

# Alaska State Legislature

## Select Committee on Legislative Ethics

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### MINUTES from June 16, 2010 FULL COMMITTEE MEETING Anchorage LIO, Room 550

- 1. CALL THE MEETING TO ORDER:** Chair Conner Thomas called the meeting to order at 12:05 p.m. Members present: Senator John Coghill, (via teleconference), Senator Gary Stevens, Representative Les Gara, (alternate for Rep Gardner), Representative Carl Gatto, Gary J. Turner, Dennis (Skip) Cook, Herman G. Walker, Jr., Antoinette (Toni) Mallott. Staff present: Joyce Anderson, Administrator. Also present: Brent Cole, Legal Counsel and Dan Wayne, LAA Legal Counsel (via teleconference).
- 2. APPROVAL OF AGENDA:** Chair Thomas asked if there were any objections to the proposed agenda and hearing none, the agenda was approved.
- 3. APPROVAL OF MINUTES:** Vice Chair Turner requested the word “almost” be inserted on page 4, third paragraph, first sentence, before “three years now”. Member Walker made a motion to approve the minutes as amended. No objections.
- 4. PUBLIC COMMENT:** Representative Craig Johnson stated he served as an alternate for Rep Gatto at the May 27<sup>th</sup> Ethics Committee meeting and wanted to clarify his position on the subject of legislative travel and campaign activity on the same trip. He did not believe it was a violation to have a conversation with a constituent on campaigning in a super market while traveling on state business. He did feel it would not be appropriate to schedule a state paid trip and a fundraiser at the same time. He further stated he believed there needed to be a balance between these two activities but questioned whether the Ethics Committee had the ability to do this within the structure of the law. Rep Johnson wanted the Committee to know for the record that he did not agree with what he and the Committee approved at the last meeting.
- 5. CHAIR/STAFF REPORT:** Ms. Anderson informed the committee the NCSL’s State Legislatures magazine, June edition, had published an article about 25 innovative web sites. The searchable database of more than 100 advisory opinions from 1984 to the present on our website was showcased. The article also mentioned disclosures could be filed online.

Ms. Anderson also informed the committee that she recently learned the audio from our Ethics Committee meetings were not available to the public and requested the Committee consider making them available, like other interim committees, on BASIS. The Committee determined the audios should be on BASIS. Sen Coghill suggested BASIS and the Ethics website be linked as well.

6. **REVIEW OF ACTION TAKEN AT MAY 27, 2010 MEETING - STATE PAID TRAVEL AND COLLATERAL CAMPAIGN ACTIVITIES:** Chair Thomas reminded members an advisory opinion was approved at the May 27 meeting authorizing collateral campaign activities when on a state paid trip as long as the trip was primarily for legislative business. The results were: YES: 5; NO: 3; with one member absent. A couple of days later, Rep Gara, who voted yes, requested reconsideration of his vote. (See his request via E-mail in meeting packet.)

Chair Thomas stated it was his role as chair to decide if the request was timely. Because the advisory opinion had already been made public, including notification to the Press, and advice had already been given out based on the opinion; he ruled the request was not timely. He stated he asked Ms. Anderson to contact each Committee member to see if there was any interest in rescinding the opinion. Several members expressed their interest in discussing this item further and possibly rescinding the advisory opinion.

Chair Thomas indicated if there was a motion today to rescind the committee's previous action and it passed, the item would be put on the table for discussion. Rep Gara made a motion to rescind the action taken by the Ethics Committee on May 27, 2010.

**Discussion on State Paid Travel and Collateral Campaign Activities:** Chair Thomas reminded members the Committee did not have the authority to set policy but only interpret the Legislative Ethics Act. The Chair gave the floor to Rep Gara to allow him the opportunity to explain his request to rescind and present his recommendations.

Rep Gara summarized the E-mail he sent to members: We were given two options at the last meeting; one prepared by Mr. Brent Cole, outside legal counsel, and the other prepared by Mr. Dan Wayne, LAA Legal Counsel. He stated Mr. Cole's opinion was flawed in that campaign fundraising activities were permitted and Mr. Wayne's opinion was also flawed by banning of legitimate, free speech.

