NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

JUDICIARY COMMITTEE

Wednesday, December 11, 2013
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator David Hogue, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators David Hogue, Kelly M. Armstrong, John Grabinger, Stanley W. Lyson, Margaret Sitte; Representatives Lois Delmore, Ben W. Hanson, Karen Karls, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Diane Larson, Andrew G. Maragos, Gary Paur

Member absent: Senator Mac Schneider

Others present: See Appendix A

At the request of Chairman Hogue, Committee Counsel reviewed the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management*.

Chairman Hogue said Representative Klemin is in attendance via telephone.

UNIFORM LAWS RECOMMENDATIONS

Chairman Hogue called on Mr. Jay E. Buringrud, Commissioner, North Dakota Commission on Uniform State Laws, regarding the recommendations of the commission for the 2015 legislative session. Mr. Buringrud said the commissioners are required to attend the annual meeting of the National Conference of Commissioners on Uniform State Laws and to promote uniformity in state laws on those subjects where uniformity may be deemed desirable and practicable. Under North Dakota Century Code Section 54-55-04, he said, the commission may submit its recommendations for enactment of the uniform and model laws to the Legislative Management for its review and recommendation. He said as a result of its meeting on July 6, 2013, the commission determined that the following uniform Acts may be appropriate for recommendation to the Legislative Management for introduction during the 2015 legislative session: Uniform Act on Prevention of and Remedies for Human Trafficking; Uniform Powers of Appointment Act; Uniform Harmonized Business Organization Code; Uniform Child Custody Jurisdiction and Enforcement Act Pertaining to International Proceedings; Amendments to Uniform Commercial Code Article 4A (4A-108); and the Uniform Asset Freezing Orders Act. He said the commission has not made a decision as to recommendations for the next legislative session. He said specific recommendations are scheduled to be made by the commission during its 2014 meeting. He provided written testimony (Appendix B).

In response to a question from Senator Hogue, Mr. Buringrud said the essence of the Uniform Act on Prevention of and Remedies for Human Trafficking Act is completed. He said the exact wording of the Act may change after it has been reviewed by the National Conference's Style Committee. He said once the Acts are in final form, the Acts will be distributed to interested parties for comments.

DRIVING UNDER THE INFLUENCE LAWS REVIEW

At the request of Chairman Hogue, Committee Counsel reviewed a memorandum entitled *Driving Under the Influence Laws Under 2013 House Bill No. 1302 - Background Memorandum*. The memorandum discussed the recently enacted changes to the state's driving under the influence (DUI) laws under 2013 House Bill No. 1302.

Chairman Hogue called on Mr. Wayne Stenehjem, Attorney General, for testimony regarding issues related to the implementation of House Bill No. 1302. Mr. Stenehjem said the new law has created a number of consequences; however, most of those consequences were intended. Regarding the issue of whether it is double jeopardy to charge an offender with the offense of refusal to submit to testing and the offense of DUI, he said, it is his position that, because the crimes have separate elements, it is not double jeopardy to charge the same person for both crimes. He said the Legislative Assembly was aware of the two separate crimes and that it is what was intended. He said a DUI defendant in Ward County challenged the law in district court claiming double jeopardy. He said the Attorney General's office submitted an amicus brief in which it was argued that it is not double jeopardy as long as there are different elements for the two offenses, and the judge agreed. He said the case may be

appealed to the North Dakota Supreme Court. He distributed a copy of the order in the case of *State of North Dakota v. Steve Jay Miller* (Appendix C), a chart (Appendix D) that compares the previous DUI law and the current law, and a chart (Appendix E) regarding participation in the 24/7 sobriety program.

Mr. Stenehjem said the impact of the new law on the drug court program was an oversight. He said the Supreme Court may have some proposed legislation to address that issue. Regarding the state's participation in the Interstate Compact for the Supervision of Adult Offenders, he said, the problem arises when an offender who is sentenced to the 24/7 sobriety program wants to leave the state and the receiving state does not have a comparable program. He said it would be possible for the Supreme Court to craft an alternative program. He said it is too early to know if the new law will be a success or failure. He said the legislation made good sense and is stringent and responsive to problems.

