JUDICIAL PROCESS COMMITTEE

The Judicial Process Committee was assigned four studies. By directive of the chairman of the Legislative Council, in light of a recent United States Supreme Court decision, the committee was directed to study issues relating to the appropriate public uses for the power of eminent domain. House Concurrent Resolution No. 3014 directed a study of judicial elections and recent federal court decisions affecting the conduct of judicial elections. House Concurrent Resolution No. 3042 directed a study of the laws of this state and other states as they relate to the unauthorized acquisition, theft, and misuse of personal identifying information belonging to another individual. Senate Concurrent Resolution No. 4027, as passed, directed a study of the need for dementia-related services, standards, and practices for caregivers and review of the legal and medical definitions used for dementia-related conditions and the funding for programs and services for individuals with dementias. By Legislative Council directive, the scope of the study was limited to a review of the legal and medical definitions used for dementia-related conditions.

The Legislative Council delegated to the committee the responsibility to receive a report, pursuant to North Dakota Century Code (NDCC) Section 19-03.1-44, from the Attorney General on the current status and trends of unlawful drug use and abuse and drug control and enforcement efforts in this state. The Legislative Council delegated to the committee the responsibility to receive periodic reports from the Commission on Legal Counsel for Indigents regarding the implementation of the Commission on Legal Counsel for Indigents and the responsibility, pursuant to Section 54-61-03, to receive an annual report from the director of the Commission on Legal Counsel for Indigents containing pertinent data on the indigent defense contract system and established public defender offices. The Legislative Council also delegated to the committee the authority to request, pursuant to Section 53-12.1-03, a report from the director of the North Dakota lottery regarding the operation of the lottery. Finally, the Legislative Council delegated to the committee the responsibility for statutory and constitutional revision. No statutory or constitutional revision issues came before the committee.

Committee members were Senators Stanley W. Lyson (Chairman), Carolyn Nelson, John T. Traynor, and Constance Triplett and Representatives Ron Carlisle, Dawn Marie Charging, Duane DeKrey, Lois Delmore, Kathy Hawken, Dennis Johnson, Joyce Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, and Shirley Meyer.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2006. The Council accepted the report for submission to the 60th Legislative Assembly.

EMINENT DOMAIN STUDY

By directive of the chairman of the Legislative Council, in light of the recent United States Supreme Court decision, *Kelo v. City of New London*, 545 U.S. 469 (2005), the committee was directed to study issues relating to the appropriate public use for the power of eminent domain. The committee was directed to determine whether any statutory or constitutional changes regarding the power of eminent domain issues are appropriate.

Kelo v. City of New London

The portion of the Fifth Amendment of the United States Constitution known as the "Takings Clause" provides that "nor shall private property be taken for public use, without just compensation." In *Kelo v. New London*, the United States Supreme Court concluded that the acquisition of property by the city of New London, Connecticut, through eminent domain for the purpose of commercial development did not violate the public use restriction of the Fifth Amendment of the United States Constitution.

Kelo arose from New London's use of eminent domain to condemn privately owned real property so that the property could be used for economic development. The case was appealed from a decision in favor of the city of New London by the Connecticut Supreme Court, which found that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions. The Connecticut court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed, even if not blighted, urban area, it qualifies as a public use. The court also found that government delegation of eminent domain power to a private entity also was constitutional as long as the private entity served as the legally authorized agent of the government.

The United States Supreme Court granted certiorari to consider questions last raised in *Berman v. Parke*r, 348 U.S. 26 (1954). The issue before the Court was whether the Fifth Amendment protects landowners from the use of eminent domain for economic development, rather than, as in *Berman*, for the elimination of slums and blight.

Appeal to the United States Supreme Court

By granting certiorari in this case, the United States Supreme Court agreed to hear its first major eminent domain case since 1984. In previous cases, states and municipalities had extended their use of eminent domain, frequently to include economic development purposes. The *Kelo* case was different in that the development corporation was a private entity. In the appeal to the Supreme Court, the plaintiffs argued that it was not constitutional for the government to take private property from one individual or corporation and give it to another simply because the other might put the property to a use that would generate higher tax revenue.

Majority and Concurring Opinions

On June 23, 2005, the United States Supreme Court, in a 5-4 decision, found in favor of the city of New London. Justice John Paul Stevens wrote the majority opinion. He was joined by Justices Anthony Kennedy, David Souter, Stephen Breyer, and Ruth Bader Ginsburg. The majority found that the city of New London exercised its eminent domain authority to acquire private property for the purpose of a program of economic rejuvenation. The majority also determined that although the petitioner's property was not blighted, the economic rejuvenation plan would serve a public interest and thus satisfy the public use requirement of the Fifth Amendment. Justice Stevens said that local governments should be afforded wide latitude in seizing property for land-use decisions of a local nature. In his opinion, Justice Stevens said "The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue." The opinion addressed the possibility that the decision would be abused for private purposes by arguing that "the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use." Justice Stevens also emphasized the importance of judicial restraint, stating that the Court recognized that condemnation of property would entail hardship and that the states were free to impose restrictions on the use of this power by local authorities. Justice Kennedy's concurring opinion observed that in this particular case the development plan was not "of primary benefit to . . . the developer" and suggested that, if it had been, the taking might have been impermissible.

Dissenting Opinions

Justice Sandra Day O'Connor wrote the principal dissent, joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. Justice O'Connor suggested that the use of this power in a reverse Robin Hood fashion--take from the poor, give to the rich--would become the norm, not the exception: "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." She argued that the decision eliminates "any distinction between private and public use of property--and thereby effectively [deletes] the words 'for public use' from the Takings Clause of the Fifth Amendment."

Justice Clarence Thomas also wrote a separate dissent in which he argued that the precedents the Court's decision relied upon were flawed and that "something has gone seriously awry with this Court's interpretation of the Constitution." He said the majority was replacing the Fifth Amendment's "public use" clause with a very different "public purpose" test: "This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'"

State and Federal Reaction to *Kelo*

The *Kelo* decision will likely have little effect on those eight states that specifically prohibit the use of eminent domain for economic development except to eliminate blight: Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington. According to the National Conference of State Legislatures (NCSL), as of September 2006, eminent domain legislation in response to *Kelo* has been considered in each of the 46 states that have been in session since the decision came down on June 23, 2005. Legislatures, to date, have passed bills as follows:

- Enacted laws in 26 states - Alabama, Alaska, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin;
- Passed a constitutional amendment that will go on the ballot for voter approval in Florida, Georgia, Louisiana, Michigan, New Hampshire, and South Carolina (Florida, Georgia, and New Hampshire also enacted statutes); and
- Vetoed by the Governor in Arizona and New Mexico. In Iowa, the legislature overrode the Governor's veto.

The legislation enacted in these states generally falls into seven categories:

- Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- Defining what constitutes "public use," generally the possession, occupation, or enjoyment of the property by the public at large, public agencies, or public utilities.
- Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- Requiring greater public notice, more public hearings, negotiation in good faith with landowners, and approval by elected governing bodies.
- Requiring compensation greater than fair market value in those cases in which property condemned is the principal residence.
- Placing a moratorium on eminent domain for economic development.
- Establishing legislative study committees or stakeholder task forces to study and report back to the legislature with findings.

Congressional Reaction

Congress passed legislation in November 2005 which prohibits states from using certain federal funds in economic development projects “that primarily benefit private entities.” The legislation exempts mass transit,

railroad, airport, seaport, and highway projects and energy, communications, water, wastewater, public utility, and brownfields projects that benefit or serve the general public. The legislation also calls for a year-long study by the Government Accountability Office on the nationwide use of eminent domain.

North Dakota Constitutional and Statutory Provisions

Article I, Section 16, of the Constitution of North Dakota provides a similar protection to that granted under the Fifth Amendment of the United States Constitution with respect to the taking of private property. Section 16 provides that private property may not be taken or damaged for public use without just compensation having been first made or paid into the court for the owner unless the owner chooses to accept annual payments. Section 16 also provides that a right of way may not be appropriated to the use of any corporation until full compensation has been made.

North Dakota Century Code Chapter 32-15 sets forth the requirements for the exercise of the power of eminent domain. Section 32-15-01 defines eminent domain as the right to take private property for public use. Section 32-15-02 sets forth the public uses for which eminent domain may be exercised.

Numerous statutory provisions specifically authorize the state and political subdivisions to exercise eminent domain for specific public purposes or public uses. Among those provisions is NDCC Section 40-58-08, which authorizes a city to exercise eminent domain when necessary for or in connection with a development or renewal project under the urban renewal law.

Other provisions include NDCC Chapter 2-06, which grants eminent domain authority to an airport authority; Section 38-14.2-09, which grants eminent domain authority to the Public Service Commission for abandoned surface mine reclamation; Section 40-33.2-06, which grants eminent domain authority to municipal power agencies; and Section 40-39-02, which authorizes municipalities to take private property by purchase or eminent domain for streets or alleys.

In 2003, legislation relating to the powers of a port authority was passed. The law is codified as North Dakota Century Code Chapter 11-36. Section 11-36-17 provides that the acquisition of land is a public and governmental function exercised for a public purpose.

North Dakota Case Law

A 1996 decision of the North Dakota Supreme Court is somewhat similar to the *Kelo* decision. In *City of Jamestown v. Leevers Supermarkets, Inc*., 552 N.W.2d 365 (N.D. 1996), the Supreme Court concluded that the city of Jamestown did not abuse its discretion in finding the taking of private property, which was used as a parking lot, to be in the interests of the public economy, health, and welfare of its residents so that the property could be used for the building of a new grocery store. However, because the trial court made no finding whether the primary object of the development project was for the economic welfare of Jamestown and its residents rather than for the benefit of the private interests, the court stated that a determination of whether the public use requirement had been satisfied could not be made and directed the trial court to make the necessary finding on that issue. The court stated that if the primary object of the development is for the economic welfare of the city and its residents, rather than the primary benefit of private interests, the trial court should reinstate the judgment of the taking and award just compensation. However, the Supreme Court further stated that if the trial court was to find that the primary object of the development was for the benefit of private interests, it must refuse to allow the taking.

Testimony and Committee Considerations

The committee studied the appropriate public uses for the power of eminent domain. The committee conducted a series of public hearings around the state to receive testimony from individuals and various organizations and entities that had an interest in the appropriate uses for the power of eminent domain and to determine whether there is a need to enact legislation or a constitutional amendment to address the issues raised in *Kelo*. The committee also received extensive testimony regarding an initiated constitutional amendment measure regarding the power of eminent domain. The chairman of the committee emphasized that the purpose of the study was to review the eminent domain issues raised in recent court decisions and to provide a forum for the public to discuss the issues. The chairman also indicated that the committee would not take a position on the initiated measure. The measure, which appeared on the November 7, 2006, general election ballot, passed.

The committee conducted two public hearings in Bismarck and one public hearing each in the cities of Fargo, Minot, and Dickinson. In addition to the general public, the committee invited to the hearings representatives of state and local economic development organizations, local chambers of commerce, elected city officials, the Department of Transportation, the North Dakota Association of Counties, the North Dakota League of Cities, the North Dakota County Commissioners Association, the North Dakota School Boards Association, the North Dakota Farm Bureau, the North Dakota Farmers Union, the Landman's Association of North Dakota, the North Dakota Stockmen's Association, the North Dakota Association of Realtors, and the sponsoring committee of the initiated measure.

The committee also received information regarding the entities in the state which have eminent domain authority.

