

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

JUDICIARY COMMITTEE

Tuesday, July 26, 2011
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Dave Nething, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Dave Nething, Jim Dotzenrod, David Hogue, Stanley W. Lyson, Carolyn C. Nelson, Curtis Olafson, Margaret Sitte; Representatives Stacey Dahl, Lois Delmore, Dennis Johnson, Joyce Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Andrew Maragos, Gary Paur

Members absent: Senator Mac Schneider; Representative Steven L. Zaiser

Others present: See [Appendix A](#)

At the request of Chairman Nething, committee counsel reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

Chairman Nething said the rules do not require committee members to thank the chairman when recognized. He said all members of the committee are equal and are entitled to be recognized.

REVISED UNIFORM LIMITED LIABILITY COMPANY ACT STUDY

At the request of Chairman Nething, committee counsel presented a background memorandum entitled [Revised Uniform Limited Liability Company Act - Background Memorandum](#).

Chairman Nething said four members of the Judiciary Committee, Senators Hogue and Nething and Representatives Klemin and Kretschmar, are members of the North Dakota Commission on Uniform State Laws.

Chairman Nething requested committee counsel to contact the National Conference of Commissioners on Uniform State Laws regarding any updates to the Revised Limited Liability Company Act.

Chairman Nething called on Mr. Alvin A. Jaeger, Secretary of State, for comments regarding the revised Act. Mr. Jaeger said some of the concerns regarding the revised Act, which he presented to the 2009-10 interim Judiciary Committee, still exist. He said Mr. William L. Guy III has informed him that the Minnesota Uniform Limited Liability Company Act drafting task force is working on changes to the revised Act with the goal of having an acceptable bill draft ready for introduction early in the 2012 Minnesota legislative session. He said the limited liability law that currently exists in North Dakota appears to be working very well for the state's

business community. He said this particular business structure has been a very popular selection by businesses. He said the limited liability company outnumbers other new corporation charters by a margin of two to one. He said, as Mr. Guy advised the last interim Judiciary Committee, this legislation is too important to be enacted without careful consideration. He said the revised Act has raised more questions than other uniform Acts on which his office has worked. He said he would like to wait and see what happens in Minnesota and then work with that product to develop legislation for North Dakota. He provided written testimony ([Appendix B](#)).

In response to a question from Senator Nething, Mr. Jaeger said North Dakota law regarding corporations is very similar to Minnesota law. He said the reason the corporation bills that the Legislative Assembly deals with each session are so long is because we have a separate chapter for each type of business entity. He said when the procedure for one type of business entity changes, the same procedural change is made to all other business entities.

In response to a question from Senator Nething, Mr. Jaeger said North Dakota would benefit from waiting to see what Minnesota does with its legislation. He said our state can benefit from Minnesota's work.

In response to a question from Senator Nelson, Mr. Jaeger said most uniform laws do not use North Dakota's procedural operating structure. He said if the revised Act is adopted, North Dakota would want to keep its procedures the same.

In response to a question from Representative Koppelman, Mr. Jaeger said North Dakota does not necessarily want to be the same as Minnesota. He said it is not that we necessarily want to borrow from other states, but the laws we have are working well for our businesses, and those laws are based on Minnesota law.

UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT STUDY

At the request of Chairman Nething, committee counsel presented a memorandum entitled [Uniform Electronic Recording of Custodial Interrogations Act - Background Memorandum](#).

Representative Klemin requested that the committee receive information on recording technology and the costs of recording equipment.

Chairman Nething called on Mr. Paul Myerchin, attorney, Bismarck, regarding the Uniform Electronic Recording of Custodial Interrogations Act. Mr. Myerchin said there are three reasons he supports the adoption of the uniform Act. First, he said, the uniform Act promotes fundamental fairness in our criminal justice system and would make our criminal justice system better. He said throughout his representation of clients, he has read many police reports in which the client is quoted directly by the officer. He said typically his clients would respond with statements such as "I never said that" or "that is not what I meant." He said the recording of interviews takes away any uncertainty about what was said. He said the uniform Act allows for the capture of an accurate and truthful account of the interview which may be helpful for courts to consider at a later time if necessary. He said by doing this, the constitutional rights of the accused and the rights of law enforcement are protected.

Second, Mr. Myerchin said the uniform Act is not unfair to law enforcement if a recording does not occur for some reason. He said the uniform Act does not punish officers for equipment failures or if officers believed the uniform Act did not apply at the time. He said violations of the uniform Act do not automatically result in excluded evidence but merely become a factor for the court to consider.

