

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

JUDICIAL PROCESS COMMITTEE

Thursday, September 17, 2009
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Shirley Meyer, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Shirley Meyer, Stacey Dahl, Lois Delmore, Chris Griffin, Nancy Johnson, Joyce M. Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Lisa Wolf; Senators Arden C. Anderson, Tom Fiebiger, Tom Fischer, Judy Lee, Stanley W. Lyson, Tim Mathern, Curtis Olafson, Jim Pomeroy

Others present: Representative Merle Boucher, member of the Legislative Management, was also in attendance.

See attached [appendix](#) for additional persons present.

Chairman Meyer welcomed committee members and called on committee counsel to review the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

MENTAL HEALTH AND SEXUALLY DANGEROUS INDIVIDUAL COMMITMENT COSTS STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [Responsibility for Legal and Other Costs Associated With Mental Health and Sexually Dangerous Individual Commitments - Background Memorandum](#).

Chairman Meyer called on Mr. Aaron Birst, North Dakota Association of Counties, for testimony regarding the mental health and sexually dangerous individual commitment costs study. He said the position of the North Dakota Association of Counties is that the costs incurred by the county in providing legal counsel in sexually dangerous individual commitment cases and mental health commitment cases should be shifted to the state. He said because the state's attorney represents the county in these cases and the respondent's attorney is paid by the county, conflict of interest issues exist. He also said because of the relatively few mental health and sexually dangerous individual cases that occur in some counties, there is a lack of expertise on the part of the attorneys handling the cases. He provided information regarding county civil commitment and guardian ad litem costs, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Birst said there are 56 individuals in the State Hospital who were committed as sexually

dangerous individuals. He said each of those individuals is entitled to an annual review of the individual's case.

In response to a question from Representative Klemin, Mr. Birst said the issue of conflict of interest also arises because the court appoints the legal counsel that represents the respondent. He said another problem is the lack of oversight in selecting attorneys to handle the cases. He said there is no procedure in place to ensure that the appointed attorneys have the expertise to handle these specialized cases.

In response to a question from Representative Griffin, Mr. Birst said before a sexual offender is released from the State Penitentiary, the Department of Corrections and Rehabilitation and the State Hospital run diagnostic tests to determine if the offender is likely to reoffend. Depending on the results of those tests, he said, a commitment hearing may be held. He said the offender may be committed if, as a result of the hearing, it is determined that the offender is likely to reoffend. He said in a mental health commitment case, the family of the respondent usually brings the respondent to a hospital. He said commitment may occur if it is determined that the respondent is a danger to himself or herself or to others.

In response to a question from Representative Dahl, Mr. Birst said the Attorney General does not have the authority to initiate sexually dangerous individual commitment cases. He said the Attorney General may assist in sexually dangerous individual cases. He said other than maintaining a sexual offender registry, the Attorney General does not have a role in sexually dangerous individual commitment cases.

In response to a question from Senator Lee, Mr. Birst said with respect to mental health commitments, the lack of available beds is a concern among law enforcement agencies and hospitals. He said Minnesota cases are frequently brought to North Dakota for evaluation.

In response to a question from Senator Fiebiger, Mr. Birst said the state has the advantage of better organization, better resources, and more expertise in handling commitment cases.

In response to a question from Representative Delmore, Mr. Birst said he would provide to the committee information regarding the number of commitment cases handled by the counties and the

costs incurred by the counties for each type of commitment. He said an individual committed under the sexually dangerous individual commitment process is entitled to an annual review of the individual's case. He said individuals committed under the state's mental health commitment laws also have a right to periodic reviews.

In response to a question from Representative Klemin, Mr. Birst said he would provide to the committee information regarding the arrangements used by counties to hire attorneys, the costs incurred by counties in contracting with the attorneys, and the amount expended by counties for hiring attorneys who are not under contract who are hired on a case-by-case basis.

Senator Lee said legal counsel costs for the mental health commitment cases are being paid. She said a related issue is the party responsible for bearing the cost of hospitalization.

In response to a question from Representative Klemin, Mr. Birst said an individual can be held in a jail for up to 72 hours pending evaluation.

Senator Mathern said there are individuals who are being incarcerated because there are no mental health services in some parts of the state.

