

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2027

2005 SENATE JUDICIARY

SB 2027

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

Senate Judiciary Committee

Conference Committee

Hearing Date January 11, 2005

Tape Number	Side A	Side B	Meter #
1	x		0.0 - 311
Committee Clerk Signature <i>Maria L Dalberg</i>			

Minutes: Relating to the commission; to provide an appropriation transition & effective date for legal counsel for indigents defense services.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Vonette Richter - Legislative Council Reviewed Bill (meter 0.5) Att #1. Sen. Trenbeath question if the fiscal dollars reflected the setup fees for the operation.

Sandi Tabor - Asst. Deputy to the Attorney General's Office requested that the hearing to be continued Tue, 118/05. Sen. Traynor granted request.

Testimony in Opposition of the Bill:

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

Senate Judiciary Committee

Conference Committee

Hearing Date January 18, 2005

Tape Number	Side A	Side B	Meter #
1	X		00- End
		X	00 - 390
Committee Clerk Signature <i>Maura L Solvey</i>			

Minutes: Relating to legal counsel for indigents defense services.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Delmore Dist #43, Introduced Bill and was a member to the Criminal Justice Interim Committee. We will either pay now or pay later. Other states are already paying for this.

Rep Kemin, Dist #47 Bismarck and was a member of the Criminal Justice Interim Committee and Ind. Defendant Task Force Study Resolution for the second time. While the fiscal note is large, it will seem small in comparison to a law suit should we have one.

Jim Gange Office of the State Court Administration (meter 640) Gave testimony Att #1

Reviewed bill. Sen. Traynor asked Mr. Gange who sets salary for the Director, the committee?

Yes. Is this fund include the bill we passed last session for the \$100 Admin fee. (meter 1695)

Yes. Sen. Trenbeath when we are talking about the \$10.5 Million is that over and above the \$100

fee? No this would be a net deduction in the general fund request. It would be \$6 Million new dollars. **Sen. Trenbeath** are the public defenders employees of the state and contract attorneys are not. Who bears the liability for their performance or lack of performance? Independent contractors are required by contract to carry their own insurance. State employees would fall under state statute that governs liability.

Judge Gerald W. Vande Walle, Chief Justice Supreme Court. I appear in support of this Bill.

Our system is fragile to begin with no stress. Now we have stress. I do not like to go to committees with the threat of a law suit. With the scourge of the Meth, this is another facet of it. I do not think that it will be able to operate any longer with out real trouble. I like the flexibility that we can have both full time and contract defenders. This is a lot of money but there is no quick fix. We must repair the underlying system anything else will only buy you time.

Sen. Traynor referred to the actions of the other states were they Judicial of Legislative action.

Judge Vande Walle responded, both.

Sharry Mills Moore - President of the ND Bar Assoc. (meter 2550) Gave testimony Att #3 and headed out Review of indigent defense services in ND Att #2

Sharon Marton - Welsh County State Attorney (meter 3060) Gave Testimony Att # 4.

Lawrence P. Kropp - Attorney from Jamestown. (meter 3947) Gave Testimony Att #5.

Kent Morrow - Bismarck Attorney (meter 0.0 side b). Discussed the termination date of the contracts.

Judge Greenwood - Stated the conflicts of interests in current system As a judge we deal with these.

Kent Morrow - Attorney in Bismarck Att #6 gave testimony

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Senate Judiciary Committee

Bill/Resolution Number SB 2027

Hearing Date January 18, 2005

Additional Submitted Testimony :

.State Bar Association of ND Indigent Defense Task Force. #8

Robin Olson - Grand Forks Attorney #9

Christopher Dodson Executive Dir of ND Catholic Church #7

Testimony in Opposition of the Bill:

none

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

Senate Judiciary Committee

Conference Committee

Hearing Date January 24, 2005

Tape Number	Side A	Side B	Meter #
1		X	2000 - End
2	X		0.0 - 220
Committee Clerk Signature <i>Maria L Solberg</i>			

Minutes: Relating to the commission on legal counsel for indigents for the purpose of providing indigent defense services.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Sen. Trenbeath - submitted amendments from the Association of Counties to the bill (meter 2000) Attachment #1.

Ted Gladden - ND State Court Administrator (meter 2085) Attachment #2 . Responding to questions in regards to the fiscal impact. Discussed charts 2b and 2c. The counties tracking of sexual predators, Mental Illness, Guardians ad Litem, and custody investigations **Sen.**

Trenbeath stated that **Mr. Gladdens** letter states his case well. **Sen. Traynor** asked if this was in the judicial budget? The money's are not in our budget, it is in the counties budget. When the task force looked at the indigent defense bill they did not look at the costs of the sexual predator

commitment procedure or the mental illness commitment proceedings. We have included these.

Most of these are contracts and paid through the counties. Mr. Gladden referred to the letter addressed to **Bonnie Johnson** - Att 2d. Sen. Traynor asked if the additional amount needed was \$590 thousand? Yes, Mr. Chairman it would include all four categories.

Sandi Tabor - Deputy of the Attorney General The cost of the civil commitment or the moving of civil commitment was only touched upon, it was not dwelled upon. It is a little of a different issue then our focus of the 6th Amendment right to council in a criminal matter. Two topics were not even discussed and the counties were represented in the task force. The committees discussed how different the dollar amounts are so varied by department by counties. Senator Hacker questioned why these costs have grown at such a rapid rate in the last few years? Senator Triplett stated how the parties paying for a process or not due to affordability. (meter 3000). We also can not anticipate any rate of growth or what the future holds.

Jim Gange - Office of the Court administrator. (meter 3226) It is very important for us to address who the "state" is in reference. is it Supreme Court or Indigent Defense". We are aware of there being issues with "muddy waters"

Wade Williams - Assoc. of Counties discussed the counties costs and haw they have been trying to transfer it to the State. It should have been done when the courts had been consolidated. The court views "criminal" and "mental" issues different but should be together. There is no other department or budget to put this in.

Sen. Trenbeath stated concern that in the past the courts only ordered this if it was affordable and would this allocation open up extra spending? I can not answer that I am not a judge. I do not think the judge cares what organization is paying for it as long as the defense is being done.

Senator Hacker stated his concern over the rapid growth this budget has taken. Mr. Williams responded that the growth is not controllable. Senator Triplett stated her concern that if amendments are accepted that it would dilute the financial funding of the bill. **Sen. Trenbeath** responded that these things should have been included in this sections and should be in this as a matter of policy. **Sen. Nelson** agreed with **Sen. Trenbeath** but thought the "state" responsibility needed clarifications.

Testimony in Opposition of the Bill:

none

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Sen. Nelson made the motion to amend the amendment - Att. #1 with the changes to separate the "state" and the "supreme court" and **Sen. Trenbeath** seconded the motion. All were in favor.

Sen. Trenbeath made the motion to Do Pass the Amended Amendment and **Senator Syverson** seconded the motion-all were in favor, motion passes.

Sen. Trenbeath made the motion to Do Pass SB 2027 as Amended and **Sen. Nelson** seconded the motion all were in favor, motion passes.

Carrier: **Sen. Traynor**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

FISCAL NOTE
Requested by Legislative Council
03/25/2005

Amendment to: Reengrossed
 SB 2027

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The original bill estimated the cost of the administration for the Commission on Legal Counsel for Indigents at \$1,135,285. This has been reduced to \$815,671. The money was removed from 2027 and is appropriated under the Judicial appropriation SB 2002. The \$815,671 is being funded by reducing the budget for contract services by \$365,593, increasing the estimated revenue of the Indigent Defense Administration Fund by \$200,000, and carrying over \$250,078 in the 2003-05 judicial appropriation to 2005-07.

As of January 1, 2006, all moneys not spent for indigent defense administration as well as contract services would transfer to the Indigent Defense Commission.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Ted Gladden	Agency:	ND Supreme Court
Phone Number:	328-4216	Date Prepared:	03/28/2005

FISCAL NOTE
 Requested by Legislative Council
 02/17/2005

REVISION

Amendment to: Engrossed
 SB 2027

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$1,135,285		\$1,135,285	
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The original bill estimated the cost of the administration for the Commission on Legal Counsel for Indigents at \$1,135,285. This has been removed from the bill. The moneys for indigent defense services, but not for operation of the Commission, are contained in SB 2002 and under SB 2027 would be transferred to the Commission effective January 1, 2006.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Ted Gladden	Agency:	ND Supreme Court
Phone Number:	328-4216	Date Prepared:	02/17/2005

FISCAL NOTE
 Requested by Legislative Council
 02/17/2005

Amendment to: Engrossed
 SB 2027

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$0		\$0	
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The original bill estimated the cost of the administration for the Commission on Legal Counsel for Indigents at \$1,135,285. This has been removed from the bill. The moneys for indigent defense services, but not for operation of the Commission, are contained in SB 2002 and under SB 2027 would be transferred to the Commission effective January 1, 2006.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Ted Gladden	Agency:	ND Supreme Court
Phone Number:	328-4216	Date Prepared:	02/17/2005

FISCAL NOTE
 Requested by Legislative Council
 01/28/2005

REVISION

Amendment to: SB 2027

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$1,725,285		\$1,725,285	
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The amendments to SB 2027 transfer costs of guardians ad litem and custody investigators in domestic relations cases from the counties to the Supreme Court, and the costs of legal representation for mental health commitment proceedings, and proceedings for the commitment of sexually dangerous individuals from the counties to the Commission on Legal Counsel for Indigents. The estimated costs to the Supreme Court for the 2005-07 biennium are \$292,000, and to the Commission on Legal Counsel for Indigents is \$298,000.

The total of these costs (\$590,000) would be added to the Supreme Court Appropriation Bill SB 2002. The amounts not spent by for mental health commitment proceedings and proceedings for sexual predator commitments on December 31, 2005 would be transferred to the Commission on Legal Counsel for Indigents on January 1, 2006.

The estimated cost of the administration for the Commission on Legal Counsel for Indigents is \$1,135,285.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Ted Gladden	Agency:	Supreme Court
Phone Number:	328-4216	Date Prepared:	01/28/2005

FISCAL NOTE
Requested by Legislative Council
01/26/2005

Amendment to: SB 2027

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The amendments to SB 2027 transfer costs of guardians ad litem and custody investigators in domestic relations cases from the counties to the Supreme Court, and the costs of legal representation for mental health commitment proceedings, and proceedings for the commitment of sexually dangerous individuals from the counties to the Commission on Legal Counsel for Indigents. The estimated costs to the Supreme Court for the 2005-07 biennium are \$292,000, and to the Commission on Legal Counsel for Indigents is \$298,000.

The total of these costs (\$590,000) would be added to the Supreme Court Appropriation Bill SB 2002. The amounts not spent by for mental health commitment proceedings and proceedings for sexual predator commitments on December 31, 2005 would be transferred to the Commission on Legal Counsel for Indigents on January 1, 2006.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Ted Gladden	Agency:	Supreme Court
Phone Number:	328-4216	Date Prepared:	01/28/2005

FISCAL NOTE
Requested by Legislative Council
12/20/2004

Bill/Resolution No.: SB 2027

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$1,135,285			
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This bill established the commission on legal counsel for indigents for the purpose of providing indigent defense services. The expenditures of \$1,135,285 are for the administration of this commission.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The request of \$1,135,285 is for the administration of this commission as follows:

- \$222,505 Director Salary and Benefits
- \$152,444 Deputy Salary and Benefits
- \$ 67,137 Administrative Assistant
- \$441,291 4 State-wide investigators Salary and Benefits
- \$210,854 Operating Expenses
- \$ 8,654 Travel and per diem for board members
- \$ 32,400 Start-up costs - furniture and computers

Sec. 9 of SB 2027 states that any moneys not expended by the supreme court for contract services by December 31, 2005 are appropriated to the commission on January 1, 2006. \$10,486,423 for contract services has been requested in the Supreme Court appropriation SB 2002.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The expenditure amount of \$1,135,285 has not been included in the appropriation line as it is being requested in Sec. 9 of SB 2027;

Name:	Ted Gladden	Agency:	Supreme Court
Phone Number:	328-4216	Date	12/22/2004
		Prepared:	

4/24/01

#1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2027

Page 1, line 2, replace "section" with "sections 14-07.1-05.1, 14-09-06.3, 14-09-06.4, 14-17-15, 25-03.1-13, 25-03.3-09, and"

Page 1, line 4, after the first "to" insert "indigent defense services for mental illness commitment proceedings, civil commitment of sexual predators, and guardian ad litem services and to"

Page 1, after line 6, insert:

"SECTION 1. AMENDMENT. Section 14-07.1-05.1 of the North Dakota Century Code is amended and reenacted as follows:

14-07.1-05.1. Appointment of guardian ad litem for minor. The court, upon the request of either party or upon its own motion, may appoint a guardian ad litem in an action for a protection order to represent a minor concerning custody, support, or visitation if either party or the court has reason for special concern as to the immediate future of the minor. The guardian ad litem may be appointed at the time of a temporary protection order or at any time before the full hearing. The role of the guardian ad litem consists of investigation and making a recommendation and report to the court. At no time may the involvement of the guardian ad litem alter the requirements set forth in section 14-07.1-03. The appointment of the guardian ad litem expires immediately after the full hearing unless the court retains the right, upon specific finding of need, to continue the appointment of a guardian ad litem to participate in visitation. The guardian ad litem shall have access to records before the court except as otherwise provided by law. The court may direct either or both parties to pay the guardian ad litem fees established by the court. If neither party is able to pay the fees, the court, ~~after notice to the state's attorney of the county of venue,~~ may direct the fees to be paid, in whole or in part, by the ~~county of venue state.~~ The court may direct either or both parties to reimburse the ~~county state,~~ ^{Supreme Court?} in whole or in part, for the payment.

SECTION 2. AMENDMENT. Section 14-09-06.3 of the North Dakota Century Code is amended and reenacted as follows:

14-09-06.3. Custody investigations and reports - Costs.

1. In contested custody proceedings the court may, upon the request of either party, or, upon its own motion, order an investigation and report concerning custodial arrangements for the child. The court shall designate a person or agency responsible for making the investigation and report, which designees may include the county social service board, public health officer, school officials, and any other public agency or private practitioner it deems qualified to make the investigation.
2. The investigator may consult any person who may have information about the child and any potential custody arrangements, and upon order of the court may refer the child to any professional personnel for diagnosis.
3. The court shall mail the investigator's report to counsel and to any party not represented by counsel at least thirty days before the hearing. The investigator shall make available to any such counsel or party the complete file of data and reports underlying the investigator's report and the names and addresses of all persons whom the investigator has consulted. A party

may call the investigator and any person whom the investigator has consulted for cross-examination at the hearing. A party may not waive the party's right of cross-examination before the hearing.

4. The court shall enter an order for the costs of any such investigation against either or both parties, except that if the parties are indigent the expenses must be borne by the ~~county~~ state. *Supreme Court*

SECTION 3. AMENDMENT. Section 14-09-06.4 of the North Dakota Century Code is amended and reenacted as follows:

Supreme Court
14-09-06.4. Appointment of guardian ad litem or child custody investigator for children in custody, support, and visitation proceedings - Immunity. In any action for an annulment, divorce, legal separation, or other action affecting marriage, when either party has reason for special concern as to the future of the minor children, and in any action when the custody or visitation of children is contested, either party to the action may petition the court for the appointment of a guardian ad litem to represent the children concerning custody, support, and visitation. The court, in its discretion, may appoint a guardian ad litem or child custody investigator on its own motion. If appointed, a guardian ad litem shall serve as an advocate of the children's best interests. If appointed, the child custody investigator shall provide those services as prescribed by the supreme court. The court may direct either or both parties to pay the guardian ad litem or child custody investigator fee established by the court. If neither party is able to pay the fee, the court may direct the fee to be paid, in whole or in part, by the ~~county of venue~~ state. The court may direct either or both parties to reimburse the ~~county~~ state, in whole or in part, for such payment. Any guardian ad litem or child custody investigator appointed under this section who acts in good faith in making a report to the court is immune from any civil liability resulting from the report. For the purpose of determining good faith, the good faith of the guardian ad litem or child custody investigator is a disputable presumption.

SECTION 4. AMENDMENT. Section 14-17-15 of the North Dakota Century Code is amended and reenacted as follows:

14-17-15. Costs. The court may order reasonable fees of experts and the child's guardian ad litem and other costs of the action and pretrial proceedings, including genetic tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by the ~~county social service board of the county in which the child resides or is found~~ state. In addition, the court may award reasonable attorney's fees if an award is permitted under chapter 28-26.

SECTION 5. AMENDMENT. Section 25-03.1-13 of the North Dakota Century Code is amended and reenacted as follows:

25-03.1-13. Right to counsel - Indigency - Waiver - Recoupment - Limitations.

1. Every respondent under this chapter is entitled to legal counsel. The counsel has access to the respondent's medical records upon proof of representation.
2. Unless an appearance has been entered on behalf of the respondent, the court shall, within twenty-four hours, exclusive of weekends or holidays, from the time the petition was filed, appoint counsel to represent the respondent. If a respondent retains counsel, the retained counsel shall immediately notify the court of that fact.
3. If, after consultation with counsel, the respondent wants to waive the right to counsel or the right to any of the hearings provided for under this

chapter, the respondent may do so by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and must also be signed by counsel.

The Court shall

- 4. If the court determines that the respondent is indigent, the court shall order that appointed counsel be compensated from ~~county state~~ funds of the ~~county that is the respondent's place of residence~~ in a reasonable amount based upon time and expenses. After notice and hearing, the court may order a respondent with appointed counsel to reimburse the ~~county state~~ for expenditures made on the respondent's behalf. *the Court shall order that appointed counsel for...*
- 5. If the state's attorney of ~~a~~ the county that has expended sums under subsection 4 on behalf of a respondent who is liable to reimburse the county is the respondent's place of residence determines that the respondent may have funds or property to reimburse the ~~county state~~, the state's attorney shall seek civil recovery of those sums. Commencement of the action must occur within six years after the date the sums were paid.

SECTION 6. AMENDMENT. Section 25-03.3-09 of the North Dakota Century Code is amended and reenacted as follows:

25-03.3-09. Right to counsel - Waiver.

- 1. Every respondent is entitled to legal counsel. Unless an appearance has been entered on behalf of the respondent, the court, within twenty-four hours from the time the petition was filed, exclusive of weekends or holidays, shall appoint counsel to represent the respondent. If a respondent retains counsel, the retained counsel immediately shall notify the court of that fact.
- 2. After consultation with counsel, the respondent may waive the right to counsel or the right to any hearing provided pursuant to this chapter by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and the respondent's counsel shall separately certify that counsel has explained to the respondent the proceedings, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings. No guardian, guardian ad litem, attorney, or other individual may waive the right to counsel on behalf of an individual with mental retardation.
- 3. If the court determines that the respondent is indigent, the court shall appoint counsel and order that appointed counsel be compensated by the ~~county that is the respondent's place of residence~~ state in a reasonable amount based upon time and expenses. *order that appointed counsel be appointed by indigent defense @*
- 4. The state's attorney of ~~a~~ the county that has expended sums pursuant to subsection 3 is the respondent's county of residence may seek civil recovery of those sums from property of the respondent. Commencement of the action must occur within six years after the date the sums were paid. After notice and hearing, the court may order an individual to reimburse the ~~county state~~ for expenditures made on that individual's behalf pursuant to this chapter."

Page 8, line 23, replace "10" with "16 of this Act"

Page 8, line 27, replace "5" with "11" and replace "7" with "13"

Re-number accordingly

Date: 01/24/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2027

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Move to Amended the Amendment Att#1 & Separate "state and "supreme court" responsibilities for clarification.

Motion Made By Sen. Nelson Seconded By Sen. Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	X		Sen. Nelson	X	
Senator Syverson	X		Senator Triplett	X	
Senator Hacker	X				
Sen. Trenbeath	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 01/24/05
Roll Call Vote #: 3

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2027

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Move to Do Pass as Amended

Motion Made By Sen. Trenbeath Seconded By Sen. Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	X		Sen. Nelson	X	
Senator Syverson	X		Senator Triplett	X	
Senator Hacker	X				
Sen. Trenbeath	X				

Total (Yes) _____ 6 No _____ 0

Absent _____ 0

Floor Assignment Sen. Traynor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2027: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS and BE REREFERRED to the Appropriations Committee (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2027 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "section" with "sections 14-07.1-05.1, 14-09-06.3, 14-09-06.4, 14-17-15, 25-03.1-13, 25-03.3-09, and"

Page 1, line 4, after the first "to" insert "indigent defense services for mental illness commitment proceedings, civil commitment of sexual predators, guardian ad litem services, and"

Page 1, after line 6, insert:

"SECTION 1. AMENDMENT. Section 14-07.1-05.1 of the North Dakota Century Code is amended and reenacted as follows:

14-07.1-05.1. Appointment of guardian ad litem for minor. The court, upon the request of either party or upon its own motion, may appoint a guardian ad litem in an action for a protection order to represent a minor concerning custody, support, or visitation if either party or the court has reason for special concern as to the immediate future of the minor. The guardian ad litem may be appointed at the time of a temporary protection order or at any time before the full hearing. The role of the guardian ad litem consists of investigation and making a recommendation and report to the court. At no time may the involvement of the guardian ad litem alter the requirements set forth in section 14-07.1-03. The appointment of the guardian ad litem expires immediately after the full hearing unless the court retains the right, upon specific finding of need, to continue the appointment of a guardian ad litem to participate in visitation. The guardian ad litem shall have access to records before the court except as otherwise provided by law. The court may direct either or both parties to pay the guardian ad litem fees established by the court. If neither party is able to pay the fees, the court, ~~after notice to the state's attorney of the county of venue,~~ may direct the fees to be paid, in whole or in part, by the ~~county of venue~~ supreme court. The court may direct either or both parties to reimburse the ~~county~~ state, in whole or in part, for the payment.

