there be a reimbursement plan requiring public officials to "pay to be paid"; and should there not be fee advancements unless the official has already been exonerated?

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REPRESENTATIVE STUTES remarked that she does not know why these rules shouldn't apply to legislators as well. She said that if a rule should apply "across the board, it should apply across the board."

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REPRESENTATIVE EASTMAN asked whether Representative Stutes means across the board as in covering the judiciary as well as the legislative and executive, or covering only two out of the three branches.

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CHAIR CLAMAN commented that he thinks it would be two out of the three branches. Given the testimony from Ms. Meade, the statute structure, and the function of the Commission on Judicial Conduct, the current proposed legislation would address only the executive branch and the legislative branch.

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REPRESENTATIVE EASTMAN asked what limitations executive branch employees would have to contend with that are parallel to the limitations put on the legislative branch, regarding acceptance of legal services.

CHAIR CLAMAN commented that the committee had not received any additional input on that topic. He suggested that Dan Wayne might be able to address this question.

[1:18:45 PM](#)

DAN WAYNE, Attorney, Legislative Legal Counsel, Legislative Affairs Agency, Alaska State Legislature, asked for clarification on the question.

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REPRESENTATIVE EASTMAN asked what limitations, like the \$250 limitation placed on legislators when accepting gifts - including legal help - are placed on executive branch employees such as the governor or lieutenant governor.

MR. WAYNE, referencing AS 39.52.130, stated that there was not a stated limit on gifts for the executive branch, just that any

gift over \$150 must be reported. In response to a follow up question from Chair Claman, he explained that there is a rule under AS 39.52.130(a), which reads:

(a) A public officer may not solicit, accept, or receive, directly or indirectly, a gift, whether in the form of money, service, loan, travel, entertainment, hospitality, employment, promise, or in any other form, that is a benefit to the officer's personal or financial interests, under circumstances in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, actions, or judgment. A gift from a person required to register as a lobbyist under AS 24.45.041 to a public officer or a public officer's immediate family member is presumed to be intended to influence the performance of official duties, actions, or judgment unless the giver is an immediate family member of the person receiving the gift.

MR. WAYNE stated that this provision might apply in some cases, depending on the facts involved, but otherwise he said it looks like there is only a reporting requirement.

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REPRESENTATIVE EASTMAN commented that this sounds like another way of saying "you're not allowed to bribe public officials, which I think we're all probably okay with." He stated that the reference to the Legislative Ethics Act is different in that there is no nexus to any official or public action, just a clearly stated cap. He expressed that that is the difference he sees between the ethics provisions for the legislative and executive branches.

MR. WAYNE commented that the main gift section of the Legislative Ethics Act, under AS 24.60.080, is much longer than that of the executive branch due to all the exceptions outlined under the provision. He explained that there is a hard \$250 a year aggregate limit on gifts with several exceptions. He added that there is another rule that prohibits accepting any gifts from lobbyists, with very narrow exceptions, which would not include a gift of legal services.

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CHAIR CLAMAN asked whether this statute prohibits a lawyer from donating legal services to a legislator accused of an ethics violation over \$250, or whether it could be allowed if it is disclosed.

MR. WAYNE replied that AS 24.60.080(c)(8) points out that "notwithstanding (a)(1) of this section, it is not a violation of this section for a person who is a legislator or legislative employee to accept a gift of legal services in a matter of legislative concern and a gift of other services related to the provision of legal services in a matter of legislative concern." He said that the question comes down to what a matter of legislative concern is, which is not defined. He expressed that beyond that he was not sure what the answer is, but he could do some research and find out if the ethics committee has considered this question before.

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REPRESENTATIVE LEDOUX asked whether a legal defense fund exists for legislators and, if so, what its role is in this situation.

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MR. WAYNE replied that he does not think there is a provision specifically allowing for reimbursement of complaint related legal fees to be paid to legislators, or a legal fund to be set up for them.

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REPRESENTATIVE LEDOUX commented that she recalled a contested election in the Utqiagvik area, in which the incumbent legislator set up a legal defense fund. She expressed that she would like to know how that came to pass and its place in this scenario.

MR. WAYNE responded that he was not familiar with that scenario, but it could be related to a matter of legislative concern instead of an ethics complaint. He expressed that he has been unable to find any authority showing that there has been reimbursement of legal fees for an ethics complaint to any legislator or legislative employee.

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CHAIR CLAMAN commented that a legal defense fund might be a different question, because if it is raising money from members of the public to pay for a legal defense, then presumably the fees of the lawyer are payed by the legal defense fund and it is not a contribution from the lawyer.

