

TESTIMONY OF REP. LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
SENATE BILL NO. 2034
JANUARY 12, 2021

Members of the Senate Judiciary Committee, I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here to testify in support of Senate Bill No. 2034, relating to written advisory opinions by the North Dakota Ethics Commission. This bill came from the interim Judiciary Committee during a study of Article XIV of the North Dakota Constitution, an initiated measure relating to ethics for public officials, candidates for elected office, and lobbyists.

This bill was suggested by the Executive Director of the North Dakota Ethics Commission at a meeting of the interim Judiciary Committee. There have been many questions about the scope of Article XIV of the North Dakota Constitution and what conduct may or may not be ethical. The bill provides a procedure for requesting written ethics advisory opinions from the North Dakota Ethics Commission.

The American Bar Association (ABA) and many State bar associations, including the State Bar of Association of North Dakota (SBAND), have procedures for the issuance of ethics opinions. This bill is modeled on the SBAND procedure. SBAND has an Ethics Committee to which requests for opinions can be submitted in writing. The requests are made for the purpose of obtaining interpretations of the rules based on actual or hypothetical facts.

Lawyers are subject to the North Dakota Rules of Professional Conduct and can be disciplined for violation of the Rules. These rules are available on the website of the North Dakota Supreme Court at <https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct>. North Dakota also has Rules for Lawyer Discipline, which are available at <https://www.ndcourts.gov/legal-resources/rules/ndrlawyerdiscipl>.

The ABA and each state bar association, including SBAND, publish ethics opinions in response to requests for advice from lawyers concerning interpretation of the Rules of Professional Conduct. The ethics opinions are advisory and not enforceable as law but can be cited to show how a bar association has interpreted a specific provision and can be relied upon by lawyers in their conduct. Rule 1.2 of the North Dakota Rules for Lawyer Discipline sets forth the grounds for which a lawyer can be disciplined for misconduct. Rule 1.2 (B) provides an exception to lawyer discipline as follows:

“A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.”

Ethics opinions of SBAND are published in *The Gavel*, which is the monthly SBAND journal, and are available on the SBAND website at https://www.sband.org/page/ethics_opinions.

This bill is enabling legislation for ethics advisory opinions and provides that the North Dakota Ethics Commission has the authority to issue written advisory opinions in response to written requests from public officials, candidates for elected office, and lobbyists. Opinions can be based on actual or hypothetical facts, but not on past conduct. The issuance of an advisory opinion is discretionary with the Ethics Commission. Within 14 days after the receipt of a request for an opinion, the Ethics Commission must notify the requester whether an opinion will be provided. The Ethics Commission then has 90 days to issue the opinion.

The bill provides that criminal and civil penalties may not be imposed upon an individual who acts in accordance with an ethics advisory opinion. The opinions are required to be made available to the public on the website of the Ethics Commission or on another readily available medium.

This bill creates a safe harbor concerning the scope of Article XIV, the statutes, and the rules of the Ethics Commission relating to transparency, corruption, elections, and lobbying, and provides a means for obtaining written interpretations of that scope that the public and the regulated officials and lobbyists can rely on.

I have an amendment set out below that I ask you to consider. The bill currently provides in subsection 4(b) on page 1, line 20, that penalties may not be imposed for conduct if the material facts are the “same” as the facts presented in an advisory opinion. Upon reflection, to require conduct that is identical to facts in an opinion is too strict a standard. It may be unlikely that the exact same facts will occur. Consequently, there is a need for some flexibility. The proposed amendment would change the standard to “substantially the same”.

I would be happy to answer any questions that you may have concerning this bill. Thank you.

PROPOSED AMENDMENT TO SENATE BILL NO. 2034

Page 1, line 20, after “are” insert “substantially”