MINNESOTA SENATE

SUBCOMMITTEE ON ETHICAL CONDUCT

Conduct of John Berglund

FINAL REPORT

April 7, 1998

CONTENTS

Page

A resolution relating to ethical conduct; conduct of John F. Berglund.

WHEREAS, the Subcommittee on Ethical Conduct, based on clear and convincing evidence, has made the following findings:

1. John F. Berglund is the Executive Director of the Minnesota Licensed Beverage Association, Inc.

2. Mr. Berglund is duly registered with the Board of Campaign Finance and Public Disclosure under Minn. Stat. §§ 10A.03 to 10A.06 as a lobbyist representing the Minnesota Licensed Beverage Association, Inc., and the Minnesota Association of Innkeepers.

3. On March 12, 1998, during the floor debate on S.F. No. 2099, a bill that would lower the alcohol concentration limit for driving while intoxicated to .08, Mr. Berglund caused to be distributed on the Senate floor a flyer produced by the Minnesota Licensed Beverage Association, Inc.

4. Mr. Berglund intended that the flyer influence the judgment and action of the Senate on S.F. No. 2099.

5. The flyer said that: "According to Kathy Burke-Moore of the Minnesota Department of Public Safety, Driver and Vehicle Services, 1,800 people who were pulled over for various reasons (improper lane change, broken tail light, etc.) were 'caught' driving with BACs of .08% and .09%. Of these, 'very few, if any' were arrested for driving under the influence of alcohol (DUI), Ms. Burke-Moore said. She estimates that as few as 2% of those driving at that BAC level were arrested for DUI, while the other 98% drove themselves safely home or wherever they were heading before being stopped."

6. Katherine Burke Moore is Director of Driver and Vehicle Services in the Department of Public Safety.

7. The flyer falsely attributed to Ms. Burke Moore four statements she had never made.

   a. She had never said that the 1800 people were "pulled over for various reasons (improper lane change, broken tail light, etc.)."
   b. She had never said that "very few, if any" were arrested for driving under the influence of alcohol (DUI).

c. She had never said that "as few as 2% of those driving at that BAC level were arrested for DUI."

d. She had never said that "98% drove themselves safely home or wherever they were heading before being stopped."

8. Mr. Berglund has acknowledged that Ms. Burke Moore did not make the statement about 98 percent driving themselves safely home and has apologized to Ms. Burke Moore and to the members of the Senate for having attributed the statement to her.

9. Mr. Berglund has not apologized to Ms. Burke Moore for falsely attributing the other three statements to her.

10. In addition to being falsely attributed to Ms. Burke Moore, three of the statements in Mr. Berglund's flyer were false in themselves.

a. The statement that "98% drove themselves safely home or wherever they were heading before being stopped" was false. Captain Mike Asleson of the State Patrol testified to the Subcommittee on Ethical Conduct that, in his 21 years on the State Patrol, he had never known a person who tested below .10 to be returned to their vehicle so they could continue to drive because of a test result. "Never. Not one case."

b. The statement that "'very few, if any' were arrested for DUI" is false. On the contrary, all were arrested and charged with driving while intoxicated, based on the evaluation of the arresting officer. "Very few, if any" were *convicted*, in spite of the efforts of the officer who arrested and charged them.

c. The statement that "the majority of people driving at .08% or .09% were deemed by experienced law enforcement officers to be safe enough to drive" was false. On the contrary, those who where stopped and arrested were deemed to be driving under the influence of alcohol and were tested and charged by the arresting officer with DWI.

11. Mr. Berglund has not acknowledged that three of the statements in the flyer, falsely attributed to Ms. Burke Moore, were false in themselves.

12. Complainant failed to prove that Mr. Berglund knew that the statements in the flyer were false.

13. Mr. Berglund should have verified whether Ms. Burke Moore had made the statements he attributed to her and was careless and negligent in failing to do so.

NOW, THEREFORE,

BE IT RESOLVED, by the Subcommittee on Ethical Conduct:

1. That the apology given by John L. Berglund to the Senate and to Kathryn Burke Moore on or about March 18, 1998, was appropriate but incomplete.

2. That Mr. Berglund be required to provide to the Senate and to Ms. Burke Moore an acknowledgment that he should have verified with Ms. Burke Moore the statements he attributed to her and that his failure to verify the truth of those statements was careless and negligent.

3. That upon receipt of the acknowledgments by the Senate, the complaint be dismissed.

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

John F. Berglund
Executive Director
2353 Rice Street
Suite 139
St. Paul, MN 55113
612-486-0910
800-967-2029
Fax: 612-486-0786

April 9, 1998

Ms. Katherine Burke Moore
Minnesota Department of Public Safety
Driver and Vehicle Services
445 Minnesota Street
St. Paul, MN 55101

Dear Ms. Burke Moore:

Pursuant to the resolution of the Subcommittee on Ethical conduct and my previous apology in regards to a flyer distributed on March 12, 1998 which attributed certain statements to yourself, the purpose of this letter is to acknowledge that I should have verified those statements with you and my failure to do so was, in retrospect, careless and negligent. I sincerely regret imposing this matter on you and I again apologize to you, as I have to the members of the Senate. A similar letter has been forwarded to the Senate.

Very truly yours,

John F. Berglund
Executive Director

JFB/ww

cc: Senator Ember Reichgott Junge
Chair, Subcommittee on Ethical Conduct

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

John F. Berglund
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April 9, 1998

Mr. Allan H. Spear
President of the Senate
120 Capitol
St. Paul, MN

Dear Mr. President:

Pursuant to the resolution of the Subcommittee on Ethical conduct and my previous apology in regards to a flyer distributed on March 12, 1998 which attributed certain statements to Kathy Burke Moore, Director of the Minnesota Department of Public Safety Driver and Vehicle Services, the purpose of this letter is to acknowledge that I should have verified those statements with Ms. Burke Moore and my failure to do so was, in retrospect, careless and negligent. While it was, as found by the Subcommittee, neither intentional or knowing, I sincerely regret imposing this matter on the Senate and I again apologize to Ms. Burke Moore and members of the Senate. I would respectfully request that you share this letter with the members of the Senate. A similar letter has been forwarded to Ms. Burke Moore.

Respectfully yours,

John F. Berglund
Executive Director

JFB/ww

cc: Senator Ember Reichgott Junge
Chair, Subcommittee on Ethical Conduct

Senator
John Marty

Senate

State of Minnesota

March 13, 1998

Subcommittee on Ethical Conduct
Room 205 Capitol
St. Paul, MN 55155

Dear Senator Junge,

I am writing to file a complaint about a possible violation of Senate Rule 76 by John Berglund of the Minnesota Licensed Beverage Association (MLBA). The pertinent provision of Rule 76 is:

> "*A lobbyist shall not knowingly furnish false or misleading information* or make a false or misleading statement *that is relevant and material to a matter before the Senate* or any of its committees *when the lobbyist knows or should know it will influence the judgment or action of the Senate* or any of its committees *thereon.*"

On March 12, during the floor debate on S.F. 2099, the .08 DWI bill, a flyer produced by the Minnesota Licensed Beverage Association, John Berglund, Executive Director, was distributed on the Senate floor. I am attaching a copy of the flyer from the Minnesota Licensed Beverage Association as well as a letter from Kathy Burke Moore, Director, Driver and Vehicle Services of the Department of Public Safety, challenging the truthfulness of Mr. Berglund's flyer.

The flyer contained *false or misleading information.* It falsely attributes to Ms. Burke Moore an estimate that of 1,800 people tested at .08% or .09% blood alcohol concentration (BAC), "98 % drove themselves safely home or wherever they were headed before being stopped."

Ms. Burke Moore responded to Mr. Berglund, "You have taken a few words from my statement and set them in language that is not true. In fact, your characterization of my statements is the direct opposite of what I said." Colonel Anne Beers, Chief of the Minnesota State Patrol, confirmed Ms. Burke Moore's position when asked whether law enforcement officers would let 98% of drivers at .08 or .09% BAC drive home in such a situation. Chief Beers stated she would be "surprised" if any officer would let a driver tested at .08% BAC drive home.

This is *relevant and material to a matter before the Senate* because central to the debate on SF 2099 is whether people at .08 drive safely. Throughout the debate Mr. Berglund and his

association have attempted to portray people at .08% BAC as safe drivers despite the fact that the National Safety Council states that drivers are impaired at .08% BAC. Mr. Berglund is entitled to state his opinion on the matter, but under Senate Rule 76 he can not provide false information to the Senate in an attempt to influence the Senate.

John Berglund, as a registered lobbyist for the MLBA, *knows or should have known (the flyer would) influence the judgment or action of the Senate* because of the time and manner in which it was distributed, on the Senate floor during debate on this issue.

The flyer contained *false or misleading information.* It was *relevant and material to a matter before the Senate.* It was distributed in a time and manner in which Mr. Berglund would *know or should know it (would) influence the judgment or action of the Senate.* The question for the subcommittee to answer is whether Mr. Berglund "knowingly" furnished false information.

To assist the subcommittee in addressing this question, please note that Ms. Burke Moore states in her letter to John Berglund "I do not believe you could misunderstand my information to such an extent as to excuse the mischaracterization of facts you have published."

Consequently, I ask the Subcommittee on Ethical Conduct to investigate whether Mr. John Berglund violated Senate Rule 76 by knowingly furnishing false or misleading information during the debate on the .08% DWI legislation.

Sincerely,

John Marty

Subscribed and sworn to before me this 13 day of March 1998

Jane Ranum

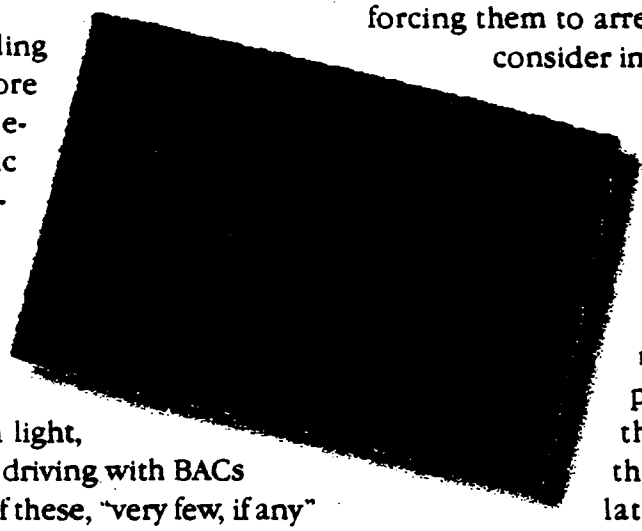
State Senator

District 63, Minnesota, ex officio notary public.
My term expires the first Monday in January 2000.

Impairment at .08% or .09% BAC?

Not According to Law Enforcement Officers

One thousand eight hundred Minnesotans who were stopped for possible safety violations in 1996 had blood-alcohol concentrations (BAC) of .08% or .09%. ***Virtually all of them spent the night in ... their own homes.***



That's right. According to Kathy Burke-Moore of the Minnesota Department of Public Safety, Driver and Vehicle Services, 1,800 people who were pulled over for various reasons (improper lane change, broken tail light, etc.) were "caught" driving with BACs of .08% and .09%. Of these, "very few, if any" were arrested for driving under the influence of alcohol (DUI), Ms. Burke-Moore said. She estimates that as few as 2% of those driving at that BAC level were arrested for DUI, while the other 98% drove themselves safely home or wherever they were heading before being stopped.

If the majority of people driving at .08% or .09% were deemed by experienced law enforcement officers to be safe enough to drive, why is the Minnesota Legislature trying to *outlaw* this benign behavior?

Current Minnesota law *already* allows the police to arrest alcohol-impaired drivers at the .08% and .09% BAC level, as the 2% of those 1,800 drivers who *were arrested* can attest. By lowering the drunk driving arrest threshold, the Minnesota Legislature is essentially overriding the judgement of trained law enforcement officers, forcing them to arrest people they do not consider impaired.

According to the US Department of Transportation, the average BAC level among fatally injured drivers is .17%, more than twice the proposed .08% arrest threshold. Nearly two-thirds of all alcohol-related fatalities involve drivers with BACs of .14% or above. Lowering the drunk driving arrest threshold will have no effect on these alcohol abusers who are ignoring the current legal threshold.

Let's follow the example set by Minnesota's law enforcement community and not persecute responsible social drinkers.

Minnesota Licensed Beverage Association, Inc. • Suite 139 • 2353 Rice Street • St. Paul, MN 55113
Tel: 612-486-0910 • Toll Free: 800-967-2029 • Fax: 612-486-0786

Marty

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

Driver and Vehicle Services

445 Minnesota Street, St. Paul, Minnesota 55101
Phone: 612/296-6911 TTY: 612/282-6555

Alcohol & Gambling Enforcement

Bureau of Criminal Apprehension

Capitol Security

Crime Victim Services

Driver & Vehicle Services

Emergency Management / Emergency Response Commission

State Fire Marshal / Pipeline Safety

State Patrol

Traffic Safety

March 13, 1998

Mr. John Berglund
Minnesota Licensed Beverage Association, Inc.
Suite 139
2353 Rice Street
St. Paul, MN 55113

Dear Mr. Berglund:

I was shocked to see your association's handout entitled, "Impairment at .08% or .09% BAC? Not According to Law Enforcement Officers", in which I was misquoted. I was even more appalled that this handout was distributed on the floor of the Senate to be used to discredit S.F. 2099. Senator Marty shared the handout with me outside of Senate Chambers while discussion on the bill was taking place. I made it clear that the content of MLBA's handout attributed to me was false.

I find it totally irresponsible of any party to mislead legislators who have the critical duty to make effective laws for Minnesota. When your association uses my name and position in the Department of Public Safety, to lend validity to the arguments you have been pushing throughout this session, I cannot help but question your ethics. You have taken a few words from my statement and set them in language that is not true. In fact, your characterization of my statements is the direct opposite of what I said.

As you know, I spoke to you shortly after the bill was amended and questioned the source of information that you attributed to me. Your response was that you got that information from my testimony in committee and from a telephone conversation I had with another lobbyist for the liquor industry. I have gotten the tape of the testimony on S.F. 2099's companion bill, H.F. 2389 before House Judiciary Finance on February 12, 1998. My testimony clearly states that the 1800 estimate indicates individuals which under the proposed law change will now be *charged* with DWI, they are currently arrested but are not charged because their BAC does not reach the legal limit of .10. You, not me, made the improper lane change and broken tail light ["speeding and safety violations"] comments. The statement that I "estimate that...2%...were arrested for DUI" and the other "98%" drove "safely home" is false. *All* of them were arrested for DWI.

DVS
Vehicle Services

I also took the time to review my telephone conversation with the other lobbyist. He recalls my giving the 1800 number as an estimate of those that could be charged with DWI if the .08 bill passes. I stressed to him a number of times that these are not new arrests, but individuals who are arrested, taken into the station and tested because the officer witnessed evidence of impairment. He also asked about the frequency of the .08 and .09 drivers being convicted of DWI. I stated that I did not have firsthand knowledge, but I believe it "is few, if any".

I do not believe you could misunderstand my information to such an extent as to excuse the mischaracterization of facts you have published. So, for the sake of clarification, the Department of Public Safety supports S.F. 2099 and H.F. 2389 and I, as Director of Driver and Vehicle Services and a citizen of Minnesota, support lowering the BAC level to .08 for all drivers on first and subsequent offenses.

I speak for the Department of Public Safety and myself. I do not speak for the liquor industry. My name and any attribution to misconstrued and fabricated information must be removed from your handouts. I trust that you will not spread this false information at the House of Representatives.

Sincerely,

Katherine Burke Moore
Director

cc: Donald E. Davis, Public Safety Commissioner
Senator John Marty
Senator Leo Foley
Representative Matt Entenza

Senate Counsel & Research

G-17 State Capitol
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St Paul, MN 55155-1606
(612) 296-4791
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Jo Anne Zoff Sellner
Director

Senate
State of Minnesota

March 17, 1998

John F. Berglund
Minnesota Licensed Beverage Association
2353 Rice Street, Suite 139
St. Paul, MN 55113

Sent via fax: 486-0786

Subj: Ethical Conduct Complaint

Dear Mr. Berglund:

As we discussed over the phone, the Subcommittee on Ethical Conduct is scheduling a hearing on Senator Marty's complaint against you. It appears that Wednesday, March 25, at 2:00 p.m. in Room 125 will work for all parties, but please await receipt of a formal notice from Senator Junge confirming this information.

I understand you have the complaint and a copy of Senate Rules 75 and76. Following this letter is a copy of the Subcommittee's Rules of Procedure.

Sincerely,

Peter S. Wattson
Senate Counsel

PSW:ph
Enclosures

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

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March 18, 1998

To: Honorable Members of the Minnesota Senate

RE: A flyer from the Minnesota Licensed Beverage Association entitled, "Impairment at .08 or .09 BAC?"

I am writing to inform you that the above flyer from my office was in error in attributing to Kathy Burke Moore, Director of the Minnesota Department of Public Safety's Driver and Vehicle Services, a comment that 98% of 1800 people testing at .08 - .09 BAC drove themselves safely home. Ms. Burke Moore did say that the people are not now being charged with DWI. She did not say that these people drove safely home after testing. This was a misinterpretation of comments made by Ms. Burke Moore in a conversation with another industry lobbyist.

I have apologized to Ms. Burke Moore for this reference, and I apologize to the members of the Minnesota Senate. I appreciate the opportunity to correct this mistake, as Senator Marty did on the Senate floor on Thursday, March 12th, a few minutes after this flyer was distributed.

If you have any questions regarding this letter please do not hesitate to contact me. Thank you.

Respectfully submitted,

John F. Berglund
Executive Director

JFB/ww

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

Office of the Commissioner

445 Minnesota Street St., Suite 1000, North Central Life Tower, St. Paul, Minnesota 55101-5000
Phone: 612/296-6642 FAX: 612.297.5728 TTY: 612/282-6555
Internet: http://www.dps.state.mn.us

March 24, 1998

Senator Ember Reichgott Junge
Chair, Rules and Administration Special Subcommittee on Ethical Conduct
205 Capitol, 75 Constitution Avenue
St. Paul, Minnesota 55155

Re: Complaint filed by Senator Marty re: John Berglund, Minnesota Licensed Beverage Association

Dear Senator Reichgott Junge:

Regarding the complaint filed by Senator John Marty against John Berglund, Minnesota Licensed Beverage Association, I am writing to inform you that although I intended to be present at the hearing, I am unable to attend as I am recovering from major surgery and am incapacitated for several weeks.

I regard Mr. Berglund's conduct in relation to the .08 proposal, especially in relation to the inaccurate information distributed by Mr. Berglund on the Senate floor, to be worthy of a prompt and thorough investigation by the Ethical Conduct Subcommittee. It is my opinion that the information distributed by Mr. Berglund, directed at a Department of Public Safety employee, Ms. Katherine Burke Moore, not only impugned her credibility but potentially tainted an otherwise thoughtful debate on the .08 legislation.

Thank you for your attention to this matter.

Sincerely,

Stephanie Reichgott for

Donald E. Davis
Commissioner

cc: Senator John Marty
Katherine Burke Moore, Director, Driver & Vehicle Services, Department of Public Safety

1656 Thomas Avenue
St. Paul, MN 55114

March 24, 1998

John Berglund
3550 Rice Street
Roseville, MN 55111

Dear John,

I regret to inform you that I will be unable to attend the hearing of the Rules and Administration Special Subcommittee on Ethical Conduct on Wednesday March, 25th due to prior commitments. In lieu of my attendance I wanted to reiterate the events evolving from my conversation with Kathy Burke Moore, Director of the Minnesota Department of Public Safeties Driver and Vehicle Services.

I contacted Ms. Burke Moore and left her a message, when she returned my call I informed her that I was calling in conjunction with her estimation of 1800 Implied Consent Arrests for .08 per se BAC. This information is contained in the five fiscal notes regarding the proposed .08 legislation. I was inquiring with her regarding the figure to determine how she had come to this estimation. According to Ms. Burke Moore, under current statutes, blood alcohol levels of .07 - .09 must be reported to the Department of Public Safety. Ms. Burke Moore stated that there are approximately 1300 arrests that were reported in 1996 at the level of .08 - .09. She claims that from experience the 1300 number only represents 60% of the actual arrests that are occurring at those levels. When she adds the estimated 40%, she then comes up with the estimated 1800 number.

After receiving the clarification of this information, I asked Ms. Burke Moore how many of these estimated 1800 were arrested for DWI/DUI (driving while intoxicated/driving under the influence). She stated that "very few if any" were being charged. When I quoted current State of Minnesota Statutes that allow for evidence of blood alcohol of .04 and above to prove impairment she stated that probably "2 – 5 percent were being charged with DWI" but she doubted that any of them were being convicted. Ms. Burke Moore never said to me that 98% of the people arrested drove themselves home. I never related that figure to Mr. John Doyle, and I can only assume he took it from her quote of "2 – 5%" that were charged.

I apologize for not being able to attend, I hope that this information will help clear up any misunderstandings that occurred in the communication of the facts between you, Mr. Doyle, and my self.

Sincerely,

Tucker Carlson

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

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March 25, 1998

Mr. Peter S. Wattson
Senate Counsel
Senate Counsel & Research
G-17 Capitol
St. Paul, MN 55155

RE: Ethical Complaint

Dear Mr. Wattson:

You have requested that I appear before the Senate ethics committee scheduled for this date, March 25, 1998. I have voluntarily agreed to do so. Because I may not be fully understanding of the procedures and protocol of the committee my appearance should not be construed as a waiver of any and all legal rights that I might have otherwise.

Very truly yours,

John F. Berglund
Executive Director

JFB/jt

Senate Crime Prevention Finance Committee
Wednesday, February 11, 1998

Introduction of the bills SF 77 and SF 2099 by Senator John Marty and Senator Leo Foley.

Senator Laidig: Chairman, trying to understand the fiscal note, are there assumptions in that fiscal note that are not complete in this bill?

Senator Marty: Katherine Burke Moore from the Department of Public Safety.

Mr. Chair, Senator Laidig, I am Katherine Burke Moore of the Department of Public Safety, Division Director.