SECTION 2. AMENDMENT. Section 14-09-06.3 of the North Dakota Century Code is amended and reenacted as follows:

14-09-06.3. Custody investigations and reports - Costs.

1. In contested custody proceedings the court may, upon the request of either party, or, upon its own motion, order an investigation and report concerning custodial arrangements for the child. The court shall designate a person or agency responsible for making the investigation and report, which designees may include the county social service board, public health officer, school officials, and any other public agency or private practitioner it deems qualified to make the investigation.
2. The investigator may consult any person who may have information about the child and any potential custody arrangements, and upon order of the court may refer the child to any professional personnel for diagnosis.
3. The court shall mail the investigator's report to counsel and to any party not represented by counsel at least thirty days before the hearing. The investigator shall make available to any such counsel or party the complete file of data and reports underlying the investigator's report and

the names and addresses of all persons whom the investigator has consulted. A party may call the investigator and any person whom the investigator has consulted for cross-examination at the hearing. A party may not waive the party's right of cross-examination before the hearing.

4. The court shall enter an order for the costs of any such investigation against either or both parties, except that if the parties are indigent the expenses must be borne by the ~~county~~ supreme court.

SECTION 3. AMENDMENT. Section 14-09-06.4 of the North Dakota Century Code is amended and reenacted as follows:

14-09-06.4. Appointment of guardian ad litem or child custody investigator for children in custody, support, and visitation proceedings - Immunity. In any action for an annulment, divorce, legal separation, or other action affecting marriage, when either party has reason for special concern as to the future of the minor children, and in any action when the custody or visitation of children is contested, either party to the action may petition the court for the appointment of a guardian ad litem to represent the children concerning custody, support, and visitation. The court, in its discretion, may appoint a guardian ad litem or child custody investigator on its own motion. If appointed, a guardian ad litem shall serve as an advocate of the children's best interests. If appointed, the child custody investigator shall provide those services as prescribed by the supreme court. The court may direct either or both parties to pay the guardian ad litem or child custody investigator fee established by the court. If neither party is able to pay the fee, the court may direct the fee to be paid, in whole or in part, by the ~~county of venue~~ supreme court. The court may direct either or both parties to reimburse the ~~county~~ state, in whole or in part, for such payment. Any guardian ad litem or child custody investigator appointed under this section who acts in good faith in making a report to the court is immune from any civil liability resulting from the report. For the purpose of determining good faith, the good faith of the guardian ad litem or child custody investigator is a disputable presumption.

SECTION 4. AMENDMENT. Section 14-17-15 of the North Dakota Century Code is amended and reenacted as follows:

14-17-15. Costs. The court may order reasonable fees of experts and the child's guardian ad litem and other costs of the action and pretrial proceedings, including genetic tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by the ~~county social service board of the county in which the child resides or is found~~ state. In addition, the court may award reasonable attorney's fees if an award is permitted under chapter 28-26.

SECTION 5. AMENDMENT. Section 25-03.1-13 of the North Dakota Century Code is amended and reenacted as follows:

25-03.1-13. Right to counsel - Indigency - Waiver - Recoupment - Limitations.

1. Every respondent under this chapter is entitled to legal counsel. The counsel has access to the respondent's medical records upon proof of representation.
2. Unless an appearance has been entered on behalf of the respondent, the court shall, within twenty-four hours, exclusive of weekends or holidays, from the time the petition was filed, appoint counsel to represent the

respondent. If a respondent retains counsel, the retained counsel shall immediately notify the court of that fact.

3. If, after consultation with counsel, the respondent wants to waive the right to counsel or the right to any of the hearings provided for under this chapter, the respondent may do so by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and must also be signed by counsel.
4. If the court determines that the respondent is indigent, the court shall order that appointed counsel be ~~compensated from county funds of the county that is the respondent's place of residence in a reasonable amount based upon time and expenses provided by the commission on legal counsel for indigents~~. After notice and hearing, the court may order a respondent with appointed counsel to reimburse the county state for expenditures made on the respondent's behalf.
5. If the state's attorney of a the county that ~~has expended sums under subsection 4 on behalf of a respondent who is liable to reimburse the county~~ is the respondent's place of residence determines that the respondent may have funds or property to reimburse the county state, the state's attorney shall seek civil recovery of those sums. Commencement of the action must occur within six years after the date the sums were paid.

SECTION 6. AMENDMENT. Section 25-03.3-09 of the North Dakota Century Code is amended and reenacted as follows:

25-03.3-09. Right to counsel - Waiver.

1. Every respondent is entitled to legal counsel. Unless an appearance has been entered on behalf of the respondent, the court, within twenty-four hours from the time the petition was filed, exclusive of weekends or holidays, shall appoint counsel to represent the respondent. If a respondent retains counsel, the retained counsel immediately shall notify the court of that fact.
2. After consultation with counsel, the respondent may waive the right to counsel or the right to any hearing provided pursuant to this chapter by notifying the court in writing. The notification must clearly state the respondent's reasons for the waiver and the respondent's counsel shall separately certify that counsel has explained to the respondent the proceedings, the legal and factual issues, potential defenses, the burden of proof, and possible outcomes of the proceedings. No guardian, guardian ad litem, attorney, or other individual may waive the right to counsel on behalf of an individual with mental retardation.
3. If the court determines that the respondent is indigent, the court shall ~~appoint counsel and order that appointed counsel be compensated by the county that is the respondent's place of residence in a reasonable amount based upon time and expenses provided by the commission on legal counsel for indigents~~.
4. The state's attorney of a the county that ~~has expended sums pursuant to subsection 3~~ is the respondent's county of residence may seek civil recovery of those sums from property of the respondent. Commencement of the action must occur within six years after the date the sums were paid. After notice and hearing, the court may order an individual to reimburse

the ~~county~~ state for expenditures made on that individual's behalf pursuant to this chapter."

Page 8, line 23, replace "10" with "16 of this Act"

Page 8, line 27, replace "5" with "11" and replace "7" with "13"

Renumber accordingly

2005 SENATE APPROPRIATIONS

SB 2027

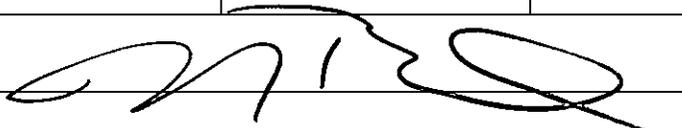
2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

Senate Appropriations Committee

Conference Committee

Hearing Date 02/02/05

Tape Number	Side A	Side B	Meter #
1	x	x	1,531
Committee Clerk Signature 			

Minutes: **Chairman Holmberg** opened meeting SB 2027.

Sen. Trenbeath, District 10 appeared in support of SB 2027. No written testimony was provided. Questions were raised regarding the responsibility of indigent funds. Sen. Trenbeath indicated that for some 18yrs the County has had the responsibility.

Vonnette Richter, Staff, Interim Criminal Justice Committee, appeared to provide and overview and background of SB 2027. Written testimony was provided, see appendix I.

Chief Justice VandeWalle appeared in support of SB 2027. Chief Justice VandeWalle spoke of the court hourly rate and contract system. Questions were asked regarding the fiscal note, Sen. Krauter wanted some of the numbers explained.

Sandy Tabor, Deputy Attorney General appeared in support of SB 2027. Written testimony was provided, see appendix II. Numerous questions were asked of Ms. Tabor regarding funding the program and paying the lawyers involved.

Susan Sisk, Supreme Court appeared in support of SB 2027. Written testimony was provided , see appendix III.

D'Joyce Kitson Smutzler appeared in support of SB 2027. Written testimony was provided, see appendix V.

Wade Williams, ND Assoc. of Counties appeared in support of SB 2027. Written testimony was provided, see appendix VI.

Bonnie Johnson, Cass Co. Coordinator appeared in support of SB 2027. Written testimony was provided, see appendix VII.

Cynthia Feeland, appeared in support of Section 5 of SB 2027. No written testimony was provided.

Sen. Triblett District 18, appeared in support of SB 2027. Sen Tripplet discussed improving the system now, so that in time we would see a decline in recidivism.

Joel Gilbertson, State Bar Assoc. appeared in support of SB 2027.

Questions were raised on whether or not the individual had an obligation to back the courts back the cost of their lawyer.

Chairman Holmberg closed meeting on SB 2027.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

Senate Appropriations Committee

Conference Committee

Hearing Date 02/11/05

Tape Number	Side A	Side B	Meter #
2		x	970-2038
Committee Clerk Signature <i>antre</i>			

Minutes: **Chairman Holmberg** opened meeting on SB 2027.

Sen. Kilzer Proposed two Amendments (#'s .0301 and .0303). Sen. Kilzer went through each of the two amendments. #.0301, removes states taking over civil proceedings. Amendment # removes appropriation for commission for legal council for indigents, the Chief Justice asked for this.

Sen. Kilzer moved .0301.

Sen. Mathern asked the committee to not adopt these two amendments. Stating that Judiciary should be in charge of indigent defense funding.

Sen. Tallackson This is the wrong move, the state should absorb this.

Sen. Kilzer The civil proceedings was not part of the bill the interim committee brought forward.

A recorded vote for .0301. The amendment passed. 9 to 5, 1 absent.

Sen. Kilzer moved amendment 0303. A recorded vote was taken, amendment passed.

Page 2
Senate Appropriations Committee
Bill/Resolution Number SB 2027
Date 02/11/05

A **Do Pass as Amended** motion was made by Sen. Kilzer, seconded by Sen. Grindberg. 9 to 5,

1 absent. Bill passed, it will be carried by Sen Kilzer.

For Amendment
0303

Date 2-14-05
Roll Call Vote #:

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2027

Senate SENATE APPROPRIATIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken For this Amendment

Motion Made By _____ Seconded By _____

Senators	Yes	No	Senators	Yes	No
CHAIRMAN HOLMBERG	✓		SENATOR KRAUTER		✓
VICE CHAIRMAN BOWMAN	✓		SENATOR LINDAAS		✓
VICE CHAIRMAN GRINDBERG	✓		SENATOR MATHERN		✓
SENATOR ANDRIST	✓		SENATOR ROBINSON		✓
SENATOR CHRISTMANN	✓		SEN. TALLACKSON		✓
SENATOR FISCHER	✓				
SENATOR KILZER	✓				
SENATOR KRINGSTAD	✓				
SENATOR SCHOBINGER	✓				
SENATOR THANE					

Total (Yes) 9 No 5

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Passed

For Amendment
.0301

Date 2-14-05
Roll Call Vote #:

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2027

Senate SENATE APPROPRIATIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken For Amendment

Motion Made By k Seconded By _____

Senators	Yes	No	Senators	Yes	No
CHAIRMAN HOLMBERG	✓		SENATOR KRAUTER		✓
VICE CHAIRMAN BOWMAN	✓		SENATOR LINDAAS		✓
VICE CHAIRMAN GRINDBERG	✓		SENATOR MATHERN		✓
SENATOR ANDRIST	✓		SENATOR ROBINSON		✓
SENATOR CHRISTMANN	✓		SEN. TALLACKSON		✓
SENATOR FISCHER	✓				
SENATOR KILZER	✓				
SENATOR KRINGSTAD	✓				
SENATOR SCHOBINGER	✓				
SENATOR THANE					

Total (Yes) 9 No 5

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

* Janet
USC flw
one

Date 2-14-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 0027

Senate SENATE APPROPRIATIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended (2 Amendments)

Motion Made By K Seconded By G

Senators	Yes	No	Senators	Yes	No
CHAIRMAN HOLMBERG	✓		SENATOR KRAUTER		✓
VICE CHAIRMAN BOWMAN	✓		SENATOR LINDAAS		✓
VICE CHAIRMAN GRINDBERG	✓		SENATOR MATHERN		✓
SENATOR ANDRIST	✓		SENATOR ROBINSON		✓
SENATOR CHRISTMANN	✓		SEN. TALLACKSON		✓
SENATOR FISCHER	✓				
SENATOR KILZER	✓				
SENATOR KRINGSTAD	✓				
SENATOR SCHOBINGER	✓				
SENATOR THANE					

Total (Yes) 9 No 5

Absent 1

Floor Assignment Kilzer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2027, as engrossed: Appropriations Committee (Sen. Holmberg, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (9 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2027 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "sections 14-07.1-05.1, 14-09-06.3," with "section"

Page 1, line 3, remove "14-09-06.4, 14-17-15, 25-03.1-13, 25-03.3-09, and"

Page 1, remove line 5

Page 1, line 6, remove "sexual predators, guardian ad litem services, and"

Page 1, remove lines 9 through 24

Page 2, remove lines 1 through 31

Page 3, remove lines 1 through 30

Page 4, remove lines 1 through 31

Page 5, remove lines 1 through 12

Page 8, line 22, replace "4" with "3"

Page 12, line 15, remove "There is appropriated out of any moneys in the"

Page 12, remove lines 16 through 18

Page 12, line 19, remove "June 30, 2007."

Page 12, line 20, replace "16" with "10"

Page 12, line 25, replace "11" with "5" and replace "13" with "7"

Renumber accordingly

2005 HOUSE JUDICIARY

SB 2027

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

House Judiciary Committee

Conference Committee

Hearing Date 3/16/05

Tape Number	Side A	Side B	Meter #
1	xx		18.4-end
1		xx	0-14.2
Committee Clerk Signature <i>Dawn Penrose</i>			

Minutes: 13 members present, 1 member absent (Rep. Charging).

Chairman DeKrey: We will open the hearing on SB 2027.

Representative Lois Delmore: Sponsor, explained the bill. I am here to introduce SB 2027.

It establishes a commission on legal counsel for indigent defense. The bill came out of my interim criminal justice committee and I want to thank the people who were served on my committee, as well as the members of the ND Indigent Defense Task Force. A number of you were on both. The task force was a collection of lawyers, judges and legislators, who helped to study and choose a workable solution to a possible lawsuit waiting to happen. It is not the first time that indigent defense has been studied, we took action. As the Interim Chair, I truly appreciate and respect the knowledge and expertise of those individuals on the committee and the task force who will appear before you today. The task of the interim criminal justice committee, and of this session Standing Judiciary Committees, is to adopt a vehicle which can drive an outmoded system of services, into a new age of criminal justice. I believe that this bill is our

vehicle. The rather sizable fiscal note on this bill, it is being worked on in Appropriations and I believe that too is indicative of the adage, you can pay me now or pay me later. Other states who are dealing with this issue and coping with lawsuits, are already paying. I would urge your favorable consideration on SB 2027.

Chairman DeKrey: Thank you.

Representative Lawrence Klemin: The bill that we have before us this morning to consider SB 2027 is a continuation of the process that has been going on for a long time. In the 2001 session, we adopted a study resolution to study the issue of providing indigent defense counsel, we did study that, then through the interim that followed and in the 2003 session, had a bill that we considered, and that bill did not pass, but instead we had another study resolution that was approved to call for another study, which is actually a continuation of the same study. So we studied that again for the next two years. In the meantime, the State Bar Association, formed an Indigent Defense Task Force, made up of lawyers and judges and legislators, and that Task Force, together with the interim committee, came up with SB 2027. We think this is a reasonable alternative to accomplish the task of providing indigent defense counsel on an appropriate basis, without having the court's appoint those counsel. I don't think there's any question that we've studied this issue enough. I urge your favorable consideration of SB 2027.

Chairman DeKrey: Thank you. I just would make some remarks that I was on the Task Force also, as was Representative Kretschmar and Representative Klemin and Representative Delmore. We really spent a lot of time, and went over how we do indigent defense, and how woefully inadequate it has become and how there might be some real constitutional questions on how we're doing it. Other states have been sued, which have similar systems to what we have now.

We feel it's important that this bill pass because we would like to play defense instead of offense, and we would also, just for the fact that it's the right thing to do. I'm sure that you will hear testimony this morning that will indicate a lot of those things.

Representative Koppelman: On page 1, where it talks about the members of the commission, it includes in item b) two members of the legislative assembly, and they are appointed according to that section, but then on page 2, in item #5, it says, individuals appointed to the commission should have experience in the defense of criminal cases or other cases in which appointed counsel services are required or should have demonstrated a commitment to quality representation in indigent defense matters. Is that second part sufficient to apply, so that the legislators appointed, would not have to be criminal defense attorneys.

Chairman DeKrey: That was our feeling when we held our task force meetings, that we didn't want to specifically say that you had to be an attorney, but we wanted to be very clear that you had know something.

Representative Koppelman: There might not be enough legislators who would qualify for that.

Rep. Ron Carlisle: Support. Yes, we served on the Interim Committee, Representative Kretschmar, Representative Klemin, you and I, and others. We just now finished SB 2002, that's the budget for the judiciary, just moments ago we attached the amendment to go to full committee, for the funding for SB 2027. I think we've got a working document, where it's located and stuff will be another issue, but we want it separated from the Supreme Court, that was the whole idea.

Representative Delmore: I would like to personally thank you and Ted Gladden for working very hard on finding funding for, I think one of the most important bills we're going to pass out this session.

Rep. Blair Thoreson: Support. It's just been very interesting working with this process. I think it is important that we get this in place and I'm glad that we were able to find funding for it. I would urge support for this bill, also.

Chairman DeKrey: Thank you. Further testimony in support of SB 2027.

Judge Gerald Vande Walle: I am the Chief Justice, and I am here to support the bill. I think Representative Klemin outlined well for you, the long process that it's taken. Some of which, I was whining about the issue and I'm really pleased with Rep. Carlisle's report that the subcommittee on the Appropriations Committee adopted the amendments for funding. I have, as a result of that, another small amendment that I'll be introducing later. Representative Koppelman, I thought when I read the bill, I just assumed that all legislators were experienced in the law. I also want to thank the members of the Task Force that was put together, that proposed a bill and to Representative Delmore's Interim Criminal Justice Committee, that studied this. I think they did an outstanding job. I'm delighted with the product, there are some things in it that some might wish had gone another way, a full time public defender system, which means FTE's as opposed to the contracts. I think the Bar preferred the contract system, and we certainly are happy with it. I thought what I might do, is for those of you that may not have been here at the start, to give you a little background in what happened. Prior to early 1980, the indigent defense was the responsibility of the counties. It was provided by the counties. There was one particular case in Adams County, that a murder trial came to the court, I wrote the opinion that reversed the

conviction and sent it back for a new trial. That case, in that small county, almost broke that county on indigent defense. It was after that, that the legislature said, all right, we will take over the indigent defense expenses. At that time, they put them in the Supreme Court budget. My predecessor, Ralph Erickstad, was Chief, and I said to him, I think we have a conflict of interest, and Ralph said there may be, but we need to get this at the state level, because the variety of defense being provided throughout the state was, it simply was not consistent. So that's what happened, and it went along without a lot of trouble for a number of years. I will tell you that starting in the late '80s and has been going on for the last number of years, the problem was the court managing the indigent defense system, and the conflict of interest that exists of a judge contracting with a lawyer to represent an indigent defendant, and then subsequently, having to rule on whether that lawyer provided effective assistance of counsel for that particular defendant. It's just a great conflict of interest. It is for the trial judges, it is for our court. You have before you a bill that I think is an excellent bill, I urge your adoption of it. There are other people that know more than I do about the actual contents of the bill. Let me introduce the proposed amendment, which would be on page 8, line 19, we would replace the word "contract" with "indigent defense" and remove "in accordance with section 10 of this act". The reason for that is the original SB 2027, contained the money for the administration of indigent defense. That has now, the Senate Appropriations Committee, removed that and Rep. Carlisle has just informed you that the appropriations subcommittee has recommended adopted amendments to the court's appropriation bill. It's necessary, if the administration money is put in our appropriation bill, it's necessary that that money transfer to the indigent defense commission on January 1 of next year. The concept of this bill is that in order to get it up and running, the court will operate in contract

for the first six months of the biennium, but following that, once the commission is up, the money will be transferred out of our budget to the commission. Prior to this time, the only money in our budget, was the actual contract money. Now the administration money will also be in our budget, so that needs to go along with the other money to the commission. That's the purpose of the amendment.

Representative Maragos: Thank you.

Representative Onstad: On page 3, it talks about line 18, "upon request of county or city, the commission may agree to provide indigent defense services. My question is would this include tribal courts, it is my understanding that they don't have a mechanism to provide indigent defense.

Judge Gerald Vande Walle: Tribal court?

Representative Onstad: Tribal court. Are we talking a whole new ball game here...

Judge Gerald Vande Walle: Tribal courts are a whole new ball game, indeed they are. We have no jurisdiction over them at all. That's a jurisdictional issue that they are a separate and independent court, they are not subject to our courts, or for that matter to the legislative assembly. In fact, there are some other guidelines that apply to tribal courts. I don't want to get in too deeply, but for the most serious offenses, those are tried in federal courts from the tribes, and of course the federal courts provide the indigent defense.

