

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Tuesday, July 27, 2004
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Merle Boucher, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives Merle Boucher, William E. Kretschmar; Senators Dennis Bercier, Michael A. Every, Stanley W. Lyson, Carolyn Nelson, John T. Traynor

Members absent: Representatives Duane DeKrey, Pam Gulleason, Lawrence R. Klemin

Others present: See attached appendix

It was moved by Senator Nelson, seconded by Senator Bercier, and carried on a voice vote that the minutes of the April 19, 2004, meeting be approved as distributed.

ASSUMPTION OF RISK STUDY

Chairman Boucher called on Judge Gail Hagerty, South Central Judicial District, for testimony regarding the assumption of risk doctrine study. Judge Hagerty said whether the assumption of risk doctrine as a complete bar to recovery is revived is a policy decision for the legislature to make. She said she conducted an e-mail poll of district judges in the state regarding the assumption of risk study. She said of the seven judges who responded, six indicated that the law should not be changed and the seventh said members of the judiciary should not comment on the issue.

In response to a question from Representative Boucher, Judge Hagerty said juries are adept at determining whether a person is at fault and the percentage of fault. She said under the current system, if a plaintiff is more than 50 percent at fault, that person does not recover damages. She said the attorneys in the state do a good job of narrowing down the cases that go to trial. She said there are few frivolous cases that go to trial in North Dakota.

In response to a question from Senator Traynor, Judge Hagerty said assumption of risk is currently an element of fault in the state's modified comparative fault statute. She said juries can consider assumption of risk when determining fault, but it is not a complete bar to recovery. She said under the assumption of risk doctrine, a person who is found to be even a small amount at fault is barred from recovery.

Chairman Boucher called on Ms. Christine Hogan, Executive Director, State Bar Association of North Dakota, for testimony regarding the assumption of risk

study. She said assumption of risk has always been a controversial issue. She said the doctrine operates harshly against the injured person even if the defendant is negligent. She said assumption of risk relieves the defendant of all duty. She said while there are varying degrees of fault, the assumption of risk doctrine does not take those degrees into account. She said assumption of risk is an element of fault that juries are now permitted to consider. She said the system that is currently in place is fair.

In response to a question from Representative Boucher, Ms. Hogan said the law provides that the alteration of a product is a defense to claims of negligence. She said current case law is quite specific on what warnings should contain or whether a warning is sufficient. She said if a case is "cut and dried," judges can step in and grant summary judgment.

Representative Kretschmar said the state's modified comparative fault statute works well and does not need to be changed. He said the current system works much better than the assumption of risk doctrine.

Senator Lyson said the committee has not received any testimony that urged a change to the current system.

Chairman Boucher said the committee has received testimony from the insurance industry, the Insurance Department, the Bar Association, attorneys, and judges. He said because the testimony has indicated the current system is working well, there is no need for a change. It was a consensus of the committee that the assumption of risk doctrine as a complete bar to recovery is not recommended and that the state should continue to use the modified comparative fault system.

OPEN RECORDS STUDY

Chairman Boucher called on Ms. MaryKae Kelsch, Assistant Attorney General, for testimony regarding the Attorney General's Open Records Task Force. Ms. Kelsch said the task force met in April. She said the task force discussed the Judicial Process Committee's concerns regarding the penalties for the release of confidential information. She said the task force did not view the penalties as a problem and were not interested in changing the severity of the penalties.

She said the task force will meet again on September 8 and October 14.

In response to a question from Senator Nelson, Ms. Kelsch said the task force discussed the consistencies of penalties. She said the general penalty for the release of confidential information is a Class C felony; however, there are some statutes that provide for a different penalty. She said the consensus of the task force was that the Class C felony serves as a good deterrent.

In response to a question from Senator Traynor, Ms. Kelsch said state law provides for minimal requirements for the content of minutes. She said the task force is reviewing the topic of minutes of public meetings. She said the task force plans to prepare legislation that addresses various open records issues. She said the Attorney General will introduce the legislation.

