

SENATE STATE AND LOCAL COMMITTEE
MARCH 28, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF THE ATTORNEY GENERAL
HOUSE BILL NO. 1601

Chairman Roers and members of the Committee:

For the record, my name is Claire Ness, and I am the Chief Deputy Attorney General. The Attorney General's Office opposes House Bill 1601 in its current form and requests the committee vote for a Do No Pass recommendation on the bill or adopt the attached amendment.

Who is a Special Assistant Attorney General (SAAG)?

The Attorney General is a constitutional officer and chief legal officer¹ of the state. Lawyers may represent the state in legal matters only if the Attorney General delegates his or her inherent authority to them. A SAAG appointment is a delegation of that authority. For clarity, I'd like to review the distinction between an assistant attorney general (AAG) and a SAAG and describe how the SAAG appointments operate.

- AAG – An attorney for the state of the North Dakota who is employed by the Attorney General's Office is an assistant attorney general, not a SAAG.
- SAAG – (1) An attorney who is employed by another state agency is a SAAG, and (2) a private attorney who is under contract with a state entity for a specific matter also is a SAAG.

¹ See e.g., *State v. Hagerty*, 1998 ND 122 (1998).

Who Hires SAAGs?

SAAGs Who Are State Agency Employees

State agencies with authority to hire SAAGs hire their own attorneys. Our office is not involved in that process unless the agencies ask us for input. Once the attorney is hired, the agency submits a brief request for the Attorney General to appoint the new attorney as a SAAG, along with a certificate of the attorney's good standing with the Bar. The SAAG appointment for an agency employee is broad (unless the agency requests otherwise) and allows the SAAG to provide legal services for that agency.

AAGs in our office answer questions, provide legal analyses, and give legal research advice to SAAGs in state agencies every day. We are consulted on large and small matters and are available to support SAAGs throughout state government. Because we have several AAGs working in one office, we are able to collaborate and share knowledge, resources, and expertise efficiently, allowing us to be a resource for SAAGs. Our Civil Litigation Division manages the litigation for most of their agencies as well.

SAAGs Who Are Private Attorneys Contracted For A Legal Matter

State agencies sometimes need to hire outside counsel due to legal resource constraints or because there is a highly unusual legal matter for which very particular experience is required (*e.g.*, immigration attorneys for state universities). Agencies are able to select the attorneys they want to engage, unless, for example, the attorneys have a conflict of interest, lack the necessary malpractice insurance, are not licensed, have a license that is not in good standing, or have a history of ethical problems. Other than conflicts of interest and low levels of malpractice insurance, these issues come up very rarely if at all. When they arise, we discuss these issues with our clients before a decision is made. We can generally resolve them favorably without appreciable risk to the state.

Engrossed House Bill 1601 and the Proposed Amendment

As a constitutional officer and steward of the Office of Attorney General, Attorney General Wrigley opposes Engrossed House Bill 1601. As written, the bill would force every Attorney General elected by the people of North Dakota to irrevocably delegate his or her essential, inherent, constitutional authority to individuals who are entirely chosen by other people. That is the entire function of the bill. – Imagine if someone said you had to delegate your constitutional authority as a legislator to an individual you had never met. You couldn't check that person's background, training, or credentials, and even if you did, it wouldn't matter what you found. And you could never revoke that delegated authority, no matter how egregious or unlawful that person's actions may be. - Our office is unaware of any similar, compulsory, nondiscretionary, irrevocable delegation in law.

The lack of anything similar is to be expected. Constitutional officers are entrusted by the people of the state to carry out their official duties and to exercise the care and discretion necessary to do so. The language on page 2, lines 6 through 17 of the engrossed bill would nullify the public's decision and set the stage for an unnecessary constitutional clash. As a compromise, the amendment we propose adds a requirement for the Attorney General to consult with the head of the state agency that employs a SAAG before the Attorney General can revoke the SAAG's appointment. This change is on page 2, lines 5-6. The "good cause" requirement would remain in the statute as well. This amendment ensures the process is as collaborative and informed as possible while not divesting a constitutional office of authority.