The first page of the fiscal note, starts with Driver & Vehicle Services because numbers usually key off of what we predict will happen. **We don't predict additional arrests.** Like Senator Marty and Senator Foley sees. What we predict is that we will have additional implied consents. We already have a law which requires law enforcement to send in BAC reports if anyone who is arrested and they test at .07, .08 or .09. We receive over 1300 of those a year and anecdotally, talking to law enforcement, they do tell us that they really probably only send about 60% of those into use because they determine tether they have time to fill out the report or not. **So we are predicting an additional 1800 implied consents. That's not additional arrests, because these people are already being arrested,** but now they will not simply be a BAC report, they will actually go through the system as a DWI or implied consent.

Senator Laidig: Mr. Chair, what is the current reinstatement fee for the driver's license? What is the cost for reinstatement?

Ms. Burke Moore: For the DWI reinstatement fee, the fee is $250 and a $10 surcharge that goes to electronic monitoring for a total of $260.

Senator Betzold: So Far.

Ms. Burke Moore: As of this moment.

Additional discussion on electronic monitoring.

Senator Foley: *Spoke of other witnesses present and ready to testify if the committee feels it needs additional discussion in favor of the bill.*

Senator Kelly: *Asks for other testimony and recognizes Mr. Berglund.*

Mr. Berglund: Thank you Mr. Chair, committee members, my name is John Berglund, representing the Minnesota Licensed Beverage Association, the Minnesota Municipal Beverage Association and with Charlie Hall, the Minnesota Bowling Proprietors Association. Thank you for this opportunity and I will essentially limit my comments to the fiscal concerns relating to this bill, but I would like to digress for a moment and make a couple of comments in response to what you have just heard.. (1) You have seen a comparison to other states. I would like to add that the state of Minnesota essentially has a better traffic alcohol related safety records than any state at .08. (2) You have heard that .08 impairment etc. there is unrefuted evidence, evidence from the Department of Transportation, that two glasses of wine over two hours, puts a 120 lb. female at .08. Those two glasses of wine are defined at 6 oz., 13% alcohol, which is certainly common with the restaurant industry. (3) Senator Marty indicated that at .08 to .09 you're sixteen times as likely to be involved in fatal accident. That is a projection from a study. That is not reality according to Minnesota statistics, and we can back that up. You are not any more likely, at .08 or .09 to be involved in a fatal accident as you are at .01 or .03 which constitutes eating a piece of rum cake or having a tablespoon of cough syrup at .01..

Regarding the fiscal note, we do have concerns, Mr. Chairman. We believe the fiscal note, that it actually will cost the state and local units of government millions of dollars because of a couple of overlooks in the fiscal note that we would like to point out. Primarily he relates to this, there will be, the fiscal note does assume that there will be 1800 new arrest for DWI implied consents. Okay now Ms. Burke Moos [Moore] testified not really more arrests because what is happening right now, as she indicated, is that they are stopping people for speeding, equipment violations, they smell alcohol and they are giving them the PBT and its coming back at .08 or .09. Or they are getting arrested for a speeding violation or equipment violation but these people are not getting arrested for an implied consent violation. What's happening now when you drop it, if you drop it to .08, they are now also going to get arrested for implied consent violations.

Okay. And when they get arrested for that there is an assumption, by the Department of Public Safety, that of these 1800 there will be 1500 additional convictions. And that is under current police staffing that's currently being stopped now that the police are not arresting even though they have the power to do that. They have the power to arrest them now but they let them drive home after giving them a speeding ticket. Because they don't believe they are impaired, but that's another point. But its 1500 additional convictions.

Now in these, there is an assumption in the fiscal note that of the 1500 convictions that about half of those will be repeat offenses. Now let's back up just a moment. The fiscal note says 1500 new convictions at an average of two days in jail each, for a total of 3000 jail days per year. But it forgot to take into account, because that came from the Department of Sentencing Guidelines, the Department of Corrections said while half of them will be repeat offenders, but didn't take into account that when you are a repeat offender under the new laws that you have passed, that it's a gross misdemeanor for a second offense within 10 years. And when it's an enhanced gross misdemeanor, the individual convicted must serve 90 days of which they must serve 30 days consecutively.

With the minimum days of 30 being served, that brings the additional jail days up from 3000 per year to 22,500 per year. So the additional cost and burdens on an already overly burdened jail system are in the millions of dollars. And also it could be a first offense at .08 that could be an enhanced gross misdemeanor if there is a child in the car or another condition that would occur. So its our belief that you are going to have with the enhanced gross misdemeanor law that you are going to have many, many more jail days under the requirement that they serve those minimum days. And as a result, there are millions of dollars in cost to the state and/or local governments to an already over burdened jail system. So with that, we hope that you would take a closer look and try to talk a look to see if in fact that fiscal note need further review. Thank you.

Additional discussion on the fiscal impact and effective dated of the bill by committee members.

House Judiciary Finance Committee
Thursday, February 12, 1998

Rep. Entenza: I have Kathy Burke Moore with me from DPS...we need to do three quick amendments. ...In other states that have adopted .08, there is significant drop in the number of DWI arrest due to the deterrent affect. We are asking Public Safety to report to us on whether or not that happened or did not happen. The projections in the bill presume we will have 1800 additional lawful arrests. We think there will be a decline.

Rep. Skoglund: Rep. Entenza, you're not arguing that there will be additional arrests, are you?

Rep. Entenza: The fiscal note is predicated on the fact that 1800 more cases will be going through the system.

Rep. Skoglund: You're not arguing that. You're saying, ***They*** are arguing that, correct?

Rep. Entenza: The Department of Public Safety and others want to be very conservative about the way they're doing fiscal notes. I'm agreeing to disagree with them that...

Rep. Entenza: I'm not posing my question correctly. You and I have talked about thie history of this in other states and arrests have not gone up. You're agreeing as a legislator, you are going along with the fiscal note because that's what you do. Do you really believe that the arrests are going to go up?

Rep. Entenza: No. I believe the experience of other states. When they adopt .08 the number of arrests stay flat and then decline.

Rep. Skoglund: That's what I wanted to get at... *Continue with discussion scrutinizing department fiscal notes.* ...It is our job to be skeptical.

Rep. Murphy: Ms. Burke Moore?

Ms. Burke Moore: I do start the numbers. I'm...I have to start with DVS [Driver & Vehicle Services] numbers. I do not say in my fiscal note that there will be additional arrests. Those arrests are already occurring. Because we get in BAC reports and law enforcement, once they arrest somebody...

Rep. Murphy: Excuse me, Ms. Burke Moore, BAC reports?

Ms. Burke Moore: I'm sorry. Blood Alcohol Content Reports. If someone is arrested, brought in and tested, in custodial arrest, and they record .07, .08, or .09, law enforcement is to do a report and send it to us and we record that. If we get two of those, we suspend the driver's license.

We get 1300 of those a year, and that is a pretty static number. And law enforcement has always told us, because of the many things that they need to do, that they're probably only sending in 50 to 60 percent of those people that they actually have arrested. So I'm not saying there are additional arrests, what I am saying is that of the arrests that are out there, that those 1800 will now be charged with DWI because now they are over the legal limit.

While today they may charge them with careless or something, but they do not become DWIs. They may also send them home or have someone come and pick them up and charge them with nothing.

So there isn't really a cost to Driver.. there is nothing in this for Driver & Vehicles Services. My fiscal note raises about $9,000 the first year and $5,000 in the subsequent years. But I am concerned that if we do have additional entities...individuals, who are charged, that the courts and everybody else has that [number] to base their fiscal notes on. I think that is my responsibility. So, that's where the 1800 comes in. It is not additional arrests – additional DWI charges.

Rep. Murphy: And that, Rep. Entenza, is why you accepted the fiscal note.

Additional discussion on fiscal note and adoption of amendments.

Rep. Murphy: Is there anyone who wishes to testify about the money...Come forward, Mr. Berglund.

Mr. Berglund: Thank you madam chair and committee members. My name is John Berglund, representing the Minnesota Licensed Beverage Association and I will keep my comments strictly to the fiscal concerns. We do have fiscal concerns regarding the fiscal note and submit to you that there are errors in the assumptions and that this has been a moving target. This is either the third draft or the second draft in the last couple of weeks. Which, after having, I think, three drafts last year I am not exactly sure why. The draft before this, I think, was costing the state a half a million dollars a year. Now we're into a plus savings and I submit to you that with the errors in the assumptions that it is going to cost the state millions of dollars and let me explain.

In fact let me back up just a moment. The draft right before this estimated 3802 extra jail days. And, like I say, it was now costing about a half million dollars a year. This draft estimated 5102 extra jail days but now has a net savings. It doesn't quite make sense. But let me explain where our concerns are. As Ms. Burke Moos...[Rep. Entenza: Burke Moore.] Burke Moore, excuse me, ah, she testified that there are 1800 additional DWI arrests or implied consent arrests. Not necessarily new arrests because these people may be stopped now and be arrested for speeding or an equipment violation. And they are taken in. They smell alcohol and they are taken into the station and given an intoxilyzer test and they test out at .08 or .09 and they are not being charged with drunk driving now, except for a very small fraction according to DPS.

So what is happening then, is that with that approximate 1800 those are new DWI arrests which will now have to be processed as drunk driving and will increase, assuming no other arrests go up for drunk driving. You have got at least 1800 who are .08 or .09 for not being charged now and they will be charged if you go down to .08 per se law. And with that will come the additional jail time, processing time and cost to state and local governments.

Now there are a couple of errors in the assumptions with those arrests. (1) The Department of Public Safety is estimating that of the 1800 arrests, only 15 % will be repeat offenders. That is not statistically accurate. Let me explain. The only statistics that we have for the state of Minnesota is that DWI arrest for the last few years. And in those arrests, approximately 50% of all DWI arrests are repeat offenders. And that has never been broken down or studied further. But we know approximately half of all DWI arrests are repeat offenders. Now if you calculate that half of those DWI arrests are repeat offender, you are going to be in thousands and thousands of extra jail days because of the enhanced gross misdemeanor laws you have passed. When you get into a repeat offender, these second offense within ten years, I believe, and you can correct me if I am wrong, has to serve a minimum of 30 days in jail. That's going to bring you up to 24,000 extra jail days.

Now this fiscal note, by the way, is assuming even if it were 15 % repeat offenders, on one page it says that means 270 repeat offenders, but in the actual jail calculation they use 232, and that is not explained. And they are using 232 repeat offenders at an average jail time of 20 days based on the April, 1997 survey. I submit to you that with the new laws you have passed, that the average jail time has to be at least 30 days. So instead of what they estimate 5100 extra jail days. You are already up to over 8100 even assuming there is only 15 % that are repeat offenders. And I submit to you statistically, the only statistic we have is that half of them will be repeat offenders.

Now why 15%? Ms. Burke Moore indicated that we did a random sample of those at .08 and .09 and it came up to about 15%. And we talked to intake workers and the feel is that it is 15 % or less. When I asked how big was that random sample? 25. While I never took statistics in college, but I submit to you that 25 out of 1800 is not a sufficient sample. And the only statistic we really have that we can count on is the State of Minnesota statistic that says half of DWI arrests are repeat offenders. Again, if half of those 1800, or a figure close to that, are repeat offenders doing an average minimum of 30 days in jail, you are up to 24,000 jail days, not the 5000 that they are submitting. [Disruption by visiting baby.] One other error not included is that in the first time arrest of those 1800, there was not one considered to be an enhanced gross misdemeanor for a first arrest, which can occur, I believe if there is a child in the car or other conditions present. And again, you are getting into the 30 days minimum jail end.

So there are a number of inaccuracies within this report. There is also local government increases, we submit, on page 12, that says it is unknown. On page 7, in another category, where it says that local agencies will see similar increases in court time. In another one, added local court staff may be required. The bottom line is, I submit to you, that the assumption (1) Even if there are no additional police officers out there, under the people testing positive now for alcohol .08 or .09, you have got an extra 1800 DWI arrest that you don't have. You have those to process them and the Department of Public Safety estimates 1500 convictions. And with the repeat offenders and the minimum days of mail that you have installed, I submit to you that you are talking well in excess of 20,000 jail time and a cost to the state, which is in millions and millions of dollars. And I submit to you and encourage you to look at this further and have it refined before you would pass it on. Thank you.

Rep. Murphy: Mr. Berglund, how do you respond to the statement Rep. Entenza made that in other states the arrests go down?

Mr. Berglund: There's fifteen states, I think, that have .08. I've never seen any study or survey that shows that's correct. In all those states, I've only seen a few states where they submit or allege that arrests have gone down. I certainly would like to see them all and also see what other data has occurred and what other things have transpired. We may be comparing apples to oranges. Based on the fiscal note alone, the testing and laws that we have in place, I don't think you can have anything less than 1800 additional DWI arrests in Minnesota.

One thousand eight hundred Minnesotans who were stopped for possible safety violations in 1996 had blood-alcohol concentrations (BAC) of .07%, .08% or .09%. Virtually all of them spent the night in ... their own homes.

That's right. According to Kathy Burke-Moore of the Minnesota Department of Public Safety, Driver and Vehicle Services, 1,800 people who were pulled over for various reasons were "caught" driving with BACs of .07%, .08% and .09%. Of these, "very few, if any" were arrested for driving under the influence of alcohol (DUI), Ms. Burke-Moore said. She estimates that as few as two percent of those driving at that BAC level were arrested, while the other 98% drove themselves safely home or wherever they were heading before being stopped.

If the majority of people driving at .07%, .08% or .09% were deemed by experienced law enforcement officers to be safe and responsible enough to drive, why is the Minnesota Legislature trying to *outlaw* this benign, responsible behavior?

According to the US Department of Transportation, the average BAC level among fatally injured drivers is .17%, more than twice the proposed .08% arrest threshold. Nearly two-thirds of all alcohol-related fatalities involve drivers with BACs of .14% or above. Lowering the drunk driving arrest threshold will have no effect on these alcohol abusers who are ignoring the current legal threshold.

Let's follow the example set by Minnesota's law enforcement community and not persecute responsible social drinkers.

For more information, contact John Berglund at XXX.XXX.XXXX.

JOHN -

HERE IS THE COPY. (DRAFT), THE FINAL ONE-SHEET WILL BE OVERNIGHTED TONIGHT. IF YOU HAVE EDITS, PLEASE CALL BEFORE 6:30 EST, THANKS!

JOHN DOYLE

202.463.7650

Consolidated Fiscal Note - 1998 Session

Bill #: H2389-0 **Complete Date: 02/02/98**
Title: DWI;LOWERING ALCOHOL CONCENTRATION

Fiscal Impact	Yes	No
State	X	
Local	X	
Fee/Departmental Earnings	X	
Tax Revenue		X

Agencies: Public Safety Dept (01/29/98)
Corrections Dept (02/02/98)
Public Defense Board (02/02/98)
Supreme Court (02/02/98)
Attorney General (01/28/98)
Natural Resources Dept (01/27/98)
Sentencing Guidelines Comm (02/02/98)

Dollars (in thousands)	FY98	FY99	FY00	FY01
Net Expenditures				
General Fund				
Attorney General		82	164	164
Public Safety Dept		135	84	84
Supreme Court		56	112	112
Public Defense Board	0	112	224	224
Corrections Dept		184	705	735
Trunk Highway Fund				
Public Safety Dept		119	169	169
Revenues				
General Fund				
Attorney General		82	164	164
Public Safety Dept		118	235	235
Supreme Court		87	173	173
Water Recreation Fund				
Natural Resources Dept		1	1	1
Snowmobile Fund				
Natural Resources Dept		1	1	1
Misc Special Revenue Fund				
Public Safety Dept		62	124	124
Supreme Court		39	78	78
Trunk Highway Fund				
Public Safety Dept		59	117	117
Net Cost <Savings>				
General Fund				
Attorney General		0	0	0
Public Safety Dept		17	<151>	<151>
Supreme Court		<31>	<81>	<81>
Public Defense Board	0	112	224	224
Corrections Dept		184	705	735
Water Recreation Fund				
Natural Resources Dept		<1>	<1>	<1>
Snowmobile Fund				
Natural Resources Dept		<1>	<1>	<1>
Misc Special Revenue Fund				
Public Safety Dept		<62>	<124>	<124>
Supreme Court		<39>	<78>	<78>

Bill Description

H.F. 2388-O lowers the alcohol concentration threshold for operating a motor vehicle or hunting from .10 to .08. Statutory provisions dealing with vehicular homicide and injury are similarly amended.

Assumptions

According to the Minnesota Sentencing Guidelines Commission, the impact on state prison resources will be minimal.

The Department of Public Safety predicts that an additional 1,800 arrests will occur because of this bill. Of the 1,500 offenders convicted, it is predicted that approximately one-half of this number will be first-time offenders (750) and the rest repeat offenders (750). Based on this assumption, the first-time offenders could be handled on a caseload of 300 offenders to one probation officer providing administrative supervision. The repeat offenders would require a normal caseload of 100 to one officer. Thus, an additional ten probation officers will be needed to supervise this population.

It is assumed that the positions would be filled using caseload reduction funding from state appropriation.

It is assumed that the offenders are phased in over the first year following a January 1, 1999, effective date.

Expenditure and/or Revenue Formula

First-time offenders:	750 ÷ 300 =	2.5 probation officers
Repeat offenders:	750 ÷ 100 =	7.5 probation officers
Total		10.0 probation officers

Fiscal Year 1999

12/1/98	2.5 x $73,518 x .583 year =	$107,152
3/1/99	2.5 x $73,518 x .333 year =	61,204
6/1/99	2.5 x $73,518 x .083 year =	15,255
Total	7.5	$183,611

Fiscal Year 2000

7/1/99	7.5 x $73,518 =	$551,385
9/1/99	2.5 x $73,518 x .833 year =	153,101
Total	10.0	$704,486

Fiscal Year 2001

	10.0 x $73,518 =	$735,180

The cost of a probation officer includes salary, clerical support, rent, travel, supplies and equipment.

Long-Term Fiscal Considerations

The cost of ten probation officers would continue beyond fiscal year 2001.

Local Government Costs

See Minnesota Sentencing Guidelines Commission analysis which indicates a cost of $219,722 per year based on 3,602 jail days at $61 per day.

References/Sources

Minnesota Sentencing Guidelines Commission staff.
Minnesota Department of Corrections staff.

Agency Signoff

FN Coord Signature: SHARI BURT
Date: 01/27/98 Phone: 603-0142

EBO Comments

This fiscal note includes an estimate of the costs for additional probation officers who may be needed to implement the bill, based on the concept of maintaining a normal caseload. In prior fiscal notes on bills creating or changing sentencing practices or definitions of criminal activities, DOC has noted but not estimated costs for additional probation officers. Although caseload reduction funding has been provided to DOC in the past, it is not clear that there is general agreement on what a normal caseload is or that the state should be obligated to pay to maintain that same caseload level. Those issues may merit further discussion.

EBO Signature: JIM KING
Date: 02/02/98 Phone: 296-7964

It is estimated that the impact on state prison resources will be minimal. The impact on local jails is estimated at $219,722 per year, due primarily to additional misdemeanor and gross misdemeanor convictions for impaired driving offenses. This estimate does not include increased expenditures that would be needed for law enforcement, prosecution, public defenders, probation services, or court costs.

Bill Description

This bill lowers the alcohol concentration threshold for operating a motor vehicle or hunting from 0.10 to 0.08. Statutory provisions dealing with vehicular homicide and injury are similarly amended. This fiscal note estimates the impact of these changes on local and state correctional resources.

Assumptions

Number of New Convictions: The Department of Public Safety estimates that lowering the alcohol limit would result in approximately 1,800 additional arrests each year. According to information maintained by the Supreme Court, the conviction rate for gross misdemeanor impaired driving offenses is approximately 96-97%. It was assumed that there would be a somewhat lower conviction rate for misdemeanors and offenses at the lower thresholds and that approximately 1,500 of the 1,800 arrests would result in convictions for misdemeanor or gross misdemeanor driving under the influence offenses.

Specific information is not available on the number of additional felony level vehicular homicide and injury convictions which would result from this bill. The 1,800 additional arrests discussed above represent approximately 5% of the adult D.U.I. arrests in Minnesota in 1996 (***Minnesota Crime Information, 1996***). For purposes of this analysis, it was assumed that there would be a similar 5% increase in the number of felony vehicular offenses. In 1996, 134 offenders were convicted of vehicular homicide offenses. It was assumed that the new provision would result in 7 additional convictions each year.

Local Jail Time Required: It was assumed that, on average, the 1,500 new offenders would serve approximately 2 days in jail. This estimate takes into account that, although some would serve significantly longer periods, many would be first time offenders who would not be required to serve any period of incarceration. [According to data collected by the Department of Public Safety, slightly over half of the alcohol related driving incidents in Minnesota involve drivers with no prior incidents on their record (***Minnesota Impaired Driving Statistics, 1996***, p. 17)].

It was assumed that the additional felony offenders sentenced each year would generally be convicted of criminal vehicular injury provisions and would be required to serve time in local facilities rather than state prison. Based on MSGC sentencing data, it was assumed that these offenders would serve an average of 86 days (the 1996 average for offenders sentenced for criminal vehicular injury).

Local Jail Per-Diem: A per diem of $61 was used to estimate the impact of this bill on local jails. This per diem was calculated using figures contained in the ***Statewide Inmate Per-Diem Report, August 1997***, produced by the Department of Corrections. In calculating this average per-diem, costs for facilities used solely for pre-trial and pre-sentence detainees were excluded. It should be noted that this

per diem estimate does not account for capital costs which may arise if the increase need for jail space requires the construction of additional jail beds.

Impact on State and Local Correctional Resources

State Correctional Resources

It is estimated that the impact of the amended felony level vehicular homicide and injury provisions on state prison resources will be minimal.

Local Jails

The table below displays the estimated impact of these provisions on local jails each year, based on the $61 per diem discussed above.

Type of Offense	Number of Additional Offenders	Average Jail Time Served	Total Jail Days	Estimated Total Cost
New Misd./Gross Misdemeanor	1,500	2 days	3,000	$183,000
New Felony Offenses	7	86 days	602	$36,722
Total	1,507	—	3,602	$219,722

Agency Signoff

FN Coord Signature: DEB DAILEY
Date: 01/26/98 Phone: 296-0727

EBO Comments

This portion of the fiscal note includes an estimate of local jail operating costs for beds that may be filled as a result of this bill. Not included are any capital costs that may be incurred for construction of new jail beds.