Third, Mr. Myerchin said the uniform Act promotes cost-savings to the state. He said when a client disputes what is written in a police report, it typically means that there will be a pretrial motion filed with the court or the case will go to trial. He said pretrial motions and trials are costly in time and money to the court system, law enforcement, and the accused. He said when an interview is recorded, prosecutors and defense attorneys can accurately access the facts of the case and give their clients the best advice based on accurate information. In turn, he said, the number of pretrial motions and trials before the court will be reduced and amount to a cost-savings. He said the actual cost of a digital recorder is relatively inexpensive--typically about \$50 to \$100. He provided written testimony ([Appendix C](#)).

In response to a question from Representative Klemin, Mr. Myerchin said costs of the recorders he reviewed were for audio recorders only, not video recorders.

Representative Klemin said he has a small compact computer that he purchased for around \$250, which can record up to 160 gigabytes of video.

Mr. Myerchin said there are some law enforcement agencies in the state which are voluntarily recording some statements. He said it may also be helpful for the court system to quantify costs of pretrial motions.

In response to a question from Representative Paur, Mr. Myerchin said if a normal chain of evidence requirement is followed there should not be a concern

about tampering or erasing portions of an interrogation. He said to withstand a credibility challenge, that same chain of evidence requirement must be followed.

Chairman Nething called on Mr. Terry Traynor, Assistant Director of Policy and Programs, North Dakota Association of Counties, regarding the uniform Act. Mr. Traynor said this uniform Act would affect a large number of the association's members, especially state's attorneys and sheriffs. He said a survey conducted by the association's attorney, Mr. Aaron Birst, reflected a general disfavor of some of the specifics of the uniform Act. He said, however, there were a few positive comments regarding some of the concepts. He said when considering this uniform Act, the following should be considered:

- Not all jurisdictions have the same resources, making a "one size fits all" solution possibly problematic;
- Equipment breaks;
- It is not always easy to determine when a conversation becomes an interrogation; and
- It is not always easy to determine when an interrogation becomes custodial.

Mr. Traynor provided written testimony ([Appendix D](#)).

Chairman Nething called on Mr. Scott Thorsteinson, Chief of Police, Wahpeton, for comments regarding the uniform Act. Mr. Thorsteinson said all of his department's officers carry digital recorders, and all of the department's cars are equipped with a camera. He said he is concerned about the equipment requirements and details of the uniform Act. He said car cameras are about \$4,000 per unit. He said chiefs of police in the state are concerned about the fiscal impact on their departments. He said if enacted, law enforcement would like to have input on the development of the rules and regulations of the uniform Act. He said there are concerns about storage. He said disks and flash drives can be lost. He said there may be a need for additional servers to store recordings. He said the 2011 bill required recordings for felonies and delinquent acts. He said there are many delinquent acts that are not felonies. He said there is a need for clarification on what constitutes juvenile delinquent acts.

Chairman Nething said it is the committee's intent to seek input from the chiefs of police and other law enforcement.

In response to a question from Representative Delmore, Mr. Thorsteinson said there are rules that must be followed with respect to the retention of records. He said some are maintained on a server. He said not all departments in the state use the same procedures for retention of records. He said what Wahpeton does is not necessarily what Bismarck does. He said the problem is requiring same procedures for everyone. He said one department estimated their cost of recording interrogations to be \$30,000. He said for most departments, one or two

interrogation rooms would be sufficient. He said, however, in those cases in which there are multiple offenders, there may be a need for more than two rooms.

In response to a question from Representative Koppelman, Mr. Thorsteinson said the standards that are developed must be practical and livable.

Chairman Nething said the committee will use 2011 Senate Bill No. 2125 as a starting point in its discussion of the uniform Act.

STATUTES OF LIMITATION AND VENUE REQUIREMENTS IN CIVIL ACTIONS STUDY

At the request of Chairman Nething, committee counsel presented a memorandum entitled [*Statutes of Limitation and Venue Requirements in Civil Actions Study - Background Memorandum*](#).

Chairman Nething called on Mr. Larry Boschee, North Dakota Defense Lawyers Association, for testimony regarding the statutes of limitation and venue study. Mr. Boschee said the North Dakota Defense Lawyers Association supports the idea of shortening the limitation period from six years to three years for the claims set forth in North Dakota Century Code Section 28-01-16. He said a shorter limitation period will prevent stale claims. Over time, he said, evidence disappears, witnesses die, or their memories fade. He said the loss of evidence impairs a defendant's ability to defend and impairs the truth-finding function of the court.