Bismarck Hearings

At the hearings conducted in Bismarck, the committee received testimony that emphasized that any change to the Constitution of North Dakota should be done slowly and carefully. According to the testimony, the reaction to the *Kelo* decision should not be to amend the constitution without serious consideration of the effects the amendment could have. It was emphasized that it is important to have faith in local governments and

other bodies of elected officials. It was suggested that if eminent domain authority is to be limited, it would be better to have the Legislative Assembly address the issue. Concerns were expressed about how the initiated measure, if passed, would affect urban renewal projects.

Testimony in support of the initiated measure from a member of the initiated measure's sponsoring committee indicated that the constitutional amendment was drafted based upon citizens' concerns about the *Kelo* decision. According to the testimony, the eminent domain issue is a battle between a private citizen's rights and the government's interest. According to the testimony, the initiated measure, which would restrict state or local governments from taking private land for economic development, is the surest way to protect private property from an eminent domain taking. According to the testimony, the decision in *Kelo* is and has been the law in North Dakota since the 1996 *Leevers* decision. It was emphasized that the Constitution of North Dakota and state law allow for a citizen-initiated process to create statutes or to amend the constitution without legislative involvement. It was pointed out that the measure will not affect the ability of the government to build roads or put in a sewer system; rather the measure provides that economic development, an increase in the tax base, or general economic health cannot be used as the rationale for an eminent domain condemnation. According to the testimony, because the United States Supreme Court has been steadily eroding property owners' rights through the eminent domain process since 1954, the *Kelo* decision was not that shocking in light of previous decisions on eminent domain. It also was noted that the measure would allow a governmental entity to condemn property that is blighted if economic development is not the purpose of the taking but rather is only incidental to the taking. According to the testimony, under the language of the proposed initiated measure, incidental economic benefit from an eminent domain taking is allowable. It was also noted that if a governing body takes more land than is needed, the governing body cannot resell the extra property for private use. It was pointed out that if the initiated measure passes, urban renewal law can still exist; however, governing bodies will not be able to use eminent domain to condemn property. The opinion was also expressed that true blight can be addressed by a city's police powers.

Other testimony in support of the initiated measure indicated that the language of the initiated measure would not affect the continuation of traditional government services. According to the testimony, the initiated measure would not prohibit the taking of property to build a road or to provide any other essential government service to an economic development project. The testimony indicated that on its face, the initiated measure would not prevent the taking of property for public uses, such as a public road, park, or school. According to the testimony, the initiated measure would prohibit the selling or transferring of land taken by eminent domain to another private purpose. However, the opinion was expressed that land that is no longer needed for a public use could be returned to any successor in interest or assignment. It was noted that if the measure passes there may be a need for legislation to address the transferability of property. The opinion was also stated that the restriction in the initiated measure would not prevent the sale of land purchased by the government because the restriction only applies to land taken by eminent domain.

The committee received testimony that one of the criticisms of the initiated measure is that as a result of this measure, unused government property will remain idle and will not be available for development. That argument, it was noted, presupposes that only the government can develop land. The testimony indicated the opinion that the measure would permit residual land to be returned to the original owner who could develop the residual property and put that property to use. Finally, the opinion was expressed that perhaps the greatest complaint about this measure is that if it passes, it will be more difficult for the government to take property. According to the testimony, that was the sponsor's intention.

Testimony in opposition to the initiated measure indicated that eminent domain is used judiciously in this state. The opinion was expressed that although eminent domain is used carefully and rarely, it is an important tool for governments. According to the testimony, Grand Forks used eminent domain authority in the late 1960s, in the late 1970s, and most recently after the 1997 flood. It was noted that the city's flood control project would not be as far along as it is without the use of eminent domain authority. It was also noted that North Dakota's eminent domain law is more stringent than the Minnesota eminent domain law. North Dakota law requires the governing body to adopt a resolution, obtain an appraisal, and negotiate in good faith with the property owner. North Dakota law also allows the property owner to ask for attorney's fees. According to the testimony, if the initiated measure regarding eminent domain passes, it would limit what Grand Forks is doing in terms of flood control. The testimony indicated that the measure would also impact the state's urban renewal law. According to the testimony, if a city uses eminent domain to obtain property under the urban renewal law, the city could not permit commercial interests to relocate in that area. The testimony indicated that the property taken by eminent domain could only be used as city property and the city could not resell the property for private development. According to the testimony, there is not an abuse of eminent domain authority in North Dakota. The testimony indicated that the appropriate place to focus on this issue is in the Legislative Assembly.

Other testimony in opposition to the initiated measure indicated that the state's urban renewal law, which has been on the books for 50 years, allows for the use of eminent domain to obtain underused property, not just blighted property. The opinion was expressed that the proposed initiated measure goes too far in its effort to protect individual rights and that those rights can be protected by making changes and modifications to the state's laws without destroying the intent of the Legislative Assembly for the past 50 years. It was

suggested that one of the changes could be made in NDCC Section 40-58-02, which contains the findings and declarations of necessity for urban renewal. This section also states why urban renewal is necessary and requires findings of unemployment, underemployment, and joblessness on a statewide basis. It was suggested one way to address some of the concerns about eminent domain would be to require a finding of unemployment, underemployment, or joblessness in a specific community rather than on a statewide basis. It was noted that another section that could be amended is Section 40-58-05. This section requires a finding that the action is necessary in the interest of the public economy, health, safety, morals, or welfare of the residents of the city. It was suggested that this section could be amended to require the city to prove that the exercise of the urban renewal law powers could reasonably be expected to alleviate the conditions at issue. Another suggested change was to require that an underutilized or unutilized property must also be blighted. It also was suggested that it may be helpful to amend Section 40-58-06 to more clearly define a development plan. It was emphasized that the initiated measure raises the question of whether a city can ever sell property that it acquires. It also was emphasized that the initiated measure would "gut" the state's urban renewal law.

Other testimony in opposition to the initiated measure expressed concern about the impact the proposed initiated measure would have on projects in McLean County. According to the testimony, the initiated measure raises concerns about the government's ability to get easements because easements are a part of eminent domain. It was noted that easements are necessary to agribusiness and development. It was suggested that any legislation dealing with changes to eminent domain should also address concerns about easements.

Additional testimony in opposition to the initiated measure indicated that the only instance in which eminent domain was used in Minot was for several highway projects. It was noted that the threat of eminent domain works well to speed up the process of acquiring land.

Committee members expressed concerns that using the initiated measure process rather than the legislative process to address this issue did not allow for public input in the language of the legislation.

The committee received a copy of a resolution adopted by the North Dakota League of Cities which indicated support for the eminent domain process to be addressed through the legislative process.

Fargo Hearing

At the hearing conducted in Fargo, the committee received testimony from local city officials, city attorneys, area legislators, and other interested persons regarding the uses of eminent domain and the initiated measure.

According to testimony in opposition to the initiated measure, the concept of eminent domain is one area of potential tension between the rights of individuals to own and control their property and the rights of the people as a whole, the government, to acquire the property for a public purpose. It was noted that any time the government gives itself power, there is a possibility of abuse. The testimony indicated that it is appropriate to work toward a goal of striking a balance between the good of the public as a whole and the rights of the individual. It was noted that the current procedural and substantive elements in the state's eminent domain law provide a fair amount of protection for private property owners and the decision whether additional protections should be inserted into the law is a matter for the policymakers to debate.

The testimony indicated that it was unclear whether the proposed constitutional amendment would prohibit a government from ever selling a parcel of property or a portion of that parcel if the parcel were obtained by eminent domain. It was also noted that the measure does not address the issue of economic development that may be incidental to the public use. The testimony indicated that if the language in the initiated measure had been in the constitution in 1996, the *Leevers* case would have been decided differently.

Other testimony in opposition to the initiated measure indicated that eminent domain and economic development are complicated issues with no easy answers. It was noted that the initiated measure would affect urban renewal and would likely invalidate portions of the state's urban renewal law. According to the testimony, North Dakota's eminent domain law is fair and there have not been any major abuses of eminent domain power in the state.

Additional testimony in opposition to the initiated measure indicated that a major water diversion project in neighboring Moorhead, Minnesota, would not have happened without the power of eminent domain. It was noted that if one landowner had refused to sell, the project would have been halted. It also was noted that eminent domain is a tax-saving tool for taxpayers. Without eminent domain, the project would not have happened or it would have cost two or three times more. According to the testimony, eminent domain is a valuable tool and it would be more difficult to negotiate without the power of eminent domain. The testimony emphasized that the initiated measure will cost the taxpayers a lot of money. It also was noted that it is clear that the measure would prevent a city from reselling remnants of property taken by eminent domain back to a private owner. According to the testimony, if a city took property by eminent domain for a water tower and 30 years later no longer needed the water tower, the language in the initiated measure would prevent that land from being sold for private use. The testimony indicated that the measure also would prevent a governmental entity from trading property if the property to be traded were acquired by eminent domain. Concern was expressed that the language used in the initiated measure was very broad.

The North Dakota League of Cities provided information to the committee regarding a survey of cities with a population of over 2,500 regarding the use of eminent domain in municipalities. According to the testimony, the survey indicated that eminent domain

rarely has been used by cities in the state and that it is a tool of last resort.

Testimony in support of the initiated measure indicated that regardless of the wording of the initiated measure, someone will contest it. It was noted that the initiated measure only prohibits the use of eminent domain when done for economic development purposes. It also was noted that the measure does not prohibit incidental economic development. According to the testimony, eminent domain should be a tool of last resort and the taking of land should not be simple.

Other testimony in support of the initiated measure indicated that the initiated measure would not prevent the taking of land for health or safety reasons. It was noted that as long as a landowner is law-abiding and pays taxes, the government should not be able to take the private property. It also was noted that taking of land to build a road that is to be used by the public would not be affected by this measure. Finally, it was noted that whether there are additional changes that may need to be made upon the passage of the initiated measure is an issue for the Legislative Assembly to decide.

Additional testimony in support of the measure indicated that as long as a city relies on property taxes, the incentive will be there to use eminent domain to increase its tax base. According to the testimony, without the safeguards of the measure, affordable housing will be affected.

Minot Hearing

The committee received testimony from the Department of Transportation regarding the department's use of eminent domain. The department acquired 1,791 parcels for highway purposes between October 15, 2000, and October 15, 2005. Seventy-five of those parcels had to be condemned to be acquired. All other parcels were acquired through negotiation without the need to file condemnation paperwork with the courts. The condemned parcels represented 32 ownerships and an appraised value of $940,220.32. The department did not go to trial to resolve any condemnations in the five-year period. It was noted that the department uses the eminent domain process as a last resort to keep projects on track.

According to the testimony, the Department of Transportation does not know how far-reaching the interpretation of the economic development language in the initiated measure will be. There were concerns from the department that the language of the measure may affect some future local economic development projects that also involve roadways. The department secures federal funding for local roadways leading to facilities that are created for the purpose of economic development. It was noted that the department often uses the term "economic development" in the environmental document that defines the fundamental purpose and need of a project. According to the testimony, the department is aware that the initiated measure is not intended to exclude condemnation for constructing roads and bridges or for conducting a common carrier or utility business, but the department is concerned that public activities, including transportation systems, may be construed as relating to an economic development purpose. It was noted that economic development is a big part of most highway projects.

Testimony in support of the initiated measure indicated that the current law needed clarification. The testimony expressed concerns that a family that finds a perfect home could lose it to eminent domain for economic development. It was noted that the ability of government to take land for economic development may affect whether someone would decide to relocate to North Dakota.

