

1999 SENATE JUDICIARY

SB 2393

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2393

Senate Judiciary Committee

Conference Committee

Hearing Date February 10, 1999

Tape Number	Side A	Side B	Meter #
1		x	1100 - end
Committee Clerk Signature <i>Jackie Follman</i>			

Minutes:

SB2393 relates to ex parte communications between an agency head and the agency head's litigation attorney.

SENATOR STENEHJEM opened the hearing on SB2393 at 10:50 a.m.

All were present.

DOUG BAHR, Attorney General's Office, testified in support of SB2393. Testimony attached.

SENATOR NELSON asked that you have to do all your discovery before you file anything.

DOUG BAHR stated that unless the agency can appoint someone, the attorney is on their own.

SEEVER VINJE, Securities Commission, testified in support of SB2393. I just want to echo what Doug Bahr has said. The Scott decision concerned our agency a lot.

MURRAY SAGSVEEN, State Health Officer, testified in support of SB2393. Testimony attached.

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Senate Judiciary Committee  
Bill/Resolution Number SB2393  
Hearing Date February 10, 1999

DANIEL ROUSE, Legal Counsel to the North Dakota Tax Commissioner, testified in support of SB2393. Testimony attached.

MATTHEW BARENBERG, Attorney for the Securities Office, testified in support of SB2393.

CAL ROLFSON, Attorney for the Board of Nursing, testified in support of SB2393.

COURTNEY KOEBELE, North Dakota Trial Lawyers Association, am neutral on SB2393. The Trial Lawyers Association had some concerns with a section SB2393.

SENATOR STENEHJEM CLOSED the hearing on SB2393.

SENATOR WATNE made a motion for DO PASS, SENATOR TRAYNOR seconded. Motion carried. 6 - 0 - 0

SENATOR TRAYNOR will carry the bill.

Date: 2-10-99  
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB2393

Senate Judiciary Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do PASS

Motion Made By Watne Seconded By Traynor

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyne Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Traynor



REPORT OF STANDING COMMITTEE (410)  
February 10, 1999 11:50 a.m.

Module No: SR-27-2449  
Carrier: Traynor  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**SB 2393: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends DO PASS**  
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2393 was placed on the  
Eleventh order on the calendar.

1999 HOUSE JUDICIARY

SB 2393

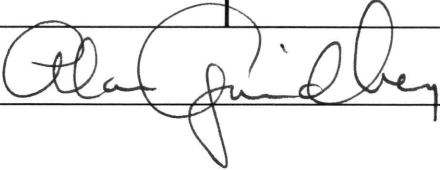
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2393

House Judiciary Committee

Conference Committee

Hearing Date : March 8, 1999

Tape Number	Side A	Side B	Meter #
1	X		0
Committee Clerk Signature 			

Minutes:

DAVID HAGLER (Asst AG) Presented written testimony, a copy of which is attached. He added: The agency head is the client and the judge. We want to be allowed to contact him as the client, but not as the judge. We realize that we are drawing a very fine line.

CAL ROLFSON (Nursing Bd.) The ruling in the Scott case prevents me from answering some of the questions agency members ask. The Nursing Board is a nine member body. They have the right to conduct hearings themselves. We request a "do pass" recommendation on this bill. Until North Dakota gets an independent ALJ system, we need this bill to enable us to protect the public. This bill will let me answer the Board's procedural questions.

DANIEL ROUSE (Tax Comm'r) Presented written testimony, a copy of which is attached.

REP. KLEMIN Mr. Bahr from AG's office said that an attorney for an agency has to be able to discuss a gamut of things with the agency head. The AG's office has interpreted Scott to

Page 2

House Judiciary Committee

Bill/Resolution Number 2393

Hearing Date : March 8, 1999

prevent this. Situation now is contrary to the law allowing closed meetings. Workers

Compensation Bureau has a quirk in its law relative to contact in that they can talk to the agency after they get Recommended Findings, but cannot talk to them before that.

DANIEL ROUSE The Tax Department's problem is that the law on the subject is varied and complex. If an ALJ presents erroneous Conclusions of Law, we need to be able to discuss them with the Commissioner so that can be corrected..

The bill was further discussed on March 16, 1999, see other minutes.