In response to a question from Senator Lyson, Ms. Kelsch said there are a number of open records issues raised when it comes to advances in technology. She said one issue is the cost of providing copies of records when the information is contained on computer backups. She said if a record is in a format that requires an information technology expert to retrieve, it may be necessary to require the requester to pay for the cost of the retrieval in advance. She said she would provide the committee with more information and proposed language of legislation regarding the content of minutes.

In response to a question from Senator Nelson, Ms. Kelsch said minutes are required to include the date, place, and time of a meeting, who is in attendance, and the major topics discussed. She said the person in charge of the minutes has the authority to refuse to change anything in the minutes.

In response to a question from Representative Boucher, Ms. Kelsch said the state's open records laws do not apply to court records. She said to protect certain information, a judge can close anything in a file. She said the courts are reviewing their own rules regarding access to records. She said unless a record has been closed by the court, anyone can access the information in court files.

Chairman Boucher said the committee should receive information from the judiciary regarding what court information is open and what information is closed. He said the committee should also receive information from the State Bar Association regarding bar practices for handling confidential information or for requesting a court to close certain files or portions of files.

Chairman Boucher called on Ms. Krista Andrews, Department of Human Services, for testimony regarding the protocol of the department for the release of confidential information. She said there are state and federal laws and regulations that prohibit the department from releasing records unless certain conditions are met. She said state law makes

confidential all department records regarding clients or applicants. She said North Dakota Century Code Section 50-06-15 makes it a Class A misdemeanor to disclose confidential information. She said federal law and regulations further restrict the disclosure of substance abuse treatment records. She said confidential client records may be released under certain circumstances, such as client consent, records used for a civil commitment proceeding, or by court order. She said the department has a 90-page manual that details the protocol for releasing client records.

In response to a question from Representative Boucher, Ms. Andrews said the department has procedures in place for releasing information. She said federal regulations are very restrictive, especially in the area of drug and alcohol treatment records. She said the department can provide non-identifying information upon request, such as the number of persons in a certain program.

In response to a question from Senator Nelson, Mr. Jim Fleming, Deputy Director, Child Support Enforcement, Department of Human Services, said he was unsure as to why the department had a penalty for the release of information which is different from the general penalty.

Senator Nelson said the penalties should be consistent.

It was moved by Senator Every, seconded by Senator Bercier, and carried on a voice vote that the Legislative Council be requested to prepare a bill draft to identify those penalty provisions that are inconsistent with the general penalty and make the penalty for the release of any confidential information a Class C felony for all cases.

In response to a question from Senator Traynor, Ms. Andrews said federal funding of programs is not affected by the severity of penalties.

In response to a question from Senator Every, Ms. Andrews said in addition to the department's manual regarding the release of information, the department conducts training sessions. She said the department's policy on the release of confidential information is very restrictive. She said employees are advised of the penalties for the release of confidential information.

Chairman Boucher called on Mr. Keith Magnusson, Department of Transportation, for testimony regarding the department's protocols with respect to the release of confidential information. Mr. Magnusson said the release of information is based upon statute. He said the department starts with the premise that the records are open. He said state law provides that the records of the department are open. He said North Dakota Century Code Section 39-02-05 provides that all license and registration records are open. He said there are exceptions for certain records such as photographs. He said driver's

license pictures, which are now digitized, are not open records. He said except when a driver's records are requested by a court or by law enforcement, the driver is notified of requests made for information. He said any entry on a driver's record which is more than three years old is not an open record. He said a driver's medical and disability information is highly restricted. He said highly restrictive personal information is only available to courts, law enforcement, and to employers of commercial drivers.

In response to a question from Representative Boucher, Mr. Magnusson said the department no longer sells mailing lists. He said the department tends to err on the side of not releasing information.

In response to a question from Senator Traynor, Mr. Magnusson said there are approximately 500,000 licensed drivers in the state. He said an individual's address could be released to a person who requests the information. He said the requester is charged a \$3 fee. He said insurance solicitors do not get their mailing list information from the department.

