

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CRIMINAL JUSTICE COMMITTEE

Thursday, September 23, 2004
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Lois Delmore, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives Lois Delmore, Bill Amerman, Randy Boehning, Ron Carlisle, Duane DeKrey, Dennis Johnson, Lawrence R. Klemin, William E. Kretschmar, Carol A. Niemeier, Mike Norland; Senators Stanley W. Lyson, John T. Traynor, Thomas L. Trenbeath, Constance Triplett

Others present: Rick Berg, State Representative, Fargo

See attached appendix for additional persons present.

It was moved by Representative DeKrey, seconded by Representative Niemeier, and carried on a voice vote that the minutes of the August 10-11, 2004, meeting be approved as distributed.

GUARDIANSHIP SERVICES STUDY

At the request of Chairman Delmore, committee counsel reviewed an amended bill draft [50135.0200] regarding the appointment of a successor guardian. She said the bill draft is different from the first draft in that it provides that if a current or former guardian serves more than 10 wards, the motion and notice of motion may be served by first-class mail. She said the first draft of the bill provided that this service could be accomplished by publication.

Chairman Delmore called on Mr. Melvin L. Webster, North Dakota Guardianship Task Force, for testimony regarding the bill draft. Mr. Webster said he supports the bill draft. He said the first three subsections of the bill draft regarding the appointment of a successor guardian are the method he uses when the appointment of a successor guardian is necessary. He said subsection 4 of the bill draft is a departure from current statute. He said existing law requires personal service by a sheriff or private process server or by certified mail. He said depending on the difficulty in locating the person to be served, the cost of these service methods ranges from \$8 to \$75. He said if Catholic Charities of North Dakota, which has over 300 wards in its care, made the decision to no longer handle guardianships, it would cost over \$30,000 to serve the notices for the appointments of successor guardians.

In response to a question from Representative Kretschmar, Mr. Webster said less than 10 percent of all successor guardianship appointments are contested.

In response to a question from Senator Traynor, Mr. Webster said the court usually rules on the motion for the appointment of a successor guardian within 14 days of the filing of the motion.

Chairman Delmore called on Mr. Bruce Murry, Protection and Advocacy Project, for testimony regarding the bill draft. Mr. Murry said the Protection and Advocacy Project opposes subsection 4 of this bill draft in its current form. He said North Dakota's court system has developed the procedures for serving notice in civil proceedings. She said these procedures have been carefully adjusted over time and are well- designed to ensure a person actually receives notice. He said one may serve notice by sending a document by any means that produces a receipt for delivery. He said under current law and procedure, one may send regular first-class mail and request the recipient to admit the recipient received service. He said subsection 4 affects the due process of a ward if the ward's guardian has 10 or more wards. He said this change would treat a ward with a corporate guardian differently than a ward with a private-party guardian. He said wards of corporate guardians are often members of groups with specific disabilities. He said to treat such persons differently than those with private guardians could create a perception of discrimination. Mr. Murry submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Klemin, Mr. Murry said certified mail brings the mail to the attention of the person receiving the mail that the mail is an important matter.

In response to a question from Senator Triplett, Mr. Murry said removing subsection 4 of the bill draft would leave the service of the notice to the procedures provided for in the North Dakota Rules of Civil Procedure.

In response to a question from Representative Klemin, Mr. Murry said the bill draft does not mandate that the service be by first-class mail, but this method of service would be a permissible option.

Representative Kretschmar said the Supreme Court is responsible for making rules for the courts.

Senator Traynor said many people do not want to accept certified mail.

Senator Triplett said subsection 4 may muddle the rules for the service process. She said this subsection could be removed and allow the court rules to determine the service method.

Representative Klemin said the language should remain in the bill draft. He said the language can be reviewed more thoroughly during the legislative session. He said it is also possible to serve notice by fax and e-mail. He said allowing service by first-class mail is a satisfactory option.

It was moved by Representative DeKrey, seconded by Senator Lyson, and carried on a roll call vote that the bill draft relating to the procedure for the appointment of a successor guardian be approved and recommended to the Legislative Council. Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, Niemeier, and Norland and Senators Lyson, Traynor, Trenbeath, and Triplett voted "aye." No negative votes were cast.

LAW ENFORCEMENT TRAINING NEEDS STUDY

At the request of Chairman Delmore, committee counsel reviewed an amended bill draft [50146.0200] relating to an appropriation for law enforcement training needs. She said the bill draft provides for a \$400,000 appropriation to the Highway Patrol for the purpose of providing training for law enforcement officers and other emergency services providers.

In response to a question from Senator Traynor, Senator Lyson said all training must be approved by the Peace Officer Standards and Training Board. He said much of the training is done at the law enforcement academy. He said the law enforcement training provided at Lake Region State College is basic training. He said the funding in this bill draft is for advanced law enforcement training, not basic training.