In response to a question from Senator Mathern, Mr. Birst said there is not any specific training required for attorneys to handle commitment cases other than to be a licensed attorney. He said some counties may have only one commitment case in five years. He said it is a very inefficient way of providing legal counsel in commitment cases. He said it would be much more efficient to have one entity responsible for providing legal counsel for all commitment cases in the state.

In response to a question from Senator Fischer, Mr. Birst said he would provide to the committee information regarding the number of mental health commitment, sexually dangerous individual commitment, and guardian ad litem cases handled by the counties each year and the costs associated with each.

In response to a question from Representative Meyer, Mr. Birst said because of the necessity to cross county lines to obtain services, the question of which county is responsible for costs becomes complex.

Chairman Meyer called on Ms. Robin Huseby, Director, Commission on Legal Counsel for Indigents, for testimony regarding the commitment costs study. She said there were about 1,300 mental health commitment filings in 2008. She said counties spent an estimated \$338,000 to provide legal counsel for those filings. She said there were about 15 new sexually dangerous individual commitment cases and about 50 sexually dangerous individual reviews in 2008. She said the commission is primarily funded through general fund appropriations and some criminal offender fees. She said she does not support the idea of requiring the commission to be responsible for providing legal counsel in civil commitment cases.

She said if the responsibility for providing legal counsel in mental health or sexually dangerous individual commitment cases is assigned to the Commission on Legal Counsel for Indigents, a new division of the commission would be necessary. She said the costs of a new division would include training and education costs as well as malpractice insurance costs. She said because sexually dangerous individual commitment cases, which are civil cases, have been challenged as being criminal or punitive in nature, it would not be a good idea to mix the sexually dangerous individual cases with the criminal cases for purposes of providing legal counsel.

In response to a question from Representative Klemin, Ms. Huseby said the commission, pursuant to North Dakota Century Code Section 54-61-02, has not been requested to provide indigent defense services in cases in which a county or city is otherwise required to provide those services. She said it is unlikely that the commission would take cases from a county or city unless required to do so statutorily.

In response to a question from Representative Delmore, Ms. Huseby said the fiscal note she prepared for 2009 Senate Bill No. 2370 included administrative costs.

Chairman Meyer called on Mr. Alex Schweitzer, Superintendent, State Hospital, for testimony regarding the commitment costs study. He said the State Hospital pays for the costs of expert examinations for sexually dangerous individual commitment cases at a cost of about \$352,000 per biennium. He said the independent evaluator conducts the initial evaluation as well as the annual evaluations. He said with regard to mental health commitments, many individuals are committed using the emergency commitment process. He said there are more commitments done through the emergency commitment process than the full involuntary commitment process. He said the Department of Human Services works hard to keep the emergency mental health cases out of the jails. He said the goal is to limit the time in jail to less than 23 hours. He said in mental health cases, when an individual is placed in a private hospital, the hospital assumes the costs if the patient is unable to pay; if an individual is placed in the State Hospital, the state pays the costs. He said the State Hospital is adding more beds to accommodate the increases in cases.

Mr. Schweitzer said 60 individuals who have been committed under the state's sexually dangerous individual laws are in the State Hospital. He said an attorney is required for all new cases and for annual reviews.

In response to a question from Representative Griffin, Mr. Schweitzer said sexually dangerous individual commitments cost the state about \$10 million per biennium. He said since 1997, nine individuals have been released from the sexually dangerous individual treatment program at the State Hospital. He said four were released based upon the recommendation of the State Hospital; five were

released by the court against the recommendations of the State Hospital. He said the State Hospital's sexually dangerous individual treatment program has a maximum capacity of 85.

In response to a question from Representative Wolf, Mr. Schweitzer said the nine releases have taken place since 2005. He said some of those individuals who have been released had been in the program since 1997. He said the sexually dangerous individual treatment program has become more sophisticated in committing and treating sexually dangerous individuals since the program began in 1997. He said he would provide to the committee information regarding the cost per case of the initial sexually dangerous individual commitment and the annual reviews.

In response to a question from Senator Mathern, Mr. Schweitzer said he would provide to the committee a list of mental health emergency providers.

In response to a question from Representative Koppelman, Mr. Schweitzer said there is not a cure for individuals who are determined to be sexually dangerous individuals; however, the behavior can be contained and treated. He said a stable environment that includes employment, family support, social involvement, and organization can lead to a successful transition back to public life. He said sexually dangerous individuals continue to work closely with law enforcement, the courts, their attorneys, and other service providers after release. He said this is known as the containment model.

