

2009 HOUSE JUDICIARY

HB 1207

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1207

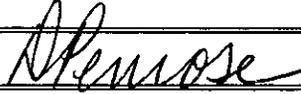
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/2/09

Recorder Job Number: 8310, 8355

Committee Clerk Signature



Minutes:

Ch. DeKrey: We will open the hearing on HB 1207.

Rep. Glen Froseth: Sponsor, support (attachment and amendment).

Rep. Delmore: On section 1, on the overdrafts of trust accounts, to whom would they be disclosed and what would be the process for that.

Rep. Glen Froseth: The estate and/or the heirs of the estate.

Rep. Delmore: Has there been any recourse in trying to find out what happened to the money.

Rep. Glen Froseth: I'm sure at the trial it was discussed. I believe the money is gone.

Rep. Delmore: Have you worked with the Bar Association on these amendments or during the process to see what recourse we can have.

Rep. Glen Froseth: Yes, they brought some suggestions on improving the language in the bill.

Chairman DeKrey: Thank you.

Sen. John Andrist: Sponsor, support. I call this the Pete Wittier bill. He wants to make sure that no one else gets \$300,000 stolen from them. Pete Wittier is a constituent of mine. We feel that attorneys with check writing authority should have someone checking up on them.

There is no bonding required for the attorney to be to handle the money of an estate, there is no real protection is that lawyer is a bad guy. I worked with the Bar Association on this. They wanted to put this into their Rules. I want this put into law. They worked revising the language on the first part; I think they offered the language on part two; to strengthen it more. This primarily happens in probate law, where attorneys could be friends of their clients and then becomes the PR and stays on as the attorney.

Ch. DeKrey: Thank you. Further testimony in support.

Bill Neumann, State Bar Association: Support. First, the Bar Association is complex. We support section 1, and we're neutral on section 2. We support section 1 because it would help facilitate a proposed Supreme Court rule; the Supreme Court wants to promulgate a rule in the very near future. It will require disclosure of photographs. After that correspondence with Jim Ganges, at the supreme court, you might want to consider in the first line of section 1, strike out supreme court and insert disciplinary board. That would work better. The Supreme Court doesn't want to worry about these things in the beginning at the front end. They have a system of dealing with them at the end, when a complaint is filed against the attorney. I think this is a worthwhile idea. Section 2, the State Bar Association takes the position that this is something they would rather see in the Supreme Court rule and promulgated in the near future. Under the constitution, the supreme court's authority regarding who disciplines attorneys is a shared authority; in the section it says unless otherwise provided for in law. The bar association does not oppose the concept contained in section 2 at all.

Rep. Delmore: Does the disciplinary board, which we created before, and everybody's not very happy with the discipline that's been going on with some lawyers who've been in trouble, a little bit shady for a while. Is there not a reason to include that information to the supreme court as well as the disciplinary board?

Bill Neumann: I don't think it would be any harm. The Supreme Court would simply pass it on to the disciplinary board for an investigation. In addition to the section in the bank, there are confidentiality laws that permit the banks to do this, and then the supreme court wants to promulgate a rule to require lawyers to have their banks do this, when banks are holding their trust accounts.

Rep. Delmore: Would there be an extra cost to the consumer, because they need someone else looking over the shoulder of the first lawyer.

Bill Neumann: Probably it would. I don't know if it would be a great cost. There is going to be a rule promulgated at the Supreme Court that says this needs to be done.

Rep. Koppelman: Section 2, what would be the penalty if there were violated.

Bill Neumann: I would have to go back and look to see if there were a general penalty in the chapter. This would add a new section in 27-13. If there is an existing chapter, it already deals with the conduct of an attorney and there may be a general penalty in there. I know there is something in the chapter that says it's a misdemeanor.

Rep. Klemin: In regard to section 2, there are a lot of attorneys who graduate from law school that don't practice law, but they are still attorneys. Would this apply to them?

Bill Neumann: Yes, I think it would, the way it is written.

