

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Monday, October 4, 2004
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Merle Boucher, Chairman, called the meeting to order at 8:30 a.m.

Members present: Representatives Merle Boucher, Duane DeKrey, Lawrence R. Klemin, William E. Kretschmar; Senators Dennis Bercier, Michael A. Every, Stanley W. Lyson

Members absent: Representative Pam Gulleon; Senators Carolyn Nelson, John T. Traynor

Others present: See attached appendix

It was moved by Representative DeKrey, seconded by Senator Bercier, and carried on a voice vote that the minutes of the July 27, 2004, meeting be approved as distributed.

OPEN RECORDS STUDY

Chairman Boucher called on Mr. Jim Ganje, State Court Administrator's office, for testimony regarding the policies of the Supreme Court regarding access to court records. Mr. Ganje said North Dakota Supreme Court Administrative Rule 41 provides for the open records policy for the state's courts. He said the policy operates on the presumption that judicial records are generally open to the public for examination, inspection, and copying. He said the rule provides for procedures for identifying certain records as exempt from disclosure. He said the rule also provides for a procedure for sealing records. He said a party may petition the court to have a record or a portion of a record sealed. A copy of North Dakota Supreme Court Administrative Rule 41 is on file in the Legislative Council office.

In response to a question from Representative Boucher, Mr. Ganje said a person who requests an open record does not have to state a reason for requesting the record. He said many clerks of court find that discomfoting. He said unless a court seals the record or a state or federal law makes the record confidential, the court record is open. He said the person requesting copies of the records is assessed a 25-cent per page copying charge. He said cases involving minors are only closed if the case involves a minor in a juvenile court proceeding. He said the name of a minor in a child custody or child support case would be an open record.

In response to a question from Senator Every, Mr. Ganje said the Supreme Court is working on revising Rule 41 to make certain items in court

records, such as Social Security numbers and credit card numbers, confidential.

In response to a question from Senator Bercier, Mr. Ganje said only a judge can seal a court record. He said Sections 9 and 10 of Rule 41 provide a procedure for the sealing of records. He said a court can seal a record based upon a motion to do so or the court can make the decision to seal a record on its own.

In response to a question from Representative DeKrey, Mr. Ganje said the number of people using pro se representation continues to increase. He said in response to the increase in pro se cases, the Supreme Court has developed forms for litigants to use.

In response to a question from Representative Boucher, Mr. Ganje said if a court record contains sensitive information, a party can request the court to seal that portion of the record. He said the public perception is that court records are open.

Chairman Boucher called on Mr. Jack McDonald, North Dakota Newspaper Association, for testimony regarding open court records. Mr. McDonald said the media supports open court proceedings. He said if court records are sealed, it is likely that the court proceedings also would be closed. He said Rule 41 has served the state's courts well. He said the state's courts have had a long tradition of open court records.

In response to a question from Representative Klemin, Mr. McDonald said in the case of personal injury or product liability cases, an attempt is often made after the court proceedings to have the court records sealed. He said generally if a plaintiff's attorney moves to have a court record sealed because of the sensitive nature of the information contained in the record and the defendant's attorney agrees, the court will seal the record.

In response to a question from Senator Every, Mr. McDonald said there is not a law that prohibits the media from publishing the name of a minor. He said the names of minors involved in juvenile court proceedings may not be released by law enforcement officials. He said this prohibition does not apply to domestic relations cases.

In response to a question from Representative Klemin, Mr. McDonald said state law protects minors who are criminal victims or witnesses. He said if a

minor's case is moved to adult court, the minor's name can be made public. He said if a minor testifies in a criminal proceeding, it is usually before a closed court or in the judge's chambers.

In response to a question from Representative DeKrey, Mr. McDonald said if a court record is ordered sealed after the conclusion of an open court proceeding, the information to be sealed may have already been reported by the media. He said it is difficult to seal information that has been presented in an open court proceeding.

In response to a question from Representative Boucher, Mr. McDonald said because of the restrictions on juvenile court information, it is often difficult for agencies to exchange information. He said in some cases, the juvenile court confidentiality rules may hurt rather than help a child.

In response to a question from Senator Lyson, Mr. McDonald said clerks of court often must review a record and redact confidential information before the record is released to the requester.

At the request of Chairman Boucher, committee counsel presented a bill draft [50171.0100] regarding the penalty provisions for the release of confidential information. She said the bill draft changes the penalty in those sections of the North Dakota Century Code which provide for a penalty that is different from the general penalty in North Dakota Century Code Section 12.1-13-01.

Representative Klemin said the use of the word "acquiesces," which means to passively assent, in Section 8 of the bill draft may not be the type of disclosure which meets the standard of "knowingly."

It was moved by Representative Klemin, seconded by Representative DeKrey, and carried on a voice vote that the words "in, or acquiesces" on page 6, line 11, of the bill draft be removed.

Representative Klemin said there is a concern that if the penalty is too severe for the release of confidential information, violations will not be prosecuted.

