

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2068

2005 SENATE HUMAN SERVICES

SB 2068

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2068

Senate Human Services Committee

☐ Conference Committee

Hearing Date January 17, 2005

Tape Number	Side A	Side B	Meter #
1		x	0450-4220
2	x		1845-1920
Committee Clerk Signature <i>Cathy Kinnard</i>			

Minutes:

Chairman Lee opened the public hearing on SB 2068.

All members were present.

Chairman Lee is a sponsor of this bill and introduced it.

Testimony in favor of SB 2068

Rolf Sletten, Executive Secretary, Board of Medical Examiners

See written testimony (Attachment 1)

Testimony in opposition of SB 2068

Dr. Bruce Levi, North Dakota Medical Association

See written testimony (Attachment 2)

Some discussion followed concerning attendance at these meetings and it really isn't a problem having a majority present at each meeting. Mr. Sletten talked about the proposed amendment, which he did not like, i.e., the majority of the majority. Just by increasing the number of people

on the panel to six it doesn't mean you have to have one more person voting in favor to carry a motion. Right now, there are five people on the panel and with this you could do business with three and then two could carry a motion. If the proposal passed, you'd have to have six on the panel and four to pass; and if there were only four at the meeting, all four would have to agree, which isn't likely. If you had five show up and you had a vote of 3 to 2, the vote wouldn't count. It gets to be cumbersome. The most common motion that is made is to dismiss a motion, so you don't want to make it so cumbersome that you can't even pass routine motions.

There was further discussion on various topics related to background information on this bill.

Neutral testimony on Bill 2068

John Emter, private citizen

Mr. Emter likened this bill to the "fox watching the henhouse" and referenced a case in Glen Ulan where a doctor did not abide by the laws. Chairman Lee commented that all professions have peer reviews, because you can't judge a peer if you're not an expert in your field. A lay person cannot be on a panel and expected to be a judge if there is no knowledge of a subject.

(Tape 1 side B meter 3200-4100)

Chairman Lee closed the public hearing

Sen. Brown moved Do Pass, Sen. Lyson seconded. Carrier: Sen. Brown

FISCAL NOTE

Requested by Legislative Council
01/19/2005

Amendment to: SB 2068

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This bill has no impact on the state budget or on any appropriation. Adding one more member to the Board of Medical Examiners increases the Board's expenses by approximately \$4000 the first year and by approximately \$3000/year thereafter.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Rolf Sletten	Agency:	Bd/ of Medical Examiners
Phone Number:	328-6500	Date Prepared:	01/19/2005

Date: 1/17/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2068

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Brown Seconded By Lyson Warner

Senators	Yes	No	Senators	Yes	No
Sen. Judy Lee - Chairman	✓		Sen. John Warner	✓	
Sen. Dick Dever - Vice Chairman	✓				
Sen. Richard Brown	✓				
Sen. Stanley Lyson	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment _____

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

Date: 1/17/05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2068

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Brown Seconded By Lyson

Senators	Yes	No	Senators	Yes	No
Sen. Judy Lee - Chairman	✓		Sen. John Warner	✓	
Sen. Dick Dever - Vice Chairman	✓				
Sen. Richard Brown	✓				
Sen. Stanley Lyson	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment Sen. Brown

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

REPORT OF STANDING COMMITTEE

SB 2068: Human Services Committee (Sen. J. Lee, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2068 was placed on the Sixth order on the calendar.

Page 1, line 8, replace "ten" with "twelve" and replace "seven" with "nine"

Page 1, line 17, overstrike "five" and insert immediately thereafter "six" and overstrike "Four" and insert immediately thereafter "Five"

Renumber accordingly

2005 HOUSE HUMAN SERVICES

SB 2068


2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2068

House Human Services Committee

☐ Conference Committee

Hearing Date February 15, 2005

Tape Number	Side A	Side B	Meter #
1	x		28-546
Committee Clerk Signature 			

Minutes:

Chairman Price opened the hearing on SB 2068. 11 members present, Rep. Weisz AB.

Rolf Sletten, Executive Director of the Board of Medical Examiners. Testimony attached.

Bruce Levi, representing ND Board of Medical Examiners. See attached testimony.

Chairman Price: Anyone else to speak in favor? Any opposition?

Hearing closed.

MR# 1748

Chairman Price opened discussion.

Rep. Porter: Motion for a Do Pass.

