

**MINUTES**  
**of the**  
**SECOND MEETING**  
**of the**  
**COURTS, CORRECTIONS AND JUSTICE COMMITTEE**  
**July 16-17, 2009**  
**Room 307, State Capitol**  
**Santa Fe**

The second meeting of the Courts, Corrections and Justice Committee was called to order at 10:10 a.m. by Representative Al Park, co-chair, on Thursday, July 16, 2009, in Room 307 of the State Capitol in Santa Fe, New Mexico.

**Present**

Rep. Al Park, Co-Chair  
Sen. Peter Wirth, Co-Chair  
Sen. Rod Adair  
Rep. Thomas A. Anderson  
Rep. Joseph Cervantes  
Rep. Gail Chasey  
Sen. Mary Jane M. Garcia  
Sen. Clinton D. Harden, Jr.  
Sen. Linda M. Lopez (July 17)  
Rep. Antonio "Moe" Maestas  
Sen. Richard C. Martinez (July 17)  
Rep. William "Bill" R. Rehm  
Sen. John C. Ryan  
Rep. Mimi Stewart

Rep. Zachary J. Cook

**Advisory Members**

Rep. Eliseo Lee Alcon (July 16)  
Rep. Elias Barela  
Rep. Brian F. Egolf, Jr.  
Rep. Dennis J. Kintigh  
Sen. Carroll H. Leavell  
Sen. Cisco McSorley  
Rep. Bill B. O'Neill  
Sen. Michael S. Sanchez (July 16)  
Rep. Sheryl Williams Stapleton  
Rep. Jack E. Thomas

Sen. Gay G. Kernan  
Rep. W. Ken Martinez  
Sen. William H. Payne  
Sen. David Ulibarri  
Rep. Gloria C. Vaughn

**Guest Legislators**

Sen. Sue Wilson Beffort (July 17)  
Rep. Nora Espinoza (July 17)  
Sen. Nancy Rodriguez (July 16)

**Absent**

(Attendance dates are noted for members not present for the entire meeting.)

**Staff**

Maha Khoury  
Kate Ferlic  
Mark Harben

**Guests**

The guest list is in the meeting file.

**Handouts**

Copies of all handouts are in the meeting file.

**July 16, 2009**

Representative Park welcomed committee members and guests and asked Senator McSorley to comment on the annual meeting of the Uniform Law Commission that took place in Santa Fe this week. Senator McSorley briefed the committee on some of the processes of the Uniform Law Commission.

**Report on Court Visits**

Representative Park discussed his visit to the Bernalillo County Metropolitan Court. He said that he was very impressed with the efficient operations of the court and the number of cases it handles. It has an excellent automation system for law enforcement and for arraignments. It is open 24 hours a day, seven days a week for bond hearings and arraignments. Among the specialty courts, it has a homeless court and a domestic violence early intervention program. He highly recommended members to visit the courts in their districts. Representative Park explained that having this experience was very rewarding and discussed how members should contact a judge or Susan Tungate, administrative assistant to the chief justice, to arrange for a court visit.

**Creating a State Civil Rights Action**

Representative Chasey said she introduced legislation relating to a state civil rights action last session and had agreed to add it to the interim agenda. Representative Chasey said that she, Michael Hart, Martinez, Hart & Thompson, PC, and Maureen Sanders, Sanders & Westbrook, PC, examined state civil rights laws of other states, namely Arkansas, New Jersey, Florida, Massachusetts, North Carolina and Alabama.

Ms. Sanders said that it was not until the 1960s that a method was developed to hear constitutional rights cases in the courts. However, in the last 15 to 20 years, the federal courts have narrowed the scope of civil rights and have made it difficult for plaintiffs to bring their cases to a jury. She said that New Mexico courts have a broader scope in dealing with civil rights than the federal courts do, but there is no mechanism to bring civil rights cases under the

New Mexico Constitution. Ms. Sanders then went over the proposed language for a state civil rights action, which would allow for attorney fees and costs and allow the attorney general to pursue civil rights violations under the New Mexico Constitution.

