

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Friday, June 16, 2006
Harvest Room, State Capitol
Bismarck, North Dakota

Senator Stanley W. Lyson, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Stanley W. Lyson, Carolyn Nelson, John T. Traynor; Representatives Duane DeKrey, Lois Delmore, Dennis Johnson, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar

Members absent: Senator Constance Triplett; Representatives Ron Carlisle, Dawn Marie Charging, Joyce Kingsbury, Kathy Hawken, Shirley Meyer

Others present: See attached appendix

It was moved by Representative DeKrey, seconded by Representative Delmore, and carried on a voice vote that the minutes of the March 27, 2006, meeting be approved.

Representative Kretschmar and the committee offered congratulations to Senator Lyson for his receipt of the Distinguished Legislator Award given by the State Bar Association of North Dakota at the association's annual meeting in Fargo on June 15, 2006.

Chairman Lyson called on Representative Bette B. Grande for a presentation regarding a proposed bill draft relating to disorderly conduct at a funeral. Representative Grande said members of the Westboro Baptist Church in Topeka, Kansas, protested at the funerals of two Fargo area soldiers. She said the protest was a vulgar interruption for the families who were trying to lay their loved ones to rest. She said the protesters' only purpose was to do harm.

Representative Grande distributed a bill draft [\[70065.0100\]](#) relating to disorderly conduct at a funeral. She said the bill draft makes disorderly conduct at a funeral a Class B misdemeanor for a first offense and a Class A misdemeanor for second and subsequent offenses. Under the bill draft, she said, protesters are required to be at least 300 feet away from the funeral activities.

Chairman Lyson called on Lt. Paul D. Laney, Fargo Police Department, for testimony regarding the bill draft. Lt. Laney said the protesters from the Westboro Baptist Church stayed in public areas. He said he supports free speech but the protesters go too far. He said the protesters demonstrated an outright disrespect for the soldier and the soldier's family. He said the protesters made vile, obscene, and disgusting remarks to the family. He said it is important to allow free speech but there also must be respect for the soldier and the soldier's family.

In response to a question from Representative Koppelman, Lt. Laney said the group of motorcycle riders who were in attendance did not have the engines of their motorcycles running during the funeral activities. He said the motorcycles and their riders lined the street as a buffer between the protesters and the funeral activities. He said the bill draft requires that a person must have the intent to disrupt in order to meet the requirements of the crime.

In response to a question from Representative DeKrey, Lt. Laney said if the family wants a certain group to be present, the family is free to invite them. He said there is not an issue if the group is welcomed by the family.

In response to a question from Senator Traynor, Lt. Laney said the bill draft requires that a protester must have knowledge that a funeral is occurring. He said that element of the crime is met when the police inform the protest group that a funeral is occurring or is about to occur.

In response to a question from Representative Koppelman, Lt. Laney said the protest group gave advance notice that it was coming to Fargo to protest at the funeral.

In response to a question from Representative Kretschmar, Lt. Laney said the Fargo ordinance on disorderly conduct excludes constitutionally protected speech activities.

In response to a question from Representative Johnson, Lt. Laney said if a group is invited by the family, there is nothing to enforce.

In response to a question from Representative Klemin, Lt. Laney said the protest group actions went beyond protesting. He said the actions were a blatant attempt to get people to come after them. He said the group attempted to incite the crowd.

In response to a question from Representative Kretschmar, Representative Grande said his recommendation to add an emergency clause to the bill draft is a good idea.

Lt. Laney said the bill draft provides a way to address the disrespectful conduct that has been displayed at military funerals.

Chairman Lyson said the committee will not be taking any action on this bill draft because the topic is outside the scope of the committee's assigned duties.