EBO Signature: JIM KING
Date: 02/02/98 Phone: 296-7964

MINNESOTA SENATE

SUBCOMMITTEE ON ETHICAL CONDUCT

Conduct of John Berglund

TESTIMONY OF MARCH 25, 1998

Transcribed on March 30, 1998

Proceedings held on the 25th day of March 1998, before the Minnesota Senate Subcommittee on Ethical Conduct, Room 125, State Capitol.

Members of the Committee include:

Senator Ember R. Junge, Chair

Senator Dennis R. Frederickson, Vice Chair

Senator Steven G. Novak

Senator Roy W. Terwilliger

Peter S. Wattson, Senate Counsel

APPEARANCES

Senator John Marty

John F. Berglund

Katherine Burke Moore

Captain Mike Asleson

Charles L. Hall

SENATOR JUNGE: For those of you new to the subcommittee, what we'll try to do is to go through this procedure: we will ask counsel to outline for us basically what the rule is that is involved here (Rule 76) and just what the pertinent provisions are and what it is that—what the standards are, basically, to be met in the rule. And then, I have asked counsel to also give us some information about what the sanctions are for consideration by the committee, just on a general basis, and I thought we'd do that first. Then we will hear from the complainant, Senator Marty, and any witnesses that Mr. Marty has brought with him. Then we will hear from Mr. Berglund and any witnesses you that you wish to present, Mr. Berglund, on your behalf. And then, at that time, we'll have committee discussion as to what options might be before us.

So, with that I would just ask Mr. Wattson to start out with the overview.

PETER WATTSON: Madame Chair and members, we're working with Senate Rule 76, and I just passed out a copy of the Senate Rules, and Rule 76 is on the second page, and it says that a lobbyist shall not appear before a Senate committee pursuant to the lobbyist's employment unless the lobbyist is in compliance with the law requiring lobbyist registration—that's chapter 10A, which is currently supervised by what used to be the Ethical Practices Board, now called the Board of Campaign Finance and Public Disclosure. It then says the lobbyist, when appearing before a committee, shall disclose to the committee those in whose interest the lobbyist speaks. Then it says the part that's relevant here: "A lobbyist shall not knowingly furnish false or misleading information, or make a false or misleading statement, that is relevant and material to a matter before the Senate or any of its committees when the lobbyist knows or should know it will influence the judgment or action of the Senate or any of its committees thereon." Then it says that this committee should investigate a complaint that's made by a member of the Senate, in writing, under oath, received during a legislative session regarding improper conduct by a lobbyist. It's saying that includes conduct that violates the rules, etc.

You're familiar with the investigatory procedures of Rule 75 because you've had occasion to do a number of those investigations in the past. But what this is saying about Rule 76 is that it doesn't set forth any particular sanction, but Rule 75, which governs the procedure with which you're familiar, does say that, in the second paragraph from the bottom there, "If

after investigation, the subcommittee finds the complaint substantiated by the evidence, it shall recommend to the Committee on Rules and Administration appropriate disciplinary action."

So, that's what you're about here today—to determine whether the complaint filed by Senator Marty is true, and, if so, what would be appropriate disciplinary action. If you come to that point, I've done a memorandum that I've passed out also on appropriate disciplinary action. You'll recall an earlier memo that I did back in about 1994 on appropriate disciplinary action relating to members—expulsion, reprimand, condemnation, payment of a fine, and so forth. Much of that does not apply in the case of a lobbyist; in particular, you can't very well expel the lobbyist from the Senate.

But there are other provisions in the Constitution and the Statutes that go to what the Senate may do to regulate conduct by people who are not members, but are participating in the legislative process. As the memorandum indicates, the most severe sanction would be imprisonment. There is constitutional authority to imprison a person who is disrupting the proceedings of the body. There is also a series of statutes that talk about how you go about doing that imprisonment. There used to be, in the Rules of the Senate, before 1975, a very specific punishment for lobbyists who furnished false information to a committee, and that was to bar them from appearing in a professional or representative capacity—that is, not as citizens, but as people who are being paid to represent other people—bar them from appearing before the Senate. That provision was dropped from the Senate Rules when they were adopted in 1975. I believe the reason for that was because of the creation of the Ethical Practices Board. Before 1975, the function of registering lobbyists was performed by the Senate; a lobbyist had to register with the Secretary of the Senate. With the creation of the Ethical Practices Board in 1974, that function of registration was moved over to the Ethical Practices Board and taken out of the Senate.

So, we are left with a rule that is silent on specific sanctions, but with some guidance from the Constitution and Statutes, and our previous rules.

SENATOR JUNGE: Thank you, Mr. Wattson. Are there any questions? Okay. Well then, if there are no questions, I think we'll just proceed to the complaint. You should have in your packet a copy of the complaint filed by Senator Marty. Attached to that complaint is a letter

that was written by Ms. Burke Moore and a form, brochure, or whatever—flyer, I guess, published by the Minnesota Licensed Beverage Association. I would like to also include in the record at some point, if I can ask Ms. Seelhoff to get a copy of the apology letter that Mr. Berglund—we do have that—so we can distribute that out as well. So, that is really all of the documents that we have before us at this time.

So, Senator Marty, we'll start with you, then, to give the background for your complaint and to present whatever witnesses you might have.

SENATOR MARTY: Thank you, Madame Chair, members of the committee. As background, before going into the specifics of the complaint that I filed, I'd like to say that during the course of this debate on .08, a central part, a key part, of the debate has been whether people at .08 blood alcohol concentration are impaired drivers or if they're safe drivers. The Licensed Beverage Association that Mr. Berglund is executive director of has made, I think, a core of their argument that .08 drivers are safe drivers. A number of public safety officials, the National Safety Council, the National Highway Traffic Safety Administration, have made the core of their argument that .08 drivers are impaired. The National Highway Traffic Safety Administration says virtually all drivers are substantially impaired at .08 blood alcohol concentration.

Both sides are entitled to their positions, and both deserve every right to try and persuade legislators of the merits of their arguments. But neither side is entitled to provide false or misleading information to the Senate. In fact, the Senate has a specific rule prohibiting lobbyists from furnishing false information to the Senate, as Senate Counsel just went over. The very existence of this rule suggests the importance of fairness in our legislative debates. I've been in the Senate for over a decade now. I've seen many good and many bad lobbying tactics. I've seen many things that have been said that were inaccurate, misleading, or just plain wrong. Nevertheless, I've never before filed a complaint over a potential violation of Senate Rule 76, and I am hesitant to do so, but chose to file a complaint here because I've never seen anything as blatant as this case. If this rule is to mean anything, we have to take certain steps when there is a flagrant abuse of trust.

On an issue central to the DWI .08 debate, Mr. Berglund's association produced a slick, professional-looking flyer—I think you've got a photocopy of it, I have a copy of the original—produced a brochure that quoted a public safety official, directly and indirectly, taking a few words from her, or adding some others, it ended up providing some statements saying what she believes is, in her words, the direct opposite of what she said.

I'd like to quickly go over some of the false points in the Berglund flyer. Point number one: Katherine Burke Moore, Director, Driver and Vehicle Services of the Department of Public Safety, did not make the statements attributed to her in the flyer. While the flyer used a few words from her statements, the flyer's characterization of those statements is the direct opposite of what she said, and again, those are her words. She's here today to speak to that. The direct opposite of what she said. Contrary to the flyer, Ms. Burke Moore did not say that 98 percent of drivers tested at .08 percent blood alcohol concentration drove themselves safely home. In fact, Ms. Burke Moore and the chief of the State Patrol have both said they would be surprised if a law enforcement officer were to allow any driver tested at .08 in one of these tests after these arrests to drive themself home.

Contrary to the flyer, of the 1,800 drivers referred to who tested at .08 or .09, virtually 100 percent were arrested for DWI because of evidence that they were impaired. Ms. Burke Moore said it was only because of their blood alcohol concentration readings were below the current .10 legal limit that this bill sought to change that "very few, if any" were ultimately charged or convicted with DWI. Those words did appear in here, but in a different context.

Contrary to the flyer's implication that almost all drivers tested at .08 can drive safely—and that's a point that was hit in here many times. I mean, that's the whole point of the flyer. If you take a look at the flyer, it says, "Impairment at .08 or .08 BAC? Not according to law enforcement officers. One thousand eight hundred Minnesotans who were stopped for possible safety violations in 1996 had blood alcohol concentrations of .08 or .09. Virtually all of them spent the night in—their own homes. That's right. According to Kathy Burke Moore of the Minnesota Department of Driver and Vehicle Services, 1,800 people pulled over for various reasons (improper lane change, broken taillight) were 'caught' driving with BACs of .08 or .09.

Of these, 'very few, if any,' were arrested for driving under the influence of alcohol (DUI), Ms. Burke Moore said. She estimates as few as two percent of those driving at that blood alcohol concentration level were arrested for DUI. The other 98 percent drove themselves safely home or wherever they were heading before being stopped." And again, as I pointed out, she said virtually all of them were arrested. If the majority of people driving—and here is where we get to the core of what is being said in the flyer— "If the majority of people driving at .08 or .09 were deemed by experienced law enforcement officers to be safe enough to drive, why is the Minnesota Legislature trying to outlaw this benign behavior?" And again, it's the implication that experienced law enforcement officers deem this to be benign behavior when she is saying—State Patrol is saying—this is not benign behavior. They're impaired. And they say it, just to make it clear in the next paragraph again, "By lowering the drunk driving arrest threshold, the Minnesota Legislature is essentially overriding the judgment of trained law enforcement officers, forcing them to arrest people they do not consider impaired." Again, these people were arrested for impaired driving.

It's this final point in which the flyer is most damaging to fair play in the legislative process. Mr. Berglund is quoting a public safety official, in her capacity as a public safety official, to suggest that public safety officials believe that .08 drivers are safe drivers, when, as I've pointed out, the National Highway Traffic Safety Administration says they're virtually all substantially impaired. That's why this flyer is so effective, and why it's most damaging to fair play. Mr. Berglund wants to quote a public safety official to prove his case. I don't doubt that he'll have the ability, the resources, to find someone who will say what he would want him to say. But it's not fair or right to attribute statements to Ms. Burke Moore who did not say, and does not believe, the statements this flyer attributes to her.

I'd like to quickly go through the applicable sections of Rule 76 that were in the complaint, the letter of complaint you have. I italicized certain words in there to point out the main points that I think I have to bring before the committee. "A lobbyist shall not knowingly furnish false or misleading information." The second one is "that's relevant and material to a matter before the Senate." The third one is that "when the lobbyist knows or should know it

would influence the judgment or action of the Senate."

On March 12, during the floor debate on Senator Foley's DWI .08 bill, the flyer produced by the Minnesota Licensed Beverage Association—John Berglund is the executive director—was distributed on the Senate floor. You've got a copy of the flyer, as well as Ms. Burke Moore's response that came with this complaint. The flyer contained false or misleading information, and I think I've gone through that. Ms. Burke Moore's statement that these people—98 percent drove themself safely home, and only two percent were arrested for DWI. I think she said virtually all of them were arrested for DWI, and so on. And as I said, both Ms. Burke Moore and the chief of the State Patrol said they would be surprised if an officer would let a person tested .08 in this situation drive home.

The number two point from the rule, this is relevant and material to a matter before the Senate. I think I've gone over that as well. I think this was the central point of the debate. Are people at .08 safe drivers, as the flyer implies, or are they impaired drivers? And Mr. Berglund is clearly entitled to state his opinion on the matter, and he can quote people on the matter, but he cannot provide false information in an attempt to influence the Senate.

The third point, did Mr. Berglund know or should have known that it would influence the judgment or action of the Senate? I would argue distributing this in the middle of the floor debate on the thing, that the reason—that's what a lobbyist is to do is to distribute information in a manner that's going to influence the actions of the Legislature. I think that's a clear point.

So, I think it's clear it contained false or misleading information. It was relevant and material to a matter before the Senate, and Mr. Berglund would know or should know it would influence the judgment of the Senate. The question is whether he knowingly furnished false information. And, to assist the committee in addressing this, I'd like to point out in Ms. Burke Moore's letter to Mr. Berglund, "I do not believe you could misunderstand my information to such an extent as to excuse the mischaracterization of facts you published." When Ms. Burke Moore speaks to the committee, I think she will go over what she said in committee in the Senate that Mr. Berglund was present for, and in the House that Mr. Berglund was present for, and I believe some other conversations and other ways of suggesting that he knew that this information

was not accurate.

Before Ms. Burke Moore testifies, I'd like to speak to the actions of Mr. Berglund since the complaint has been filed. He stopped by my office, politely, and I felt contritely, asking whether I'd be willing to drop the complaint if he apologized to the Senate. I told him I have no intention of being mean or unfair and I would consider his request, but I wanted to discuss it with Ms. Burke Moore, the person who was quoted in the flyer. I told him I'd get back to him the next day. The next day, on March 18, I received a copy of a news report in the Star Tribune in which Mr. Berglund dismissed his misstatement of fact as "a matter of semantics." And I think the terms he said that we were confused on were "arrests" versus "charges." I think that's just an attempt to minimize the gravity of the situation and just does nothing to set the record straight. I wrote a letter to Mr. Berglund that afternoon to let him know that I thought he did not appropriately apologize, he did not correct the misinformation, and I told him I would be willing to drop the complaint if I got those things cleared up, if the misinformation was corrected, if there was an apology to her and to the Senate. The next day, I believe, I received a copy of his complaint to the Senate and to her. I was angry at the response. I did not consider it an appropriate apology. Ms. Burke Moore told me she did not consider it acceptable either, and, furthermore, I don't think it did anything to correct any of the misinformation in the flyer. And, with that, I'm happy to stand for questions. Otherwise, Ms. Burke Moore is here to speak about what she said, and the record that led up to this situation.

SENATOR JUNGE: Thank you, Senator Marty. Ms. Seelhoff, can we get a copy of the apology so that we can also have that for questions. Questions for Senator Marty? Senator Frederickson.

SENATOR FREDERICKSON: Madame Chair, as I read through this information, I think it does center on what the word arrested means. Senator Marty, how do you define that word? What does arrested mean?

SENATOR MARTY: Madame Chairman, Senator Frederickson. I do not—first of all, I am not an attorney, and I don't want to pretend to be one, but arrest, in my mind, is to take somebody into custody. I believe in these cases, Ms. Burke Moore has said that these are full

custodial arrests, where the person is brought in, and I believe, in these 1,800 cases, from her testimony, these are people who have been stopped on the road for what—an officer has suspicion of impaired driving. They do some sort of—I believe they do some field sobriety tests, or a preliminary breath test, and, if there is enough suspicion, they bring them into the station and they test them, and, again, arrest in my mind is to stop somebody and take them into custody.

SENATOR FREDERICKSON: Madame Chair, Senator Marty.

SENATOR JUNGE: Senator Frederickson.

SENATOR FREDERICKSON: Does arrested mean spending a night in jail also?

SENATOR MARTY: Madame Chair, Senator Frederickson. I would assume not, though I am sure many people who are arrested may also spend the night in jail.

SENATOR FREDERICKSON: Madame Chair, Senator Marty. If an officer stops somebody, maybe takes them in to the Sheriff's office or the police and interviews them and then releases them to go on their way, is that considered arrested?

SENATOR MARTY: Madame Chair, Senator Frederickson. We have Captain Asleson from the State Patrol here who, I believe, would be better equipped to answer what they call arrest, and Ms. Burke Moore, who is the one who came up with the figure using statistics at Driver and Vehicle Services on these 1,800 people, to better clarify what all of these arrests were. And, in terms of your question, if they take somebody in for questioning, I would assume—my understanding would be that that would be an arrest, even if they decide in the end not to charge them. I think when there's suspicion somebody commits a crime, they arrest the person, and later on, you may release them with lack of evidence to bring a charge against them. And, in terms of saying that somebody may not be charged after they've been arrested, Ms. Burke Moore said that, I believe, and I'd rather defer to her on the specifics, that many of these people, most of them are not charged with DWI. Many will be charged with other things, perhaps. Perhaps reckless driving, perhaps something else. And a big reason for that is, again, because they do not meet the current blood alcohol level of the state law, the .10 standard.

SENATOR NOVAK: Madame Chair.

SENATOR JUNGE: Senator Novak

SENATOR NOVAK: Madame Chair, Senator Marty. I'm trying to recall here, I'm looking at the letter from Mr. Berglund, but when was it that you rose on the floor of the Senate? Was that after the debate on the bill?

SENATOR MARTY: Mister Chairman, the statement I made about the point of personal privilege was I believe March 13, the day I wrote the complaint, later in the day. I filed the complaint later that day. Yes, I did speak up on the floor saying that I think this is incorrect information. I tried to hunt down Ms. Burke Moore who was outside the chamber at that time. I asked her if she said any of this stuff and she said, "No," she did not, and she said she didn't say this. I said that during the debate the next morning, think it, yes, it was the next day that on the floor I asked, rose to a point of personal privilege to say that I think that this was beyond the bounds of fairness.

SENATOR NOVAK: That was going to be my second question. I think I was on the floor for the entire debate. I'm trying to recall whether or not any member of the Senate rose to speak on the issue for or against the bill referencing the specifics of this particular piece of literature in a context that might have swayed people one way or the other, or whether this was distributed for our perusal and our individual study and everybody reflected on it however. Do you recall whether or not it was referenced by anyone else?

SENATOR MARTY: Mr. Chairman, Madame Chair, Senator Novak, I'm sorry I do not know if anyone else referred to it. As I said, I made a brief reference to the fact that I thought it was inaccurate and furthermore, and also for purposes of this complaint I do not know that the Rule 76 requires me to prove that it changed the behavior of the Senate, changed the vote or anything, but simply that the lobbyist knows, or should know, who influenced the judgment or action, but I would argue that I don't think there are any lobbyists in this room or elsewhere in the capitol who are going to distribute things that they don't think are going to make any difference.

SENATOR JUNGE: Senator Marty, can you help remind me what was in the middle here?

SENATOR MARTY: It was a welcome mat, I think, that meant to the fact that you were

welcome home that night, the same night you were arrested.

SENATOR JUNGE: OK, further questions?

SENATOR NOVAK: I just wanted to point—make sure that Senator Marty—but on the floor of the Senate sometime during the debate you mentioned that you felt that part of the body of this letter was inaccurate so in that way you did inform us.

SENATOR MARTY: Madame Chair, Senator Novak, yes, I tried to make sure that people would hear that this was misinformation and frankly I would hope that if a lobbyist was handed out something that was incorrect and if they were listening to the debate and heard somebody say that they would immediately send in a note to whoever sent it around and say "I think there might be something wrong" and apologize. I would hope that that might happen, but again, I certainly would have wanted to make sure, do everything that I could. I ran out of the chamber with the flyer trying to get a comment from the Public Safety official because I think I've always, when I've served on the Crime Committee I know she's been testifying for years and with accurate information, I was just frankly surprised so see this.

SENATOR JUNGE: OK, thank you. Then I would bring up Ms. Burke Moore. Members, I might just state for the record that the substance of the issue is, will hopefully not come in to play here. I think we're just members of the public. It is interesting. This issue divides the Senate almost down the middle and our committee is just as divided as far as the substance of the issue. Two votes on one and two votes on the other. I just want to make that clear that this committee is a reflection of the Senate on the substance of the issue, but that hopefully we'll just be looking at the facts and procedures that are brought before us in context of the complaint.

OK, Ms. Burke Moore, welcome to the committee and please identify yourself for the record and then you can begin your presentation.

KATHERINE BURKE MOORE: Thank you Madame Chair, members of the committee. I am Katherine Burke Moore, Director of Driver and Vehicle Services Division of the Minnesota Department of Public Safety. I am here today because the Minnesota Licensed Beverage Association chose to use my name, my position in Public Safety, and my role with the

Legislature to present false information to the Senate. I always come prepared to any committee. This committee I am probably more than prepared for. I have some things to hand out and I'm not, I'm so unfamiliar with this type of committee, I'm not quite sure how to do it. I'd like to first start. Our commissioner, Don Davis, would be here, however, he had major surgery last week so he chose to send a letter. So there is a letter there for the members of the committee. If I could take just a few moments to review my role with the Legislature. And excuse me, I believe that you understand, but I just feel that I need to do this. As an agency director, I'm expected to provide information to individual legislators, legislative staff, and committees on various bills and amendments that are being considered. My staff and I track bills that affect Driver and Vehicle Services and attend the committee where these bills are presented and discussed. We come prepared with whatever numbers, statistics, fiscal information may be requested of us. It is very common for legislators to discuss proposed bills and amendments with me before they even introduce them. Those legislators want an idea of the impact of their proposal as part of their consideration in preparation of making Minnesota law. I take this role very seriously. I make sure that a request is routed to the person in Driver and Vehicle Services with the best knowledge of the particular subject. We do all that we can to pull up information from our systems and get them back to the requester as soon as possible. If we predict significant impact on the public or an agency, we try to meet with the author of the bill before it is in committee to give him or her that information. I personally follow the bills that go through judiciary and crime prevention committees. Those committees have come to rely on me to be prepared with numbers if they are available, and our systems don't always have all the numbers that committees and legislators would like. They often ask me to testify with whatever information I can share, and I gladly do so. I am not a lobbyist. As you know, state employees are specifically forbidden to lobby. I do not speak to individual legislators promoting or opposing a bill. Unless a legislator asks me information, I do not provide it. I do not go from office to office trying to influence how legislators vote. That's not my role.

The false information that the Minnesota Licensed Beverage Association has attributed to me is contained in the flyer that you have seen and was distributed on the Senate floor. The flyer

names me, identifies me, and states that "1,800 people who were pulled over for various reasons, 'very few, if any' were arrested for DUI." The flyer goes on to say that I estimate the number arrested and the number that then "drove themselves home safely." I would like to submit to you both tapes—I did not bring a tape recorder if anybody would like to listen to it at your leisure—and transcripts of my testimony and Mr. Berglund's testimony before Senate and House Finance committees this session. I have those here if they could be distributed to the committee; if you don't want the tapes that's fine.