Mr. Boschee said a three-year limitation period will bring North Dakota into the mainstream. He said 39 states have either a three-year or a two-year limitation period. He said in 1992, there were seven states with a six-year limitation period. He said now there are just three--North Dakota, Minnesota, and Maine. He said South Dakota and Montana have three-year limitation periods on personal injury claims.

Mr. Boschee said a three-year limitation period will help prevent forum shopping. He said the six-year limitation period has attracted foreign controversies to this state. He said in one current case, 29 Alabama plaintiffs are suing asbestos-related product liability claims in Grand Forks County. He said plaintiffs from Illinois, Louisiana, Tennessee, Texas, and New Brunswick are also suing in Grand Forks County. He said North Dakota taxpayers should not have to fund the resolution of out-of-state disputes. He provided written testimony ([Appendix E](#)) that included a listing of general torts personal injury limitations periods of each state, a proposed bill draft, and other information.

In response to a question from Representative Koppelman, Mr. Boschee said the discovery process begins after a case is filed. He said he would prefer a similar statute of limitations for all contract and tort cases unless there is a good reason for a shorter or longer limitations period. He said the discovery rule applies to contract cases and tort cases.

In response to a question from Senator Hogue, Mr. Boschee said there is an outer limit on the discovery rule for wrongful death cases.

In response to a question from Representative Kretschmar, Mr. Boschee said the reasons for a six-year limitation period for personal injury cases dates back to Dakota Territory days. He said at that time, a six-year limitation was more common than it is now. He said in those days, people did not have the resources or technology to handle cases quickly. In addition, he said, North Dakota did not have a discovery rule at that time.

In response to a question from Representative Klemin, Mr. Boschee said the last section of his proposed bill draft includes a provision that the bill would apply to causes of action accruing on or after the effective date of the Act.

In response to a question from Senator Hogue, Mr. Boschee said if legislatively imposed limits were placed on the discovery rule, it is likely that a challenge to those limits would be based upon a violation of substantive due process. He said there are public policy reasons for setting an outer limit on the discovery rule.

Chairman Nething called on Mr. Paul Sanderson for testimony regarding the statutes of limitation and venue study. Mr. Sanderson said he represents the Property Casualty Insurers Association of America (PCI). He said PCI supports reducing the statute of limitations in personal injury actions from six years to three years. He said the North Dakota Supreme Court has stated that the purpose of a statute of limitations is to prevent plaintiffs from sleeping on their legal rights to the detriment of the defendants. He said there are a number of public policy reasons for reducing the statute of limitations in personal injury actions, including the diminishing value of evidence, fairness, and finality. He said not all injuries are known immediately and a shorter statute of limitations could be harsh. He said, however, in those circumstances, the courts have adopted the discovery rule under which the statute of limitations period does not begin to run until the plaintiff discovers or reasonably should have discovered the injury. He said reducing the statute of limitations would not alter the current application of the discovery rule. He said an injured party would have three years to bring a claim once the plaintiff discovers he or she had been injured. He said a reduction of the personal injury statute of limitations would lessen the current disparity that exists between personal injury actions and other statute of limitation in North Dakota. He said it is difficult to understand why a person who is injured by a doctor can be aware of the injury and commence an action within two years yet a person injured by the actions of a businessman needs six years to determine whether they are injured and to commence their claim. He provided written testimony ([Appendix F](#)).

In response to a question from Representative Klemin, Mr. Sanderson said Minnesota is considering

a four-year statute of limitations. He said he would prefer a three-year limitation period but would not be opposed to a four-year limitation. He said a four-year limitation would be better than a six-year limitation.

In response to a question from Representative Delmore, Mr. Sanderson said it would be nearly impossible to gather accurate statistics on the number of frivolous lawsuits because many cases are never filed in the court system. There would not be a record of those cases other than in the attorney's office. He said the primary reason cases are not filed right away is because of filing fees. He said the vast numbers of cases are not filed. After service, he said, settlement usually happens rather than filing the case. He said statistics would not accurately reflect what is filed in between the four-year and six-year timeframe. He said most people know they are injured but just do not know the extent of the injury. He said there has to be finality sometime.

In response to a question from Representative Koppelman, Mr. Sanderson said any change should be prospective in that the statute should apply to injuries going forward. He said the cases that wait six years before commencing action are usually not the strong cases.

