

Lesson 18. LEGAL REMEDIES

A. CRIMINAL ACTIONS

INTRODUCTION

Criminal prosecution is a mechanism that is often employed by state and local health agencies in enforcing environmental health codes. State and federal environmental protection and occupational health and safety agencies, on the other hand, tend to make more use of the civil sanctions. There are some indications that health agencies are beginning to make greater use of the civil sanctions available to them. However, whether or not an agency may use criminal or civil procedures, or both, depends on the types of remedies authorized by statute.

Neither is inherently better than the other, although in some situations, one may be more appropriate, or work better, than the other. Since the criminal prosecution process is different than the process in a civil suit, it is important that you understand the difference and know when and how to use both the criminal and civil sanctions which may be authorized in a particular program.

Knowing how to get a legal action initiated is not enough, you must be able to help your prosecutor win it. To do this you need to know what kinds of information are needed and how to present the information in court. Cases have been lost because the sanitarian was not aware of, or did not follow, the procedures which have been established by the courts regarding the admissibility of information. Over the years the courts have established specific guidelines regarding information which is admissible in court. These guidelines, known as the "rules of evidence" and the "rules of testimony", cover the types of information, the methods of collection, its use, and the ways in which it may be presented. Being familiar with the general requirements of these rules, can help the practitioner avoid making mistakes at the very beginning of a case which might nullify all of the succeeding work by having the case dismissed.

LESSON OBJECTIVES

The objectives for this lesson are that you should:

1. Understand the nature of criminal sanctions as they are commonly used in environmental health;
2. Be able to determine the appropriate remedy for a particular situation; and,
3. Understand how the rules of evidence and testimony affect the gathering, maintenance and presentation of information in a case.

KEY POINTS

When a violation order is not obeyed, applicable statutes generally authorize summary abatement of the condition, or criminal prosecution, or injunctive relief. A refusal to comply with an order of the Board of Health or from a public health officer is, under many statutes, itself a violation punishable by fine or imprisonment or less frequently a violation subject to civil penalty. To achieve a conviction for failure to obey a violation order it must commonly be shown that there was a statutory authority to issue the order, that the defendants had notice of the order, and that he failed to heed the same.

A. Criminal Sanctions

1. **Misdemeanors:** Misdemeanors are offenses lower than felonies and generally those punishable by a fine or by imprisonment (other than in a penitentiary). Under federal law, and most state laws, any offense other than a felony is classified as a misdemeanor.¹

2. **Felonies:** A felony is defined as a crime of a graver or more serious nature than those designated as misdemeanors; e.g. aggravated assault (felony) as opposed to simple assault (misdemeanor). Under federal law, and many state statutes, any offense punishable by death or imprisonment exceeding one year is a felony.²

The readings for this lesson discuss the nature of the criminal actions and the requirements for a successful prosecution.

B. Prosecution

The use of criminal sanctions, to coerce compliance with environmental health standards, relies on the deterrent force of the punishment (fine or imprisonment) involved. Its effectiveness is dependent upon: (1) the willingness of the appropriate prosecutor (county prosecutor, state attorney general, etc.) to file charges; and (2) upon the effect of the punishment in encouraging correction of the problem.

Once a case has been tried and a fine imposed and collected for the violation, that case is over. If the guilty party does not choose to abate the problem, the agency may not bring additional criminal actions based on the original complaint. However, most statutes and ordinances provide that each and every day of the existence of the unlawful condition constitutes a separate violation. Thus, the continuing refusal of a party to correct a situation could become a very expensive proposition. Nevertheless, if he/she chose to continue to pay the fine rather than correct the violation, the agency would have few recourses under criminal law.

The general steps involved in the criminal procedure are:

- a. Filing Charges
 - 1) On information
 - 2) By indictment

- b. Summons (Court notifies defendant of the charges and requires that he/she appear in the court at a specific time and date to answer them.)
- c. Plea (The defendant enters a plea of guilty or not guilty)
- d. Pre-trial Maneuvers
 - 1) Discovery (depositions, subpoenaing records, etc.)
 - 2) Negotiations/Plea bargaining
- e. Trial
 - 1) Prosecution
 - Rules of Evidence
 - Rules of Testimony
 - 2) Defense (Same rules apply)
- f. Appeals

As pointed out above, the criminal prosecution, itself, does not remove the condition that gave rise to the order. Hence, a civil proceeding to obtain a prohibitory or mandatory injunction is frequently authorized by statute and used by agencies when a criminal action is ineffective or inappropriate. The nature of this injunction process will be discussed in the next lesson.

STUDY QUESTIONS:

1. Is a violation of the federal Food, Drug and Cosmetic Act, a civil or criminal offense?
 - a. What about a violation of a municipal housing code?
 - b. How do you know?
 - c. How do you determine if a criminal violation is a misdemeanor or a felony?
2. What is the difference between a summons and an arrest warrant?
 - a. Would a sanitarian be capable and authorized to complete and execute a summons?
 - b. Which is the common method used to charge a person with environmental health violations? An information or an indictment? What is the difference between the two of them? What steps are necessary to procure each?
3. At a trial which side presents its evidence first?
4. After a verdict is rendered by a jury or judge, the judge is supposed to impose a sentence. What advantage in obtaining compliance is there for the judge to delay the sentencing for 30-60 days?

