

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**JUDICIARY COMMITTEE**

Thursday, January 23, 2014

Hidatsa Room, Memorial Union, North Dakota State University  
Fargo, North Dakota

Senator David Hogue, Chairman, called the meeting to order at 9:30 a.m.

**Members present:** Senators David Hogue, Kelly M. Armstrong, John Grabinger, Stanley W. Lyson, Mac Schneider; 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 Margaret Sitte

**Others present:** See [Appendix A](#)

At the request of Chairman Hogue, Committee Counsel distributed a memorandum ([Appendix B](#)) from Mr. Glenn Jackson, Director, Drivers License Division, Department of Transportation, in which Mr. Jackson requested a correction be made to the testimony he provided to the committee at its December 11, 2013, meeting. According to Mr. Jackson, his testimony had indicated there had been 56 dual conviction cases reported to the department. He said that number was incorrect. He said the department has received only six dual conviction cases.

**It was moved by Representative Maragos, seconded by Representative Delmore, and carried on a voice vote that the minutes of the December 11, 2013, meeting, as amended, be approved.**

**ASSESSMENT OF COURT FEES**

At the request of Chairman Hogue, Committee Counsel reviewed a memorandum entitled [Assessment of Court Fees - Background Memorandum](#). She said the study is a result of 2013 Senate Bill No. 2078, a bill that could have replaced the current criminal court fees and the community service supervision fee with a single court fee that would be distributed among various funds. She said the House amended the bill to provide for this study.

Chairman Hogue called on Judge Frank L. Racek, East Central Judicial District, for testimony regarding the assessment of fees study. Judge Racek provided information ([Appendix C](#)) regarding fee revenues, the number of criminal cases files, and a county-by-county breakdown of victim witness fee revenues. He said there are currently seven different fees with various subparts. He said the amount of the fees and the funds to which the funds are to be deposited are not issues for the court to decide. He said the person being sentenced only cares about the total amount owed rather than where the money goes or what it is being used to fund. He said one difficulty in consolidating the fees into a single fee is the victim witness fee. He said for those counties that regularly collect victim witness fees, the amount that would be distributed to some counties under the formula proposed in House Bill No. 2078 may be less than those counties are receiving now. He said the problem is how to distribute those fees to the counties that collect more victim witness fees than other counties.

In response to a question from Representative Paur, Judge Racek said the percentages in Senate Bill No. 2078 were derived from the average amount of revenues for a period of 10 years.

In response to a question from Representative Koppelman, Judge Racek said the reason collection rates of the victim witness fee vary from county to county may be because some counties do not need that money for their victim witness programs; therefore, those counties are not diligent about collecting it. He said the bill proposed a dollar amount that could replicate the same amount the counties are getting now. He said the fees assessed can be very difficult to collect, and a determination must be made it is prudent to try to collect money that is not recoverable.

In response to a question from Representative Delmore, Judge Racek said in some cases fees are waived and in others the fees may not get collected. He said just because the Legislative Assembly adds another fee does not add more money to the offenders' pockets. He said the fees recommended in the bill would have been sufficient to replicate the status quo of \$9.9 million.

In response to a question from Representative Klemin, Judge Racek said it is difficult to determine the amount of the uncollected fees because there are cases in which the fees are never imposed and there are cases in which fees are ordered but never collected. He said the court is collecting about \$161 per case. He said collection efforts include sending out delinquency notices, intercepting tax refunds, and the authority to reduce the fees to a civil judgment. He said there are various collection tools available but can be expensive to impose. He said the Legislative Assembly gave the court the authority to intercept tax refunds; however, the court does not have the authority to use collection agencies.

In response to a question from Senator Armstrong, Judge Racek said the indigent defense application fee applies regardless of what happens with the case. He said the indigent defense application fee is different from other fees in that it is collected upfront while the other fees are assessed only on those who are found to be or who plead guilty.

Senator Armstrong said in some counties the victim witness fees are used to fund a victim witness coordinator. Judge Racek said under the consolidated fee that was proposed in Senate Bill No. 2078, all the fees collected would be distributed pro rata to the various funds.

In response to a question from Representative Klemin, Judge Racek said not all fees are assessed in all cases. He said probation officers are good about making sure their probationers have paid their fees before being released from probation. He said an offender's probation can be extended if the fees are unpaid.