Rep. Klemin: What we're really trying to get at, you can practice law and not have a license to practice law.

Bill Neumann: I think that what we are trying to get at, is any lawyer that might be tempted to do inappropriate things with somebody else's property, whether they are in private practice or not. I think we have generally seen this problem where the lawyer is a practicing attorney.

Rep. Kretschmar: Do you think we should add "attorney licensed to practice law".

Bill Neumann: Yes, I think that would be fine. When I used the term "attorney" I was generally thinking of someone licensed to practice law. That probably wouldn't do any harm.

Rep. Klemin: A person with a law degree who is not practicing law, he's serving as a fiduciary, and he would still do it. You would still need to hire another lawyer to represent the entity.

Bill Neumann: I think you're right.

Rep. Klemin: Has to be represented by another attorney. What does that mean? If he writes a letter to the beneficiary, does it have to go through a second attorney, or are we talking about in a legal proceeding or in court.

Bill Neumann: I think any PR who has retained the services of another attorney and is represented by another attorney.

Rep. Klemin: I know in trust law, trusts aren't in court all that much. But there is a lot of business that goes on with trusts, where the attorney who is serving as a trustee has to do certain duties; do you interpret this to mean that you would have to do those duties through a second attorney.

Bill Neumann: I would certainly think that you could retain the services of the second attorney to give him legal advice. Now if you interpret the word "representation" to mean only to represent in court, then we should use a different word, because that's too narrow a concept.

Rep. Kretschmar: In the last sentence of section 2 regarding the family situation, it would seem to me that not every family is that trusting. Some families are quite hostile to each other. I wondered why the exception was in there, I mean maybe they should be covered also.

Bill Neumann: There has been a lot of discussion about that, about whether that exception should be in there or not. I have mixed feelings about it myself. This language originally came

from the Supreme Court's Joint Standards Committee, which recommended this rule. We went back and forth on this issue.

Chairman DeKrey: Thank you. Further testimony in support.

Marilyn Foss, ND Bankers Association: Support. In section 1, this concept that the banks should be reporting overdrafts in lawyer trust accounts was presented to the ND Bankers Association and other people earlier this year. Our concern with it was the confidentiality laws, which are varied and comprehensive and there are a number of obstacles to the kind of disclosure that was originally proposed. But we did work with the Bar Association and the Attorney Standards Committee and presented this language to our legislative committee which has members on boards of banks and also among smaller banks in the state, and they indicated that with this language they would be comfortable providing overdraft notices, at the same time that they send it to the attorney, they would simply copy to the disciplinary board. We were told that this was modeled on legislation in Minnesota. We think that this can work.

Rep. Griffin: In section 2, when a bank acts as a manager of a trust, is there a requirement under federal or state law requiring that the person be an attorney.

Marilyn Foss: There are two things when a bank serves as a trustee – there will be an attorney someplace in the process because banks cannot act as their own attorney, there are things which they can and cannot draft trust documents. They work cooperatively with attorneys in the trustee circumstances. I think virtually all the banks when they are representing an estate, a PR would be a separate attorney for the estate.

Rep. Klemin: On those cases, you are talking about the attorney not serving as the fiduciary; rather the bank or trust dept or trust companies actually are the fiduciaries, isn't it.

Marilyn Foss: Yes.

Rep. Klemin: Must be represented by another attorney...I'm thinking in the context of trustees. Trustees, as you know having worked on the Trust Code project, have a lot of duties that don't have anything to do with going to court or things like that. Would you interpret this as meaning that if a trustee, who happened to be an attorney, wanted to send a letter to the beneficiary as required by the trust document, that the letter has to go through another attorney.

Marilyn Foss: I'm not sure that I would represent that or interpret it that way. I would think that ordinary communication between the trustee and beneficiary would not have to do this. Even a non-lawyer can do this without running into problems with the unauthorized transactions. Even a lawyer who served as trustee could do that. Truthfully I find myself as a trustee for a family trust, and I'm not looking at this as a big opportunity to take advantage of the trust. I don't think the intention of this is to relieve the ordinary responsibilities of the personal representative or a trustee who doesn't have to be an attorney.