Dickinson Hearing

According to the testimony received at the hearing held in Dickinson, there is a fear that the eminent domain court rulings authorize the taking of one business to give it to another business. The *Leevers* case required that the taking must be for the benefit of the public and not for the benefit of a private business. It was noted that there are a number of issues with the proposed initiated measure, specifically the second sentence of the measure. This sentence provides that "[p]rivate property shall not be taken for the use of, or ownership by, any private individual or entity, unless the property is necessary for conducting a common carrier or utility business." The *Kelo* decision emphasized that the entity was required to have a plan before the taking could occur. According to the testimony, North Dakota law, through the *Leevers* decision, already contains that requirement. Consequently, the *Kelo* decision was not a drastic change from North Dakota law. It was noted that it is unclear as to the effect the initiated measure would have on transactions, such as long-term leases. It was noted that the measure would apply not only to land acquired by eminent domain in the future but in the past as well.

Testimony in opposition to the initiated measure indicated that eminent domain is a means of last resort for finding land for development and that it is more likely in North Dakota that a county would take land because of the failure to pay property taxes than by using eminent domain proceedings. It was noted that the government does not like using eminent domain because the process is more expensive and time-consuming than negotiation. According to the testimony, the Dickinson City Commission has had one request from a developer to take land by eminent domain, which the commission refused.

Testimony from a representative of a rural water authority indicated that the eminent domain process is important for securing rural easements. It was noted that eminent domain can be used as a threat. According to the testimony, the laying of water pipeline may involve thousands of landowners. It was noted that there are usually one or two landowners per project who refuse to grant an easement and eminent domain must be used. According to the testimony, the passage of the measure could affect an authority's ability to obtain easements. It was noted that the eminent domain process usually results in more money for the landowner than the negotiation process.

Committee Considerations

During the course of the hearings, some committee members noted that there were conflicting opinions in the testimony as to whether the language of the initiated measure would allow excess property taken by eminent domain to be resold for private use. In an effort to gather additional information, the committee requested a meeting of a subcommittee of the committee with the sponsoring committee of the initiated measure to discuss concerns about the wording and scope of the initiated measure and the possibility of withdrawing and amending the initiated measure. Committee members in opposition to a meeting with the sponsoring committee indicated that the language in the initiated measure was what the sponsoring committee intended. According to the committee members in opposition to the meeting, it was not the responsibility of the Judicial Process Committee to question that language. The chairman of the Legislative Council denied the committee's request to form a subcommittee to meet with the members of the initiated measure's sponsoring committee.

Several committee members also expressed an interest in preparing a sheet of facts and concerns regarding the initiated measure for distribution to the public. Committee members in support of preparing a sheet of facts and concerns indicated the information would be a way to make the public aware of the issues that were raised at the hearings. Committee members opposed to the idea indicated that the issues and concerns would be reflected in the report of the committee. Other committee members opposed to the idea indicated that the committee should let the initiated process work and that the initiated measure process is the people's business, guaranteed to the people by the Constitution of North Dakota. It was noted that the Legislative Assembly should take a "hands off" approach with respect to the initiated measure process. It also was noted that the committee should be very careful about providing any kind of fact sheet or opinions or even a committee vote regarding which way the committee is leaning. Another committee member indicated that it is the responsibility of the sponsoring committee to promote the committee's position and it is the responsibility of those who oppose the measure to organize and make their position known. The chairman of the committee indicated that the role of the committee was to conduct hearings and gather information. The chairman indicated that the committee would not be making any statements regarding concerns about the initiated measure. It was noted that the minutes of the hearing are public records and the public can read the minutes and form opinions regarding the measure. The chairman also noted that individual legislators were free to discuss with others any concerns they may have regarding the measure.

During the course of the study, the committee expressed concerns that there may be a need for a bill draft that would address eminent domain issues in the event the initiated measure failed to get the required signatures to get on the ballot or if the initiated measure failed to pass. According to the committee members, it is appropriate for the Legislative Assembly to review the eminent domain laws of the state and to address any problem raised by the *Kelo* decision. Other committee members expressed concerns that if the initiated measure passes, the Legislative Assembly may want to define the "public benefits of economic development." Other committee members indicated that there may be a need for the Legislative Assembly to address the standard of review for courts in eminent domain cases. It was suggested that courts should have de novo review to allow the courts to look at the merits in eminent domain cases.

The committee considered a bill draft that limits the uses of eminent domain. Testimony in explanation of the bill draft indicated that the bill draft would prohibit private property from being taken for use by a private commercial enterprise for economic development or for any other private use without the consent of the owner; would define economic development as any activity to increase tax revenue, tax base, employment, or general economic health; would provide that public use does not include the public benefits of economic development, including an increase in the tax base or in tax revenues or an improvement of general economic health; would provide that the question of whether a use is a public use must be determined by a court; and would provide that the court is required to try the matter de novo.

Committee members noted that regardless of whether the initiated measure passes, the bill draft would give the Legislative Assembly a vehicle to discuss eminent domain issues during the 2007 legislative session. Committee members also noted that there did not appear to be any provisions in the bill draft which would directly conflict with the language in the initiated measure.

Recommendation

The committee recommends Senate Bill No. 2039 to limit the uses of eminent domain. The bill prohibits private property from being taken for use by a private commercial enterprise for economic development or for any other private use without the consent of the owner; defines economic development as any activity to increase tax revenue, tax base, employment, or general economic health; provides that public use does not include the public benefits of economic development, including an increase in the tax base or in tax revenues or an improvement of general economic health; provides that the question of whether a use is a public use must be determined by a court; and provides that the court is required to try the matter de novo.

JUDICIAL ELECTIONS STUDY

House Concurrent Resolution No. 3014 directed a study of judicial elections and recent federal court decisions affecting the conduct of judicial elections. Testimony in support of the resolution indicated that recent federal court decisions will have an impact on how judicial candidates campaign and solicit funds, thus creating a need for a study.

North Dakota Judicial System

The North Dakota judicial system consists of the Supreme Court, court of appeals, district courts, and municipal courts. The North Dakota Supreme Court is the highest court in the state. This court is composed of five justices elected on a nonpartisan basis for 10-year terms. Each justice must be a licensed attorney and a citizen of the United States and North Dakota.

One member of the Supreme Court is selected as Chief Justice by the justices of the Supreme Court and the judges of the district courts. The Chief Justice's term is five years. The Chief Justice's duties include presiding over Supreme Court conferences, representing the judiciary at official state functions, and serving as the administrative head of the judicial system.

The court of appeals hears only the cases assigned to it by the Supreme Court. The court of appeals is composed of three judges chosen from among active and retired district court judges, retired justices of the Supreme Court, and attorneys. Temporary court of appeals judges are assigned by the Supreme Court for up to one year. The Supreme Court assigns cases to the court of appeals from among those cases filed with it.

The district courts are the courts of general jurisdiction in North Dakota. The office of district judge is an elected position filled every six years by nonpartisan election held in the district in which a judge will serve. The district courts have original and general jurisdiction in all cases, including criminal felony and misdemeanor cases and general jurisdiction for civil cases. The district courts also serve as the juvenile courts in the state and have exclusive and original jurisdiction over any minor who is alleged to be unruly, delinquent, or deprived. The state is divided into seven judicial districts. In each judicial district a presiding judge supervises court services of all courts in the district. There is a district court in each of the state's 53 counties.

Municipal courts in North Dakota have jurisdiction of all violations of municipal ordinances, with some exceptions. All municipal judges in North Dakota are part-time and are elected by the people for four-year terms.

Judicial Conduct

The American Bar Association adopted the first Canons of Judicial Ethics in 1924. These first canons were advisory in nature and were intended to act as a guide for judicial behavior. In 1972 the American Bar Association promulgated the Model Code of Judicial Conduct, which specified a mandatory and enforceable standard of conduct and behavior. This Code of Judicial Conduct was meant to aid the states in adopting their own rules of conduct for sitting judges as well as judicial candidates. Today most states that have an elected judiciary have approved campaign restrictions based on the Model Code, specifically Canon 5. This canon was revised in 1990 due to concerns that certain language was unconstitutionally overbroad. Many states, including North Dakota, updated their codes accordingly, but some states, such as Minnesota, chose not to. Regardless of which version of the Model Code, if any, a state's judicial code is based upon, all 39 states that have elections for judicial positions have statutory regulations of conduct during campaigns.

The states that have elections for judicial positions are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

North Dakota, like most states, has a code of judicial ethics that restricts a candidate seeking election as a judge from discussing issues that could come before the judge if elected. North Dakota Century Code Section 27-23-03(3) empowers the North Dakota Supreme Court, upon the recommendation of the Commission on Judicial Conduct, to censure or remove a judge for action that constitutes a willful violation of North Dakota Rules of Judicial Conduct. *Judicial Conduct Comm'n v. Wilson*, 461 N.W.2d 105 (N.D. 1990).

Court Decisions

In June 2002, the United States Supreme Court handed down its first ruling regarding judicial elections. A 5-4 majority in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) held that part of the Minnesota Code of Judicial Conduct was unconstitutional as violating the First Amendment of the United States Constitution. A similar provision in the North Dakota Code of Judicial Conduct was challenged in *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021 (D.N.D. 2005). Both cases are summarized below.

Republican Party of Minnesota v. White

In *Republican Party of Minnesota v. White*, the United States Supreme Court held that part of the Minnesota Code of Judicial Conduct was unconstitutional as violating the First Amendment of the United States Constitution. The specific clause at issue in this case is known as the "announce clause" and states that "[a] candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." In *White*, a judicial candidate alleged that he was forced to refrain from announcing his views on disputed issues during a campaign because of this provision, in violation of the First Amendment. A majority of the Supreme Court agreed and held that Minnesota's announce clause is unconstitutional. Justice Scalia, writing for the majority, found that the standard of there being a compelling state interest, and any restraints being narrowly tailored in order to restrict speech, was not met. Justices Scalia, Rehnquist, O'Connor, Kennedy, and Thomas were in the majority. Justice Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer joined. Justice Ginsburg also filed a dissenting opinion, in which Stevens, Souter, and Breyer joined.

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court. He distributed literature

critical of several Minnesota Supreme Court decisions. An ethics complaint was filed against him; however, the board that was to review the complaint dismissed the charges. In 1998, Wersal ran again for the same office. This time Wersal preemptively filed suit in federal district court against Suzanne White, the chairman of the Minnesota Board on Judicial Standards, charging that the "announce clause" limited his right to free speech and made a mockery of the election process by denying him the ability to wage a meaningful campaign. The Republican Party of Minnesota joined in the lawsuit, arguing that the restrictions prevented the party from learning Wersal's views on the issues, and as a result either opposing or supporting his candidacy. The district court found that the announce clause did not violate the constitution. Wersal appealed to the United States Court of Appeals for the Eighth Circuit, and the circuit court affirmed the district court's decision. Wersal filed a writ of certiorari to the United States Supreme Court, which was granted.

In *White*, the United States Supreme Court struck down the campaign ethics rule prohibiting judicial candidates from announcing their views. The Supreme Court held that the portion of Canon 5A of the Minnesota Code of Judicial Conduct which provided that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues," violates the First Amendment. Using strict scrutiny, the Court held the "announce clause" was not narrowly tailored to serve the asserted compelling state interest in the judiciary's impartiality. The Supreme Court then remanded the case to the Eighth Circuit Court of Appeals to determine what effect, if any, its decision would have on the rest of the plaintiff's challenge. A three-judge panel of the Eighth Circuit issued a decision and found that some of the candidates' speech prohibitions were unconstitutional but upheld others. *Republican Party of Minnesota v. White*, 361 F.3d 1035 (8th Cir. 2004). The Eighth Circuit vacated the panel decision and decided to hear the case en banc.