In response to a question from Representative Amerman, Senator Lyson said law enforcement training is often performed in conjunction with emergency services providers.

In response to a question from Senator Traynor, Representative Delmore said the funding in this bill draft is for training that is separate from the type of training covered under homeland security funds.

Chairman Delmore called on Colonel Bryan Klipfel, Superintendent, Highway Patrol, for comments concerning the bill draft. Colonel Klipfel said the funds appropriated under the bill draft would be used to provide additional advanced training for the state's law enforcement officers. He said although there may be some joint training with emergency services providers, the funds would predominantly be used by law enforcement officers.

It was moved by Senator Lyson, seconded by Representative Carlisle, and carried on a roll call vote that the bill draft providing for a \$400,000 appropriation to the Highway Patrol for the purpose of providing law enforcement training be approved and recommended to the Legislative Council. Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, Niemeier, and Norland and Senators Lyson, Traynor, Trenbeath, and Triplett voted "aye." No negative votes were cast.

SMOKING IN THE WORKPLACE STUDY

At the request of Chairman Delmore, committee counsel distributed information regarding the tobacco tax revenue collected in North Dakota for the years 1998 through 2003. A copy of the information is on file in the Legislative Council office.

Chairman Delmore called on Mr. John Quinlan, Tax Department, for testimony regarding tobacco tax revenue collections. Mr. Quinlan said in 2003 the total amount of cigarette and tobacco tax revenue collected totaled \$20,687,895.73. He said the collections in 1998 were \$23,978,505.89.

In response to a question from Senator Traynor, Mr. Quinlan said in North Dakota the tobacco tax is collected from the wholesalers, not the retailers. Although tobacco tax revenues have decreased, he said, those decreases could not necessarily be attributed to local smoking ordinances that restrict smoking in public places.

In response to a question from Representative Kretschmar, Mr. Quinlan said the tax on a pack of cigarettes in North Dakota is 44 cents.

At the request of Chairman Delmore, committee counsel presented information on the tobacco tax revenue collected in California. Committee counsel said California has seen a steady decrease in tobacco sales and consumption over the past 40 years. She said a 50-cent per pack tax increase in 1998 raised the per pack tax to 87 cents. A copy of the California tobacco tax information is on file in the Legislative Council office.

At the request of Chairman Delmore, committee counsel presented a bill draft [50166.0100] regarding smoking restrictions in places of public access, publicly owned buildings or offices, and nonpublic workplaces. She said the bill draft prohibits smoking in places of public access and in workplaces, with some exceptions. She said the bill draft provides that the smoking prohibition does not apply to places of public access operated by a social, fraternal, or religious organization when the place is being used solely by the organization's members or their guests or families; guest rooms in lodging facilities; establishments licensed primarily or exclusively to sell alcoholic beverages for consumption on the premises; private clubs; and certain separately enclosed smoking areas. She said the bill draft provides for a \$100

penalty for violations with a maximum of \$500 for second and subsequent offenses.

Chairman Delmore called on Ms. Leann Bertsch, Commissioner, Labor Department, for testimony regarding the bill draft. Ms. Bertsch said the bill draft places the authority and obligation to enforce the proposed restrictions with the State Department of Health. She said this designation is logical considering the department currently has authority to enforce smoking restrictions in places of public assembly. She said regardless of which state agency is given the authority and obligation to enforce any workplace smoking restrictions, it is extremely important that this significant public policy issue be addressed by the Legislative Assembly. She said the law that has recently been interpreted to authorize the Labor Commissioner to address workplace smoking is vague. She said any rules that the Department of Labor would adopt would be substantially more restrictive than existing law, which merely provides that the Labor Commissioner may establish standards for workplace health and safety. She said the authority for any state agency to make rules must be clear with well-defined parameters. She said this is necessary to assure that any rules adopted by the agency withstand judicial scrutiny if challenged. She said the bill draft provides that framework and establishes limits within which an agency can adopt pertinent rules to enforce the law. Ms. Bertsch submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Carlisle, Ms. Bertsch said the Labor Department will wait to see what action is taken by the Legislative Assembly before a decision will be made as to whether the department will adopt rules regarding workplace smoking.

In response to a question from Representative Niemeier, Ms. Bertsch said the bill draft would allow cities and counties to develop their own rules regarding smoking but the restrictions could not be less stringent than the state law.

In response to a question from Representative Klemin, Ms. Bertsch said it would be helpful if the current law would provide more parameters regarding the Labor Commissioner's authority regarding smoking in the workplace.

Chairman Delmore called on Mr. Wally Kalmbach, Workforce Safety and Insurance, for testimony regarding the bill draft. Mr. Kalmbach said Workforce Safety and Insurance has the authority to adopt workforce safety standards. He said there are no standards in place which address smoking restrictions.