IDENTITY THEFT STUDY

Chairman Lyson called on Mr. Larry Maslowski, Director, Property and Casualty Division, Insurance Department, for testimony regarding the impact of credit scores on insurance premiums. Mr. Maslowski said in recent years, auto and homeowner insurance companies have developed a new tool that they feel will help them in more accurately predicting future losses of their insureds. He said this new tool is called a "financial responsibility score." He said while this score is similar to the credit score that lenders and mortgage companies use when a person applies for a loan, it is not the same score. He said Fair Isaac, a statistical company that was instrumental in developing the system for calculating the credit score used by lenders, was the leader in developing a formula for calculating a score that is used in the insurance underwriting and rating process. He said there is no standard statistical formula in use by all companies. He said formulas can vary from 11 attributes to as high as 25 attributes. He said some attributes that are common among formulas are timeliness of payments, number of credit cards, amount of indebtedness compared to the total amount of available credit, number of bankruptcies, judgments, or defaults and the length of time a consumer has had credit. He said Fair Isaac initially took the credit information of over 15 million auto insurance policyholders, applied the formula to the policyholder's credit reports to find the score, and found a direct correlation between the scores and the policyholder's insurance loss experience. He said it is this correlation that serves as the insurance industry's basis for using the score as a tool in determining whether to write certain risks or to decide what the appropriate premium is for the risk. He said it can be and is used both ways.

Mr. Maslowski said when this new methodology was used, North Dakota did not have a law in place to deal with this new concept. The Insurance Department, he said, in an attempt to provide some consumer protections and create some uniformity and guidelines in the use of credit information by the insurance industry, proposed House Bill No. 1260 in the 2003 legislative session, which passed. He said the new law, codified as North Dakota Century Code Chapter 26.1-25.1, set some requirements and limitations on the use of credit information for companies. For example, he said, the 2003 law prohibits:

- The denial, cancellation, or nonrenewal of a policy solely on the basis of credit information, without consideration of any other applicable underwriting factor independent of credit information;
- Taking an adverse action against a consumer solely because the consumer does not have a credit card account without consideration of any other applicable factors independent of credit information; and

- Using credit inquiries not initiated by the consumer, inquiries relating to insurance coverage if so identified on a consumer credit report, collection accounts with a medical history code, multiple home mortgage lender inquiries made within 30 days of one another, and multiple auto lender inquiries made within 30 days of one another as negative factors in scoring or reviewing credit information.

Mr. Maslowski said the 2003 law also provides consumer protections. He said these protections, including requiring disclosure to the consumer at the time of an application that the company may use credit information and requiring the disclosure to the consumer if the use of credit information results in an "adverse action," such as a higher rate or refusal to insure. As of February 2006, he said, approximately 45 states had enacted statutes to address the use of credit information in personal lines insurance. He said of the states with laws in place, about 15 are currently revisiting their laws in attempts to either repeal the laws, add more restrictions, or to completely prohibit the use of credit for predicting future losses. Mr. Maslowski submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Koppelman, Mr. Maslowski said placing additional restrictions on the use of financial responsibility scores has not had a significant impact on policyholders in North Dakota. He said 97 percent of the state's population will never have an issue with this. He said the number of people who are negatively impacted is very low. He said North Dakota has one of the toughest laws with respect to the restrictions placed upon insurers and their use of credit information. He said the insurers are complying with the statutory requirements.

In response to a question from Representative Delmore, Mr. Maslowski said the North Dakota automobile insurance industry is very competitive.

Representative Delmore said she is concerned about uninsured motorists and the impact they have on insurance rates. She said it is unfortunate that people have to pay for those who do not pay.

In response to a question from Representative Klemin, Mr. Maslowski said a model Act was used in drafting the legislation. He said other features, such as extraordinary living expenses, were added.

In response to a question from Senator Traynor, Mr. Maslowski said credit information resides with the credit reporting agency. He said some insurers use their own formula to read credit reports. He said the formulas are trade secrets. He said different companies use different formulas. He said there are not set standards with respect to the formulas.

At the request of Chairman Lyson, committee counsel presented a memorandum entitled [State Security Freeze Laws](#). She said a security or credit freeze is a tool available to a consumer to lock or "freeze" the consumer's credit report and score. She said 23 states have enacted credit freeze legislation.