SENATOR JUNGE: These were transcribed by whom?

KATHERINE BURKE MOORE: They were transcribed by Senator Marty's secretary, and then also by me, since after she transcribed it, I listened again, and actually broke into paragraphs. Some words that she couldn't understand I could understand because I was there. So, kind of a combination.

SENATOR JUNGE: And so you would—

KATHERINE BURKE MOORE: That's why the tapes are here.

SENATOR JUNGE: —testify that you think that these are a clear reflection of—

KATHERINE BURKE MOORE: Yes.

SENATOR JUNGE: —an accurate reflection of the tapes.

KATHERINE BURKE MOORE: Yes. And you will see the sum of it is, I italicized things where I just summarized generally what was said. I just gave direct testimony when I thought it was important to this particular issue.

I have highlighted in blue my statements on both of these transcripts where I say that 1,800 people are already being arrested—not as few as two percent, as the flyer attributes to me. I say nothing about these same people driving themselves home. Now, I'd like you specifically to take the Senate transcript—and they're both labeled on top—if you turn to the second page, it's actually the back of the first page, and you'll see two paragraphs highlighted in yellow. That is Mr. Berglund's testimony, and I feel that those statements before the Senate are very important statements, if you can follow along. And I quote Mr. Berglund's testimony: "Okay, now—Ms. Burke Moose [it's Moore—he's trying to make me Scandinavian] testified not really more

arrests, but, because what is happening right now, as she indicated, is that they are stopping people for speeding, equipment violations. They smell alcohol. They are given the PBT, and it's coming back at .08 or .09. Or they are getting arrested for a speeding violation or equipment violation, but these people are not getting arrested for an implied consent violation. What's happening now when you drop it, if you drop it to .08, they are now going to get arrested for implied consent violations. Okay, and when they get arrested for that, there is an assumption by the Department of Public Safety that, of these 1,800, there will be 1,500 additional convictions, and that is under current police staffing, that's currently being stopped now, that the police are not arresting, even though they have the power to do that. They have the power to arrest them now, but they let them drive home after giving them a speeding ticket, because they don't believe they are impaired. But that's another point."

Now, there's a lot more testimony from Mr. Berglund there. Note that Mr. Berglund's statements were not said by me in the preceding testimony, and I'd like at some point that you take the time to compare that. He is the only person who made such statements in committee. He does attempt to attribute those statements to me, even in committee, but I find a big difference between Mr. Berglund's attempt to misquote me in committee and the flyer he distributed on the Senate floor, and here's what the difference is. First, in committee, the members have the opportunity to hear what I said. I was present in committee, and in fact, as Mr. Berglund misquoted me, I sat there, in full sight of many committee members, and shook my head "no." And, Senator Junge is the only one who probably noticed me in committee, but I do that all the time. If someone's going to quote me or the Department of Public Safety's statistics, and they're not what I say, I don't run up there and testify, I just shake my head, and that lets the people on the committee know if you want me to come up and say more, I'm here. Again, I'm just here to provide the information that you know. I did that that particular day.

And number two, I was not present on the floor of the Senate when the flyer was distributed. Now, there are 67 members of the Senate, and only the thirteen that are on the Crime Prevention Finance Committee—and unfortunately not all of them were there—had the opportunity to hear my actual words. The other 54 were presented with Mr. Berglund's words

attributed to me. Many of those 54 know that I have the ability to provide numbers to the legislators. Yet, only my name and my number, 1,800, were provided correctly. The remainder is the exact opposite of what I have said. The rest was manufactured—I say was manufactured by Mr. Berglund, just as he manufactured it in committee.

Shortly after the flyer was distributed on the Senate floor, and the vote was finished on the Senate floor, the bill was finished, I asked Mr. Berglund where he got his so-called information that he attributed to me. He stated that it came from my testimony before committee, and from a telephone conversation that I had with another lobbyist. You have my testimony before you. You'll note that that information is not contained in my testimony. I did have a telephone conversation with a gentlemen that I later learned was a liquor lobbyist. I did not state any of the information in that conversation other than the—attributed to me in that flyer other than the number 1,800—1,800 people currently arrested. The rest of the information in the flyer did not come from me.

I feel that Mr. Berglund intentionally used my name and reputation to provide false information. Although I have stated again and again that all 1,800 individuals are currently arrested, the Minnesota Licensed Beverage Association continues to use different information.

Now, since I'm the keeper of the driving records, putting fictitious numbers in my mouth lends validity to the Minnesota Licensed Beverage Association's arguments. Who else would have these numbers? If Driver and Vehicle Services provides numbers, doesn't the Legislature usually rely on those? Although I am not a lobbyist, I have a reputation before the Legislature. Attributing false information to me harms my reputation, and it harms the reputation between the Legislature and my entire department. I believe that, in the very least, Mr. Berglund needs to set the record straight. His flyer is not a mere matter of semantics or misunderstanding. I cannot believe that. In fact, between the Senate committee and the House committee, the Senate committee met first, the House committee was to meet the morning of February 12. All the people that follow that bill were before Mary—were outside of Mary Murphy's committee that morning. They let us know that .08 was not going to be heard until that afternoon. I stopped Mr. Berglund in the hallway, and I let him know the information that I read to you that I quoted from

his testimony in the Senate—that that's wrong, that's not what I'm saying. That these 1,800 people are currently being arrested. He now—a later conversation, he doesn't remember that conversation, but I spoke to him again to make sure that he understood what I was saying in committee. So, I just can't believe this is semantics or misunderstanding.

I also ask that Mr. Berglund be directed not to distribute that flyer, or the information which is attributed to me, in any other jurisdiction at any other governmental level. I also have a national reputation, and I do not want my name and my position used to spread false information.

In conclusion, I think we all need to remember what this hearing is about. It is not about whether you support .08 or .10. It's about the truth, and the responsibility of all of us, including Mr. Berglund, not to treat the truth cavalierly or irresponsibly, especially before the Legislature. Thank you and I'll answer any questions.

SENATOR JUNGE: Thank you, Ms. Burke Moore. Senator Terwilliger.

SENATOR TERWILLIGER: Thank you, Madame Chair, and, Ms. Burke Moore, thank you for being here. The question just goes back to your most recent part of your testimony here. Did you state that you had asked Mr. Berglund not to distribute this—this pamphlet—

KATHERINE BURKE MOORE: Madame—

SENATOR TERWILLIGER: —or did I misunderstand your statement?

SENATOR JUNGE: Ms. Burke Moore.

KATHERINE BURKE MOORE: Madame Chair, Senator Terwilliger. I never saw that flyer until Senator Marty brought it out from House chamber, so I had never seen that before. What I asked him to do was to not be misquoting me as he had in the Senate committee, and to make sure he understood what my 1,800 number stood for, that that's the number of people currently arrested, brought in to the station, given an Intoxilyzer test. They are arrested—they are not given an Intoxilyzer test because of a broken taillight. You have to have some evidence of impairment before a police officer could justify arresting you and giving you the Intoxilyzer test.

SENATOR TERWILLIGER: Madame Chair

SENATOR JUNGE: Senator Terwilliger.

SENATOR TERWILLIGER: To clarify it then in my own mind, you had not seen this pamphlet before that, but you had advised Mr. Berglund. Is this what you're telling the committee? You had advised Mr. Berglund to not quote you as he had in committee at any further time, and that was prior to our taking it up on the Senate floor. Is that correct?

KATHERINE BURKE MOORE: Madame Chair, Senator Terwilliger. That is correct.

SENATOR JUNGE: And Ms. Burke Moore, along those lines, I was curious, did the House committee occur prior to the Senate committee then? What order are these transcripts?

KATHERINE BURKE MOORE: Madame Chair. The Senate committee took place first, then the House committee.

SENATOR JUNGE: So, after the Senate committee, you went to Mr. Berglund to tell him this concern about the number. Then what happened at the House committee?

KATHERINE BURKE MOORE: Madame Chair. At the House committee, his testimony changes somewhat. He doesn't talk anything about people driving themselves home safely. He stays away from that these—let's see—I could actually pull it out instead of trying to go from memory. I've actually highlighted on the House committee in yellow on the back of the second page—he does change somewhat. I can read. I'm Ms. Burke Moose to begin with again here, too. "She testified that there are additional—1,800 additional DWI arrests or implied consent arrests. Not necessarily new arrests, because the people may be—" Now, he heard me, but then he goes on to "may be stopped now and be arrested for speeding or equipment violations." He's still claiming that these arrests are for speeding or for a taillight. He's claiming that again, I'm not. And they—

SENATOR JUNGE: Have you ever said that to him? Anything about the speeding or equipment violations, or—

KATHERINE BURKE MOORE: No. Those are what he's saying. That they're arrested for equipment violations and speeding.

SENATOR JUNGE: I'm sorry. Continue.

KATHERINE BURKE MOORE: "And they are taken in. They smell alcohol, they are taken into the station and given an Intoxilyzer test." So, you can—he did hear me somewhat.

"And they test out at .08 or .09, and they are not being charged with drunk driving now, except for a very small fraction." So, his testimony does somewhat change when he gets to the House. But, when you get to the flyer, it's back to where he was back in the Senate again.

SENATOR JUNGE: So, Ms. Burke Moore, let me understand his—tell us again the inaccuracies in the House testimony. What inaccuracies do you see in the House testimony?

KATHERINE BURKE MOORE: That I am saying that these people are being arrested for speeding or equipment violation.

SENATOR JUNGE: Okay.

KATHERINE BURKE MOORE: Since he testifies so much, and I only highlighted that one part, I can't say that there aren't other inaccuracies in here.

SENATOR JUNGE: In that paragraph. The rest of it—

KATHERINE BURKE MOORE: But in that paragraph—

SENATOR JUNGE: pretty much follows—

KATHERINE BURKE MOORE: Yeah. Excluding the, you know, the jail days, but before that. That's not my expertise. That comes from, I believe, Sentencing Guidelines, but the part that I highlighted—

SENATOR JUNGE: And then, Ms. Burke Moore, do you recall how long a period of time was between the House—this House testimony and then the Senate floor debate. Are we talking a day or a week or—

KATHERINE BURKE MOORE: I believe it only was a day. It was Wednesday night in the Senate, and then Thursday night in the House. So, that Thursday morning—

SENATOR JUNGE: No, I meant the House committee—

KATHERINE BURKE MOORE: I'm sorry.

SENATOR JUNGE: —and the Senate floor debate.

KATHERINE BURKE MOORE: Oh. The House committee was on February 12.

SENATOR JUNGE: Okay—okay—

KATHERINE BURKE MOORE: And was the floor debate on March 12? I thought it was.

SENATOR JUNGE: So it was about a month's difference.

KATHERINE BURKE MOORE: Yes. I do see one—excuse me, Madame Chair—one difference. That's that he testified that there are 1,800 additional DWI arrests. No, these have always been DWI arrests. So that is—is wrong.

SENATOR JUNGE: Not additional.

KATHERINE BURKE MOORE: Not additional. Right.

SENATOR JUNGE: Senator Frederickson.

SENATOR FREDERICKSON: Madame Chair, Ms. Burke Moore. How do you define arrested?

KATHERINE BURKE MOORE: How—when I—I don't know if I want to say I'm giving a definition. I get my information on arrests from the State Patrol and from law enforcement, and what arrested is in these particular cases is that they were actually taken into custodial arrest. They are taken from their vehicle. They are placed in the squad car, taken into the station. And that is the full custodial arrest. Their cars are towed, and at that point, then they can give them the Intoxilyzer test, which is not the PBT test you get by the road side, but another type of equipment that reads the blood alcohol content.

SENATOR FREDERICKSON: Madame Chair, Ms. Burke Moore. Are they retained overnight, then? Are they put in the jail?

KATHERINE BURKE MOORE: Madame Chair, Senator Frederickson. That part I don't know, because that doesn't deal with Driver and Vehicle Services. You'd have to ask law enforcement directly, because I've never testified to whether they're detained or kept overnight in jail.

SENATOR FREDERICKSON: Madame Chair, Ms. Burke Moore. I'm looking over the material that's been supplied to us, and in your letter of March 13, down in the third paragraph, there's a sentence in there that states: "My testimony clearly states that the 1,800 estimate indicates individuals which under proposed law will now be charged with DWI." And I've seen that 1,800 in the flyer, I believe, that Mr. Berglund distributed. But then I saw in the testimony before the Senate Crime Prevention Committee another figure of 1,300. How do I correlate

those two numbers? How do I reconcile the difference between the 1,300 and 1,800?

KATHERINE BURKE MOORE: Madame Chair, Senator Frederickson. When we're asked, the Driver and Vehicle Services, to give numbers for anything, estimates of how this—whatever law will affect the public, we go into our system and we do the best we can. Sometimes we have the statistics. Sometimes we have to take what we have and then extrapolate from there. What we do have on the number of people currently arrested for DWI is 1,300, because we get over 1,300 reports a year, and that's a pretty static number. We get those 1,300 reports a year, and if we get two of those on an individual, their driver's license is suspended. Now, where do we get then 1,800 is your question. We know from law enforcement that, because these people are not necessarily charged with DWI or will be convicted of DWI, that they're not consistently sent in to us, and my staff and I have also talked to law enforcement to say, well, give us a percentage. How many actually get sent in to Driver and Vehicle Services, and they give us between 50 and 60 percent, actually, of those reports actually get sent to us. So, we take the 1,300 and we added 40 percent of that to come up with the 1,800 for our estimate.

SENATOR FREDERICKSON: Madame Chair, Ms. Burke Moore. So, the 1,300 is an actual number from past experience.

KATHERINE BURKE MOORE: Yes, it was 1,300 and there—it's 1,300 and something, it's like 52. I'm sorry I don't know the number off the top of my head.

SENATOR FREDERICKSON: And then the—the 1,800 then is kind of a subjective extrapolation of the 1,300? This is a projected number? An estimate? Is that—

KATHERINE BURKE MOORE: Well, Madame—

SENATOR FREDERICKSON: —a fair characterization?

KATHERINE BURKE MOORE: Madame Chair, Senator Frederickson. I need to make sure I understand what you're saying. I'm not projecting that we now have 1,300 and we're now going to have an additional 500. What I'm saying is that we've actually always had 1,800 arrested, because law enforcement consistently sends us in between 50 and 60 percent of these reports. So, if I need to give a number for how many people will now be charged with DWI or have implied consent license revocations, I need to take that 1,300 and factor in that other 40

percent that aren't even coming in to us.

SENATOR FREDERICKSON: Madame Chair, Ms. Burke Moore. I'm still not sure I understand the difference between the 1,300 and the 1,800. In testimony, you said, "we receive over 1,300 of those a year." And that's .07, .08, or .09. Then—

KATHERINE BURKE MOORE: Madame Chair, Senator. It's somewhat difficult to explain, but where that 1,800 number is actually coming is out of a fiscal note, and we always have to have some number to base off costs of the bill. I have 1,300 and 52, fifty-some—I don't remember the exact number—about 1,300 of those reports a year. But if I'm going to base my fiscal—my fiscal impact or other agencies' fiscal impact off a number, and I know that that 1,300 is not the total set that is out there being affected by law enforcement, that is, testing at .08 and .09, I then have to factor in what that—the rest of that missing subset is. And that's where we get from the 1,300 to 1,800. That group of reports that should have been written and sent to Driver and Vehicle Services that weren't. That goes from the 1,300 to the 1,800.

SENATOR FREDERICKSON: Madame Chair, Ms. Burke Moore. That is an estimate, between the 1,300 and 1,800.

KATHERINE BURKE MOORE: Madame Chair, Senator Frederickson. Correct.

SENATOR JUNGE: Ms. Burke Moore. The question that came to my mind as you were testifying is whether you did go to Mr. Berglund to try to correct the information from the Senate hearing, which is the first one, and you indicated that you did. Can you tell me some more about where that conversation took place and some more details of the conversation, including his response? At least to your recollection.

KATHERINE BURKE MOORE: Again, my recollection was it was Thursday morning, February 12, when a number of people were over at the House, in the State Office Building, out—to go to Mary Murphy's committee because .08 was on the agenda. At one point, I saw him alone in the hallway outside of that committee, and I went up to him and I said, Mr. Berglund, I said, I'd like to take a moment—and I'm not quoting because this is my recollection, obviously—I'd like to take a moment to explain what my—where my 1,800 number is and what it actually comes from, and explained to him that these are people currently being arrested, and

that they are currently taken into custody, they are currently given the Intoxilyzer test. These are not new arrests. They're not arrested for speeding violations. This is not where the information is coming to us from Intoxilyzer tests.

SENATOR JUNGE: Did you say that not for speeding violations and other things? Do you recall that?

KATHERINE BURKE MOORE: I think I did. I'll have to say I think I did that. The other thing that I did at that point is, in Mr. Berglund's Senate testimony, he correctly takes information out of the first fiscal note on .08, and as we all know, there have been numerous fiscal notes on .08. And one of the other agencies had used that 50 percent of the 1,800 would be repeat offenders. So, he correctly quotes or—talks about that in his testimony before the Senate. He was not, however, informed that Representative Entenza, who was the author of .08 in the House, had asked me, because—asked me to look, do we know what the percent of repeat offenders are in these reports that we get? And I don't—I didn't have a statistic on that, and I said, "I can go and see what type of estimate I can get on number of repeat offenders in that—those reports where we're getting our estimate, and that 1,300 that we have. We'll see if I can get some type of a repeat offender." And we were able to come up 15 percent, just from using a real small sample of what was in the office and talking to my data entry clerks. So, I told Mr. Berglund at that time, too. I said, "You used the 50 percent in the Senate. I want you to know that there's another fiscal note you haven't seen yet, and we really looked at this and we're seeing that these lower BACs very rarely are repeat offenders. It looks like only about 15 percent are repeat offenders, unlike our general DWI population that we have today." So I gave him that information at that time too, and you will find in the Senate—in the House testimony, Mr. Berglund refers to that 15 percent and refers to, in detail, how I came up with the 15 percent. He criticizes it, and that's fine. I don't have a problem with his criticizing how I came up with the 15 percent, but he does specifically talk about that conversation that he got from me, where the 15 percent repeat offenders came from.

SENATOR JUNGE: And that conversation about the 15 percent was the same conversation you had when you also corrected the 1,800—

KATHERINE BURKE MOORE: That is—

SENATOR JUNGE: —statement.

KATHERINE BURKE MOORE: Madame Chair. That is correct.

SENATOR JUNGE: They took place at the same exact time.

KATHERINE BURKE MOORE: Same time.

SENATOR JUNGE: Which was after the Senate hearing, but prior—just prior to the House hearing—

KATHERINE BURKE MOORE: Madame Chair. You asked me how he reacted. On the first part, about the 1,800, my perception is he discounted what I said. The part about the 15 percent, he questioned me quite a bit about that outside of committee, and then he also said, well, that's not statistically correct, or something along those lines, and I don't ever claim that—the short time that we have to pull up estimates, they're not done on a statistical basis. So, I didn't have a problem with that.

SENATOR JUNGE: Why do you say he discounted what you said on the 1,800?

KATHERINE BURKE MOORE: He actually really didn't even comment on that.

SENATOR JUNGE: Do you think he heard you?

KATHERINE BURKE MOORE: I don't know what he wouldn't have. It wasn't loud. I was speaking directly to him. I was probably less than three feet from him, so I don't know why he wouldn't have heard me unless he chose not to hear me.

SENATOR JUNGE: Any other questions? Thank you, Ms. Burke Moore, for your testimony. Can you stay in case other questions come later? So, that—

KATHERINE BURKE MOORE: I believe so.

SENATOR JUNGE: Okay. I think, just in case there are final questions at the end.

KATHERINE BURKE MOORE: Would you like these tapes?

SENATOR JUNGE: Why don't we take them and give them to counsel, so that if there is any question on the verification, we can check that. I do—if I may, I would like to ask the law enforcement officer, State Patrol, a couple of questions on what Senator Frederickson has been following up on. I guess—maybe you could identify yourself for the record. I think that Senator

Frederickson's questions are good ones. I guess I just would like to get the official answers to them, if that's alright.

CAPTAIN MIKE ASLESON: Sure, I'd be happy to. I'm Captain Mike Asleson with the Minnesota State Patrol. I'm assigned to our Mankato district.

SENATOR JUNGE: I'll yield, but I think your point between the charging and the arrest is what I'm kind of interested in.

SENATOR FREDERICKSON: Madame Chair, Captain Asleson. What does it mean when somebody is arrested? At what point are they kept in custody and spend the night in a lockup? And when are they released to go on their way, whether it's being driven home or driving home themselves?

CAPTAIN MIKE ASLESON: Sure. Madame Chair, Senator Frederickson. Any time we're talking about an arrest as it relates to DWI, it is a custodial arrest. That person accompanies the peace officer in a patrol car to some type of law enforcement facility. The reason that I say that is that that is the—well, let me back up a second. It's either to a law enforcement facility or it's to a hospital to obtain an evidentiary test, because for the officer to know—and I don't care what department we're talking about—for the officer to know that there was a specific alcohol concentration, that needs to be done on an evidentiary test, which is an Intoxilyzer, which is not in a patrol car, or a blood test, or a urine test, the latter two which are analyzed days later at a lab. So, many times, when we get alcohol concentrations back when testing with blood or urine, we don't even know the results for several days, so those people for sure are treated as any DWI offender would be. Now, depending on the jurisdiction that you're in, you have different ways of processing. It's our policy, and I think the policy of most law enforcement agencies, to book the DWI offender into the county jail. Some jails have absolutely no space on most nights, especially weekend nights. The second alternative is to take the person to a detox. The third alternative is to release to a sober responsible person. The type of testing that's been talked about at roadside is a pre-arrest test. Those are tests that are given just like somebody walking a line, or somebody reciting the alphabet—things that an officer uses to determine whether there is impairment. Those are done before the suspect is ever advised that

they're under arrest. The other part of that, maybe to clarify this issue, is that any time we read someone the implied consent advisory, which is our state's way of saying, we're going to ask you to take an evidentiary test, and if you don't there's some consequences. There's also some consequences if you fail. But peace officers are required to read that word for word, and the start of that form says: the person's name, I believe you have been driving, operating, or controlling a motor vehicle while under the influence of alcoholic beverage, and you have been placed under arrest for that offense. The only way that that would not be read is if there's an accident, if there's been some kind of crash. So, either way you look at it, whether you're looking at it because of the advisory that's read ahead of time, or whether you're looking at just the fact that they're removed from their car, their vehicle's towed or left locked up, it's a custodial arrest.