Thank you for your time this morning. The Attorney General's Office requests a Do Not Pass recommendation from the committee or adoption of the proposed amendment. I'll be happy to answer any questions.

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1601

Introduced by

Representatives O'Brien, McLeod, Satrom, Nelson, Bahl

Senators Lee, Roers

1 A BILL for an Act to amend and reenact section 54-12-08 of the North Dakota Century Code,
2 relating to special assistant attorney generals.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 54-12-08 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **54-12-08. Assistant and special assistant attorneys general - Appointment -**
7 **Revocation - Compensation.**

- 8 1. ~~After~~ ~~Except as provided under subsection 2, after~~ After consultation with the head of
9 the state department or institution or with the state board, commission, committee, or
10 agency affected, the attorney general may appoint assistant or special assistant
11 attorneys general to represent the state board, commission, committee, or agency.
- 12 a. A state officer, head of any state department, whether elected or appointed, or
13 state department, board, commission, committee, or agency may not employ
14 legal counsel, and no person may act as legal counsel in any matter, action, or
15 proceeding in which the state or any state department, board, commission,
16 committee, or agency is interested or is a party, except upon written appointment
17 by the attorney general.
- 18 b. Workforce safety and insurance, the department of transportation, the state tax
19 commissioner, the public service commission, the insurance commissioner, the
20 agriculture commissioner, and the securities commissioner may employ attorneys
21 to represent them. These entities shall pay the salaries and expenses of the
22 attorneys they employ within the limits of legislative appropriations.

1 c. The attorneys that represent these entities must be special assistant attorneys
2 general appointed by the attorney general pursuant to this section. Absent good
3 cause, the attorney general shall appoint as special assistant attorneys general
4 licensed attorneys selected by these entities. The attorney general may revoke
5 the appointment only for good cause after consultation with the head of the
6 entity or ~~or~~ and upon the request of the entity. Good cause means an inadequate
7 level of experience, competence, or ethical standards.

8 2. ~~Notwithstanding any other provisions of this section, the attorney general may not~~
9 ~~refuse to appoint a special attorney general and may not revoke the appointment of a~~
10 ~~special assistant attorney general licensed to practice law in the state, in good~~
11 ~~standing, and employed by the:~~

12 ~~a. Governor;~~

13 ~~b. Agriculture commissioner;~~

14 ~~c. State auditor;~~

15 ~~d. Insurance commissioner;~~

16 ~~e. Public service commissioner;~~

17 ~~f. Secretary of state;~~

18 ~~g. Superintendent of public instruction;~~

19 ~~h. Tax commissioner; or~~

20 ~~i. State treasurer.~~

21 3. The powers conferred upon special assistant attorneys general are the same as are
22 exercised by the regular assistant attorneys general, unless the powers are limited
23 specifically by the terms of the appointment. Except as otherwise provided by this
24 section, an appointment is revocable at the pleasure of the attorney general. The
25 appointment may be made with or without compensation, and when compensation is
26 allowed by the attorney general for services performed, the compensation must be
27 paid out of the funds appropriated therefor.

28 ~~3.4.~~ The attorney general may require payment for legal services rendered by any
29 assistant or special assistant attorney general to any state official, board, department,
30 agency, or commission and those entities shall make the required payment to the
31 attorney general. Moneys received by the attorney general in payment for legal

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1 services rendered must be deposited into the attorney general's operating fund.

2 General fund moneys may not be utilized for the payment of legal services provided by
3 the attorneys employed by the attorney general, except for those payments required of
4 the department of health and human services, department of environmental quality,
5 and the state hospital.

6 4.5. An assistant or special assistant attorney general appointed to represent the state
7 board of higher education or an institution under the control of the state board of
8 higher education may access and examine any record under the control of the state
9 board of higher education. For purposes of reviewing records under the Family
10 Educational Rights and Privacy Act [20 U.S.C. 1232g; 34 CFR 99] or any other federal
11 privacy law, the assistant or special assistant attorney general is considered a state
12 educational official authorized to access student records.