In response to a question from Representative Carlisle, Mr. Kalmbach said the rates charged are commensurate with the risk. He said certain industries are higher risk than others.

In response to a question from Representative Delmore, Mr. Kalmbach said he was not aware of any

other states that use workplace smoking as a specific risk factor. He said most workers' compensation agencies operate like an insurance company.

In response to a question from Representative Niemeier, Mr. Kalmbach said there are connections to certain hazards, such as asbestos, which are compounded by exposure to smoke.

In response to a question from Senator Traynor, Mr. Kalmbach said Indian casino employees are covered by Workforce Safety and Insurance.

Chairman Delmore called on Mr. Tim Wahlin, Workforce Safety and Insurance, for testimony regarding the study. Mr. Wahlin said Workforce Safety and Insurance does not track claims based on smoking injury grounds. He said his agency is aware of one occasion in which a secondhand smoke claim was accepted. He said there are substantial proof problems with secondhand smoke claims.

In response to a question from Senator Traynor, Mr. Wahlin said when rates are set, the agency looks at the loss history for that group and for that employer. He said allowing smoking in the workplace is not specifically considered in setting rates.

In response to a question from Representative Berg, Mr. Wahlin said if the bill draft passed, it would not relieve Workforce Safety and Insurance of its duty to insure.

In response to a question from Representative Klemin, Mr. Wahlin said the agency does offer rate discounts for employers that conduct health and safety programs. He said it is possible that an employer that voluntarily adopted a smoke-free workplace policy could receive a discount but it must be shown that the policy would actually result in a reduction in claims.

Chairman Delmore called on Ms. Kathleen Mangskau, Director, Division of Tobacco Prevention and Control, State Department of Health, for testimony regarding secondhand smoking litigation. Ms. Mangskau said the first secondhand smoke lawsuit was filed in 1976. She said since the early 1980s, more than 420 cases involving exposure to secondhand smoke have been identified. She said the only North Dakota lawsuit on secondhand smoke involved a pregnant woman who alleged that secondhand smoke caused her illnesses. She said the jury decided the county was negligent under the state law that requires public places to have designated smoking areas if smoking is allowed and the pregnant woman was entitled to 5 percent, or \$650, of the \$13,000 in awarded damages. Ms. Mangskau submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Traynor, Senator Trenbeath said even if the bill draft became law, a plaintiff would still have to prove causation. He said a proven violation of the law could be introduced in a civil action.

In response to a question from Representative Amerman, Ms. Mangskau said more than 60 smoking cessation programs have been established in this state. She said the state does not have a residential treatment facility for smoking cessation but there is such a program at the Mayo Clinic in Minnesota. She said a residential treatment facility for smoking cessation would be costly to build and operate. She said it usually takes a person five to seven attempts before the person has long-term success with smoking cessation.

In response to a question from Representative Carlisle, Ms. Mangskau said there are smoking cessation programs available to state and county employees.

In response to a question from Senator Traynor, Ms. Mangskau said there are local tobacco prevention coordinators on all the state's reservations.

In response to a question from Senator Triplett, Ms. Mangskau said about 10 percent of the \$3.76 million allocated for public health is used for cessation programs. She said about 800 persons have gone through the smoking cessation programs in the past 18 months. She said there is about a 15 to 20 percent success rate in the newer programs and a 20 to 25 percent success rate in the more established programs. She said six months of a person being smoke-free is considered success.

Chairman Delmore called on Ms. Deborah Knuth, Director of Advocacy and Health Initiatives, American Cancer Society, for testimony regarding the bill draft. Ms. Knuth said previous testimony before the committee indicates there is broad consensus in the medical and scientific communities that exposure to secondhand smoke causes death and disease in nonsmokers. She said the bill draft would be difficult to enforce and would not protect all workers. She said the portion of the bill draft that provides for exceptions for certain establishments should be deleted. Ms. Knuth distributed to the committee an alternate bill draft. She said the alternate bill draft would address the concerns raised in her testimony. Ms. Knuth submitted written testimony and an alternate bill draft, copies of which are on file in the Legislative Council office.

In response to a question from Representative Carlisle, Ms. Knuth said while the bill draft under consideration by the committee is a step in the right direction, it would not protect all workers from secondhand smoke.

COMMITTEE DISCUSSION

Representative Carlisle said he believes the bill draft before the committee should go forward to the Legislative Council in its present form.

Representative Niemeier said she supports a total ban of smoking in the workplace.

It was moved by Representative Niemeier and seconded by Representative Kretschmar that the

bill draft relating to smoking restrictions in places of public access and in workplaces be approved and recommended to the Legislative Council.

Senator Trenbeath said he does not support the bill draft. He said individual choice should determine a business's smoking restrictions. He said an individual has the choice of whether he or she frequents a business or whether he or she wants to work in a business that allows smoking.