Rep Gara recommended accepting Mr. Cole's opinion focusing on the "primary purpose" rule and adding a statement indicating, **"fundraising on a state-paid trip can create the appearance of impropriety."**

The Chair asked Mr. Wayne if the Committee has the authority to make the type of modification Rep Gara is recommending and to also give his legal opinion on the freedom of speech issue. Mr. Wayne stated the Committee has the authority to interpret the statute based on the facts of the question and statutory language. He stated he understood Rep Gara's concerns.

Mr. Wayne pointed out in his updated opinion that if the political activity the person is engaged in is made possible by the use of state resources, and then s/he should not engage in it. The opinion included relevant examples. However, Mr. Wayne concluded the subject matter can be complicated and it would not be difficult to think of unusual conundrums that people could run into.

Sen Stevens agreed this issue was complicated and suggested the committee make it simple and clear for legislators to know when they are in violation and when they are not. He questioned if the legislature should be working this issue, not the Committee.

Member Walker stated that he understood the merit of Sen Stevens' position and Rep Gara's and believes this should be a legislative fix. The public members have been in favor of a legislative fix from the start. He stated there needs to be a balance between urban and rural legislators with the way the state is laid out. The balance should not be determined by this Committee.

Member Cook concurred with Member Walker stating he felt the Legislature should fix this issue, not the Committee. There are problems with both opinions but ultimately it's the statute that is the problem and needs to be addressed. He felt the statute was too absolute in that campaigning is prohibited and there are no exceptions, whatsoever. There are exceptions for everything else. If the Legislature can come up with a quick fix to the state jet issue (Administrator's Note: When this issue came to light, legislation was passed to address it the next legislative session), then they can fix and corrected this situation as well. Member Cook believes the Legislature does not want to loosen up the rules; they want the Ethics Committee to do it for them. As a member of the Committee, he is not willing to do what the Legislature should be doing. The Legislature passed the statute, let the Legislature fix it.

Member Mallott stated she was under the impression from the May 27 minutes that Sen Coghill was going to take this issue to the Legislature for review. Member Mallott also brought up a very common scenario that could occur while a legislator was visiting a village on state business. If a legislator declined an invitation to a potluck to discuss campaign issues, the legislator would be insulting the village and community. Potlucks are a common event in small villages.

Chair Thomas redirected the discussion and requested Mr. Cole to address Rep Gara's concerns before addressing Member Mallott's comments.

Mr. Cole stated it was not uncommon for a statute to be rewritten. He also stated it was not unusual to have two or three interpretations relating to the same statute. Legislators need guidance and he felt Mr. Wayne's interpretation allows for too many limitations for legislators while they are traveling on state business. He did not feel his opinion was "extreme", as some members had stated. He stated if legislators are on a state paid trip to a village, the legislator should be able to communicate with the people there on all facets.

Chair Thomas asked Mr. Cole if the Committee has the authority to revise the opinion as Rep Gara suggested. Mr. Cole stated he believed the Committee has the authority. It would first require rescinding the advisory opinion which has already been approved and then rewriting certain sections as the committee directed. However, he did not agree with Rep Gara's recommendation of prohibiting fundraising only.

Sen Stevens agreed with Mr. Cole's comment that legislators need guidance and it needs to be clear. If a legislator files paperwork to attend a meeting and states the meeting is the primary purpose of the trip, and he approves it as Senate President, and the legislator also attends a campaign fundraising event for himself or herself while on the trip, anyone can file a complaint saying that was not the primary purpose of the trip. In his opinion, it is obvious and clear to him that this person violated the ethics code.

Rep Gara agreed the issue is clarity. He did not agree with Mr. Wayne's opinion since it banned free speech. Rep Gara also stated he agreed that this was the Legislature's job but it was not realistic to expect it to pass. From past experience, even with the best intentions, it is difficult to pass a bill. That is why it is important to come up with something now; a rule that honors the statute but isn't unreasonable or with unintended circumstances.

Rep Gara stated Mr. Cole's opinion makes sense but liked the idea that the Ethics Committee could bar things that raise the appearance of impropriety. Chair Thomas added the Committee has in the past deemed the appearance of impropriety was not in and of itself an ethics code violation.