Representative Koppelman: We've heard your thoughts on the indigent defense system that would include full time staff to provide that service versus contract folks, and you indicated again today that that might be your preference, it's interesting, because I know some people in Cass County that provide this service, on a contract basis I might add, and I realize that there

have been some real issues in other parts of the state, and so I appreciate the work of the Interim Committee, because I think what they've done from what I've seen in the bill, is effectively balance the different issues in the state. You're concerns about the conflicts of interest, notwithstanding in terms of the way the system works, in some parts of the state it's working really well, and in other parts, it's a problem. So, as we always do with state law, we have to come up with something that can fit everything, and I think this probably does it. I've been told by some of the people in Cass County, that provide the service on a contract basis, that if there were an office of indigent defense, where they would have to become an employee of the state to do that, and not practice other law, they probably would not apply for that job and we'd lose some really good quality experienced people. Do you consider that with regard to your idea.

Judge Gerald Vande Walle: First of all, if you look on page 3, line 11-14, the commission can do either one. They can establish and implement a process for contracting for legal counsel services for indigents, establish public defender offices in the regions of the state as the commission considers necessary and appropriate. They can do so, and that's probably the best system of all.

Representative Koppelman: It's not either/or.

Judge Gerald Vande Walle: It's not either/or. I think there are some areas in which a full-time public defender would be advantageous. There may be others in which they are not. I caution you, however, not to be too self-satisfied with the operation of the system in Fargo. If you look at reports, there were some very serious issues that anecdotally arose out of that district. Particularly with regard to conflict of interest. Representative Onstad, I should go back to your question, on those lines that you referred to, that language is meant to permit a city, who may

have to appoint an attorney for an indigent defendant in a city court on a DUI charge, or something like that, those are the responsibility of the cities and the same with counties, county ordinances, but they can contract for that. That's the purpose of that language.

Representative Onstad: The question of the city, I was just wondering if a tribal court could request indigent defense, but it's a whole separate gamut, I guess.

Judge Gerald Vande Walle: I haven't really thought about that. We, I suppose we could contract with them on it, on an absolutely separate sovereign basis, is what it would be. It would not be as a political subdivision of the state, it is a separate sovereign. I would be very concerned, I'd have to think long and hard about that.

Representative Onstad: The comment, I initiated a discussion with them earlier because of lack of court reporting. That was the comment that if we had indigent defense, maybe we would be more willing to report some of the things.

Judge Gerald Vande Walle: We have a tribal/state court committee that operates with state judges and tribal court judges, and tribal court people on that. Justice Kapsner, who is here this morning, is a member of that committee; Judge Foughty, from Devils Lake chairs the committee, and they've got several of these issues, you may want to contact that committee to see if they would be interested in a discussion on that issue.

Representative Maragos: Thank you. Further testimony in support.

Sherry Mills Moore, State Bar Association: The problem with indigent defense is a problem of the entire state, and it's a problem that's been going for quite a while, as the other people have testified that we counted. But the State Bar Association made a commitment to this issue a couple of years ago. In many ways, we needed a primary issue, we had a resolution passed by the

membership to establish an indigent defense task force. We funded the indigent defense task force and we contributed staff to that as well as members, and organizing it and writing the reports and that is because it is a very important issue to us. So it is my duty or privilege to introduce the people who really worked on it, other than those that have already been mentioned. I do want to thank all of you who did participate in both the Indigent Defense Task Force, as well as the Interim Criminal Justice Committee, in making this move forward. Our legislative committee is chaired by Sandi Tabor, so when she appears before you, she will be wearing that hat. She is going to explain to you how the bill works, where it came from, and the work that was done. In addition to staffing the committee, and putting it together and paying for the costs of transportation and the rest, the State Bar Association also contributed to the cost of the expert group that we brought in, who does nothing but study this particular issue. So what I really want to say to you, is that it is a very important issue to the Bar Association. It doesn't necessarily impact a substantial number of our members, from the employment point of view, but it is in having an adequate and constitutional representation for the constituents of this state is important enough that we dedicated that time and those resources to it.

Representative Maragos: Thank you.

Representative Delmore: I want to say, how much help, she kept close tabs on both the Task Force and on the interim committee and did an excellent job.

Vonette Richter, LC: (see written testimony) I staffed the interim criminal justice committee, the details of the bill will be reviewed by Sandi Tabor, but I would like to distribute a copy of the final report of the committee to give some more background. There is a summary of the Spangenberg Group Report in here, as well as the findings of the task force.

Representative Maragos: Thank you.

Sandi Tabor: Support (see written testimony & Spangenberg Group Report). I'm here today as chair of the Legislative committee for the State Bar Association of ND. It is, in fact, in that capacity that I'm going to address SB 2027, with a caveat, that the reason I'm actually here in part is because the AG is very concerned about this issue. He was concerned after the events of the last session, when we failed to address the issue in the way we all believed needed to be addressed. I'm actually here because the AG also is concerned about what might happen in the future if we don't come to some final decision on how to handle the issue of funding indigent defense. I passed around a copy of the Spangenberg Report for those of you who haven't seen it, and also an overview of it, which is actually my testimony too, because that's what I'm going to do for you this morning, is just review what The Spangenberg Group had to say and what SB 2027 includes. Let me start, I'm not going to repeat all the history, but let me start by saying, that one of the things that occurred in the last session, and actually as long as I've been around and watched this issue be discussed, is a great deal, I think it would be fair to characterize it as skepticism, about really what is the issue, is there really a problem with the way we're running the indigent defense right now, and finally after the last session, the Bar decided that we needed to bring somebody in, that we needed to bring in an outside source in who could look at this independently and review it. That's what the Spangenberg Group did. Spangenberg Group works on these types of issues all across the nation, they've worked on programs for states, for cities, because many municipalities have their own indigent defense program. They've a wealth of experience and when they came in, they came in for the specific purpose of saying is there a problem with this system. I don't think they came in assuming there was one, they came in

saying, is there a problem. I don't think it should come as any shock, that in fact, they did find some of the very issues that the court has been raising for years, were in fact, real issues to them too. The very first thing that they found in their findings, is that the present program lacked independence. Their concern, and you've been hearing it from the Chief Justice for many years, that it is just not appropriate to have judges telling legal counsel how to run their cases. You may say, well were they actually doing that day to day. The answer is no, but here's what happens. Any time a defense attorney wants an investigator and the cost is going to be over \$500, guess who has to approve it. A judge, the presiding judge in most instances, but sometimes the presiding judge is often the judge on the case. It is a direct conflict, and it's happened in the past, and it will continue to happen unless we fix the system. They also stated, unequivocally, that our funding was way off. In my testimony, you'll see current biennial budgets for some of the surrounding states, including WY, SD and MT. Montana, as many of you know, is currently in the process of settlement negotiations on a lawsuit with the ACLU, regarding the under-funding of their program and the way it was operated. At this point, we believe that their proposed budget is \$27 million, with \$23 million of that coming from the state. South Dakota, their budget seems to have run fairly consistently right around \$13 million. Wyoming has upped their budget slightly, to \$12 million. Right now in our budget, as approved by the Senate, we're asking for \$9.8 million. A little over \$1 million of that would come from special funds. The other finding that they made was the high case load. I think everybody understands that, how we do the present system, is that there are contracts are let, and under that contract you receive whatever number of cases they decide to give you. You also have to hold those cases until you finished all the way through the appeal. In many instances, that means that people are putting

literally hundreds of hours into a case and getting paid nowhere near the presumptive fee of \$75, let alone the fee that they try and achieve, which is \$65/hr. That, in itself, is another issue because people are not able to cover basic operating costs, because of the enormous amount of time spent on this and the little amount of money that's paid for it, we're finding that attorneys are not really interested in these contracts anymore. I think it's no surprise that we had some problems in Williston where attorneys actually said, we're not interested. If you want us to do these cases, you just pay \$65/hr and we'll bill you. That's not the only place where there are problems. The Chief Justice alluded to Fargo, we're now down to 4 contract attorneys in Fargo, because one quit. I've had a discussion with some people in the legislature regarding this whole issue and one of the things they said is, well attorneys are a dime a dozen and we're graduating all kinds of attorneys who want to live in Fargo and Grand Forks, and they'll take these contracts. The truth of the matter is, that isn't happening. First of all, many of the people who are graduating from law school, aren't sticking around in ND, unfortunately; and second, those who are, aren't finding these contracts any more attractive than the people who have been taking them for a while, because they said they don't provide enough money to sustain a law practice on. There are issues with both caseload and low pay. The report, if you get a chance to just thumb through it, I know it's lengthy, but in the report you'll see a lot of anecdotal information about caseload. There are some things that are startling. An attorney in Bismarck, who closed between 250-275 juvenile cases in a year. A Minot attorney, who opened 350 cases in 2002, when I say he opened them, that's how many he got assigned to him. Again, since there is no real cap on these contracts, they just divvy them out. In Fargo, an attorney stated that he had opened 550 new cases in one year. Here's part of what happens when you have people with that kind of a

caseload. They don't get to take enough time to talk to their clients. They're often in too much of a hurry to do anything but maybe see them on the day of the master calendar, the initial arraignment. That is not the way we would like to see our justice system work, and it is a basis for challenges as to competency of counsel, or more importantly, inadequate counsel. So when we have this kind of system and it just seems to be getting worse, not better, we also increase the vulnerability of the entire system. The other thing that the report presented was, and I've alluded to it a little bit, is administrative and quality problems. The key point that I take from the report is that we need more thorough and consistent oversight in administration. By setting this into a commission setting, where you have people who are dedicated to not only administering the program, but perhaps at times helping out with the program, someone who's actually able to look at caseloads and look at how people are handling cases, you will improve the quality of justice in this state. That is one of the things that we must keep our eyes on, is the type of justice that we're providing in the state. The Spangenberg Group made the following recommendations, and again this is no surprise; current funding needs to be improved, my hat's off to Rep. Carlisle. We worked with the Supreme Court to try and figure out a way to tailor back some of the money for the administrative cost of the commission and the Supreme Court was able to find a little bit of funding within their turn back money, and I hope that you will all go and tell the members of the appropriations committee to let 'er rip. It's important, and I think the court has done a good job of figuring out how to make it a viable budget. One of the things I would like to just mention is that SB 2027 has no money in it anymore. If you recall in the Senate, it had an appropriation of over a million dollars. The Senate stripped that money out, and there was a conscious decision on our part, not to try and get this committee to try and put it back in, because we decided this is

a money issue, let's leave it in appropriations and let them work it out with the court. So I would encourage this committee, let's keep this bill clean and not put money into it because I think it's going to muddle the whole issue. Let's worry about money in the Supreme Court budget and I think it sounds like the appropriations committee is well on their way to figuring out how much money we need for this. I would encourage us not to worry about money for this bill, and keep the money out, so that we can get it through the House. The Spangenberg Group recommended was the need for infrastructure and better administration. On page 2 of my testimony, it kind of goes through quickly, just the very things that we've alluded to; minimum attorney qualifications, support services for paralegal and investigators. This is something that is really important to many of the attorneys who do this contract work. Many of them don't have a paralegal, and they don't necessarily have access to investigators, unless the court is willing to help them out with it financially. So this program does, as part of the administrative cost, includes some money for funding both of those, and we would hope that we would be able to sustain some of that funding level so that we can keep those particular services included. We've talked about independent oversight monitoring, workload caps, again another crux of the whole issue of what's jeopardizing the system from challenges, is the issue of too many cases. Guidelines on client contact and notification of appointment, that's just communication skills, which again, because in many instances because of the number of cases they're taking, we're just not seeing it happen the way it should. Oversight and evaluation of contract attorneys - there's been some talk about the public defender system versus the contract attorney system and for those of you who are on the commission, you know that it was a very conscience choice to have a dual system, Representative Koppelman. You're comment about the contract attorneys in Fargo

saying we don't want to become employees of the state, was something we heard and we listened to, for the exact point that you brought up. We'd lose some very qualified people. But we did, as Justice Wande Valle mentioned, we did want to leave in a public defender component, because one of the things when we were looking at the state as a whole, is we know that we have holes in the state, where we don't have coverage. I think that the hope is that some time after everything is set up, they'll be able to look at where are the deficiencies in the system and where do we need to maybe bring a public defender on. That person may very well have to travel a quadrant of the state, but there are places where we are having a tough time finding public defenders or contract attorneys, so we needed to have that component. Let me go quickly through the bill with you. Section 1, as was pointed out earlier, establishes the commission and provides for the way the appointments will be made. Section 2 outlines the duties of the commission and they have to develop standards, they have to do many of the things that were outlined in the Spangenberg Report that need to be done, and most of those are in the form of a standard. It allows for the present contract system, but as I mentioned, we also will allow for public defenders. Section 3 provides for the appointment of a director and outlines the duties of the director. Section 4 deals with confidentiality of files. Section 5 moves the funding source regarding ad litem services to the commission, this is money as I understand it, for the guardian ad litem services for juvenile cases. Section 6 excludes the commission from the definition of administrative agency, so they don't have to go through the administrative rule making process. Section 7, clarifies that the commission will determine the compensation rate for counsel. Section 8 directs the continuing appropriation of funds generated by the indigent defense administration fund, that's a special fund that was set up in the last session; that money will go to the commission now to help pay for

contract attorney expenses. In the original budget, that was about a million dollars, slightly over \$1 million. The court has been able to refine some of their numbers on that, now we believe it will be about \$1.2 million and that also helps us take care of some of the administrative costs of the commission. Section 9 and 10 provide transition language, about transferring the money, and Section 11 provides effective dates for Section 5 and Section 7 of the bill.

Representative Koppelman: I have to ask about the exemption from the Administrative Rules.

Sandi Tabor: Probably the main reason, is that most of the things that they will be doing, are known as standards and policies really don't seem to fit into the concept of what we usually think of when we are doing Administrative Rules, which are more issues that affect the public as a whole. They're not much different than a lot of the other agencies that are listed as exempt from that.

Representative Koppelman: Could they be done as policies, rather than rules, then.

Sandi Tabor: I am not sure that they will actually do rules. I think that there is just some concern that we make sure that there not, any decisions that they make won't be subject to 28.32. I don't know that they will be doing any rulemaking per se.

Representative Koppelman: If you look at section 2, I see that one of the items mentioned both under #1, item 4 and again in item b below that, have to do with standards for contract counsel and public defender caseloads and monitoring those caseloads. There are logistical differences within our state as to how various courts handle the way these cases proceed. I don't know if that has to do with the way motions are made, etc. In other words, you might be able to compress the process, that way your case gets disposed and in another court, it might be more

cumbersome. So are you talking about doing a standardized number of cases per defender in the state here, or are you talking about standardizing the processes.

Sandi Tabor: We're talking case loads. There are national averages, which Spangenberg talked about for the time, because it's kind of two-tiered. First it's the number of cases, but it's based also how much time you spend on a case, an average of how much time. So what this will be looking at is those average hours and then the number of cases, and Jim Gange, from the Court, has done a very good job of projecting for us, what he thinks the caseload will be during the next biennium; in fact, the money in SB 2002, was based on some of his work. This will not get into court procedures.

Representative Koppelman: If there are different procedural models in different parts of the state, in different courts, public defender A under one model might be able to comfortably handle more cases because of the logistics of how they are handled, than public defender B under another structure.

Sandi Tabor: That could be true, although I don't think that the differences in how they handle cases across the state differs that much, that it's actually impact how much time it takes and what those caps on caseloads should be. There are differences, but I don't think they are significant enough to impact the actual casework.

Representative Koppelman: In Section 3, where you talk about the Director, I see that there's a provision that requires the director to be an attorney. At first, that makes sense, but as I think about it, this is kind of an administrative position as I understand it. We've already got the commission being mostly attorneys, as I look at the structure of the bill. I think of other administrative positions, the Hospital administrator is not to be a surgeon or a doctor. A court

administrator of the Supreme Court, I don't know if there is a requirement that the person be an attorney. Is that necessary.

Sandi Tabor: In part, my answer is yes. The reason, in part, is some of the things that we learned from WY, when their public defenders actually met with the task force. He actually sometimes gets involved in cases. Even if they're not directly involved in them, part of this oversight and administration, we hope will be looking at how people are spending their time, and if they're actually doing the cases as efficiently as they should be done, or if they're not taking enough time, that they're taking enough time, and you really need to have a legal background to understand the nuances of criminal law. I do think it is important.

Representative Koppelman: Finally, the budget issue, the report and I think your testimony indicated that, here in ND, we're spending 43% less than the next lowest state, like that's a bad thing. It could be, if we're under-funding; but I'm not sure it is unfaceable.

Sandi Tabor: This goes back to every argument we've ever had about anything in this state, about money and where we are. I think what's telling about it, though, is that we are so far and so low, and when you add that to the number of cases they're doing, and how that hourly rate, which really, I challenge any of you to run an office for \$45/hr. When you add that all together, that's why I think it becomes significant; 43% lower than the next lowest is a big gap. But the real issue is, the actual money that we see that we're using and that impact on the type of our ability to deliver a competent and efficient indigent defense system is being greatly compromised.

Representative Koppelman: So we just shouldn't assume, because that number is low, is not that we're inefficient, that we're under-funding.

Sandi Tabor: Exactly.

Representative Meyer: I was just wondering on the exceptions. Why are the county's responsible for paying for the mental health commitment proceedings. If this passes, will they still be required to do that, or will that shift to the state.

Sandi Tabor: The mental health proceedings.

Representative Meyer: It states the one exception, is that each of the 53 counties are responsible for fundingfor representation of indigent defense facing mental health commitment proceedings, or proceedings for the commitment of dangerous individuals.

Sandi Tabor: I don't know what you're reading from.

Representative Meyer: I was just reading from your final report for this bill. I didn't see it in the bill, and I was wondering if that's addressed.

Sandi Tabor: I don't think it is in the bill, Representative Meyer.

Vonette Richter, LC: That's in the final report. As is done now, counties are responsible for indigent defense costs for mental health commitment and sexual predator civil commitments. There were amendments added in Senate Judiciary to make that a state responsibility, those amendments were stripped out in Senate Appropriation. It was an issue that was raised during the Interim by representatives of the counties. It wasn't a part of the bill that was introduced, but it was briefly in the bill while it was on the Senate side.

Representative Meyer: So if this passed, that doesn't reflect on this at all, it still is the county's responsibility for those things.

Vonette Richter, LC: Exactly, it is.

Sandi Tabor: One of the reasons why that wasn't put in, is that this is criminal defense, and those are civil issues and there was really a need to keep them separated at this time.

Representative Klemin: Just as a comment, I think that the provision on page 3, line 18-22 allows the county to contract with this commission to provide indigent defense services, where it's intended to encompass that situation whereby a county could enter into a contract for the commission to provide the services for civil commitments.

Sandi Tabor: That's right.

Representative Klemin: That would be a matter for the counties, if they wanted to do that or not.

Representative Meyer: The county would have to pay for it.

Sandi Tabor: Yes. That's right, that's why it was put in there. But the issue is that it would be at the county expense.

Representative Klemin: Just a comment, the counties, many of the counties at least, do have separate contracts with attorneys to provide those services for civil commitments.

Sandi Tabor: Just a couple of closing comments.

Representative Bernstein: In Section 3, which Representative Koppelman talked about, the director must be an attorney licensed. I want to point out to you how much better the State Hospital is run when it's not run by a doctor, when it's run by someone who has a little business experience.

Sandi Tabor: Well taken point. Again, though, I think the difference is that these people might actually be doing some of the cases and practicing; which helps with the efficiency I might add.

Representative Koppelman: Explain how that works, the director would actually be handling some cases.

Sandi Tabor: In WY, if there is a conflict of interest, and they can't find someone else to handle it, the director in WY will actually help out.

Representative Koppelman: But that's not part of his job, well it could be.

Sandi Tabor: Could be, but it's not specifically.

Representative Koppelman: If you ended up in that scenario, you could appoint someone, or bring somebody in from another jurisdiction in the state.

Sandi Tabor: If you could, I assume that's what they would first try to do, is find someone else to cover.

Chairman DeKrey: It was also talked about during the commission, that if something came up that the director had expertise in that area, it would be a natural that he would be able to move into courtroom work in that area. It would be a cost saving measure, if nothing else. It just makes sense.

Representative Kretschmar: There are many differences between doctors and lawyers.

Sandi Tabor: Only you could say that. Just a couple of quick points in closing and trying to highlight exactly why we're here and how important this bill really is. One of the things that people seem to think, and it kind of keeps us muddling along, if you will, that this is the court's problem, because the courts always had it. The real truth of the matter is, is that 6th amendment challenges to the constitution are the state's problem, not the courts. We really need, as a state, to come together on the fact that it is time to make a move in this area and it's time to get the system back where it needs to be. We are very, as you know, careful about ever talking about

lawsuits, and I'm not going to talk about one today either. Please be advised that now we have a report from an independent body, which tells us that the problems in the system are big, and that they need to be addressed. Keep that in mind when you deliberate. This is important, I think the court has really tried hard to put together a budget for this that makes sense. With the commission's help and assistance in trying to define what needs to be done, so with that I thank you for your kind attention.