On August 2, 2005, in the remand of *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) the Eighth Circuit held:

1. Minnesota Code of Judicial Conduct Canon 5B(2), which prohibits a judicial candidate from personally soliciting campaign contributions, is unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above their personal signature, to the extent of the plaintiffs' challenge; and
2. Minnesota Code of Judicial Conduct Canons 5A(1) and 5B(1), which prohibit judges or judicial candidates from identifying themselves "as members of a political organization" attending political gatherings, and seeking, accepting, or using endorsements from a political organization, are unconstitutional.

North Dakota Code of Judicial Conduct Canons 5A and 5B contain language that is substantially similar to Minnesota's "partisan-activities clause" and "solicitation clause."

North Dakota Family Alliance, Inc. v. Bader

In *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021 (D.N.D. 2005), United States District Judge Dan Hovland held that the "pledges and promises clause" and the "commit clause" of the North Dakota Code of Judicial Conduct Canon 5A unconstitutionally restrict speech. The judicial canon at issue in this case was Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct, which provides that a candidate for a judicial office may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

In this case, North Dakota Family Alliance, Inc., a nonprofit educational organization, sought to collect and publish data regarding judicial candidates' political philosophy and stance on disputed legal and political issues by sending a questionnaire to judicial candidates. Many judicial candidates refused to answer the questions on the survey and the candidates cited the relevant canon of ethics.

The district court, in its analysis, stated that in *White*, the Supreme Court held that Minnesota's "announce clause" violated the First Amendment because the canon was not narrowly tailored to serve a compelling state interest. The district court also noted that the Supreme Court did not address the constitutionality of the "pledges or promises" clause of Minnesota's Canon 5A(3)(d)(i) which is identical to North Dakota's Canon 5A(3)(d)(i) nor did the Supreme Court address the validity of the "commit clause," which is a clause that prohibits a judicial candidate from making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.

The district court held that if North Dakota's interest ultimately concerns a judge's impartiality toward parties, the language of Canon 5A(3)(d)(i) and (ii) is overbroad and does not reflect that interest. The district court held that like the "announce clause" in *White*, the "pledges and promises clause" and the "commitment clause" are too broadly tailored to serve that interest. According to the district court, these clauses forbid the same type of speech that was found to be constitutionally protected in *White*. The court found little distinction between the clauses at issue in *White* and the clauses at issue in this case. The district court concluded that "Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct impermissibly burdens free speech and violates the First Amendment of the United States Constitution." According to the district court, "[t]he 'pledges and promises,' and the 'commitment clause,' are essentially de facto 'announce clauses' which were found to be unconstitutional by the United States Supreme Court in *Republican Party of Minnesota v. White*. For the same reasons stated in *White*, the Court finds that these clauses violate the First Amendment."

The district court concluded that there is nothing in its opinion which requires a judicial candidate to respond to a survey in the future; however, the court noted that responding to such a survey may create a serious ethical dilemma that may require recusal at a later date. Finally, the district court concluded that it is clear under *White* that "because North Dakota has chosen to select its judges by popular election, the State may not impermissibly restrict the constitutionally-protected speech of judicial candidates."

In *North Dakota Family Alliance, Inc. v. Bader*, the court also analyzed a challenge to the constitutionality of Canon 3E(1) of the North Dakota Code of Judicial Conduct which relates to the recusal obligations of judges. The canon requires judges to recuse themselves from those proceedings in which impartiality "might reasonably be questioned." The district court concluded that this canon is narrowly tailored to serve a compelling state interest. According to the district court, the recusal provisions in Canon 3E(1) serves the state's interest in impartiality and the canon is narrowly drafted to achieve that interest and, therefore, survives a constitutional challenge.

Testimony and Committee Considerations

The committee received information and testimony from the North Dakota Supreme Court and the State Bar Association of North Dakota regarding judicial conduct and judicial elections.

The committee received testimony from the Supreme Court regarding the effect of recent federal court decisions on certain judicial election canons. According to the testimony, federal judges are of the opinion that a judicial election is the same as any other election. It was noted that while judicial candidates are subject to the same campaign statutes as are any other election candidates, the Rules of Judicial Conduct add another layer of rules on top of the election laws. The state's election laws provide that a judicial candidate cannot solicit funds but rather must set up a committee for that purpose. The election laws also provide that the candidate is not permitted to know the identity of the contributors. The testimony indicated that this process may not survive the recent federal court rulings.

The testimony from the Supreme Court also indicated that judges who seek political party endorsements, solicit campaign contributions, and declare their beliefs on issues are more likely to have to recuse themselves from hearing cases because their impartiality might be questioned. It was noted that because North Dakota has a very small judiciary, if judges are recusing themselves, it creates a problem in finding judges to replace them. According to the testimony, while a general statement about judicial philosophy may not be grounds for recusal, it is difficult to determine at what point a recusal is appropriate.

According to the testimony, as a result of the recent Court decisions, a judge or a judicial candidate is permitted to answer certain questions but is not required to answer. According to the testimony, while there is no requirement that the candidate answer certain questions, there may be political repercussions for not answering. The testimony indicated that the Rules of Judicial Conduct which were held to be unconstitutional will need to be revised before the next judicial election.

The committee also received extensive testimony, information, and recommendations from a special task force formed by the State Bar Association of North Dakota. The task force was formed to address issues raised by the recent Court decisions involving judicial elections. The task force was composed of judges, lawyers, and legislators from around the state. The committee received regular reports from the task force. Based upon these reports, the committee's considerations focused on four areas: the North Dakota Code of Judicial Conduct; the election statutes affecting judicial elections; the method of selecting judges in North Dakota; and the task force's conclusions and recommendations.

North Dakota Code of Judicial Conduct

The committee received testimony from the task force that in the past the North Dakota Rules of Judicial Conduct have limited what candidates for judicial office were allowed to say and do when campaigning. It is portions of these rules that were specifically addressed and declared unconstitutional by the United States Supreme Court and the Eighth Circuit Court of Appeals in *Minnesota Republican Party v. White* and the United States District Court in *North Dakota Family Alliance v. Bader*. It was noted that setting ethical standards for the behavior of judges is the responsibility of the North Dakota Supreme Court. According to the testimony, these rules have been or are in the process of being addressed by the Judiciary Standards Committee, one of the Supreme Court's standing committees.

According to the testimony, the *White* decision deals not only with the right of the candidate to speak but also deals with the right of people to endorse a candidate. It was noted that a judicial candidate's refusal to accept an endorsement may only work for a limited time. Because a candidate may want funding from one party or another, the candidate may seek the endorsement of a party.

According to the testimony, changes that have been adopted by the Supreme Court include a restriction on judges and candidates making "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office," and a definition of "impartiality" that includes not only absence of bias or prejudice for particular parties but also "an open mind in considering issues that may come before the judge." The testimony indicated that other recommendations that have been forwarded to the Supreme Court for its consideration include retaining the limitations on active involvement with "political organizations," but adding an expanded definition of "political organization" which would include not only political parties but also organizations whose purpose is to "support or oppose the continuation, amendment, repeal, enactment, initiative or referendum of any constitutional, statutory or regulatory provision." According to the testimony, the basis for this proposed change is the Eighth Circuit's criticism of the old canon's ban on political involvement as underinclusive.

According to the testimony, the proposed canons would limit political endorsements. It was noted that if the proposed canons stand up to the requirements set forth in the federal cases, seeking an endorsement would be prohibited. It was noted that the proposed canons would permit an organization to give a letter of support. According to the testimony, it is the intent of the Supreme Court to have all amendments in place in time for the 2006 election cycle.

Election Statutes Affecting Judicial Elections

The committee received testimony from the task force regarding North Dakota election statutes, specifically NDCC Section 16.1-11-08. This section requires judicial candidates and others to run on a no-party ballot without reference to a party affiliation. According to the testimony, opinions were divided on whether, in light of the federal decisions, this statute is entirely unconstitutional, whether it might be saved by some form of amendment, or whether a change to the statute was necessary at all. It was noted that if the statute is repealed entirely, questions are raised about the application of some of the other election laws and whether judicial candidates would be forced to run under a party designation if the no-party portion of the ballot were abolished.

According to the testimony, the task force concluded that the *White* and *Family Alliance* cases have no impact on the use of a no-party ballot in North Dakota and therefore raise no concern for the constitutionality of NDCC Section 16.1-11-08 as long as the possibility of endorsement by political parties or other interest groups is permitted.

Method of Selecting Judges in North Dakota

The committee received testimony that any effort to change the method of selecting judges in North Dakota must include long-term structural considerations of whether the method of selecting judges in North Dakota should be modified in some way in order to avoid full-scale political elections for judicial office. It was emphasized that any effort in this area would require an in-depth study and a long-term approach. According to the testimony, North Dakota citizens are comfortable with the no-party approach for judicial elections. The testimony indicated that there likely is not a way to avoid making changes to the conduct of judicial elections as long as the state has judicial elections. It was noted that because North Dakota citizens like elections, there probably is not a great deal of support for adopting the federal system of lifetime judicial appointments. It was the consensus of the task force that the subject of judicial selection in North Dakota requires further study.

Task Force Conclusions and Recommendations

The task force presented the following conclusions and recommendations to the committee:

1. The task force should continue to monitor and comment upon, as appropriate, any proposed changes to the North Dakota Code of Judicial Conduct which deal with judicial selection or election;
2. The State Bar Association of North Dakota should consider and adopt a resolution at its annual meeting in June 2006 setting forth the association's official position on the extent to which judicial candidates should make "pledges or promises" or "commitments" to the voters;
3. The interim Judicial Process Committee should not propose and the Legislative Assembly should not enact any immediate legislative changes as a result of the recent trilogy of cases involving judicial selection and election; and
4. The interim Judicial Process Committee should propose a concurrent resolution draft to continue the present study of the Judicial Process Committee into the next biennium and pursue a joint legislative and State Bar Association of North Dakota public information and education program, including public forums around the state, regarding judicial selection methodology and the conduct of judicial elections.

Based upon the conclusions and recommendations of the task force, the committee considered a concurrent resolution relating to a study of judicial election and selection issues which would continue the present study into the next interim.

Testimony in support of the concurrent resolution indicated that although recent federal court opinions have limited the restrictions the state can place upon judicial elections and judicial candidates, the study could provide for a review of the way judges are selected, including the possibility of changing from an elected system to an appointed system. It was suggested that the concurrent resolution be amended to provide for a joint legislative and State Bar Association of North Dakota public information and education program regarding judicial selection methodology and the conduct of judicial elections. It was noted that the program should include public forums around the state.

Recommendation

The committee recommends House Concurrent Resolution No. 3002 to study judicial election and judicial selection issues. The concurrent resolution also provides that the Legislative Council study should include a public information and education program with the State Bar Association of North Dakota which includes public forums around the state regarding judicial selection methodology and the conduct of judicial elections.

IDENTITY THEFT STUDY

House Concurrent Resolution No. 3042 directed a study of the laws of this state and other states as they relate to the unauthorized acquisition, theft, and misuse of personal identifying information belonging to another individual. Testimony in support of the resolution indicated that a need exists to review the laws of the state to determine if those laws provide the citizens of the state with adequate protection from identity theft.