SENATOR FREDERICKSON: Madame Chair, Captain Asleson. And—you stated you wouldn't know for a few days or several days what the actual blood alcohol content would be?

CAPTAIN MIKE ASLESON: Madame Chair, Senator Frederickson. That's partially correct. To make sure I'm understood, that's only if a blood or a urine test were the test that is offered and then elected. If it is a test on an Intoxilyzer, then certainly, shortly after the officer and the driver get to the station, there's the opportunity to call an attorney and so forth, but the test results from the Intoxilyzer are known pretty much immediately.

SENATOR FREDERICKSON: Madame Chair, Captain Asleson. If that Intoxilyzer test comes back with, say, .07, .08, what happens to the motorist—the person?

CAPTAIN MIKE ASLESON: It's been my experience that they're treated the same way as if they'd have tested over .10, because that driver has been arrested for being under the influence of alcohol. Now, I'm not suggesting that there aren't plea negotiations that occur at a later time, but as far as how the officer treats that situation, they're booked or turned over to a responsible person just as though the test had been much higher, and one of the reasons for that is that officers are very frequently commenting about liability issues, and the reason I bring that up is that even when we test somebody at roadside and choose not to arrest them, the officer has real concerns. The officer is making the following opinion: I don't think that this driver is under the influence, but yet, they have a PBT in front of them that shows a warn. In other words, they're

less than the per se limit, but they've also got some alcohol on board, and officers are very concerned about letting people like that drive, just because of the liability, even when they're not going to arrest them. So the notion that people who are in fact arrested for being under the influence, taken into custody, and brought to a station and then allowed to drive. That's not the way it works.

SENATOR JUNGE: They're never allowed to drive "home."

CAPTAIN MIKE ASLESON: Well, that's true. For one thing, they've been separated from their vehicle. I know of—I've been on the Patrol for 21 years. I've worked in both metro and rural, and I've never known a driver to be returned to their vehicle so that they could drive because of a test result. Never. Not one case.

SENATOR JUNGE: So, the statement that was made here about—that they—.that 98 percent drove themselves safely home or wherever they were heading before being stopped. Would you comment on that statement?

CAPTAIN MIKE ASLESON: That would be as inaccurate as it could possibly be. I've never seen that happen. The people are not allowed to continue. In order for those people to have been tested, and we would have any knowledge that they're .08 or .09 or .07, whatever the test may be, we're talking somebody that's been in custody, taken from their car, probably handcuffed, put in the back seat of the patrol car, and an hour later, they're give a breath test, a blood test, or a urine test. They're not allowed to drive. No.

SENATOR JUNGE: And, I think that the point that Mr. Berglund will make is that—that these people will not be—are not charged. Is that—I mean, it is the same procedure you're talking about, whether or not they are later charged for DWI.

CAPTAIN MIKE ASLESON: Madame Chair. I'm not sure I understand the question.

SENATOR JUNGE: Okay. I'm trying to get to the charge issue.

CAPTAIN MIKE ASLESON: Sure.

SENATOR JUNGE: So—so, they're arrested, and they're in custodial arrest. Okay. Then you find out that maybe it's .09. Okay. Then how is the decision made, then, to charge them?

CAPTAIN MIKE ASLESON: They're still charged—Madame Chair. They're still charged with driving under the influence of alcohol, subdivision 1, clause (a), of the DWI law. The only difference between that and a test above .10 is they're not charged with the additional clause, clause (d) or (e), that says it's illegal to drive with an alcohol concentration above .10. They're still charged with the basic driving under the influence of alcohol. Now—so, they're charged with DWI. That can take a couple of forms, depending on their record. If it's a misdemeanor charge because the driver's got no prior records, it doesn't elevate to a gross misdemeanor. They're issued a citation, or they're tab charged at the jail. In some counties, however, if they've got a prior DWI, for example, one in five or two in ten, that county may not allow any kind of tab charging. Instead they'll have the officer prepare a report that goes to the prosecutor to have a formal complaint drafted, and it's at those times, where the prosecutor becomes involved and goes, you know, with this test, there may be a better alternative, so that they're not in fact prosecuted for the original charge, but they're charged with that. They're charged with DWI by the officer.

SENATOR JUNGE: So they're all arrested and charged with DWI, but not necessarily DWI at the .10 level.

CAPTAIN MIKE ASLESON: Yes, and that's been my experience. And, Madame Chair, if I could offer this: if you put yourself in the officer's position, that makes sense, because for the officer to, at roadside, say, Mr. Driver, I believe you're under the influence of alcohol, and therefore am arresting you. For them to one hour later, just because the test doesn't come back above .10, they would charge them with something less is really saying, what I did at the very start of our meet doesn't make any sense. In other words, I've changed my mind. I guess you're really not under the influence. The test is not the basic requirement of the arrest. The arrest is made based on the opinion of whether somebody is under the influence or not. The test helps support that, or if it's over one-oh, it supports it even more heavily, but it's the officer's opinion that starts and carries the arrest through. Just like if there were no test taken at all.

SENATOR JUNGE: Okay. Thank you. That helps me to just understand the process better. Alright. Senator Marty, are there any further witnesses or do you wish to make any final

points before we move on?

SENATOR MARTY: Madame Chair. No other witnesses, and, again, I think we've had a good summary of what the concern is. Again, the question is if this was knowingly distributed false information or if it was, I'd call it, reckless disregard for the truth, given the fact that, as Ms. Burke Moore pointed out, after the Senate hearing, in which he was clearly misstating what she said, she corrected him, and the House language, whether he remembers the conversation or not, refers to part of their conversation. He quotes her in part of that conversation, and the other part, he did change some of the language in his testimony which would reflect that, and then when the flyer came out a month later, it's back to the first version. I guess it does suggest extremely careless, if not intentional. I guess that's the issue the committee will have to wrestle with when it gets to that point.

SENATOR JUNGE: Okay. Thank you. At this point, then, Mr. Berglund, we will move to your response to the complaint, and I want to suggest that you're entitled to have witnesses if you wish, and also to have counsel present.

JOHN BERGLUND: Thank you, Madame Chair. I just wish the committee to be present.

SENATOR JUNGE: And please identify yourself for the record.

JOHN BERGLUND: Thank you, Madame Chair and committee members. My name is John Berglund, the executive director and legal counsel for the Minnesota Licensed Beverage Association. Let me begin where you left off, on the differences, and, I submit, confusion, between the words arrest and charge, and I submit to you that you even had some contradictory statements, if I jotted them down correctly today, in the previous testimony.

But let me begin by saying that, Ms. Burke Moore and I did have that—a conversation. I think she said I denied saying there was ever a conversation, and that would not be true. We did have the conversation and I remember it quite well. And during that conversation, she did come over to me to talk, and she approached me as she indicated, to—what I think she intended to do was clarify the number or definition of arrest, because she indicated essentially that these were 1,800—or charges, or whatever, and I said 1,800 new arrests, and she said these were not new arrests. And in fact if you'll see in her testimony, where she dotted in blue, she said that

these—these are—we don't—these are not additional arrests because these people are already being arrested.

She says in a couple of places that these people are being arrested. My point was that what's the purpose of the arrest? What's the purpose of the stop? Are they stopped for speeding? Are they stopped for an equipment violation? Because I believe, and Ms. Burke Moore said that you have to have some evidence of impairment before an Intoxilyzer test. I may be wrong, but I believe that's not correct. Okay. And that's my knowledge. My experience says that if you are stopped for speeding at 2:00 in the morning, if you are stopped at a public safety check point, and I believe they exist—not sobriety check points, but public safety check points to check equipment—and if there is a strong odor of alcohol on the driver, I believe that's probable cause for the officer, if they so choose, to give the hand-held portable breath test, because it is against the law in this state to drive over .10, whether or not there is any evidence of impairment. So, even if there is no evidence of impairment in the stop, they give them the test. If it blows a fail, that is certainly grounds to take them in for a real test. Into the police station. Now, if, in the real—if in the police station, they tested .08, our point, or our question, or our belief was—was that then the officer has not charged them with DWI. The—after the test, they are not arrested for DWI. They are not charged. Even though the officer had—the DWI law says two things. One, it is against the law to either drive while impaired or to drive with a blood alcohol of over .10. So, the point was, if these people are not being charged, is it not a reasonable conclusion to say that the law enforcement officer stopped them, is it not reasonable to say that they did not find evidence of impairment, they were stopped for some other reason, and they blew and .08, and the officer could charge them for .08, for driving while under impairment, but did not. But chose not to.

Now, here is what confused me, and I'm not sure which is the case. I believe the lieutenant testified that these people are still charged with DWI for under the influence. And they certainly have that option. The police can do that. But in Ms. Burke Moore's letter, dated March 13, toward the last—the first page—toward the last paragraph, she says, "My testimony clearly states that the 1,800 estimate indicates individuals under the proposed law change will

now be charged with DWI. They are currently arrested but are not charged." Okay? That is in contradiction to what the lieutenant said. So, if they are not charged with DWI, then what happens? Is it not reasonable to believe that these people are given their ticket for speeding, for whatever it is, and sent home?

Now, if they cannot drive their car home, because they're separated or if they don't get a ride back, and they may get a ride back to their car, I don't know. The lieutenant said that certainly he's not aware of that, and it's not his policy and I wouldn't question that with him. But, let's say they call—okay, they just tested a .08. They could write a ticket, right then and there, for DWI, driving while under the influence, but, according to Ms. Burke Moore, they are not charged. They are no longer under arrest after the test, and they are—reasonably, I think we can assume, they are released. Ticketed and released for whatever the ticket is for. So, they're released and let's say they call a spouse to come and pick him up. Say it's a man that was arrested. And ten minutes later she comes down to the station after testing for .08, and he gets in the car and says, "Move over honey, I'll drive." He was not arrested for impaired driving. He is not violating the law to get behind the car and drive.

So, the primary—the confusion between arrest and charge, and I certainly will say today, and that's what I said before, I thought that particular confusion was a matter of semantics. I certainly will say charge is the more appropriate word, and I certainly will be using the word charge. When we used the word arrested, we meant arrested for DWI after taking the test. And in Ms. Burke Moore's—in her letter and testimony, they are not arrested, or at least not charged after taking the test, and that's what we meant by that. In fact, let me distribute for you a portion of one of the recent fiscal notes, and as Ms. Burke Moore said, there's been a number of them. In this fiscal note, and I just have portions for you, the relevant portions—page 19 and 22—there are departments of the State of Minnesota that uses the word arrest, like I did. Okay? And I've highlighted them in yellow for you. One says the Department of Public Safety—and this is either Corrections or Probation, but it's signed off, I have the person who signed it off, Shan Burt—the Department of Public Safety predicts that an additional 1,800 arrests will occur because of this bill. And then on the next one, on page 22, the Department of Public Safety

estimates that lowering the alcohol limit would result in approximately 1,800 additional arrests each year. So, if I was confused over the terminology, so was other departments. I used the word arrest. I should have used the word charge, but I certainly intended arrest. And I don't think the meaning is lost, that if, after they take the test, they are not arrested for DWI or for impaired driving, then they are not charged, and that is the point that we are trying to make.

Let me move on, if I may, to what I believe is the basis of the complaint. Let me begin by saying that for 16 years, I have represented the interests of the Minnesota Licensed Beverage Association before this body. For 16 years, I have worked on a variety of issues. This year, in fact, I've had at least nine other issues that I have worked on specifically other than .08. For 16 years, I have shared a lot of information with legislators. Hundreds of pages of documents and flyers and studies and information. This year, in fact, on .08, I have been involved in over 20 pieces of information or flyers or documents on that issue alone. For 16 years, I believe I've enjoyed a good reputation for honesty and integrity. A week ago last Thursday, on the Senate floor, I had a flyer distributed with the name of our association on that contained an inaccurate statement, and as stated in the—and I deeply regret that. I take responsibility for it. I sincerely apologize now, as I did publicly to the members of the Minnesota Senate, and as I did privately to Ms. Burke Moore by letter.

The only reason for the delay in sending that apology—the only reason—was that when I got back to my office on Friday, after I received Ms. Burke Moore's letter—remember the flyer came out on Thursday on the Senate floor. Senator Marty stood up and said this is not correct. I just talked to Ms. Burke Moore. I talked to Ms. Burke Moore in the hallway; she came up to me and she was furious, and I didn't quite understand what was wrong. I was sincerely surprised. I did not quite understand what was wrong in the flyer. She really didn't want to talk to me, and I asked her please send me a letter. I got it. She sent it Friday. I think Senator Marty read it on the Senate floor in personal privilege. When I got back to the office, four or five o'clock, and started drafting a letter of apology, at 5:30, by fax, the ethics complaint came in to my office. I held back a few days in forwarding the letter of apology simply because I didn't know what was going to hit next. I didn't know the procedures and protocol. I didn't understand this process. I

should have sent it right away, but I held back a few days to talk to other people to see what they had suggested how I proceed.

The complaint before you identifies one statement. That statement is that 98 percent drove themselves safely home. And if I may abbreviate it, I'm just going to put down 98 percent drove home. That is the statement in the complaint I believe that we're focusing on today. That was attributed to Ms. Burke Moore, even though one attorney called me, looked at the document, and he claimed, well, I don't believe that that's attributed to her because it's not in quotes and there was a comma. Well, maybe it can be looked that way. Certainly it's not clear and certainly it's inappropriate, and certainly any attribution is wrong. So, 98 percent drove home.

The question, as stated in the complaint, for you to determine as a body, the question is, for the sub—the question for the subcommittee to answer whether I knowingly furnished this inaccurate statement. Okay? So the question issued before you is "knowingly." As I understand the rules from Mr. Wattson, the burden is on the complainant, by clear and convincing evidence, yet I still wish to respond and tell you why I—I know it wasn't knowingly, and why I hope you know it wasn't knowingly. The answer is it absolutely was not knowingly, and there are three reasons, I submit, why it was not knowingly.

Number one. My reputation for 16 years. .08 is a big issue for our members. It is not the first issue I've worked on. It is not the biggest issue I've ever worked on. It's not the second or third biggest issue I've ever worked on for our members. It is not the only issue I've worked on this year. It likely will not be the last issue. I would in no way wish to risk my credibility and integrity and reputation, knowingly giving false information to the Senate. I have many other issues and many other fish to fry, to do that on any particular issue. And, I might add, that I was honored when Hamline University called me up about two months ago—I believe it was the law school—and asked me to author an article on ethics and lobbying. It was about a 30 page article that I had to decline because I did not have time. I'm not an alumni of Hamline, but they asked me, I believe, because I've participated in the intern program, I've had a few of their students—law students intern with me, and I'd like to believe they gave back good reports as to our reputation, honesty and integrity.

Number two. On that flyer, we put our name on it, and we identified the source of a portion of that—or that 1,800 figure, if you will. Ask yourselves, why would we put our name on it, why would we do that, why would I do that, if I knew it to be false? Well, a cynic might say timing. You did it so that it goes on the Senate floor on Thursday, and it can't be corrected until it's too late. Don't believe that. Don't believe that for the following reasons. First, as Ms. Burke Moore, I think, testified, she was outside the Senate chambers during the debate. She's been at all the hearings. She was at the conference committee last year. I certainly anticipated that she would be outside the Senate chambers. I certainly anticipated that if there was something wrong, it could have been corrected immediately. The fact that Senator Marty stood up a few minutes later after it was distributed and said, I just talked to Ms. Burke Moore and this is not correct, that did not surprise me. The timing, the quickness of the correction. And I'm delighted and pleased that he did correct it. However, I was surprised that it was corrected because I did not know that it was false. And let me also add that that flyer was not drafted or intended for the Senate floor. I will show you in just a minute that that flyer was intended for the Senate Crime Prevention Committee, and we simply didn't get it done in time. We didn't get it done in time, and I had the flyer, and I went to a little meeting with other lobbyists interested in my position, and some of them in the room today, and I said, I've got a couple of pieces of information. I'm going to stick them in the mailbox of all the Senators, and they said, no, no—in the hectic pace, it's not going to be read. They talked me out of it and said, try to get it done on the Senate floor, and I concurred.

The third reason why this was not done knowingly, and I believe any reason by itself could be sufficient to tell you in my heart that it was not knowingly, but I believe collectively they also say not knowingly. The third reason is, I did not draft or produce the flyer. Now, I do not—that does not mean I abdicate responsibility. I do take full responsibility for it, for the inaccuracy and for the apology, but as it is relevant to the issue of knowingly, I did not draft or produce the flyer. The chronological order was that Ms. Burke Moore had a conversation with the lobbyist for the Beer Wholesalers. She had a conversation with him. That lobbyist contacted me, called me, and said, gee, we've got some interesting information, and what he told me was

that he talked to Ms. Burke Moore, and I have a letter from him to me indicating this, if you need it, that he talked to Ms. Burke Moore, and that Ms. Burke Moore said these 1,800 estimated would be new arrests or charges for impaired driving, that "very few, if any, are now being arrested or charged after the test" and that only two to five percent are being charged. What I did—I called a gentleman by the name of John Doyle in Washington, D.C., who contracts for our national association, the National Association of Beverage Retailers, and I asked him for help. So we've got some information here, and I'm not sure where to go with it or what to do with it. Can you help? He said, sure. He can put together a flyer. And this was approximately two weeks before—approximately two weeks before the Senate—the Senate Crime Prevention Committee, which occurred, I believe, on February 20, a Friday. I called him a few days before the hearing saying, where is the fly—and, I also said, by the way, you should talk to the Beer Wholesalers lobbyist. I said he will call you or you will call him. They had met before. They had conversed, and, in fact, they did converse on this issue. I then called him and said, where is the flyer? I'd like to have it by Friday, February 20, for the Crime Prevention Committee. He sent me this fax, which I would ask copies to be distributed for you, and it was the—the text of the flyer. And a handwritten note at the bottom that, you know, you've got a few hours to make some corrections here, or edits, so we can try to get it to you in time for the committee meeting. I immediately faxed that to the Beer Wholesalers lobbyist, with a note to call me as soon as he got it. I did not get a call from the Beer Wholesalers lobbyist, so I called him on his portable phone, and on his phone, I asked him the question that stood out to me, and that was, the first paragraph, where it mentioned .07, .08, or .09. I know that that had come from the Beer Wholesalers lobbyist, because he had mentioned that figure to me, that there were 1,800 people testing out—estimated testing out, as he said, at .07, .08, or .09. My recollection in Ms. Burke Moore's testimony was that it was .08 or .09, so I looked in the fiscal notes, and I believed I read the fiscal notes to say .08 or .09, and I asked the lobbyist, I said, you know, I think that .07 is incorrect, and I said, I just checked the fiscal notes and I think that should be deleted. He said, fine then. If you believe that, delete it.

So I—and that was it. I left it at that. In my haste, I then called John Doyle in

Washington and said, two changes—delete .07 in the first paragraph, and at the bottom, instead of putting my name personally, put the association name, which I thought more appropriate. He got these out to our office. We did not get them in time for the afternoon hearing before Senator Spear's Crime Prevention Committee. I tucked the flyers away intending on using them again to just put in the mailbox of Senators a few days before the Senate hearing.

I would like to conclude, and I know I have a lot more to say, and a lot more in my mind. I'm certainly very bothered by this. I'm sick about this. I apologize deeply for this, and I certainly have a lot going on in my mind, and I'm not sure where to go with it, and maybe something will come later should there be additional testimony. I do apologize to Ms. Burke Moore, and I do apologize to the members of the Minnesota Senate.

In conclusion, is that 98 percent drove themselves safely home—was that a correct attribution to Ms. Burke Moore? And the answer is it was not correct. Was it a mistake? Absolutely. Was it done hastily on our part? Absolutely. Was it careless? Well, I certainly believe it was. Did it create any harm? And while that is not necessary, as Senator Marty said in this hearing, thankfully it did not because Senator Marty corrected it post haste, a few minutes after the flyer was distributed. Was it knowingly? Absolutely not. Absolutely not. If it had—if I had any idea that that was knowingly incorrect, I would have either changed it or not distributed it. With that, I would close by asking you, respectfully, to accept the apology, and to dismiss any further action on the complaint, and I certainly stand before you for questions.

SENATOR JUNGE: Thank you, Mr. Berglund. One question just comes to my mind. Did you ever ask Ms. Burke Moore to just review the flyer before you put it out? Just to see if she would, you know, confirm that that was her comments?

JOHN BERGLUND: Thank you, Madame Chair. Let me digress for just a moment. I forgot something. When I mentioned earlier in my opening comments about the stop for speeding, Ms. Burke Moore says we may have talked about that. We absolutely did not talk about that.

To answer your question on this, I did not share the information on the flyer with her. Should I have done that, in retrospect? Would I do that in the future? Absolutely. I do know,

though—I didn't for a number of reasons, and I'm not sure which, whether it was simply haste, because I had, like I say, over 20 documents that I was working with and helping produce or producing myself on .08, and this was just one of many. I do know that, as she indicates in her letter, that Ms. Burke Moore is—and I certainly respect her for that, but I disagree—she's a personal and professional advocate for .08. We believe she said something that would say that 1,800 were not impaired because they were not charged, and the officers, we believe, would have charged them if they would have been impaired. But I did not, and I was wrong for that, and to use her name, and I would not do that again.

SENATOR FREDRICKSON: Madame Chair, Mr. Berglund.

SENATOR JUNGE: Senator Frederickson.

SENATOR FREDERICKSON: In the—in explaining to us how this flyer was produced, you said, I believe, that you were not responsible for the content.

JOHN BERGLUND: Oh, I'm responsible for it all, Senator Frederickson. I'm simply saying I didn't draft or produce it.

SENATOR FREDERICKSON: Madame Chair, Mr. Berglund. Let me rephrase the question then. You accept the responsibility. I understand that. But, you were not the one that drafted this flyer, and you did not do the research or obtain the information for the content. So, who was responsible for the content?