Mr. Hart stated that the New Mexico Constitution is not usually taught in high school or even in law school. He said this happens because there is no true way to enforce the state's constitution. Mr. Hart discussed how the New Mexico Constitution provides rights that other states do not have and often provides broader rights than the U.S. Constitution, including the right to bear arms, freedom of speech and the Treaty of Guadalupe Hidalgo.

Mike Wilson, director of the Risk Management Division (RMD) of the General Services Department, discussed the role of RMD, saying it is self-funded and not an insurance company. He said the RMD works to administer claims and lawsuits against state agencies and entities and does not have insurance in the traditional sense because there is no company that would take on the risk for an entire state, especially for excessive force cases.

Manuel Tijerina, legal bureau chief, RMD, said that the RMD provides defense and pays settlements in lawsuits against the state, including claims under the Tort Claims Act and federal civil rights claims. He discussed legal costs and expenditures, along with numbers of cases, which he said have gone down.

Sean Olivas, Keleher & McLeod PA, a contract attorney with the RMD, discussed civil rights lawsuits and the Tort Claims Act. He stated that the proposed language is "breathhtaking" in scope and that no intent is required for the civil rights action proposed. Mr. Olivas opined that this proposal is really forum shopping and that plaintiffs would prefer to bring their cases in state court rather than federal court because federal courts dismiss weak cases more often than state courts do.

Committee members discussed policy options, asked questions of the panel and discussed existing laws and remedies in New Mexico. Senator Wirth requested that the proponents provide background on the experience of the nine states with similar statutes, including copies of the statutes, whether they have caps on damages, whether they provide for attorney fees and what the costs have been to those states and their local governments as a result of enacting this legislation.

The committee recessed for 10 minutes at 1:00 p.m. and continued the meeting with a working lunch.

### **Medical Malpractice: Limitation on Recovery; Patient's Compensation Fund**

Morris J. Chavez, superintendent of insurance, Public Regulation Commission, discussed how the limitations on recovery (caps) under the Medical Malpractice Act may be unconstitutional and subject to challenge under the equal protection clause since some doctors are subject to the caps and some are not. He recommended an increase in the cap from \$600,000 to \$1,000,000, which would increase the premiums by about three percent. Mr. Chavez stated

that recently, the number of claims and severity of claims have increased.

Dan Derksen, M.D., University of New Mexico Medical Center, immediate past president for the New Mexico Medical Society (NMMS), discussed the NMMS and said that it is difficult to recruit health professionals for areas in need of such professionals. Dr. Derksen explained that New Mexico is actually below the lowest level of needed health professionals in the United States and the state loses three out of four medical students and residents to other states. Dr. Derksen pointed out that there is no cap for punitive damages or future medical expenses under the act.

Denise Torres, New Mexico Trial Lawyers Association, stated that APA, the NMMS' exclusive carrier, has been extremely profitable and, despite the number of claims remaining flat since 1980, APA continues to increase premiums. She also stated that New Mexico physicians are paying 40% more in premiums, for less coverage, than Indiana physicians. The cap in Indiana is \$1,250,000. The committee requested that Superintendent Chavez compare the cost of insurance in other states that have the same or higher caps than New Mexico or that have no caps on recovery for medical malpractice. Committee members discussed policy options and asked questions of the panel.

#### **Citizen Petitions for a Grand Jury**

Denise Lamb, chief deputy clerk for elections in Santa Fe County, told the committee that Article 2, Section 14 of the New Mexico Constitution is not self-executing and that county clerks need legislation to be able to address citizen petitions for a grand jury investigation. Problems in Santa Fe County include petitions submitted without addresses, which are thus unverifiable, and no time limits on how long a petition can be active. The bill draft prepared by the LCS addresses the problems and creates a procedure that is workable for the county clerks. She would like the committee to sponsor the bill. Questions and comments followed from the committee.

Due to time constraints, the tabulation of votes topic was taken off the agenda and postponed.

