

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIARY A COMMITTEE

Monday, November 5, 2001
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, Bruce Eckre, April Fairfield, Joyce Kingsbury, Lawrence R. Klemin, William E. Kretschmar, John Mahoney, John M. Warner

Members absent: Representatives Duane DeKrey, G. Jane Gunter; Senators Deb Mathern, Carolyn Nelson, John T. Traynor, Darlene Watne

Others present: See attached appendix

Chairman Boucher recognized Representative Lois Delmore, a member of the Legislative Council, who was present at the meeting.

Chairman Boucher called on Ms. Terry Ostmo, Wahpeton. Ms. Ostmo said several points in the minutes of the July 25, 2001, meeting should be clarified. She said the minutes provided that the preliminary hearing must be held in the county of residence. She said the preliminary hearing may be held either in the county of residence or in the county in which the respondent is detained. She said the seven-day period referred to in the minutes is a timeframe within which the preliminary hearing must be held. She said a statement made by Ms. Rose Stoller, Executive Director, Mental Health Association in North Dakota, which referred to her knowledge of incidents of due process violations, should have stated that Ms. Stoller was not aware of any instances of gross negligence with respect to due process at the State Hospital.

It was moved by Representative Mahoney, seconded by Representative Kretschmar, and carried on a voice vote that the minutes of the July 25, 2001, meeting, as clarified, be approved.

CLERK OF COURT STUDY

Chairman Boucher called on Chief Justice Gerald W. VandeWalle, Supreme Court, for information regarding benefits of clerk of court office employees. Chief Justice VandeWalle said Mr. Keith Nelson, State Court Administrator, who had been scheduled to appear before the committee, was seriously ill. He said Mr. Ted Gladden has been appointed as acting State Court Administrator. He also said Ms. Susan Sisk has been hired to fill the position vacated by Ms. Jana Thielges.

Chairman Boucher extended the committee's best wishes to Mr. Nelson.

Regarding leave benefits for clerk of court employees, Chief Justice VandeWalle said the Supreme Court, in administrative conference, decided to assume all sick leave that employees had on the county books as of April 1, 2001. He said this liability was assumed by the Supreme Court to ensure new state employees would have sick leave if needed. He said all annual leave, up to 240 hours, on employee records with the county was assumed by the state and credited to the account of each employee. He said all new state employees were given credit for time worked in county clerk of court offices for purposes of annual and sick leave accrual. He said because clerks of court were elected officials and unable to accrue annual leave or sick leave, the Supreme Court gave a one-time credit in order to give these employees a fair start. He said clerks of court with up to nine years of service were given 80 hours of sick leave and 80 hours of annual leave. Clerks with more than nine years of service, he said, were given 160 hours of sick leave and 160 hours of annual leave. He said an additional 176-hour block of sick leave is available with certification from the employee's doctor in the event of a major illness.

Regarding salary, Chief Justice VandeWalle said all clerks of court and deputies were brought into the state payroll at the salary they had when they left county employment. He said there was only one salary question that arose. He said Morton County permitted employees to decline health care and receive the amount saved in cash. He said Morton County employees who had received cash for declining health care were upset because they believed their state salary should be their county salary plus the amount for declined health care coverage. He said to do so would have given them money for declined coverage plus health care coverage automatically provided by the state. He said the Supreme Court based the salary on the county salary, not including paybacks for benefits declined. Chief Justice VandeWalle submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Boucher, Chief Justice VandeWalle said the salaries of employees who were paid more than their new state position authorizes are frozen until their position catches up with their current pay. He said he would

provide the committee with additional information on the salaries of the clerk of court employees.

In response to a question from Representative Warner, Chief Justice VandeWalle said the number of full-time equivalent (FTE) positions assigned to each state-funded clerk of court office was determined by a formula that was based on the number of filings.