Background

Identity theft occurs when someone possesses or uses another person's name, address, Social Security number, bank or credit card account number, or other personal identifying information without that person's knowledge with the intent to commit fraud or other crimes. The Federal Trade Commission reports that identity theft is the fastest growing white-collar crime.

Prevalence of Identity Theft

According to a Federal Trade Commission report, between January and December 2004, Consumer Sentinel, the complaint data base developed and maintained by the Federal Trade Commission, received over 635,000 consumer fraud and identity theft complaints. According to the report, consumers reported losses from fraud and identity theft of more than $547 million. The report indicated that credit card fraud (28 percent) was the most common form of reported identity theft followed by phone or utilities fraud (19 percent), bank fraud (18 percent), and employment fraud (13 percent). Other significant categories of identity theft reported by victims were government documents and benefits fraud and loan fraud. According to the report, the percentage of complaints about “electronic fund transfer” related identity theft more than doubled between 2002 and 2004. The major metropolitan areas with the highest per capita rates of reported identity theft were Phoenix-Mesa-Scottsdale, Arizona; Riverside-San Bernardino-Ontario, California; and Las Vegas-Paradise, Nevada.

The Federal Trade Commission's report also indicated that there were 188 identity theft complaints from North Dakota victims, including 53 for credit card fraud (28 percent), 42 for phone or utilities fraud (22 percent); 27 for bank fraud (14 percent); 12 for employment-related fraud (6 percent); 11 for government documents or benefits fraud (6 percent); 9 for loan fraud (5 percent); 52 for other (28 percent); and 11 for attempted identity theft (6 percent). The report also listed the number of identity thefts by city as follows: Fargo (42); Grand Forks (22); Bismarck (17); Minot (17); Cavalier (6); Dickinson (6); Mandan (6); and Minot Air Force Base (6).

North Dakota Law

North Dakota Century Code Section 12.1-23-11 prohibits the unauthorized use of personal identifying information. A violation of this section is a Class B felony if the credit, money, goods, services, or anything else of value exceeds $1,000 in value, otherwise the offense is a Class C felony. A second or subsequent offense is a Class A felony.

In addition to the specific statute for the unauthorized use of personal identifying information, there are a number of theft statutes that are likely to be applicable, including NDCC Sections 12.1-23-02 and 12.1-23-03.

North Dakota Century Code Section 12.1-23-05 provides for the grading of theft offenses. This section provides that theft is a Class B felony if the property or services stolen exceed $10,000 in value or are acquired or retained by a threat to commit a Class A or Class B felony or to inflict serious bodily injury on the person threatened or on any other person. This section also provides that theft is a Class C felony if certain criteria are met, including that the property or services stolen exceed $500 in value; the property or services stolen are acquired or retained by threat and are either acquired or retained by a public servant by a threat to take or withhold official action or exceed $50 in value; or the property or services stolen exceed $50 in value and are acquired or retained by a public servant in the course of official duties. With some exceptions, all other theft under Chapter 12.1-23 is a Class A misdemeanor.

North Dakota also has a body of law that addresses issues relating to consumer fraud. North Dakota Century Code Chapter 51-15 is often referred to as the state's "consumer fraud law." Section 51-15-02 provides that "[t]he act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice."

The law authorizes the Attorney General to conduct and investigate unlawful practices under NDCC Chapter 51-15. The chapter also authorizes the Attorney General, upon court approval, to obtain injunctions, cease and desist orders, restitution, the appointment of a receiver, and the imposition of penalties, attorney's fees, and expenses. Section 51-15-09 creates a private cause of action for violations of the consumer fraud laws.

2005 Changes to Identity Theft Laws

In 2005 the North Dakota Legislative Assembly enacted several pieces of legislation to specifically address identity theft issues. North Dakota Century Code Section 12.1-23-11 was amended to provide that a person is guilty of an offense if the person uses or attempts to use any personal identifying information of an individual, living or deceased, to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the individual. Under this section, the offense is a Class B felony if the value of the credit, money, goods, or services obtained exceeds $1,000 in value, otherwise the offense is a Class C felony; and a subsequent offense is a Class A felony. This section also provides that prosecution for a violation must be commenced within six years after the discovery by the victim of the facts constituting the violation.

North Dakota Century Code Chapter 51-31 was enacted to provide that, upon the request of a consumer, a consumer reporting agency is required to include an initial or extended fraud alert in the file of that consumer. This chapter also provides that an individual who learns or reasonably suspects that the individual’s personal identifying information has been unlawfully used by another may initiate a law enforcement action by contacting the local law enforcement agency and that an individual who reasonably believes the individual is the victim of identity theft may petition the district court for an expedited judicial determination of the individual’s factual innocence. In addition, this chapter provides that the

Attorney General may enforce identity theft laws and a violation of the identity theft laws is a violation of the consumer fraud and unlawful credit practices laws.

North Dakota Century Code Chapter 51-30 provides that in the case of a breach of security, a person that conducts business in North Dakota and that owns or licenses computerized data that includes personal information is required to notify the residents of this state who may have been affected by the breach and provides that a person that maintains such computerized data for such an owner or licensee must notify the owner if there is a breach of security. The chapter also provides that the Attorney General may enforce breach of security laws and violation of the breach of security laws is a violation of the consumer fraud and unlawful credit practices laws.

Identity Theft Laws of Other States

Nearly all 50 states have enacted laws that specifically address the issue of identity theft. Several states, including Alaska and Colorado, have not enacted specific identity theft laws but rather rely on their general theft statutes to address the issue. A number of states, including Missouri, Montana, Nebraska, and Pennsylvania, make the act of stealing identifying information a crime even if no credit, money, goods, services, or other thing of value was gained or was attempted to be gained. Although the classification of the offenses varies greatly from state to state, most states base the severity of the penalty on the dollar amount of the theft.

In 2005 at least 25 states enacted legislation to address issues relating to identity theft. For example, Illinois passed a law that removed the statute of limitations for the commencement of an identity theft prosecution and passed another law that increased the penalties for identity theft and aggravated identity theft by one class higher than the current law. Illinois also passed a law that prohibits the denial of credit, public utility services, or the reduction in the credit limit of a consumer solely because the consumer has been a victim of identity theft. Kansas changed the definition of identity theft from someone who uses personal identification to knowingly and intentionally defraud a person for economic benefit to a person receiving any benefit from using someone else's personal identification. A number of states, including North Dakota, Maine, and Montana, enacted legislation that limits the information a consumer reporting agency may report without the consumer's authorization. Several states, including North Dakota, Montana, Maryland, and Hawaii, passed legislation to study issues relating to identity theft.

Federal Identity Theft Laws

Identity Theft and Assumption Deterrence Act of 1998

In October 1998 Congress passed the Identity Theft and Assumption Deterrence Act of 1998 [Pub. L. No. 105-318; 112 Stat. 3007; 18 U.S.C. 1028] to address the problem of identity theft. Specifically, the Act made it a federal crime when anyone "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law."

Identity Theft Penalty Enhancement Act of 2003

The Identity Theft Penalty Enhancement Act of 2003 [18 U.S.C. 47] established penalties for aggravated identity theft. The Act prescribes sentences of two years' imprisonment for knowingly transferring, possessing, or using, without lawful authority, a means of identification of another person during and in relation to specified felony violations, including felonies relating to theft from employee benefit plans and various fraud and immigration offenses; and five years' imprisonment for knowingly taking such action during and in relation to specified felony violations pertaining to terrorist acts, in addition to the punishments provided for such felonies.

Fair Credit Reporting Act

The Fair Credit Reporting Act [15 U.S.C. 1681 et seq.] establishes procedures for correcting mistakes on an individual's credit record and requires that a credit record only be provided for legitimate business needs. The Act, enforced by the Federal Trade Commission, is designed to promote accuracy and ensure the privacy of the information used in consumer reports. Recent amendments to the Act were intended to expand consumer rights and place additional requirements on credit reporting agencies.

Other Federal Laws

- Fair Credit Billing Act [15 U.S.C. 1601] establishes procedures for resolving billing errors on credit card accounts. The Act also limits a consumer's liability for fraudulent credit card charges.
- Fair Debt Collection Practices Act [15 U.S.C. 1692] prohibits debt collectors from using unfair or deceptive practices to collect overdue bills that a creditor has forwarded for collection.
- Electronic Fund Transfer Act [15 U.S.C. 1693] provides consumer protection for all transactions using a debit card or electronic means to debit or credit an account. The Act also limits a consumer's liability for unauthorized electronic fund transfers.
- Driver’s Privacy Protection Act of 1994 [Pub. L. 103-322; 18 U.S.C. 2721 et seq.] places limits on disclosures of personal information in records maintained by departments of motor vehicles.
- Family Educational Rights and Privacy Act of 1974 [20 U.S.C. 1232g] puts limits on disclosure of educational records maintained by agencies and institutions that receive federal funding.
- Gramm-Leach-Bliley Act [Pub. L. No. 106-102; 113 Stat. 1338, 1436-4515; U.S.C. 6801-6809] requires the Federal Trade Commission, along with the federal banking agencies, the National Credit Union Administration, the Treasury Department, and the Securities and Exchange Commission, to issue regulations ensuring that

financial institutions protect the privacy of consumers' personal financial information.

- Health Information Portability and Accountability Act of 1996 [Pub. L. 104-191; 110 Stat. 1936; 42 U.S.C. 201] regulates the security and confidentiality of patient information.

Testimony and Committee Considerations

The committee received extensive testimony and information from the Attorney General, the Insurance Commissioner, the North Dakota Bankers Association, representatives of the United States Postal Service, and an identity theft victim regarding issues relating to identity theft. The committee's considerations focused on five issues: state efforts and legislation to combat identity theft, federal efforts and legislation to combat identity theft, an identity theft victim testimonial, the impact of credit scores on insurance premiums, and security freeze legislation.

State Efforts and Legislation to Combat Identity Theft

The committee received extensive testimony from the Attorney General's office regarding the prevalence of identity theft and the efforts being made at the state level to combat identity theft.

The committee received testimony that it can take up to 600 hours for an identity theft victim to correct the credit problems created by an identity thief. The average identity theft nets between $45,000 and $50,000 and the thief rarely gets caught while the average bank robber nets $3,000 to $4,000 and usually gets caught. It was noted that it is often very difficult to find an identity thief because identity thieves often relocate to countries in which there is not extradition, e.g., Nigeria.

According to the director of the Consumer Protection and Antitrust Division of the Attorney General's office, a staff of two assistant attorneys general, one field investigator, three investigators, and three administrative assistants receive 100 to 150 calls per day regarding incidents of or questions about identity theft. It was noted that persons are not required to report identity theft to the Attorney General's office so this number may be just the tip of the iceberg. According to the testimony, identity thieves use personal identifying information to go on spending sprees using credit card or debit card account numbers, open new credit card accounts, buy high-ticket items, gain employment, obtain duplicate driver's licenses, and use the victims' reputations without damage to their own. The victims' information can be obtained by discarded ATM receipts, stealing mail from mailboxes, illegally obtaining credit reports, and going through garbage cans. A common way of obtaining information using a computer is a method known as "phishing." There are a number of "phishing" scams that attempt to obtain personal identifying information by fraudulently attempting to represent reputable companies. It was emphasized that people need to guard their personal information and be very careful about what information is revealed. The Attorney General offers an identity theft affidavit for victims to use to prove they have been a victim of identity theft. It also was emphasized that everyone should check their credit reports several times per year to check for errors and suspicious activity. A person can request up to three free credit reports each year, one from each of the credit reporting agencies. The Attorney General's office offers a kit to help victims of identity theft. It was noted that some of the additional law enforcement training funds authorized during the 2005 legislative session are being used to provide training on identity theft. According to the testimony, one of the best solutions for reducing identity theft is consumer education.