Chairman Nething called on Mr. Alan Austad, Executive Director, North Dakota Association for Justice, for testimony regarding the statute of limitations and venue study. Mr. Austad said North Dakota is ranked very high for state liability systems. He said the number of tort cases is going down significantly. He said in South Dakota, the percentage of cases filed is higher. He said because of South Dakota and Montana's shorter limitations periods, more cases are filed. He said all factors must be considered when looking at statute of limitations changes. He said he is not sure if there is forum shopping in North Dakota. He said one case does not make a trend. He said he is willing to work with the committee as it studies this issue. He said there should be a good judicial and legal reason to make the change. He said North Dakota is out of the mainstream in a number of areas, but this law works here. He provided information regarding the results of a state liability systems survey ([Appendix G](#)) and regarding civil caseloads ([Appendix H](#)).

In response to a question from Senator Olafson, Mr. Austad said tort reform usually refers to caps on awards and not to statutes of limitations and the discovery rule.

JUVENILE COURT JURISDICTION STUDY

At the request of Chairman Nething, committee counsel presented a memorandum entitled [Juvenile Court Jurisdiction Study - Background Memorandum](#).

Chairman Nething called on Ms. Haley Wamstad, Assistant State's Attorney, Grand Fork County, Grand Forks, for testimony regarding the study. Ms. Wamstad said under the current juvenile transfer process, there are certain offenses that are mandatorily transferred to adult court, such as certain

gross sexual imposition offenses, drug offenses, and murder. She said this mandatory transfer provision takes away the ability of the juvenile court to assess what type of treatment or rehabilitation is best for the child. She said extended juvenile court jurisdiction is an extra tool for juvenile courts to assess each case individually. She said rather than sending a child directly to adult court, the extended jurisdiction would give a child one last chance for treatment in juvenile court before facing the significant sanctions of adult court. She provided written testimony ([Appendix I](#)).

In response to a question from Representative Kretschmar, Ms. Wamstad said the most serious cases should be transferred directly to adult court. She said the benefit of the extended juvenile court jurisdiction plan is that it helps the juvenile court keep jurisdiction over the child. If the juvenile does not cooperate in juvenile court, she said, the juvenile still can be transferred to adult court. She said it is not possible to do that now.

In response to a question from Representative Dahl, Ms. Wamstad said 2011 Senate Bill No. 2305 provided that the request for extended juvenile court jurisdiction must be made by the prosecution. She said the court would need to make certain findings before the case would be eligible for extended juvenile court jurisdiction. She said under that bill, cases of gross sexual imposition could be automatically transferred to adult court but would be eligible for extended juvenile court jurisdiction. She said only murder and attempted murder would be automatic transfers without the opportunity for extended juvenile court jurisdiction.

In response to a question from Representative Koppelman, Ms. Wamstad said there are concerns for the victim. She said the extended juvenile court jurisdiction is appropriate because it provides more flexibility. She said sometimes victims want to keep the matter in juvenile court because it makes the case more private. She said the court would still have the option of automatically transferring the juvenile to adult court if the court deemed it appropriate. She said the flexibility would give the court more options than the current law. She said the only flexibility now is prosecutorial discretion regarding what offense to charge.

In response to a question from Representative Koppelman, Ms. Wamstad said under Senate Bill No. 2305, if a juvenile qualified for extended juvenile court jurisdiction, the case would be kept open to allow more information to be gathered.

Chairman Nething called on Mr. Traynor for testimony regarding the juvenile court jurisdiction study. He said most county officials are not ready to weigh in on the concept of a juvenile court of extended jurisdiction. He said when the bill was first introduced there did not appear to be much interest because it was viewed as applicable to so few cases. He provided written testimony ([Appendix J](#)) that included information published by the United States Department of Justice regarding Minnesota's

extended juvenile jurisdiction program. He also provided information ([Appendix K](#)) regarding North Dakota juvenile arrests by offense for the years 2000 through 2009.

Chairman Nething called on Mr. Louis Hentzen, Assistant State Court Administrator, Supreme Court, for testimony regarding the juvenile court jurisdiction study. Mr. Hentzen said he serves as the staff person for the Juvenile Policy Board. He said the board advises the Supreme Court on juvenile court issues. He said the Grand Forks State's Attorney's office outlined the proposal to the board before the 2011 legislative session. He said the board had a number of concerns. He said the board is made up of four district court judges, one Supreme Court justice, one judicial referee, and one juvenile court director. He said it is clearer now what the intent of Senate Bill No. 2305 is than what was previously presented to the board. He said judicial referees do not have the authority to do jury trials. He said there also are concerns about what happens if the juvenile violates probation. He said it is unclear if the consequences would be to send the juvenile to prison or whether there would be another hearing. He said blended sentencing is done in other states. He said this would allow the court to impose juvenile or adult sanctions or both. He said the board would like to work with the committee. He said members of the board will be available at future meetings.

