

# **Minutes: Minority Justice Implementation Committee**

(Unofficial Until Approved)

**14 August, 2013**

**North Dakota Department of Corrections  
3100 Railroad Avenue  
Bismarck, North Dakota**

**University of North Dakota (ITV Location), Abbott Hall Room 119  
151 Cornell Street Stop 9024  
Grand Forks, North Dakota**

## **Members Present**

Hon. Donovan Foughty  
Leann Bertsch  
Birch Burdick  
Brad Peterson for Jim Fitzsimmons  
Sally Holewa  
Robin Huseby  
Ulysses Jones  
Hon. Steven McCullough  
Corey Pedersen  
Bruce Quick  
Anthony Weiler

## **Members Absent**

Dr. Leander McDonald  
Scott Davis  
Dean Kathryn Rand  
Professor James Grijalva

**Guests**

Lee Brockington  
Lisa Jahner  
Scott Johnson  
Jeanne McLean

**Staff**

Jim Ganje  
Andrew Frank

Call to Order: 10:00 a.m.

Members and guests took turns introducing themselves to the Committee.

Sally Holewa moved to approve the minutes from the 15 May Committee meeting. Leann Bertsch seconded and the motion carried unanimously.

**Current Items:**

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**Juvenile Justice Programs Update**

Chairman Foughty introduced Lisa Jahner to speak about juvenile justice programs in North Dakota.

Lisa Jahner said that two minority arrest assessments have been completed in compliance with federal Juvenile Justice and Delinquency Prevention Act, which requires states to monitor disproportionate minority contact with the justice system.

Lisa Jahner explained a handout on the relative rate index, which examines the rates minority contact with the system compared to rates of contact for white youth. These rates are calculated at each point of contact beginning with arrest and including court referrals, diversion, decision to detain, petition filing, formal probation, and commitment to the Division of Juvenile Services. The rates include any minority group with numbers exceeding 1% in the general population: Native American, Black, and Hispanic youth. Handouts included relative rates calculated for 2012. There is a requirement to calculate rates for the four counties with the largest minority youth populations: Burleigh, Cass, Grand Forks, and Ward.

The relative rates set the rate of white youth as equal to one. If data reveals that a minority group has a rate of one, then the rate of contact of minority youth is the same as white youth and

no disproportionality exists. Values greater or less than one indicate disproportion. The points of arrest and detention showed the most significant disproportion. Data also showed an elevated rate for state commitment, but conclusions at this stage are less reliable because of small numbers, often fewer than ten individuals.

Additional materials presented assessment data for individual minority groups, including arrest and detention rates. Burleigh and Cass Counties were examined because of population size, data reliability, and high minority arrest rates. The assessments examined arrest data over a 5 year period, including arrest location, time, type of offense, and potential seasonal influences. The greatest disproportion was found for American Indian youth, as well as Black youth in Cass County. Detention rates were not as high as arrest rates, but were significant: minority youth were detained at about twice the rate of whites. Assessments included data from law enforcement surveys to provide information on law enforcement practices and attitudes that might factor into the arrest rate.

In Cass County, Black youth are about 5% of the population, but they represented 17% of juvenile arrests. Native American youth in Burleigh County represent about 8% of the population but were about 30% of juvenile arrests. Burleigh County data showed that many citations were based upon calls for service from parents or schools. There is broad discretion for law enforcement to handle these kinds of citations informally. The hours and type citations tended to indicate a lack of parental supervision and instability in the home. Arrests tended to occur between 3 am and 7 am or during late afternoon or early evening. Running away was one of the primary citations for juveniles.

In Cass County, data on time of arrest indicated a much larger percentage of Black youth arrested during school hours than other times. In addition, disturbance at school was the second highest citation for black youth, while it was not in the top ten for citations in any other population.

The assessments recommended creating opportunities for training law enforcement, utilizing objective criteria for detention determinations, and establishing a minority liaisons to work with minority families. Some funding was allocated to Burleigh and Cass counties to specifically address these recommendations. A detention tool was implemented statewide in 2014. Lutheran Social Services received a money award to initiate a minority liaison position in Fargo. This position, titled 'prevention coordinator,' was designed to help minorities navigate the court system and overcome transportation or job issues.