Rep. Kretschmar: Under section 1, it talks about if an attorney's trust account is overdrawn, would the bank call up the Supreme Court and say an attorney's account is overdrawn, or would the bank wait until the disciplinary board or somebody ask if the account has been overdrawn.

Marilyn Foss: I do not know the requirements of the rule-making process. The attorney will have to let us know when he opens the account under which overdraft on the account will be reported to the attorney and the disciplinary board.

Rep. Koppelman: As I looked at 6-08-16.2, that deals with sort of generically with people who are agents, and if we change the language as you suggest, in ND Supreme Court, is the ND disciplinary board, is that a generic term, or is that the specific term for that board that applies to attorneys specifically to this section as referred to.

Bill Neumann: There is a specific entity called the Disciplinary Board exists under Supreme Court rules.

Rep. Koppelman: This is a section that deals primarily with estates, not attorneys, so can you just say disciplinary board, that it would be identified as the disciplinary board of the Supreme Court.

Bill Neumann: I think we are looking for 6-08.1 and .2. This is a list of exemptions, 6-08.1, to the general requirement of bank confidentiality and this would add one more exemption or exception to the confidentiality requirement, saying that this is okay for bank to pass on.

Rep. Koppelman: So the generic name of ND Disciplinary Board automatically references attorneys.

Bill Neumann: This is a specific thing that references disciplined attorneys.

Rep. Klemin: Just to make sure that we are on the same wavelength isn't that the disciplinary board of the Supreme Court.

Bill Neumann: I'm not sure how it's referred to. It's created by a Supreme Court rule.

Rep. Klemin: We can't just say in this law, the ND Disciplinary Board, like the ND Public Service Commission. We need the proper wording. We would probably have to say the Disciplinary Board of the Supreme Court.

Bill Neumann: Certainly the clarifying language would be fine.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

(Reopened in the afternoon session)

Chairman DeKrey: We will take a look at HB 1207.

Rep. Delmore: I move the Froseth amendment.

Rep. Dahl: Second.

Chairman DeKrey: Voice vote, motion carried.

Rep. Klemin: I move to further amend, under section 1, should read "A disclosure made to the disciplinary board of the ND supreme court or"....

Rep. Koppelman: Second.

Chairman DeKrey: Voice vote, motion carried.

Rep. Klemin: I further amend by removing the last sentence in section 2, "This section does not apply.....".

Rep. Delmore: Second.

Chairman DeKrey: Voice vote, motion carried. We now have the bill before us as amended.

Rep. Koppelman: Two other issues come up on this bill, first of all I don't think it addresses the question of the penalty. I looked into it, and it appears that there are other sections there that specifically have a penalty; a lot of them are the same – class A misdemeanor and some have civil damages. But I'm not sure if this has a penalty the way it's written.

Rep. Klemin: Why do you need that penalty. If you're going to court and the fiduciary is representing himself, the judge is going to say that you can't do that, or another attorney is going to say that you can't do that. That's why a corporate officer can't go to court representing a corporation because you have to be a lawyer.

Rep. Koppelman: My only question is, are these abuses occurring in court, or are they occurring when someone takes on this duty. I think this bill tries to prevent that from happening, so I would assume that there has to be a penalty for doing it. I think once you reach court, if someone was doing this, maybe the court will catch it.

Rep. Klemin: What about situations where people or attorneys are currently serving in one of these capacities, are they going to be subject to a penalty on August 1, 2009 if this becomes effective.

Rep. Koppelman: That's a good question. I think that might be something for the committee to think about. Would we want to make it retroactive or exclude anyone who is currently doing it.

Rep. Klemin: I don't think it would be retroactive; I think anybody who had a dual capacity would have to get out of one of their jobs on August 1.

Rep. Koppelman: I think that would be the case whether there was a penalty or not.