The committee received testimony that the 2005 increase in the penalty from a Class C felony to a Class B felony for certain types of identity theft with the offense elevated to a Class A felony for second and subsequent offenses made North Dakota's penalty one of the toughest in the country. The legislation also allowed one jurisdiction to prosecute multiple offenses which made it easier to gain jurisdiction over an offender. In addition, the 2005 legislation that requires fraud alerts on credit reports, makes police reports a mandatory item, allows for a judicial determination of factual innocence, and gives the Attorney General greater enforcement authority has provided effective tools in combating identity theft. It was noted that locking mailboxes is an effective way to prevent identity theft. It was suggested that the committee may want to encourage the United States Postal Service to require locked mailboxes. According to the testimony, the Attorney General's office would be willing to aid in the education efforts.

Testimony from a representative of the North Dakota Bankers Association indicated that when a customer requests an address change, notification that an address has been changed may be sent to both the accountholder's old address and new address. It was noted that there is not a specific requirement that this be done; however, the federal government requires banks to maintain the security of the accountholder's data.

During the course of the committee's study of identity theft and state efforts to combat identity theft, the committee considered a bill draft that prohibited third parties from assisting and facilitating consumer fraud upon the consumers in our state.

Testimony in support of the bill draft indicated that as consumer fraud proliferates, it becomes more organized and more complicated. This often requires the assistance of third parties, such as third-party processors, to facilitate and perpetrate the fraud. It was noted that these third parties are not the individuals directly engaged in the fraudulent solicitations but they are critical to the process of completing the fraud. According to the testimony, the telemarketing fraud industry is largely dependent upon third-party processors, which are businesses that handle the mechanics of taking money out of consumers' bank accounts and transferring that money to the fraudulent telemarketers. The Attorney General has begun investigating the third parties that facilitate fraudulent activity by, for instance, collecting payments from North Dakota victims. According to the testimony, the Attorney

General would like clear legislation authorizing the Attorney General to take enforcement action against third parties that facilitate or assist others who are initially more directly engaged in fraudulent conduct. It was noted that the bill draft provided authority that is similar to the authority granted to federal agencies to prosecute persons engaged in assisting and facilitating consumer fraud in North Dakota. It was also noted that there is a $5,000 penalty imposed for those third parties that assist and facilitate consumer fraud.

Committee members expressed concern over the phrase "substantial assistance or support" in the bill draft. According to the testimony, the word "substantial" was used to exclude those persons who unwittingly become involved in the act or practice. It was noted that the federal version of this law does not use the word "substantial." The committee amended the bill draft to remove the word "substantial."

Testimony in opposition to the bill draft indicated that the bill draft casts a wide net. It was noted that the bill draft could affect many small Internet service providers and shopper newspapers in small towns.

Federal Efforts and Legislation to Combat Identity Theft

The committee received testimony that Congress is considering a bill that amends the Fair Credit Reporting Act and extends protection to sensitive personal information, sensitive financial account information, and sensitive financial identity information. The bill requires notice to consumers if there is a breach that risks "substantial harm" or "substantial inconvenience." The bill preempts state law with respect to the responsibilities of any person to protect confidentiality of consumer information. According to the testimony, other bills, including the Consumer Data Security and Notification Act, the Consumer Identity Protection and Security Act, and the Notification of Risk to Personal Data Act, are also pending in Congress. It was noted that several of the pending Acts would preempt state action.

The committee also received testimony from a postmaster and a postal inspector of the United States Postal Service regarding methods used by the United States Postal Service to combat identity theft. According to the testimony, postal inspectors handle cases relating to mail theft, mail fraud, and burglary. It was noted that identity theft is a big issue for the Postal Service. Four percent of people who have had their identity stolen claim the theft occurred through the United States mail. It was noted that one way identity is stolen is by stealing mail either from a mailbox or from a person's trash; however, most cases involve an item fraudulently mailed through the Postal Service. According to the testimony, the Postal Service uses a financial crimes data base to track identity theft cases. Customers can report cases to this data base. The Postal Service's efforts to combat identity theft include education campaigns, an annual national consumer week, presentations to the public on how to prevent identity theft, and a change of address validation program to prevent fraudulent attempts to change an address. It was noted that the convenience checks sent by credit card companies are one of the most sought after items by thieves.

According to the testimony, the United States Postal Service attempts to educate people on the advantages of having locked mailboxes, which significantly reduce the incidents of mail theft. It was noted that the Postal Service encourages locked mailboxes but often cost is an issue. The testimony indicated there are many jurisdictional issues when dealing with international mail crimes. It was noted that lottery scams create big problems for the Postal Service. According to the testimony, the Postal Service has two postal inspectors who work exclusively on foreign lottery scams.

Identity Theft Victim Testimonial

The committee received testimony from an individual who had personal experience with identity theft. The victim's ordeal began in 1997 when an individual from Minnesota was able to obtain information regarding the victim's bank accounts and a copy of his birth certificate. The individual who stole his identity opened accounts in his name and attempted to purchase a $30,000 truck using those accounts. The individual, who was eventually caught, spent 13 days in jail in North Dakota and 30 days in jail in South Dakota. According to the testimony, that individual offended again and received a three-year sentence. According to the testimony, the whole ordeal cost the victim attorney's fees, over $2,000 in other costs, and many hours of his time. It was noted that as a citizen and consumer, he was the one being punished. The victim emphasized the importance of frequent credit checks. The victim reported that although his credit report was eventually cleared, it took more than a year and many letters and affidavits to accomplish it.

Impact of Credit Scores on Insurance Premiums

The committee received testimony from a representative of the Insurance Commissioner regarding the impact of credit scores on insurance premiums. According to the testimony, in recent years, automobile and homeowner insurance companies have developed a new tool to predict more accurately future losses of their insureds. This new tool is called a "financial responsibility score." It was noted that while this score is similar to the credit score that lenders and mortgage companies use when a person applies for a loan, it is not the same score. A statistical company that was instrumental in developing the system for calculating the credit score used by lenders was the leader in developing a formula for calculating a score that is used in the insurance underwriting and rating process. There is not a standard statistical formula in use by all companies and formulas can vary from 11 attributes to as high as 25 attributes. According to the testimony, some attributes that are common among formulas are timeliness of payments, number of credit cards, amount of indebtedness compared to the total amount of available credit, number of bankruptcies, judgments, or defaults, and the length of time a consumer has had credit. The testimony indicated that the statistical company initially took the credit information of over

15 million automobile insurance policyholders, applied the formula to the policyholders' credit reports to find the score, and found a direct correlation between the scores and the policyholders' insurance loss experience. It is this correlation that serves as the insurance industry's basis for using the score as a tool in determining whether to write certain risks or to decide what the appropriate premium is for the risk.

According to the testimony, when this new methodology was used, North Dakota did not have a law in place to deal with this new concept. The Insurance Commissioner, in an attempt to provide some consumer protections and create some uniformity and guidelines in the use of credit information by the insurance industry, proposed a bill that passed during the 2003 legislative session. That law, codified as North Dakota Century Code Chapter 26.1-25.1, sets requirements and limitations on the use of credit information. For example, the 2003 law prohibits the denial, cancellation, or nonrenewal of a policy solely on the basis of credit information, without consideration of any other applicable underwriting factor independent of credit information.

The testimony also indicated that the 2003 law also provides consumer protections. These protections include requiring disclosure to the consumer at the time of an application that the company may use credit information and requiring the disclosure to the consumer if the use of credit information results in an "adverse action," such as a higher rate or refusal to insure. As of February 2006, approximately 45 states had enacted statutes to address the use of credit information in personal lines insurance. Of the states with laws in place, about 15 are revisiting their laws in attempts to either repeal the laws, add more restrictions, or to completely prohibit the use of credit for predicting future losses.

Security Freeze Legislation

During the course of the committee's study of identity theft, the committee received information regarding security freeze legislation. A security freeze or credit freeze is a tool available to a consumer to lock or "freeze" the consumer's credit report and credit score. When a consumer places a security freeze on the consumer's credit report, all third parties, such as credit lenders and other companies, whose use is not exempt under law, are unable to access the consumer's credit report or credit score without the consumer's consent. The committee received testimony that 23 states have enacted security freeze legislation.

According to testimony from the Attorney General's office, in light of escalating identity theft occurrences and theft or security breaches relating to the storage and collection of confidential personal and financial information, the Attorney General believes it is very important for North Dakota to implement security freeze legislation to provide additional protection to North Dakota consumers. It was noted the Attorney General considered introducing security freeze legislation during the 2005 legislative session but it was late in the legislative process and he opted to research and consider security freeze legislation for the 2007 legislative session. According to the testimony, of the 23 states that have enacted security freeze legislation, 18 made the security freeze available to all consumers, not just identity theft victims. According to the testimony, the Attorney General prefers the security freeze tool be available to all North Dakota consumers. A security freeze should apply to all types of new account fraud and should not be limited to the extension of credit. It was emphasized that it is important that a security freeze be easy to use. It was noted that Congress has legislation pending, the Financial Data Protection Act of 2006, which would preempt all state laws that regulate data security breaches and security freezes. According to the testimony, the Attorney General and 48 other Attorneys General sent a letter to congressional leaders urging them, in the event of preemption, to adopt strong legislation regarding security breach notification and strong security freeze legislation, enforceable by the states' Attorneys General.

The testimony indicated that the Attorney General is preparing a bill draft on security freezes. It was noted the legislation is somewhat controversial in the credit reporting community. It was also noted such a freeze would cause a person delays in obtaining credit.

Testimony from the North Dakota Bankers Association indicated that uniformity of security freeze legislation among states is a concern for banks. It was emphasized that in considering identity theft legislation it is important to keep in mind that North Dakota and South Dakota have the least amount of identity theft. It was noted that security freeze legislation is a new tool so there is not much data available on its effectiveness.

Recommendation

The committee recommends Senate Bill No. 2040 to prohibit third parties from assisting and facilitating consumer fraud upon the consumers in this state.

DEFINITION OF DEMENTIA-RELATED CONDITIONS STUDY

Senate Concurrent Resolution No. 4027, as passed, provided for a study of the need for dementia-related services, standards, and practices for caregivers and a review of the legal and medical definitions used for dementia-related conditions and the funding for programs and services for individuals with dementias. Testimony in support of Senate Concurrent Resolution No. 4027 indicated that because the number of individuals with Alzheimer's disease and related dementia in the state will continue to increase, there is a need to determine whether North Dakota has adequate services to care for these individuals. By Legislative Council directive, the scope of the study was limited to a review of the legal and medical definitions used for dementia-related conditions.