Regarding the 24/7 sobriety program, Mr. Stenehjem said the law's mandatory participation in the program for second and subsequent offenses has resulted in an increase in the number of offenders in the program from 472 offenders statewide in November 2012 to 880 offenders in November 2013. He said that is a good thing because it means these people are not drinking. He said an alternative to the 24/7 sobriety program testing is the use of the secure continuous remote alcohol monitoring (SCRAM) bracelets. He said they have about 450 bracelets available with additional funding for more if needed.

In response to a question from Representative Larson, Mr. Stenehjem said the maximum amount of time a juvenile can be sentenced to the 24/7 sobriety program is nine months. He said there is not a minimum sentence for juveniles. He said DUI offenses from other states can be considered when determining the level of offense.

In response to a question from Representative Delmore, Mr. Stenehjem said the full impact of the law on incarceration rates is still months away. He said the immediate impact of the law has been on the 24/7 sobriety program.

In response to a question from Senator Armstrong, Mr. Stenehjem said one of the problems with the transfer of offenders under the Interstate Compact is that most states will not take misdemeanor offense transfers. He said the one misdemeanor offense that is allowed under the Interstate Compact is the DUI offense. He said under the previous law, about 20 percent refused to take the test. He said there may be agreements between state's attorneys and offenders to plead guilty to one or the other.

In response to a question from Representative Koppelman, Mr. Stenehjem said the 24/7 sobriety program costs $2 per day per offender, and the SCRAM bracelet costs $5 per day per offender.

In response to a question from Senator Hogue, Mr. Stenehjem said if a person is stopped for probable cause on a DUI offense then refuses to test, the person can be charged with refusal to test even if the person does not test positive for a DUI.

In response to a question from Senator Sitte, Mr. Stenehjem said changes to the offense for actual physical control was not part of the new law. He said the decision to treat actual physical control as the same offense as a DUI was a policy decision the Legislative Assembly made many years ago.

Chairman Hogue called on Ms. Dawn Deitz, Assistant State's Attorney, Burleigh County, for testimony regarding issues related to House Bill No. 1302. Ms. Deitz said with the new minimum mandatories, felony level DUI defendants are forced to serve their jail time before they can begin drug court, thus eliminating much of the incentive to enter the program. A second concern, she said, is the confusion as to whether refusing the onsite test or chemical test is a complete separate crime from a DUI. She said clarity in this law is needed to ensure consistency in prosecutions across the state. A third concern, she said, is the actual prosecution of repeat offenders. She said while it may be easy to verify convictions on the public access page, getting certified judgments for proof purposes has proven to be much more difficult. She said the courts are requiring more than a mere printout from the public records page. She said courts often require certified judgments indicating advisement of rights and the status of counsel for each prior conviction. She said under Administrative Rule 19, clerk of court offices may dispose of misdemeanor case records after seven years, causing documentation retrieval for a majority of cases pre-2007 nearly impossible. She said although Section 39-08-01(3) directs the court to take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the Director, problems also arise when attempting to acquire certified information from the Department of Transportation. She said because the Department of Transportation has a similar seven-year retention policy, the certified documents from the department may not contain all previous DUI offenses.

Ms. Deitz said the Burleigh County State's Attorney's office is exploring judicial notice of prior offenses through motions to the court. She said an issue that likely will be argued by defense attorneys will be that the court cannot take judicial notice of an essential element. She said while testimony could be provided at trial concerning the prior offenses, the best witness for prior offenses would be the law enforcement officer involved with the stop. She said these are issues that have arisen for prior in-state offenses. She said the difficulty in proving prior in-state DUI offenses is difficult; however, proving prior out-of-state DUI offenses will be incredibly difficult. She submitted written testimony (Appendix F).

In response to a question from Senator Hogue, Ms. Deitz said there may be cases in which the offense will have to be reduced because of the difficulty in proving prior offenses.

In response to a question from Senator Armstrong, Ms. Deitz said in those cases, there is still a DUI charge, but it is being charged at a lower level, such as a second offense instead of a third offense. She said from this point forward, with changes in technology and as time passes, more records will be kept.