In response to a question from Representative Kretschmar, Chief Justice VandeWalle said of the 53 counties, Oliver, Billings, and Sioux opted to fund their own clerk of court services; 11 counties opted to have the state provide clerk of court services; 38 counties opted to contract with the state; and one county, Sheridan, did not make an election by the April 1, 2000, deadline and, therefore, is providing clerk of court services at its own expense. He said the level of benefits provided to the employees was worked out by a clerk of court committee. The number of district judgeships, he said, is always an issue. A weighted caseload study indicated that 42 judgeships are adequate; however, he said, problems arise in the statewide distribution of those positions. He said the weighted caseload study is only a tool and is not a precise science. He said the issue of the number of judges in the state is similar to problems faced by the schools. He said all children need an education, but there are not enough children in some parts of the state to justify operating a school. He said the same applies to the courts. Some areas of the state are not populated enough for a judgeship position, but the judicial services are still needed.

Chairman Boucher called on Mr. Kevin Glatt, Auditor, Burleigh County, for testimony concerning the transfer of clerk of court benefits. Mr. Glatt said Burleigh County gave clerk of court office employees the option to "cash out" benefits. He said 6 of the 10 eligible employees opted to cash out a portion of their sick leave. He said the total cost to the county for the "cashout" was about \$6,000.

Chairman Boucher called on Mr. Wade Williams, North Dakota Association of Counties, for testimony concerning clerk of court benefits and restitution issues. Mr. Williams said the majority of clerk of court employees received an increase in pay when they became state employees, particularly when taking into consideration the increases in benefits. He said he will provide the committee with exact salary numbers.

Regarding the costs of providing restitution services in the four counties in which the state's attorney's office provides this service, Mr. Williams said Cass County has two FTE positions at a cost of \$57,369; Grand Forks County has two FTE positions at a cost of approximately \$60,000; Ward County has a .9 FTE position at a cost of \$30,911; and Burleigh County has .75 FTE position at a cost of \$20,673. He said these amounts reflect the cost of salary and benefits. He distributed a copy of a document regarding the estimated number of FTE positions needed in each

county to perform restitution duties, a copy of which is on file in the Legislative Council office.

Chairman Boucher called on Mr. Mike Lefor, North Dakota Collectors Association, Dickinson, for testimony regarding debt collection practices in the state. Mr. Lefor introduced Ms. Kim Rau and Ms. Lisa Lauiner, both of whom work with collection agencies in Bismarck. He said the North Dakota Collectors Association is a group of collection professionals within the state of North Dakota. He said a professional collection service could assist state government in collecting accounts that remain delinquent. He said collectors have a vast knowledge of collection techniques, technology, and compliance issues. He said using a professional collection service saves time and will likely yield better results. Mr. Lefor submitted written testimony and two brochures on collection services, copies of which are on file in the Legislative Council office.

In response to a question from Representative Kretschmar, Mr. Lefor said collection agencies do their best to collect a debt before seeking a judgment to collect the debt.

In response to a question from Representative Mahoney, Mr. Lefor said depending on the age of the debt, the fee retained by the collection agency for collection of a debt is between 30 and 50 percent. He said the lowest rate charged is for simple collections.

In response to a question from Representative Klemin, Mr. Lefor said the average amount of an account is \$300. He said collection agencies are not authorized to use small claims court for collection.

In response to a question from Representative Klemin, Chief Justice VandeWalle said one of the ways of collecting a debt is to reduce the claim to judgment.

In response to a question from Representative Klemin, Ms. Rau said several state agencies use collection agencies for the collection of delinquent accounts. She said the state agency accounts are handled in the same manner as private sector accounts.

In response to a question from Representative Boucher, Mr. Lefor said he is not aware of any collection agencies in the state that buy account receivable accounts.

In response to a question from Representative Klemin, Chief Justice VandeWalle said in criminal cases in which restitution is ordered, the majority of defendants are not on supervised probation.

In response to a question from Representative Boucher, Chief Justice VandeWalle said there is not a firm statewide process for the collection of restitution. He said the duty is the responsibility of state's attorneys in some counties and the responsibility of clerks of court in others. He said some judges view restitution as a court order that is the responsibility of the court to collect. He said the statute regarding restitution is silent on the issue of who is responsible for restitution collection. He said whether there should

be a statewide system for the collection of restitution is a political decision.

Representative Klemin requested the committee be provided with a copy of the statute regarding restitution.