Representative Kretschmar said the state should have some type of policy on smoking. He said the bill draft should go forward to the Legislative Assembly for a full discussion and debate.

It was moved by Representative Niemeier and seconded by Senator Triplett that the bill draft be amended to include the provisions contained in the alternate bill draft provided to the committee by Ms. Knuth.

Representative Amerman said the committee has received testimony from the medical community on the effects of smoking. He said for smoking restrictions to be effective, more participation from the medical community is needed. He said smoking cessation products should be more readily accessible to those who need them.

Representative Carlisle said the proposed amendment should be defeated.

Senator Traynor and Representative DeKrey said they opposed the proposed amendments.

In response to a question from Senator Triplett, Ms. Mangskau said the smoking cessation programs funded by the \$376,000 are provided at little or no cost to the clients. She said it would cost between \$1 million and \$2 million to offer the smoking cessation services for free to anyone who wanted to participate in a smoking cessation program.

Following the discussion, **the amendment failed on a roll call vote.** Representative Niemeier voted "aye." Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, and Norland and Senators Lyson, Traynor, Trenbeath, and Triplett voted "nay."

It was moved by Representative Niemeier and seconded by Senator Triplett that the bill draft be amended to remove the exemption in subsection 2 of Section 2 of the bill draft for establishments licensed primarily or exclusively to sell alcoholic beverages for consumption on the premises.

Representative Niemeier said bar employees are at 1.5 times more at risk to secondhand smoke-related illnesses than are other workers. She said in an eight-hour shift, a bar employee is exposed to the amount of secondhand smoke that is equivalent to smoking 1.5 to 2 packs of cigarettes. She said law enforcement officers regularly patrol bars. She said these officers could be used for enforcing the smoking restrictions in bars. She said bar employees are the employees who are the most exposed to secondhand smoke but who have the least potential for being able

to find alternative employment. She said bar employees are also less likely to have health insurance.

Representative Klemin said he agreed philosophically with Representative Niemeier's concerns but removing the exemption for bars would likely kill the bill.

Senator Triplett said there is a social equity matter at issue in this bill draft. She said to be fair, the smoking ban should be all or nothing. She said the persons working at lower-income levels are less likely to have insurance. She said if the goal is to protect workers, all workers should be protected.

Representative Delmore said there may be a need for compromise. She said while the bill draft may not meet everyone's needs, it is a starting point.

Senator Lyson said he opposed adding this amendment to the bill draft. He said these amendments should be offered during the legislative session.

Following the discussion, **the amendment failed on a roll call vote.** Representative Niemeier and Senator Triplett voted "aye." Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, and Norland and Senators Lyson, Traynor, and Trenbeath voted "nay."

It was moved by Representative Niemeier and seconded by Representative Amerman that the bill draft be amended to exempt private homes, private vehicles, and retail tobacco businesses.

Senator Traynor said based upon the definition of "places of public access," private homes are already exempt from the smoking restrictions in the bill draft.

Senator Triplett said adding this amendment would confuse the issue.

Following the discussion, **the amendment failed on a roll call vote.** Representative Niemeier voted "aye." Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, and Norland and Senators Lyson, Traynor, Trenbeath, and Triplett voted "nay."

It was moved by Representative Niemeier, seconded by Senator Triplett, and failed on a roll call vote that the bill draft be amended to delete the provision in subsection 2 of Section 3 of the bill draft regarding designated smoking areas. Representatives Amerman and Niemeier and Senator Triplett voted "aye." Representatives Delmore,

Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, and Norland and Senators Lyson, Traynor, and Trenbeath voted "nay."

A copy of each of the amendments offered by Representative Niemeier is on file in the Legislative Council office.

Representative DeKrey said although he opposed 2003 House Bill No. 1408, the bill upon which the bill draft is based, North Dakota needs to make a statement on the smoking policy of the state.

Senator Traynor said the state is experiencing a secondhand smoke outcry. He said the Legislative Assembly should respond to this outcry. He said by January several North Dakota cities will have voted on the smoking issue.

Representative Carlisle said he voted against 2003 House Bill No. 1408 but to allow the discussion of the issue to continue, he would vote to recommend the bill draft. He said a "one size fits all" approach usually does not work in North Dakota.

Following the discussion of the bill draft, **the motion to approve and recommend to the Legislative Council the bill draft relating to smoking restrictions in places of public access and in workplaces carried on a roll call vote.** Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Klemin, Kretschmar, Niemeier, and Norland and Senators Lyson and Traynor voted "aye." Senators Trenbeath and Triplett voted "nay."

It was moved by Senator Trenbeath, seconded by Representative Kretschmar, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and the recommended bill drafts to the Legislative Council.

It was moved by Senator Lyson, seconded by Senator Trenbeath, and carried that the meeting be adjourned sine die.

Chairman Delmore adjourned the meeting sine die at 12:30 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1