In response to a question from Representative Klemin, Mr. Schweitzer said he will provide to the committee a breakdown of mental health and chemical dependency costs incurred by the State Hospital.

Senator Lyson said there are times when jail is the only place an individual can be detained safely.

INVOLUNTARY MENTAL HEALTH COMMITMENT PROCEDURES STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [*Involuntary Mental Health Commitment Procedures - Background Memorandum.*](#)

Chairman Meyer said at the next meeting, the committee will receive testimony from mental health professionals, state's attorneys, indigent defense attorneys, judges, and advocacy organizations regarding this study. She said the individuals will provide information and identify issues and concerns with the state's mental health commitment procedures.

OMBUDSMAN PROGRAM FOR CHILD AND FAMILY SERVICES STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [*Establishment of Ombudsman Program for*](#)

[*Consumers of Child and Family Services - Background Memorandum.*](#)

Chairman Meyer called on Ms. Tara Muhlhauser, Director, Children and Family Services Division, Department of Human Services, for testimony regarding the ombudsman program study. She said the Children and Family Services Division receives inquiries from direct calls from consumers, inquiries from the website, referrals from others or requests from others to contact a certain party, and calls received in the Department of Human Services' executive office regarding child welfare situations and inquiries, calls of inquiry from the Governor's office in response to information the Governor has received, and calls of inquiry received from legislators. She said most of the calls are from parents or grandparents. She said approximately three calls are received each week. She said the protocol for the calls varies depending on the nature of the call. She said direct calls, referrals, and website inquiries are referred to the program administrators. She said calls from the Governor's office, legislators, or the department's executive office come either to her for assignment and resolution or go directly to the program administrator. She said upon receipt, an inquiry is addressed the same day if possible. She said files and documentation of inquiries are maintained by the division's staff.

Ms. Muhlhauser said many of the calls and inquiries concern activities that involve county social service offices or county staff of those offices. She said the division works with the county, using a formal protocol, to address these inquiries. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Ms. Muhlhauser said the division occasionally receives emergency calls. She said those calls are referred to the appropriate entity, such as law enforcement or other first responders.

In response to a question from Representative Dahl, Ms. Muhlhauser said the Department of Human Services has a process and a protocol in place for taking inquiries and complaints and for taking action on those inquiries and complaints. She said if an ombudsman program were implemented, the department would work with that program.

In response to a question from Senator Fiebiger, Ms. Muhlhauser said the inquiries and complaints are related to both case issues as well as system issues. She said many calls are received from grandparents who are unable to visit their grandchildren who have been placed in foster care. She said there is a need for more training about keeping a child's extended family involved and informed. She said the timeline for the resolution of a call can range from one or two telephone calls to taking a case to the North Dakota Supreme Court to overturn a decision. She said there is a process in place and the process works.

In response to a question from Representative Wolf, Ms. Muhlhauser said there is not a formal

process for those consumers who are still dissatisfied after dealing with the division or the department. She said the department does not have a contract with an outside entity to resolve disputes. She said some consumers may contact the Protection and Advocacy Project for assistance.

Chairman Meyer called on Mr. Leon Francis for testimony regarding the establishment of an ombudsman program study. He said he was appearing before the committee because of his family's experience with the Cass County Social Services office. He said the problem is the lack of accountability with social service offices. He said there is a need for an ombudsman or some independent entity to assist families in working through the system. He said if there is such a process or protocol in place, he was never made aware of it. He said the social services system is difficult for people who are not part of the system to understand. He said an independent ombudsman office could provide that contact between the family and the system. He said the current system pits the state against the layperson. He said the system has had an adverse, severe impact on his family.

In response to a question from Senator Olafson, Mr. Francis said his family's situation, which occurred in 2007, began when his parenting skills came into question. He said charges and arrests occurred and his children were placed in foster care. He said there was a lack of accountability on the part of the social services system throughout the entire process. He provided written documentation, a copy of which is on file in the Legislative Council office.

Chairman Meyer called on Mr. Steve Wolt for testimony regarding the establishment of an ombudsman program study. He discussed the impact the social services system has had on him and his children. He submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Meyer called on Ms. Carol Wolt for testimony regarding the establishment of an ombudsman program study. She discussed the issues and difficulties she has had as a grandparent of children in the foster care system. She said an ombudsman program is needed to provide assistance to families. She provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Mathern, Ms. Wolt said she was not given information when she requested it. She said there is a need for checks and balances in the social services system. She said social services are not accountable to anyone. She said there is a need for someone to look out for the consumers.