In response to a question from Representative Koppelman, Ms. Deitz said some of the refinements to the law may be changing records retention policies and allowing fewer loopholes. She said there may be a need for court rule changes. She said no motion for judicial notice has been ruled upon yet. She said clerks of court are concerned there will not be enough space to store documents indefinitely; however, technology may change that.

In response to a question from Senator Sitte, Ms. Deitz said she has seven felony DUI cases pending. She said other attorneys in the office have a similar load.

Chairman Hogue called on Ms. Leah Viste, Assistant State's Attorney, Cass County, for testimony regarding issues related to House Bill No. 1302. Ms. Viste provided written testimony (Appendix G). She discussed three ways to fine-tune the law. First, she said, it is important that offenders be allowed to participate in and complete drug court by serving shorter periods of incarceration, an option not provided for under the new law. Second, she said, to avoid potential violations of the Interstate Compact for the Supervision of Adult Offenders, the mandatory participation in the 24/7 sobriety program should be changed from 12 months to 360 days. She said under the Interstate Compact for the Supervision of Adult Offenders, offenders sentenced to unsupervised probationary periods of one year or longer must have their probation transferred before traveling to, or residing, in another state. She said offenders sentenced to unsupervised probationary periods of less than one year need not have their probation transferred when traveling to, or residing in, another state. Third, she said, there is a need to change the law to provide for appropriate alternatives to the 24/7 sobriety program when an offender's jurisdiction does not provide the program, and the court finds that imposing the requirement would create a manifest injustice.

Ms. Viste said as of December 5, 2013, Cass County had approximately 128 participants in the 24/7 sobriety program. She said of those participants, 45 submit to twice-daily breath tests, 43 are wearing SCRAM ankle bracelets, and 40 are wearing patches. She said the participant costs are $1 per test or $2 per day for the breath test, $5 per day for the bracelet, and $50 for two weeks or $3.57 per day for the patch.

In response to a question from Senator Armstrong, Ms. Viste said her office has not seen an increase in citations for refusals since the new laws became effective.

In response to a question from Senator Hogue, Ms. Viste said the implied consent warnings are being read to offenders. She said there are two adult drug courts in Cass County. She said drug court may not be appropriate for first offenses or even second offenses. She said the drug court reaches out to people who really need to make changes. She said the more significant offender gets the most benefit from drug court. She said individuals in the drug court program undergo rigorous probation, are required to report regularly to drug court, and have regular drug testing. She said a number of people are involved in the process, including court officials and treatment personnel. She said the new law does not provide any incentives for an offender to go through the drug court process. She said statistics show the effectiveness of the drug court program.

In response to a question from Representative Larson, Ms. Viste said the problem with the longer look-back period is that older first offenses were handled in municipal court, and the records for many of those cases no longer exist. She said because the number of the offense is an essential element of the offense, the older prior offense may have to be dropped. She said an accurate record of the prior offense is necessary because it must be established that the prior case met constitutional requirements, such as the right to legal counsel.

In response to a question from Senator Sitte, Ms. Viste said she has been assigned at least 10 felony DUI cases in Cass County since July. She said other assistant state's attorneys in Cass County have a similar number of felony DUI cases. She said most are unresolved. She said the state's defense bar is trying to work on some of the

issues that have arisen. She said she applauds the changes to the state's DUI laws, but there are some kinks. She said there is no excuse for a DUI when one considers the horrendous consequences of doing so.

In response to a question from Senator Hogue, Ms. Viste said even though the drug court in Cass County is currently at its maximum number of participants, it is still important that it remain an option should the opportunity to get into the program arise.