#### **Voting Equipment Maintenance**

Don Francisco Trujillo, deputy secretary of state, said that in 2006, New Mexico bought new voting machines from Election Systems and Software, Inc. (ES&S). The warranty expired in 2007, and currently there is no maintenance agreement on the machines. The secretary of state has attempted to get funding for maintenance of the machines but has not been successful. One year was covered for software and firmware with interest from an account, but there is no money for support and maintenance now. Mr. Trujillo discussed some of the negotiations that have occurred with ES&S and how ES&S initially wanted to charge the state \$1.3 million to maintain the voting equipment. In further negotiations, the price was reduced.

Ms. Lamb said that since every voting machine in the state is manufactured by ES&S, it is difficult to negotiate with it. Prices to train operators of the machines have skyrocketed,

totaling \$106,000 to train the Santa Fe County operators alone. Previously, it would only cost the county hotel, food and travel to Las Cruces for training sessions. She stated that the switch to paper ballots was too urgent and happened too fast.

Sheryl Nichols, president, county clerk affiliate, attended a user group conference and said that none of the users are happy with the ES&S machines. ES&S can be very unreasonable. For example, under the current agreement, ES&S decides if the equipment is "fixable", without consultation with the clerks or the secretary of state. She believes the average lifespan for these machines is 10 years.

### **Compliance with the Campaign Reporting Act**

Mr. Trujillo said the campaign reporting guide will be ready in August 2009. He stated that updating technology and equipment is expensive, and the department is assessing what the most important updates are.

### **Domestic Violence Victim Confidential Addresses**

Mr. Trujillo said the program has 172 participants and it is growing. The program works with a variety of different agencies to secure the identities of participants, utilizing similar strategies as witness protection services. Mr. Trujillo said the Secretary of State's Office (SOS) supports the program, but needs funding for it. The Children, Youth and Families Department gave the program \$100,000 for its first year, and last year \$110,000 for the program was funded out of the SOS's budget. This coming session, the SOS's will request an appropriation for the program.

Committee members asked questions and discussed possible solutions.

The committee heard comments from members of the public.

### **Recess**

The committee recessed at 5:30 p.m.

### **Friday, July 17**

The committee reconvened at 9:10 a.m. and was called to order by Senator Wirth.

### **Creation of an Ethics Commission**

Representative Park introduced the panel of presenters with him. Representative Park said it is important for the State of New Mexico to establish an ethics commission because it would provide enforcement for ethics laws, along with providing advisory opinions for complex ethical issues. He said that state employees work hard and attempt to maintain ethics, but not all issues are clear-cut or straightforward; establishing a commission would help people in ethical dilemmas. Representative Park discussed the lieutenant governor's ethics proposal as well. He

said that this legislation is the biggest and most important legislation on ethics that the legislature has not passed.

Stuart Bluestone, senior counsel to the attorney general, thanked the committee for allowing him to speak about ethics reform, especially so early in the interim. Mr. Bluestone said he agreed with Representative Park wholeheartedly, and he believes ethics laws are essential for maintaining the public's trust. Mr. Bluestone said the best next step for ethics reform is to create an independent body to rule and advise officials on ethics. He also discussed the objections regarding the formation of an ethics commission, along with the necessary precautions and maneuvers undertaken to ensure those objections are addressed and placated. Mr. Bluestone explained that Attorney General Gary King and Governor Bill Richardson have been working long and hard on creating ethics legislation, task forces and programs; he also mentioned the legislators involved with those reforms. Mr. Bluestone told the committee that there are a number of ways to go about creating a commission and mentioned that there are 40 states with ethics commissions. One overriding concern, according to Mr. Bluestone, is the separation of powers issue. He said that a useful way to address those concerns is providing education regarding the purpose and functionality of ethics laws.

Senator Lopez discussed SB 557, which she introduced last session. She said that legislation for ethics does not necessarily stop people from committing ethics violations, citing laws against drunken driving not preventing DWI as an example. She said her bill created three bodies for ethics legislation, one to look at the executive branch; one for the legislative branch; and one for public officials as defined in the bill. She reiterated that ethics laws should be in place, but not limited to examine just legislators, but every state position. According to Senator Lopez, there are concerns and issues that must be addressed carefully, including who appoints the members of any ethics commissions.