COMMITTEE ACTION: March 17, 1999

REP. KLEMIN moved that the committee recommend that the bill DO PASS. Rep. Hawken seconded and the motion passed on a roll call vote with 9 ayes, 6 nays and 0 absent. Rep.

Klemin was assigned to carry the bill.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2393

House Judiciary Committee

Conference Committee

Hearing Date 3-16-99

Tape Number	Side A	Side B	Meter #
Two SB 2393	x		1.0 to 8.5

Committee Clerk Signature

*Orlin Hanson* (Prepared by Orlin Hanson)

Minutes:

Summary of bill: Relating to an Ex Parte communications between an Agency head and the Agency Head's litigation Attorney.

Heidi Hietkamp: Attorney General St of ND. Bill has had a hearing at an earlier date. Gave some examples for SB 2393

Heidi Heitkamp: Independent hearing officer. Talking about the Scott case, and what happens when there is no communications. Let me tell you there are more protections against ex-parte communications in this statute than there are in the Workmens Comp rules. We have set boundary's where there were none before. That's what this bill does

Rep Meyer: I have problems with this bill, I like to think the Hearing's Officer is completely impartial but now I know they are not.

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House Agriculture Committee

Bill/Resolution Number JUDSB2393

Hearing Date 3-16-99

Heidi Keitkamp: In order to have that system you would have to completely revamp the administrative agency practice after North Dakota's.

Rep Mahoney: Tell us how the Scott case enters in, we desperately need this bill.

Heidi Heitkamp: How would you basically decide the case without the hearing officer.

Hearing closed.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2393

Page 2, line 15, after the underscored period insert "Unless specifically permitted by law, after recommended findings of fact, conclusions of law, and orders are issued, counsel for the administrative agency and the agency head may not consult to decide whether to accept, modify, or reject the recommended findings of fact, conclusions of law, and orders."

Renumber accordingly

Date: 3-16-99  
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2393

House JUDICIARY Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass ~~with amendment~~

Motion Made By Klemin Seconded By Hawken

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH		✓
REP. CLEARY	✓		REP. KLEMIN	✓	
REP. DELMORE	✓		REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	<del>✓</del>
REP. FAIRFIELD		✓	REP. MARAGOS		✓
REP. GORDER		✓	REP. MEYER		✓
REP. GUNTER	✓		REP. SVEEN		✓
REP. HAWKEN	✓				

Total Yes 8 No 6

Absent 0

Floor Assignment Klemin

If the vote is on an amendment, briefly indicate intent:



REPORT OF STANDING COMMITTEE (410)  
March 18, 1999 10:25 a.m.

Module No: HR-49-5060  
Carrier: Klemin  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**SB 2393: Judiciary Committee (Rep. DeKrey, Chairman)** recommends **DO PASS** (9 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). SB 2393 was placed on the Fourteenth order on the calendar.

**1999 TESTIMONY**

**SB 2393**

**TESTIMONY OF DOUGLAS A. BAHR**

**IN SUPPORT OF**

**SENATE BILL NO. 2393**

Mr. Chairman, members of the committee, my name is Doug Bahr, I am the Acting Solicitor General with the Office of Attorney General. I am appearing on behalf of Attorney General Heidi Heitkamp to testify in support of Senate Bill No. 2393.

In order to understand the need of SB 2393, it is necessary to understand the current requirements of N.D.C.C. § 28-32-12.1. N.D.C.C. ch. 28-32, known as the Administrative Agencies Practices Act, addresses the manner in which adjudicative proceedings are conducted. Adjudicative proceedings are hearings conducted by administrative agencies. Adjudicative actions include hearings on a complaint; hearings on an application seeking a right, privilege, or an authorization from an agency; or a hearing on appeal to an agency. See N.D.C.C. § 28-32-01(1).

Section 28-32-12.1 addresses ex parte communications during an adjudicative proceeding. An ex parte communication is a one sided communication, meaning one party to the proceeding communicates with the hearing officer or agency head without providing the other party the opportunity to participate. In its simplest terms, section 28-32-12.1 provides that parties to adjudicative proceedings, persons with direct or indirect interests in the outcome of the proceeding, and persons allowed to participate in the proceeding may not communicate directly or indirectly to the hearing officer or

the agency head unless all other parties are provided notice and the opportunity to participate. For purposes of this law, agency head means the final decision-maker, whether it be a department head or a decision-making body such as a board or commission. See N.D.C.C. § 28-32-01(3).