Rep. Potter: Second

Vote: 10-0-2. Carrier: Rep. Pietsch.

Date: 2/15/05

Roll Call Vote #: /

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-513 2068

House _____ Human Services _____ Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep Porter Seconded By Rep Pietsch

Representatives	Yes	No	Representatives	Yes	No
Chairman C.S. Price	\		Rep.L. Kaldor	\	
V Chrm.G. Kreidt	AB		Rep.L. Potter	\	
Rep. V. Pietsch	\		Rep.S. Sandvig	\	
Rep.J.O. Nelson	\				
Rep.W.R. Devlin	\				
Rep.T. Porter	\				
Rep.G. Uglem	\				
Rep C. Damschen	\				
Rep.R. Weisz	AB				

Total () 10 yea No 0 no

Absent 2-

Floor Assignment Rep Pietsch

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

REPORT OF STANDING COMMITTEE (410)
February 15, 2005 12:00 p.m.

Module No: HR-30-2942
Carrier: Pietsch
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2068: Human Services Committee (Rep. Price, Chairman) recommends DO PASS
(10 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2068 was placed on the
Fourteenth order on the calendar.

2005 TESTIMONY

SB 2068

*same
test may given
to the House*

TO: HUMAN SERVICES COMMITTEE
FROM: ROLF SLETTEN, EXECUTIVE SECRETARY
RE: SB 2068
DATE: JANUARY 17, 2005

The Board of Medical Examiners is currently comprised of eight (8) MD's, one (1) DO, and two (2) public members. For purposes of conducting investigations the Board is divided into two panels imaginatively called Investigative Panel A and Investigative Panel B.

The main reason there are two panels is that the people who investigate a particular case and make the decision to bring a formal disciplinary action against that physician cannot also sit in final judgement of the case. In other words, the police cannot also be the judges. If panel A investigates a particular case then panel B will make the final decision in that case and vice versa.

Each investigative panel is made up of four (4) physician members and one (1) public member. Under the current law the chairman of the Board sits on neither panel.

The problem with this arrangement is simply that the chairman is entirely excluded from one of the Board's most important functions, the investigations. Instead of being the best informed person on the Board the chairman becomes the least informed person on the Board. As a result the chairmen tend to become very frustrated with their role on the Board.

In fairness to this committee I should point out that the current regulatory scheme came into

being at our request. In 1999 when the panels were created, the chairman sat on both panels, then in 2001 we asked you to change it so that the chairman sits on neither panel. The idea was that if the chairman served on neither investigative panel then we would have one more person eligible to vote on the final disposition of our cases. In real life it has seldom worked out that way.

The members of the Board often serve just one year as chairman. Obviously the chairman must declare a conflict-of-interest in any case that was considered by an investigative panel while the chairman was still sitting on that panel. Most of the cases the Board is called on to decide were reviewed by one of the investigative panels just a few months before they appeared on the Board's agenda for final disposition. The net result is that there are very few situations where the current arrangement provides an extra voter when the case comes before the Board.

This bill will mean that the chairman simply remains on the panel to which he or she was assigned prior to being elected chairman. As a result, the chairman will be much better informed and much more involved in all of the Board's activities.

If the chairman is permitted to remain on the investigative panel to which he/she was assigned prior to being elected chairman then the Board should once again be comprised of an even number of members. Historically the Board had 10 members however the Medical Association has suggested that 12 Board members (10 physicians and 2 public members) would be better. We do not object to that suggestion/amendment.

Please vote "Do pass" on SB 2068.

Testimony in Support of Amendments to SB 2068
Senate Committee on Human Services
Bruce Levi, North Dakota Medical Association
January 17, 2005

Senator Lee and members of the Senate Human Services Committee, I'm Bruce Levi and I represent the North Dakota Medical Association. The North Dakota Medical Association is the professional membership organization for North Dakota physicians, residents and medical students.

Senate Bill No. 2068, which was introduced at the request of the North Dakota Board of Medical Examiners, would allow the Board's president to serve on one of the Board's two investigative panels and would decrease the size of the Board by one physician member, from eleven to ten members. The North Dakota Medical Association opposes Senate Bill No. 2068 in its present form but offers amendments that would address concerns of North Dakota's physicians regarding the structure and process issues raised by this bill.