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REPRESENTATIVE LEDOUX stated that it is her understanding that over \$250 a person can be raised for a legal defense fund without running into an ethical violation, although it is not allowed to be raised from lobbyists.

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MR. WAYNE replied that the type of fund being described does not sound like an ethics complaint fund, but rather some other kind of legal issue where the money from the fund is used to pay for representation in litigation for that issue, not to reimburse the legislator for money he/she laid out for an ethics complaint.

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CHAIR CLAMAN commented that he agrees that this sounds like the case in the example described by Representative LeDoux, but he thinks that there was a time when Congressman Don Young was facing various ethics and other complaints, and he raised a significant amount of money with a legal defense fund which he used to pay his legal fees. He expressed that it seems there are examples in Alaska of people raising legal defense funds, although it is not clear if these applied to state legislators.

MR. WAYNE remarked that the Legislative Ethics Act does not apply to Congressman Don Young.

CHAIR CLAMAN agreed with Mr. Wayne that the Legislative Ethics Act does not apply to a congressman.

MR. WAYNE suggested that perhaps Chair Claman was referring to Alaska Public Offices Commission (APOC) regulations or statutes, regarding the regulation of raising money for a campaign of some kind.

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REPRESENTATIVE EASTMAN commented that APOC has published the opinion that campaign funds may be used for contesting election results as a part of the election process; however, the funds are not going to the individual legislator, they are going straight from the campaign to the attorney. He stated that the [U.S.] congressional ethics rules regarding legal defense funds are well established and lengthy. He stated that Alaska does not have any rules like that, although some people say that there should be. He expressed that his understanding of the Ethics Committee's interpretation of defense in an ethics complaint is that it is a private concern, which means that a \$250 limit would apply to any legal help being received. He expressed that his understanding is that there is no situation in which a legislator can accept any help over \$250; currently there is no reimbursement process laid out for legislators. He expressed that he might be sympathetic to making regulations which apply to the executive branch apply "across the board," as there are occasions when a complaint made could justify reimbursement. He suggested that the rules regarding a \$250 limit should be investigated to ensure that they do not interfere with a legislator's ability to mount a legal defense. He summarized that he would find it problematic if a legislator were to find himself/herself in a situation where he/she did not personally have the funds to pay for a defense and he/she could not accept funds from any source.

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REPRESENTATIVE LEDOUX commented that she thinks the reason these rules should extend to the legislative branch is that currently, an informal process exists in which the chair of the Legislative Council has the authority to reimburse legislators, which has happened in the past; however, this process is "not written down anywhere." She suggested that a specified standard should be in place so that all legislators would have access to reimbursements, as opposed to the current process in which only legislators who have been informed of the process by word of mouth know about them.

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CHAIR CLAMAN commented that it is one thing to say that a legislator can't except gifts, and another to determine whether the fees advanced for a defense, in an allegation that a legislator has acted outside the scope of his/her authority, should be reimbursed if that legislator is exonerated or receives some degree of exoneration. He clarified that this is

different from receiving representation from a lawyer that does not charge. He expressed that possibly the determination might be that "we" are comfortable with that level of pro bono representation.

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REPRESENTATIVE LEDOUX suggested that the discussion on gifts may not be important in the context of HB 201, if the determination is that a procedure should be in place that a legislator or the governor can be reimbursed for expenses that he/she has laid out or, in the event that he/she cannot afford the expenses, that the state should pay for an attorney with the "proviso that the funds be repaid." She stated that the topic of gifts might be important in another discussion, but she does not think it needs to be resolved at this specific point in time.

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REPRESENTATIVE EASTMAN commented that the concern would be that if an individual has to "come up" with the money first, in order to go through the process that would allow for him/her to be reimbursed, then it could create a situation in which someone can only be reimbursed if he/she has a significant amount of money to begin with. He remarked that he does not think "we want to do that."

[1:35:00 PM](#)

CHAIR CLAMAN offered that a counter to the scenario suggested by Representative Eastman would be whether the state should be advancing money when someone is alleged to have acted outside the scope of his/her authority and is found to have, in fact, acted outside of his/her authority. He remarked that that person may not have the ability to pay the money back, regardless of whether he/she is required to. He suggested that a stronger case could be made for reimbursement when a claim is dismissed than when it is found that someone has been acting outside his/her authority. He summarized that the general sense he is getting from the committee is a reception to modifying HB 201 to add legislators to the people covered under the proposed legislation.