In Scott v. North Dakota Workers Compensation Bureau, 1998 N.D. 1991 (Dec. 22, 1998), the North Dakota Supreme Court held that an agency attorney representing an agency in an adjudicative proceeding is a “person allowed to participate in the proceeding.” In Scott, the Supreme Court reversed the decision of the Workers Compensation Bureau because the agency attorney privately communicated with the director of the Workers Compensation Bureau after the administrative law judge issued the recommended decision.

The Office of Attorney General does not disagree with the general holding of the Scott decision. As a general rule, attorneys involved in an adjudicative proceeding should not communicate with the ultimate decision-maker after an administrative law judge issues a recommended decision. However, based upon Scott, N.D.C.C. § 28-32-12.1 affects much more than an agency attorney’s communications with an agency head after the issuance of the recommended decision. According to the Supreme Court, the agency’s attorney is a “person allowed to participate in the proceeding.” N.D.C.C. § 28-32-12.1 prohibits persons allowed to participate in the proceeding, and thus the agency attorney, from communicating with the agency head during any and all phases

of the adjudicative proceeding. This prohibition raises a serious concern. It prevents the agency's attorney from communicating to the attorney's client - the agency head. In other words, once the adjudicative proceeding has commenced, attorney-client communication between the agency attorney and the agency head must cease unless the other party is present. Agency heads are left with two unacceptable options—permit the opposing party to participate in attorney-client communications or have no attorney-client communications.

The first option, permitting the opposing party to participate in the attorney-client communication, would generally be harmful to the interests of the agency. The agency attorney could not openly communicate with the agency head out of fear of disclosing harmful, privileged, or confidential information to opposing counsel. The opposing party would be able to listen to discussions of litigation strategies, settlement possibilities, discussions regarding the legal and factual weaknesses in the case, etc. However, the alternative—no communication between the agency head and the agency attorney—creates problems of its own.

The agency head, whether elected or appointed, is responsible to administer the agency. In order to effectively do so, the agency head must receive adequate information to make informed decisions. With regard to adjudicative proceedings and other types of litigation, adequate information includes factual and legal information to make policy decisions, information regarding the strengths and weaknesses of the

case, information regarding settlement opportunities, information regarding potential costs and liabilities, etc. A number of litigation decisions, including the possibility of settlement, typically cannot be made absent open communication between the agency attorney and the agency head. Adjudicative proceedings help establish policy of agencies. Absent information regarding the adjudicative proceeding, an agency head cannot knowledgeably make decisions regarding whether the adjudicative proceeding is establishing the appropriate policy. Adjudicative proceedings can also be expensive, particularly when expert witnesses are required. Absent consultation between the agency head and agency attorney, the agency head cannot make informed decisions regarding the amount of resources that should be expended in the adjudicative proceeding. An agency head can also not properly respond to the public, media, or other inquirers regarding the adjudicative proceeding if no communication exists between the agency head and the agency attorney.

Serious concerns also exist for an agency attorney who is prohibited from communicating with the agency head. Absent appropriate attorney-client communication, the attorney cannot receive direction regarding how to handle the adjudicative proceeding. Decisions that should be made by the client are left to the sole judgment of the attorney. These decisions include decisions regarding agency policy, how to spend agency resources, settlement, and other significant decisions that should be made by the agency head.

Prohibiting an agency attorney from communicating with the attorney's client creates a Hobson's choice for the attorney—comply with N.D.C.C. § 28-32-12.1 or the North Dakota Rules of Professional Conduct. This choice exists because the Rules of Professional Conduct are in direct conflict with the prohibition that an attorney communicate with the attorney's client. For example, Rule 1.4 states “[a] lawyer shall make reasonable efforts to keep a client reasonably informed about the status of a matter.” It further states that “[a] lawyer shall explain matters related to the representation to the extent reasonably necessary to permit the client to make informed decisions.” These requirements are mandatory. A lawyer is also to communicate settlement offers to a client. The comments to Rule 1.4 explain that “a lawyer negotiating on behalf of a client should provide a client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party.” A lawyer cannot fulfill these ethical obligations if the lawyer is prohibited from communicating with the client. Rule 2.1 provides “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” N.D.C.C. § 28-32-12.1 prohibits an agency attorney representing the agency in an adjudicative proceeding from rendering candid advice because the opposing party is required to be present during the communication. A lawyer's failure to comply with these ethical standards could result in disciplinary action.