Rep. Klemin: I'm not so sure I see a need for having a separate criminal and civil punishment.

Rep. Koppelman: I think the intent of this is to prevent it, so if we enact it into law, and we don't have a penalty, are we doing any more than the court simply having it as a court rule. I think the intent of the sponsors is to say, well let's do something in law that prevents that, or punishes them.

Rep. Klemin: We have penalties if somebody is violating the rules, the Professional Responsibility, if there was a violation of the statute.

Rep. Kretschmar: I want to amend section 2, after "An attorney" insert "licensed to practice law" serving as a fiduciary of an estate...".

Rep. Wolf: Second.

Rep. Kretschmar: I think we want to make it perfectly clear that someone who can't practice law has to have another attorney if he's being the fiduciary. Some attorneys may not be licensed to practice in our state.

Ch. DeKrey: Voice vote, motion carried.

Rep. Koppelman: Just looking at 27-13-08, for example which deals with misconduct of an attorney it talks about treble civil damages and a class A misdemeanor and has to do with deceit, delaying a client's suit, receiving money or property on account...there are other things

in there like that, all dealing with attorney's actions and most of them have penalties. I move that we add a class A misdemeanor to the bill.

Rep. Hatlestad: Second.

Rep. Delmore: Call the question.

Chairman DeKrey: Voice vote. Motion failed. We now have the bill before us as amended. What are the committee's wishes.

Rep. Boehning: Aren't attorneys required by law to have insurance coverage so that the family would get reimbursed. Aren't they required to be bonded.

Rep. Griffin: I was working at a private firm at the beginning of the year, and working a probate case and I didn't have insurance. I couldn't afford it.

Rep. Klemin: In any of these cases, the court can require bond if someone wants to serve as Personal Representative. Whereas for malpractice insurance, usually there is an exclusion for intentional acts or crimes. So insurance companies won't insure you against committing a crime.

Rep. Boehning: But if you have a bond, then the bond would pay for it.

Chairman DeKrey: I don't think there's a bond company out there that will sell you a bond in case I steal money.

Rep. Klemin: There are fidelity bonds, but the thing is, those cases we heard about, those are pretty bad cases, but bonds drive up the costs paid by the estate or trust or conservatorship. Do you want to drive up the cost on all of those entities to require a person be bonded. We can do that.

Rep. Boehning: Here's a rebuttal on that, doctors have to require malpractice insurance to practice, thereby driving up the cost up for what we pay. There are people out there that might be damaged.

Rep. Klemin: I don't think we require anybody to have insurance, other than people who drive cars, and some of them don't.

Rep. Dahl: Aren't we already driving up the cost by possibly requiring another attorney to be paid for here.

Rep. Koppelman: Someone asked this morning about the term "represented by"...

Rep. Klemin: It was a little vague.

Rep. Koppelman: Are we going to improve that.

Rep. Delmore: I move a Do Pass as amended.

Rep. Wolf: Second.

13 YES 0 NO 0 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Griffin

VR
2/3/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1207

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 6-08.1-02 and a new section to chapter 27-13 of the North Dakota Century Code, relating to an exemption to bank confidentiality requirements for attorney trust account overdrafts and to the conduct of attorneys.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 6-08.1-02 of the North Dakota Century Code is created and enacted as follows:

A disclosure made to the disciplinary board of the North Dakota supreme court or another state's authority with responsibility for enforcing rules of professional conduct for lawyers regarding dishonor of an instrument issued against any trust account maintained by an attorney or law firm, as these terms are defined in section 6-08-16.2.

SECTION 2. A new section to chapter 27-13 of the North Dakota Century Code is created and enacted as follows:

Attorney for attorney fiduciary required. An attorney who serves as a fiduciary of an estate, trust, or conservatorship must be represented by another attorney. The attorney who serves as fiduciary or the attorney's law firm may not serve as attorney for the fiduciary."