Chairman DeKrey: Thank you. Further testimony in support, testimony in opposition, neutral testimony. We will close the hearing.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2027

House Judiciary Committee

Conference Committee

Hearing Date 3/22/05

Tape Number	Side A	Side B	Meter #
1	xx		0-8.5
Committee Clerk Signature <i>Dawn Penrose</i>			

Minutes: 13 members present, 1 member absent (Rep. Boehning).

Chairman DeKrey: We will take up SB 2027. I have an amendment that I passed out that contains the Supreme Court's amendments and contains some language that leadership wants in the bill. All it does is require the new commission to periodically report to Legislative Council on how the formation of the Indigent Defense staff is going. I don't think it's too onerous.

Representative Maragos: I move the amendment, version .0402.

Representative Delmore: Seconded.

Chairman DeKrey: Motion carried.

Representative Koppelman: I would move that on page 3, remove lines 28-30, we remove the sentence, the director must be an attorney, licensed and eligible to practice law in this state, at the time the appointment and at all times during the service as the director. The reason I'm moving that is because I think the line before that, clearly gives the commission the authority, if they want to appoint an attorney, to do so; but I think it is probably better public policy not to put

that statement in law to hamstring any future situation that might come up where the commission may say, we've got a great administrator here, who might have great familiarity with the law, but not necessarily a licensed attorney at this point. Much as we have had other people in administrative positions heading agencies of any particular profession.

Representative Bernstein: Second Koppelman amendment.

Representative Onstad: I understood testimony that there might be a time when that director might have to go and defend somebody; so if what you're saying, saying that it doesn't necessarily have to be an attorney to be the director, I think you're asking that the director might at times have to provide that type of defense...

Representative Koppelman: I understand that, but removing this sentence does nothing to impede the commission from hiring an attorney for that position, if they want to do that. All it does is take the requirement out of law, the mandate that it be in there, they can still hire one, if that's the person they think they need.

Representative Delmore: I would like to leave this bill intact, as much as possible. A lot of work went into this, a lot of thoughtfulness, if in two years, we see some problems with that, that they're by-passing people that's one thing, but I think right now it needs to be left as an attorney, especially as we're beginning this commission. I understand what you're trying to do, but I would resist that motion.

Representative Maragos: That was certainly my concern, what is the composition of the commission again.

Representative Delmore: Page 1 and 2, it's spelled out.

Chairman DeKrey: Two members appointed by the governor, 2 members of the legislative assembly, two members appointed by chief justice, and one member appointed by board of governors of the State Bar Association.

Representative Delmore: I think that is input from people other than those who are lawyers.

Representative Klemin: Well, I think, particularly at the beginning, when this commission is trying to develop all of these standards relating to how to provide for the indigent defense services and those kinds of things, it might be particularly helpful to have somebody in the position of director, who's got experience with doing those things, that you can really only get by being an attorney who's handled indigent defense cases. It seems to me that I agree with Representative Delmore, if we have to change this later, we can. But for now I think it is better to leave it the way it is.

Representative Bernstein: I believe you all recall the statement I made when we heard this bill, that the same arguments that you are arguing, Representative Klemin, they used to use that for a doctor at the State Hospital. They found out that they were much better off with a business person, rather than a doctor. Representative Kretschmar, I remember your statement, too. You can take that under consideration.

Representative Koppelman: I'd just like for you to look at page 2, item 5 here, it says that individuals appointed to the commission should have experience in the defense of criminal cases, or other cases in which appointed counsel services are required or should have demonstrated a commitment to quality representation in indigent defense matters. I think, clearly, the people on this commission are going to be predominantly lawyers, if not all lawyers, certainly probably not all, because there are a couple of legislators and so on. This is not an anti-lawyer amendment, I

would totally expect that if we remove this line from the bill, a lawyer is probably going to be appointed. I have no objection to that. What I object to, is putting it in law as a mandate, as a requirement for now and forever forward. I know that some of you have said, well we can come back later and take it out. You know as well as I, that that's much tougher than it would be to just not have that mandate in there. I recognize that a lot of work went into the bill, that's true of most of the bills we get from Interim Committees, and we respect their work, but oftentimes we amend that work, if in the name of good public policy, we see an improvement that could be made.

Representative Delmore: As I read that same part, I think that section, should have demonstrated a commitment to quality representation in indigent defense matters, would hold that those of us that served on my interim committee, as well as those people that served on the task force, lawyer or not, being able to serve on it.

Representative Klemin: As far as responding to Representative Bernstein, I know that a typical medical education and the undergraduate training that goes into somebody, that goes to medical school, typically does not focus on business law or business administration, or a variety of those types of degrees. However, many people who go to law school have undergraduate degrees in those kinds of areas or in law school, you take a lot of business law courses, that you're required to take. I think that, from an administrative standpoint, a lawyer is going to have a lot better background to be an administrator because of his training, than a doctor would be.

Chairman DeKrey: We are going to take a roll call vote on the Koppelman amendment.

4 Yes 9 No 1 Absent

MOTION FAILS

Representative Maragos: I would move a Do Pass on SB 2027 as amended.

Page 5

House Judiciary Committee

Bill/Resolution Number SB 2027

Hearing Date 3/22/05

Representative Koppelman: Seconded.

13 YES 0 NO 1 ABSENT

DO PASS AS AMENDED CARRIER: Rep. DeKrey

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2027

Page 8, line 19, replace " contract " with " indigent defense " and remove " in accordance
with section10 of this Act, "

Renumber accordingly

House Amendments to Reengrossed SB 2027 - Judiciary Committee 03/22/2005

Page 1, line 4, after the first semicolon insert "to provide for a report to the legislative council;"

House Amendments to Reengrossed SB 2027 - Judiciary Committee 03/22/2005

Page 8, after line 17, insert:

"SECTION 9. REPORT TO LEGISLATIVE COUNCIL. During the 2005-06 interim, the commission on legal counsel for indigents shall report periodically to the legislative council regarding the implementation of this Act. The commission shall present its first report to the legislative council before December 1, 2005."

Page 8, line 19, replace "contract" with "indigent defense" and remove "in accordance with section 10 of this Act,"

Renumber accordingly

Date: 3/22/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2027

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Koppelman Amendment

Motion Made By Rep. Koppelman Seconded By Rep. Bernstein

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey		✓	Representative Delmore		✓
Representative Maragos		✓	Representative Meyer		✓
Representative Bernstein	✓		Representative Onstad		✓
Representative Boehning	A		Representative Zaiser		✓
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury		✓			
Representative Klemin		✓			
Representative Koppelman	✓				
Representative Kretschmar		✓			

Total (Yes) 4 No 9

Absent 1

Floor Assignment Motion Failed

If the vote is on an amendment, briefly indicate intent:

Date: 3/22/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2027

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Maragos Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	A		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. DeKrey

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2027, as reengrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Reengrossed SB 2027 was placed on the Sixth order on the calendar.

Page 1, line 4, after the first semicolon insert "to provide for a report to the legislative council;"

Page 8, after line 17, insert:

"SECTION 9. REPORT TO LEGISLATIVE COUNCIL. During the 2005-06 interim, the commission on legal counsel for indigents shall report periodically to the legislative council regarding the implementation of this Act. The commission shall present its first report to the legislative council before December 1, 2005."

Page 8, line 19, replace "contract" with "indigent defense" and remove "in accordance with section 10 of this Act,"

Renumber accordingly

2005 TESTIMONY

SB 2027

#1

North Dakota Indigent Defense

The right to counsel in North Dakota is established by North Dakota Supreme Court rules. Rule 44 of the North Dakota Rules of Criminal Procedure provides, in part:

Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases. Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all non-felony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment.

In North Dakota indigent defense services are provided primarily by attorneys working under contract with judges. Court-appointed attorneys handle those cases in which the contract attorneys have a conflict of interest. North Dakota is divided into seven judicial districts. In each judicial district a presiding judge supervises the court services of all courts in the district. The position of district judge is an elected position filled every six years by a nonpartisan election held in the district in which the judge will serve. North Dakota's indigent defense system is administered through the judiciary and is almost 100 percent state-funded. The one exception is that each of the 53 counties is responsible for funding assigned counsel representation of indigent defendants facing mental health commitment proceedings or proceedings for the commitment of sexually dangerous individuals.

The North Dakota Legal Counsel for Indigents Commission is the statewide indigent defense oversight commission responsible for reviewing indigent defense caseload data, preparing recommended indigent defense budgets, and adopting assigned counsel eligibility qualifications. The commission is made up of eight members who are appointed by the Chief Justice of the North Dakota Supreme Court from nominations by judges, the State Bar Association of North Dakota, the Attorney General, and the Legislative Assembly.

Testimony and Committee Considerations

The committee received testimony and information from the Supreme Court, the State Bar Association of North Dakota, district court judges, and attorneys currently and formerly involved in the indigent defense contract process regarding issues facing the state's indigent defense system. The committee's consideration centered on seven issues--concerns about the current indigent defense system, the indigent defense administration fund, the federal indigent defense system, the Indigent Defense Task Force, the Indigent Defense Task Force proposals and recommendations, proposed legislation, and other indigent defense issues.

Concerns About the Current Indigent Defense System

The committee received testimony from the Supreme Court that the current system of appointing and contracting with attorneys by the judiciary raises conflict of interest concerns. According to the testimony, the current system requires the judge, who is supposed to be the arbiter, to be in a position to award contracts and select counsel for the defendant. The testimony also expressed concern over the lack of attorneys in the state who are willing to contract with the state to provide the indigent defense services. The committee received testimony that judicial districts in rural areas of the state, particularly the northwest, are experiencing a shortage of attorneys who are willing to provide indigent defense services. It was reported that the lack of attorneys willing to contract to do indigent defense work in these counties has resulted in the need to hire outside counsel for indigent defense cases.

The testimony from the Supreme Court indicated that the state has relied on young attorneys who are willing to take the indigent defense contracts. The testimony indicated that when reviewing criminal trial transcripts in which indigent defense counsel has been appointed, there is a general concern about the effectiveness of counsel. It was suggested that this may not solely be because of poor or inexperienced attorneys but may be the result of the lack of time to spend on the cases.

The testimony also noted that the increasing indigent defense caseload in the state is due in large part to the increasing methamphetamine problem in the state, especially in the rural areas where there are fewer attorneys willing to do indigent defense work. According to the testimony, the large increases in caseload are very difficult to handle in a contract system that operates on a fixed budget. Thirty-eight new attorneys were admitted to the bar last year. It was noted that there were more attorneys in the state last year who died than were admitted and the newly admitted attorneys are not locating in the rural areas.

The committee also received testimony from an attorney formerly involved in the indigent defense contract process. According to the testimony, heavy caseload and inadequate compensation were the reasons the attorney terminated his contract with the state. It was also noted that the increase in drug offenses in the northwestern part of the state has greatly impacted the number of cases being assigned to the attorneys. The testimony indicated that when under contract, many attorneys are not earning more than \$50 per hour. Because there are no attorneys currently under contract with the court in the Northwest Judicial District, the court is hiring attorneys to do the indigent defense work at a rate of \$65 per hour. It was recommended that to attract attorneys to take the contracts, the hourly rate should be in the \$75 to \$85 per hour range. The testimony indicated that there were not any other attorneys or law firms in the Williston area who are interested in the criminal defense contract and that the court was struggling to find attorneys to take the work on an assignment basis. The attorney estimated that he spent approximately 50 hours per month, or one-third of his time, on the contract cases he had been assigned.

Indigent Defense Administration Fund

The committee received testimony regarding House Bill No. 1088 (2003), which established the indigent defense administration fund and the court facilities improvement and maintenance fund. Under that legislation, the first \$750,000 collected from the court administration fee is to be

deposited in the indigent defense administration fund, the next \$460,000 is to be deposited in the court facilities maintenance fund, and any amounts collected beyond those amounts are to be divided equally between the two funds. As of October 2004 the collections from the administration fee totaled \$1,000,832. Based upon an estimate of \$90,506 per month, the estimate of total receipts through June 30, 2005, is \$1,905,891. It was estimated that in addition to the \$750,000 that will be deposited in the indigent defense administration fund and the \$460,000 that will be deposited in the court facilities maintenance fund, an additional \$347,945 will be deposited in each fund this biennium. Approximately 70 percent of the court administration fees that have been assessed have been collected. The majority of the administration fees that has been collected are from misdemeanor offenses.

The judicial branch 2003-05 budget for indigent defense services in the state is \$4,312,397. According to the testimony, about \$400,000 of the funds in the indigent defense administration fund has been used to enhance the indigent defense contracts for the upcoming year.

The committee also received testimony from a district judge regarding the court administration fee imposed by House Bill No. 1088. The judge's concerns centered on the employment of the courts as a revenue source, especially when the funds are dedicated funds in which the courts have a direct interest. The testimony indicated that there are three groups of defendants that appear before the court in criminal cases--the group that is not indigent and may or may not have privately retained counsel, the group that fall below the indigent defense guidelines and are represented by court-appointed legal counsel, and the group that appear before the court, do not seek legal representation, and enter pleas of guilty. All three groups, it was noted, are routinely advised by the court that if they enter a plea of guilty to the alleged offense they will be subject to mandatory court administration fees as mandated for the level of the alleged offense. The groups however are not routinely advised that the court may waive the fees if they are indigent. The result according to the testimony is that frequently defendants are subjected to mandatory court administration fees that may be inappropriate if the court were fully informed as to the financial status of the defendants. The testimony also noted that a court-appointed legal counsel, who has a direct interest in the revenue generated from court administration fees, may well argue to the court that the court should reduce the fine imposed since the defendant will be subject to the existing court administration fees. It was also noted that criminal defendants are subjected to court administration fees dedicated to court facilities improvement and maintenance but no such fee is imposed upon others who use court facilities, such as civil litigants.

Federal Indigent Defense System

During the course of its study of indigent defense issues, the committee received testimony from a representative of the United States District Court regarding the federal indigent defense program. The federal Criminal Justice Act of 1964 provides for the hourly payment of indigent defense counsel in the federal courts. In the federal court system in North Dakota, attorneys are appointed on a case-by-case basis. Attorneys are paid a flat rate of \$90 per hour with caps of \$5,200 for felony cases, \$1,500 for misdemeanors, and \$3,700 for appeals. Additional compensation can be approved by the court. Attorneys can request additional money for interpreters, investigators, and experts.

The Criminal Justice Act provides authority for the creation of community defender organizations and federal public defender organizations. The attorneys in the public defender organizations are federal employees, while community defender organizations are nonprofit groups and the attorneys are employed by the nonprofit group. Eighty-three of the 94 judicial districts in the United States have implemented either the federal public defender organization or the community defender organization systems. Of those 83 districts, 58 districts have the federal public defender office system.

North Dakota does not have either type of organization but rather uses a panel attorney system. Each federal district adopts its own plan. All members of the federal bar are eligible to be on the panel. There are 302 attorneys on the North Dakota panel and about one-fourth of those attorneys are actively taking appointments. The district court has two attorneys on contract who serve as advisors to the panel attorneys. When making appointments, the magistrate judge looks at the needs of the defendant and the experience of the attorneys. It was noted that most attorneys are cutting their regular fees by \$40 to \$50 per hour when they take a case. Approximately 200 appointments are made per year in the state at a cost of about \$400,000. It was noted that some incentives for attorneys to take cases are the \$90 per hour rate and the promptness of getting paid, usually within 10 to 14 days after submitting a voucher. It was also noted that the federal indigent defense program is a good program for young attorneys to get experience in federal court. Defendant indigency status is based upon financial information submitted by a defendant. Once indigency is determined, the magistrate appoints counsel.

Indigent Defense Task Force

The committee received extensive testimony from the State Bar Association of North Dakota Indigent Defense Task Force. The task force was composed of a panel of lawyers, judges, and legislators who were selected because of their understanding of the problems with the current indigent defense system. Throughout the course of the interim, the task force reported its findings and recommendations to the committee.

The task force, with funding from the State Bar Association of North Dakota, the Legislative Council, and the Supreme Court, contracted with the Spangenberg Group, a national consulting firm that conducts studies of indigent defense programs. The Spangenberg Group has reviewed 32 statewide systems and has been under contract with the American Bar Association for the last 12 years to provide support and technical assistance to groups working on indigent defense. The Spangenberg Group outlined the following issues for consideration in the task force's study:

- The scope of the right to counsel in North Dakota.
- The type of indigent defense system that would work best for North Dakota, whether it be a public defender system, a contract system, or a combination of the two.
- The type of oversight structure, whether it be an independent body, the judicial branch, or the executive branch.
- The source of funding.

The committee received testimony and a report from the Spangenberg Group regarding the findings of its study. The Spangenberg Group conducted interviews with current and former contract attorneys, judges, state's attorneys, and court administrators in Dickinson, Bismarck, Jamestown, and Fargo. In conducting the site work and reviewing data on the state's indigent defense system, the Spangenberg Group concluded that the North Dakota system is wrought with many serious problems. It was pointed out that the current system is in danger of failing to fulfill its constitutional mandate of providing indigent defendants with effective assistance of counsel.

North Dakota is the only state in the country that uses an indigent defense model relying primarily on private attorneys working under contract with judges. Under North Dakota's system, attorneys agree to accept flat fee contracts requiring them to handle an unlimited number of cases in a given county or judicial district. This type of contracting method presents two primary potential problems--a lack of independence from the judiciary and the inability for contract attorneys to receive relief from excessive case assignments not anticipated when the contract period began. These two potential problems are impacting the quality of legal representation provided to indigent defendants in North Dakota. It was noted that the chief problem with North Dakota's indigent defense system is the pervasive absence of independence for the defense function from the judiciary.

In conducting the study, the Spangenberg Group met with three presiding judges. All three judges were uncomfortable with the current system. North Dakota has some of the lowest rankings among all states in the nation for indigent defense expenditures and cost per capita. The average cost per capita for indigent defense in nine states similar to North Dakota in population and geography was \$8.54 while in North Dakota it was \$3.23. In terms of overall indigent defense expenditures, North Dakota spent 43 percent less than the state with the second-lowest expenditure--Wyoming. In terms of cost per capita, North Dakota spent 49 percent less than the state with the second-lowest rank--Idaho. The 2003-05 appropriation of \$4.3 million for indigent defense was a 5 percent increase over the previous biennium; however, the overall caseload has increased by 8 percent and the felony caseload has increased by 15 percent.

According to the Spangenberg Group, the goal in the state is to pay contract attorneys \$65 per hour, which is \$10 an hour less than the amount recommended by the North Dakota Legal Counsel for Indigents Commission. It was noted however that none of the attorneys interviewed reported earning a full \$65 an hour for their contract work. It was also noted that when a contract attorney is appointed to a very serious case, such as a homicide case, there is often no additional pay for the time required to properly handle the case. In addition to concerns about high caseloads and inadequate pay, there are also concerns that there are no minimum qualifications for attorneys to get contracts. According to the testimony, all judges interviewed noted that they receive complaints about contract attorneys from indigent defendants, most concerning a lack of communication with their lawyers. The testimony indicated that the current system does little in the way of monitoring the work of contract attorneys and there is not a formal process for addressing client complaints. It was noted that some attorneys reported pressure from judges to not request motions, preliminary hearings, or trials.

The Spangenberg Group also reported that there is a disparity between the level of resources provided to contract attorneys and state's attorneys. It was noted that this disparity can impact the

quality of representation provided by defense counsel by diminishing the level of adversarialness called for in a healthy criminal justice system. Full-time state's attorneys receive salaries and benefits, are provided with support staff, and are sent to training at no cost. It was noted that in the Burleigh County State's Attorney's office, additional resources include Westlaw; victim witness coordinators; access to law enforcement personnel for help with investigations; and assistance from the crime lab, medical examiner, toxicologist, and out-of-state experts when needed. By comparison it was noted that contract attorneys receive no benefits, have to pay for their own training and online legal research, and must seek approval for investigators and experts. Finally, it was noted that contract attorneys have no effective voice in the system.

The Spangenberg Group report recommended that North Dakota create a primary public defender system to fulfill its duty of providing its indigent citizens with meaningful and effective representation. In addition to a central administrative office for the public defender system, the creation of a contract administrator position was recommended. The position should be staffed with someone who is familiar with indigent defense practice and issues. It was further recommended that North Dakota create an indigent defense commission that is involved in policy oversight of both the public defender and contract systems, serves as a voice for indigent defense needs, and is responsible for selecting and overseeing the state's public defender. It was noted that regardless of the type of indigent defense system North Dakota chooses, there will be an increase in funding needs. The indigent defense systems in Connecticut and Georgia have been sued; the Georgia case resulted in the state being required to double and in some cases triple its level of funding. Montana's indigent defense system has recently been sued, but the litigation is on hold pending action by the Montana legislature, which has proposed a statewide public defender system.

Indigent Defense Task Force Proposals and Recommendations

Based upon its own findings and upon the recommendations of the Spangenberg Group, the Indigent Defense Task Force presented to the committee a legislative proposal for a structure to provide indigent defense services in the state. The proposal was based on two central principles--the delivery and management of indigent defense services should be removed from the judicial branch and the delivery of indigent defense services should be accomplished through an independent entity with general responsibility for funding, management, and oversight. The task force proposal differed from the recommendation of the Spangenberg Group in that the proposal did not contemplate the establishment of a public defender system as the primary vehicle for providing indigent defense services.