INDIGENT DEFENSE AND PUBLIC DEFENDER SYSTEM STUDY

Chairman Boucher called on Chief Justice VandeWalle for information regarding indigent defense costs. Chief Justice VandeWalle distributed information regarding the amounts budgeted by each judicial district for indigent defense. He also distributed information on the number of cases assigned and assignments made outside of contracts. Copies of both documents are on file in the Legislative Council office.

Chief Justice VandeWalle said the current system of providing indigent defense raises concerns about conflict of interest. He said he would prefer a state-operated public defender system; however, that type of system would be very costly.

In response to a question from Representative Eckre, Chief Justice VandeWalle said North Dakota is the only state that exclusively uses the contract system for providing indigent defense. He said the committee may want to consider contacting a consulting company called the Spangenberg Group for information on indigent defense issues. He said the attorneys who work under contract to provide indigent defense services in the state are doing a good job, but they frequently do not have the time necessary to spend on cases.

In response to a question from Representative Klemin, Chief Justice VandeWalle said a public defender office would be a separate, freestanding office. He said even if indigent defense is not completely handled outside the judicial branch, there should be some type of "wall" separating the two. He said the involvement of the judiciary requires the judiciary to deal with the appearance of impropriety issue. He said the Office of Administrative Hearings is an agency that could possibly administer indigent defense. He said the state needs a system that does not include the involvement of district judges in the process.

At the request of Chairman Boucher, committee counsel distributed a copy of the Uniform Model Public Defender Act, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Mahoney, Chief Justice VandeWalle said eligibility standards for indigent defense exist; however, it is often difficult to determine whether the applicant is revealing all assets.

Chairman Boucher called on Mr. Williams for information regarding the costs of prosecution and indigent defense. Mr. Williams said counties do not keep specific numbers on the costs of prosecution but approximately 60 to 80 percent of a county's budget is

spent on criminal cases and 20 to 40 percent is spent on civil actions and other duties. He said up to 60 percent of some counties' budgets are used for mental health commitment cases and murder cases. He said he will be working with one county to come up with more specific numbers and will provide that information to the committee at a future meeting.

In response to a question from Representative Boucher, Mr. Williams said the amount spent on prosecuting indigent defendants is significantly more than is spent on defending indigent defendants.

In response to a question from Representative Klemin, Mr. Williams said counties do not keep track of the costs of individual cases. He said the annual budgets are based on previous year caseloads. He said the budgets are based on anticipated salary, travel, and office expenses.

In response to a question from Representative Boucher, Mr. Williams said it is difficult for counties to plan for large or expensive cases. He said in the event of a large, time-consuming case, the state's attorney may request additional funding from the board of county commissioners.

In response to a question from Representative Boucher, Representative Mahoney said as a prosecutor it has been difficult to project the type or number of cases that will arise in any given year. He said the number of cases tend to average out over a period of years, but there are high years and low years.

Chairman Boucher called on Ms. Bonnie Johnson, Cass County Coordinator, Fargo, for comments regarding indigent defense and guardian ad litem costs. Ms. Johnson said as part of the court unification process, the payment of indigent defense for criminal cases became a state obligation. She said providing indigent defense for civil cases should be a responsibility of the state as well. Ms. Johnson submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Ms. Johnson said Cass County spends about \$45,000 per year to provide indigent defense services for civil cases. She said it would cost the state an estimated \$100,000 to \$150,000 to fund indigent defense services for civil cases.

In response to a question from Representative Mahoney, Ms. Johnson said each county is responsible for providing the indigent defense services for civil cases.

In response to a question from Representative Boucher, Ms. Johnson said the majority of the civil cases for which the counties are responsible for providing indigent defense services are mental health commitment cases.

In response to a question from Representative Boucher, Mr. Williams said Burleigh County spent \$13,000 on indigent defense services for mental health commitment cases, \$11,000 on guardian ad litem services, and \$318,000 on indigent defense in criminal cases.