Senate Bill 2393 attempts to recognize that an agency head acts both as a client and as a decision-maker. The new language permits the agency head and agency attorney to communicate and consult regarding the adjudicative proceeding so the agency head can make informed decisions regarding the proceeding. Absent such communication, the agency head cannot effectively perform the agency head's responsibilities. Although SB 2393 permits the agency attorney to communicate to the attorney's client, the agency head, it continues to prohibit such communications after the recommended decision has been issued except for settlement purposes.

SB 2393 would permit appropriate attorney-client communication to occur between an agency attorney and the agency head. This will permit the agency head to make informed decisions and, therefore, better fulfil the agency head's responsibilities. It will also permit the agency attorney to comply with the Rules of Professional Conduct and receive appropriate direction from the agency head regarding how to represent the agency in the adjudicative proceeding. Absent this amendment to N.D.C.C. § 28-32-12.1, state agencies involved in adjudicative proceedings are placed at a serious disadvantage—either no communication occurs between the agency attorney and the agency head or the opposing party receives notice of and the opportunity to participate in all attorney-client communication. We do not believe that exposing attorney-client communication to opposing parties is sound public policy or in the best interest of state agencies. For this reason, we ask for a do pass.



**Testimony on Senate Bill 2393**  
before the  
**Senate Judiciary Committee**  
**Murray G. Sagsveen, State Health Officer**  
**February 10, 1999**

The North Dakota Supreme Court's *Scott v. North Dakota Workers Compensation Bureau* decision in December 1998 severely limited the ability of department administrators to manage their departments. Enclosed is a copy of my guidance, following *Scott*, to the chief of the environmental health section of the department.

Please note that page 2 of my memorandum states, in part:

It is obvious that the *Scott* decision alters normal supervisory relationships. Once a contested administrative action is initiated, the section chief [or the division director] is "on their own" – they become the client, they make the policy decisions concerning the administrative action, and they ensure compliance with § 28-32-12.1. The State Health Officer must be isolated from the administrative action until the record lands on the State Health Officer's desk. The State Health Officer then must review the record independent of any advice from the section chief or division director – in effect, second-guessing the section chief or division director.

Senate Bill 2393 would resolve most of the administrative problems in § 28-32-12.1, as recently interpreted by the North Dakota Supreme Court. Accordingly, I urge you to vote "do pass" on the bill.



**NORTH DAKOTA  
DEPARTMENT OF HEALTH**

600 E. Boulevard Avenue  
Bismarck, ND 58505-0200

OFFICE OF  
STATE HEALTH OFFICE  
701-328-2372  
FAX 701-328-4727

TO: Fritz Schwindt, Lyle Witham  
FROM: Murray G. Sagsveen  
State Health Officer *MGS*  
RE: Scott v. ND Workers Compensation Bureau  
DATE: January 18, 1999



It appears that the Scott decision requires that we clarify how we will approach contested administrative actions.

Based upon the Supreme Court's guidance, it is my suggestion that:

- The State Health Officer shall be the "agency head" as defined in § 28-32-12.1(3).
- An administrative action begins with service of an administrative complaint.
- When an administrative complaint is served, the assigned assistant attorney general will directly communicate with EHS chief and his staff (and not the State Health Officer) concerning that administrative action (i.e., section chief will be the client for the purpose of that administrative action).
- The State Health Officer will arrange for necessary legal assistance with the Attorney General's office.
- EHS chief, the assigned assistant attorney general, and the environmental health staff working on the administrative action shall avoid ex parte contacts with the State Health Officer concerning the contested administrative action.
- If EHS chief or the assigned assistant attorney general must discuss the contested administrative action with the State Health Officer, appropriate notice pursuant to § 28-32-12.1(3), must first be provided to any adverse party.
- All staff in the Environmental Health Section must be briefed about this procedure to minimize the potential for an inadvertent violation of § 23-31-12.1.

