

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### JUDICIAL PROCESS COMMITTEE

Monday, April 19, 2004  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Merle Boucher, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Merle Boucher, Pam Guleson, Lawrence R. Klemin, William E. Kretschmar; Senators Stanley W. Lyson, Carolyn Nelson

**Members absent:** Representative Duane DeKrey; Senators Dennis Bercier, Michael A. Every, John T. Traynor

**Others present:** See attached appendix

**It was moved by Senator Lyson, seconded by Representative Guleson, and carried on a voice vote that the minutes of the September 23, 2003, meeting be approved as distributed.**

#### OPEN RECORDS STUDY

Chairman Boucher called on Ms. Mary Kae Kelsch, Assistant Attorney General, for testimony regarding the Attorney General's Open Records and Open Meetings Task Force. Ms. Kelsch said the task force met in January and February and will meet again later in April. She said the task force plans to report its findings to the Judicial Process Committee at its next meeting.

In response to a question from Representative Boucher, Ms. Kelsch said last year the Attorney General issued 22 opinions that dealt with open records or open meetings. However, she said, the Attorney General's office receives calls on a daily basis from persons with open meetings or open records questions. She said some of those calls are elevated to opinion requests but most are answered informally. She said the office receives many open meetings questions about executive sessions. She said the calls are made to the office because people are trying to avoid violating the statutes.

In response to a question from Representative Guleson, Ms. Kelsch said the task force is also studying the impact of technology on open records and open meetings issues. She said the state's open records laws may need to be amended to cover certain electronic transmissions such as instant messaging.

In response to a question from Representative Klemin, Ms. Kelsch said many of the inquiries regarding open records or open meetings are handled informally. She said often when it is explained to the

caller that a certain record is an open record, the agency will release the record. She said some callers want the explanation in writing. Others, she said, want the violation recorded in order to create a record of repeat violations. She said the Attorney General's office makes presentations to various groups, such as the North Dakota Association of Counties and the North Dakota League of Cities, regarding open records and open meetings requirements. She said other sources of open records and open meetings information include brochures, manuals, and online information.

Representative Kretschmar said a balance is needed between what may be just a casual conversation among people and a formal meeting. He said an incident in his home county involved three county commissioners who were accused of conducting an illegal meeting when they went to the county state's attorney's office to ask the state's attorney a question.

In response to a question from Representative Guleson, Ms. Kelsch said information obtained during an active criminal investigation is not required to be released. She said the information that may be made public during a criminal investigation includes a description of the arrestee, facts about the arrest, photographs, and a listing of the chronology of events.

In response to a question from Representative Guleson, Mr. Jack McDonald, North Dakota Newspaper Association, said court rules may determine whether certain documents in a criminal investigation are open. He said in cases such as the Dru Sjodin investigation, the court may decide to seal the court records. He said both state law and court rules may apply in criminal investigations.

In response to a request from Senator Nelson, Ms. Kelsch provided to the committee a list of the members of the Attorney General's Open Records and Open Meetings Task Force. A copy of the task force membership is on file in the Legislative Council office.

At the request of Chairman Boucher, committee counsel presented a memorandum entitled *Confidentiality of Certain Records - Survey of Other States*. Committee counsel said the memorandum compared the penalties of North Dakota with those of Minnesota, South Dakota, Nebraska, Iowa, and

Wisconsin for the unauthorized release of confidential information.

Representative Klemin said it appeared from the information presented in the memorandum that North Dakota's penalty is the most severe for the release of confidential information.

In response to a question from Senator Lyson, Ms. Kelsch said a Social Security number is required to apply for or obtain a hunting or fishing license but the Game and Fish Department may not release the number.

Mr. McDonald said in order to obtain a professional license, a person must provide his or her Social Security number.

At the request of Chairman Boucher, committee counsel presented a memorandum entitled "*Knowingly*" or "*Knowing*" *Culpability Standard*. She said the memorandum provides a comparison of the statutes of various states as well as the court interpretations of the "knowingly" standard.

In response to a question from Representative Boucher, Ms. Kelsch said the Attorney General's office receives numerous requests for open records and open meetings training. She said many entities also have their own legal counsel to train employees. She said law enforcement agencies also receive training on open records and open meetings. She said the office also receives complaints from private citizens regarding the release of information by businesses. She said many of the complaints from private citizens are more likely to fall within the consumer protection realm rather than open records. She said the state's open records and open meetings laws apply only to public employees and public agencies.