Chairman Boucher called on Mr. Paul Schadewald, Chief Administrative Services Division, Game and Fish Department, for testimony regarding the protocol of the department for the release of confidential information. Mr. Schadewald said North Dakota Century Code Section 20.1-03-35 requires the use of Social Security numbers on all game and fish licenses. He said the law was passed at the request of the Department of Human Services as part of its child support enforcement program. He said this requirement is being implemented nationally. He said individuals who are behind on child support payments are denied participation in hunting license lotteries. He said the department is required to collect Social Security numbers from customers but has taken steps to minimize the misuse of the numbers. He said the department has stopped printing Social Security numbers on electronically issued hunting and fishing licenses. He said the number is collected from the customers, but it is not printed on their licenses. He said the department is not able to do this for the old-style paper licenses that are issued by agents throughout the state. He said the department does not include the Social Security number in any response for open record information and does not print Social Security numbers on any hunter lists or on any license tags.

Mr. Schadewald said the department receives 100 to 200 requests per year from businesses for lists of names and addresses and any other information about customers that they can get. He said the requesters often want telephone numbers and e-mail addresses in addition to regular mail addresses. He said Social Security numbers are not provided with this information. He said the department occasionally receives requests for biological information. He said this typically involves data on the location of animals from their wildlife population and habitat surveys. He

said it could involve the location of grouse dancing grounds, information on radio-collared animals, nesting sites, and other similar information. He said the information is sometimes requested by hunters but also is used by private companies in their work. He said under current law, the department is required to release this information. He said the department is considering legislation that would protect some of this information. Mr. Schadewald submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Nelson, Mr. Schadewald said lists are provided to anyone who requests the lists, including political parties.

Chairman Boucher called on Mr. Parrell Grossman, Attorney General's office, for testimony regarding consumer complaints regarding the release of information. He said his division receives few complaints from the public about the release of consumer information. He said the division has received some complaints about the Game and Fish Department's request for Social Security numbers for hunting and fishing licenses. He said people are concerned about identity theft.

In response to a question from Representative Boucher, Mr. Grossman said most of the consumer questions about the use of Social Security numbers are in regard to the reasons why the numbers are needed. He said the office does receive complaints that too much personal information is accessible.

COURT FACILITIES STUDY

Chairman Boucher called on Mr. Jim Ganje, State Court Administrator's office, for testimony regarding the rules of operation and procedure for the Court Facilities Improvement Advisory Committee. Mr. Ganje said the rules were developed for the administration of the court facilities improvement and maintenance fund. He said the first applications for court facilities improvement grants will be due by December 31, 2004. He said once the applications are received, the committee will begin awarding the grants. Mr. Ganje submitted a copy of the rules of operation and procedure for the committee, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Kretschmar, Mr. Ganje said the collection rate is better than anticipated and is continuing at that pace.

In response to a question from Senator Traynor, Mr. Ganje said the awarding of the grants will be based upon the applications. He said the requesters will be required to provide information on the project. He said the requesting county will be required to contribute 25 percent of the cost of the project. He said there is not an appeal process for denied applications. However, he said, the applicants are permitted to reapply at a later date.

In response to a question from Senator Nelson, Mr. Ganje said the committee will award the grants

based on the merits of the project and the funds available. He said 25 percent of the money in the fund is required by law to be dedicated to smaller counties. He said the committee surveyed the counties about their project priorities. He said most of the projects were sensible projects. He said there is not a maximum on the amount of the grants. However, he said, the committee will try to meet the needs of as many applicants as possible.

In response to a question from Senator Nelson, Mr. Ganje said if there are not any small counties that apply, that amount will be retained in the fund for future applicants from small counties.

Chairman Boucher called on Ms. Susan Sisk, State Court Administrator's office, for testimony regarding the status of revenue collection for the court facilities improvement and maintenance fund and the indigent defense administration fund. Ms. Sisk said the collections to date total \$790,656. She said the estimate of total receipts through June 30, 2005, is \$1,753,878. She said this is based on an estimate of \$80,269 per month through the end of the biennium. She said it is estimated that \$750,000 will be deposited in the indigent defense fund, \$460,000 will be deposited in the court facilities fund and, as provided for in the statute, any additional funds collected in excess of these amounts are to be divided equally between the two funds. She said it is estimated that an additional \$271,939 will be deposited in each fund this biennium. Ms. Sisk provided information on the actual and estimated revenue collection, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Traynor, Ms. Sisk said the counties are using the legal tools available to them for revenue collection. She said the funds that have been deposited in the indigent defense fund are being used for the indigent defense program. She said the Supreme Court is still having some difficulty hiring attorneys in the northwestern part of the state, but improvements are being made. She said the court is striving for a pay rate for indigent defense attorneys of \$64 per hour.