Senator Lyson said a person violating the law is more likely to be reprimanded than prosecuted.

Representative Boucher said a law should be useful and effective but the penalty should not be so severe that the law is not used.

Senator Lyson said "knowingly" is a high standard. He said the release of confidential information is more often done "negligently" than "knowingly."

Mr. McDonald said before 1957, the release of confidential information was an infraction. He said even when the penalty was an infraction, there were not any prosecutions of violations. He said if the release is inadvertent, it is not a knowing violation. He said because of the nature of the crime, a violation is more likely to result in a reprimand or a change in procedures than a prosecution.

In response to a question from Senator Every, Mr. McDonald said the bill draft would make the

penalties consistent throughout the North Dakota Century Code.

It was moved by Representative DeKrey, seconded by Senator Every, and carried on a roll call vote that the bill draft relating to the penalties for the release of confidential information be approved and recommended to the Legislative Council. Representatives Boucher, DeKrey, Klemin, and Kretschmar and Senators Bercier, Every, and Lyson voted "aye." No negative votes were cast.

COURT FACILITIES STUDY

Chairman Boucher called on Mr. Ganje for testimony regarding the status of revenue collection for the court facilities maintenance fund and the indigent defense administration fund. Mr. Ganje said the collections to date total \$1,000,832. He said the estimate of total receipts through June 30, 2005, is \$1,905,891. He said this is based upon an estimate of \$90,506 per month through the end of the biennium. He said \$750,000 will be deposited in the indigent defense fund, \$460,000 will be deposited in the court facilities maintenance fund and, as provided for in the statute, any additional funds collected in excess of these amounts is to be divided equally between the two funds. He said it is estimated that an additional \$347,945 will be deposited in each fund this biennium. Mr. Ganje provided information on the actual and estimated revenue collection, a copy of which is on file in the Legislative Council office.

Mr. Ganje also provided information to the committee regarding the collection rate of the criminal defense fee. He said through June 2004 about 70 percent of the amount assessed has been collected. A copy of the information, which was prepared by Mr. Ted Gladden, State Court Administrator, is on file in the Legislative Council office.

In response to a question from Representative Boucher, Mr. Ganje said the 30 percent that is in accounts receivable is well beyond the expectations of the amount that would be collected.

In response to a question from Representative DeKrey, Mr. Ganje said there has not been a great deal of criticism about the imposition of the fee.

In response to a question from Senator Bercier, Mr. Ganje said the judges have made the collection of this fee a top priority.

In response to a question from Representative Klemin, Mr. Ganje said the collection of the criminal defense fee has not had a dramatic effect on the collection of other fees.

UNIFORM LAWS

Representative Kretschmar said the North Dakota Commission on Uniform State Laws will be making a decision on which uniform laws to introduce to the 2005 Legislative Assembly. He said because of the current federal law regarding estate tax, the commission likely will not introduce the Uniform Estate Tax

Apportionment Act during the upcoming session. He said the Uniform Trust Act, the Uniform Securities Act, and several other uniform Acts are being considered by the commissioners for introduction.

In response to a question from Senator Bercier, Representative Kretschmar said the Uniform Estate Tax Apportionment Act is not related to streamlined sales tax collection efforts. He said the uniform law applies to those situations in which a person owns property in more than one state. He said this Act would determine how the estate tax would be divided between states.

In response to a question from Representative Boucher, Representative Kretschmar said this Act would apply only to personal property. He said real property is taxed by the state in which the property is located.

Mr. John Walstad, Code Revisor, Legislative Council, said the interim Taxation Committee is considering a bill draft regarding sales tax collections on Internet sales. He said there are efforts underway for a streamlined tax collections agreement between states. He said until Congress acts, compliance with the agreement by a state would be voluntary.

TECHNICAL CORRECTIONS BILL DRAFT

At the request of Chairman Boucher, Mr. Walstad presented a bill draft [50164.0100] regarding technical amendments to the North Dakota Century Code. He said the bill draft makes technical corrections, including improper, inaccurate, redundant, missing, or obsolete references. He said a legislative change giving the code revisor more authority to make

technical corrections has greatly reduced the size of this bill draft over previous technical corrections bills. He said any additional corrections that may arise between now and the introduction of the bill draft will be offered as amendments during the legislative session.

It was moved by Representative DeKrey, seconded by Senator Every, and carried on a roll call vote that the bill draft relating to the technical corrections to the North Dakota Century Code be approved and recommended to the Legislative Council. Representatives Boucher, DeKrey, Klemin, and Kretschmar and Senators Bercier, Every, and Lyson voted "aye." No negative votes were cast.

It was moved by Representative DeKrey, seconded by Senator Bercier, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.

It was moved by Representative DeKrey, seconded by Senator Every, and carried that the meeting be adjourned sine die.

Chairman Boucher adjourned the meeting sine die at 10:30 a.m.

Vonette J. Richter
Committee Counsel

ATTACH:1