The Association reviews and monitors Board activity from the standpoint of assuring both the public's safety and the fairness of disciplinary procedures used by the Board. While the Board assures adherence to baseline expectations for physician conduct to protect the public, NDMA as a professional organization works to promote and preserve professionalism, to develop and promote standards for medicine, and to support the role of the Board in a self-governing profession. The Association routinely takes interest in structure and process issues stemming from Board activity. The concerns NDMA has with SB 2068 are not the result of any particular action taken by the Board, or the Board's decision to discipline any particular physician.

As noted earlier, this is not the first time the role of the Board president has come before the Legislative Assembly. The 1999 legislation that formed investigative panels of the Board had the Board president serving on both investigative panels. In 2001, the Board advocated for legislation in SB 2163 which provided for the president serving "on neither investigative panel." Now in 2005 the Board proposes to place the president on one of the investigative panels.

The issue raised by SB 2068 stems from the 1999 restructuring of the Board into investigative panels and abolition of a separate investigative arm, the Commission on Medical Competency. Prior to 1999, the Commission on Medical Competency included six members (two of which were Board members) and the Board of Medical Examiners included ten members, nine of which were physicians, who took action in any disciplinary proceeding with the exception of the two members who also served on the Commission. The resulting structure abolished the Commission in 1999 and created two investigative panels within the Board comprised of six members each (the president served on both investigative panels) to perform the responsibilities previously performed by the Commission on Medical Competency. The result in 1999 was that fewer Board members are qualified to participate in making decisions in disciplinary proceedings, making the numbers of Board members an Association concern in ensuring a fair process for physicians who find themselves the subject of a complaint. In 2001, the panels were reduced to five members each as the result of legislation that took the president off both investigative panels.

Another change was made in 1999 – the statute setting forth the decisionmaking process for the investigative arm of the Board (43-17.1-04) was changed to allow a quorum of the investigative panel to take action by a majority of a quorum present, rather than by a majority of the full investigative panel. Previous to the 1999 change, the Commission on Medical Competency was required to take action by concurrence of a majority of the Commission members, and not just those present at a meeting. In the context of a five-member panel, this change is significant. If there are only three members of a panel present, those three members currently would constitute a quorum and a majority of that quorum would only be two Board members, one of which may be a non-physician public member. In other words, under the current statutory framework, two members might be able to take action as an investigative panel.

Since all the records of an investigative panel are confidential, it is important that there be some assurance that an adequate number of panel members are involved in decisionmaking. The small size of the panels and the “back and forth” activity among Board members in serving as both panel members in investigations and Board members in disciplinary proceedings has, since 1999, raised concern in the Association regarding the need for separation of Board member investigative and hearing roles so those roles do not become inadvertently “mixed.” As expressed by the Board in 1999 and 2001, NDMA agrees that the police should not also be the judges. *However, our concern would be compounded further by reducing the number of physicians on the Board and involving the president in investigative functions.*

NDMA does not view SB 2068 as a “simple” change or something that should be done to accommodate a perceived need to involve the Board president more in the investigative process. In our NDMA legislative group that discussed this issue, some physicians felt that the Board president exercises a unique role in ensuring a fair and impartial process for physicians whose conduct is scrutinized by the investigative panels of the Board, and should not himself or herself participate in the investigative function. Other members expressed concern over the prospect of even fewer physician members on the Board, particularly in light of the quorum and majority vote requirements. They concluded that SB 2068 does not further the objectives of ensuring patient safety or due process, but suggested that if the Board is intent on having the president serve on one investigative panel, that the Board consider an alternative approach in ensuring that an adequate number of physicians on the Board are involved in decisionmaking concerning investigative and disciplinary matters. NDMA proposes that if the Board president is to be allowed to serve on an investigative panel, the following additional changes should be made, which would be accomplished by the proposed amendment:

- 1) That the resulting need for equal numbers between the two panels be addressed by adding one physician member to the Board, rather than decreasing the Board by one member; and
- 2) That NDCC sections 43-17.1-04 and 43-17.1-05 be amended to require a “majority of panel members” to take action, rather than a majority of those members “present at the time of the decision” (a requirement of four votes for a six-member panel to take action) for both investigative decisions and decisions of the Board on whether to discipline a physician.