Renumber accordingly

Date: 2/2/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1207

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Delmore Seconded By Rep. Wolf

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	—	
Rep. Boehning	✓		Rep. Vig	—	
Rep. Dahl	✓		Rep. Wolf	—	
Rep. Hatlestad	✓		Rep. Zaiser	—	
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 0

Floor Carrier: Rep. Guffin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1207: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1207 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 6-08.1-02 and a new section to chapter 27-13 of the North Dakota Century Code, relating to an exemption to bank confidentiality requirements for attorney trust account overdrafts and to the conduct of attorneys.

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Renumber accordingly

2009 SENATE JUDICIARY

HB 1207

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1207

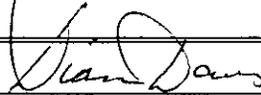
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/9/09

Recorder Job Number: 10220

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Relating to an exemption to bank confidentiality requirements for attorney trust account overdrafts and to the conduct of attorney.

Representative Glen Froseth – District 6 – Introduces the bill – see written testimony. Urges do pass.

Senator Andrist – District 2 – see written testimony. Supports a do pass.

William Neuman – ND Bar Association – Board of Governors strongly supports the first section of the bill. Their position of section 2 is that they strongly support the concept but they think it is more appropriate for a Supreme Court rule. He offers his technical assistance.

Senator Nething – States he has a problem with using attorney. Believes it should say attorney at law. It is not distinguished here. We are talking about attorney at law.

Neuman- Agrees with him.

Senator Nelson – Asks him to explain why some lines in the bill say lawyer and some say attorney.

Neuman – Says, it makes perfect sense to use Lawyer instead of attorney throughout.

Opposition

Mike Wagner – Federal Bankruptcy Trustee – See written testimony. He proposes an amendment.

Marilyn Foss – Testifying for herself. She manages a family trust but under this bill she would have to retain an attorney, she asks for what? She thinks there is work to be done in this bill relating to family situations.

Neutral

Jack McDonald – State Bar Association's Legislative Committee – He worked on the drafting of this bill and the amendment. The language concerning the family members is word for word exactly as is the Supreme Court rule that is now pending before the ND Supreme Court. The amendment essentially exempts bankruptcy trustees, bankruptcy estates and also the family members. He encourages adopting the amendment.

Senator Fiebiger – Asks for an interpretation of Section 1.

Jack McDonald – These amendments are excellent and should be considered.

Close hearing 1207.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1207

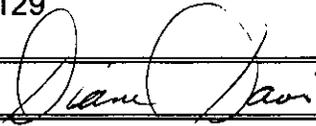
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/17/09

Recorder Job Number: 11129

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Committee work.

Committee discusses changing language from attorney to lawyer. They discuss the amendment and how it applies to estates.

Senator Nelson moves the amendment

Senator Olafson seconds

Verbal vote on the amendment, all yes

Senator Olafson motions do pass as amended

Senator Schneider seconds

Vote – 6-0

Senator Fiebiger will carry

Date: 3/17
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

AB 1207
Amendments

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended

Motion Made By Sen Nelson Seconded By Sen Olafson

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman			Sen. Tom Fiebiger		
Sen. Curtis Olafson - V. Chair.			Sen. Carolyn Nelson		
Sen. Stanley W. Lyson			Sen. Mac Schneider		

Total (Yes) _____ (N) _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Verbal - yes

REPORT OF STANDING COMMITTEE

HB 1207, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1207 was placed on the Sixth order on the calendar.

Page 1, line 15, after "required" insert " - **Exception**"

Page 1, line 17, after the period insert "This section does not apply to United States bankruptcy court proceedings or to matters in which the decedent, trustor, beneficiary, or protected individual is a spouse, child, grandchild, parent, grandparent, or sibling of the attorney serving as a fiduciary."

Renumber accordingly

2009 TESTIMONY

HB 1207

Testimony HB 1207

Chairman DeKrey and members of the House Judiciary Committee, for the record I'm Rep. Glen Froseth, representing District 6, which is all of Bottineau and Renville Counties and the north half of rural Ward County.