Corey Pedersen said that the courts are looking at two locations to expand this program: one in Fargo to support Lutheran Social Services and another in Devils Lake. The request for this expansion is in the budget. The goal for liaisons is to figure out the needs of populations in their general area and provide any services based on these needs. This is a family-driven program that focuses on providing families to get services to prevent delinquency.

Lisa Jahner noted that over-rides of the detention tool can occur because of issues such as safety. Corey Pedersen said that he could not think of any Native American youth that went into detention for a status offense, unless there was a failure to appear or similar situation. Lisa

Jahner said that there was no data on whether school resource officers issuing citations has increased either the number of arrests or disproportion. She said recommendations call for training resource officers as mentors and educators rather than only enforcers. Corey Pedersen said he could make data available to the Committee from the School-Justice Partnership Team, which tracks suspensions and expulsions.

Ulysses Jones asked if data exists showing any significant change in minority involvement with the justice system during the summer months. Lisa Jahner said that the report showed a small increase in Native American involvement in the system in late summer and early fall. Some of the increase may be attributed to the Pow-wow in Burleigh County. There was no significant difference in Cass County.

Bruce Quick asked how the statistical numbers covered immigrant populations. Lisa Jahner said that Somalia, Sudan, the Congo, Liberia are the main groups included in that category. She said that because the immigrant population is not completely included in the 'Black' category, and there should be another way of measuring rates.

Ulysses Jones asked about the work of the liaison positions in minority communities. Lisa Jahner said, to her knowledge, the liaison focuses on restorative justice concepts: victim/offender conferences, work with the schools, and some work with Fargo police. The Fargo Police Department also has an officer working specifically with minority populations. Corey Pedersen said that the coordinator and Lutheran Social Services would be willing to speak with the Committee on the program.

### **Jury Study Update**

Ross Munns presented an update on the ongoing jury study. He distributed handouts covering the juror questionnaire provided to potential jurors. This questionnaire was modified to include a question on race and/or ethnicity. The modified form has been in circulation since about mid-March. Data input has been reconfigured in the jury management system used by clerks in all 53 counties to allow collection of race/ethnicity information. Each county has at least one person entering data.

Ross Munns shared several screenshots on the process for running reports. Currently, reports can only be run based on identified jury pools, and mining the data requires a labor-intensive process of analyzing each jury pool for every county. However, there has been an effort to configure the system to run reports based on location and date range. The ultimate goal would be to isolate data down to each county, and be able to run reports on the district, unit, and state levels. The goal was to have final reports within one year from the beginning of data collection. Currently, the project is about five months into the data collection phase, which appears to be effective.

Ross Munns presented examples of reports in the handouts. If a court sends summons for a trial and some are not returned, race or ethnicity cannot be calculated for the non-returns. However, the number of missing entries would be a known value. There is also a 'no response' option to account for those who return the questionnaire but decline to share race information. This option was included because of Committee concerns about the sensitive nature of the inquiry.

Sally Holewa asked if there was an estimate on cost. Ross Munns said it may be possible to make the necessary changes with minimal to no cost. Sally Holewa agreed, and added that the vendor has been very reasonable with program costs, and a no-cost solution is not strictly required.

Ross Munns said some data is available for Cass and Burleigh Counties, but smaller counties will take longer to generate a sample. Reports will not be skewed because of the two step process used in part of the state. The data collected so far would probably show that there is not adequate representation in the population centers.

Ross Munns said he could run some preliminary reports based on a few counties. Judge Foughty said Sioux, Benson, and Rolette would be useful because they are within or bordering Indian Country. Scott Johnson said that North Dakota statistics could be compared to the US Census data to create a disparity index.

### **Alternatives to Incarceration Update**

Leann Bertsch provided an update on bill drafts that are being discussed or have been approved by the Alternatives to Incarceration Commission. She gave a short explanation of that Commission and its members.

Last year the Alternatives to Incarceration discussed a sentencing and corrections initiative passed in South Dakota. The Department of Corrections (DOCR) worked with the Commission workgroup to put together a bill draft. This draft would essentially have added 'good time' for probation. The draft was modified to provide courts the power to authorize DOCR to terminate probation as soon as 18 months if the offender is in compliance with all probation conditions. Currently, DOCR can petition the court and ask states attorneys to sign-off. The bill allows DOCR to incentivize offenders to do well on probation, and to terminate with notice to the courts and states attorneys. Another piece of the bill gives judges the authority to decide whether to place offenders convicted of felonies on probation. Currently, offenders have to be placed on supervised probation.