Mr. Cole stated he did not see how you could say fundraising raises the appearance of impropriety but then allows other candidate campaign activities. In his opinion all campaign activities raise the appearance of impropriety.

Rep Gatto agreed leeway was important but finding the right language was a difficult task. What a legislator might see and what another perceives as proper or improper can be very different.

Chair Thomas believed it boils down to the purpose of the trip; i.e., the specific set of circumstances. He does not believe they can come up with any rule that can guarantee a complaint won't ever be filed.

Sen Stevens stated that he was invited to attend two fundraisers the night before, which he did not attend, but questioned if the Committee was referring to personal fundraisers for the legislators on the state paid trip or any fundraiser. Mr. Wayne indicated there is another opinion on this subject. He believes the statute reads whether you are helping someone else raise money for their campaign or raising money for your campaign, it's all considered fundraising. This would include the situation where your name is listed on an invitation to a fundraiser. Mr. Wayne offered to look up the opinion and provide additional information. Sen Stevens then questioned if it included attending fundraisers for other candidates, such as a fundraiser for Sen Murkowski or President Obama. Member Cook stated the statute reads, "no partisan political activity", which includes all

levels of partisan political activity. Member Cook indicated that's the problem with the statute; it's very broad. Sen Stevens stated the words "primary purpose" definitely clarifies things for him and that he preferred the term.

Chair Thomas stated that there was a motion on the floor and asked each member to voice their opinion before taking a vote.

- Member Cook stated the Legislature should make the policy call through legislation.
- Sen Coghill stated he preferred Mr. Cole's opinion in that the term "primary purpose" was defined and was against rescinding the opinion.
- Rep Gara stated he would like a rule that meets the public's expectations – when on a state paid trip you are not going to a fundraiser on the same trip. He clarified the prohibition doesn't mean you shouldn't be able to talk to a voter or the press while on that trip. He is against the approved opinion and hopes the Committee comes up with a rational rule.
- *MEMBER MALLOTT'S COMMENTS WERE INAUDIBLE.*
- Member Walker had no comment at this time.
- Sen Stevens stated he was against rescinding the opinion without replacing it with something else. He believes in the honor system; i.e., signing paperwork that states the primary purpose of a trip is for legislative business. He believes the committee is delving in dangerous territory in that we are close to writing legislation which is not the Committee's job.
- Rep Gatto stated he was against rescinding the opinion.
- Chair Thomas agreed with Member Cook. The Legislature was clear when they wrote the current legislation. No state resources can be used for campaigning. He also agrees that the prohibition does not mean a legislator cannot talk on the phone about campaign issues. But he stated there are no exceptions in the current statute for the use of state resources and that is a concern that has been voiced by many members. He stated the Legislature should be addressing this issue. Chair Thomas explained that in August of 2008 the Ethics Committee's letter to APOC is what generated this discussion. There was an opinion drafted but never adopted. The Committee maintained its position that there were no exceptions in the statute.

Sen Stevens voiced concern and frustration over rescinding Mr. Cole's opinion due to the fact Legislators had been notified of the opinion and received advice based on the opinion and now the opinion may be rescinded today.

Chair Thomas agreed that it is frustrating to him as well, but if the current opinion is rescinded today and no other opinion is approved, the recommended advice to legislators and staff would be what was in place prior to adopting Mr. Cole's opinion in May. The advice provided after the May 27 opinion was adopted would stand and action taken by legislators and staff during the period the opinion was in force would not be in violation of the Act.

Chair Thomas asked Ms. Anderson to take a roll call vote. YEAS: Skip Cook, Rep Gara, Toni Mallott, Gary Turner, Herman Walker, Jr., Chair Thomas, NAYS: Sen Coghill, Rep Gatto, Sen Stevens. Motion to rescind the committee's May 27 action passes.

Chair Thomas suggested the members break for 10 minutes to review Mr. Wayne's advisory opinion.

Sen Stevens recommended legislators be notified immediately that Mr. Cole's advisory opinion was rescinded today. Ms. Anderson stated she would send out an "All Users" e-mail ASAP.

(Herman Walker leaves the meeting and does not return.)

1:40 p.m. - Members reconvened.