Dementia

Dementia is not a specific disease. It is a descriptive term for a collection of symptoms that can be caused by a number of disorders that affect the brain. Individuals with dementia have significantly impaired intellectual

functioning that interferes with normal activities and relationships. An individual may also lose the ability to solve problems and maintain emotional control and may experience personality changes and behavioral problems, such as agitation, delusions, and hallucinations. A diagnosis of dementia is made only if two or more brain functions, such as memory and language skills, are significantly impaired without loss of consciousness. Some of the diseases that can cause symptoms of dementia are Alzheimer's disease, vascular dementia, Lewy body dementia, frontotemporal dementia, Huntington's disease, and Creutzfeldt-Jakob disease. Physicians have identified other conditions that can cause dementia or dementia-like symptoms, including reactions to medications, metabolic problems and endocrine abnormalities, nutritional deficiencies, infections, poisoning, brain tumors, anoxia or hypoxia (conditions in which the brain's oxygen supply is either reduced or cut off entirely), and heart and lung problems. In some circumstances, dementia may be temporary or is reversible. Some common causes of dementias that may be reversible include brain disease, such as tumors, subdural hematoma, and hydrocephalus; depression; negative drug interactions; drug overdose; alcohol abuse; malnutrition; heart disease; traumas that cause concussions or contusions; metabolic or endrocrine disorders; infections; and environmental changes.

Alzheimer's Disease and Related Dementias

Well-known diseases that cause dementia include Alzheimer's disease, multi-infarct dementia, Parkinson's disease, Huntington's disease, Creutzfeldt-Jakob disease, Pick's disease, and Lewy body dementia. A description of each disease, as provided by the Alzheimer's Association, is:

1. Alzheimer's disease is a degenerative disease that attacks the brain, begins gradually, and progresses at a variable rate. Alzheimer's disease results in impaired memory, thinking, and behavior and can last from three to 20 years from the time of onset of symptoms.
2. Multi-infarct dementia, or vascular dementia, is a deterioration of mental capacity caused by multiple strokes (infarcts) in the brain. These events may be described as mini strokes, where small blood vessels in the brain become blocked by blood clots, causing the destruction of brain tissue. These strokes may damage areas of the brain responsible for a specific function as well as produce general symptoms of dementia. As a result, multi-infarct dementia is sometimes misdiagnosed as Alzheimer's disease.
3. Parkinson's disease is a progressive disorder of the central nervous system. In Parkinson's disease certain brain cells deteriorate for reasons not yet known. These cells produce a substance called dopamine, which helps control muscle activity. Parkinson's disease is often characterized by tremors, stiffness in limbs and joints, speech difficulties, and difficulty initiating physical movement. Late in the course of the disease, some patients develop dementia, Alzheimer's, or some other dementia.
4. Huntington's disease is an inherited, degenerative brain disease that causes both physical and mental disabilities and usually begins in mid-life. Early symptoms can vary from person to person but include involuntary movement of the limbs or facial muscles, difficulty concentrating, and depression. Other symptoms include personality change, memory disturbance, slurred speech, and impaired judgment.
5. Creutzfeldt-Jakob disease is a rare, fatal brain disorder that causes rapid, progressive dementia and other neuromuscular disturbances. Creutzfeldt-Jakob disease is cause by a transmissible agent. The disease can be inherited, but usually is not. Early symptoms of Creutzfeldt-Jakob disease include failing memory, changes in behavior, and lack of coordination. As the disease advances, usually very rapidly, mental deterioration becomes pronounced, involuntary movements appear, and the patient experiences severe difficulty with sight, muscular energy, and coordination. Like Alzheimer's disease, a definitive diagnosis of Creutzfeldt-Jakob disease can be obtained only through examination of brain tissue at autopsy.
6. Pick's disease, also known as frontotemporal dementia, is also a rare brain disorder, characterized by shrinkage of the tissues in the frontal and temporal lobes of the brain and by the presence of abnormal bodies, called Pick's bodies, in the nerve cells of the affected areas of the brain. The symptoms are similar to Alzheimer's disease, with a loss of language abilities, skilled movement, and the ability to recognize objects or people. Initial diagnosis is based on family history, symptoms, tests, and ruling out other causes of dementia. A definitive diagnosis of Pick's disease is usually obtained at autopsy.
7. Lewy body dementia is an irreversible form of dementia associated with abnormal protein deposits in the brain called Lewy bodies. Symptoms of Lewy body dementia are similar to Alzheimer symptoms and include memory loss, confusion, and difficulty communicating. Hallucinations and paranoia also become apparent in the earlier stages of the disease and often last throughout the disease process. Although initial symptoms of Lewy body dementia may be mild, affected individuals eventually develop severe cognitive impairment. There is no treatment available for Lewy body dementia.

2005 Legislation

Several bills enacted in 2005 affected the services provided for individuals with Alzheimer's disease or related dementia. House Bill No. 1190, which related to

the policy of determining further expansion of basic care facilities in the state, stated the two circumstances under which basic care beds may be added between August 1, 2005, and July 31, 2007, provided the process for transferring of basic care beds, and addressed requirements for basic care beds acquired by Indian tribes. House Bill No. 1191 related to the policy of expansion of nursing facilities in the state. The bill retained one exception to limiting expansion of nursing facility beds, allowing a facility to revert a basic care bed to a nursing bed. The bill also allowed transfers of beds from one facility to another and provided a nursing bed that is converted to a basic care bed may be transferred as a basic care bed, but that bed may not then be relicensed as a nursing bed. In addition, the bill addressed requirements for nursing beds acquired by Indian tribes.

Testimony and Committee Considerations

The committee, in its study of the legal and medical definitions used for dementia-related conditions, received testimony from representatives of the Real Choice Systems Change Task Force, the Minnesota-North Dakota Alzheimer's Association, and the Department of Human Services regarding the study and recent projects, including the Alzheimer's Disease Demonstration Grants to States Program and the Real Choice Systems Change Grant Program. The committee also received testimony regarding concerns about problems with a statutory definition of a terminal condition.

Alzheimer's Disease Demonstration Grants to States Program

The committee received testimony regarding the federal Alzheimer's Disease Demonstration Grants to States Program, which was established under Section 398 of the Public Health Service Act [Pub. L. 78-410], as amended by Public Law 101-157 and by Public Law 105-379, the Health Professions Education Partnerships Act of 1998. The program is administered by the Administration on Aging, which is an agency within the United States Department of Health and Human Services.

According to the testimony, the program's mission is to expand the availability of diagnostic and support services for persons with Alzheimer's disease, their families, and their caregivers, as well as to improve the responsiveness of the home and community-based care system to persons with dementia. The program focuses on serving hard-to-reach and underserved individuals with Alzheimer's disease or related dementia. The program awarded demonstration grants to 38 state government agencies in fiscal year 2005, including the North Dakota Department of Human Services through the Aging Services Division.

The committee received testimony that the grant awarded to the Department of Human Services is in the amount of $261,150 per year for up to three years. The purpose of the North Dakota program is to increase dementia identification, treatment, and caregiver respite with a special focus on rural areas and American Indian reservations. Two medical systems will provide protocols, tools, and training to the medical community to facilitate assessment, treatment, and referral for enhanced respite services. The grant requires a 25 percent nonfederal match the first year, 35 percent the second year, and 45 percent the third year. The Dakota Medical Foundation has committed to providing a portion of the match for each of the three years of the project. The remainder of the match is required of the contractors who will be providing services funded by the grant. No state general fund money is budgeted for the grant.

The committee received testimony that Alzheimer's disease is growing at an alarming rate. According to the testimony, this growth will impact in-home services, long-term care services, and the Medicaid and Medicare programs. According to the testimony, in 2000 there were 16,000 North Dakotans with Alzheimer's disease. The testimony estimated that the number will grow to 20,000 by 2025.

Real Choice Systems Change Grant Program

In September 2004 a grant was awarded to the Aging Services Division of the Department of Human Services. The purpose of the $315,000 three-year grant is to provide a single point of access to long-term support and care services for the elderly and individuals with disabilities. The Department of Human Services has contracted with the North Dakota Center for Persons with Disabilities at Minot State University to conduct the project. The project, known as the Real Choice Systems Change Grant Rebalancing Initiative, is working to develop a plan for rebalancing of funds between long-term care services and those services provided in home or community settings. The project is also looking at developing a new system for providing a single point of entry for services for elderly and individuals with disabilities who are considering long-term care and home and community-based services. The project involves bringing together representatives from public and private organizations that play a role or are interested in assuring that North Dakota elderly and persons with disabilities have options and access to the continuum of long-term care services in the state.

The committee received testimony from a representative of the Real Choice Systems Change Task Force regarding the program. According to the testimony, one of the goals of the Real Choice Systems Change Task Force is to support family caregivers. It was noted that many people with Alzheimer's and related dementia can be cared for at home. According to the testimony, it is important to look at the legal and medical definitions of dementia because of how complicated the diseases are and because people with dementia often fall between the cracks in our legal and medical systems. The testimony indicated that a person with dementia may look very healthy physically and may present very well in a situation such as a guardianship, conservatorship, or power of attorney proceeding. It was noted, however, that person may later not remember anything about the proceeding. It also was noted social workers are often available to help families obtain

services for persons afflicted with dementia-related conditions. According to the testimony, although a definitive diagnosis of Alzheimer's disease can be made only at the time of autopsy, by process of elimination, Alzheimer's disease can be diagnosed with about 90 percent accuracy. It was noted that North Dakota ranks first in the nation in the percentage of its population over age 85.

Definition of Terminal Condition

During the course of the study, the committee received information that the need for this study was based more upon a concern about the North Dakota Century Code's definition of terminal condition than the definition of dementia. According to the information, an attorney who prepares health care powers of attorney found the definition of terminal condition in North Dakota law was overly restrictive, unreasonable, and difficult to use in practice. Before the 2005 legislative session, the definition contained in NDCC Section 23-06.4-02(7) provided that a "'terminal condition' means an incurable or irreversible condition that, without the administration of life-prolonging treatment, will result, in the opinion of the attending physician, in imminent death. The term does not include any form of senility, Alzheimer's disease, mental retardation, mental illness, or chronic mental or physical impairment, including comatose conditions that will not result in imminent death." The information also indicated that the Minnesota definition of terminal condition contained in Minnesota Statutes Annotated Section 145B.02(8) was much more useful for medical professionals and did not have the unnecessary general restrictions of the North Dakota definition. The Minnesota statute defines terminal condition as "an incurable or irreversible condition for which the administration of medical treatment will serve only to prolong the dying process."

North Dakota Century Code Chapter 23-06.4, the Uniform Rights of Terminally Ill Act, was repealed by 2005 Session Laws Chapter 232, Section 19. According to the information received by the committee, the 2005 revisions to Chapter 23-06.5, which contain the requirements for health care directives, no longer include a definition of terminal condition. The chairman indicated that, in light of the repeal of Chapter 23-06.4 and the revisions to Chapter 23-06.5, regarding health care directives, the issues with the definition of terminal condition and dementia did not require further action by the committee.

Conclusion

The committee makes no recommendation as a result of this study.

DRUG USE AND ABUSE REPORT OF THE ATTORNEY GENERAL

The committee received a report from the Attorney General on the current status and trends of unlawful drug use and abuse and drug control and enforcement efforts in the state as required by NDCC Section 19-03.1-44. The report evaluated five sets of statistics, each of which provided a different aspect of the substance abuse problem in the state. The first set evaluated the youth risk behavior survey results. While tobacco, alcohol, and drug use by the state's youth in grades 7 through 12 has steadily decreased since 1999, North Dakota continues to rank near the top in youth who binge drink, drink while driving, and ride with persons who have been drinking. North Dakota's youth tend to be near the top of all states when it comes to alcohol use.