JOHN BERGLUND: Madame Chair, Senator Frederickson. Thank you for the question. It was three-way deal. It was the Beer Wholesalers lobbyist who got the information, told me about it. I called John Doyle in Washington, asked him to do the flyer, and I also asked him to talk to the Beer Wholesalers lobbyist. They did talk. They had met before. They knew each other. They did talk, and those two talked and the flyer came out, and when I got it, I believed it to be correct.

SENATOR JUNGE: Mr. Berglund, did you suggest that he talk, perhaps, not to the lobbyist, but to Ms. Burke Moore?

JOHN BERGLUND: I did not suggest that.

SENATOR FREDERICKSON: Madame Chair, Mr. Berglund.

SENATOR JUNGE: Senator Frederickson.

SENATOR FREDERICKSON: So, would it be a reasonable assumption that most of the information comes from the Beer Wholesaler, that individual, because I would assume Mr. Doyle did not have first-hand knowledge of the conversations and testimony before a Minnesota Senate Committee?

JOHN BERGLUND: That would be correct. I have a letter from that lobbyist, if you need to see that, as to his conversation, from his recollection, with Ms. Burke Moore.

SENATOR JUNGE: I think that would be helpful information.

SENATOR NOVAK: Madame Chair, before I leave—

SENATOR JUNGE: Senator Novak.

SENATOR NOVAK: Again, reflecting on the debate, I guess this question has been answered, but I was trying to recall, too, the flood of paper at the time, from both sides, and one of the questions I was going to ask, I guess that has been answered, is how many different documents were provided to members of the Senate on this position during the debate? For the record, that's 20?

JOHN BERGLUND: I think I counted 20 or 21 that I either drafted or assisted in drafting, that we had our name on, and I have all those with me.

SENATOR JUNGE: Has Ms. Burke Moore seen a copy of the letter from Mr. Carlson?

JOHN BERGLUND: I just handed that to her now. I just got it two hours ago—

SENATOR JUNGE: I'd like to hear her response.

JOHN BERGLUND: —absolutely. I just got it a few hours ago.

SENATOR JUNGE: Is Mr. Carlson any relation to the Governor?

JOHN BERGLUND: Ah, I believe he is.

SENATOR JUNGE: What kind of relation to the governor?

SENATOR JUNGE: Ah—[reading] "Ms. Burke Moore never said to me that 98 percent of the people arrested drove themselves home. I never related that figure to Mr. Doyle. I can only assume he took it from her quote of two to five percent that were charged." Would you have—does that not mean something?

JOHN BERGLUND: Madame Chair. I did not know that until after the fact. I did not know that that was not transpired between Mr. Carlson and Mr. Doyle until after the fact, until after the—we were notified it was incorrect.

SENATOR JUNGE: I would like to ask, at some point, Ms. Burke Moore some more questions. I want you to take a look at that, and have some time to look at that, but—and I think you raised an interesting issue about the difference between charges and arrests that I actually had thought about earlier, but there seemed a confusing—some inconsistencies in that that I want to clarify.

But this is the area of concern that I'm going to zero in on, for me, is that we have the Senate hearing, and then she had a conversation with you to correct your Senate testimony, and she told you, she explained to you what the 1,800 was, and it appears from the House testimony, which occurred just after your conversation, that you indeed heard her, with the exception of the arrested for speeding or an equipment violation, that you did indeed change your language to be more consistent with what she was telling you, that there are 1,800 DWI arrests or implied consent arrests. And so, it appears to me you heard it, because you talked about it in new language, and then, you say that, if I understand your testimony, that this brochure had been prepared prior to the Senate committee, probably prior to this conversation, but then, why wouldn't you have gone back, then, in light of that conversation, and looked at the flyer prior to any further use being made? If it indeed was based on earlier information that was corrected, why did you not, based on that correction, revise the flyer?

JOHN BERGLUND: Madame Chair. What was corrected?

SENATOR JUNGE: If—okay, maybe we can just step back. It's her testimony that she—

JOHN BERGLUND: What are you reading off of?

SENATOR JUNGE: It's her testimony that after the House Judiciary—.or, prior to the House Judiciary Committee, that she visited with you about your Senate testimony, saying that your number and your interpretation of the number was inaccurate.

JOHN BERGLUND: Mm hmm.

SENATOR JUNGE: And then—and it appears to bear that out, because the House—your House testimony uses the language she was trying to convey to you, at lease partially.

JOHN BERGLUND: Mm hmm.

SENATOR JUNGE: Okay. Now, I recognize from your testimony that you're saying this flyer was actually put in the works prior to this conversation you had on the House.

JOHN BERGLUND: That is correct, Madame Chairman. But—I understand the question now.

SENATOR JUNGE: So, why didn't you go back, then, based on the information that you apparently heard here on the day of the House to fix it in here?

JOHN BERGLUND: Well, I don't think–Madame Chair. I don't think my testimony is inconsistent with the wording in that flyer. My testimony said that she testified that there are 1,800 additional DWI arrests or implied consent arrests. Not necessarily new arrests because these people may be stopped now for speeding, etc. But, my point was—is that these are DWI arrests. Again, my confusion—my point was—was that after the test, after the test, they basically were then arrested for DWI. After the test they were arrested. I used the word arrested when I should have used the word charged. I don't think it takes away from the meaning, or, certainly, that was not our intention. The point is, these people took the blood alcohol test through the Intoxilyzer, I'd assume, and they hit .08 or .09, and they were not charged. They were no longer under arrest for DWI for purposes of prosecution. And that was our point. That the police officers who could have given them a tab charge, could have written a ticket for driving while impaired, chose not to do so after getting a test back at .08 or .09. That was the point, and I don't believe that point is inconsistent from that testimony to the flyer.

SENATOR JUNGE: Okay. There may be more questions. Can you stay around, too, because I want to—

JOHN BERGLUND: I won't go anywhere.

SENATOR JUNGE: —get Ms. Burke Moore's response now—

JOHN BERGLUND: Sure.

SENATOR JUNGE: —and are there any other questions at this time from the committee? Mr. Berglund, before you go, I just am taking a look now at the transcript of the House, which was February the 12th, and that is the day, at least it has been identified as the day, that you were contacted by Ms. Burke Moore to correct the information, and now I'm looking at the fax, and I'm seeing that it's 2/19, which is a week later, and so, now I'm seeing that this, at least the 2/19 date maybe was prepared earlier, but the 2/19 date seems to supersede both the Senate hearing for which you say it was prepared and the correction.

JOHN BERGLUND: Madame Chair. That is correct. But you're failing to understand that when Ms. Burke Moore talked to me, that I did not understand her correction, what she was trying to say. She said two things. She first talked about saying these are not new arrests. And I'm saying, well, of course they are. They of course are new arrests. At least, they are new arrests for the purposes of prosecution. Okay? They are new arrests. They test at .08 or .09, and then they are not arrested, or they are no longer under arrest, and I disagreed with her.

SENATOR JUNGE: Then you had a disagreement—

JOHN BERGLUND: And in my testimony—

SENATOR JUNGE: —about this.

JOHN BERGLUND: —in my testimony, I still used—shortly thereafter, I still said there are 1,800 additional DWI arrests. Again, the proper word should be charged, but I don't think it changes the meaning of what we were trying to convey. The second thing she told me, as she correctly indicated, was that they did a survey of the 1,800, and they believed only 15 percent were repeat offenders. Now, that's very relevant to the fiscal cost. I based my testimony, and as she indicated I disagreed with that, I said it was 50 percent repeat offenders based on the fact that about 50 percent of all DWI arrests in Minnesota are repeat offenders. She indicated in their sampling of the 1,800, they estimated 15 percent. I asked her—and we started focusing on that issue, because that was the fiscal concern for that hearing. I asked her how big of a sampling was it. I believe she said 25 people. And I said, 25 out of 1,800 or 1,300 is not a very big sampling, and is not much to go on. So, I still am going—I told her, I think, I am still going to contend that it's closer to 50 percent, and we were primarily working on the fiscal element, and we disagreed,

and we had some confusion over the term arrest versus the word charge. Okay? In no way did I—did I intentionally move forward with something that I believed was incorrect. I believe that these people were now being arrested, and that's why I didn't make the correction when the facts came later, were now being arrested after taking the test for DWI. Again, the technical word should be charged. But the point—the message that we were trying to convey is—is that they—after the test, they were not charged or arrested for purposes of prosecution, and our contention was, because the police officers did not believe they were impaired, otherwise they could have and should have charged them with driving while under—while being impaired.

SENATOR JUNGE: Can I just clarify the dates when this flyer was prepared and for what purpose? Was it prepared on 12/19? Is this the first time that you saw the language of the flyer? On 2/19.

JOHN BERGLUND: That date would be accurate. That date would be accurate.

SENATOR JUNGE: Okay. Now, you said it was going to be prepared for the Senate Crime Prevention Committee, which apparently took place a full week prior to that.

JOHN BERGLUND: It took place February 20. And you'll see, that's the purpose—they were to overnight it to me, to try to get it to me in time for that hearing.

SENATOR JUNGE: Okay. Let's see. The transcript says, maybe these dates are incorrect.

JOHN BERGLUND: I've got—you're—what happened, a little bit unusual, is that the Senate Budget Committee heard it first, before the policy committee.

SENATOR JUNGE: Okay. Finance Committee, that's what it is.

JOHN BERGLUND: The Policy Committee, with Senator Spear, heard it on February 20.

SENATOR JUNGE: Okay.

JOHN BERGLUND: I believe the other—and Ms. Burke Moore, I believe, had the accurate date. I believe it was February 12 and 13. It was a Wednesday and a Thursday. Wednesday in the Senate, and Thursday in the House, and I may be incorrect, and I digress, and it's not relevant, but in those 24 hours, the fiscal note changed significantly.

SENATOR JUNGE: Okay, now, I do understand what you're trying to say about the confusion between charge and arrest, but my question now would be, how do you get from there to a fairly sweeping statement that 98 percent drove themselves safely home—

JOHN BERGLUND: I should have inquired of Mr. Doyle and Mr. Carlson, and I didn't.

SENATOR JUNGE: So you just didn't bother to take any steps to check it?

JOHN BERGLUND: No, first of all, I assumed it was. . .it was correct that if these people aren't being charged, they're going home, whether or not they're driving their own car or their wife comes to get them and they move over. But I just assumed that and I didn't bother to correct it, whether it was attribution to Ms. Burke Moore or not and I should have.

SENATOR JUNGE: But didn't you just testify that you and she had at least, at a minimum, a disagreement about this issue.

JOHN BERGLUND: No, Madame Chair. We only disagreed about the word arrest, whether these were new arrests and over the repeat offenders, the percent of repeat offenders and I don't believe, I know we never talked about whether or not they drove home afterwards. We just didn't talk about that.

SENATOR JUNGE: Okay, so you didn't talk about it but you still allowed that to be put in a flyer?

JOHN BERGLUND: Correct.

SENATOR JUNGE: —being basically attributed to her?

JOHN BERGLUND: That is correct.

SENATOR JUNGE: That does cause me some concern. I guess the question I would ask there is what level of accuracy would you want to attain at least in checking on those facts.

JOHN BERGLUND: Again, the statement could be true, Madame Chair, that these people drive home and again, if not their own car, that someone comes and picks them up and they drive or they stop at a convenience store and they buy cigarettes and they switch the driver's seat or whatever. The problem was in having the attribution to Ms. Burke Moore. That was wrong, that was incorrect and that slipped by me. And for that I deeply regret and deeply apologize.

SENATOR JUNGE: Okay, are there any other questions by either committee members, Senator Marty or Mr. Wattson?

SENATOR MARTY: Mr. Berglund, I think earlier you said something about you were saying—things to Ms. Burke Moore and to members of the Senate and I understand what you're saying, I hear you clearly on that, you said something about the term reckless or careless in terms of not checking these facts out. Can you restate how you characterize the production of the flyer and the role of distributing this? You're saying it was not knowing but it was, I think I saw the word, it was done hastily, I think my note said and did you use the word reckless?

JOHN BERGLUND: No, Madame Chair, Senator Marty, I used the word careless. I kick myself, I kick myself then and now for allowing even the question, for this question to even arise and had I believed, had I any intention of knowing that this was incorrect I would not have allowed it to proceed.

SENATOR MARTY: Madame Chair, Mr. Berglund, dropping back from the issue, that you have been focusing on the word charging versus arresting, the semantics issue, I know you have been following this issue for at least a couple of years and I guess I wonder because I have seen you in many hearings on this issue and many debates on the issue. You kept focusing on the fact that I used, and I only quoted one thing this 98 percent figure, I think that was, may have been the only fact I gave in the brochure that I was challenging the accuracy of it. I think I referred to a number of times the entire flyer focused on the fact that law enforcement officers don't consider you impaired there and I know you've seen National Highway Traffic Safety Administration says that virtually everybody is substantially impaired at that level. You've heard testimony from I think, Captain Asleson and others over the last couple of years on what law enforcement officials, some of whom think this should be changed to .08, some of them do not. I think that's very clear there's not unanimity of opinion there, but you used, or the flyer, uses very strong language, the majority of people driving at .08 or .09 were deemed by experienced law enforcement officials to be safe enough to drive, while it's benign behavior. I guess my point is throughout the entire thing you're talking about overriding the judgment of trained law enforcement officers. And my question is aside from Ms. Burke Moore, but I don't

know if Captain Asleson or who has testified in committee in the past couple of years, but during all that testimony, do you think it's safe to say that they're calling this benign behavior and that it's overriding the judgment of trained law enforcement officers?

JOHN BERGLUND: Madame Chair, Senator Marty, we concluded that either one of two things were occurring, either these drivers were impaired and were being charged or being arrested after the test or being charged, or they were not. And if they were not, it's because the officer did not believe they were impaired. It was either one or the other. If not, then you need to ask of the body, "Why are officers finding people at .08 or .09 and not charging them if there's evidence of impairment?"

SENATOR MARTY: Madame Chair, Mr. Berglund, one of the reasons I have been supporting .08 legislation is because I frankly think when law enforcement officials are stopping people as impaired and arresting them and the federal safety agency is saying they're virtually all impaired, that indeed we ought to make it so that it's easier to charge them with an offense they can prosecute on because the standard is there. I think you know as well as I do that there are plenty of attorneys who if you're at .09 even if you are impaired, that they can get you with something perhaps careless driving or something, instead of a DWI conviction. I guess . .

SENATOR JUNGE: Senator Marty, I caution you, I don't really want to get in the merits of the .08 debate. I don't think that's appropriate here.

JOHN BERGLUND: Madame Chair, just to briefly respond. I think Senator Marty is just assuming that all these people are stopped for impaired driving. We don't have evidence of that. We don't know that. And the second question is, the whole impairment issue is still a matter of somewhat some subjectivity and the question is whether or not they're impaired for the purposes of the law for driving while impaired or not. And again, we're getting probably into the subject itself.

SENATOR JUNGE: I think my only concern on this, Mr. Berglund, is from the procedural aspect, is that there just appears to be a jump here in some of these broad statements, even given the testimony that you heard that we have a transcript of, to say somehow this is benign behavior. How do you get to that statement that law enforcement deems it safe enough to

drive and benign behavior from her testimony that says that there are, that there are 1,800 arrests out there? I mean, I guess I'm just trying to figure out how, tell me your logic stream as to how get to there from here, can you tell me how it works? I just want to understand your thinking.

JOHN BERGLUND: Madame Chair, at the risk of public ridicule, I am not even sure of the definition of benign. Again, I didn't use the draft—or use the word—and where are you talking on the flyer?

SENATOR JUNGE: Well, I'm just trying to look at her testimony. I guess I'm just trying to say, given what her testimony is and was, can you help me to say that it supports what is in this flyer?

JOHN BERGLUND: Sure, absolutely. You're looking at the paragraph on the flyer, left-hand column, at the bottom, that the majority of people driving at .08 or .09 were deemed by experienced law enforcement officers to be safe enough to drive, why is the Minnesota Legislature trying to outline this benign behavior again? I am not sure of the definition of the word benign, but let me at least eliminate that and proceed. Because law enforcement, the point is and was, because law enforcement officers can arrest people right now for a DWI either at driving while impaired regardless of the blood alcohol limit, it could be .08, .09, .07, or a per se while driving over .10, the point is that if the officer, they have that power now, if these people are impaired, to arrest them and if they are not doing that, if they are not, again I use the word arrest, I should be using the word charge. If they are not charging them after receiving that test because they do not, I think we can conclude, do not believe they are impaired at least for the purposes of this law, then why would the Minnesota Legislature make it a per se standard for all? Why would it be an arbitrary standard of one size fit all and reduce it? That was the point.

SENATOR JUNGE: I'm trying to tie back to this testimony. I'm not seeing that but I appreciate your answer . . .

JOHN BERGLUND: I'm not sure I understand what you're not seeing, Madame Chair.

SENATOR JUNGE: Well, I'm trying to understand . . . I'm really just trying to understand how you are basing what's in this flyer on the testimony that I've got a transcript of.

JOHN BERGLUND: Madame Chair, the message of the flyer again. . .

SENATOR JUNGE: Maybe you can point to me . . .

JOHN BERGLUND: . . .the message of the flyer again, okay, the word that we got is that 1,800 people, an estimated 1,800 people are testing at .08 and .09 and are not being charged with driving while impaired. Because the officers can and should charge them while driving while impaired, if they are impaired, we then submit that we need not, if we go to .08, these people will now be violating the law for something that they may not be impaired at. That was the intended message of the flyer. Again, whether you agree with it or disagree with it, is something else. But that was the intended message of the flyer.

SENATOR JUNGE: Okay, further questions? Senator Marty.

SENATOR MARTY: One more question about this and again, again it goes to the entire nature of it and I apologize for what I didn't mean to get into the issue too much. I guess what I'm wondering is you're saying that despite the testimony you had heard Ms. Burke Moore say, despite the testimony everywhere else, that in terms of putting out a flyer that if I can summarize or characterize what this is saying. It's saying that people who are at the level of blood alcohol concentration that this law would have changed onto, the bill would have changed the law, that they basically, despite the fact that they were stopped for some reason or another, tested at this level, considered harmless behavior by law enforcement, they—we would be forcing them to arrest people they do not consider impaired. I guess I'm asking, did you take the one misunderstanding, if that's the way I can characterize it, misunderstanding of the difference between arrest and charged and—blew up because of the process you've explained to putting out a whole flyer saying that law enforcement officials are saying that this is safe behavior? I'm asking how it came from one.

JOHN BERGLUND: Madame Chair and Senator Marty, again I must not be articulating our purpose and intent here, okay? The information that we had from Ms. Burke Moore, and I think it's still consistent today, is that most all of the 1,800 people testing at .08 or .09 are not being charged with DWI. Okay. They can be charged under Minnesota law so therefore we made the argument, we made the position, that these people were not judged to be impaired by the officers, otherwise we believe they would have been charged.

SENATOR MARTY: Madame Chair, Mr. Berglund, the fact that the improper lane change, broken tail light, etc. that you use in that brochure is a speeding or equipment violation that you use in your House or Senate testimony, those examples of what these people are pulled over for, which I think is in your testimony or your flyer, never Ms. Burke Moore's, because I think if you listen to what she is saying, she's saying these are people who are arrested for DWI, hauled into the station because of impairment evidence. How did that example in the flyer, the improper lane change, broken tail light, was that from the national people or the other lobbyist?

JOHN BERGLUND: No, I believe that came from me, Madame Chair, Senator Marty. I use the word et cetera, okay, as a kind of catch all. But the point was, that if these people are stopped and tested .08, .09 and then not charged, and if we're making the argument that they are not impaired, then we must also assume that there was no evidence of impairment in their driving behavior and therefore they were stopped for a reason other than impairment. Which, it is clearly possible, Senator Marty.

SENATOR JUNGE: Senator Marty.

SENATOR MARTY: Madame Chair, Mr. Berglund, after following this debate for a couple of years, I suppose it is possible to come up with that but every time I've heard Ms. Burke Moore talk about it, she talks about the fact and the Captain said earlier about how they are tested on the scene, preliminary breath tests, other sorts of things, and then once they have enough evidence to bring them in, they bring them into the station and test them and they come up with .08 or .09. I think you're still continuing to attribute, although I think you've acknowledged it's your own choice of options, that you are continuing to attribute to people like Ms. Burke Moore or law enforcement officers that they were brought into the station, tested here for equipment violations, broken tail lights, and I guess I'd be curious in wanting somebody to point out if it's wrong, but nobody in law enforcement is saying that.

JOHN BERGLUND: Madame Chair, Senator Marty, in looking at Ms. Burke Moore, in her letter to me after the fact said that these 1,800 people are stopped or arrested for impairment. I don't know if that is correct or not, but I did not have that knowledge prior to the time of this flyer. In her testimony to the two committees, she is saying that—arrest—she is not saying that

these are DWI arrests, she is not saying these are arrests because of impairment, they can be stopped and arrested for other violations, equipment, speeding, and we drew that inference based on the fact that they were not charged. That is the information we had at the time the flyer was drafted.

SENATOR JUNGE: One final point, Mr. Berglund. Did you—this flyer that you put on the Senate floor, did this go anywhere else, to the media or to any other place?

JOHN BERGLUND: Madame Chair, no. And to answer Ms. Burke Moore's request that it not go any further, I can certainly assure you that it will not.

SENATOR JUNGE: So it hasn't been distributed since—there are no further copies?

JOHN BERGLUND: Absolutely not.

SENATOR JUNGE: Okay. All right, thank you Mr. Berglund. I appreciate your testimony. Ms. Burke Moore, I would like to call you back. First, if you have any general response, and then I've got some questions on some of the inconsistencies, if other members may do as well.