Currently, failures to comply with probation require a Rule 32 hold and a petition to revoke. Often revocation is not the best solution. The proposed bill allows a court to authorize intermediate sanctions, including placing the offender in jail for 48 hours. DOCR would build due process constraints in a similar manner to 72 hour parole holds, including a hearing. The bill would disallow use of the 48 hour jail penalty for more than five times in any 12 month period. It would also restrict use of this penalty to a maximum of 10 days in a single year, and successive use of the 48 hour incarceration periods would be disallowed. This bill was forwarded from the meeting.

Another forwarded bill dealt with the drug paraphernalia law. Currently, felony drug paraphernalia is a C felony. The bill differentiates between drug paraphernalia that is used to ingest or to use drugs, which drops down to an A misdemeanor, and paraphernalia used to manufacture or produce drugs, which remains a felony. The bill changes marijuana drug

paraphernalia from an A to a B misdemeanor to align with marijuana possession, which is a B misdemeanor.

Another bill that just passed out deals with laws on child abuse and neglect. DOCR proposed language that separates child abuse from child neglect so there has to be more specific charges on behalf of the prosecutor. The modification does not change any penalties, but makes a big difference in assessing criminal history. Change would allow a determination of whether a person moving from state to state is a child abuser or if he or she were charged with child neglect because of a filthy house. The language would also affect registration for those offenders. Members asked if offenders would still be subject to the Department of Human Services registration for both abuse and neglect. Human Services indicated they would consider the necessary changes.

Justice Maring brought forward a bill on mandatory transfers from juvenile court. Basically, the statute eliminates mandatory transfer from juvenile to adult court for manufacture and delivery or possession with intent to manufacture and deliver a controlled substance. The committee approved this bill and it will go forward.

Representative Klemin brought forward a bill on mandatory minimums which allows the court to depart from the mandatory minimum for a compelling reason if finds manifest injustice to the defendant and no threat to the public. A series of exceptions exist that prevent judges from departing from the mandatory minimum, including the use of firearms or violence. DOCR drafted another proposal which would have done away with mandatory minimums for drug crimes. This proposal failed on the vote, but it may be brought back during the legislative session.

Ulysses Jones asked if data exists on the effectiveness of community service and if consideration has been given to this subject as an alternative to incarceration. Leann Bertsch said there is no data to support the idea that community service is actually an effective alternative to incarceration and, in fact, it can become a barrier and end up adding jail time if offenders do not complete service hours. She indicated that the legislature currently directs approximately \$370,000 to community service programs.

Judge Foughty said that one helpful aspect of community service is that programs often provide drug testing and screening in addition to service. Many times, the reason people get out on bail is because someone is there to monitor them in this manner.

Another bill would have removed some of the penalties for exposure of a child to controlled substance or drug paraphernalia, particularly in cases where an adult with a child has problems with marijuana or another drug. However, this bill failed because of major concerns from the Department of Human Services. Sally Holewa added that this draft would not have eliminated penalties if the child was actually exposed to drugs.

Leann Bertsch said that there were several recommendations to increase either the DOCR or Human Services budget to provide additional treatment services. There is significant need for these services in all areas of the state.

## **Limited-Scope Representation: State Examples & Comments**

Jim Ganje provided a short background on limited-scope representation in North Dakota. Several years ago, an advisory committee on rules of professional conduct concluded that North Dakota rules permit limited-scope representation. However, the group suggested some ancillary amendments to the rules of procedure to clarify certain situations. Amendments were adopted to civil rules of procedure including: Rule 5, on service, and Rule 11, on pleadings. These amendments included provisions specifically related to limited-scope representation. There was also language added to rule 11.2 that governs withdrawal of attorneys from limited representation.