Chairman Lyson called on Mr. Parrell Grossman, Consumer Protection and Antitrust Division, Attorney General's office, for testimony regarding security freeze legislation. Mr. Grossman said in light of escalating identity theft occurrences and theft or security breaches relating to the storage and collection of confidential personal and financial information, the Attorney General believes it is very important for North Dakota to implement security freeze legislation to provide additional protection to North Dakota consumers. He said the Attorney General considered introducing security freeze legislation during the last legislative session but it was late in the legislative process and he opted to instead research and consider security freeze legislation for the 2007 session. He said of the 23 states that have enacted security freeze legislation, 18 made the security freeze available to all consumers, not just identity theft victims. He said the Attorney General would like the security freeze tool to be available to all North Dakota consumers. He said a security freeze should apply to all types of new account fraud and should not be limited to the extension of credit. He said it is important that a security freeze be easy to use. He said the committee should be aware that Congress has legislation pending that would preempt all state laws that regulate data security breaches and security freezes. He said the legislation is called the Financial Data Protection Act of 2006. He said the Act is expected to be voted on by the United States House of Representatives within a week. He said Attorney General Wayne Stenehjem and 48 other Attorneys General sent a letter to congressional leaders on October 27, 2005, urging them, in the event of preemption, to adopt strong legislation regarding security breach notification and strong security freeze legislation, enforceable by the states' Attorneys General.

Mr. Grossman said the Attorney General is working on a proposed draft of security freeze legislation. He said the Attorney General will continue to review the proposed legislation and make any appropriate changes. He said the Attorney General has discussed the introduction of security freeze legislation with several interested sponsors. Mr. Grossman provided written testimony and a copy of the proposed legislation, copies of which are on file in the Legislative Council office.

In response to a question from Representative Koppelman, Mr. Grossman said state legislation on security freezes is not preempted by the Fair Credit Reporting Act. He said a security freeze is much stronger than a fraud alert. He said a security freeze gives consumers control over their information and allows consumers to be proactive in protecting their credit. He said there are remaining issues to be addressed as more security freeze legislation is passed, including how to deal with the fraudulent use of security freezes.

Chairman Lyson said he would discuss the security freeze legislation with the Attorney General.

In response to a question from Senator Lyson, Mr. Grossman said the proposed legislation is based upon Minnesota's security freeze legislation.

Mr. Grossman said the Attorney General would also like the committee to consider recommending legislation that would prohibit third parties from assisting and facilitating consumer fraud upon the consumers of the state. He said testimony and a copy of proposed legislation on this topic was provided to the committee at its February 27, 2006, meeting. A copy of the proposed legislation is on file in the Legislative Council office.

In response to a question from Senator Nelson, Mr. Grossman said there is a \$5,000 penalty imposed for those third parties that assist and facilitate consumer fraud.

It was moved by Representative DeKrey, seconded by Representative Delmore, and carried on a roll call vote that the bill draft relating to facilitating and assisting deceptive acts or practices be approved and recommended to the Legislative Council. Senators Lyson, Nelson, and Traynor and Representatives DeKrey, Delmore, Johnson, Klemin, Koppelman, and Kretschmar voted "aye." No negative votes were cast.

Chairman Lyson called on Ms. Marilyn Foss, General Counsel, North Dakota Bankers Association, for testimony regarding security freeze legislation. Ms. Foss said when considering identity theft legislation it is important to keep in mind that North Dakota and South Dakota have the least amount of identity theft. She said the Veterans Administration incident involved a stolen personal computer, not identity theft. She said there has not been any victimization as a result of that incident. She said it is important to keep perspective on what is a security breach. She said the problem should not be minimized but it also should not be overemphasized.

In response to a question from Representative Delmore, Ms. Foss said security freeze is a new tool so there is not much data available on its effectiveness.

In response to a question from Representative Klemin, Ms. Foss said she did not believe a security freeze law in Minnesota, but not in North Dakota, would give Minnesota bankers an advantage over North Dakota bankers.

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS UPDATE

At the request of Chairman Lyson, committee counsel read a letter provided by Ms. Robin Huseby, Director, Commission on Legal Counsel for Indigents, regarding the status of the implementation of the new indigent defense system in the state. In the letter, Ms. Huseby said the three public defender offices in Minot, Dickinson, and Williston are operational and the public defenders in those offices began taking cases in March 2006. She also said the Commission on Legal Counsel for Indigents held its first training

session. She said 75 attorneys participated in the training. She said the commission is working on preparing its budget for the 2007-09 biennium. She said the commission is also working on developing indigent defense standards. She said the commission meets on a monthly basis. A copy of Ms. Huseby's letter is on file in the Legislative Council office.