In response to a question from Representative Boucher, Mr. McDonald said North Dakota has a lot of protections for privacy. He said when a person deals with a public agency, the person may have to give up some privacy rights. He said private employers are not as careful as public agencies about releasing information. He said this is an area that the federal Health Insurance Portability and Accountability Act (HIPAA) law has tried to address.

Chairman Boucher said the committee should receive testimony from the Game and Fish Department, Department of Transportation, and Department of Human Services regarding their protocols for the release of information.

## STATE LEASING OF COUNTY FACILITIES

Chairman Boucher called on Mr. Ted Gladden, State Court Administrator, Supreme Court, for testimony regarding the Court Facilities Improvement Advisory Committee and the revenue in the court facilities improvement and maintenance fund. Mr. Gladden said including preliminary estimates from February 2004, \$424,959 has been received in the fund. He said based upon a projection that the collections have leveled off at around \$73,000 per month,

he is anticipating that a total of \$1,605,000 will be collected during the biennium. He said North Dakota Century Code Section 29-26-22 provides that the first \$750,000 must be deposited in the indigent defense administration fund, the next \$460,000 must be deposited in the court facilities improvement and maintenance fund, and any amount received above \$1,210,000 is to be divided equally between these two funds. He said based upon deposit trends, the court facilities fund will begin receiving money early in the second year of the biennium. Mr. Gladden said the Court Facilities Improvement Advisory Committee is made up of County Commissioners Dwayne Erickson, Kensal; Scott Wagner, Fargo; State Bar Association Executive Director Christine Hogan, Bismarck; Senator Stanley W. Lyson, Williston; and himself, as chairman. He said the committee has met twice. He said at its second meeting, the committee reviewed a draft rule for the administration of the funds and is expected to finalize the rule at its next meeting for submission to the Supreme Court. Mr. Gladden provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Boucher, Mr. Gladden said it is anticipated that the committee will take applications from counties regarding their court facilities' needs and then will prioritize the applications.

In response to a question from Representative Guleson, Senator Lyson said to receive grants from the fund, it is likely that the county requesting the grant will need to provide funds.

In response to a question from Representative Boucher, Mr. Gladden said the rules being developed by the committee will include cost-sharing requirements. He said he would provide information to the committee regarding the cost-sharing proposals.

In response to a question from Representative Kretschmar, Mr. Gladden said the law provides for a continuing appropriation into the two funds. He said the legislation did not have an expiration date.

In response to a question from Representative Klemin, Mr. Gladden said the funds deposited into the indigent defense fund are in addition to funds that were appropriated to the Supreme Court for the indigent defense contract system. He said he does not expect that the funds being deposited into the indigent defense fund will create a surplus. He said using the administration fee to fund indigent defense was part of the strategy of the Legislative Assembly to make up for the inadequate funding of the indigent defense program.

In response to a question from Representative Boucher, Mr. Gladden said there are no caps on the amount that counties may apply for. However, he said, there is a requirement that a certain percentage be awarded to the smaller counties.

In response to a question from Senator Nelson, Mr. Gladden said when the administration fee

legislation was passed, there was a fear that the fee would reduce the amount being deposited in the common schools trust fund. He said that has not happened.

### **ASSUMPTION OF RISK STUDY**

Chairman Boucher called on Mr. Rob Hovland, Center Mutual Insurance Company, Rugby, for testimony regarding the assumption of risk doctrine and the insurance industry. Mr. Hovland said in the insurance industry, higher premiums are usually the result of an incident. He said when claims are paid out, that cost is passed on to policyholders. He said in a negligence claim the jury is given a form and is asked to determine the percentage of fault for both the plaintiff and the defendant. He said assumption of risk is no longer listed on that form but it is a part of comparative fault. He said in our state's comparative fault system, in order to collect any damages, the plaintiff must prove the defendant was at least 51 percent at fault. He said that percentage is the amount of damages the plaintiff will collect. He said the assumption of risk doctrine is geared toward certain types of conduct. He said South Dakota recently passed a law that limits a person's right to sue the owner of an anhydrous ammonia tank if the person tampers with the tank and is injured.

In response to a question from Representative Boucher, Mr. Hovland said the posting of a warning sign does not necessarily preclude an injured person from being able to collect damages for an injury. He said most insurance companies do not cover hunting accidents unless the landowner purchases additional coverage. He said if the landowner does carry the additional coverage, it may increase the landowner's duty to provide a safe hunting environment.