Chairman Hogue called on Mr. Chad McCabe, Attorney, McCabe Law Firm, Bismarck, for comments regarding the implementation of House Bill No. 1302. He said he is a defense attorney who handles DUI cases. He said he is pleased that others think drug court is a good thing and that it should be returned as an option for certain offenders. He said the newly created crime for refusing to submit to testing has caused chaos for law enforcement and state's attorneys. He said the Legislative Assembly may want to consider eliminating the crime for refusing to submit to testing. He said while it probably will pass constitutional muster for double jeopardy, he questioned whether it is a crime the state wants to prosecute. He said state's attorneys are tending to charge just one charge with refusing to submit as a charge in the alternative. He said the screening is not admissible as long as probable cause is not being challenged. He said the refusal to submit to testing crime could result in sober people getting convicted of a DUI. He said Mr. Ladd Erickson, State's Attorney, McLean County, suggested that the language of the statute be amended to refer to the number of actual convictions rather than the number of offenses as is currently the case in the state's drug laws. He said he has not had a problem with the mandatory 24/7 sobriety program and out-of-state offenders. He said the court should have more discretion on this issue. He said the courts and the state's attorneys should be given a set of tools. He said it is a good law, but more discretion should be given to the courts.

In response to a question from Senator Hogue, Mr. McCabe said the consideration of prior convictions is affecting many of his cases. He said the vast majority of prior DUI offenses are old. In some of the older cases, he said, 16-year-olds were charged in adult court for a DUI. He said the Legislative Assembly may want to put a 7-year or 10-year limit on the look-back rather than lifetime. He said there are concerns that the jails are getting full. He said he has heard of the possibility that the Department of Corrections and Rehabilitation will parole offenders who are sentenced to the State Penitentiary for a DUI.

In response to a question from Representative Koppelman, Mr. McCabe said the new law puts every case in the same box. He said many people who are being charged under the new law do not know to seek counsel.

In response to a question from Representative Hanson, Mr. McCabe said it is very difficult to gather the necessary information to prove the old cases. He said if a person is clean for 10 years, the person should get a clean slate.

In response to a question from Senator Sitte, Mr. McCabe said those sentenced to the 24/7 sobriety program are allowed to get a work permit. He said of the 105 DUI cases he is handling, about 12 are felony cases. He said those would likely be eligible for drug court if it were an option. He said many of his cases are first-time offenders.

Chairman Hogue called on Mr. Glenn Jackson, Director, Drivers License Division, Department of Transportation, for testimony regarding the implementation of House Bill No. 1302. Mr. Jackson provided written testimony (Appendix H) which included a chart of the administrative and criminal process in a DUI case. He said before the law changed, if an individual refused the test, the department would get notice of the refusal and administratively revoke driving privileges for 180 days. He said the court would then potentially convict the individual of a DUI without a test or the individual could elect to cure the refusal and plead guilty to a DUI. In either of these cases, he said, the department processed this conviction in a manner such that additional suspension time was not added to the time currently being served for the administrative revocation. He said under the new law, that scenario is the same except that now the courts may provide a second conviction--one for a DUI and one for refusal to test. When the second conviction is applied, he said, there is already a conviction on the record, so the consequences for the second conviction would typically be enhanced because of the first conviction on record. He said this would lead to a separate 365-day suspension that must be served consecutively with the first suspension, resulting in a driver receiving a total of 545 days suspended. He said this may not have been the intent of the Legislative Assembly. He said the department is considering indicating on the driving record that both convictions received from the court are first-time DUI offenses. He said to date, the department has received 56 dual convictions from the court but has not taken action on the second conviction. He said a third offense would be enhanced as a third offense.

Senator Armstrong said it was never his intent to have two separate driving suspensions for the same incident. He said that may need to be clarified.

In response to a question from Representative Paur, Mr. Jackson said both the DUI and the refusal to test are Section 39-08-01 offenses and are treated as DUI offenses for purposes of suspension. He said, however, the offenses are two separate administrative offenses. He said while it was clearly the intent to have two separate criminal offenses, he was not aware of any discussion to have both offenses affect the driving record.

In response to a question from Representative Koppelman, Mr. Jackson said the department is considering asking for an Attorney General opinion on the issue.

In response to a question from Senator Sitte, Mr. Jackson said the 56 dual convictions reported to the department are from across the state. He said there is not a cluster of cases in any particular area.

Chairman Hogue called on Honorable Gail Hagerty, District Judge, to discuss the implication of House Bill No. 1302 on drug court. Judge Hagerty said drug court should be available for both drug and DUI offenses. She said a proposed bill draft (Appendix I) has been prepared to address the problem. She said drug court is not as simple as it sounds. She said the drug court program uses many resources. She said many offenders think it is much easier to serve a sentence rather than go through drug court. She said there are different sanctions and rewards as the offender works through the program. She said it would be great to have drug courts in all parts of the state, but because of the limited resources available, the drug court program has to be limited.