Mr. Wayne presented a revised draft of the 2008 advisory opinion not approved by the committee. He explained that he reviewed previous discussion on this subject and incorporated some of the examples in this opinion. He clarified his drafted opinion was to assist the Committee and not to advocate for any particular policy. The Committee can accept it, modify it or reject it.

(Sen Stevens temporarily leaves the meeting.)

Mr. Wayne proceeded to point out the changes he made from his first draft opinion. He changed the wording from "legislative resources" to "state resources" throughout the opinion to be consistent with the term used in statute. The examples will aid in understanding where the Committee might "draw the line". The long paragraph on page three is new and addresses the interpretation of the two prohibitions in statute in regard to legislators and staff traveling to and from legislative sessions. There was some discussion at previous meetings in relation to the term "incidental" and the long paragraph on page 3 and page 4 covers those concerns. The second paragraph on page 5 covers "inadvertent" campaign activity that many members voiced concerns about; for example, if you're approached by a constituent in the super market with a campaign related issue while traveling on a state paid business trip.

(Sen Stevens returns to the meeting.)

Sen Stevens requested a definition of the terms "political fundraising", "campaigning" and "partisan political activity". Mr. Wayne provided Sen Stevens some examples but explained there were no definitions in statute. Mr. Wayne indicated there are the

obvious examples of when you are campaigning, but there are also gray areas which may be more obvious or less obvious to some and fall subject to interpretation.

Rep Gara requested clarification regarding phone calls and a scenario during a month long special session. What if a legislator received a call from the press stating your opponent has accused you of doing something you did not and you feel you need to address it immediately, and you do, are you engaging in “political activity”. Mr. Wayne stated he would have to know the facts of the subject matter that was before the press. Without the facts, he could not answer the question.

Vice Chair Turner commented that APOC also did not have definitions on these three terms. They have said it would greatly help them if there were definitions. He also commented that he did not fully agree with any of the options today and reminded the members there was still the option to adopt the Executive Branch’s method, which was prompted by the use of the executive airplane by a sitting governor, such as portioning the expense out.

Members discussed what the next step should be. Rep Gara stated he could agree with members if the consensus was more discussion and more work on the issue. However, he was concerned about what was to be the rule in the meantime. He offered taking it to the Legislature, but felt time was of the essence. He felt that a ruling should be made today and requested feedback from members on his recommendation of adopting Mr. Cole’s opinion with the exception of fundraising.

Sen Coghill indicated the pressing concerns were definitions, the freedom of speech issue, and when impropriety of fundraising occurs. He feels the Committee wants a rule that is “prescriptive” rather than something they can use as a guide. For example, the members want to be able to tell people when it is okay to fundraise rather than what is the impropriety in mixing legislative work with campaign work. He felt this was discussion for the Legislature, as was defining terms. He agreed that the statute was too narrow, but the Committee has been pretty clear about what an impropriety might look like. He voiced it was not impossible to get things passed in the Legislature it just takes tenacity. He felt the statute is what it is but there is also a record of the numerous discussions held on this issue and minutes available to the public that shows why the impasse is so difficult to navigate.

Members discussed the next step. Legislators asked what advice the Ethics office will be giving to legislators. Chair Thomas replied that the Committee will stand behind what the statute says and the position outlined in the committee’s letter to APOC.

Rep Gara made a motion to accept Mr. Cole’s opinion with the exception of fundraising, reiterating that he felt a rule needed to be in place today. If a ruling was not made today, he felt what could happen is that a complaint will be filed and then the Committee will be forced to come up with a rule. He disagrees with this practice.

The Chair disagreed with Rep Gara in that the Committee has already taken a position. The position the Committee has taken is outlined in the letter to APOC. What the Committee has not done is adopt an advisory opinion.

All members agreed there should not be a vote without Member Walker's presence. Rep Gara withdrew his motion.

Members reviewed the August 19, 2008 letter to APOC. Rep Gara noted that the freedom of speech issues continue to be a problem.

Chair Thomas concluded that the item today will be tabled for the next Committee meeting.

7. **ADJOURN:** Member Cook moved to adjourn the meeting at approximately 2:30 p.m. No objections.