Chairman Boucher called on Ms. Brenda Neubauer, Bismarck attorney, for testimony regarding the state's indigent defense system. Ms. Neubauer said she has concerns over the indigent defense application process. She said she is aware of a number of incidents in which the applicant's eligibility was questionable. She said requiring verification of income is needed. She said there are also eligibility issues raised when minors who live with their parents apply for indigent defense. She said if a minor is eligible to be claimed as a dependent, the parent's income should be used for determining eligibility.

In response to a question from Representative Boucher, Ms. Neubauer said there is a need for a uniform statewide application for indigent defense services. She said because of increasing overhead costs and because of the caseload and time commitment, attorneys who do indigent defense work are not able to take as many "paying" cases. She said some of the more experienced attorneys are getting out of indigent defense work.

In response to a question from Representative Mahoney, Ms. Neubauer said defense costs are rarely collected from defendants who, at some future time, may be in a position to afford to pay for the services. She said overall, contract attorneys enjoy doing indigent defense work and are doing a good job. She said there is a need for more statewide consistency in the system.

In response to a question from Representative Boucher, Ms. Neubauer said child support cases are assigned under a separate contract from the indigent defense contract.

In response to a question from Representative Delmore, Ms. Neubauer said the lead firm in a district is responsible for assigning cases to the contract attorneys in the district. She said being the lead firm requires a significant amount of added responsibility and paperwork. She said the lead firm is paid an additional \$400 to perform the additional duties. She said the indigent defense system in the state works well; however, it requires a significant amount of an attorney's time. She said the nonuniformity of applications is an issue that needs to be worked out with the judiciary.

Chairman Boucher requested that a representative of the North Dakota Indigent Defense Commission be invited to discuss the application process and eligibility requirements.

MENTAL ILLNESS COMMITMENT PROCEDURES STUDY

Chairman Boucher called on Judge Burt L. Riskedahl, South Central Judicial District, for testimony regarding mental illness commitment proceedings and the present commitment law. Judge Riskedahl said the delivery of mental health services has changed over the years. He said much more treatment is being done within the community than in the past. He said the total number of cases has not decreased, but

the court's involvement in cases has decreased. He said there has been a cultural shift in how we deal with mental illness. He said many of the needs of persons previously referred to the court are now being addressed in the community without court involvement. He said there is also more treatment being done at local hospitals rather than at the State Hospital. He said the state's law on commitment is limited to mental illness and chemical dependency. He said the commitment law is not based on the idea that everyone with mental illness needs to be a part of a court proceeding but rather that it applies to those who pose a danger to themselves or others. He said the number of cases in which a person is actually detained for seven days is low. He said in the majority of cases, a treatment plan is in place within the first two to three days. He said this has resulted in fewer hearings. He said with a treatment plan in place, the 90-day maximum length of detention is rarely reached.

In response to a question from Representative Boucher, Judge Riskedahl said the amount of time a court spends on commitment cases has decreased dramatically. He said the filing of the petition is followed by an order issued for hospitalization. He said lawyers are spending less time on these cases than previously. He said when the law was originally enacted, it provided that the hearing must be held within three business days; however, in 1989 the law was changed to seven days. He said the seven-day law is not detaining people who do not need to be detained. He said the seven-day period includes Saturdays, Sundays, and holidays, whereas the previous three-day period did not. He said probable cause is needed to hold a person.

In response to a question from Representative Eckre, Judge Riskedahl said community resources may be limited in rural areas; however, services can be obtained through regional human service centers.

In response to a question from Representative Boucher, Judge Riskedahl said the seven-day period can be extended for good cause. He said judicial availability should not be an issue. He said the mental illness commitment law is working. He said there is statewide uniformity in the forms used in the commitment process.

In response to a question from Ms. Ostmo, Judge Riskedahl said the petition originates with the state's attorney and not with the court.

Chairman Boucher called on Mr. Alex C. Schweitzer, Superintendent, State Hospital, for testimony regarding mental illness proceedings, detention periods, and interstate compacts. Mr. Schweitzer said he researched the allowable time period for emergency detention in a treatment facility before a court hearing is required. He said of the 14 states he researched, 13 have time periods that are less than North Dakota's maximum length of detention and one state's time period exceeded North Dakota's. He said 8 of the 14 states have a 72-hour timeframe for a

court proceeding. He said those states with the 72-hour timeframe exclude weekends and holidays.