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REPRESENTATIVE LEDOUX pointed out her understanding that current regulations allow the executive branch to hire an attorney and

for there to be a reimbursement prior to a determination of guilt or innocence. She expressed that she would not be inclined to change this regarding the executive branch, as she thinks that there would be a multitude of complaints against an official regardless of who he/she is, that is just "the nature of politics today." She summarized that a person should not have to be independently wealthy in order to be a public servant.

CHAIR CLAMAN stated that the next topic of discussion would be whether there should be a standard exoneration rate requirement for the state to pay an official's fees, as in: Should the accused public official have to be the prevailing party on 100 percent, 90 percent, or 75 percent of the allegations?

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REPRESENTATIVE EASTMAN commented that he thinks when there are multiple complaints brought against an official, each complaint should be treated separately; an exoneration should allow for reimbursement on that specific complaint only.

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REPRESENTATIVE LEDOUX asked how reimbursements are determined in public interest litigation.

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CHAIR CLAMAN replied that the committee had not researched that topic; however, he knows there are cases about what a prevailing party is in public interest litigation. He commented that he had not looked at any of these cases for at least 20 years and his memory on them was unreliable. He remarked that Representative Eastman's question raised an interesting point regarding reimbursements for multiple complaints. As an example, he referenced a hypothetical situation in which a "Legislator Smith" had a complaint filed against him/her on the first of January with one allegation, and another complaint filed with one allegation on the first of July. He explained that it would be easy to distinguish between the fees accrued for each allegation; however, if instead on the first of January the complaint contained six different allegations, the reality is that the lawyer retained by Legislator Smith would look at all six allegations collectively and respond collectively. This would make it difficult to distinguish which fees covered a specific allegation for reimbursement purposes. He summarized

that in some instances it might be easy to distinguish one allegation from the next, but in others it would be muddled.

CHAIR CLAMAN remarked to Representative LeDoux that his sense of the committee is that it would probably like to know more about public interest attorney's fees. In response to a follow up question from Representative LeDoux, he asked Mr. Wayne whether he has done research into prevailing party attorney's fees in public interest litigation.

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MR. WAYNE answered that he recalls reading a statute over 15 years ago on a court rule. He added that he couldn't answer the question currently but could try to find an answer.

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REPRESENTATIVE EASTMAN remarked that another factor worth considering is that in some public interest cases, such as a constitutional rights case, a person cannot be required to cover the legal fees of the opposing party, regardless of whether that individual prevails on the case.

[1:42:02 PM](#)

CHAIR CLAMAN stated that the third question before the committee was whether the state should advance fees regardless of the outcome of the case, and how it should be dealt with when someone does not prevail on a claim filed against him/her. He commented that Representative LeDoux had expressed a view that the "fees should be advanced and just see what happens" and then "cross that bridge" when there is a question of reimbursement and whether the individual can cover repayment.

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REPRESENTATIVE LEDOUX responded that she thought that the way the process works in the executive branch is that the official can either ask for reimbursement or, if he/she doesn't have the money, he/she can ask for the state to pay, and her "gut reaction" is to let that rule apply to the legislature as well.

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REPRESENTATIVE STUTES remarked that she does not think the state should advance fees. She said that she thinks it would be difficult to recover the fees and would be inappropriate.

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REPRESENTATIVE EASTMAN recalled a situation from his "part of town," in which a legislator was assessed some fees by the state and a payment plan was put together. He stated that this has happened at least once or twice, so he could see how it could happen in a situation like this as well.

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CHAIR CLAMAN commented that it sounded like Representative Eastman was "in Representative LeDoux's camp" and would be comfortable with the state potentially advancing fees, and if the accused individual ends up not getting an exoneration, then he/she would either have to pay back the fees or come up with a payment plan.

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REPRESENTATIVE EASTMAN replied that he thinks it would be nice to have a standard across the board, and he sees a problematic nature in the current system, whereas sometimes a legislator can receive money from the Legislative Council, other times a legislator may not even be aware it is a possibility. He summarized that he would like to see a more uniform system.

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REPRESENTATIVE LEDOUX commented that her intent with HB 201 was not to make things more difficult for the executive branch than they currently are; her intent was to incorporate the old regulations into statute. She added that the discussions the committee had regarding prevailing parties and whether the proposed legislation should apply to the legislature leads to the question of whether the standards should be the same for the legislative branch and executive branch.

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CHAIR CLAMAN suggested that the committee go off record to discuss a reasonable timeline for HB 201 moving forward, as it seemed to him that the existing legislation would need to be amended.

1:46:30 PM

The committee took an at-ease from 1:46 p.m. to 1:47 p.m.

1:47:54 PM

CHAIR CLAMAN announced that HB 201 would be held over for further review.

1:49:20 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 1:49 p.m.