Chairman Meyer called on Ms. Lorelee Bernsteen for testimony regarding the establishment of an ombudsman program study. She said her situation involved her son who was placed in the social services system. She said she received little information about her son's progress or the programs in which he was participating. She said it was difficult

to get progress reports regarding her son. She said an ombudsman program would be helpful for parents who need assistance in obtaining information about their children. She said parents do not have any recourse when their child is placed in the social services system. She said the current system provides little information or assistance to parents.

Chairman Meyer called on Ms. Robin Bauer for testimony regarding the establishment of an ombudsman program. She said an ombudsman program would be helpful for her family and other families who need assistance when dealing with the social services system. She provided written testimony, a copy of which is on file in the Legislative Council office.

Chairman Meyer called on Ms. Sharon McMahon for testimony regarding the establishment of an ombudsman program study. She said she had a traumatic experience with the social services system between 2000 and 2005. She said she had to learn the process on her own and had no place to go to discuss issues. She said her child, who had multiple failed foster placements, was passed back and forth between the schools, court, foster care, and residential treatment centers. She said she experienced a lot of hostility from agencies. She said there is a need for a single place for parents to go to receive help and information. She said the process takes an emotional and physical toll on parents.

Chairman Meyer called on Mr. John Ford, Executive Director, North Dakota Coalition for CPS and Foster Care Reform, for testimony regarding the establishment of an ombudsman program study. He said his involvement with the social services programs in North Dakota began when he and his wife moved to the state with their adopted special needs child. He said he hopes that as a result of his efforts, there will be steps taken to ensure that the family values, parental rights, and safety of the child are made a paramount concern of all agencies and that there is an independent complaint process created by the completion of the next legislative session for any complaint against any agency, public or private, in the state. He provided written testimony and documentation, copies of which are on file in the Legislative Council office.

Representative Dahl said the committee should receive more information on the framework of ombudsman programs in several other states.

Representative Meyer said it would be helpful if the advocates for an ombudsman program would provide to the committee a proposal for the structure of an ombudsman program for the state.

CHILD SUPPORT OBLIGATIONS AND ENFORCEMENT STUDY

At the request of Chairman Meyer, committee counsel presented a memorandum entitled [*Child Support: Determination of Income and Support*](#)

[Obligations and Enforcement - Background Memorandum.](#)

Chairman Meyer called on Mr. Mike Schwindt, Director, Child Support Enforcement, Department of Human Services, for the presentation of information regarding the state's child support enforcement system. He said the state's child support enforcement unit has ranked in the top three programs nationally since 2003 according to the federal performance measures. He said the program was recognized as the outstanding program by the Western Interstate Child Support Enforcement Council in 2006 and the National Child Support Enforcement Association in 2008. He said the program has also received innovation awards and several staff members have been recognized for their work.

Mr. Schwindt provided to the committee a PowerPoint presentation of the child support enforcement process and the program structure. He also provided to the committee information regarding the organizational structure of the Department of Human Services, information regarding the agencies with which the child support enforcement unit interacts in providing child support enforcement services, and information regarding the goals of the child support enforcement unit. A copy of his presentation, written testimony, and other information regarding the child support enforcement program is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Schwindt said the child support guidelines, which are published in a chart format, are contained in the North Dakota Administrative Code.

Chairman Meyer requested that committee counsel provide to the committee a copy of the child support guidelines.

In response to a question from Representative Klemin, Mr. Schwindt said the Legislative Assembly delegates to the Department of Human Services the authority to develop the child support guidelines. He said the federal government does not designate the child support guidelines model that is to be used by the states. He said North Dakota uses the obligor's income as the basis for establishing the guidelines. He said the child support guidelines are reviewed every four years. He said the next review of the guidelines will occur in 2010.

In response to a question from Senator Lee, Mr. Schwindt said an economic downturn pilot project is underway which helps obligors who lose their job through no fault of their own. He said the program helps to get an obligor's case back to court quickly. He said the program has worked well.

In response to a question from Senator Fiebiger, Mr. Schwindt said about 20 percent of child support cases involve multiple obligations of one obligor. He said the perception that the income shares model would be fairer to both parties is more theory than reality. He said current law provides that if the custodial parent's income is more than three times that of the obligor, the obligor can request a review.