Senator Nelson said Senate Bill No. 2305 was introduced as a means to get a discussion started on this issue.

CHARITABLE GAMING ORGANIZATION ELIGIBILITY REQUIREMENTS STUDY

At the request of Chairman Nething, committee counsel presented a memorandum entitled [Charitable Gaming Organization Eligibility Requirements - Background Memorandum](#).

Chairman Nething called on Ms. Missy Tesky, Licensing Administrator, Attorney General's office, for testimony regarding the charitable gaming organization study. Ms. Tesky said the Attorney General verifies that an organization meets the statutory requirements for an organization. She said there are 285 licensed organizations. She said the breakdown by type of eligible organization is:

- 17 licensed charitable organizations;
- 29 civic and service organizations;
- 5 educational organizations;
- 25 fraternal organizations;
- 44 public safety organizations;
- 113 public-spirited organizations;
- 2 religious organizations; and
- 50 veterans' organizations.

Ms. Tesky said although each organization, with the exception of an educational organization, must be properly registered with the Secretary of State's office as a nonprofit organization to be eligible for a state gaming license, only fraternal and veterans

organizations are also required to be recognized by the Internal Revenue Service as an organization exempt from federal income tax under Sections 501(c)(8),(10), or (19) of the Internal Revenue Code. She said the games of chance administrative rules define the types of organizations that are ineligible to receive a state gaming license. She said a county, city, state, political subdivision, or federal entity is not eligible for a gaming license. In addition, she said, nonprofit social, hobby, trade, business, professional, or similar clubs or associations, or those organizations whose primary purpose mainly provides a direct benefit to its officers is not considered a public-spirited organization eligible for a gaming license. She provided written testimony ([Appendix L](#)).

In response to a question from Representative Kretschmar, Ms. Tesky said the Attorney General tracks the organizations that receive local permits. She said about 1,200 organizations per year are issued local permits.

In response to a question from Representative Maragos, Ms. Tesky said local organizations may be issued extended use local permits to conduct ongoing games such as small-scale bingo.

In response to a question from Representative Klemin, Ms. Tesky said there is the most concern about the public-spirited organizations and the broad use of that term.

Senator Dotzenrod said during the committee discussion on 2011 Senate Bill No. 2042, there was some criticism that many organizations do not fit the definition of public-spirited and that the definition was too broad on what qualifies as public-spirited.

Chairman Nething said he would like to receive information on which organizations are included in that category. He said the committee would like to hear from those organizations to see what they do and whether they fit the definition.

In response to a question from Senator Sitte, Ms. Tesky said since 2005 there have been a total of 10 gaming license applications received in the Attorney General's office from organizations that, at the time of application, did not meet the requirements to receive a state gaming license. She said four organizations were considered nonprofit social, hobby, trade, business, or professional clubs or associations; three organizations had not been fulfilling their primary purpose for the two years immediately preceding their application; one organization was not domiciled in North Dakota; one organization's primary purpose included the conduct of games; and one organization's primary purpose mainly provided a direct benefit to its officers.

Senator Hogue said one of the common complaints is that certain establishments are attracted to certain public-spirited organizations and, consequently, were able to crowd out other organizations.

In response to a question from Senator Hogue, Ms. Tesky said the bar owners have free choice to

select the gaming organizations they want in their establishments.

Chairman Nething called on Ms. Karen Breiner, Manager, Plains Art Museum, Fargo, for testimony regarding the study. Ms. Breiner said she would like the committee to revisit the charitable gaming tax changes that were passed in Senate Bill No. 2042 so that the tax structure does not inhibit the growth of an organization. She said she would appreciate it if the gaming tax structure could be fine-tuned for the next legislative session.

COMMITTEE DISCUSSION

At the request of Representative Maragos, Chairman Nething said he would discuss with Representative Al Carlson, Chairman of the Legislative Management, as to whether the committee's duties could be expanded to include a study of issues related to what is known as "Caylee's Law."

No further business appearing, Chairman Nething adjourned the meeting at 2:30 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:12