The second set of statistics contained in the report dealt with controlled substance testing. The number of narcotics cases submitted for analysis has steadily increased from 1,735 in 1999 to over 2,900 in 2005. The figures represented a 70 percent increase during the five-year period. The number of exhibits analyzed increased from 5,535 in 1999 to 10,312 in 2005, an 86 percent increase. The exhibits involving marijuana and methamphetamine constituted the majority of exhibits analyzed with marijuana leading the way. The testing indicated that the potency of marijuana is ever-increasing.

The third set of statistics, which was compiled by the Department of Human Services, dealt with treatment information. The department's information is derived from screening interviews conducted when individuals seek treatment at regional centers. Statistics from 2001 through 2004 reaffirm that alcohol, by far, remains the substance of choice in this state, followed by marijuana and methamphetamine and amphetamines. Patients identifying methamphetamine as their primary substance rose by 175 percent between 2002 and 2004. Patients who identified marijuana as their primary substance decreased by 9 percent.

The fourth set of statistics, which was compiled by the Department of Corrections and Rehabilitation, was an analysis that examined the number of admissions for drug offenses for each year. The data provided information on the number of offenders who were court-ordered to treatment, the number of offenders referred to chemical dependency treatment, and the number of offenders who completed chemical dependency treatment. The state has seen a steady increase in each area since 1999. The number of admissions for drug offenses increased by 28 percent between 2002 and 2004 and the number of offenders who completed chemical dependency treatment increased by 15 percent during the same period. The waiting list for criminal offenders who want to get into treatment increased from 44 in 2003 to 95 in 2004. According to the report, this statistic merits further review in future years to ascertain whether the system is handling the treatment needs of those sentenced to incarceration.

The fifth set of statistics, an overview of current law enforcement efforts to combat unlawful drug trafficking and usage, was compiled by the Bureau of Criminal Investigation. The bureau's 2004-05 enforcement activities included partnering with the Highway Patrol, State Radio, and the National Guard to create a fusion center located at Fraine Barracks to receive and disseminate homeland security intelligence to the proper agencies; supporting the concept of intelligence-driven investigations by developing a postseizure analysis team

to help facilitate information sharing among task forces, analysts across the nation, and the international border enforcement teams; working with the Federal Bureau of Investigation and the Bureau of Indian Affairs to establish a Safe Trails Task Force to focus on narcotics enforcement in and around the state's Indian reservations; and conducting a one-week narcotic investigation school for law enforcement officers and conducting a methamphetamine summit in Minot.

According to the report, methamphetamine lab seizures decreased as a result of the vigilant efforts of the nine task forces, legislation regulating the sale of over-the-counter medications containing precursors for manufacturing, and the public's willingness to call law enforcement regarding suspicious activities. It was noted that although the number of methamphetamine lab busts in the state continues to decrease, most of the methamphetamine used in the state is not manufactured in the state. According to the report, most of the methamphetamine used in the state appears to be coming from Mexico. The number of methamphetamine lab busts is down but methamphetamine use is not. It was pointed out that the Byrne grant, a previous source of federal funds for law enforcement efforts, is drying up. According to the report, that grant was used to fund the salaries for local law enforcement.

It was noted that there is a new federal law that restricts the sale of the precursor drugs used in the manufacture of methamphetamine. According to the report, after North Dakota passed its law regarding the sale of these precursor drugs, Minnesota, Montana, South Dakota, Manitoba, and Saskatchewan passed similar legislation, making it very difficult to obtain the precursor drugs in this region.

The report indicated that new information regarding the effectiveness of the treatment for methamphetamine addiction indicated that the treatment can be effective but the treatment must be appropriate. In some cases, it was noted, the appropriate treatment may need to be intensive and inpatient.

Finally, the report indicated that a pilot project to provide locks for anhydrous ammonia tanks has been very successful. No theft of anhydrous ammonia has occurred in any county in which the project was implemented. The report indicated that the Legislative Assembly may want to consider implementing the program statewide but an evaluation should be done as to whether the decrease in anhydrous ammonia thefts is due to that pilot project or if it is because of the restrictions in the sale of the precursor drugs.

REPORT OF COMMISSION ON LEGAL COUNSEL FOR INDIGENTS

The committee received periodic reports from the Commission on Legal Counsel for Indigents and the director of the Commission on Legal Counsel for Indigents regarding the implementation of the indigent defense system, data on the indigent defense contract system, and the establishment of public defender offices as provided in NDCC Section 54-61-03 and 2005 Session Laws Chapter 538, Section 9. The initial report of the commission indicated that Ms. Robin Huseby had been hired to serve as director of the commission. The director assumed her duties on November 1, 2005, with her office located in Valley City. The director's staff includes an administrative assistant and an assistant director. The director provided regular reports to the committee regarding the status of the new indigent defense system.

As of January 1, 2006, all indigent defense duties and funding, including the fees that are deposited in the indigent defense fund, were transferred from the Supreme Court to the commission. The reports indicated that because of the lack of attorneys who are willing to take an indigent defense contract in certain parts of the state, the commission made the decision to open public defender offices in Minot, Dickinson, and Williston. The Minot office employs three attorneys, one paralegal, and one support staff person and the Dickinson and Williston offices each employ two attorneys and one support staff person. All positions are classified state employees. The reports indicated that the public defender offices in all three cities are running smoothly. The Minot public defender office, which began operations on March 20, 2006, had closed approximately 300 cases to date. It was noted that the local bar associations are providing counsel in all cities to handle cases in which there are conflicts. According to the reports, the conflict attorneys are working under the auspices of the commission and local public defenders. It was noted that reports from court personnel who work with the public defender offices have been very positive. According to the reports, public defenders are assigned only new cases; all cases that existed before the creation of the public defender offices continue to be handled by the attorneys who were originally assigned those cases.

The reports also indicated that the commission plans to open a public defender office in Grand Forks in the spring of 2007. The office will have three attorneys and a support staff. According to the report, the commission has had some difficulty maintaining indigent defense service in Grand Forks using only contract attorneys. It was noted that the commission is considering the prospect of an internship program with the University of North Dakota School of Law.

According to the reports, the commission holds monthly meetings to address issues that arise in the implementation of the state's new indigent defense system. The commission, which has approved its budget for the upcoming biennium, requested an optional package of $1.6 million to establish full public defender offices in Fargo and Bismarck. According to the reports, if public defender offices are established in Bismarck and Fargo, the public defenders would handle about one-third to one-half of the cases with the remainder of the cases handled by contract attorneys. According to the reports, a contract that was lost in Fargo cost the commission $60,000. The reports indicated that using public defenders helps alleviate spikes in costs. It was reported that not all contract attorneys are pleased with the change to public defender offices.

The commission also reported that it has been working on standards for the commission, public defenders, and contract attorneys. The commission has developed a web page that contains basic information, forms, standards, newsletters, and contact information. According to the reports, the commission eventually would like to use the web page as a vehicle for the attorneys to report their hours. The commission conducted its first annual attorney training in May 2006. Seventy-five attorneys participated in the training.

It was noted that an issue has been raised by the Supreme Court as to whether NDCC Section 12.1-04.1-02 should be amended to provide that the commission is responsible for mental health evaluation costs. The reports indicated that the commission plans to prepare a bill draft for the 2007 legislative session which will address this section as well as other issues that have arisen since the new indigent defense system was implemented. It was noted that the commission is reviewing the qualifications for indigency as well as ways to recoup costs from those persons who are later able to pay.

According to the reports, the indigent defense system in the state will benefit from a public defender system. The reports indicated that use of public defenders allows for more consistency, especially financial consistency, than the contract system.

NORTH DAKOTA LOTTERY REPORT

The committee received a report from the director of the North Dakota lottery regarding the operation of the lottery pursuant to NDCC Section 53-12.1-03. According to the report, the lottery's mission is to maximize net proceeds for the benefit of the state by promoting entertaining games; providing quality customer service to retailers and players; achieving the highest standards of integrity, security, and accountability; and maintaining public trust.

The lottery employs eight full-time employees and two part-time operators. For the 2003-05 biennium, the lottery's operating revenue was $25.3 million. It was noted that this was more than twice the amount initially projected. The state general fund revenue was $7.19 million, which was five times the amount initially projected. For the 2005-07 biennium, the lottery's projected sales are $38.5 million with state general fund revenue of $10 million. According to the report, the lottery is on track to meet or exceed those projections. For the period March 25, 2004, through December 31, 2005, total sales were $35.1 million. For the period March 25, 2004, to date, total operating revenue has exceeded $40 million. Nearly 1.7 million winning tickets sold in the state. As of December 31, 2005, the total value of unclaimed winning lottery tickets was $483,000. About $7,000 to $8,000 of prize money per week goes unclaimed. The money from unclaimed tickets is used for expenses and lottery net proceeds.

According to the report, at least once per year the lottery transfers its net proceeds, less the Multi-State Lottery Association grand prize and set prize reserve amounts and the $200,000 allocated to the compulsive gambling prevention and treatment fund, to the State Treasurer for deposit in the state general fund. The report indicated that the state's 32 cents per dollar in net proceeds is the highest among states of similar size. It was noted that North Dakota is the only state that is restricted to multistate online lottery games.

According to the report, to maximize revenue for the state general fund, the lottery must offer exciting and attractive games that add value to the lottery's product mix for players to play, license retailers that are in convenient locations to sell tickets, create effective annual marketing plans, provide quality customer service to retailers and players, and control operating expenses. According to the report, the saturation point for North Dakota is probably five or six lottery games. It was noted that total sales are highly affected by the size of the game's jackpot with larger jackpots generating higher sales. During the 2005-07 biennium, the lottery plans to launch one or two new games that add value to the lottery's product mix. One of those games--2by2--was launched on February 2, 2006. The lottery launched a subscription service on November 1, 2005. As of the date of the report from the lottery, there were 527 subscriptions for $45,760 in subscription sales.

According to the report, in accordance with state law, the lottery established a debt setoff program in which a lottery prize of $600 or more is used to set off a delinquent debt owed to a state agency or collected through a state agency on behalf of a third party. As of February 23, 2006, there had been 11 prize claims of $600 or more. There have been three claims against those prizes totaling $2,904.

Scientific Games International, Inc., provides the lottery with online and secondary online gaming systems hardware, games management system software, retailer telecommunications network, 400 lottery terminals, electronic scrolling and logo backlit signs, primary and secondary internal control systems, and five field technicians to provide service to lottery retailers. The lottery's online and secondary online gaming systems are collocated with the primary and secondary online gaming systems of the Montana lottery at a Scientific Games-owned computer data center in Helena, Montana. According to the report, the lottery's online gaming systems were scheduled to be moved to Oklahoma City, Oklahoma, in March 2006.

A five-member Lottery Advisory Commission serves as a policy advisor to the Attorney General and the director of the lottery and as the audit committee of the lottery. The commission provides a perspective on issues and operation of the lottery and presents ideas and recommends solutions while it represents the interests of the state, public, and lottery industry. The commission meets at least quarterly and has met 18 times since the members were appointed on July 1, 2003. A volunteer 12-member retailer advisory board is an informal board that serves as a front-line retailer and player advisor to the lottery.

According to the report, there has been little turnover in retail sites. The 400 lottery terminals are located in 127 cities throughout the state. Some terminals in remote parts of the state are not meeting the required sales quota. The lottery requires retailers to have a

minimum of $250 per week in ticket sales. It was noted that the lottery lost 10 retail sites during the first year, eight of which were located in liquor stores. At the time of the report, there were plans for removing terminals at three locations. It was noted that the lottery has to strike a balance between trying to service all areas of the state and looking at the bottom line.