In response to a question from Representative Koppelman, Mr. Schwindt said a conversion to the income shares model would require additional staff to review the additional incomes that would have to be considered. He said the conversion would also require about \$300,000 for a new computer system. He said an interim Legislative Council study in 1997-98 concluded that there was not a significant enough difference between the two methods to justify the change. He said nationally, more states use the income shares method. He said the income shares method of calculating child support creates a perception of fairness.

Senator Lee said the fact that the custodial parent has more income than the noncustodial parent does not relieve the noncustodial parent of the duty to support his or her child.

In response to a question from Senator Lee, Mr. Schwindt said there is not a consensus among the parenting groups as to which method of calculating child support is best. He said it would be more productive to put additional money into customer support than conversion to a new method.

In response to a question from Representative Koppelman, Mr. Schwindt said interstate agreements provide "long-arm" tools necessary to collect child support from parents in other jurisdictions.

In response to a question from Representative Klemin, Mr. Schwindt said the child support enforcement unit is working on developing the policy for the new law that authorizes the issuance of work permits for those individuals whose driver's license has been suspended due to nonpayment of child support. He said he does not foresee much need to use this tool. He said if the obligor is working, an income withholding order can be put in place and there is not a need to suspend the driver's license.

In response to a question from Representative Wolf, Mr. Schwindt said the child support enforcement program has the authority to suspend motor vehicle registrations as well as driver's licenses.

In response to a question from Senator Fischer, Mr. Schwindt said federal prosecution can be triggered by arrears of more than \$10,000, arrears more than two years old, or if multiple states are involved.

In response to a question from Representative Boucher, Mr. Jim Fleming, Child Support Enforcement, Department of Human Services, said the person who has legal custody of the child is the person to whom the child support payment is made. He said finding the correct payee is the function of the child support enforcement program.

In response to a question from Representative Delmore, Mr. Schwindt said the program assesses a monthly administrative charge of \$2.10 for non-IV-D cases. He said for IV-D service recipients, a \$25 annual fee is charged in each case in which an individual has never received assistance and for whom there has been support collections of at least \$500. He said the fee is collected from the custodial

parent by retaining the amount from support collected in excess of the first \$500. He said the court may order that the amount of the fee be collected from the noncustodial parent as an additional arrearage. He said the child support enforcement unit was given legislative authorization to assess these fees.

In response to a question from Senator Olafson, Mr. Schwindt said any direct payment of support from one parent to another is outside the law. He said any direct payments are considered a gift and are not counted as child support payments. He said state law requires that all child support payments are to be collected and disbursed by the state disbursement unit.

In response to a question from Representative Delmore, Mr. Schwindt said all states assess the \$25 annual fee for IV-D cases. He said not all states handle non-IV-D cases. He said he will provide to the committee information on how much is collected from the administrative fees assessed on non-IV-D cases as well as information on the amount charged by other states that collect this fee. He said arrearages are charged simple interest, which is currently 7 percent.

Senator Mathern said the child support enforcement unit should provide to the committee specific recommendations for changes.

In response to a question from Representative Meyer, Mr. Schwindt said there is a role for outreach and customer service to assist custodial and noncustodial parents, legislators, employers, and others in addressing child support enforcement issues and concerns.

OTHER BUSINESS

Chairman Meyer called on Ms. Sharon Parsley for testimony regarding the need for immunity in state law for individuals who are appointed by the court as lay guardians ad litem. She said lay guardians ad litem, who are appointed by a judge in cases of child abuse and neglect, deprivation, permanency hearings, and termination of parental rights, do not have immunity from civil suit when acting in their official capacity. She said Section 14-09-06.4 provides immunity for guardians ad litem in custody and visitation cases and Section 14-09.2-07 provides for immunity for parenting coordinators. She said Section 27-20-48, which provides for the appointment of lay guardians ad litem, does not have a comparable immunity provision.

Chairman Meyer also called on Ms. Barbara Olinger and Ms. Hannah Balaban, lay guardians ad litem, who also expressed a concern over the lack of immunity for lay guardians ad litem. Ms. Balaban provided written information, a copy of which is on file in the Legislative Council office.

At the request of Representative Klemin, committee counsel provided to the committee copies of Sections 14-09-06.4, 14-09.2-07, and 27-20-48.

No further business appearing, Chairman Meyer adjourned the meeting at 4:00 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1