Thank you for the opportunity to discuss our concerns. NDMA urges the Committee to adopt the proposed amendments to SB 2068.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2068

Page 1, line 1, replace the second "and" with a comma

Page 1, line 2, after "43-17.1-02", insert ", section 43-17.1-04 and subsection 2 of section 43-17.1-05"

Page 1, line 8, replace "ten" with "twelve" and replace "seven" with "nine"

Page 1, line 17, overstrike "five" and insert immediately thereafter "six" and overstrike "Four" and insert immediately thereafter "Five"

Page 1, after line 20 insert:

"SECTION 3. AMENDMENT. Section 43-17.1-04 of the North Dakota Century Code is amended and reenacted as follows:

43-17.1-04. Meetings of investigative panels. Meetings of the investigative panels must be held at least once annually in Bismarck, North Dakota, and at such other place or places within the state and at such times as each investigative panel may determine. A majority of the members of an investigative panel constitutes a quorum, ~~and no~~. No action of an investigative panel is effective without the concurrence ~~therein~~ of a majority of the members ~~present at the time of the decision of the panel~~. Special meetings of an investigative panel may be called at any time by the chairman or vice chairman of an investigative panel or upon the written request of any three members of an investigative panel.

SECTION 4. AMENDMENT. Subsection 2 of section 43-17.1-05 of the North Dakota Century Code is amended and reenacted as follows:

2. If the investigative panel determines that a formal hearing should be held to determine whether any licensed physician, physician assistant, or fluoroscopy technologist has committed any of the grounds for disciplinary action provided for by law, it shall inform the respondent physician, physician assistant, or fluoroscopy technologist involved of the specific charges to be considered by serving upon that person a copy of a formal complaint filed with the board of medical examiners for disposition pursuant to the provisions of chapter 28-32. The board members who have served on the investigative panel may not participate in any proceeding before the board relating to said complaint. The complaint must be prosecuted before the board by the attorney general or one of the attorney general's assistants. No action of the board is effective without the concurrence of a majority of the members of the panel qualified to participate in the board proceeding."

Renumber accordingly

Testimony Re: Engrossed SB 2068
House Committee on Human Services
Bruce Levi, North Dakota Medical Association
February 15, 2005

Madam Chairman Price and Members of the House Human Services Committee, I'm Bruce Levi and I represent the North Dakota Medical Association. The North Dakota Medical Association is the professional membership organization for North Dakota physicians, residents and medical students.

As amended in the Senate, Senate Bill No. 2068 would allow the president of the North Dakota Board of Medical Examiners to serve on one of the Board's two investigative panels and would increase the size of the Board by one physician member, from eight to nine physician members. The North Dakota Medical Association originally had concerns with SB 2068, which would have decreased the number of physicians on the Board. We took issue with a further diminishment in the number of physician members on the Board, particularly in light of the existing quorum and other decisionmaking requirements which allowed decisions to be made by very few members of the Board. With the changes to SB 2068 made in the Senate, NDMA no longer opposes the bill.

Perspective on NDMA's Original Concerns

This is not the first time the role of the Board president has come before the Legislative Assembly. The 1999 legislation that formed investigative panels of the Board had the Board president serving on both investigative panels. In 2001, the Board advocated for legislation in SB 2163 which provided for the president serving "on neither investigative panel." Now in 2005 the Board proposes to place the president on one of the investigative panels.

The issue originally raised by SB 2068 stems from the 1999 restructuring of the Board into investigative panels and abolition of a separate investigative arm, the Commission on Medical Competency. Prior to 1999, the Commission on Medical Competency included six members (two of which were Board members) and the Board of Medical Examiners included ten members, nine of which were physicians, who took action in any disciplinary proceeding with the exception of the two members who also served on the Commission. The resulting structure abolished the Commission in 1999 and created two investigative panels within the Board comprised of six members each (the president served on both investigative panels) to perform the responsibilities previously performed by the Commission on Medical Competency. The result in 1999 was that fewer Board members are qualified to participate in making decisions in disciplinary proceedings, making the numbers of Board members an Association concern in ensuring a fair process for physicians who find themselves the subject of a complaint. In 2001, the panels were reduced to five members each as the result of legislation that took the president off both investigative panels.