First, let me apologize for offering a hog house amendment and asking you to approve this amendment. Also I will be presenting my testimony in regard to the amendment.

I am introducing HB1207 in an effort to help protect the interests of heirs and the possible estates they may inherit from family members. My knowledge of laws pertaining to this issue are very limited, however HB1207 as amended, hopefully will help alleviate a problem that has allowed a couple of family estates to have been fraudulently taken by their attorneys who were also serving as Personal Representatives of the estate. As a result of these fraudulent acts, both attorneys have been disbarred and the heirs of the estates lost virtually everything.

HB1207, as amended, addresses two areas of concern which will, hopefully, put more accountability into the supervising and administering of an estate. This will allow at least two individuals to oversee transactions in regard to the estate, and permit financial institutions to disclose overdrafts in a lawyers trust account.

Section 1 of the amendment would amend Section 6-08.1-02 of NDCC to add another exemption to the bank confidentiality law to permit disclosure of overdrafts in lawyer trust accounts. This is a part of what we need to do to get better control of this problem. This section will clear the way for a Supreme Court rule requiring disclosure of trust account overdrafts to the Court's attorney disciplinary system.

Section 2 of the amendment would require a lawyer who is acting as the Personal Representative of an estate, a trustee of a trust, or as a conservatorship of the property of a protected person to have another lawyer looking over his shoulder, just to make sure the first lawyer isn't tempted to help himself to someone else's property.

This is a problem recognized by the legal profession itself, and by the judicial system. The Supreme Court will soon be considering an amendment to their Rules of Professional Conduct that will say the same thing. One of the reasons for this amendment is that the bill and the proposed Supreme Court rule will take the same approach, and will work together.

The hog house amendment to the bill improves the original draft by broadening it to include not just estates, but also trusts and conservatorships of the property of protected persons, too. The amendment will also take the proposed bill out of the Uniform Probate Code and put it into Chapter 27-13, relating to the conduct of lawyers.

I was prompted to have this legislation drafted as a result of an incident in Burke County, whereby an estate of two unmarried sisters resulted in the loss of more than \$800,000 to the estate's six heirs. This estate had been accumulated over 3 generations. This family originated in North Dakota as homesteaders before the turn of the 19th century. These homesteaders went through some tough times, including the depression years of the 1930s. However, with the family working together, they were able to pay off their mortgages and pass the farm along to their children. Eventually, the farm was inherited by two remaining daughters. Along with owning this farm, one of the ladies also worked for 40 years with the Farm Home Administration and the other worked for a telephone company in Burke County. When they had both passed away, only six heirs remained to share an estate accumulated by a hard working, dedicated, honest family . . . only to see the entire estate lost to a dishonest attorney who also served as their personal representative.

A more recent case of misappropriating client property by an attorney occurred in McLean County, and I'm sure most of you are familiar with this recent case that made local news during the past year. In this incident, a couple of estates lost more than \$600,000.

In both cases, the attorneys have been found guilty and disbarred. The Burke County attorney served 30 months in prison and was ordered to repay the estate. As of this date, the Burke County heirs have received \$15,000 from the Client Protection Fund and the ND Bar Assn., and they have received two checks from the disbarred attorney for a total of \$50.09.

I have received several letters from one of the heirs in the Burke County case, detailing their story, and indicating they have resigned to the fact that their inheritance is forever lost. Their goal is to try correct the circumstances that allowed this to happen.

HB1207 is not the entire solution, however, it may be a small step in the right direction to close some loopholes that allowed these two incidents to take place.

Chairman DeKrey and committee, I encourage you to pass HB1207.

Thank you for your consideration.

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Renumber accordingly

HB 1207

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Section 1 of the amendment would amend Section 6-08.1-02 of NDCC to add another exemption to the bank confidentiality law to permit disclosure of overdrafts in

lawyer trust accounts. This is a part of what we need to do to get better control of this problem. This section will clear the way for a Supreme Court rule requiring disclosure of trust account overdrafts to the Court's attorney disciplinary system.