5. If part of the problem with criminal prosecution is that courts do not distinguish between serious and minor code violations, how can a sanitarian correct the problem?
- a. Is this problem the sanitarian's responsibility or somebody else's?
 - b. Does traditional public health policy favor punishment or deterrents for insanitary conduct?
 - c. Are the usual penalties attached to health code violations sufficient for these purposes?
 - d. If the sanitarian's purpose behind taking someone to court is to correct a violation, will the criminal prosecution accomplish this? Why, or why not?
 - e. Are there ways to make criminal prosecutions more effective in attaining compliance?

B. CIVIL ACTIONS

INTRODUCTION

Civil actions are legal actions which are based on the principal of equity. That is, the primary function of the civil side of the court is to arrive at a decision that is fair rather than punitive, i.e., it attempts to dispense justice. Civil actions include both injunctions -- requiring a person to do something, or refrain from doing something, and penalties. In environmental health, both are designed to prevent, stop or correct a public health problem or hazard. The distinction can be somewhat confusing, since the imposition of a penalty is punishment for a wrongdoing. However, even the penalty can be viewed as an attempt to right a wrong, rather than to punish a crime.

LESSON OBJECTIVES

The readings and discussion for this lesson are intended to enable you to:

1. Understand the major types of civil sanctions available for use in environmental health; and,
2. Be able to describe the procedures for applying civil sanctions in a particular situation.

KEY POINTS

In addition to the criminal sanction discussed in the previous lesson, the federal government, and some states, provide for the use of civil procedures to enforce public health and environmental protection regulations. Civil remedies are often more flexible than criminal

penalties and allow the agency discretion to achieve its real purpose, full compliance with the statutes and regulations designed to protect the health and safety of the public.

A. Civil Penalties

1. **Authority:** Like all enforcement actions undertaken by an agency, the authority to impose, or seek, civil penalties must be delegated to the agency -- either by specific statutes governing a particular program or through the broader enabling legislation which established the agency.
2. **Use:** Depending on the authority delegated to the agency, civil penalties may be imposed in two ways. The first and most common method, is for the agency to file suit in the appropriate court to subject a non-complying party to a fine within the dollar amount prescribed in the statutory authority. Usually each day of noncompliance constitutes a separate violation. The second method is for the agency to levy the penalty itself. It is relatively uncommon for a local agency to have this kind of authority. Even in state and federal agencies which have been provided with this ability, there is usually a requirement that provisions be made for a hearing either before or after the imposition of the penalty, and in some cases, the agencies are required to have a separate board which reviews the case before the penalty is imposed.

B. Injunctions

Injunctions are equitable remedies which require that a person cease and desist from a certain activity or conform to a rule, regulation, requirement or order that is being presently neglected. Injunctions are considered extraordinary remedies and are granted only if there is not available an adequate remedy at law.

1. **Authority:** An injunction is distinct from the health officer's initial order to abate, in that it is issued by a court and is not made permanent until a hearing on the issue has been held, and in that the court itself will compel compliance with the order should an injunction be disobeyed. Injunctions may be issued by courts against common law (trespass and nuisance) and under the expressed provision of a statute.
2. **Types & Use:** The federal terminology for the various kinds of injunctions are as follows.
 - a. **Temporary Restraining Order** - These are issued *ex parte* and for only a limited period of time (7 or 10 days for example).
 - b. **Preliminary Injunctions** - These are issued during a dispute which has already entered into litigation. The judge's decision to grant or deny a preliminary injunction will be based on one of two grounds.
 - 1) A preliminary injunction may be granted if the judge believes that an imminent and irreparable harm may occur. This requires a determination that there is serious risk posed by the conditions.
 - 2) It may also be issued to ensure the status quo, that is, to make sure that one side or the other would not de facto lose its position while the case is being heard.

- c. **Permanent Injunctions.** As indicated by its name, this is a decision granting permanent status quo to the terms of the injunction unless it should be subsequently repealed or overturned.

STUDY QUESTIONS:

1. What is the source of authority for an administrative agency to impose a lien against a piece of property? Describe the procedures for having a lien attached to a property and explain why so few agencies use liens.
2. The water pollution and air pollution control programs conducted by the federal government routinely make use of civil penalties.
 - a. Do you feel the use of civil penalties is more effective than using criminal sanctions?
 - b. List some advantages and disadvantages of using civil penalties rather than criminal prosecutions to secure abatement of environmental health violations.
3. How could a state or local environmental health agency use civil penalties? Use one of the programs listed below to illustrate your answer.
 - Restaurant inspection program
 - Complaint housing code enforcement program
 - On-lot sewage disposal programIn this case, would the use of civil penalties be more effective than criminal sanctions?
4. Discuss the use of injunctions in environmental health. Use one program with which you are familiar to illustrate your response to the following questions.
 - a. When should an injunction be used?
 - b. Who decides whether an injunction will be issued?
 - c. What degree of proof is necessary to obtain one?
 - d. What might happen to a person who refused to obey an injunction.
 - e. Does your agency have a policy and/or procedure for initiating efforts to obtain an injunction? If so, briefly outline the important points and steps involved.
5. Read reading #34 -- *United States v. Ward*, 100 S.Ct. 2636 (1980), then discuss this case in relation to the concepts covered in this lesson. What guidance does the decision in this case provide for practitioners in environmental health agencies?