In response to a question from Senator Hogue, Judge Racek said consolidating all fees except the victim witness fee would be better than continuing to assess seven fees. He said the computer can be programmed to prioritize partial payments. He said if the fee system could be consolidated, the staff would have more time for collection efforts.

Chairman Hogue called on Ms. Robin Huseby, Executive Director, Commission on Legal Counsel for Indigents. Ms. Huseby said the majority of the commission's funding is general fund money. She said the commission also has a special fund, a continuing appropriation, which is funded from the court administration fee. She said about \$1.6 million per biennium is collected from this fund. She said the commission also receives about \$180,000 per biennium from the indigent defense application fee. She said she is not opposed to the consolidation of fees. She said, however, she needs more information on how the new fee would be divided among the various funds. She said she is concerned about whether a new "super fee" would affect collections for the commission's special fund. She provided written testimony ([Appendix D](#)).

In response to a question from Representative Kretschmar, Ms. Huseby said the commission's current funding level is not sufficient.

In response to a question from Senator Schneider, Ms. Huseby said the projected percentages provided by Judge Racek would equal the amount of funding she is now receiving. She said she would like to have a hold harmless provision in order to give some budgeting certainty to the commission.

At the request of Chairman Hogue, Committee Counsel distributed copies of letters from Mr. Richard Riha, Burleigh County State's Attorney, ([Appendix E](#)) and Ms. Rozanna Larson, Ward County State's Attorney, ([Appendix F](#)) regarding the assessment of fees study.

## DRIVING UNDER THE INFLUENCE LAWS REVIEW

Chairman Hogue called on Ms. Tatum Lindbo for testimony ([Appendix G](#)) related to the driving under the influence (DUI) law changes in 2013 House Bill No. 1302. Ms. Lindbo said there are some positive aspects to the new DUI laws, such as the ability for second and subsequent offenders and refusals to get a temporary restricted license. She said she has clients who opt to participate in the 24/7 sobriety program so they are able to qualify for the temporary restricted license. She also discussed the following points:

- Refusal to submit to testing should not be a crime, but if it is, there should be a provision for curing the refusal.
- Abrogating the ability to use drug courts and imposing minimum mandatory penalties have created substantial unintended consequences.
- Withholding a temporary restricted license for drivers who appeal an implied consent suspension serves no legitimate purpose.

- There continues to be issues with the temporary restricted permit and mandatory 24/7 sobriety program, such as no exceptions for out-of-state defendants, for military members who are deployed, and for drivers who have completed intensive treatment.
- North Dakota Century Code Section 39-08-01(5)(f) and (h) need to be harmonized with respect to the court's authority to suspend a portion of jail time on a third or subsequent DUI upon completion of rehabilitation and 24/7 sobriety program before sentencing in subdivision f and the authority to allow a day-for-day credit against a sentence for a rehabilitation program that an offender does after sentencing in subdivision h.
- Possibly reducing the lookback period to 10 years rather than lifetime.

Chairman Hogue called on Mr. Mike Reitan, Assistant Chief, West Fargo Police, for testimony ([Appendix H](#)) regarding issues related to House Bill No. 1302. Mr. Reitan said the DUI legislation was a step in the right direction. He said the legislation provided additional avenues to allow an offender to drive and to remain in home and workplace with use of the 24/7 sobriety program, SCRAM bracelets, and patches. He also discussed the following points:

- The mandatory application of the 24/7 sobriety program for juveniles may be overly burdensome and unnecessary. He suggested using the more permissive "may" and allowing juvenile referees to use their discretion.
- Section 39-06.1-10 provides for license suspensions based on a .18 of 1 percent alcohol concentration while Section 39-08-01(5)(a)(1) provides for an aggravated offense when the test result indicates an alcohol concentration of at least .16 of 1 percent. He suggested the alcohol concentrations be consistent.
- Allowing local law enforcement agencies and private contractors to provide additional testing sites for the 24/7 sobriety program would remove some of the burden from sheriffs' departments.
- Move the refusal of a chemical test to a new section under Chapter 39-08 and create a new penalty or alternatively, provide for a mechanism to cure an arrest for refusal similar to the cure of a driver privileges revocation for refusal as allowed under Section 39-20-04(2) and which would direct the dismissal of the refusal charge at the time of the first appearance.