- All staff in the Environmental Health Section must be briefed about this procedure to minimize the potential for an inadvertent violation of § 23-31-12.1.

Please provide a list of all pending contested administrative actions.

A copy of this memorandum, along with a copy of the Scott decision, will be sent to Darleen Bartz because of the periodic contested administrative actions that arise in the Health Facilities Division. That division will establish a SOP similar to that in paragraph 2.

It is obvious that the Scott decision alters normal supervisory relationships. Once a contested administrative action is initiated, the section chief (or, in Darleen's situation, the division director) is "on their own"—they become the client, they make the policy decisions concerning the administrative action, and they ensure compliance with § 28-32-12.1. The State Health Officer must be isolated from the administrative action until the record lands in the State Health Officer's desk. The State Health Officer then must review the record independent of any advice from the section chief or division director—in effect, second-guessing the section chief or division director.

Please advise, as we move forward under this SOP, whether requirements or "fine tuning" are needed.

MGS:lr

cc: Mike Mullen  
Darleen Bartz

**TESTIMONY BEFORE THE  
SENATE JUDICIARY COMMITTEE  
ON SENATE BILL 2393**

February 10, 1999, 10:45 a.m.

Chairman Stenehjem, members of the Senate Judiciary Committee, I am Daniel L. Rouse, Legal Counsel to the North Dakota Tax Commissioner, Rick Clayburgh. I am here today to represent the Commissioner and testify in support of SB 2393.

An agency head should be permitted to discuss with counsel the status of an adjudicative proceeding, discovery, litigation decisions, settlement, and other matters commonly communicated between an agency head and counsel. If enacted, this bill will enable an agency head to engage in protected attorney-client discussions during the pendency of an administrative matter while limiting that protected dialogue to the period before recommended findings of fact, conclusions of law, and orders are issued. This legislation is responsible, narrowly tailored, and is good public policy in that it ensures that an agency head makes informed, well-founded decisions.

If enacted, this change to the Administrative Agencies Practices Act will be of benefit to all - especially taxpayers - because it will allow the Commissioner to receive the assistance of counsel before making an informed, reasonable, and cost-effective determination of a matter, while still fulfilling the Commissioner's mission to fairly and effectively administer the tax laws of this state.

The Tax Commissioner asks that this Committee give SB 2393 favorable consideration. If the Committee has any questions, I will be happy to answer them.

TESTIMONY BEFORE HOUSE JUDICIARY COMMITTEE  
IN SUPPORT OF SENATE BILL NO. 2393

David D. Hagler  
Assistant Attorney General  
Office of Attorney General

March 8, 1999

Chairman DeKrey, members of House Judiciary Committee, my name is David Hagler, I am an Assistant Attorney General, assigned to the Criminal/Regulatory Division. I am appearing on behalf of Attorney General Heidi Heitkamp to testify in support of Senate Bill No. 2393. On the Senate side, Mr. Doug Bahr, acting Solicitor General for the office of Attorney General testified, but unfortunately he had a commitment which prevents him from being here this morning. Mr. Bahr was the primary drafter of this bill and I will be presenting his testimony and hopefully be able to respond to questions you may have. Mr. Bahr indicated he would also be happy to attend a committee hearing if requested to respond to any other questions you may have.

In order to understand the need of SB 2393, it is necessary to understand the current requirements of N.D.C.C. § 28-32-12.1. N.D.C.C. ch. 28-32, known as the Administrative Agencies Practices Act, addresses the manner in which adjudicative proceedings are conducted. Adjudicative proceedings are hearings conducted by administrative agencies. Adjudicative actions include hearings on a complaint;

hearings on an application seeking a right, privilege, or an authorization from an agency; or a hearing on appeal to an agency. See N.D.C.C. § 28-32-01(1).