Mr. Hovland said cases in which a person is injured while driving with a drunk driver usually result in a finding that the driver is 60 percent negligent and the passenger is 40 percent negligent. He said these injuries often involve a husband and wife with one spouse suing the other spouse to recover damages for injuries sustained. He said South Dakota law prohibits husband/wife lawsuits if both spouses are in the same vehicle.

Mr. Hovland said assumption of risk is also a part of products liability cases. He said modified comparative fault comes into play in negligence cases but not in strict liability cases.

In response to a question from Representative Boucher, Mr. Hovland said anhydrous ammonia and propane would likely be considered unreasonably dangerous. He said the cost of insuring dangerous products is often very high or even cost-prohibitive. He said, however, it is difficult to not compensate a person for a serious burn injury.

In response to a question from Representative Gulleason, Mr. Hovland said a hunter signing a release before hunting on a landowner's property only

releases the landowner from liability for injuries arising from obvious danger. He said a person cannot be released from liability for dangers that the other person does not know exist.

In response to a question from Senator Lyson, Mr. Hovland said because of the legal fees involved, in many cases it is financially better for an insurance company to settle rather than litigate.

In response to a question from Senator Nelson, Mr. Hovland said in the insurance industry all costs are built into premiums. He said automobile insurance rates are geared toward the classification of the driver, such as the driver's age and driving record. He said other types of insurance spread the risk, such as hail insurance.

In response to a question from Representative Boucher, Mr. Hovland said generally the state's insurance rates are low, but the rates are increasing at a higher rate than the rest of the country.

Chairman Boucher called on Mr. Patrick Ward, Bismarck, regarding the assumption of risk doctrine. Mr. Ward said costs of insurance in the state are based upon North Dakota experience. He said rates are required to be submitted to the Insurance Commissioner for approval. He said in North Dakota, American Family Insurance has paid out \$4 for every dollar paid in premiums and State Farm Insurance has paid out \$3 for every dollar paid in premiums in the state. He said in eight of the last 10 years, these two companies have lost money in North Dakota. He said in automobile insurance, the state's rates rank 49th or 50th. He said the insurance industry did not request the assumption of risk study but that it would benefit it if the assumption of risk doctrine was in effect.

Mr. Ward said in North Dakota, assumption of risk has become part of the state's modified comparative fault statute. He said assumption of risk has become just one of the factors the court or jury may consider when determining fault. He said assumption of risk used to be a complete bar to recovery in the state for injuries that result from certain types of activities. He said some states use the doctrine for limiting liability for specific high-risk activities.

In response to a question from Representative Klemin, Mr. Ward said insurance companies would benefit in certain cases if the assumption of risk doctrine was revived. He said this would eventually translate into lower rates. In some states, he said, juries will find a way to not find that assumption of risk played a part in the injury in order to prevent a complete bar to recovery for the plaintiff. He said assumption of risk may be more applicable for limiting liability for certain activities, such as the use of anhydrous ammonia or the failure to wear a helmet while motorcycling.

Chairman Boucher called on Ms. Paula Grosinger, Executive Director, North Dakota Trial Lawyers Association, for comments concerning the assumption of

risk study. She said the doctrine of assumption of risk, which bars recovery for a person who knowingly elects to confront a risk, is excessively broad and is not justified by the state's legitimate interests in furthering or respecting human autonomy. She said while this study may not be geared toward the application of this doctrine in all settings, other states have applied the doctrine for certain types of cases, such as sporting events and hunting. She said if assumption of risk had been a complete bar to recovery, there may not have been tobacco litigation. She said certain professionals are said to have assumed the risk of their profession, such as those who work with hazardous materials, environmental contamination, and those who work with dangerous animals.

Chairman Boucher called on Mr. Jeffrey Weikum, Mandan, for testimony concerning the assumption of risk doctrine. Mr. Weikum said the assumption of risk doctrine is a "get out of jail free card" for defendants. He said North Dakota juries have been effective at determining who is at fault. He said the current system of modified comparative fault is fair and equitable. He said to go from a system that bases recovery on a percentage of fault to one that would completely bar recovery to a person who is found to be even 1 percent at fault is probably not where the state wants to be as a judicial system.

In response to a question from Representative Boucher, Mr. Weikum said defense attorneys do what they can to mitigate costs to their clients.

In response to a question from Representative Klemin, Mr. Weikum said in the case of high-risk activities, the assumption of risk defense would preclude a person from recovering for an injury even if the person was only found to be a small percentage at fault. He said the assumption of risk does not result in fair or equitable results for the injured person. He said the state should be careful about not making people responsible for their actions when their actions may have caused an injury to someone.