The bill draft proposed by the task force established a seven-member commission on legal counsel for indigents. The members would have staggered terms and should have experience in criminal defense or other appointed counsel cases or have demonstrated a commitment to quality indigent defense representation. Under the bill draft, the commission had a variety of responsibilities regarding the delivery, management, and oversight of indigent defense services. The two central responsibilities of the commission were to establish and implement a process for contracting for legal counsel services for indigents and, if deemed necessary and appropriate, to establish public defender offices within the state. The commission's other derivative responsibilities included tracking and monitoring appointed counsel caseloads, developing

standards regarding delivery of indigent defense services, and approving a biennial budget for submission to the Legislative Assembly. The bill draft authorized the commission to enter an agreement with a city or county to provide indigent defense services that the city or county would otherwise be required to provide. The commission would appoint a director who would have to be a licensed attorney and be eligible to practice law at the time of appointment. The director's responsibilities included preparation of a proposed budget for consideration by the commission; preparation of an annual report on operation of the system; hiring staff, including attorneys as public defenders; and otherwise administering and implementing standards, rules, and policies adopted by the commission. The bill draft also amended NDCC Section 27-20-49 to transfer responsibility for appointed counsel services in juvenile court cases from the Supreme Court to the new commission; amended Section 29-07-01(1) to identify the commission, rather than the court, as being responsible for determining the rate of compensation for appointed counsel; amended Section 29-07-01.1 to appropriate money in the indigent defense administration fund to the commission rather than to the judicial branch; and provided for a transition from the Supreme Court to the commission and for effective dates.

The task force also presented information to the committee regarding the estimated costs of implementing the indigent defense system proposed in the bill draft. The estimated biennial cost to fully and adequately implement the proposed system would be \$11,737,301. This amount includes approximately \$750,000 in special funds, leaving a general fund impact of \$10,954,901. The current indigent defense budget for the 2003-05 biennium is \$4,312,397 from the general fund plus approximately \$750,000 in special funds, for a total biennial budget of \$5,062,397. North Dakota will spend about \$2.5 million per year on indigent defense during the 2003-05 biennium. By way of comparison South Dakota spends about \$6.3 million per year, Montana spends about \$8 million per year, and Wyoming spends about \$6.5 million per year.

The proposed estimate is based on compensating contract counsel at \$75 per hour, which is the presumptive amount per hour currently identified under NDCC Section 29-07-01.1 and is the amount per hour recommended by the North Dakota Legal Counsel for Indigents Commission. The testimony indicated that the estimate is based on 21,810 projected case assignments for the biennium. This compares with 16,747 assignments during the 1999-2001 biennium and 18,039 during the 2001-03 biennium. Costs associated with the establishment and operation of the Commission on Legal Counsel for Indigents is estimated to be approximately \$1,235,285 for the 2005-07 biennium. This includes the annual salary and benefits for a director, who would be appointed by the commission; a deputy; an administrative assistant; and four investigators. It was noted that because of the additional work that would be required in the first year, the commission may need more than the \$8,654 estimated for expenses in the proposal.

One committee member suggested that the Legislative Assembly may want to consider whether the state's indigent defense system could be placed within an existing agency rather than to create a new agency.

Proposed Legislation

Based upon the legislation proposed by the Indigent Defense Task Force, the committee considered a bill draft that established the Commission on Legal Counsel for Indigents. The bill draft provided for the powers and duties of the commission and for a transition of indigent

defense services from the Supreme Court to the commission. Under the bill draft, the Supreme Court maintained the current contract system for six months. However, on January 1, 2006, all indigent defense funds would be transferred to the commission. The bill draft did not contain an appropriation but relied on the Supreme Court to include the funding in its budget request so the amount would be included in the executive budget submitted to the Legislative Assembly rather than requiring the Legislative Assembly to add the amount to the executive budget.

Testimony concerning the bill draft indicated that the intent of the task force in drafting the bill draft was to separate the money needed to establish the commission from the money needed to fund indigent defense services. It was emphasized that the \$1,135,000 needed to establish the commission should be included in the bill draft and that the appropriation for the attorney services would be included in the Supreme Court budget request. Testimony in support of the bill draft indicated that the state needs to act on the issue of indigent defense. According to the testimony, the current system is in crisis and is not meeting the constitutional requirements because of inadequate funding. Because of the low funding and compensation, indigent defense attorneys have the incentive to plead out cases. Montana's indigent defense system has been challenged by the American Civil Liberties Union (ACLU). Montana requested that it be given an attempt to address the problem legislatively. According to the testimony, the Montana legislature's proposal to the ACLU is to increase indigent defense funding from \$8.5 million to \$20 million. According to the testimony, North Dakota's indigent defense system has many of the same problems as Montana's system, including inadequate funding and overworked attorneys. State and federal constitutions require that a defendant is entitled to an adequate defense. It was emphasized that this is where the ACLU may step in and prove that defendants are not getting an adequate defense. The testimony noted that the system proposed in the bill draft does not totally replace the contract system with a public defender system but rather provides for a combination of the two systems. It was noted that there may be some merit to a full-time public defender system; however, this bill draft was the compromise reached by the task force. Finally, it was noted that as long as the appropriate safeguards and funding are in place, this proposal solved the problems with the current system.

Other Indigent Defense Issues

The committee received testimony that costs of indigent defense for mental health commitments, the civil commitment of sexual offenders, and guardians ad litem are still the responsibility of the county. These indigent defense costs are costing the counties about \$300,000 per biennium. The committee was urged to consider whether these costs should be the responsibility of the state.

In response to committee concerns about the lack of attorneys willing to handle indigent defense cases, it was suggested that the Legislative Assembly may want to consider offering a law student loan repayment and forgiveness program for new attorneys who provide indigent defense services and other public interest legal work. The committee received testimony that over the past four years, 84 to 93 percent of law students at the University of North Dakota School of Law borrowed money to finance their law school education. The average student loan amount for graduates of the law school in 2003 was \$48,800. The committee also received information on loan repayment and forgiveness programs in other states and on salaries and employment of recent law school graduates. A number of states, including Arizona, Florida, Maine, Maryland,

Minnesota, New Hampshire, North Carolina, and Texas, have established loan repayment assistance and forgiveness programs for public service lawyers.

Recommendation

The committee recommends Senate Bill No. 2027 to establish the Commission on Legal Counsel for Indigents. The bill provides for the powers and duties of the commission and for a transition of indigent defense services from the Supreme Court to the commission. Under the bill, the Supreme Court would maintain the current contract system for six months; however, on January 1, 2006, all indigent defense funds will be transferred to the commission. The bill includes the funding for the establishment of the Commission on Legal Counsel for Indigents.

SUMMARY - 2005 SENATE BILL 2027

HH #1
(meter 640)

Senate Bill 2027 resulted from draft legislation developed by the SBAND Indigent Defense Task Force and would establish an alternative structure to provide indigent defense services in the state. The bill is based on two central principles. First, delivery and management of indigent defense services should be removed from the judicial branch. There are several reasons for this, all of which have been identified in a report prepared for the Task Force by The Spangenberg Group, a nationally recognized consulting firm specializing in the study of indigent defense systems. The second principle, directly related to the first, is that delivery of indigent defense services should be accomplished through an independent entity with general responsibility for funding, management, and oversight. The key importance for establishment of such an entity is, again, described in The Spangenberg Group report. The alternative structure provided for under the bill differs from the report's final recommendation in that it does not contemplate the establishment of institutional public defender system as the primary vehicle for providing indigent defense services.

The central features of Senate Bill 2027 are briefly described below.

Sections 1 through 4 contain the central elements of the bill. First, *Section 1* would establish a 7 member commission on legal counsel for indigents. Two members each would be appointed by the Governor and the Chief Justice. Two of these four members must be appointed from counties with a population of ten thousand or less. Two members, one from each house of the Legislative Assembly, would be appointed by the chairman of the Legislative Council. One member would be appointed by the Board of Governors of the State Bar Association. Members would have staggered terms and should be those with experience in criminal defense or other appointed counsel cases or have demonstrated a commitment to quality indigent defense representation. Members would be reimbursed for expenses and would receive per diem.

Under *Section 2*, the commission would have a variety of responsibilities regarding delivery, management, and oversight of indigent defense services. The two central responsibilities are to establish and implement a process for contracting for legal counsel services for indigents, and, if deemed necessary and appropriate, to establish public defender offices within the state. Derivative responsibilities include tracking and monitoring appointed counsel caseloads, developing standards regarding delivery of indigent defense services, and approving a biennial budget for submission to the Legislative Assembly. The commission could enter into an agreement with a city or county to provide indigent defense services that the city or county would otherwise be required to provide. The commission would be required to adopt rules for the exercise of its authority in a manner consistent with the notice and comment provisions under the Administrative Agencies Practices Act. However, as clarified in a subsequent amendment, the commission would not be considered an executive branch administrative agency for the general purposes of that Act.

Section 3 requires the to commission appoint a director, who must be a licensed attorney and eligible to practice law at the time of appointment. The director may be removed for cause on a majority vote of commission members. The director would have several responsibilities concerning

the administration of the indigent defense system. Those responsibilities include preparation of a proposed budget for consideration by the commission, preparation of an annual report on operation of the system, hiring staff (including attorneys as public defenders), and otherwise administering and implementing standards, rules, and policies adopted by the commission.

Section 4 governs accessibility to and confidentiality of case-related records maintained by contract counsel and by the commission and its director and staff.

Section 5 would amend Section 27-20-49 of the Century Code to transfer responsibility for appointed counsel services in juvenile court cases from the Supreme Court to the new commission.

Section 6 would amend subsection 2 of section 28-32-01 to exclude the commission from the definition of an administrative agency.

Section 7 would amend subsection 1 of Section 29-07-01.1 to identify the commission, rather than the court, as being responsible for determining the rate of compensation for appointed counsel.

Section 8 would amend subsection 4 of Section 29-07-01.1 to appropriate moneys in the indigent defense administration fund to the commission, rather than to the judicial branch.

Section 9 provides an appropriation of \$1,135,285 for the establishment of the commission effective July 1, 2005. It is important to note that the remainder of the estimated budget related to the implementation of the new indigent defense structure is included in the Supreme Court's biennial appropriation request (Senate Bill 2002).

Section 10 is a transitional provision and would require the Supreme Court to maintain contracts for indigent defense services through December 31, 2005, after which the commission would implement the new system.

Section 11 provides an effective date of January 1, 2006, for Sections 5 and 7, which would establish the commission's statutory responsibility for appointed counsel services. The remaining sections of the bill would become effective on July 1, 2005, as the bill contains an appropriation.

Submitted by:

Jim Ganje
Office of State Court Administrator
January 18, 2005

III

Detail of 2005-07 Proposed Indigent Defense Costs
SB 2027 - Commission on Legal Counsel for Indigents
SB 2002 - ND Supreme Court

Administration of Commission on Legal Counsel for Indigents - SB 2027	
Director - Salary (\$90,000/yr) and Benefits	222,506
Deputy Director - Salary (\$60,000/yr) and Benefits	152,444
Administrative Asst. - Salary (\$23,472/yr) and Benefits	67,137
4 statewide Investigators - Salary (\$41,964/yr) and Benefits	441,291
* Operating - See Note 1	210,854
Oversight Board - 7 members - 4 meetings per year	8,654
Start-up Costs - desks, chairs, computers, printers	32,400
	1,135,286
Funding Sources:	
General Fund	1,135,286
Special Fund	-
	1,135,286

Judicial Appropriation - SB 2002	
Contract Amounts - 21,810 estimated assignments @ 5.3 hrs/assignment @ \$75/hr - Note 2	8,669,475
Reimbursement of Expenses - 10%	866,948
Caseload Increase - in the event caseload increases beyond projection	500,000
Out of contract - Conflicts	350,000
Expert Witness Fees	100,000
Total Indigent Defense Contract Costs	10,486,423
Guardian ad Litem Costs (would stay in the judiciary) - Note 3	527,875
Total Indigent Defense Request in Judicial Appropriation	11,014,298
Funding Sources:	
General Fund	9,994,298
Special Fund (Indigent Defense Administration Fund)	1,020,000
	11,014,298
2003-05 Indigent Defense Budget:	
General Fund	4,312,397
Special Fund (Indigent Defense Administration Fund)	750,000
	5,062,397
Increase from 2003-05 to 2005-07	
General Fund	5,681,901
Special Fund (Indigent Defense Administration Fund)	270,000
	5,951,901

Note 1 - Detail of Operating Expenses:

***Operating:**

IT - Data Processing	6,000
IT - Telephone	4,744
Travel	140,560
IT - Software/Supplies	1,500
Postage	2,500
IT - Contractual Services	-
Space Rental	28,800
Dues & Professional Development	11,050
Operating Fees & Services	1,000
Repairs	500
Professional Services	-
Property Insurance	1,000
Office Supplies	2,000
Printing	2,500
Professional Supplies & Materials	5,000
Misc. Supplies	500
Office Equip & Furniture	1,500
IT Equipment less than \$5,000	1,700
Total Operating	<u>210,854</u>

Note 2:

Estimates of case filings and indigent defense assignments for 2004, 2005, 2006 and 2007 were based on an average increase per year for felonies (6%), misdemeanors (marginal increase), and juvenile (4%). Estimated indigent defense assignment rates were based on an approximate average of previous assignment rates: felonies (94%), misdemeanors (18%), and juvenile (76%). The estimates for filings are based on a static percentage of increase for each year and the estimates for assignments assume the assignment rate will remain constant.

Applying the estimated case filings and assignments, it was estimated that approximately 21,810 assignments will be made during the 2005-07 biennium. This would represent an increase of approximately 1,885 assignments (felony, misdemeanor, juvenile) in each of the 2003-05 biennium and the 2005-07 biennium.

The compensation to be provided to contract counsel is based on an estimated number of hours per case type, which is then applied to a \$75 per hour rate. The \$75 per hour rate is the presumed amount per hour for counsel services identified under NDCC Section 29-07-01.1.

The 5.3 hours per case represents a "midpoint" range of hours per assignment based on nationally developed standards recommended by the Spangenberg Group and hours reported in the current system.

Note 3:

The \$527,875 represents amounts requested by the judiciary for guardian ad litem services for juveniles in deprivation and termination cases. This amount would stay with the judiciary, regardless of the outcome of SB 2027 regarding indigent defense services.

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SBAND Indigent Defense Task Force

— Case Load, Assignment, and Budget Information —

The Indigent Defense Task Force based its assessment of filings and indigent defense assignments on historical data and estimates of future filings and assignments. The Task Force report and recommendations are based on information reviewed in February, March, and April 2004 and attempt to "look forward" to the 2005-2007 biennium during which the new indigent defense system would be implemented.

1999

3105 felony filings; 2824 indigent defense assignments (91%)

20385 misdemeanor filings; 3443 indigent defense assignments (17%)

2313 juvenile filings; 1970 indigent defense assignments (85%)

2000

3203 felony filings (3% increase); 2998 indigent defense assignments (94%)

21055 misdemeanor filings (3% increase); 3665 indigent defense assignments (17%)

2240 juvenile filings (3% decrease); 1856 indigent defense assignments (82%)

2001

3571 felony filings (12% increase); 3357 indigent defense assignments (94%)

21033 misdemeanor filings (stable); 3712 indigent defense assignments (18%)

2581 juvenile filings (15% increase); 2134 indigent defense assignments (82%)

2002

4240 felony filings (19% increase); 3982 indigent defense assignments (94%)

22258 misdemeanor filings (6% increase); 3934 indigent defense assignments (18%)

2358 juvenile filings (9% increase); 1770 indigent defense assignments (75%)

2003

4144 felony filings (2% increase); est. 3902 indigent defense assignments (based on 94%)

23228 misdemeanor filings (4% increase); est. 4091 indigent defense assignments (based on 18%)

2451 juvenile filings (4 % increase); est. 1840 indigent defense assignments (based on 75%)

Estimates of case filings and indigent defense assignments for 2004, 2005, 2006, and 2007 were based on an average increase per year for felonies (6%), misdemeanors (marginal increase), and juvenile (4%). *Estimated* indigent defense assignment rates for 2004, 2005, 2006, 2007 were based on an approximate average of previous assignment rates: felonies (94%), misdemeanors (18%), and juvenile (76%). Caveat: the estimates for filings are based on a static percentage of increase for each year and the estimates for assignments assume the assignment rate will remain constant.

Estimated Results for 2004, 2005, 2006, 2007:

2004 —	4392 felony filings; 4128 indigent defense assignments
	23300 misdemeanor filings; 4194 indigent defense assignments
	2524 juvenile filings; 1918 indigent defense assignments
2005 —	4655 felony filings; 4375 indigent defense assignments
	23400 misdemeanor filings; 4212 indigent defense assignments
	2599 juvenile filings; 1975 indigent defense assignments
2006 —	4934 felony filings; 4637 indigent defense assignments
	23500 misdemeanor filings; 4230 indigent defense assignments
	2676 juvenile filings; 2033 indigent defense assignments
2007 —	5230 felony filings; 4916 indigent defense assignments
	23600 misdemeanor filings; 4248 indigent defense assignments
	2756 juvenile filings; 2094 indigent defense assignments

Biennial Totals

Applying the estimated case filings and assignments, it was estimated that approximately 21810 assignments will be made during the 2005-2007 biennium. This would represent an increase of approximately 1885 assignments (felony, misdemeanor, juvenile) in each of the 2003-2005 biennium and the 2005-2007 biennium.

Compensation Amount

The compensation to be provided to contract counsel is based on an estimated number of hours per case type, which is then applied to a \$75 per hour rate. The \$75 per hour rate is the presumed amount per hour for counsel services identified under NDCC Section 29-07-01.1.

Based on nationally developed standards, The Spangenberg Group recommended that the delivery of indigent defense services be based on an hour commitment of 11 hours per felony assignment, 3 hours per misdemeanor assignment, and 5.5 hours per juvenile assignment. In contrast, information reviewed by the Task Force and The Spangenberg Group indicated reported hours in the current system reflect an hour commitment of 5 hours per felony assignment, 2.7 hours per misdemeanor assignment, and 3.1 hours per juvenile assignment. For a variety of reasons (local practices, differences between a nationally applied standard and the requirements of a smaller indigent defense system), the Task Force declined to adopt the hour recommendations provided by the consultant. The Task Force did, however, conclude that proper and more intensive case monitoring and management should seek to ensure that a more appropriate amount of time is spent on assigned cases. This would assist in ensuring that more adequate counsel services are provided and may reduce the number of post-conviction relief proceedings or appeals. The Task Force, therefore, adopted a "midpoint" range of hours per assignment with respect to felony and juvenile assignments: 8 hours for felonies, 4.5 hours for juveniles. The Task Force adopted The Spangenberg Group recommendation with respect to misdemeanor assignments (3 hours) as information indicated reported hours of approximately 2.7 hours per misdemeanor assignment under the current system. The Task Force then applied an average of 5.3 hours per case to the estimated 21810 assignments to determine the total number of estimated counsel hours for the 2005-2007 biennium:

$$21810 \text{ assignments} \times 5.3 \text{ hours/assignment} = 115593 \text{ hours}$$

The total number of hours was then multiplied by the rate of \$75 per hour to determine the total estimated dollar amount for counsel services for the 2005-2007 biennium:

$$115593 \text{ hours} \times \$75 = \$8669475$$

It is this amount that constitutes the largest share of the estimated cost for implementing the new system for delivering indigent defense services recommended by the Task Force.

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**REVIEW OF INDIGENT DEFENSE SERVICES IN
NORTH DAKOTA
Draft Report January 30, 2004**

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**At the Request of:
State Bar of North Dakota
Task Force on Indigent Defense**

**REVIEW OF INDIGENT DEFENSE SERVICES
IN NORTH DAKOTA
(Draft report January 30, 2004)**

INTRODUCTION

House Concurrent Resolution No. 3004, passed in 2003, directed the North Dakota Legislative Council "to study the state's method of providing legal representation for indigent persons and desirability of establishing a public defender system."

In response to the Resolution, the President of the State Bar of North Dakota formed a Blue Ribbon task force to work with the Legislative Council Criminal Justice Interim Committee in fashioning an acceptable legislative package for the 2005 session. At the November 2003 meeting of the State Bar of North Dakota Task Force on Indigent Defense (SBAND Task Force), Task Force members voted to enlist the assistance of The Spangenberg Group (TSG), a nationally renowned criminal justice research and consulting firm located in West Newton, Massachusetts that specializes in studying indigent defense systems. The report was sponsored by the SBAND Task Force and the American Bar Association Bar Information Program.¹

The scope of TSG's work included in-person interviews with individuals who are involved with the state's indigent defense system and review of various data reports on the system. The goal of TSG's work was to provide the Task Force with additional information from which to make recommendations about changes to North Dakota's indigent defense system.

Marea L. Beeman and Jennifer W. Riggs of The Spangenberg Group traveled to North Dakota the week of December 8, 2003. The pair conducted interviews with current and former contract attorneys, judges, state's attorneys and court administrators in four areas: Dickenson, Bismark, Jamestown and Fargo. Some of the interviews were conducted by telephone. All interviews were arranged by Task Force Chair Sandi Tabor.