In response to a question from Representative Boucher, Mr. Schweitzer said he has experienced few problems with scheduling a hearing. He said the courts are hearing the cases on a timely basis. He said most of the commitment hearings involve emergency commitments.

In response to a question from Representative Eckre, Mr. Schweitzer said most of the hearings are held within the seven-day period. He said the goal is to hold the hearings as soon as possible.

Regarding the Interstate Mental Health Compact, Mr. Schweitzer said some states, predominately Minnesota, delay the transfer of their citizens residing in the State Hospital or in North Dakota community hospitals by claiming they have full beds. He said Minnesota and Wisconsin have an interstate compact that allows patients to remain in a treatment facility in which they are currently residing until the home state has a bed opening. He said each state is responsible to provide payment for its respective citizens. He said other interstate compact issues involve the transfer from community hospitals to the State Hospital for a transfer back to the home state through the interstate compacts. He said the State Hospital is working with community hospitals to inform them of the potential for direct transfer rather than an admission to the State Hospital. He also said because of jurisdictional issues, the State Hospital supports an arrangement similar to the Minnesota and Wisconsin interstate agreement to resolve the issues. Mr. Schweitzer submitted written testimony, a copy of which is on file in the Legislative Council office.

At the request of Chairman Boucher, committee counsel distributed a copy of North Dakota Century Code Chapter 25-11, the "Interstate Mental Health Compact."

In response to a question from Representative Eckre, Mr. Schweitzer said an agreement, similar to the one negotiated between Minnesota and Wisconsin, is being pursued between Minnesota and North Dakota.

In response to a question from Representative Boucher, Mr. Schweitzer said there are problems with reimbursement when North Dakota treats out-of-state patients. He said the patient is liable for payment. He said the out-of-state patients are not eligible for the North Dakota Medicaid program. He said of the out-of-state patients treated at the State Hospital, about 75 percent are Minnesota residents. He said because the majority of treatment tends to be provided locally, the State Hospital rarely receives referrals for mental illness from tribal courts.

Chairman Boucher called on Ms. Ostmo for comments concerning the mental illness commitment study. Ms. Ostmo said in the mental illness commitment process, the preliminary and treatment hearings should not be combined. She said the patient should

have his or her day in court as soon as possible. Ms. Ostmo submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Eckre, Ms. Ostmo said the preliminary hearing can be waived, but it should be a patient option.

In response to a question from Representative Boucher, Mr. Schweitzer said the preliminary hearing, which can be waived, must be held within seven days of the date the respondent was taken into custody. If the court finds probable cause to believe the respondent is in need of treatment, the court may order the respondent detained for up to 14 days for treatment in a treatment facility. He said the venue for the preliminary hearing is in the county of residence. He said the law provides that the respondent is entitled to legal counsel.

In response to a question from Representative Warner, Mr. Schweitzer said an evaluation is done within 24 hours after the person is taken into custody. He said the petitions are filed with the clerk of court. He said local law enforcement agencies bear the expense of transporting persons taken into custody. He said most of the patients transported to the State Hospital do not have health insurance.

In response to a question from Representative Kretschmar, Mr. Schweitzer said 2001 Senate Bill No. 2291, which would have changed the maximum number of days for detention from seven to three, failed because of concerns about the timelines the change would create. He said the consensus was that the issue required more study.

At the request of Chairman Boucher, committee counsel distributed a copy of the legislative history for 2001 Senate Bill No. 2291.

Chairman Boucher called on Ms. Stoller for comments regarding the study. She said the Mental Health Association is interested in working with the State Hospital to resolve mental health commitment issues. She said a task force, if formed, could address issues relating to reimbursement problems.

Chairman Boucher said the committee should receive more information on the agreement between Minnesota and Wisconsin and review whether North Dakota could benefit from a similar agreement.

Representative Eckre said Minnesota Representative Kevin Goodno may be able to provide information on the Minnesota/Wisconsin agreement.

No further business appearing, Chairman Boucher adjourned the meeting at 2:15 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1