In response to a question from Representative Boucher, Mr. Weikum said when looking at injuries that occur on unposted land, the jury would look at reasonableness and whether the landowner should have reasonably known that the hazard existed. He said juries are adept at shifting through the facts and the fictions in a case. He said it is important to rely on the courts and juries to determine whether a person is negligent in a specific situation. He said it is impossible to legislate every scenario.

In response to a question from Senator Lyson, Mr. Weikum said if failure to wear a motorcycle helmet was an activity for which the assumption of risk defense would preclude recovery, if the motorcycle rider was determined to be even 1 percent at fault in an accident, the rider would be precluded from recovering for his or her injuries. He said the result, even for high-risk activities, would not be fair or equitable.

## **UNIFORM LAWS**

### **Uniform Trust Code**

Chairman Boucher called on Ms. Marilyn Foss, North Dakota Bankers Association, for testimony regarding the Uniform Trust Act. Ms. Foss said the North Dakota Bankers Association Trust Committee is reviewing the Uniform Trust Act but the committee has not completed its review of the Act. She said her reaction to the conversations with committee members is generally one of support for adoption of the Uniform Trust Code subject to a series of possible proposed amendments now under consideration by the committee. She said she expects the North Dakota Bankers Association to support the adoption of the Uniform Trust Code with amendments. She said the new Act appears to do a lot to fill in gaps in the current law regarding trusts. Ms. Foss submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Nelson, Ms. Foss said the new Act is considerably more expansive than the state's current trust law. She said North Dakota has fairly minimal requirements for trusts and there is a limited amount of case law on the topic. She said the new Act would give answers to those areas that were lacking.

Representative Klemin said the new Act contains retroactive provisions that deal with trusts created before the new Act would go into effect.

### **Uniform Securities Act (2002)**

Chairman Boucher called on Ms. Foss for testimony regarding the Uniform Securities Act (2002). Ms. Foss said there is one area in the Uniform Securities Act that is of concern. She said the proposed Uniform Securities Act raises issues related to the federal Gramm Leach Bliley Act. She said in addition to privacy, the Gramm Leach Bliley Act addresses exemptions to security broker registration for banks that are engaging in certain "traditional" or de minimis securities activities. She said the proposed Uniform Securities Act also covers this subject, but it is narrower than federal law in that the Act permits 200 unsolicited trades to be made by a bank without a state broker registration, while federal law allows 500 such trades and the Uniform Securities Act does not include a Gramm Leach Bliley Act-type exemption for private placements. She said the difference between these two statutory schemes creates complexity and possible confusion by banks about the securities activities in which they may engage without registering as brokers. She said she is not sure what position the North Dakota Bankers Association will take regarding the bank exemption provision of the Uniform Securities Act. She said the association believes it is appropriate for the Act to be introduced in the upcoming legislative session, but before a decision is made regarding a possible amendment for the bank registration exemption, the association will need

to hear more from its members and to discuss the matter in detail with Securities Commissioner Karen Tyler. Ms. Foss submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Boucher called on Mr. Matthew Bahrenburg, Securities Commissioner's office, regarding the proposed Uniform Securities Act (2002). Mr. Bahrenburg said the sale of securities in the state is currently regulated by the Securities Act of 1951, which is codified as North Dakota Century Code Chapter 10-04. He said in regard to uniform securities law, there are currently two versions of the Uniform Securities Act in effect throughout the country. He said the Uniform Securities Act of 1956 has been adopted, in whole or in part, by 37 United States jurisdictions. He said the Revised Uniform Securities Act of 1985 has been adopted in only a handful of states. He said the 1951 Act that is currently in effect in North Dakota is very similar in substance to the Uniform Securities Act of 1956. He said the new Uniform Securities Act (2002) has been adopted in four states and has been introduced in nine other jurisdictions. He said of the states that have adopted the new Act, most have made several significant changes to the Act prior to adoption. He said he is aware of a number of states--California, Florida, Massachusetts, North Carolina, New Jersey, New York, Pennsylvania, and Texas--that have indicated they will not support the new Act. He said it is the opinion of the state regulators in those jurisdictions that existing securities law is superior to the new Act. He said the North Dakota Securities Department began a comprehensive comparative analysis of the new Uniform Securities Act and the 1951 Act. He said they have begun to develop amendments that the commissioner will recommend be incorporated into either the 1951 Act or into the new uniform Act if it is introduced. He said through the comparative analysis being done, the Securities Department has identified the significant substantive differences between the 1951 Act and the new Uniform Securities Act. He said the new Act would also have a fiscal impact on the state. He said certain alternatives made available in the implementation of the new Act would reduce the amount of filing fee revenue collected by the Securities Department. He said the North Dakota Securities Department generates approximately \$13 million in revenue per biennium. He said although the potential lost revenue has not been calculated, it could be quite significant and fairly detailed work may be required in order to produce a revenue neutral bill. Mr. Bahrenburg submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Nelson, Mr. Bahrenburg said it does not appear from the states that have adopted the new Act and the states in which it has been introduced that the Act will be adopted uniformly.