Section 28-32-12.1 addresses ex parte communications during an adjudicative proceeding. An ex parte communication is a one sided communication, meaning one party to the proceeding communicates with the hearing officer or agency head without providing the other party the opportunity to participate. In its simplest terms, section 28-32-12.1 provides that parties to adjudicative proceedings, persons with direct or indirect interests in the outcome of the proceeding, and persons allowed to participate in the proceeding may not communicate directly or indirectly to the hearing officer or the agency head unless all other parties are provided notice and the opportunity to participate. For purposes of this law, agency head means the final decision-maker, whether it be a department head or a decision-making body such as a board or commission. See N.D.C.C. § 28-32-01(3).

In Scott v. North Dakota Workers Compensation Bureau, 1998 N.D. 1991 (Dec. 22, 1998), the North Dakota Supreme Court held that an agency attorney representing an agency in an adjudicative proceeding is a “person allowed to participate in the proceeding.” In Scott, the Supreme Court reversed the decision of the Workers Compensation Bureau because the agency attorney privately communicated with the director of the Workers Compensation Bureau after the administrative law judge issued the recommended decision.

The Office of Attorney General does not disagree with the general holding of the Scott decision. As a general rule, attorneys involved in an adjudicative proceeding should not communicate with the ultimate decision-maker after an administrative law judge issues a recommended decision. However, based upon Scott, N.D.C.C. § 28-32-12.1 affects much more than an agency attorney's communications with an agency head after the issuance of the recommended decision. According to the Supreme Court, the agency's attorney is a "person allowed to participate in the proceeding." N.D.C.C. § 28-32-12.1 prohibits persons allowed to participate in the proceeding, and thus the agency attorney, from communicating with the agency head during any and all phases of the adjudicative proceeding. This prohibition raises a serious concern. It prevents the agency's attorney from communicating to the attorney's client - the agency head. In other words, once the adjudicative proceeding has commenced, attorney-client communication between the agency attorney and the agency head must cease unless the other party is present. Agency heads are left with two unacceptable options—permit the opposing party to participate in attorney-client communications or have no attorney-client communications.

The first option, permitting the opposing party to participate in the attorney-client communication, would generally be harmful to the interests of the agency. The agency attorney could not openly communicate with the agency head out of fear of disclosing harmful, privileged, or confidential information to opposing counsel. The

opposing party would be able to listen to discussions of litigation strategies, settlement possibilities, discussions regarding the legal and factual weaknesses in the case, etc. However, the alternative—no communication between the agency head and the agency attorney—creates problems of its own.

The agency head, whether elected or appointed, is responsible to administer the agency. In order to effectively do so, the agency head must receive adequate information to make informed decisions. With regard to adjudicative proceedings and other types of litigation, adequate information includes factual and legal information to make policy decisions, information regarding the strengths and weaknesses of the case, information regarding settlement opportunities, information regarding potential costs and liabilities, etc. A number of litigation decisions, including the possibility of settlement, typically cannot be made absent open communication between the agency attorney and the agency head. Adjudicative proceedings help establish policy of agencies. Absent information regarding the adjudicative proceeding, an agency head cannot knowledgeably make decisions regarding whether the adjudicative proceeding is establishing the appropriate policy. Adjudicative proceedings can also be expensive, particularly when expert witnesses are required. Absent consultation between the agency head and agency attorney, the agency head cannot make informed decisions regarding the amount of resources that should be expended in the adjudicative proceeding. An agency head can also not properly respond to the public, media, or



other inquirers regarding the adjudicative proceeding if no communication exists between the agency head and the agency attorney.

Serious concerns also exist for an agency attorney who is prohibited from communicating with the agency head. Absent appropriate attorney-client communication, the attorney cannot receive direction regarding how to handle the adjudicative proceeding. Decisions that should be made by the client are left to the sole judgment of the attorney. These decisions include decisions regarding agency policy, how to spend agency resources, settlement, and other significant decisions that should be made by the agency head.

Prohibiting an agency attorney from communicating with the attorney's client creates a Hobson's choice for the attorney—comply with N.D.C.C. § 28-32-12.1 or the North Dakota Rules of Professional Conduct. This choice exists because the Rules of Professional Conduct are in direct conflict with the prohibition that an attorney communicate with the attorney's client. For example, Rule 1.4 states “[a] lawyer shall make reasonable efforts to keep a client reasonably informed about the status of a matter.” It further states that “[a] lawyer shall explain matters related to the representation to the extent reasonably necessary to permit the client to make informed decisions.” These requirements are mandatory. A lawyer is also to communicate settlement offers to a client. The comments to Rule 1.4 explain that “a lawyer negotiating on behalf of a client should provide a client with facts relevant to

the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party.” A lawyer cannot fulfill these ethical obligations if the lawyer is prohibited from communicating with the client. Rule 2.1 provides “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” N.D.C.C. § 28-32-12.1 prohibits an agency attorney representing the agency in an adjudicative proceeding from rendering candid advice because the opposing party is required to be present during the communication. A lawyer’s failure to comply with these ethical standards could result in disciplinary action.