Senator Lyson said he recently met with Ms. Huseby to discuss concerns regarding a public defender who is the son of a district judge. He said the issue has been resolved. He said the process seems to be working well. He said the county commissioners in Williams County have asked Ms. Huseby whether the commission would be willing to handle the county's mental health commitment cases. He said the commission is considering this request.

In response to a question from Representative Klemm, Representative DeKrey said the commission is exempt from the Administrative Agencies Practice Act but the process being used to develop standards is similar to the administrative rules process.

Senator Lyson said an issue has been raised by the Supreme Court as to whether North Dakota Century Code Section 12.1-04.1-02 should be amended to provide that the commission is responsible for mental health evaluation costs.

Representative DeKrey said the commission is working on a bill draft for the next session that will address this section as well as other issues that have arisen since the new indigent defense system was implemented. He said the commission is also reviewing the qualifications for indigency as well as ways to recoup costs from those persons who are later able to pay.

Senator Lyson said he is aware that some judges in the state do not agree with the fee schedules and are waiving them.

DRUG USE AND ABUSE REPORT

Pursuant to North Dakota Century Code Section 19-03.1-44, the committee received a comprehensive status and trends report from the Attorney General regarding unlawful controlled substance use and abuse and drug control and enforcement efforts in the state. Chairman Lyson said the Attorney General would be available at the next meeting to discuss the report and to answer questions. A copy of the report is on file in the Legislative Council office.

EMINENT DOMAIN STUDY

At the request of Chairman Lyson, committee counsel presented a bill draft [\[70124.0100\]](#) regarding the uses of eminent domain.

Senator Lyson said if the proposed initiated measure does not have the required number of signatures to be on the November ballot or if the measure does not pass, this bill draft gives the Legislative Assembly a vehicle to discuss the eminent domain issue during the upcoming session.

Representative Koppelman said the committee should receive information on whether the language contained in this bill draft would conflict with the proposed initiated measure.

Senator Traynor said the *Kelo* decision was discussed at the annual meeting of the State Bar Association of North Dakota. He said 43 states have considered eminent domain legislation since the *Kelo* decision and 25 states have enacted legislation. He said Wisconsin has developed a definition of blighted property that may be helpful in the bill draft.

Representative Kretschmar said the committee should receive copies of the eminent domain laws passed in Minnesota and South Dakota.

Chairman Lyson called on Mr. Jerry Hjelmstad, North Dakota League of Cities, Bismarck, for comments regarding the bill draft. Mr. Hjelmstad said the North Dakota League of Cities supports a legislative review of the eminent domain issues. He said he would provide testimony regarding the bill draft at the committee's next meeting.

JUDICIAL CONDUCT STUDY

Chairman Lyson called on Mr. Jack McDonald, State Bar Association of North Dakota, Bismarck, for the presentation of the final report of the State Bar Association of North Dakota Task Force on Judicial Selection. Mr. McDonald said the task force makes the following conclusions and recommendations:

1. The task force should continue to monitor and comment upon, as appropriate, any proposed changes to the North Dakota Code of Judicial Conduct which deal with judicial selection or election;
2. The State Bar Association of North Dakota should consider and adopt a resolution at its annual meeting in June 2006 setting forth the association's official position on the extent to which judicial candidates should make "pledges or promises" or "commitments" to the voters;
3. The interim Judicial Process Committee should not propose and the Legislative Assembly should not enact any immediate legislative changes as a result of the recent trilogy of cases involving judicial selection and election; and
4. The interim Judicial Process Committee should propose a concurrent resolution draft to continue the present study of the Judicial Process Committee into the next biennium and pursue a joint legislative and State Bar Association of North Dakota public information and education program, including public forums around the state, regarding judicial selection methodology and the conduct of judicial elections.

Mr. McDonald submitted a written copy of the final report, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. McDonald said campaign reform and spending limits on campaigns raise constitutional questions.

Senator Nelson said there are few contested judicial elections in North Dakota.

At the request of Representative Kretschmar and Senator Nelson, Chairman Lyson requested the Legislative Council staff to prepare a concurrent resolution draft to continue the study of judicial

elections and judicial conduct as recommended in the final report of the task force.

No further business pending, Chairman Lyson adjourned the meeting at 2:10 p.m.

Vonette J. Richter
Committee Counsel

[ATTACH:1](#)