KATHERINE BURKE MOORE: Madame Chair, just one general response to the conversation is that I see Mr. Berglund kind of doing today in this committee what he's done in past committees. If you look again at what they have me saying in this flyer, virtually all of them spent their night in their own homes. That's right, according to Kathy Burke Moore, the Minnesota Department of Public Safety, Driver and Vehicle Services. Go on with that first paragraph, they attribute that whole thing to me. That, I think, is what—that's what I'm here about. The first paragraph that is attributed to me. He has said here that I didn't say those things and we're mixing all these other things up, but he still chose to use my name, my position, the fact that I provide information to the Senate and I provide numbers and—irresponsibly. If you receive this in a memo or a fax from John Doyle, who I have never heard of, on February 19, and didn't have time to check it out with me before March 12, when it's handed out on the Senate floor, I don't see haste there. That's my only—and I'm so indignant because of the fact that I should not even been dragged into this mess. I just come here to do my job, to give you people the numbers you need, and go back. Then to be dragged into this with this type of irresponsible

quoting, I resent that. I resent Mr. Berglund from February 19, I understand something was faxed from John Doyle, until March 12, that he didn't have time to come and talk to me and say boy, this is a lot different than what I've seen on—heard you testify to what we talked about before the House. I'm—I'm indignant about that. Now, I'll be quiet, put my indignity aside and be open to your other questions.

SENATOR JUNGE: Thank you, Ms. Burke Moore. Questions? There does seem to be an inconsistency on the charging, the definition of charging. Because you're basically, you said something different than what the Lieutenant said basically. Can you explain that?

KATHERINE BURKE MOORE: Madame Chair, members of the committee, I did say that they are not charged and I probably was sloppy in saying that. One of the things to go back to arrest and charge. Arrest to me is not the same as charge. Mr. Berglund is saying it is. Arrest is taken into custodial arrest and then given an Intoxilyzer test. Charging—the information that I had from law enforcement was that they weren't charged or convicted and that's what I was differentiating between the arrest and that's where I get the additional 1,800—and the charge or conviction prosecution. Mr. Berglund is kind of putting the arrest and charge together. So on my part, I did hone in on charge that they're not charged. Mr. Asleson or Captain Asleson would have the better information on that than I would.

SENATOR JUNGE: Mr. Berglund called you a personal and professional advocate for the .08. Did you wish to respond to that?

KATHERINE BURKE MOORE: Madame Chair, I guess one way that I'd respond is that—it's in my letter, what's interesting is that during the conversations after the flyer was handed down, I spoke with Mr. Berglund briefly and I was angry about it. I don't disagree with that and he did not ask me to send him a letter. I told him I would not speak to him since he was so fond of misquoting me. I would instead send my comments to him in a letter. I think you may, he said he would accept it. But, here I'm kind of going around in circles here, but in those conversations I had someone say to me, one of the lobbyists, "We didn't even know whether you supported an .08 or not." And my response was, "You know, what I think of personally, does not really matter. I am here representing the Department of Public Safety and on this particular

bill, the Department of Public Safety has determined to support it." I haven't testified to that. You'll notice in my testimony before the committees, I don't say, "I am here to support .08." Because that is not my role. My role is to give you information. I have not been in any legislator's office to talk about .08 and how they should vote on it and you can ask every legislator. The only people I've worked with are the people who've asked me on this bill questions. So, do I support it? Yes, I do and I did happen, since they asked me, I personnally support it as well. But that is not my role before the Legislature. My role is to give you information so you can make your own decision and I have not, you can ask every legislator here, I have not been in anyone's office, including my own legislator, my own senator, my own representative. I have not taken the time and I don't do that even though I could do that on my own time because I think, in my position, I shouldn't do that. That's not my role.

SENATOR JUNGE: Ms. Burke Moore, have you had a chance to look at the letter from Tucker Carlson.

KATHERINE BURKE MOORE: Yes, Madame Chair, I have.

SENATOR JUNGE: And he is quoting you there. Is this an accurate, accurate of your conversation, to your recollection?

KATHERINE BURKE MOORE: Madame Chair, some of it is. Some of it is also accurate as to what I testified to, what you'll see in fiscal notes, but the part that they quote me in, where you actually see quotation marks in the third paragraph, that is absolutely false. "2-5 percent were being charged with DWI." I don't know what, I've never had a number for that, I still don't have a number of who were being charged. So, they're putting numbers in my mouth. "Few, if any," being charged or convicted. Yes, I did say that in the conversation. But this "2-5 percent were being charged with DWI." No, I've never said that.

SENATOR JUNGE: Finally, Ms. Burke Moore, the issue here and I think Mr. Berglund identified it fairly well, and that is the issue of "knowingly," okay? I think very appropriately come forward and said basically, "I've made a mistake, here's an apology, not intentional, you know, and that's what happened and that's the truth of the matter, and I had no knowing intent to mislead, which is the issue that's before us." Would you address that issue from your

perspective?

KATHERINE BURKE MOORE: Madame Chair, from my perspective, I don't know if I can speak to what somebody knows and what somebody doesn't know. I can only speak from what I see. I believe that Mr. Berglund knew. One reason, Mr. Berglund, I do believe knows the difference between arrest, charge, convicted. I believe Mr. Berglund knows the definition of benign, as well. If you look at the timing on these things. I spoke with Mr. Carlson and I wish I had made a notation because I don't make a notation every time I speak with someone on the telephone. I believe I spoke with Mr. Carlson before there were any hearings on this issue. I believe, it was my recollection, but I don't know for sure, I believe it was the first Monday in February, because I was out of the office on the Friday before that and that's when I got his message and returned the call the following Monday. That was before either the House or Senate finance committee. Now he's getting different information. By the way, and I didn't know if he was a lobbyist, I had no idea. I just knew he was the governor's son, but that wouldn't change what I would have said to him. I don't ask people who call me, to ask for information about anything. I mean, I have three and a half million customers who are licensed drivers. Anybody can call me and ask me a question. I'll given them the information that I need. I just—some of it doesn't add up with the timing of things. I spoke to Tucker Carlson I believe in early February, could have even been early January, but I don't think so. The Senate finance committee was on February 11. That's where we heard Mr. Berglund talk about people driving home safely. This is where we heard Mr. Berglund talk about that they are arrested for speeding and they are given the PBT. We don't even hear the Intoxilyzer. I talked to him the next day, February 12, before the House committee. He changes some of his testimony that afternoon when we actually both testified before the House committee. That's February 12. Now, somewhere between the time Mr. Carlson and I had a conversation, a telephone conversation, they've decided to take his information, and not the information from my testimony, not the information that I've shared with Mr. Berglund before the committee, but an individual telephone conversation and put that together as a flyer and quote me. That's what—to me—it doesn't add up to not being knowingly. It just doesn't work for me. I think there was some

intent to use my position and the fact that I give statistics and numbers to influence the Senate. But that is only my personal perception. Oh, I have one other statement, if I may. Mr. Berglund I thought was interesting—he said it is correct like I said earlier, I follow the Driver and Vehicle Services bills that go through the Judiciary and Crime Prevention—we have others—we divide up the bills because so many effect us. And I show up at every committee. Senator Spear has complimented me that if he needs something from me, I'm there and I've got the stats. He's done that publicly. I don't go and stand outside the Senate chambers when a bill is up. I rarely ever do that. I have a Department to run. The legislative session to me is a juggling act, just trying to do everything I do the rest of the year and then also spend a lot of time over here. I happen to be outside the Senate chambers during the testimony or the presentation of S.F. 2099 because Senator Marty called the commissioner's office and said could you have a few staffers outside chambers so if there's any statistics or questions, if we need to get information in and out, so I was there. I wouldn't have been there if Senator Marty hadn't asked. Neither of us anticipated the flyer to have been there. Mr. Berglund's contention that he knew I'd be there and I'd be able to set the record straight if it was wrong, I don't know how he'd know I'd be there. I have never been outside the chambers unless it was just to run and provide somebody information and run back to my office. I don't stand outside the Senate chambers. I don't have time to do that unless I am requested to.

SENATOR JUNGE: All right, thank you. Are there other questions, Senator Marty, counsel or members? Okay, thank you very much for your time and testimony. Oh, I'm sorry, yes, go ahead, Mr. Berglund.

JOHN BERGLUND: Just one brief comment. It's very minor. I forgot earlier. I did believe that Ms. Burke Moore would be outside the Senate chambers. She indicated that she normally isn't. That's fine. But I wanted to add, I knew, I knew or certainly anticipated that had the amendment been successful, repeat offenders, that there was going to be a reconsideration likely the following day or two days later. So I certainly anticipated that and certainly knew that if I'd given some false information, that that could have killed us, could have absolutely killed us, and would never have intended in doing that. Thank you.

SENATOR JUNGE: Yes, you do need to state your name.

CHARLES HALL: Okay, Charles L. Hall. I am a registered lobbyist as of this moment and I represent the Minnesota State Bowling Proprietors as their chair of their governmental affairs committee, and I've done so since about 1980. I have lobbied both the Senate and the House since 1982, and I have lobbied a lot with John Berglund and this is about ethics. And I think that if a person would be fair and honest with themself we have seen a lot of people make mistakes and make misstatements that after they go out through the door, they might say oh-oh, I created a boo-boo there and they're really sad and sorry about that. I think there's not a legislator here that doesn't make mistakes. And so this is about ethics and I was thinking back there just as an average person how I would feel with my character and my background and with what people think of me. I believe they think of me. That if I was sitting here like John is, I would just feel absolutely dismayed. I would be busted up. I would be hurt to the core. I am hurt like that, right now, Madame Chair and Senator Marty, because I know John Berglund. I know him like a brother. I have said many, many times, this is brother John. I do not know of another person, and I know a lot of people, and if you would like to have me give you a background of things I've done over my life, I think it would be impressive to you. I do not know of one person, of all the people I know, that I would put anybody ahead of John Berglund as being ethical. He is as pure as they come. And for him to sit here with the scrutiny and the question after question after question—the same questions and supposedly not understanding it, and turning it around and misconstruing what he says and then coming back and ask that question again, drives me and compels me to come up here and say that I wonder really what's happening here. I feel badly for John, I feel badly for other lobbyists. My intent is tomorrow is to send a resignation in as being a lobbyist anymore. I don't want to be part of that. I don't know what I would do to myself if I was brought up for making a simple mistake. He's only human, Senator Marty's only human, and Madame Chair, you're only human, we all are, and committee members. We all make mistakes, and when you persecute a person as heavily as this has been going on, the same, if it was just that one question, if they just asked the one question and they'd get his answer and they'd go along their way, that's fine. But when you have other people coming in here making

SENATOR JUNGE: I think you've raised some good points as to what the role of the committee is and the role of the committee is to basically look at the complaint before us and to determine whether or not there is: number one, a basis for the complaint and number two, if so, what would be the sanctions, if any, that would be imposed. And that is all that we're here to judge today and that's why the questions from all of the members to determine the facts because I, as one person of the committee, did find some conflicting facts that needed to be flushed out, I think to have a good overview of the situation. Senator Marty, my sense is because I do have, still some sense of conflicting facts here, that I would like to offer the two main parties one more chance to provide any written comments that you would like to—that if you feel weren't covered or, upon reflection, would have preferred to have said this or that, I want each party to have that opportunity to do that. So, Mr. Berglund if you can, you don't need to, but if you want to you can submit written comments for the whole committee, counsel, Senator Marty, so that we can include that in our deliberations. And I would just suggest by Friday if that would be possible, because I would like to try to tie this up early next week. If that's not possible, we can certainly see if there's some more time.

JOHN BERGLUND: My only request, Madame Chair, if we do that is that I would have an opportunity to respond to anything that is submitted in writing.

SENATOR JUNGE: And vice versa, I suppose.

JOHN BERGLUND: Absolutely.

SENATOR JUNGE: Okay, alright, that is appropriate. But the first thing would be submit it Friday and maybe your response by Monday or Tuesday, if that's not too tight of a time schedule. Is that all right, Ms. Burke Moore? I think it would probably be Ms. Burke Moore or through Senator Marty, or whatever or however you want to do that. And then Mr. Berglund. So I would—I think it would be helpful to me because I really do want to sit back and reflect on the information that we had today and I thought it was an excellent hearing and good testimony on both sides. It will be helpful to us. My hope then is for us as a subcommittee to try and reflect on this and come to some consensus on whatever we decide to do. And that's what we've always done in these cases and that's try to come up with something that all four of us can agree

STATE OF MINNESOTA)

) ss.

COUNTY OF RAMSEY)

CERTIFICATE

I, Marcia Seelhoff, an employee of the Minnesota Senate, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken by me on the dates and times stated, in the matter of John Berglund.

Marcia Seelhoff

Dated: March 30, 1998.

Subscribed and sworn to before me this 30th day of March, 1998.

Margaret J Collins

Notary Public

MARGARET J COLLINS
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Commission Expires Jan. 31, 2000

2) Lobbyists and members of the public should have the same right to bring complaints against members of the legislature as members have to bring complaints against lobbyists. In no other court of judgment in Minnesota does a person accused not have the right to also accuse.

3) Potential sanctions against lobbyists should be specified in the rules of the Senate. It is unclear whether the Senate has any power to restrict the 1st Amendment Rights of lobbyists and their employees.

4) The Senate must take precautions to guard against the process being used to further a anyone's political or legislative agenda.

5) By rule, the Senate should require the member to publicly apologize to lobbyists against whom an unsubstantiated or frivolous complaint has been filed.

6) If a lobbyist's reputation and ethics are to be questioned in a public meeting, no member of the public (including lobbyists) should be admonished by the Subcommittee Chair to refrain from discussing that matter with the member of the Subcommittee. If the agenda is too sensitive for full public input, you should meet in closed Executive Session.

Lobbyists enter the Capitol each day with two commodities: their ideas and their reputations. If the Senate rejects today's idea, a lobbyist can return tomorrow with another. But when the Senate takes away a reputation, it can never be restored.

The Senate should proceed with great caution before passing judgment about individuals who are powerless to work within the process which judges them. The precedent being set by the Subcommittee on Ethical Conduct is very dangerous.

We respectfully request that Subcommittee members should accept Mr. Berglund's apology and dismiss its current deliberations, so that a more thoughtful process can be considered.

Respectfully submitted on behalf of the MGRC Board of Directors.

Joan Archer
President, MGRC
Vice President for Government Relations
Minnesota Bankers Association

Scott Lambert
MGRC Legislative Chairperson
Director of Government Affairs
Minnesota Auto Dealers Association

cc: Senate Majority Leader Roger Moe
Senator Steve Novak,
Senator Denny Frederickson
Senator Roy Terwilliger

done as a last resort, and the person taking responsibility for the person being released is informed they cannot let the suspect drive a motor vehicle.

With regard to the phrase *"stopped for possible safety violations"*; drivers arrested for DWI are in fact stopped for traffic violations (be it weaving, over centerline, speeding, failure to dim, or an equipment or registration violation). The DWI arrest is ***not*** based on what violation they committed which lead to the stop, but <u>whether the officer had probable cause (once they were stopped) to believe the driver was under the influence of alcohol or another drug</u>. This is the important point – in order to determine that the driver was .08 or .09, the officer would have had to make a custodial arrest, impound the driver's vehicle (or release it to a responsible person), and read the driver the Implied Consent Advisory. The advisory states, *"I believe you have been driving, operating, or controlling a motor vehicle in violation of Minnesota's D.W.I. laws, and you have been placed under arrest for this offense."* The driver is placed under arrest for Driving While Under the Influence of Alcohol. The officer, by making this custodial arrest which leads to testing, <u>has deemed the driver to be unsafe</u>. That officer has committed him/herself to a custodial arrest which will take him/her from patrol duties for one to two hours (or more). (Hardly a time commitment an officer would dedicate to "benign behavior".) I have attached a copy of the Implied Consent Advisory which would have been read to the drivers Mr. Berglund refers to in his flyer.

<u>Therefore, the majority of people driving at .08% or .09% were NOT deemed by experienced law enforcement officers to be safe enough to drive (as stated in the flyer)!!! That is why they were taken from their car in the first place.</u> **They were arrested and taken into custody, for driving while under the influence of alcohol – not for driving with a cracked tail light or speeding, after they happened to have been drinking!**

I could ***imagine*** that a citizen completely unfamiliar with DWI laws or DWI enforcement could honestly be confused about this – <u>maybe</u>! But Mr. Berglund told me during a radio interview on March 4, 1998 that he is an attorney, and a former prosecutor of DWI laws. The process of arresting a DWI suspect, and the reading of the Implied Consent Advisory, is the same now as when Mr. Berglund says he was prosecuting these cases. It is beyond me to believe that any attorney, and especially a prosecutor, could "misunderstand" that drivers who are taken into custody are allowed by officers to drive home.

The last paragraph in the flyer says, *"Let's follow the example set by Minnesota's law enforcement community and not persecute responsible social drinkers."* It seems clear that Mr. Berglund is again referring to the estimated 1,800 drivers who tested .08 or .09. Again, if these drivers were ***"safe enough to drive"***, they wouldn't have

ICR _____

MOTOR VEHICLE IMPLIED CONSENT ADVISORY

(Effective August 1, 1997)

Time Started _____ Location read: _____

_____ , I believe you have been driving,
(person arrested)
operating or controlling a motor vehicle in violation of Minnesota's D.W.I. laws "and you have been placed under arrest for this offense," or "you have been involved in a motor vehicle accident resulting in property damage, personal injury, or death."

_____ (Check when read) 1. Minnesota law requires you to take a test to determine:

(Check applicable portion when read)

_____ a.) if you are under the influence of alcohol

_____ b.) If you are under the influence of hazardous or controlled substances, or to determine the presence of a controlled substance listed in schedule I or II, other than marijuana or tetrahydrocannabinols.

_____ (Check when read) 2. Refusal to take a test is a crime.

_____ (Check IF read) 3. **(READ ONLY IF PROBABLE CAUSE TO BELIEVE VIOLATION OF CRIMINAL VEHICULAR HOMICIDE AND INJURY LAWS)** Because I also have probable cause to believe you have violated the criminal vehicular homicide or injury laws, a test will be taken with or without your consent.

_____ (Check when read) 4. Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone will be made available to you. If you are unable to contact an attorney, you must make the decision on your own. You must make your decision within a reasonable period of time.

_____ (Check when read) 5. If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test.

Do you understand what I have just explained? _____

Do you wish to consult with an attorney? _____

Time telephone made available: Start: _____ Stopped: _____

Will you take the (Breath) (Blood or Urine) test? _____

(If person refuses:)
What is your reason for refusing _____

_____

Name of Officer: _____ Time Completed: _____
(PRINT name of officer)

Date: _____

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

Driver and Vehicle Services

445 Minnesota Street, St. Paul, Minnesota 55101
Phone: 612/296-6911 TTY: 612/282-6555

March 27, 1998

Alcohol & Gambling Enforcement

Bureau of Criminal Apprehension

Capitol Security

Crime Victim Services

Driver & Vehicle Services

Emergency Management / Emergency Response Commission

State Fire Marshal / Pipeline Safety

State Patrol

Traffic Safety

The Honorable Ember Reichgott Junge
205 State Capitol
St. Paul, MN 55101

Dear Senator Junge:

As you requested, I have reviewed the materials handed out at the March 25, 1998, Subcommittee on Ethical Conduct. I have the following information that I would like the subcommittee members to review.

I have reviewed the letter to Mr. Berglund from Tucker Carlson. I agree with the information in the second paragraph of the letter. That is consistent with what I have testified to and what I said in subcommittee. The information in the third paragraph is another example of using misinformation to confuse the issue. What I did say, and have said again and again, is that all 1800 are currently arrested for DWI. The 2%, 5% and 98 % quotes are false. Please note: quotation marks are used around information that I did *not* say, yet not used in the preceding paragraph which contains information that we all agree I did say.

I was asked a question Wednesday` that I had not anticipated would be directed to me. I was asked whether I thought Mr. Berglund "knowlingly" provided false information. Having reviewed the information provided to the subcommittee, including the Carlson letter and John Doyle fax (which I had not seen before) I feel I can give the subcommittee members information to assist them in making that decision.

First, Mr. Berglund claims that he is simply ignorant. He did not realize that when I was speaking about arrests, that those arrests were for DWI. I would like to put that claim into perspective. Look at the testimony before the Senate Crime Prevention Finance Committee and the House Judiciary Finance Committee. The contexts of the discussion was on the proposed .08 bills, *not* about speeding or equipment violations. Please note the transcript from the House Judiciary Finance Committee. Rep. Entenza stated in the first paragraph, "In other states that have adopted .08, there is a significant drop in the number of *DWI arrests* due to the deterrent effect. We are asking Public Safety to report to us on whether or not that happened or did not happen. The projections in the bill presume we will have 1800 additional lawful arrests." Rep. Skoglund and Rep. Entenza then exchanged statements about the source of the 1800 additional arrests. Rep. Murphy then recognized me and I stated, "...I do

I corrected Mr. Berglund once. I should not need to correct him a second time. His claim to your subcommittee was that the flyer was produced in haste. Therefore, he was unable to verify it with me. Mr. Berglund had three weeks to speak to me about the conflicting information he received by fax. He did not bother to do so.

In conclusion, I would ask that the committee look again at the flier and the statements attributed to me and then reread Mr. Berglund's Senate Crime Prevention Finance Committee testimony, "...[T]hey are stopping people for speeding, equipment violations, they smell alcohol and they are giving them the PBT....the police are not arresting even though they have the power to do that. They have the power now but they let them drive home after giving them a speeding ticket. Because they do not believe they are impaired." The statement in the flyer closely tracks Mr. Berglund's testimony, not mine.

Why didn't the Minnesota Licensed Beverage Association quote their own lobbyist, John Berglund? They chose, instead, to *mis*quote me.

Had this been a simple misunderstanding, had I not had a conversation and corrected Mr. Berglund's inaccuracies regarding the 1800 arrests, his apology may have sufficed. However, the chronology of events and the subsequent distribution of a flier containing false information using my name, my position in public safety and my role of providing numbers to the legislature, deserves this subcommittee's close scrutiny. I can provide you with additional information as needed. I can be reached at 296-4544.

Sincerely,

Katherine Burke Moore
Director

cc: Senator Marty
Donald E. Davis, Commissioner
Dept. of Public Safety

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

John F. Berglund
Executive Director
2353 Rice Street
Suite 139
St. Paul, MN 55113
612-486-0910
800-967-2029
Fax: 612-486-0786

March 27, 1998

TO: Members of the Rules and Administration Special Subcommittee on Ethical Conduct

Senator Ember Junge
Senator Dennis Frederickson
Senator Steve Novak
Senator Roy Terwilliger

On March 12, 1998 a flyer from the Minnesota Licensed Beverage Association, of which I am the executive director, was distributed on the Senate floor at my request during the debate on the .08 BAC issue. The flyer was in error in attributing to Kathy Burke Moore, Director of the Minnesota Department of Public Safety's Driver & Vehicle Services, a comment that 98% of 1800 people testing at .08-.09 BAC drove themselves safely home.