Senate Bill 2393 attempts to recognize that an agency head acts both as a client and as a decision-maker. The new language permits the agency head and agency attorney to communicate and consult regarding the adjudicative proceeding so the agency head can make informed decisions regarding the proceeding. Absent such communication, the agency head cannot effectively perform the agency head’s responsibilities. Although SB 2393 permits the agency attorney to communicate to the attorney’s client, the agency head, it continues to prohibit such communications after the recommended decision has been issued except for settlement purposes.

SB 2393 would permit appropriate attorney-client communication to occur between an agency attorney and the agency head. This will permit the agency head to make informed decisions and, therefore, better fulfill the agency head’s responsibilities. It

will also permit the agency attorney to comply with the Rules of Professional Conduct and receive appropriate direction from the agency head regarding how to represent the agency in the adjudicative proceeding. Absent this amendment to N.D.C.C. § 28-32-12.1, state agencies involved in adjudicative proceedings are placed at a serious disadvantage—either no communication occurs between the agency attorney and the agency head or the opposing party receives notice of and the opportunity to participate in all attorney-client communication. We do not believe that exposing attorney-client communication to opposing parties is sound public policy or in the best interest of state agencies. For this reason, we ask for a do pass.



RICK CLAYBURGH  
COMMISSIONER

STATE OF NORTH DAKOTA

## OFFICE OF STATE TAX COMMISSIONER

STATE CAPITOL, 600 E. BOULEVARD AVE., DEPT. 127, BISMARCK, NORTH DAKOTA 58505-0599

701-328-2770

FAX 701-328-3700

Hearing/Speech Impaired 800-366-6888 (TTY Relay North Dakota)

[HTTP://WWW.STATE.ND.US/TAXDPT](http://www.state.nd.us/taxdpt)

### TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

#### SENATE BILL 2393

March 8, 1999, 9:00 a.m.

Chairman DeKrey, members of the House Judiciary Committee, I am Daniel Rouse, Legal Counsel to the North Dakota Tax Commissioner, Rick Clayburgh. I am here today to represent the Commissioner and testify in support of SB 2393.

An agency head must be permitted to discuss with counsel the status of an adjudicative proceeding, discovery, litigation decisions, settlement, and other matters commonly communicated between an agency head and counsel. If enacted, this bill will enable an agency head to engage in protected attorney-client discussions during the pendency of an administrative matter while limiting that protected dialogue to the period before recommended findings of fact, conclusions of law, and orders are issued. This legislation is responsible, narrowly tailored, and is good public policy in that it ensures that an agency head makes informed, well-founded decisions.

If enacted, this change to the Administrative Agencies Practices Act will be of benefit to all - especially taxpayers - because it will allow the Commissioner to receive the assistance of counsel before making an informed, reasonable, and cost-effective determination of a matter, while still fulfilling the Commissioner's mission to fairly and effectively administer the tax laws of this state.

The Tax Commissioner asks that this Committee give SB 2393 favorable consideration. If the Committee has any questions, I will be happy to address them.

Prepared by Rep. Klemin  
March 17, 1999

PROPOSED AMENDMENT TO SENATE BILL NO. 2393

In an adjudicative proceeding conducted by a hearing officer other than the agency head, counsel for the administrative agency and the agency head, without notice and opportunity for all parties to participate, may only communicate and consult regarding procedural questions, the status of the adjudicative proceeding, and for purposes of negotiating settlements. Unless specifically permitted by applicable law, after recommended findings of fact, conclusions of law, and orders have been issued, counsel for the administrative agency and the agency head may not consult to decide whether or not to accept, modify or reject the recommended findings of fact, conclusions of law and orders.