Section 2 of the amendment would require a lawyer who is acting as the Personal Representative of an estate, a trustee of a trust, or as a conservatorship of the property of a protected person to have another lawyer looking over his shoulder, just to make sure the first lawyer isn't tempted to help himself to someone else's property.

This is a problem recognized by the legal profession itself, and by the judicial system. The Supreme Court will soon be considering an amendment to their Rules of Professional Conduct that will say the same thing. One of the reasons for this amendment is that the bill and the proposed Supreme Court rule will take the same approach, and will work together.

The amended bill improves the original draft by broadening it to include not just estates, but also trusts and conservatorships of the property of protected persons, too. The amendment will also take the proposed bill out of the Uniform Probate Code and put it into Chapter 27-13, relating to the conduct of lawyers.

HB 1207

I was prompted to have this legislation drafted as a result of an incident in Burke County, whereby an estate of two unmarried sisters resulted in the loss of more than \$800,000 to the estate's six heirs. This estate had been accumulated over three generations. This family originated in North Dakota as homesteaders before the turn of the 19th century. These homesteaders went through some tough times, including the depression years of the 1930's. However, with the family working together, they were able to pay off their mortgages and pass the farm along to their children. Eventually, the farm was inherited by two remaining daughters. Along with owning this farm, one of the ladies also worked for 40 years with the Farm Home Administration and the other worked for a telephone company in Burke County. When they had both passed away, only six heirs remained to share an estate accumulated by a hard working, dedicated, honest family . . . only to see the entire estate lost to a dishonest attorney who also served as their personal representative.

A more recent case of misappropriating client property by an attorney occurred in McLean County, and I'm sure most of you are familiar with this recent case that made local news during the past year. In this incident, a couple of estates lost more than \$600,000.

HB 1207

In both cases, the attorneys have been found guilty and disbarred. The Burke County attorney served 30 months in prison and was ordered to repay the estate. As of this date, the Burke County heirs have received \$15,000 from the Client Protection Fund and the ND Bar Assn., and they have received two checks from the disbarred attorney for a total of \$50.09.

I have received several letters from one of the heirs in the Burke County case, detailing their story, and indicating they have resigned to the fact that their inheritance is forever lost. Their goal is to try to correct the circumstances that allowed this to happen.

HB 1207 is not the entire solution, however, it may be a small step in the right direction to close some loopholes that allowed these two incidents to take place.

Chairman Nething and committee, I encourage you to pass HB 1207.

Thank you for your consideration.

1207 Testimony of Sen. John Andrist, District 2

Wed., March 4 – Senate Judiciary – 9:00 a.m.

You trust your money to a bank and you are protected by FDIC insurance. Government entities are protected from theft and mishandled money by bonds. When a contractor builds a large building he ordinarily has to have a performance bond.

In our society we do our best to provide protection for assets that can be dissipated by the misdeeds or shoddy performance of another.

I call this the Pete Willyard bill. A retired Bowbells school teacher, Pete lost a huge inheritance of \$200 to \$300,000 when a philandering attorney handling the estate of a couple of aunts made off with the money. It happened to others in the Garrison community not so long ago. It's little satisfaction to those who have been victimized that these now disbarred attorneys are in jail.

Searching for a way to prevent more thefts such as these I found that bonds are not available to protect you from our own misdeeds. And there is no available insurance.

Working with the Bar Association this bill seemed to be the best Rep. Froseth and I could come up with. The heart of this bill is Section 2 which will prevent an attorney from performing both as attorney and personal representative for an estate. This will remove one very big conflict of interest.

Section 1 further strengthens the bill by permitting banks to inform the Supreme Court disciplinary board when an attorney writes an overdraft check on a trust account.

This isn't all that we should do and it doesn't satisfy Pete Willyard and perhaps other victims. But until we find a more complete solution it will go a long way to reduce the problem. That's good for the bar association, and it's good for North Dakota and so many of our older people whose life savings can be at risk after they die. I hope you will give it a do pass

BANKRUPTCY TRUSTEE

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March 4, 2009

Senate Judiciary Committee

Re: House Bill 1207
Our File No.