Most of the limited scope rules from other states in the meeting materials are nearly identical to those in North Dakota. However, the Nebraska rule adds three provisions to their equivalent of Rule 1.2. The rules include specific language indicating that an attorney's signature on the pleadings does not constitute an appearance in court. They also describe the process for attorney withdrawal from limited-scope representation without court approval. Some of this language could be adopted to clarify North Dakota's limited-scope rules. However, most of the Nebraska language would be more appropriate in North Dakota procedural Rule 11 on pleadings or 11.1 on withdrawal. Adding the Nebraska language may be worth considering if there is a need to clarify limited-scope services and address attorney anxieties about providing and withdrawing from limited scope representation.

Judge McCullough said that any changes to Rule 11 would involve the Joint Procedure Committee, while changes to the Rules of Professional Conduct would go through the Attorney Standards Committee.

Anthony Wieler said SBAND has been trying to send out information to explain limited scope representation to increase attorney awareness. Sally Holewa said that past discussion suggests that most attorneys know they can provide limited-scope services, but many attorneys feel uneasy about the subject. Jeanne McLean said that she is in a position to speak to local bar associations on limited-scope services. She has developed model forms including sample agreements for unbundling, sample withdrawal forms, and sample notice to the court and opposing counsel. Judge Foughty suggested sending a notice to the bar of availability to speak on this topic.

Jeanne McLean said she has received many calls from people who are pro se only because they cannot find someone to help them with a small part of their case. Many attorneys seem to think that if they appear the judge will somehow require long-term representation. She clarified that her work does not provide help on the criminal side, though she receives many calls from people with such issues.

Members requested a proposed rule consistent with the Nebraska language to be considered at the next meeting and forwarded to the Joint Procedure Committee.

## **New Items:**

### **Access to Justice Commission**

Sally Holewa provided some background on access to justice commissions. The Conference of Chief Justices has pushed for every state to create a commission at the urging of the ABA and the Department of Justice. Almost thirty states have complied and tasked their access to justice commissions with examining culture, language, age, and disabilities as factors that may affect participation in the legal system. Chief Justice VandeWalle said that he would like to see the Minority Justice Committee rolled into an Access to Justice Commission. The group would continue implementation of the Race and Bias recommendations and its minority justice work, but would also broaden its focus. Membership on the current committee would continue, but would be expanded.

Judge Foughty said that many state race and bias committees have followed a similar path. Some states run separate committees, but with North Dakota's size, one would probably be sufficient. Judge McCullough said that it will probably be necessary to change to Administrative Order 21, which was included in the meeting materials. He said that additional language should emphasize low income and disadvantaged individuals as well as minorities.

Judge Foughty said he could convey the Minority Justice Committee's willingness to be transformed to the Chief Justice. He indicated that Jeanne McLean would be a member, along with one or two others, and asked for feedback on potential additional members.

Anthony Weiler suggested including the chair of the Pro-bono/ALP Committee to provide more input from the bar with an access to justice focus. Robin Huseby suggested including a law student. Sally Holewa agreed, but said there would have to be a defined mechanism for choosing the student. Judge Foughty said that the position could be a special, shortened term. He added that one reason for including a law student might be more insight on how to encourage minorities to practice in North Dakota.

Members discussed whether the change in title and broadened emphasis would be perceived as somehow giving up on the subject of race and bias. Ulysses Jones said the title "Access to Justice Commission" would be sufficiently broad to include minorities, economically disadvantaged persons, those facing language barriers, and others. Sally Holewa noted that meeting materials described access to justice commissions as covering subjects that the Minority Justice Committee has already begun to consider.

Birch Burdick said that meeting materials describing similar commissions focused solely on civil issues. He said it is important to maintain the Committee perspective that the criminal side also presents problems relating to fairness and bias. Sally Holewa agreed, noting that most of the state's pro se cases are actually on the criminal side. Judge Foughty said that the Commission would continue its focus on criminal issues.

Judge Foughty said the Committee consensus is that there is no objection, but he can inform the Chief Justice can be informed of our concerns expressed in the discussion.

Jim Ganje said that the Chief Justice asked him to re-work AO 21 to create an access to justice commission. As the meeting material indicates, about half of these commissions have been

established by supreme court order or rules. He said that melding the purpose of an access to justice with the current responsibilities of the Minority Justice Committee should not be difficult.

Sally Holewa asked if there were any comments on the Committee Interim Report draft. Judge Foughty said that he would like to submit an interim report and asked committee members to review it and provide comments for next meeting.

Having no further business, the meeting adjourned at 12:25 p.m.