The following report highlights some of the major issues we identified with the current contract system in North Dakota. After conducting the site work and reviewing data on the indigent defense system, we feel that the North Dakota system is wrought with many serious problems. The current system is in danger of failing to fulfill its constitutional mandate of providing indigent defendants with effective assistance of counsel. *We recommend that North Dakota shift to a statewide public defender program to better serve indigent defendants.* A detailed explanation of this recommendation appears at the end of this report.

¹ Since 1986, The Spangenberg Group has been under contract with the American Bar Association's Bar Information Program (BIP), which provides support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. As the primary provider of technical assistance under BIP, TSG has responded to requests from organizations working to improve their jurisdictions' indigent defense systems in all fifty states.

BACKGROUND

North Dakota is the only state in the country that uses an indigent defense model relying primarily on private attorneys working under contract with judges. Attorneys agree to accept flat fee contracts requiring them to handle an unlimited number of cases in a given county or judicial district. This type of contracting method presents two primary potential problems: 1) a lack of independence from the judiciary and 2) the inability for contract attorneys to receive relief from excessive case assignments not anticipated when the contract period began. We found in our site work that both of these two potential problems are indeed impacting the quality of legal representation provided to indigent defendants in North Dakota. Besides these two fundamental structural problems, we discovered a number of other issues with the current indigent defense system in North Dakota that impact the ability of attorneys to properly handle their indigent defense contracts.

LACK OF INDEPENDENCE AND THE CONFLICT OF THE JUDICIARY MAKING ALL DECISIONS REGARDING FUNDING FOR INDIGENT DEFENSE

The chief problem with North Dakota's indigent defense system is the pervasive absence of independence for the defense function from the judiciary. All key decisions about which attorneys will provide indigent defense representation, how much they will be paid, and what individual case resources will be allocated to them are made by the judiciary.

• Bid Process

When asked how the bid process worked in their county, most attorneys we interviewed relayed a similar experience. Generally, attorneys are sent letters from the court soliciting interest and notifying them that the contracts are being let. Some attorneys said the court suggests a budget amount that is firm while others said they perceive that the contracts are up for bid. One attorney said he always submits a bid that is a little less than the contract amount.

One presiding judge told us that in the past North Dakota used a low-bid process when selecting contract attorneys. Contracts were awarded to attorneys who submitted the lowest bids. The Legal Counsel for Indigents Commission strongly discourages courts from doing this any longer and to instead look at overall qualifications of the attorneys. We were told that the process is supposed to be that the Office of the State Court Administrator informs a judicial district what it has to spend on indigent defense, and the local courts get to decide how to apportion that amount between criminal and juvenile court services. This is done by reviewing the previous year's number of contract hours reported and the number of cases handled. One judge said the bid solicitation notice is supposed to state what the amount will be and there is not supposed to be any bidding. However, a judge in another district thought that the contractors were selected on the basis of the lowest bid.

Generally there is not a lot of competition for the contracts; in some districts contracts go to all attorneys who apply. In large part this is due to the relatively low pay and high workloads, but another factor is a perceived lack of prestige of doing contract work.

One county's attorney selection process raised strong concerns about the level of independence of indigent defense contract attorneys from the judiciary. In Cass County, there are eight judges and the judges decide as a group who will be awarded contracts. Contracts are not awarded on the basis of a majority vote; it is all or nothing. If a single judge feels that an attorney should not be awarded a contract, no contract will go to that attorney.

We were told by several people that the contract of at least one Cass County attorney was not renewed because one judge, before whom the lawyer had on occasion exercised his right to demand a different judge, voted against it. (North Dakota is one of several states where an attorney can automatically demand and get a change of judge within a specific timeframe after assignment of a case. Such a right is sometimes exercised by defense counsel when they feel a particular judge is likely to sentence a client disproportionately harshly if the client is convicted.) One attorney told us: "An unwritten rule is: if you (exercise your right to) bump judges, you won't get your contract renewed." "You're working for the judges."

Beyond this problem, another Cass County contract attorney identified another inherent conflict of judges having the authority to award indigent defense contracts. Some judges subtly let contractors know that they do not want them to file too many motions or seek too many trials. This attorney was explicitly told when he got his contract not to file unnecessary motions or go to trial unnecessarily. He said if he did not have this sort of pressure, he would have gone to trial more often. "If you hope to get your contract renewed, you shouldn't have to worry that you are upsetting or not pleasing the judges if you are filings motions, requesting trials and transcripts, etc."

• Budget Process

All money for indigent defense in North Dakota is appropriated to the judiciary. The judiciary requests funds for indigent defense as part of the District Courts Operating Budget. The Office of the State Court Administrator provides some guidelines on how much to request. For example, for the 2003-2005 biennium, the Office of the State Court Administrator suggested that the Court budget for a five percent increase to the attorney contracts. The judiciary projects budget needs for experts, investigators, travel and other expenses for indigent defense.

In the past two bienniums, indigent defense expenditures slightly exceeded what was budgeted, whereas in the 1997-1999 biennium, the budget was underspent by 1.7 percent. When expenses exceeded the budget, funds have been redirected to indigent defense from elsewhere in the court's operating budget. The following table sets out the

indigent defense biennial budgets by judicial district and the state's overall expenditures since 1997-1999.

Table 1 - Indigent Defense Biennial Budgets and Expenditures

Judicial District	1997-1999	1999-2001	2001-2003	2003-2005 Requested
East Central	\$622,076	\$688,738	\$837,745	\$961,130
Northeast Central	\$374,004	\$404,634	\$453,180	\$523,999
Northeast	\$399,017	\$404,759	\$418,805	\$514,943
South Central	\$824,763	\$824,763	\$875,600	\$976,500
Southeast	\$435,121	\$452,233	502,200	\$535,100
Southwest	\$228,503	\$214,713	\$246,640	\$268,162
ASFA funds*			\$225,000	
TOTAL	\$3,265,250	\$3,409,483	\$4,055,670	\$4,312,397
Total expenditure	\$3,208,408	\$3,424,683	\$4,098,646	
% under/over budget	under 1.7%	over 0.4%	over 1.1%	

Source: North Dakota State Court Administrator's Office

* Federal Adoption and Safe Families Act (ASFA) funds are received from the Department of Human Services. In the 2003-2005, \$250,000 in ASFA funds was included within the districts' budgets.

** Does not include Criminal Administration Fees under Continuing Appropriation. An additional \$750,000 is estimated to be available for indigent defense spending under this continuing appropriation.

North Dakota has some of the lowest rankings among all states in the nation for indigent defense expenditures and cost-per-capita. Table 2 below provides FY 2002 indigent defense expenditure and cost-per-capita comparison for nine states: five with populations below 900,000, including North Dakota, and four that have greater populations but also have large rural areas, similar to North Dakota. Among these nine states, North Dakota ranks last in both cost-per-capita and overall expenditure on indigent defense. The average cost-per-capita among the nine states was \$8.54; while in North Dakota it was \$3.23. In terms of overall indigent defense expenditures, North Dakota spent 43 percent less than the state with the second-lowest expenditure (Wyoming) among the group, and in terms of cost-per-capita, North Dakota spent 49 percent less than the state with the second-lowest rank (Idaho).

Table 2 – 2002 Indigent Defense Cost Per Capita Comparisons

State	2002 Population	2002 Expenditure	Cost Per Capita	Primary System
Delaware	807,385	\$9,223,500	\$11.42	PD
Idaho	1,341,131	\$8,570,299	\$6.39	PD, AC
Maine	1,294,464	\$9,624,000	\$7.43	AC
Montana	909,453	\$9,293,648	\$10.22	K, PD, AC
New Hampshire	1,275,056	\$13,396,398	\$10.51	PD
North Dakota	634,110	\$2,049,323	\$3.23	K
South Dakota	761,063	\$6,354,067	\$8.35	AC, K
Vermont	616,592	\$7,461,030	\$12.10	PD, K
Wyoming	498,703	\$3,583,111	\$7.18	PD
			Average = \$8.54	

PD = public defender
 AC = assigned counsel
 K = contract

Although the Office of the State Court Administrator suggested that indigent defense contracts be increased by five percent for 2003-2005, the actual increases varied from district to district, ranging from two to seven percent increases. Overall, the indigent defense budget increased 6.3 percent. Contractors are not paid uniformly throughout the state. In some areas, attorneys are paid roughly \$70 an hour while in other areas they are paid roughly \$40 an hour.

• **Experts, Investigators**

Contract attorneys must get court permission for payment of an expert or investigator that will run more than \$500. Any request amounting to over \$500 must be submitted to the Presiding Judge of a judicial district. The presiding judge reviews all requests, even in cases before him or her.

There is a clear conflict with judges making all of the decisions about how much indigent defense lawyers will be afforded for experts and investigators in individual cases. Three presiding judges expressed displeasure with this approach. One said it puts judges in an uncomfortable position to field requests for experts and also get told to watch costs.

CASELOAD IS UP, WORKLOAD IS HIGH AND FLAT FEE CONTRACTS DON'T PROPERLY COMPENSATE FOR THIS

Table 3 - Statewide Indigent Defense Assignments²

Case Type	1999-2001 biennium*	2001-2003 biennium**	Percent Change
Felony	5,823	6,691	+ 14.9%
Misdemeanor	7,098	7,424	+ 4.6%
Juvenile	3,826	3,924	+ 2.6%
TOTAL	16,747	18,039	+ 7.7%

* includes assignments outside of contracts

** does not include assignments outside of contracts

In the 2001-2003 biennium, 18,039 new assignments were made to contract attorneys in North Dakota. That is nearly an eight percent increase from the 1999-2001, when all indigent defense assignments totaled 16,747.³ The area with the largest growth (approximately 15 percent) in this period was felony cases - the most demanding work for contract attorneys. Much of the increase in contract work is from cases relating to an increase in the manufacture, use and sale of crystal methamphetamine in North Dakota in recent years.

All contracts in North Dakota are flat fee amounts for an unspecified number of cases. While some contract attorneys agree to do a certain percentage of indigent cases in a given jurisdiction - e.g., one attorney will sign on for 50 percent of the cases in a particular county - there is still no specified caseload cap. Attorneys must take as many assignments as they are given, absent a conflict of interest. Thus, although an effort is made to determine the number of cases that will be assigned in a coming year, there is no way to predict with certainty, and in recent years, caseloads have been steadily exceeding predictions.

In 1973, the National Advisory Commission (NAC) published its recommended maximum annual caseload standards for full-time public defenders, standards which have been endorsed by the American Bar Association and tailored by many local jurisdictions to their own practice. While there is no similar national model for contract counsel or assigned counsel who are handling indigent defendant cases on a part-time basis, it is understood that a part-time contract attorney would have a proportionately reduced caseload. Standard 13.12 on courts of the NAC report states:

The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150;

² Data from the Office of the State Court Administrator.

³ The 1999-2001 caseload numbers included those appointments made outside of the contracts. Were the 2001-2003 caseload numbers also to include assignments made outside of the contracts, the percentage increase would be even higher. Data on the number of appeals assigned to indigent defense lawyers is not available for either period.

misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.⁴

High caseloads were cited by many if not most of the contract attorneys we interviewed. For example:

- A Bismark juvenile contract attorney closes between 225-250 juvenile cases a year, and he estimated that the contract work is only 15-20% of his practice.
- A Minot attorney whose contract work constitutes roughly 30-40% of his practice, said his own statistics show that in 2000 he opened 216 criminal cases, while in 2002, he opened 350 criminal cases. This caseload was in addition to 30-40 juvenile cases and a number of mental health cases each year. Through June of 2003, the attorney opened 154 criminal cases. The workload became so unmanageable that the attorney agreed to renew the contract in July on the condition that he could adjust the terms later, which he did in October by cutting his portion of the contract work from 40% to 20%.
- In Cass County, where there are separate contracts for juvenile and criminal cases, one criminal case contract attorney estimated he had 170-180 open, active cases. In early December he had received over 550 new cases for the year and expected to finish with about 570. With a caseload this high, "it's impossible to do everything for your clients." In Cass County, however, the number of criminal contract attorneys has been reduced from 5 to 4, despite increasing caseloads.
- A Cass County juvenile contract attorney estimated he had opened 500 cases in 2.5 years; 750 if you include cases that get re-opened.
- We were told that in Grand Forks, criminal case contractors have about 120 cases apiece a year. One contractor devotes about 100 hours per month (averaging \$42-\$45 per hour) and thus has little time left for any retained work. "The contract is a double-edged sword: you need it to survive, but it leaves you with little/no time for anything else."

We were told that in Burleigh County (Bismark) alone, the number of felony filings increased by 54% between 1999 (593) and 2002 (916), misdemeanor filings increased by 40% (1,220 to 1,712), and juvenile cases (including delinquency and deprivation) more than doubled (350 to 782) and were estimated to nearly triple in 2003 (to 1,100).

⁴ National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts* at 186 (Washington, D.C. 1973). The standards are disjunctive, thus, if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should not exceed 100 percent.

One Bismark attorney interviewed gave up contract work because the caseload became unmanageable. When she began the contract as a new attorney in 1995, the contract caseload was manageable, but it gradually got out of control. She could get between 15-30 new adult criminal cases in a month, and the contract work was only 30-40% of her total practice. At the end she was receiving about 200 cases a year. "With the numbers [of cases], you are jeopardizing the level of representation. It's impossible to do everything... Something has to give." When the attorney's personal life began to suffer, she quit the contract.

Consequences of excessive caseloads include: lack of client and family member contact, inability to do legal research, weak or no motion practice, insufficient investigation in cases where investigators are not used, insufficient case and trial preparation, failure to prepare a pre-sentence plan and, eventually, burnout. All of these factors affect an attorney's ability to effectively litigate the case, whether going to trial or negotiating a plea bargain.

CONTRACT PAY ISSUES

As previously mentioned, pay for contract attorneys is not uniform throughout the state. Although the goal is to pay contract attorneys \$65 an hour (\$10 an hour less than the amount recommended by the North Dakota Legal Counsel for Indigents Commission, actual rates range from \$55 an hour in the South Central district to \$96 in the Southwest district.⁵

The Office of the State Court Administrator requires that contract attorneys report all time spent on cases. These time reports are used to determine the average amount of time put into various types of cases and thus determine how much money to request for indigent defense. The average hours per-case figures used by the State Court Administrator are low, especially for felony cases. Statewide, the figure used for the average hours per felony case in 2001-2003 was 5.1 hours. The average hours per misdemeanor case was 3.2, the average hours per juvenile case was 3.1, and the overall average for all three case types was 3.8 hours. When asked about these figures, one contract attorney complained that the figures the State Court Administrator uses to create the contract amounts do not include travel time, which can add up. Also, attorneys are reportedly only permitted to bill for 0.1 hour for a phone call, "even if it lasts 30 minutes."

None of the attorneys we interviewed reported earning a full \$65 an hour for their contract work. Even in the Southwest district (Dickinson), where contract work reportedly pays more than \$65 an hour, one attorney left the contract last year because it required too much work for too little pay. This attorney also said that two or three other attorneys left the contract when he did, for the same reasons. Contract pay was

⁵ Average hourly rates reported by the State Court Administrator's Office, calculated using closed cases for each district and state average hours per case, and based on July 1, 2001 through June 30, 2002 statistics.

inadequate for many of the attorneys we met with in our site work and the reasons for this varied. A number of these reasons are discussed below.

- *Some Requirements and Reimbursements are Not Uniform*

Contract attorneys receive a small amount (totaling 2% of their contract) to cover expenses. Some said the amount does not adequately cover costs. Postage and telephone expenses mount quickly: "in a rural area, every call is long distance." One attorney said the limited amount forces attorneys to decide how much case-related material they are going to photocopy and send to their client. This attorney said he thinks clients should get copies of every scrap of paper affecting their case, so he sends copies at his own expense (he sent over 3,000 pages of materials in a homicide case). However, he said other attorneys pick and choose what they will send.

Some contracts provide reimbursement for travel (e.g., \$.31/mile on travel in Minot and Dickinson) while others do not. One attorney from Bismark, where no travel reimbursement allowance is made, said he travels on average 1,400 miles a month driving to the new women's correctional facility (260 miles roundtrip), going to court, going to jail, and viewing crime scenes.

- *Very Serious Cases/Special Case Compensation/Appeals*

When a contract attorney is appointed to a very serious case, such as a homicide case, there is often no additional pay for the time required to properly handle the case. In some districts, contracts permit contract attorneys to apply to the court for "special case compensation" if they put in a certain number of hours in a particular case. In one district, the trigger figure was 100 hours, in another it was 200 hours. The number of hours one must put into a case before requesting additional pay is high, and the amount of money provided is typically not much. For example, one attorney said he put in over 400 hours on a homicide case and expects he will receive no more than \$1,500 in special compensation, the amount other attorneys in his district received on cases requiring an extraordinary amount of time. Special case compensation will not be paid until a case reaches final disposition, which in many cases will mean after appeal.

While handling a homicide contract case is tough on the practice of any contract attorney, the impact on a solo practitioner is particularly pronounced. Handling a homicide contract case can cripple a solo practitioner's practice for a month or longer. Attorneys will have no time to take on retained cases, but must keep up with other contract cases. One contract attorney in Dickinson got a murder case which, he said, "cost me four months of my practice. All I got was \$1,000 a month for four months. My private practice went to hell." Another attorney in Bismark said he spent 500 hours on a murder case, but, remarkably, he had not sought special case compensation. In fact, several attorneys we interviewed said they had never requested special case compensation.

Contract attorneys are expected to handle any appeal arising out of a case they handled at trial. Appeals can be very time consuming. At a minimum, work on an appellate case entails a review of the transcript and record, issue spotting, research, and care in drafting. One contract attorney who had four appeals last year said they took, on average, 60 hours apiece. This amount of time is consistent with NAC guidelines. If a contract attorney following the NAC guidelines (25 appeals for a full-time defense attorney per year) worked full-time handling appeals and put in 1,730 annual billable hours,⁶ the average amount of time per appeal would be 69 hours per case. No additional pay is provided for appeals.

Several attorneys praised the University of North Dakota Law School's central legal research program as being helpful for appellate cases. Contract attorneys may request legal research to be conducted - at no cost - by law students, whose work is reviewed by faculty. According to the law school's website:

The mission of Central Legal Research is to provide legal research services free of charge to North Dakota licensed attorneys who are publicly-paid personnel in the municipal, state, federal, and tribal court systems, such as judges, prosecuting attorneys, and court-appointed defense counsel.

The program turns around requests in about three weeks, so it is an impractical resource for some cases. But the service is particularly valuable in appellate cases. One attorney said, "I don't know what I'd do without them."

Some cases have little to no chance of success on appeal. Contract attorneys told us they are sometimes asked to file briefs in cases that they feel have no merit. A few years ago there was a proposal to create an appeals board of three people who would review a case to see if there was merit, however, it was not created. As it stands now, contract attorneys must take the time to prepare briefs in all appellate cases appointed to them.

• *Termination Catch 22*

A common theme we heard was from attorneys who wanted to terminate their contracts but felt unable to because the contracts require attorneys to carry all cases open at the end of the contract period through to disposition, which in some cases will not occur for months to come. This can put a serious burden on practitioners who no longer

⁶ Over the past 15 years, The Spangenberg Group has conducted quantitative workload studies for public defender agencies to establish workload measures that reflect the time needed to dispose of various types of criminal cases during the course of a year. (Such studies have been conducted by The Spangenberg Group for indigent defense programs in Colorado, Tennessee, Minnesota, Wisconsin, King County, Washington, New York City and Maricopa and Pima County, Arizona). In these studies, caseload standards and measures were developed from detailed, quantitative time sheets kept by public defenders over a period of time. In each study, a number of billable hours is calculated based upon full-time work, less vacation, sick time, training, administrative time, etc. The average yearly billable time among all of the studies averaged 1,730 hours per attorney per year.

have any income from the contract, but are still working on contract cases months later. More than one attorney we interviewed had given notice he wanted to terminate the contract only to be appointed to a homicide in the months between notice and the end of the contract. Such attorneys felt they had no choice but to re-contract in order to have some income while working on these demanding and time consuming cases. As one said, "We're damned if we do, damned if we don't" re-contract.

The 2003-2004 contract in the Northeast Central district included a first-time provision allowing attorneys who terminate their contracts and are still carrying cases three months after the contract ends to apply for extra compensation. However, there is no guarantee money will be available.

OTHER PROBLEMS WITH THE CONTRACTS

High caseloads and inadequate pay are not the only areas of concern with North Dakota's contract systems. Some other problems include the following.

- *There are No Minimum Qualifications to Get Contracts*

Very inexperienced attorneys can and do get contracts to represent indigent defendants in North Dakota. In part this is because few attorneys seek contract work. In some areas of the state there are no experienced attorneys - or worse yet, no attorneys at all - willing to take the contracts. Thus in some districts, if only one attorney applies for a contract, he or she will get it, regardless of experience. One former contract attorney who is now a presiding judge recounted with some chagrin that when she first accepted a contract she had very little experience. Still, having few experienced attorneys living in a given district and willing to accept contracts is not a justification for having no minimum experience or previous training requirements for contract attorneys.