Steven Robert Allen, executive director for Common Cause New Mexico, said the ethics reform discussion has been significant over the last few years. He said there is no consensus on a model of how to create an ethics commission across the 40 states with such commissions, but there are many aspects that can be utilized from them. He mentioned various issues such as jurisdiction, appointments and enforcement as primary topics that need to be evaluated carefully. Mr. Allen said he has discussed the creation of an ethics commission with the National Conference of State Legislatures and said that the lieutenant governor's proposal is largely based on the Hawaiian version. He said that the one thing that all commissions have is a requirement to be bipartisan in nature, but there is no consensus on a way to do this. It is vital to have a commission with "teeth", but, at the same time, it cannot be used as a mechanism for witch-hunt tactics. He explained that a way to do this is maintaining the anonymity of the complainant, which is quite innovative. Mr. Allen told the committee that another significant question is the funding of the commission, which has proved contentious in many states. Mr. Allen commented that he believes there is a crisis in public trust for the ethics of state officials in New Mexico, even though those fears may be largely unfounded.

Committee members discussed possible solutions and policy options and asked questions

of the panel. Senator Wirth said he feels that there should be a working group or subcommittee of the Courts, Corrections and Justice Committee to discuss and work on this issue.

### **Whistleblower Protection Act**

Representative Cervantes and Senator Beffort discussed their whistleblower protection bills that would protect employees from retaliation for speaking out on matters of public concern. Representative Cervantes said his bill was passed unanimously in the House of Representatives. Senator Beffort said it is important that this bill does not have risk management repercussions that will adversely affect the state and its employees. She said the legislation is vital, but there may be language in the legislation that needs to be tightened up and made less vague.

Philip Baca, assistant attorney general, commended the whistleblowers before the committee. He said the majority of states have whistleblower protection laws, and he helped to draft the legislation utilizing the best features of those laws. Mr. Baca continued to say that there was feedback from the New Mexico Municipal League and the New Mexico Association of Counties and the bill was drafted with their consensus.

Frances Williams, former commissioner of the Region 7 Housing Authority, thanked the committee for the opportunity to speak. She provided the committee with her personal history and her professional background. She was appointed commissioner of the Region 7 Housing Authority in March 2004 and questioned the funding and financial statements of the authority right away. Ms. Williams explained that after questioning the financial standing of the authority, she was subjected to inappropriate behavior such as name-calling and malignant accusations. Upon making no headway with the authority itself, Ms. Williams sent letters to the governor and the attorney general. After bringing the discrepancy out into the open, Ms. Williams said she was met with little support and was shunned by many of the people to whom she reported the incongruities. Ms. Williams told the committee that Region III Housing Authority Executive Director Vincent "Smiley" Gallegos filed a lawsuit against her for slander and she was forced to hire a lawyer at her own expense. Ms. Williams asserted that she has been shunned from politics, even though she has been a staunch member of the Democratic Party and a dedicated public servant. As a result of the hardships she has endured from being a whistleblower, Ms. Williams is a supporter of protection for whistleblowers and has worked with whistleblower programs as an employee of the federal government. She is saddened that New Mexico does not have better programs and protections in place.

Barbara Perea Casey, former superintendent of the West Las Vegas Public School District, recounted her experience as a whistleblower. She said she reported irregularities in how the Head Start program was administered by the West Las Vegas Public School District to federal authorities. She then was demoted and told her contract was not going to be renewed. Ms. Casey was not allowed to take leave to avoid problems at work, faced harsh treatment and was singled out for being outspoken. She said that whistleblowers do not call out irregularities because it is enjoyable, but to do the right thing, maintain their integrity and keep their record in good standing.

Committee members expressed their concern, discussed policy options and asked questions of the panel. Members thanked Ms. Williams and Ms. Casey for their courage and participation in the meeting.

The committee heard comments from members of the public.

**Adjournment**

The committee adjourned at 12:30 p.m.