Senator Marty, within minutes of the flyer being distributed had talked to Ms. Burke Moore and announced on the senate floor that the flyer was not correct, and as a result, it did not impact the outcome of the debate.

This mistake was not done knowingly or with any intent to mislead. I have apologized for this mistake to Ms. Burke Moore and to the members of the Minnesota senate. The ethical complaint before you alleges one incorrect statement attributed to Ms. Burke Moore, that "98% drove themselves safely home or wherever they were headed before being stopped." The issue before you is whether that incorrect attribution was "knowingly".

The burden of proving "knowingly" by clear and convincing evidence rests on the complainant. The only evidence submitted was Ms. Burke Moore's testimony that she believed it was knowingly. There was no evidence that Ms. Burke Moore and I ever discussed whether or not these people not charged with DWI ever drove home. In fact, the only items discussed with Ms. Burke Moore, on or about February 12, 1998 was whether the 1800 people represented new arrests and what percentage might be repeat offenders.

The mistake in the flyer was not knowingly. In addition to the lack of evidence on the point by complainant, I submit it was not knowingly based on the following:

c. The "timing" theory is not borne out by the facts. The flyer in question was intended to be distributed at the Senate Crime Prevention Committee on February 20, 1998, as evidenced by the urgency in the fax dated February 19 from the drafter of the flyer, John Doyle, to myself. The only reason I did not distribute it at the committee was because I did not gain possession of the flyer in time.

The flyer, having missed the deadline for the Senate committee meeting, was intended by myself to be distributed to all senators via their Senate mailbox. At a meeting of other lobbyists supporting my association's position on the issue, without examining the flyer, they suggested and convinced me not to mail anything else but to distribute it on the senate floor which offered a better chance, however small, of having it read.

3. I did not draft or produce the flyer. This is not to suggest that I do not and have not taken responsibility for the flyer, because I do and I have. But, to the issue of "knowingly" this is quite relevant.

The fact is, as evidenced in the Doyle fax of February 19 and the March 24, 1998 letter from Tucker Carlson, this flyer was drafted by Mr. Doyle in Washington D.C., at my request, after he had a conversation with Mr. Carlson, who had reported that he heard the information from Ms. Burke Moore. In his letter, Carlson says Burke Moore never said to him that 98% drove themselves home. I was not aware of that until after the flyer had been corrected and had no reason to disbelieve the contents of the flyer, both as to the attribution to Burke Moore and to what would appear a reasonable/logical conclusion that if these people are not charged with DWI they would go home, meaning they would drive home.

3. A contradiction between the testimony at the hearing between the state patrol officer and Burke Moore. Without the transcript (it was not available at this time of writing) I must rely on what I believe I heard and my notes.

   I believe the officer, in reference to the 1800 people tested at .08 - .09, said these people are still "charged" with DWI, for under the influence and are issued a citation.

   This is in direct contrast to Burke Moore's testimony who claims these people are not charged. When asked by Senator Junge about this contradiction I do not believe Burke Moore responded in substance.

4. The subcommittee may have been left with the impression by Burke Moore that in a brief conversation with her she corrected any misunderstandings that I might have had. That is not true. As evidence of her contention Burke Moore claimed at the subcommittee hearing that I changed/corrected my testimony on February 12 from my testimony on February 11 after she had talked to me. That is absolutely false and is documented by a review of the two transcripts.

   As I indicated previously, Burke Moore and I did have a brief conversation on or about February 12 related to the fiscal note. The only two issues briefly discussed were whether the 1800 were "new" arrests or not and the percentage of those that would be repeat offenders.

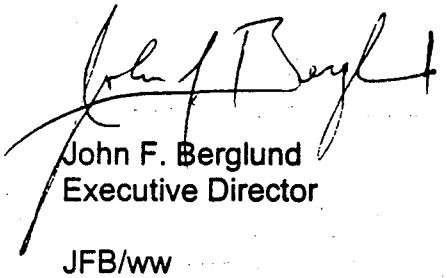
   A review of the transcripts, provided by Burke Moore, of the February 11 and 12 hearings documents my understanding and knowledge that these 1800 may not be additional arrests but that if the .08 BAC proposal were adopted these would be additional DWI arrests.

   On both February 11 and 12 Burke Moore said the 1800 are not "additional arrests" and on February 12 she said, "I do not say in my fiscal note that there will be additional arrests. Those arrests are already occurring."

Conclusion

I have apologized for my error numerous times, in two letters, and before the subcommittee, as I do now. For all the reasons above, and for my understanding of the issue when the flyer was distributed, I did not knowingly allow for the flyer to incorrectly make an attribution to Ms. Burke Moore. I respectfully request that my apology be accepted and the complaint be dismissed for a lack of a finding of "knowingly".

Respectfully submitted,



John F. Berglund
Executive Director

JFB/ww

cc: Senator John Marty
Peter Wattson

This is the first time to our knowledge that a complaint against a lobbyist for providing false information has been pressed by a complainant. It is also the first time, to our knowledge, that an innocent third party has been a principal in the complaint. The Subcommittee has a responsibility to hear the third party's concerns as well, particularly when the third party alleges that she had been wronged by the lobbyist and that her reputation had been damaged.

Your concerns go to the very heart of the rule prohibiting improper conduct by a lobbyist. If you believe the Senate should not have a rule, or the rule should not be enforced by the Senate, this is a matter for consideration by the full Rules Committee. We strongly believe the rule is essential to insure the integrity of the legislative process. The rule should be enforced by the Senate in full and fair hearings.

Given this context, we are always open to improving the procedures of the Subcommittee on Ethical Conduct, and appreciate your efforts in this regard. With regard to the changes you suggest in our procedures:

1. Contrary to your understanding, Rule 9a of the Subcommittee's rules of procedure does give the accused the right to cross examine his accusers. Mr. Berglund was given a copy of those rules on March 17. We acknowledge that it would have helped to remind Mr. Berglund during the hearing of his right to cross examine witnesses and to sit at the table. In the future, counsel will be asked to review the rules of procedure on the record for the parties and the public. Mr. Berglund was specifically asked if he had counsel, and he affirmatively waived his right to counsel.

2. Again, contrary to your understanding, lobbyists and members of the public do have a right to make a complaint about improper conduct by a member of the Senate. All they need to do to invoke the jurisdiction of the Subcommittee on Ethical Conduct is have another member of the Senate file the complaint in writing under oath. In lieu of that, they may file a complaint with the President of the Senate, who may choose to seek an advisory opinion from the Subcommittee.

3. You ask that the possible sanctions be spelled out in the rule. Article IV, § 25 of the Minnesota Constitution gives each house the power to "punish by imprisonment for not more than 24 hours any person not a member who is guilty of any disorderly or contemptuous behavior in its presence." Minn. Stat. § 3.15 provides that the imprisonment will be by confinement to the Ramsey County jail. As more relevant to recent proceedings, the Subcommittee has determined disciplinary action on a case-by-case basis ranging from apology or censure, to expulsion (member) or ban from appearance (lobbyist).

This is an adversary proceeding, not a normal legislative hearing. The adversaries have the right to call the witnesses they choose. That is why we do not solicit testimony from the public. However, as in this case, we may allow public testimony when no objection is raised by the parties.

We hope this letter eases your concerns about our procedures. To the extent you have further points you wish to make, you may address them to us in writing, and we will provide them to the other members of the Subcommittee.

We appreciate your efforts to work within the process to improve it.

Sincerely,

Ember Reichgott Junge, Chair
Subcommittee on Ethical Conduct

Dennis R. Frederickson, Co-Chair
Subcommittee on Ethical Conduct

cc: Sen. Steve Novak
Sen. Roy Terwilliger
Sen. John Marty
Sen. Roger Moe
Sen. Dick Day
John Berglund
Peter Wattson

Senator
John Marty

Senate

State of Minnesota

March 31, 1998

Senator Junge, Chair
Senate Subcommittee on Ethical Conduct
206 Capitol
St. Paul, MN 55155

Dear Senator Junge and members,

I have reviewed the additional information provided by Mr. Berglund, as well as the letters from Katherine Burke Moore and Captain Mike Asleson. Ms. Burke Moore and Captain Asleson have rebutted specific points in Mr. Berglund's letter. As a result, these comments summarize the overall complaint.

I concur with the point in your March 30 letter on this issue, "The Senate has an inherent right and constitutional obligation to demand the highest standards of conduct from those who appear before it in a professional capacity." This does not mean that we expect perfection. In fact we expect mistakes will be made. When there is a simple mistake made, an apology and attempt to set the record straight is sufficient. I have never before filed a complaint against a lobbyist for violation of Senate Rules because we all make mistakes.

But this is not a simple mistake. It is one of a knowingly false statement or one that is made with reckless disregard for the truth. Neither is acceptable behavior, even if Mr. Berglund made an "apology".

It is extremely difficult to prove that an individual "knowingly" distributed false information. However, to summarize the case for knowingly distributing false information, I quote Captain Asleson's letter,

> *"Therefore, the majority of people driving at .08% or .09% were NOT deemed by experienced law enforcement officers to be safe enough to drive (as stated in the flyer). That is why they were taken from their car in the first place. They were arrested and taken into custody for driving while under the influence of alcohol - not for driving with a cracked tail light or speeding after they happened to have been drinking!*
>
> *I could imagine that a citizen completely unfamiliar with DWI laws or DWI enforcement could honestly be confused about this - maybe! But Mr. Berglund told me during a radio interview on March 4, 1998 that he is an attorney, and a former prosecutor of DWI laws.*

MINNESOTA DEPARTMENT OF PUBLIC SAFETY

Driver and Vehicle Services
445 Minnesota Street, St. Paul, Minnesota 55101
Phone: 612/296-6911 TTY: 612/282-6555

March 31, 1998

The Honorable Ember Reichgott Junge
205 State Capitol
St. Paul, MN 55101

Dear Senator Junge:

I have reviewed the other letters that have been submitted for your subcommittee's review. As you suggested at last week's hearing, I am providing additional comment on the letters.

Mr. Berglund claims confusion and haste as reasons the flier was produced and distributed with errors. On page 2, Item 2, paragraph (a), he says he anticipated my being outside chambers and saw me prior to distributing the flier. Here was another opportunity for Mr. Berglund to review the information attributed to me. He did not exercise that opportunity.

On page 4, Item 1, Mr. Berglund does not believe me when I say that law enforcement must have some evidence of impairment before an intoxilyzer test is given. Minnesota Statutes, section 169.121, subdivision 6, clause (a) states, "When a peace officer has reason to believe from the manner in which a person is driving, operating, controlling or acting upon departure from a motor vehicle, or has driven, operated or controlled a motor vehicle, that the driver may be violating or has violated subdivision 1 or section 169.1211, the officer may require the driver to provide a sample of the driver's breath...". You will see the probable cause requirement in Minnesota Statutes, section 169.123, subdivision 2 as well, which is specific to the chemical test taken with an intoxilyzer.

On page 4, item 2, Mr. Berglund, an attorney, continues to use hearsay as the source of his quotations. I did not say 2% - 5% to Tucker Carlson or anyone else. I have no such figures, the Driver's License System has no such numbers. Mr. Carlson's letter states that "probably 2-5 percent were being charged with DWI." Now note the language in the flier, "She estimates that as few as 2% of those driving at that BAC level were **arrested** for DUI." The statement in the flier does not even quote Mr. Carlson's letter correctly.

Alcohol & Gambling Enforcement
Bureau of Criminal Apprehension
Capitol Security
Crime Victim Services
Driver & Vehicle Services
Emergency Management / Emergency Response Commission
State Fire Marshal / Pipeline Safety
State Patrol
Traffic Safety

DVS Driver & Vehicle Services

I have also reviewed the testimony from the March 25 subcommittee meeting where Mr. Berglund tries to distance himself from the contents of the flier. However, on page 33, lines 5 through 8 of the transcript, he admits that he contacted John Doyle regarding production of the flier. On page 34, lines 1 through 2 of the transcript, he tells us he asked for two edits. After being asked by Senator Junge about the source of the broken tail light, improper lane change language in the flier, Mr. Berglund states, (page 46, lines 8 through 10) "No, I believe that came from me, Madame Chair, Senator Marty. I used the word et cetera, okay, as a kind of catch all. But the point was, that if these people are stopped and tested at .08,.09 and then not charged and if we're making the argument that they are not impaired...". How can Mr. Berglund admit to the information above and simultaneously say he did not produce or draft the flier?

"We're making the argument that they are not impaired..." (page 46, lines 10 and 11). Yes, John Berglund and the Minnesota Licensed Beverage Association are making that argument. They are certainly entitled to do so. They are not, however, entitled to use my name and title to make that argument when I have never said that or anything like that.

Sincerely,

Katherine Burke Moore
Director

cc: Commissioner Donald E. Davis
Dept. of Public Safety
Senator John Marty

a. I did not change my testimony.
b. Burke Moore never discussed with me privately that the 1800 arrests were "DWI arrests" or were for impaired driving; she only said they were not "new" arrests. Although she has subsequently claimed they were (Burke Moore letter dated March 13, 1998 and transcript, p. 15, lines 24-26), this is in direct contrast to:
    1. My testimony that evidence of impairment is not legally necessary under the .10 per se law (transcript, p. 28, lines 3-23), which was never contradicted by Burke Moore or the state patrol officer.
    2. Comments from the state patrol officer, who said, "... drivers arrested for DWI are in fact stopped for traffic violations (be it weaving, over center line, speeding, failure to dim, or an equipment or registration violation)." The officer continued by claiming a determination is later made that the driver is unsafe, a point I submit is not legally correct or necessary and essentially digresses from the issue of "knowingly" before the committee and moves to the merits of the .08 BAC issue.
c. Burke Moore's testimony was consistent in not specifying that these arrests were "DWI arrests" or for "impaired driving."
d. Burke Moore never corrected my testimony even though she had the opportunity to do so on both dates before the committees.

2. I had no reason to believe the driving home safely wasn't discussed by Burke Moore and the other industry lobbyist when the flyer was drafted by a third individual in Washington D.C.

3. My professional experience led me to believe the statement driving home safely would be true, that:
    a. Those not charged with DWI would be sent home, and

I respectfully request that the apology be accepted and the complaint be dismissed for lack of a finding of "knowingly".

Respectfully submitted,

John F. Berglund
Executive Director

JFB/ww

cc: Senator John Marty
Peter Wattson

MANSFIELD & TANICK

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PLEASE REPLY TO MINNEAPOLIS OFFICE UNLESS BRANCH OFFICE CHECKED BELOW:

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1021 EAST BANDANA BLVD.
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☐ WEST SUBURBAN OFFICE:
5841 CEDAR LAKE ROAD SO.
ST. LOUIS PARK, MN 55416
TEL. (612) 525-2465
FAX (612) 525-1633

April 3, 1998

Joan Archer
President - Minnesota Governmental
Relations Council
Vice-President for Governmental Relations -
Minnesota Bankers Association

Scott Lambert
Chairperson - Minnesota Governmental
Relations Council
Director of Governmental Affairs - Minnesota
Automobile Dealers Association

Re: Senate Subcommittee On Ethical Conduct

Dear Ms. Archer and Mr. Lambert:

I am writing at the request of the Minnesota Governmental Relations Council (MGRC) to furnish an analysis of the process followed by the Subcommittee on Ethical Conduct. This request was triggered by a recent hearing by the Subcommittee concerning one particular incident. However, I have been asked to focus on the broader issue of the process in general, rather than one specific instance.

I have reviewed the background of the recent proceeding, the Senate Rules in general, rules governing the Subcommittee; and correspondence between the MGRC, Senators Junge and Frederickson, Chair and Co-Chair, respectively of the Subcommittee. I have also conducted independent research on certain Constitutional issues in connection with the Subcommittee's process.

While this review has not been exhaustive, after preliminary examination, I have concluded that there are a number of aspects of the Subcommittee's current process that are Constitutionally deficient, and other features that raise serious Constitutional questions. These shortcomings merit review and reform in order to comply with fundamental Constitutional principles.

MANSFIELD & TANICK

A PROFESSIONAL ASSOCIATION

It may be that Rule 76 is unnecessary altogether. Other laws exist that deal with similar subjects. For instance, Minn. Stat. § 609.425 makes it a felony to "corruptly" influence legislators by "deception." The "knowing falsity" provision of Rule 76 might be duplicative, redundant, and unnecessary. It also runs the risk of exposing an individual to punishment for what essentially amounts to criminal-like behavior, without the protections of criminal law. It may be preferable, if knowing falsity is believed to have occurred, to pursue the matter through the criminal process, rather than through the adversarial process that does not embrace a number of important Constitutional protections.

The Subcommittee's Role

Although not explicitly stated in the Rules, the Subcommittee functions in a "quasi-judicial" capacity in reviewing complaints, as reflected in the March 30, 1998, letter from Senators Junge and Frederickson. The process is considered an "adversary proceeding" in which the Subcommittee is "acting in the role of a judge or jury." *Id.*, pp. 3-4.

The Rules do not state any sanctions that may be imposed in connection with adjudication of complaints. But potential punishments apparently can range from banishment from appearing before, or participating in, Senate proceedings, to "imprisonment" for up to a day, pursuant to Article IV, § 25 of the Minnesota Constitution. In addition to imprisonment under the State Constitution, the legislature can punish an individual for contempt by imprisonment until the end of the legislative session at which the wrongful act occurred. Minn. Stat. §§ 3.14 and 3.15.

Further, the name and reputation of an individual may be tarnished or otherwise damaged in connection with the Subcommittee's proceedings. That individual may have little recourse in connection with the proceedings. Because these are quasi-judicial proceedings, are conducted in an adversary fashion, and the Subcommittee sits in the role of prosecutor, judge and jury, it is necessary that the Subcommittee adhere to basic Constitutional and statutory rights.

There are, of course, substantial Constitutional issues with regard to imposing punishment upon lobbyists in connection with their legislative activities. Restrictions or limitations that may be imposed upon a lobbyist's ability to participate in the process, such as banishment, could constitute a prior restraint in violation

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Senate

State of Minnesota

April 9, 1998

Dear Senate Colleague:

Recently the Senate Subcommittee on Ethical Conduct completed its work on a complaint filed by a Senate member against a lobbyist. This is the first time the subcommittee has faced this issue since 1974, and we believe there are some fundamental issues involved about which members should be informed. Questions raised during this proceeding go to the basic premise of our Senate Rules and our right to enforce them.

As Co-chairs of the Subcommittee, we wish to address these questions and make recommendations for future consideration by the Rules Committee or subcommittee. We also attach the Subcommittee's findings unanimously adopted in the Berglund matter, as well as editorial comment about the process.

Does the Senate have a right to regulate the conduct of the lobbyists that appear before it?

Yes. Since 1961, the Senate has had a rule regulating the conduct of lobbyists and prohibiting the knowing distribution of false information. The Senate has an inherent right and constitutional obligation to demand the highest standards of conduct from those who appear before it in a professional capacity. Just as a court may impose professional discipline on an attorney, a legislative body may impose professional discipline on a lobbyist.

The rule is there to protect the integrity of the Senate process. We make decisions on behalf of the public we represent. We must have truthful information for the process to work. We firmly believe it would not be proper to cede that disciplinary responsibility to the Minnesota Government Relations Council (MGRC), as the Council suggests.

Is the Subcommittee required to investigate every complaint?

Yes. If a member submits a complaint in writing, the Subcommittee is **required,** under Rule 76, to investigate the complaint. That duty to investigate is not ended by an apology. In past proceedings against Senate members, apologies by the member did not end the proceeding, nor

not respond to private conversations or solicitations made to individual members outside of the record. Lobbying the committee is as inappropriate as lobbying a judge or jury.

Can politics and outside agendas be kept out of Subcommittee deliberation?

We firmly believe that outside political agendas have no place in our subcommittee ethics process. The precedent, practice, rules and structure of the Subcommittee severely limit that opportunity. The Subcommittee focuses on facts surrounding violation of a rule and works to develop consensus among four members. All subcommittee procedure and leadership decisions are agreed in advance by both co-chairs (opposite parties) and legal counsel.

To date, we believe the Subcommittee has succeeded under difficult and trying tests. In each of eight proceedings to come before us in recent years, we have achieved unanimous consensus despite equal division by party. In the most recent case, unanimous consensus was reached among four members who were also equally divided on the substantive .08 issue involved in the complaint.

What were the specific findings on the recent complaint against Mr. Berglund?

The subcommittee unanimously found, by clear and convincing evidence, that:

- The flyer falsely attributed to Ms. Burke Moore four statements she had never made.
- Mr. Berglund acknowledged and apologized to Ms. Burke Moore for one of the four statements falsely attributed to her.
- Three of the statements in the flyer were false in themselves. Mr. Berglund has not acknowledged that these statements were false.
- Sen. Marty failed to prove by clear and convincing evidence that Mr. Berglund knew that the statements in the flyer were false.
- Mr. Berglund should have verified whether Ms. Burke Moore had made the statements he attributed to her and was careless and negligent in failing to do so.

The subcommittee unanimously recommended:

- That the apology given by Mr. Berglund was appropriate but incomplete.
- That Mr. Berglund be required to acknowledge to the Senate and Ms. Burke Moore that he should have verified those statements he attributed to her, and that his failure to do so was careless and negligent.
- That upon receipt of the acknowledgments by the Senate, the complaint be dismissed.

We hope this information is helpful to Senate members with regard to recent proceedings. We also hope it will be useful to future members of the Senate Subcommittee on Ethical Conduct. All cases before our committee are cases of precedent, and none of them has been easy. Your input or response to the issues raised in this memorandum are welcomed.

Sincerely,

Sen. Ember Reichgott Junge
Chair, Senate Subcommittee on
Ethical Conduct

Sen. Dennis Frederickson
Co-Chair, Senate Subcommittee on
Ethical Conduct