Mr. Reitan also provided information ([Appendix I](#)) regarding the number of offenders in the 24/7 sobriety program before and after the new DUI law took effect and a copy of the Department of Transportation's report and notice form ([Appendix J](#)). He said in Cass County that number increased from fewer than 40 during the summer months of 2013 to almost 150 per day in January 2014. He said Burleigh County reported 50 to 60 offenders testing per day during the summer months of 2013 to about 155 per day in January 2014. He said the paperwork associated with the program is reported as cumbersome. He said 24/7 sobriety program failures are reported to the court or the Department of Transportation, or both.

In response to a question from Representative Delmore, Mr. Reitan said it is important officers make it clear to the person that it is a crime to refuse to test. He said that language is in the information the officer is supposed to read to the person. He said the sheriffs are feeling the impact of the 24/7 sobriety program. He said sheriffs have had to hire additional staff to handle the 24/7 sobriety program testing. He said there is a concern among sheriffs about the growth of the program, especially for those offenders who are sentenced to two years on the 24/7 sobriety program. He said it would be helpful if the testing was allowed to be done by police departments or by a contractor.

Senator Armstrong said the law is clear that refusal to test is a crime. He said sometimes those arrested are in an altered state and may not always understand what they are being told.

In response to a question from Senator Grabinger, Mr. Reitan said the Department of Transportation provides a manual and training for officers. He said all officers are required to be trained and to follow the manual. He said the lifetime lookback on DUIs is a concern due to the lack of good records. He said law enforcement would not oppose a year limit as long as it was not too short. He said it is important that people change their behaviors. He said he has no objections to making the law more workable.

In response to a question from Representative Kretschmar, Mr. Reitan said Minnesota law was considered extensively when developing this new law. He said North Dakota does not have a checklist like Minnesota which offenders must read and sign. He said reducing the alcohol concentration would not result in the arrest of many more people. He said most who are arrested for DUI are over the .10 of 1 percent alcohol concentration.

Chairman Hogue called on Mr. Mike Argall, Cass County Sheriff's office, for testimony regarding the DUI law study. Mr. Argall said the Cass County Sheriff's office has hired extra personnel to handle the increase in participants in the 24/7 sobriety program. He said the 24/7 sobriety program in Cass County has about 10 "fails" per week, most of which are no-shows. He said about two or three participants per week blow "hot" or positive.

In response to a question from Senator Hogue, Mr. Argall said he was not sure if juveniles are tested separately from the adults. He said the plans for their new facility include a separate area for testing juveniles.

In response to a question from Representative Koppelman, Mr. Argall said the new DUI laws have had little effect on deterring the third-time and fourth-time offenders. He said law enforcement hopes the new laws will change the conduct of the offenders who are in the .17 of 1 percent alcohol concentration area. He said they do not see many offenders at the lower alcohol concentration levels.

Chairman Hogue called on Mr. Russ Myhre, North Dakota Association of Criminal Defense Lawyers, for testimony. Mr. Myhre said the association is working on legislation to present to the committee which will resolve some of the issues that have been raised.

Chairman Hogue called on Mr. Lynn Mickelson for testimony regarding the DUI law study. Mr. Mickelson said his daughter, son-in-law, granddaughter, and unborn grandchild were killed by a drunk driver. He thanked the Legislative Assembly for making the changes to the state's DUI laws. He said his one concern was the elimination of the 24/7 sobriety program for first-time offenders. He said the message needs to be sent that drinking and driving will not be tolerated in North Dakota. He said the inconvenience of getting to a 24/7 sobriety program location is not his problem. He said he has no sympathy for those that think new laws and penalties are too tough. He said he understands that the new law is a burden for law enforcement. He said the Legislative Assembly should not make the law more lenient. He said he does not want another family to go through what his family has gone through.