- *Client Contact and Oversight and Monitoring of Contractors*

All judges interviewed noted that they receive complaints about contract attorneys from indigent defendants, most concerning a lack of communication with their lawyers. Contract attorneys acknowledged that these complaints occur. Some attorneys felt that indigent defendants can be more demanding than retained clients, who face having to pay for additional time spent with their attorney, and thus many of them have unrealistic expectations of appropriate client contact. There can be little question, however, that contract attorneys have a lot of clients, thus getting back to clients in a timely fashion is challenging. An attorney who serves on the Inquiry West Committee, an attorney disciplinary committee for the western part of the state, said one of the biggest complaints they receive is from prisoners regarding contract attorneys. The complaints are typically that there was not enough contact from the attorney, or the attorney did not listen to what witnesses the client suggested to call, or that the attorney did not file appropriate motions.

Visiting clients in jail can be problematic for attorneys working in counties with no jail, where defendants get housed in other counties, or for attorneys who work in multiple districts and thus face considerable travel time to visit detained clients. Detained clients can talk to their lawyers on the telephone, but there is no assurance of privacy. Even though jails are easier to access in larger cities, many attorneys have initial client contact by phone. One attorney said candidly that although he will meet with in-custody clients soon, it is "hardly ever within 24 hours" as the contract requires. Some clients - detained and out on bond - only see their contract attorney at court appearances; the rest of their contact is by telephone if at all. A Dickinson judge said there are times when it is clear an attorney is meeting a client for the first time just before a hearing, particularly at misdemeanor pretrials, which occur six weeks after initiation of the case and appointment of counsel. While some clients do not contact their attorney even if they receive an initial contact letter, attorneys should attempt to make telephone contact when possible if they have not heard from a client and a court date is approaching.⁷

There is no formal process to address client complaints. A number of judges said they forward complaints to the attorneys and expect them to be addressed. This is not an ideal situation; again it points to an inappropriate level of independence between the court and indigent defense functions. Handling client complaints is a proper function of an oversight entity, such as an indigent defense commission or, if a public defender system is in place, the chief public defender.

Not only is there is no formal process to address client complaints, but there is also almost no oversight or monitoring of contract attorney performance. The North Dakota Counsel on Indigents Commission does not serve this function. If any monitoring is to be done it is by judges, primarily through refusal to renew a contract.

Oversight benefits indigent defense systems in many ways, one of which is ensuring that attorneys actually meet their clients. In most counties, attorneys receive notice of who their clients are via a letter or fax from the court. Defendants are given the name of the attorney appointed to represent them and are instructed by the court to contact the lawyer before their first court appearance. Once notified of a new case, most attorneys send a letter to new clients encouraging them to set up a meeting. Still, the onus is on defendants to meet with their attorney, and that does not always happen.

In Cass County, contract attorneys are expected to attend arraignment, which is the point at which counsel is appointed for indigent defendants. This is a better practice, because even though necessary case information, such as the police report, may not yet be available, the attorney is able to make valuable initial personal contact with the client. (Another advantage of requiring attorneys to appear at arraignment is that a small percentage of cases can be resolved at this early stage, either via a plea in straightforward cases with clear cut facts or via a dismissal due to facial defects in the prosecution's case.) Many public defender systems require attorneys to be present at arraignment, thereby solidifying initial client contact.

⁷ N.D.R. Prof. Conduct Rule 1.4(a) requires attorneys to "make reasonable efforts to keep a client reasonably informed about the status of a matter".

- *Incentive to Move/Plead Cases*

Flat fee contracts that do not pay attorneys any more if a case goes to trial or takes extraordinary time encourage quick resolution of cases with minimum effort. In such a system, despite a lawyer's best intentions, there can be a disincentive to take the extra time to seek an investigator or expert, file and argue motions, or visit clients in custody (where confidentiality can be assured, unlike over the phone). The calendaring system in Cass County also facilitates if not encourages pleas. Ten to fifteen trials are set on the same day, with full knowledge that all but one or two will settle. The flat fee contract system may well contribute to the very low trial rate in North Dakota. While two contract attorneys reported having between 10 and 20 jury trials in the previous year, most contract attorneys interviewed had had no more than three or four jury trials in the previous year.

North Dakota has a very low trial rate in both criminal and civil cases. For example, according to data from the Office of the State Court Administrator, in 2002 in the Southwest district, there were a total of 15 jury trials in the district. Information is not available on how many of these were civil v. criminal. However, even if all 15 trials were criminal trials, out of 2,817 adult criminal dispositions, the criminal trial rate (contract and private) would still be only 0.5 percent. One misdemeanor contract attorney in the Southwest district who commented on the necessity of handling contract cases cost-effectively, reported to have two trials a year in misdemeanor contract cases and four to five trials a year in retained cases. Still, according to the State Court Administrator's data, two judicial districts have even lower trial rates, the Northeast Central district at 0.2 percent and the Northeast district at 0.3 percent. The South Central district has the highest jury trial rate of 1.6 percent of all cases cleared.

While no attorneys felt they did a deficient job in contract cases, most distinguished the effort put into retained and contract matters. One attorney said, in retained cases, the goal is to open new files. In contract cases, the goal is to resolve the matter...to focus on what needs to be done. Another said, "you have to learn to streamline these cases; you get the factual background, decide if you need a preliminary hearing to cross examine witnesses, file motions if necessary and argue them if necessary. You don't file frivolous motions." Numerous contract attorneys and judges echoed the sentiment that contract attorneys "don't file frivolous motions."

One presiding judge said that some contract attorneys are more likely to file motions in their retained cases, for example, a suppression motion in a DUI case. Also, he noted, more private cases go to trial than contract cases. Still, he reports the quality of contract representation to be good; the primary problem area is client contact.

One attorney said the contract system "doesn't induce an attorney to do the best job possible." Another said that you are "cautious of how much time you should spend... There is a tendency to not do what you would normally do on private cases, and that bothers me. If I were paid more, I'd put more time in because I wouldn't have to

supplement with private practice so much." Another attorney candidly spoke of the financial conflict in contract cases: "If you settle cases, you get paid more per hour. I tried to forget it was a contract case, but it's hard to do."

Some attorneys, as mentioned previously, felt pressured to not request motions arguments, preliminary hearings or trials, not because of the pay but because judges frowned on the extra work. However, one presiding judge said he was not at all satisfied with the level of services contract attorneys can provide because of their workload and felt a public defender model would offer better service to clients.

- *Most Contracts, Outside the Larger Districts, Require Attorneys to Do All Sorts of Cases: Criminal and Juvenile Court*

In Burleigh, Grand Forks and Cass counties, separate contracts are issued for adult criminal cases and juvenile court cases. In other areas, attorneys accept contracts requiring them to handle all sorts of cases. We believe that separating the two functions is a better approach. Some attorneys who practice criminal law have little interest in deprivation casework, which can lead to clients in deprivation matters getting inadequate attention. Also, there can be scheduling conflicts between juvenile court cases handled by referees and criminal cases handled by district court judges. One attorney felt that the tightened ASFA⁸ timeframes, which require expedited hearings in deprivation and termination of parental rights matters, prohibit doing juvenile and adult court cases.

Attorneys and court staff in the areas with separate adult and criminal contracts felt that separate contracts serve the courts, clients and attorneys better. However, juvenile court staff in Cass County noted that they were not consulted by the district court judges when the juvenile court contract attorneys were being selected. District court judges have very little contact with these matters (they are handled by the juvenile court director and referees). It makes sense for district court judges to seek input from the people who see the day to day performance of attorneys in juvenile court matters when selecting contractors.

- *Contract Attorneys Must Do CLE in Their Contract Practice Area, But Have to Pay for It Themselves*

Contract attorneys are required to attend continuing legal education in criminal law each year, however, no funds are provided by the state for the training. Both attorneys and judges interviewed felt it would be appropriate for the state to pay.

⁸ Stressing that a child's health and safety is of paramount concern, ASFA, the federal Adoption and Safe Families Act of 1997, required states to enact laws that will timely place children in permanent homes. Among other things, the Act set forth new timing requirements for handling termination of parental rights and permanency hearings. In addition, the federal law outlines specific requirements for when a state must file a petition for termination of parental rights if a child is in foster care. If states fail to comply with ASFA requirements they risk losing federal funding.

• *Declining Interest in Contracts*

In the areas we visited, there appeared to be an overall declining interest in indigent defense practice marked by fewer contract attorney applications, especially in the more rural areas. In Burleigh County (Bismark), although there were enough attorneys with contracts, each attorney that applied for a contract received one. In more rural Stark County (Dickinson), the number of applicants, especially for a juvenile contract, has declined in recent years. The court reported that it used to receive more applicants than it needed, but that this past year it was scrambling to get enough attorneys to handle the cases. We were told attorneys in the area are older with established practices and not many young attorneys who might be interested in indigent defense are coming to the area. Similarly, there is a declining interest in contracts in the Northwest judicial district in Williston and in Minot. In Williston, a group of three relatively young attorneys who were previously on a contract decided to opt out due to the large volume of cases and low compensation, and currently all attorneys are being paid off the contract at the rate of \$65 an hour. One of these attorneys reported to take about half the caseload as the others intermittently cut back on their cases. Minot has three experienced contract attorneys but not a lot of interest from new attorneys. One of the contractors is 70 years old and already semi-retired.

While increased funding and compensation in a contract system may bolster interest in the contracts, the recent budget increase did not seem to improve attorney interest. Further, in some areas, the declining interest may be a function of a declining interest in indigent defense practice in general and/or declining numbers of new attorneys practicing in North Dakota's rural areas. If this is the case, only a switch to a statewide public defender program can cure the problem, as attorneys can be recruited from across the state or country, hired centrally, and placed locally in the rural districts.

PRACTICE FACTORS

• *It Can Be Tough to Get Investigators/Experts*

Contract attorneys have a professional responsibility to zealously represent their clients and to analyze both the factual and legal issues in the case. In some situations, it is necessary to enlist the assistance of an expert or an investigator to fulfill this duty. Appropriate requests for and use of expert services and investigators is implicit in meeting ethical obligations lawyers have to their clients.

While investigators and experts are not warranted for every case, North Dakota contract attorneys we met felt requests for investigators and experts are sometimes unreasonably denied. Judges acknowledged they are under pressure to keep expenditures on experts and investigators under control. One contract attorney said that judges caution attorneys not to spend recklessly; that the districts only get budgeted so much for indigent defense and if more is spent on investigators, less will go to the attorneys. One attorney who has been frustrated by refusal of funds for investigators noted that his clients

benefited every time he has hired an investigator, either through a reduced sentence or a dismissal.

Practically speaking, in rural areas, there is sometimes no one available who can serve as an investigator or expert. Defense attorneys routinely have to use personnel from the state hospital for mental health (competency or insanity) evaluations, raising questions of independence. In some cases, defense attorneys said, their best bet was to cross examine the expert used by the state.

Despite the appropriateness of involving experts and investigators in certain cases, both attorneys and judges told us such requests are made relatively infrequently. One presiding judge said he seldom sees requests for experts and never receives requests for investigators. He believes the attorneys are simply relying on police reports and what their clients tell them as they do not appear to be conducting their own factual investigations. At least one attorney agreed with this statement. The Court Administrator in Bismark reported that in the 12 years he has been at the court, he has seen perhaps one request for an expert filed.

- *Disparity of Resources*

There is a disparity between the level of resources provided to contract attorneys and state's attorneys. This disparity can impact the quality of representation provided by defense counsel by diminishing the level of adversarialness called for in a healthy criminal justice system.

Full-time state's attorneys receive salaries and benefits, are provided with support staff, and are sent to trainings at no cost. In the Bismark state's attorney's office, additional resources include Westlaw, victim witness coordinators, access to law enforcement personnel for help with investigation, and assistance from the crime lab, medical examiner, toxicologist, and out-of-state experts when needed. By comparison, contract attorneys receive no benefits, have to pay for their trainings and on-line legal research, and must seek approval for investigators and experts. Some are not reimbursed for expenses. Bismark assistant state's attorneys are paid salaries between \$43,000 and \$55,000.

CONTRACT ATTORNEYS HAVE NO VOICE IN THE SYSTEM

There is no effective voice for indigent defense in North Dakota. While the North Dakota Legal Counsel for Indigents Commission develops policy for indigent defense, it does not actively advocate for adequate resources for indigent defense. Contract attorneys have no negotiating power individually or collectively. State's attorneys have a statewide organization that meets, reviews legislation, lobbies, and provides CLE. There is no similar entity for contract attorneys. Unlike the state's attorneys, contract attorneys have no way to meet and discuss important issues affecting indigent defendants, such as issues of due process that arise in proposed legislation. Nor can they collectively press

for changes to the contract system, for example, establishing a mechanism to seek additional pay if they put in more than a certain number of hours per month on contract work. And any system for contract attorneys to talk to one another about their cases is an informal system. One contract lawyer said he requested a list of all other contract attorneys from the State Court Administrator's office but never got one.

STANDARDS, GUIDELINES AND CODE OF PROFESSIONAL RESPONSIBILITY PROVISIONS PERTAINING TO ADEQUATE REPRESENTATION OF CRIMINAL DEFENDANTS

In rendering services to clients, criminal defense lawyers must practice under various constitutional and statutory mandates as well as their particular state's rules of professional responsibility (in North Dakota, this is the North Dakota Rules of Professional Conduct). In addition, criminal defense attorneys are urged to follow accepted national standards. In the past 15 years, the adoption of standards and guidelines has been one of the most notable developments in the delivery of indigent defense services. Standards and guidelines pertaining to attorney performance, attorney eligibility, caseloads, conflict of interest, indigency screening, and administration of indigent defense systems have been adopted by: state and local legislation; state supreme court rule; national, state and local public defender organizations, indigent defense commissions and other entities.

At the national level, the clear leader in this effort has been the American Bar Association (ABA). The ABA has promulgated standards for criminal justice involving all the components of the justice system including indigent defense. Chapter 4 of those standards addresses the criminal defense function. Chapter 5 addresses the delivery of indigent defense services. The ABA has promulgated standards which address the processing of death penalty,⁹ juvenile delinquency¹⁰ and juvenile abuse and neglect cases.¹¹ Another national leader in promulgating well thought-out, thorough standards has been the National Legal Aid and Defender Association (NLADA), which has published guidelines for awarding contracts to contract defenders,¹² standards for the administration of assigned counsel systems¹³ and performance standards that set out minimum requirements of practice for lawyers representing indigent defendants.¹⁴

⁹ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Rev Ed. Feb. 2003).

¹⁰ Robert B. Shepherd, Jr., Editor, *Juvenile Justice Standards Annotated: A Balanced Approach*, ABA INST. OF JUDICIAL ADMIN. (1996).

¹¹ ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996).

¹² National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984).

¹³ National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989).

¹⁴ National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* (1995).

National standards and guidelines serve a number of important purposes. While neither the ABA's nor the NLADA's standards are expressly binding on state or local programs, they do serve as a measure to judge the extent to which an individual organization provides quality indigent defense services. Most states that adopted indigent defense standards and guidelines have modeled them after these national documents, tailoring them to local practice.

The national standards that set forth the requirements of defense counsel give meaning to the Sixth Amendment right to counsel, as do some standards set forth in the North Dakota Rules of Professional Conduct (e.g., zealous advocacy, competence, diligence, and communication). Just as criminal cases vary endlessly in their details, jurisdictions vary in practice and procedure. However, a list of requirements cited in the NLADA Performance Guidelines as absolutely necessary in all cases, regardless of a jurisdiction's practice and procedure, include:

- Defense counsel is to provide zealous and quality representation to his or her clients at all stages of the criminal process.
- To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.
- Before agreeing to accept an appointment by the court, counsel has an obligation to make sure that he or she has available sufficient time, resources, knowledge and experience to offer quality representation to each client.
- Counsel has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.
- Counsel has a duty to inform the accused of his or her rights at the earliest opportunity and act promptly to take all necessary procedural steps to protect the defendant's rights.
- Counsel should conduct a full and complete interview with the client as soon as possible after appointment.
- Counsel must be familiar with the elements of the offense charged and the potential punishment for the charge.
- Counsel should obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by all bail agencies concerning pretrial release, and law enforcement reports that might be available.
- Counsel has a duty to conduct an independent investigation, regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as soon as possible.
- Counsel has the duty to pursue, as soon as practicable, discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.
- Counsel has an obligation to prepare the case and develop a theory of the case.

- Counsel has the obligation to keep the client informed of the progress of the case and all available options.
- Counsel should explore with the client the possibility and desirability of reaching a negotiated plea rather than proceeding to trial. Counsel should fully explain the rights that are waived by entering a plea rather than proceeding to trial.
- The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.
- Counsel should be fully prepared for all hearings and for trial.
- Counsel should not accept excessive workloads that will interfere with quality representation.
- Counsel should be alert to all potential and actual conflicts of interest that would impair counsel's ability to properly represent the client.
- Where the client is entitled to a preliminary hearing, counsel should take steps to see that the hearing is conducted in a timely manner unless there are strategic reasons for not doing so.
- Counsel should develop a sentencing plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions and other information pertinent to the sentencing decision.
- Counsel should be familiar with the procedure concerning the preparation, submission and verification of the pre-sentence investigation report or similar documents.
- Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect the appeal.

A measure of an adequately functioning indigent defense system is an evaluation of whether indigent defense counsel are able to follow these requirements in all cases handled. As described above, North Dakota contract attorneys are not always meeting or able to meet these requirements, placing indigent defendants in the position where neither the courts nor the government can assure their rights are being protected as required under federal and state law.

OPINIONS FROM THE FIELD: PUBLIC DEFENDER VS. CONTRACT

All the judges we spoke with wanted to see a change to a public defender system that would take the indigent defense budget and decision-making processes away from the judicial branch. They would like to see a public defender system with its own administration and oversight which also handles an alternate contract system. All judges recognized the inherent conflict in the judiciary making indigent defense cost determinations.

Attorneys' opinions of a contract system versus a public defender system were mixed, although none expressed flat out opposition to a public defender system. Some attorneys strongly supported a change to a public defender system but were skeptical because of costs, while others, although not strongly supporting a change, recognized some merits in switching to a public defender system. Others were ambivalent, simply questioning how a switch to a public defender system would work or whether it would ever actually happen. The main concern consistently was funding. A public defender system will not be an improvement, all agreed, if it is not well-funded.

Most contract attorneys who continue to represent indigent defendants in North Dakota do so because they enjoy the work and feel it is important. However, many struggle financially and some struggle ethically with the competing interests of a private practice.¹⁵ One attorney commented that contract attorneys don't put in as much time as they should and are too quick to seek a plea bargain. As quoted earlier, another said, "There is a tendency to not do what you would normally do in private cases, and that bothers me." One judge reported to observe a difference in the representation some individual attorneys provide private clients versus indigent clients. Public defenders would not have the competing interest of generating income in private cases.

A number of attorneys we spoke with said they would be interested in becoming a public defender should the system change as long as the position was well-funded. A public defender program could provide attorneys with the support and resources they currently lack, including training, support staff without overhead costs, investigators, health insurance, a retirement plan and paid vacation.

Some attorneys expressed a preference for keeping the current system but increasing the funding. Should the contract system remain, attorneys expressed a desire for a number of changes, including an increase in rates, affirmative caseload caps, and removing the requirement that an attorney complete all cases without further compensation when deciding to leave a contract. In addition, a number of attorneys expressed a desire for access to investigative, expert and other services independent of court approval.

Most attorneys preferred to have the option of separate contracts for adult and juvenile cases, and even for felony and misdemeanor cases.

Some attorneys expressed concern over losing local control of the contracts and specifically did not want to see the Office of Administrative Hearings in Bismark overseeing contract attorneys statewide and making appointments. There was concern

¹⁵ See N.D.R. Prof. Conduct Rule 1.7 (a) ("A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests"); and Rule 1.7 (b) ("A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation").

over the office's knowledge of local attorneys and practice, lack of criminal law experience, and efficiency and speed of a centralized appointment process.

PUBLIC DEFENDER CONSIDERATIONS

After performing our site work and reviewing the data, we feel that North Dakota should move to a public defender system for a number of reasons. A public defender program would provide indigent defense in North Dakota with the independence from the judiciary it currently lacks. Both the fiduciary and the oversight functions now within the judiciary could be transferred to a public defender program, which would have its own budget and oversee its own costs and staff, including attorneys and investigators. Further, the public defender could have a line-item for experts and be responsible for overseeing expert requests, as well as other expenses such as travel.

The creation of a unified public defender program would give indigent defense in North Dakota the voice that it has long needed. A public defender director would be a leader in the state on indigent defense issues and could be a strong advocate for support and change. The public defender would also require oversight, and some independent body would need to be involved in the hiring and oversight of the public defender and the making of public defender policies. (See Indigent Defense Commissions, below.)

While there would likely be several local offices, the program would have central administration and leadership which would stay knowledgeable on indigent defense issues occurring in the local jurisdictions and provide centralized oversight of the offices. Within the offices, supervisors would oversee staff attorneys and field the client complaints currently handled by the court.