In response to a question from Senator Lyson, Ms. Sisk said the money collected in each of the two funds is being used in the current biennium. She said the court received a continuing appropriation for those funds.

In response to a question from Senator Nelson, Ms. Sisk said she would provide information to the committee on the amount that has been not been collected.

In response to a question from Senator Traynor, Mr. Ganje said by December 31 the committee will know how much money will be available for grants. He said some applications may have to be rejected based on the statutory requirements for the grants.

In response to a question from Representative Boucher, Mr. Ganje said the decisions on the first applications will be made by January.

Senator Lyson said in addition to the 25 percent grant match, the counties will be required to report on the progress of their projects.

UNIFORM LAWS

Chairman Boucher called on Mr. Fleming for testimony regarding the Revised Uniform Parentage Act (2002). Mr. Fleming said a number of substantive and technical changes would be needed to make the revised Act work with other statutes of this state. He said the Child Support Enforcement Unit is willing to provide assistance to the committee if the committee decides to introduce or recommend the Act.

Mr. Fleming said the Act would be a significant improvement over the state's current paternity law, which was enacted in 1975. He said the revised Act provides more guidance in many areas than current law. He said one such area is when there are multiple presumed fathers and it is necessary to determine which man should be legally established as the child's father. He said states and legislatures throughout the country are struggling with the important policy issue of whether the rights and responsibilities of being a parent belong to the biological parent or to the child's "psychological" parent. He said the revised Act does not settle this issue with a single arbitrary rule, but establishes a framework for a court to make a decision, which is generally lacking in current law.

Mr. Fleming said North Dakota has a very successful voluntary paternity acknowledgments (VPA) program under North Dakota Century Code Chapter 14-19, which is a separate chapter from the current paternity law. He said in some respects the current VPA law is even better than the VPA provisions in the revised Act. He said if the revised Act is introduced, the Child Support Enforcement Unit recommends that it be amended to incorporate the beneficial provisions in current law or else omit Article III of the Act in its entirety. He said the revised Act would be an improvement over current law, but a number of changes will be necessary to ensure that the state does not take a step backward and lose the benefit of several provisions in current law. He said at the same time there are areas that can be improved in current paternity law. Mr. Fleming submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Boucher, Mr. Fleming said a mother who is not on public assistance is permitted to use the services of the Child Support Enforcement Unit.

In response to a question from Senator Traynor, Representative Kretschmar said the state uniform laws commissioners will be meeting in August and will likely recommend the revised Uniform Parentage Act.

In response to a question from Senator Nelson, Mr. Fleming said the revised Act may impose, in some cases, additional procedures on paternity

determinations. He said there are some provisions in the current state paternity law which are working well and should not be changed.

In response to a question from Senator Traynor, Mr. Fleming said the Child Support Enforcement Unit will be offering amendments to the Act either before or during the next legislative session.

Senator Traynor said the committee should receive testimony from the State Bar Association regarding the Uniform Estate Tax Apportionment Act.

COMMITTEE DISCUSSION

Chairman Boucher said the committee has completed its study of the assumption of risk doctrine. Chairman Boucher said regarding the open records study, the committee will review a bill draft at the next meeting which provides for consistent penalties for the release of confidential information. He said the

committee will also receive information on open records from the judiciary and from the State Bar Association. He said the committee should also receive an update on the revenue collections in the court facilities improvement and maintenance fund.

It was moved by Senator Bercier, seconded by Senator Every, and carried on a voice vote that the meeting be adjourned.

Chairman Boucher adjourned the meeting at 2:30 p.m.

Vonette J. Richter
Counsel

ATTACH:1