Chairman Hogue called on Mr. David Todd, Deputy Chief, Fargo Police Department, for testimony regarding the DUI laws study. Mr. Todd said he was appearing on behalf of Fargo Police Chief Keith Ternes. He said about 1,000 people are arrested each year in the state for DUI offenses. He said based upon a request from the municipal judge, the Fargo police do not double charge for the refusal and for a DUI for the same incident. He said most arrests are captured on in-car cameras and on audio recordings. He said the Fargo police officers read verbatim from the DUI form that states a refusal is a criminal offense. He said it is the department's expectation that the officers read the information directly from the form. He said the average alcohol concentration is .17 to .18 of 1 percent over the last several years. He said Fargo was recently designated as the drunkest city in the country. He said a culture change is needed on drinking and driving. He said more deterrence is needed. He said the Fargo Police Department supports the changes to the DUI laws.

### **COMMISSION ON LEGAL COUNSEL FOR INDIGENTS REPORT**

Chairman Hogue called on Ms. Huseby for her presentation of an annual report ([Appendix K](#)) of pertinent data on the indigent defense contract system and the established public defender offices. Ms. Huseby said the Commission on Legal Counsel for Indigents provides indigent legal services to persons who are indigent and who are charged with misdemeanors and felonies in state district court. She said the commission also provides counsel to indigent persons who are parties in some juvenile and other miscellaneous matters. She said from September 1, 2012, through August 31, 2013, the commission provided counsel on approximately 11,168 case assignments, an increase of 19 percent from two years ago. She said in McKenzie County, case assignments went from 89 to 197 in two years, a 121 percent increase. She said Williams County increased by 54 percent, and Burleigh County increased by 34 percent in that same time period.

Ms. Huseby said approximately 87 percent of cases are criminal matters, and approximately 13 percent of the case assignments are juvenile matters. She said the commission also provided legal counsel for about 61 appeals to the North Dakota Supreme Court and 62 postconviction petitions. She said the commission employs 33 full-time equivalent (FTE) positions and several part-time employees who serve as administrative aides. She said the seven public defender offices are located in Williston, Dickinson, Bismarck, Grand Forks, Fargo, and Minot. She said there are two offices in Minot--the main office and an adjunct office with one attorney and one part-time staff. She said the adjunct office provides assistance with Minot conflict cases and Williams County cases.

Ms. Huseby said the commission's budget consists of \$11,923,410 of general fund dollars for the 2013-15 biennium. She said the commission also has the authority to spend money from a special fund in the amount of \$2,497,866. She said these funds are received from court fees paid by defendants and from the indigent application fee. She said the collection of these fees is not necessarily guaranteed to be consistent from year to year as the judges have discretion in waiving the fees in any particular case. She said the commission does not

apply for grants nor does it receive any federal funds. She said the commission will need an increase in general fund dollars. She said the caseload continues to grow and that it does not look like that trend will change in the next biennium. She said the commission continues to look at ways to recruit attorneys.

### STATUTORY REVISION

Chairman Hogue called on Representative Klemin for testimony regarding an Attorney General letter opinion ([Appendix L](#)) regarding the implementation of 2013 House Bill No. 1263. Representative Klemin said the letter opinion discusses an ambiguity in whether the charge of driving without liability insurance is to be treated as an infraction under Chapter 12.1-32 of the criminal code or a noncriminal offense under Chapter 39-06.1, and which of these chapter's procedures would more properly be applied to the offense of driving without liability insurance. He said the Attorney General concluded that House Bill No. 1263 amended the statute concerning driving without liability insurance by reducing a violation from a Class B misdemeanor to an infraction, making the offense a noncriminal moving violation traffic offense, and adding enhanced penalties for a second or subsequent offense. He said for a repeat violation, the opinion indicated the officer either may advise the driver of the penalties, bond, and mandatory impound order, or may take the driver to a magistrate who may then advise the driver of the enhanced charge, bond, and mandatory impound order and release the driver on a promise to appear. He said the Attorney General recommended those courses of action for law enforcement to use until the matter can be brought to the Legislative Assembly for clarification.

Chairman Hogue said the committee will request that a representative of the Attorney General's office attend the next meeting of the committee to further explain the issues raised in the letter opinion. He said any legislator may request a bill draft to address the issue.

No further business appearing, Chairman Hogue adjourned the meeting at 12:30 p.m.

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Vonette J. Richter  
Committee Counsel

ATTACH:12