Another change was made in 1999 – the statute setting forth the decisionmaking process for the investigative arm of the Board (43-17.1-04) was changed to allow a quorum of the investigative panel to take action by a majority of a quorum present, rather than by a majority of the full investigative panel. Previous to the 1999 change, the Commission on Medical Competency was required to take action by concurrence of a majority of the Commission members, and not just

those present at a meeting. In the context of a five-member panel, this change is significant. If there are only three members of a panel present, those three members currently would constitute a quorum and a majority of that quorum would only be two Board members, one of which may be a non-physician public member. *In other words, under the current statutory framework, two members might be able to take action as an investigative panel.*

Since all the records of an investigative panel are confidential, it is important that there be some assurance that an adequate number of panel members are involved in decisionmaking. The small size of the panels and the "back and forth" activity among Board members in serving as both panel members in investigations and Board members in disciplinary proceedings has, since 1999, raised concern in the Association regarding the need for separation of Board member investigative and hearing roles so those roles do not become inadvertently "mixed." As expressed by the Board in 1999 and 2001, NDMA agrees that the police should not also be the judges. However, our concern was compounded further by the Board's original proposal to reduce the number of physicians on the Board and to involve the president in investigative functions.

As we noted in the Senate, NDMA does not view SB 2068 as a "simple" change or something that should be done to accommodate a perceived need to involve the Board president more in the investigative process. In our NDMA legislative group that discussed this issue, some physicians felt that the Board president exercises a unique role in ensuring a fair and impartial process for physicians whose conduct is scrutinized by the investigative panels of the Board, and should not himself or herself participate in the investigative function. Other members expressed concern over the prospect of even fewer physician members on the Board, particularly in light of the quorum and majority vote requirements. They concluded that SB 2068 as introduced did not further the objectives of ensuring patient safety or due process, but suggested that if the Board is intent on having the president serve on one investigative panel, that the Board consider an alternative approach in ensuring that an adequate number of physicians on the Board are involved in decisionmaking concerning investigative and disciplinary matters. After SB 2068 was introduced, NDMA proposed that if the Board president is to be allowed to serve on an investigative panel, the following additional changes should be made:

- 1) That the resulting need for equal numbers between the two panels be addressed by adding one physician member to the Board, rather than decreasing the Board by one member; and
- 2) That NDCC sections 43-17.1-04 and 43-17.1-05 be amended to require a "majority of panel members" to take action, rather than a majority of those members "present at the time of the decision" (a requirement of four votes for a six-member panel to take action) for both investigative decisions and decisions of the Board on whether to discipline a physician.

The Senate adopted the first amendment above, and NDMA is comfortable that this change assures that a sufficient number of decisionmakers would be present in any given investigation or disciplinary proceeding. A six-member panel will require four members present to constitute a quorum and three of the four members present would be required to take action.

However, if the House disagrees with the Senate amendments, and decides to reduce the number of physician members on the Board as originally proposed in SB 2068, then NDMA would propose that the second amendment above be adopted, as follows:

Page 1, line 1, replace the second "and" with a comma

Page 1, line 2, after "43-17.1-02", insert ", section 43-17.1-04 and subsection 2 of section 43-17.1-05"

Page 1, after line 20 insert:

"SECTION 3. AMENDMENT. Section 43-17.1-04 of the North Dakota Century Code is amended and reenacted as follows:

43-17.1-04. Meetings of investigative panels. Meetings of the investigative panels must be held at least once annually in Bismarck, North Dakota, and at such other place or places within the state and at such times as each investigative panel may determine. A majority of the members of an investigative panel constitutes a quorum, ~~and no~~. No action of an investigative panel is effective without the concurrence ~~therein~~ of a majority of the members ~~present at the time of the decision of the panel~~. Special meetings of an investigative panel may be called at any time by the chairman or vice chairman of an investigative panel or upon the written request of any three members of an investigative panel.

SECTION 4. AMENDMENT. Subsection 2 of section 43-17.1-05 of the North Dakota Century Code is amended and reenacted as follows:

2. If the investigative panel determines that a formal hearing should be held to determine whether any licensed physician, physician assistant, or fluoroscopy technologist has committed any of the grounds for disciplinary action provided for by law, it shall inform the respondent physician, physician assistant, or fluoroscopy technologist involved of the specific charges to be considered by serving upon that person a copy of a formal complaint filed with the board of medical examiners for disposition pursuant to the provisions of chapter 28-32. The board members who have served on the investigative panel may not participate in any proceeding before the board relating to said complaint. The complaint must be prosecuted before the board by the attorney general or one of the attorney general's assistants. No action of the board is effective without the concurrence of a majority of the members of the panel qualified to participate in the board proceeding."

Thank you for the opportunity to discuss SB 2068.