In response to a question from Representative Boucher, Mr. Bahrenburg said there currently is substantive uniformity among most United States jurisdictions regarding securities law.

In response to a question from Senator Nelson, Mr. Bahrenburg said the department would prefer to offer amendments that would amend the current securities law. However, he said, if the new Act is introduced, the department will offer amendments.

In response to a question from Representative Klemin, Mr. Bahrenburg said there are a number of provisions in the new Act that are good and could be implemented. He said those provisions could be added to current state law to update the state's securities law. He said it would be more difficult to amend the new Act and make it work in North Dakota. He said some provisions in the new Act are better than current law and could be implemented.

### **Revision of Uniform Commercial Code Articles 3 and 4**

Chairman Boucher called on Ms. Foss for testimony regarding the revision of Uniform Commercial Code Articles 3 and 4. Ms. Foss said Articles 3 and 4 concern negotiable instruments, including checks and promissory notes, bank deposits, and collections. She said the North Dakota Bankers Association opposed the revisions when the revisions were before the 2001-02 interim Judiciary A Committee and would have vigorously opposed them had bills to adopt them been introduced in the 2003 session. She said she does not have any reason to think that the North Dakota Bankers Association opposition to the revisions has changed or will change. She said in its opposition, the North Dakota Bankers Association has joined with more than 40 bankers associations from other states. She said the unity and depth of banker opposition to a uniform proposal for a uniform law is virtually unique and its effect has been that only one state, Minnesota, has adopted a version of the proposed revisions and then only after substantial and substantive amendments. She said while other states have rejected proposed revised Articles 3 and 4, they have adopted one of its provisions to address the problem of unauthorized drafts against consumers' checking accounts. She said the problem arises when a person discloses information about a checking account to a telemarketer or other unscrupulous person who then uses that information to originate an "item" which may be deposited with a financial institution and collected through the automated payment system that has developed for the fast processing of checks. She said revised Article 4 dealt with the problem by shifting the liability for an unauthorized draft to the depository institution from the paying bank that has no practical way in which to stop payment on an unauthorized draft within the short timeframes that are prescribed by law for final payment of an item. She said the

drafters of revised Articles 3 and 4 took this solution from a California law that was passed in 1996. She said California was the first state to enact this type of law and North Dakota was the second. She said North Dakota enacted the law in 1997. She said this liability shift is being made the "uniform" law of the land because numerous states are adopting it, but North Dakota does not have to do so because the North Dakota Legislative Assembly was ahead of the pack on this problem. Ms. Foss submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Nelson, Ms. Foss said the federal Patriot Act is causing banks to change many of their customer rules and procedures. She said the revised Articles 3 and 4 have no relation to the Patriot Act.

The committee received no testimony regarding the revised Uniform Commercial Code Articles 2, 2A, and 7 and the revised Estate Tax Apportionment Act (2003).

#### **Uniform Parentage Act (2000)**

Chairman Boucher called on Ms. Paulette Oberst, Child Support Enforcement, for comments regarding the Uniform Parentage Act. Ms. Oberst said the revised Act contains some good provisions. She said her office has identified the revised Act as a possible legislative issue to track.

In response to a question from Representative Boucher, Ms. Oberst said her office would further review the Act and would be available to make recommendations to the committee at a future meeting.

#### **COMMITTEE DISCUSSION**

Representative Gulleon said the committee should hear from a representative of the business community on how requests for information are handled. She said possible sources of information may be the North Dakota Retailers Association and the Consumer Protection Division of the Attorney General's office.

Chairman Boucher requested that the committee receive a copy of the South Dakota law that limits the liability of anhydrous ammonia tank owners. He said the next meeting of the committee will be in midsummer.

Chairman Boucher adjourned the meeting at 1:30 p.m.

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Vonette J. Richter  
Committee Counsel

ATTACH:1