In response to a question from Representative Larson, Judge Hagerty said there is one adult drug court in Bismarck and participation is holding steady. She said a drug court uses a great deal of judicial resources.

In response to a question from Representative Delmore, Judge Hagerty said drug court takes the more difficult cases. She said those who can be helped with treatment and probation may not need drug court. She said the 24/7 sobriety program can be used as a sanction. She said the purpose of drug court is different from the 24/7 sobriety program.

In response to a question from Senator Hogue, Judge Hagerty said if the offender is not committed to long-term sobriety, it can be very difficult for that person to succeed in drug court. She said some offenders who are sentenced to a year in prison are willing to take their chances on getting paroled early rather than having their sentence reduced through participation in the drug court program. She said because House Bill No. 1302 is a new law, many of the felony DUI cases are pending. She said the issue of prior convictions is causing concerns in the system. She said to use those prior convictions, it must be proven that the offender had the right to an attorney and that it was waived. She said a copy of the judgment is needed; however, that may no longer be available. She said she is seeing more motion practice with regard to issues related to the increased penalties.

In response to a question from Representative Koppelman, Judge Hagerty said individuals accepted to drug court must have an evaluation. She said being a substance abuser is not enough, the person must be addicted.

In response to a request from Representative Paur, Judge Hagerty provided the committee a list (Appendix J) of the drug court programs in the state.

Chairman Hogue called on Mr. Jim Ganje, State Court Administrator's office, for testimony regarding concerns of the court system regarding recent changes to the DUI statutes. Mr. Ganje provided written testimony (Appendix K) from Ms. Sally Holewa, State Court Administrator. In her testimony, Ms. Holewa discussed issues the law changes have made on adult drug court, including the minimum length of jail time an offender must serve. Her testimony indicated the length of time is counter to two of the key components of drug court, which are early entry into drug court and access to treatment. Her testimony also expressed concerns about the mandatory use of the 24/7 sobriety program for first-time juvenile offenders when there may be no indication that the child is likely to repeat the offense. Her testimony included a proposed bill draft (Appendix L) that would make it discretionary to put a juvenile in the 24/7 sobriety program for a first offense and mandatory for a second offense.

In response to a question from Representative Larson, Mr. Ganje said if a child in the 24/7 sobriety program is delinquent, the normal procedure under the new law would be for law enforcement to pick up the child. He said, however, law enforcement will not put the child in detention with adult offenders. Instead, he said, law enforcement contacts the juvenile court and asks what to do with the delinquency. He said the .02 percent alcohol concentration is unique to the child DUI offense.

In response to a question from Representative Koppelman, Mr. Ganje said if the discretionary aspect was changed for the first offense, the juvenile court should be able to determine if the 24/7 sobriety program is appropriate. He said the law does not impose the mandatory 24/7 sobriety program for the first offense for adult offenders, but it does impose the sanction for first offense juvenile offenders.

In response to a question from Senator Hogue, Mr. Cory Pedersen, Director, Juvenile Court, said statewide, there are 36 juveniles who are in or have gone through the 24/7 sobriety program. Mr. Pedersen said those 36 juveniles are being or were tested twice a day with the adult offenders.

In response to a question from Senator Armstrong, Mr. Pedersen said the average time in the 24/7 sobriety program is two weeks to four weeks for first-time minor in consumption juvenile offenders and four weeks to eight weeks for first-time DUI juvenile offenders. He said there is not a minimum amount of time the juvenile could be sentenced to the 24/7 sobriety program.

In response to a question from Senator Sitte, Mr. Pedersen said once the juvenile admits to the alcohol offense or is found to be unruly or delinquent, the juvenile is required to be in the 24/7 sobriety program.

In response to a question from Representative Larson, Mr. Pedersen said a DUI by a minor is a delinquent offense, and minor in possession is an unruly offense. He said if the 24/7 sobriety program is mandatory, it would not make sense to sentence the juvenile to only one day in the program.