Dear Senate Judiciary Committee:

I am appointed by the Department of Justice, United States Trustee, to the panel of Bankruptcy Trustees for the District of North Dakota. I have served as a Trustee since 1995. There are three trustees in North Dakota, two of them attorneys and one a CPA. Most Bankruptcy Trustees throughout the country are attorneys. A Bankruptcy Trustee is constantly in need of legal services. Some examples include objecting to debtor's claim of exemptions, which always requires legal interpretation of the exemption statutes and generally requires the taking of testimony and appearing before the federal bankruptcy court. Recognizing that Bankruptcy Trustees require the constant assistance of attorneys, and also recognizing that many times it would be a waste of resources to hire outside counsel, Congress enacted 11 U.S.C. § 327(d) which provides:

The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

In sparsely populated states, such as North Dakota, courts generally allow Trustees to employ themselves as legal counsel to the estate. In estates where I, as trustee, need legal counsel pertaining to bankruptcy matters, I generally request the court allow me to be employed as legal counsel. I have been employed as both trustee and attorney in thousands of cases.

In order to get paid for legal services, I, like any other professional employed by the estate, must submit an application to be paid, which is reviewed by the United States Trustee and the court. If the fee request is over \$1,000, all creditors must be notified and given the opportunity to object to fees.

The United States Trustee has published *Guidelines For Reviewing Applications For Compensation And Reimbursement of Expenses Filed Under 11 U.S.C. § 330*. Prior to any legal

fees being paid, the court must enter an order approving the fees. Bankruptcy Code § 330 sets forth the factors the court is to consider in deciding whether the fee is reasonable, such as the time spent, rate charged, whether the services benefited the estate, etc.

Prohibiting Bankruptcy Trustees from providing legal services to Bankruptcy Estates will also likely lead to denial of effective, efficient legal services for Bankruptcy Estates. If a typical person retains an attorney to provide legal services, a retainer is paid or other arrangements are made for payment of legal services close in time to when the services are actually provided. In Bankruptcy Estates, there are usually no funds available to pay professionals until many months, and sometime years, after the services are provided. That will force Bankruptcy Trustees to find legal counsel willing to wait long periods of time before being paid. In many small cases, there are no funds to pay legal fees even though legal services were necessary at the outset of the case in order to protect the estate. That is, many times an estate needs legal services before it is known whether there will be any funds available to pay such fees, and it is not unusual to provide legal services where it turns out there are no funds with which to pay the attorney.

I doubt the drafters of HB 1207 contemplated that the Bill may affect Bankruptcy Trustees serving in North Dakota. I suggest the Bill be amended to read consistent with one of the following alternatives:

Alternative #1:

Attorney for attorney fiduciary required. An attorney who serves as a fiduciary of a probate estate, trust, or conservatorship must be represented by another attorney. The attorney who serves as fiduciary or the attorney's law firm may not serve as attorney for the fiduciary.

Alternative #2:

Attorney for attorney fiduciary required. An attorney who serves as a fiduciary of an estate, trust, or conservatorship must be represented by another attorney. The attorney who serves as fiduciary or the attorney's law firm may not serve as attorney for the fiduciary. This section does not apply to bankruptcy estates.

Thank you for considering these alternatives.

Bankruptcy Trustee
Michael L Wagner, J.D., Trustee
Trustee@bt7.us

Attachment 2
HB 1207

March 4, 2009
HB 1207
Senate Judiciary Committee
Michael L. Wagner

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL 1207

On page one, line 17, after "fiduciary." insert "This section does not apply to U.S. bankruptcy court proceedings or to matters in which the decedent, trustor, beneficiary, or protected person is a spouse, child, grandchild, parent, grandparent, or sibling of the attorney serving as a fiduciary."

Re-number accordingly.