In response to a question from Senator Hogue, Mr. Pedersen said none of the juveniles have been required to do the maximum time of nine months in the program. He said of the 36 DUI offenses, three were second offenses.

Chairman Hogue called on Mr. Charles Placek, North Dakota Commissioner, Interstate Commission for Adult Offender Supervision, for testimony regarding the impact of House Bill No. 1302 on the Interstate Compact for the Supervision of Adult Offenders. Mr. Placek said the participation in the 24/7 sobriety program as a mandatory condition of program for second offenses would put all convicted second offense offenders under the Interstate Compact if they relocated outside North Dakota during their probation period. He said the vast majority of these offenders are placed on unsupervised probation, and their court-ordered conditions are monitored either by the clerks of court or the local sheriff regarding the 24/7 sobriety program. He said his concern as a state commissioner is that the Department of Corrections and Rehabilitation may be unaware as to who has been placed on probation, and the offender is unaware that if the offender relocates to another state, the offender is required to have probation transferred. He said the failure to transfer these offenders under the Interstate Compact is a liability concern for the state.

Mr. Placek said in addition to the concern about the requirement that triggers the requirement for transfer under the Interstate Compact if the offender relocates out of the state, the commission is faced with attempting to transfer offenders to a receiving state that may not have a 24/7 sobriety program. He said in the past, when faced with that knowledge, the Department of Corrections and Rehabilitation would request the court to modify the original court order. He said because the 24/7 sobriety program is now mandatory, the court cannot legally modify its original order. He recommended a change in the language that would allow participation in a program that is equal to the 24/7 sobriety program if the offender lives in another state. He also said if the language of Section 39-08-01(5)(b) were modified to require the 24/7 sobriety program participation for a period of less than one year, the second offense sentence would not trigger the Interstate Compact. He provided written testimony (Appendix M).

In response to a question from Senator Hogue, Mr. Placek said if the mandatory participation in the 24/7 sobriety program were changed to 360 days, the Interstate Compact would not be triggered.

In response to a question from Representative Koppelman, Mr. Placek said he would suggest language that the receiving state's program must be equivalent to North Dakota's 24/7 sobriety program.

In response to a question from Representative Paur, Mr. Placek said the use of SCRAM bracelets on offenders who leave the state creates monitoring and enforcement issues.

Mr. McCabe said the use of private companies may be an alternative to the 24/7 sobriety program. He said the SCRAM bracelets are not submersible. He said it would to helpful to have a statute that allows for alternatives to the 24/7 sobriety program.

In response to a question from Representative Delmore, Chairman Hogue said the committee will receive testimony from law enforcement at the committee's next meeting in Fargo on Thursday, January 23, 2014.

Senator Armstrong said the intent of House Bill No. 1302 was to change the refusal sanctions to match the enhanced first offense suspensions. He said it was not the intent to get a double suspension for the same traffic stop. He said the intent was never to suspend twice for one incident for the same conduct.

Senator Sitte said the committee may want to address the intent issue.

In response to a question from Senator Sitte, Representative Klemin said an expression of intent by a committee after the legislature adjourns is not an acceptable way to establish legislative intent.

Chairman Hogue said the interim Judiciary Committee is a legislative committee not a legislative body. He said legislative intent is an issue for the court to determine.

Representative Koppelman said he agreed that an Attorney General opinion is what may be needed to answer the double suspension issue before the 2015 legislative session. If it is not clearly indicated in law, he said, the Department of Transportation could create an administrative rule to that affect.

Representative Larson said her concern is that the Department of Transportation would do something to minimize the refusal. She said the department must be careful not to undo the Legislative Assembly's intent.

Chairman Hogue said the committee will meet jointly on Wednesday, January 22, 2014, in Fargo with the interim Higher Education Funding Committee to look at intellectual property issues. He said the committee will meet separately from the Higher Education Funding Committee on Thursday, January 23, 2014, in Fargo.

No further business appearing, Chairman Hogue adjourned the meeting at 1:30 p.m.

____

Vonette J. Richter
Committee Counsel

ATTACH:13