At least in larger jurisdictions, public defenders would be full-time staff attorneys dedicated entirely to indigent defense work without the competing interest of a private practice and other income. One of the results would likely be increased attorney-client contact, which appeared to be an issue at least in terms of client complaints and in a reported insufficient rate of jail visits. Instead of choosing between making a jail visit and working for an hourly fee on a retained case, a public defender could set aside several hours to do nothing but visit in-custody clients or initiate contact with out-of-custody clients they have not yet met. Moreover, while a contract attorney may need to choose between filing a motion in an indigent case and performing work on a retained case which pays on average \$125 an hour, a public defender could simply access a centralized public defender motion bank or e-mail public defenders statewide to file a motion with efficiency. In addition, while a contract attorney may be concerned with filing a motion which might upset the judge who controls the contract, a public defender could file a motion without fear of financial repercussions.

In addition to being free of financial conflict or concerns, full-time public defenders would have more time to devote to indigent cases and fewer scheduling conflicts than contract attorneys who juggle civil and criminal cases. Still, given the

sparsely populated rural areas in North Dakota, part-time attorneys would need to be involved in the system, either working under contract or as part-time public defenders.

A public defender office would provide attorneys with other provisions likely to advance indigent defense representation in terms of quality and efficiency. Ideally a public defender office would have caseload standards to ensure that staff attorneys can provide quality representation, fulfill their ethical obligations to clients,¹⁶ and not suffer burnout. A public defender system should provide attorneys with proper support staff and investigators - or at least the funds to hire them - which would allow attorneys to spend more time on legal work and to handle more cases with more efficiency. Proper supervision should be provided to all attorneys. A public defender program should also provide attorneys with access to research tools. In addition, a public defender system offers attorneys invaluable support and feedback from other public defenders across the state, which could increase the quality and efficiency of representation.

A key function of the public defender system would be provision of initial and ongoing trainings for both new and experienced attorneys. In-house trainings could be conducted by the program for public defender and conflict attorneys alike across the state, and staff attorneys could be funded to attend outside trainings as well. Statewide public defender trainings advance the cause of indigent defense and help to create a cohesive and positive network of indigent defense attorneys.

Finally, a public defender program in North Dakota could have a central administrative office responsible for recruiting and hiring new attorneys. While a number of attorneys in the state are currently interested in becoming public defenders, in the future, there may be a need to recruit attorneys from out-of-state. A public defender program would be able to recruit from law schools nationwide, hire attorneys centrally and place them locally where the need exists.

Reality of Cost

At least initially, a public defender system will cost more than the contract system. However, the contract system likewise needs more funding if it is to remain. As mentioned earlier, the current average hours per case based on the contract attorney data are extremely low and raise a concern about the quality of representation being provided, particularly with respect to the felony cases. We strongly recommend against basing any cost estimates, either public defender or contract, on the reported average hours per case. We feel that average hours per case should be, at a minimum, ten to twelve hours for a felony (double the current average hours), three hours for a misdemeanor, and five to six hours for a juvenile delinquency case.¹⁷ Another potential standard to use for calculating staffing and costs is to apply the NAC standards (150 felonies, 400 misdemeanors, 200 juvenile delinquency cases, and 25 appeals) to projected indigent defendant caseloads.

¹⁶ See N.D.R. Prof. Conduct Preamble, Rule 1.1 Competence, Rule 1.3 Diligence, and Rule 1.4 Communication.

¹⁷ The minimum hours figure for juvenile cases pertains to delinquency cases. Separate data is not available for average time spent on deprivation and termination of parental rights cases.

A public defender program will have operating costs including rent, equipment, and salaries. One-time start-up costs will include equipping the offices with appropriate computers, furniture, etc. Setting up a public defender system will require recruiting staff and locating office sites. However, once running, a public defender system is likely to be more efficient and better able to contain costs in the future than a contract system.

Monies to help fund indigent defense may come from a number of sources, including user fees. Currently, the courts are collecting a \$25 application fee from defendants applying for a court-appointed attorney.¹⁸ Courts are also collecting attorney fees from defendants and ordering such costs during sentencing. Another possibility, which we found being applied in Cass County in juvenile cases, is to create a status of "Indigent But Able to Contribute," or quasi-indigence, to apply to borderline cases where a defendant is capable of paying more towards the cost of representation than a person falling squarely within the indigency guidelines. Caution should be noted, however, that supplemental revenue streams, which are unpredictable, are never a replacement for adequate general fund appropriations.

Office Locations

A common and sensible way to look at the planning of a new statewide public defender system is to consider the judicial districts as coverage areas for indigent defense services. In rural states such as North Dakota, it may not make sense to create a staffed office in each judicial district, as population and caseload in some districts will not justify the expense of offices. The table on the following page provides some useful data in considering which judicial districts in North Dakota may be best served by a public defender office.

¹⁸ During our site work, we were concerned to hear that the court in one district may not appoint an attorney until the defendant has paid the \$25 application fee. A contract attorney in this district reported that a misdemeanor defendant may reach the pretrial without counsel if the fee has not been paid (although at this stage the court will finally appoint an attorney). In one case, the attorney called the court to ask why an indigent client with a new matter had not been appointed an attorney. The attorney reported that the client could not pay the application fee, but the court would not appoint an attorney without receiving the fee. Frustrated, the attorney went to court and paid the defendant's fee with a \$25 personal check, which the court accepted.

**Table 4 - North Dakota Judicial Districts:
Public Defender Office Considerations**

Judicial District (Total Counties)	Total Population ¹⁹	Counties with Population near/over 20,000 ²⁰	State's Attorney Offices Staffing - FTEs ²¹	2001-2003 Indigent Defense Assignments			
				Felony	Misd.	Juv.	Total
East Central (3)	133,873	Cass (124,021)	25.0	1,493	1,984	836	4,313
			27.5 Total				
South Central (12)	136,116	Burleigh (70,069)	14.5	1,798	2,005	901	4,704
			32.4 Total				
Northeast Central (2)	69,824	Grand Forks (64,390)	16.0	715	619	290	1,624
			17.6 Total				
Northwest (6)	75,688	Ward (57,247)	9.0	864	611	690	2,165
		Williams (19,606)	4.0				
			18.5 Total				
Southwest (8)	38,365	Stark (22,213)	5.0	197	289	175	661
			12.0 Total				
Southeast (10)	86,767	Stutsman (21,575)	6.0	891	1,121	296	2,308
			21.4 Total				
Northeast (11)	81,806		20.8 Total	733	795	736	2,264
TOTALS	622,439		150.2	6,691	7,424	3,924	18,039

Public defender offices should first be placed in geographical areas with the highest concentrated population and highest caseloads. Another consideration is the concentration of State's Attorney's staff in the equivalent geographical areas. In North Dakota, public defender offices would be most suitable in the East Central and South Central judicial districts as they have the two counties (Cass and Burleigh) with the highest population and highest caseloads. These districts also have the greatest numbers of combined full-time equivalent (FTE) staff positions in their counties' State's Attorneys' offices. In considering the FTE figures shown in the above table, it should be noted that the figures represent all staff positions, not just attorney positions. In Burleigh

¹⁹ 2000 populations of judicial districts as reported in indigent defense statistics reported from the North Dakota State Court Administration.

²⁰ U.S. Census Bureau 2001 population estimates.

²¹ FTE figures are not limited to attorney positions but include all staff.

²² Does not include assignments made off the contract.

County, for example, there are 14.5 FTE positions. However, we learned during our site work that the office has seven attorneys handling criminal and juvenile cases, and four attorneys are in a separate unit handling child support enforcement cases.

The East Central office would be placed in highly-populated Cass County (Fargo), and the South Central office would be centrally located in Burleigh County (Bismark), although a satellite office may also be useful as this district is among the largest geographically, has the highest population, highest caseload, and highest reported jury trial rate.

In addition, the Northwest and Northeast Central judicial districts would each be appropriate for public defender offices. The Northwest district has a large geographical coverage area, but no larger than South Central's. Although Ward County (Minot) is likely the best location for a Northwest office, Williams County (Williston) also has a significant population as well as a high volume of methamphetamine cases, and this district may also be well served by having a satellite office in Williston. A public defender office in this Northwest district would solve the current problem of a waning interest in contract work.

In the Northeast Central judicial district, a public defender office could be opened in Grand Forks and would have a relatively small geographic area to cover.

The three remaining judicial districts have fewer counties with significant populations. The Northeast and Southeast districts have significant caseloads and State's Attorney positions. However, they each cover a large geographic area and have at least ten counties, although no county in the Northeast district is over 20,000 in population, and only one county in the Southeast district is over 20,000 in population. The Southwest judicial district has eight counties and a large geographical area of coverage, but only one county is over 20,000 in population (Stark), and the district has the lowest caseload of the seven districts in the state.

In the Southwest district, which we visited, the current contract attorneys live in Dickinson in Stark County and travel to outlying counties only once a month for a day or half a day. Six of the eight counties house their pre-trial detainees and inmates in Stark County. The other counties transport inmates to Dickinson or may hold bond hearings via teleconference calls. Stark County has one full-time State's Attorney, while the other counties in the district have part-time State's Attorneys. Still, a small public defender office in Dickinson could work and would solve the district's problems of a waning interest in contract work. At least one experienced contract attorney there expressed strong approval for a public defender office and would be interested in a staff position if it were sufficiently funded.

Although not all contract attorneys we spoke with preferred a public defender system, for the most part we did not encounter strong opposition to a public defender system in the judicial districts we visited. Further, some attorneys from the South

Central, Northwest, and Southwest districts reported an interest in a public defender staff position if it were sufficiently funded.

In the more rural districts, there are several options. Small public defender staff offices could be created, with full or part-time attorneys and support staff. New Hampshire, for example, has a statewide public defender program with several small staff offices covering large geographical rural areas. Of nine public defender offices in New Hampshire, only two are located in the northern half of state, one with three attorneys and another with four attorneys. Alternatively, similar to the Wyoming plan, the state could hire a number of attorneys in each district to handle indigent defense cases, each having and supplying their own offices in separate locations. These attorneys could be full-time or part-time and would be paid salaries and stipends for office overhead and expenses. In addition, these attorneys would have the same statewide access to resources and oversight as public defenders in staffed offices. Alternatively, these districts could stay with the contract system, but with improvements (see below).

In the large geographic districts in North Dakota, whether using a public defender or a contract system, the use of technology can create some ease and efficiency in matters where a defendant's appearance is not required in person. Although some districts are holding some hearings via teleconference, the use of interactive television (ITV) is preferable as it allows the defendant to see and be seen by the attorneys and the court and thus be more present than simply a voice on a phone. Burleigh County, which has a large coverage area, is currently using ITV for some bond hearings, and the state may wish to consider expanding this to other districts.

No public defender program can provide all indigent defense representation due to conflicts of interest. In counties with staff public defenders, conflict of interest cases would need to be handled by either contract attorneys or assigned counsel panels. To avoid conflict of interest issues, this alternative system for handling conflicts should be administered outside of the local public defender offices, such as by a central indigent defense administrative office.

Another consideration is which case types a public defender program should handle. For example, should a public defender office handle juvenile deprivation and termination cases, which are non-criminal and have multiple parties and require multiple attorneys? Like contract attorneys, a public defender office could also handle deprivation cases, but would have to limit its representation to one party, such as parents. This may make sense and require fewer outside appointments, at least at the deprivation stage because children are not given attorneys (but lay GALs) unless the case becomes a termination case. One consideration with a public defender office handling deprivation cases is how many attorneys are in the office; that is, could one attorney specialize in juvenile cases, or even deprivation and termination cases only. In jurisdictions with higher caseloads, such an approach is likely to be more efficient than having public defenders handle juvenile, misdemeanor, and felony cases, due to conflicting court schedules of criminal and juvenile court cases. A juvenile contract attorney in the South Central district reported that there are usually five State's Attorneys in the district

handling juvenile matters and thought the district would probably need five public defenders handling juvenile cases. Another attorney suggested a small conflict office in this and other large districts.

CONTRACT SYSTEM CONSIDERATIONS

If North Dakota continues with its contract system, whether in whole or in part, it is clear that change is needed. In addition to the desires expressed by contract attorneys above for improvements to the system, we found several other concerns during our site work as expressed in this report, including a lack of caseload limits, the existence of a low bid process in some courts, lack of uniformity among the contracts (e.g., in expense reimbursement and the minimum hours required in a case before special case compensation is a possibility), lack of oversight, lack of attorney resources, and lack of a statewide support network.

In *Contracting for Indigent Defense Services: A Special Report*, which was prepared by The Spangenberg Group for the U.S. Department of Justice Bureau of Justice Assistance in 2000, two lists are provided regarding contract system considerations, one with characteristics of deficient contract systems and the other with characteristics of effective contract systems. The lists are re-printed below with parenthetical reference when applicable to North Dakota (ND):

Characteristics of Deficient Contract Systems

The most seriously criticized contract systems:

- Place cost containment before quality. (ND)
- Create incentives to plead cases out early rather than go to trial. (ND)
- Result in lawyers with fewer qualifications and less training doing a greater percentage of the work. (ND – some localities)
- Offer limited training, supervision or continuing education to new attorneys or managers. (ND)
- Reward low bids rather than realistic bids. (ND – some localities)
- Provide unrealistic caseload limits or no limits at all. (ND)
- Do not provide support staff or investigative or expert services. (ND)
- Result in case-dumping that shifts cost burdens back to an institutional defender. (n/a)
- Result in case dumping that shifts cost burdens back to the institutional defender. (n/a)
- Do not provide for independent monitoring or evaluation of performance outside costs per case. (ND)
- Do not include a case-tracking or case management system and do not incorporate a strategy for case-weighting. (ND)

Characteristics of Effective Contract Systems

Contract systems viewed by critics as the most effective share features that allow administrators to monitor and evaluate costs while providing quality representation.

These features include:

- Minimum attorney qualifications.
- Provisions for support costs such as paralegals, investigators, and social workers.
- Independent oversight and monitoring.
- Workload caps.
- Limitations on the practice of law outside the contract.
- Provisions for completing cases if the contract is completed but breached or not renewed. (ND, but problematic)
- Caseload caps.
- Case management and tracking requirements. (ND – assignments and attorney hours tracked)
- Guidelines on client contact and notification of appointment. (ND – initial client contact guidelines)
- A mechanism for oversight and evaluation.

As stated throughout this report, we have found that North Dakota's current system is deficient in most of its characteristics and effective in few.

First and foremost, the current system needs more funding, as compensation must be tied to actual work performed or number of cases accepted. Second, the current system lacks strong infrastructure and administration to provide independence, uniformity and oversight. A statewide public defender system would resolve such problems for the majority of cases. However, whether North Dakota remains with a statewide contract system, keeps a contract system in some areas, or switches to a public defender system and only uses contracts for conflict cases, stronger and more uniform administration is needed to oversee the contracts. Some sort of contract administrator office will be required, even if there is a statewide public defender office created.

While some attorneys balked at the idea of an office in Bismark overseeing attorneys and contracts statewide, such an office with staff knowledgeable in indigent defense could work with the local courts in its administration and oversight. For example, a central administrator could review contract applications forwarded by the local judges with the courts' recommendations but could have the final decision-making authority. A central administrative office could also have a budget for both attorney and non-attorney expenses, and make final determinations as to uniform contract terms, attorney fees, and the granting of expert, investigative and other service requests. Such an office would also field client complaints and could be a valuable resource for contract attorneys statewide, especially in the absence of a public defender program (e.g., maintaining a list of experts and investigators and creating a list-serve for statewide communication among contractors.) If a public defender program is created, the program and its attorneys would serve as a great resource of information and trainings for all indigent defense attorneys statewide.

INDIGENT DEFENSE COMMISSIONS

Thirty-two states and the District of Columbia have some sort of statewide body or commission responsible for developing policy and providing oversight for indigent defense services²³ (see Appendix A). The North Dakota Legal Counsel for Indigents Commission was created in 1981 with the goal of improving indigent defense services in the state. North Dakota's commission has provided guidelines and technical assistance to the counties on indigent defense, and has reviewed costs, caseload, and attorney fees. The Commission, however, has no real authority; it is largely an advisory body. For example, contractors are not paid the hourly rate (\$75) the Commission recommends that contractors should be paid.

In most states, indigent defense commissions were created to provide independent oversight and accountability for indigent defense services, to develop uniform standards and guidelines for program operation, and to advocate for adequate resources in order to deliver indigent defense services.²⁴ In North Dakota, however, indigent defense has fallen under the budget and the responsibility of the judiciary, whose members feel a conflict in overseeing indigent defense services and expenditures. The Commission, as a judicial agency, it has not been a strong advocate for increasing indigent defense resources. We believe that the current Commission will have to be substantially redesigned or abolished once a new system is implemented.

CONCLUSION

This is an exciting time for indigent defense in North Dakota as a real opportunity for positive change now exists. The judiciary, the legislature, and the indigent defense community appear open and willing to change a system which for years has been one of the lowest-funded state systems in the country on a per capita basis. (see Table 2). Whether North Dakota continues with a contract system or moves to a public defender system, the change is needed and will unavoidably come with additional costs for improvement. However, increased funding for a public defender system will not only improve the system, but may well save the current system from future collapse, as fewer attorneys wish to provide indigent defense representation under the current system yet caseloads continue to rise.

In closing, we stress that whatever system is developed, it will be created based on current caseloads and costs for indigent defense in North Dakota. In order to make key decisions and assumptions about a new system, policy-makers must have reliable

²³ In a few states, the indigent defense commission is only responsible for appellate cases. In some states with statewide public defender programs, the commission is only responsible for public defender offices, while another program or no program oversees assigned counsel programs.

²⁴ For a discussion of the role of indigent defense commissions, see Kate Jones, *The Case for Commissions*, THE CHAMPION (June 2001) at <http://www.nacdl.org/public.nsf/ChampionArticles/2001jun01?opendocument>.

data available. Ensuring that accurate and complete indigent defense data is collected should be a priority for the state.

ROUGH OUTLINE OF A PUBLIC DEFENDER SYSTEM

We recommend that North Dakota seize the opportunity now to create a primary public defender system to fulfill its duty of providing its indigent citizens' with meaningful and effective representation. Based on our site work, review of data, and knowledge and experience in the field of indigent defense, we find that the current system is woefully underfunded and in danger of future collapse. If the system continues without change, the state risks liability from a potential systemic challenge brought on behalf of indigent defendants who believe they were not afforded adequate representation as required under state and federal law. While the contract system could be improved with increased funding and greater oversight and administration, we believe that North Dakota, which has been contemplating a public defender system for some time, should make the switch now to a public defender system. In the long run, a public defender system will pose less potential for future collapse from increasing caseloads and decreasing attorney interest than the current contract system poses.

Earlier in this report we sketched out some appropriate functions for a public defender system, including development of caseload and practice standards, provision of training and supervision, and provision of adequate staff and resources to handle cases appointed to the system. To carry out these functions, a public defender program needs a director and a central administrative office with some support staff to provide oversight and administration of the program. To maximize use of facilities, the central administrative office could be located on-site with one of the public defender trial offices.

In addition to a central administrative office for the public defender system, we recommend creation of a contract administrator position as discussed in the report. This position should be staffed with someone who is familiar with indigent defense practice and issues. Funding for public defender conflict and overflow cases should be structured so that attorney compensation is tied to actual caseload or workload, rather than using inflexible fixed fee contracts.

We further recommend that North Dakota create an Indigent Defense Commission that is involved in policy oversight of both the public defender and contract systems, serves as a voice for indigent defense needs that is separate from the judiciary, and is responsible for selecting and overseeing the state's Public Defender.

As funds are not likely yet available to create a public defender office in each judicial district, we recommend that North Dakota begin by creating at least one public defender office in the following four districts: East Central, South Central, Northeast Central, and Northwest. Satellite offices should also be considered for the South Central and Northwest districts. With regard to staffing of the offices, we recommend that the number of attorney positions created for each office be based on a projection of the

district's indigent caseload, as well as a comparison with state's attorney positions in the district with consideration of whether comparable case types are handled (e.g., criminal, juvenile, mental health, child support enforcement).

As mentioned earlier, potential methods for calculating attorney positions in application to caseload numbers include using average hours per case and using NAC caseload standards. We strongly recommend that the average-hours-per-case-type figures used for such a calculation be increased from those that have been used in the past. In addition, the number of appellate cases also needs to be taken into consideration for staffing projections. Further, should public defenders handle deprivation cases, separate estimates should be used, as these cases are very different from delinquency cases.

Finally, each office must have support staff, including secretaries and investigators and, if funds permit, paralegals. An excellent model for determining support staff needs are found in guidelines developed by the Indiana Public Defender Commission,²⁵ which were developed in recognition of the important role support staff play in providing quality indigent defense. In addition to support staff guidelines, Indiana has indigent defense attorney workload guidelines,²⁶ which provide that full-time indigent defense attorneys should handle annual caseloads of no more than 120-200 felonies,²⁷ 400 misdemeanors, 250 juvenile cases or 25 appeals apiece. The following table assumes that an indigent defense program meets these caseload standards and maintains an adequate level of support staff consistent with the guidelines. County public defender offices that do not maintain the required support staff to attorney ratios are held to more stringent annual caseload standards (100-150 felonies; 300 misdemeanors; 200 juvenile cases; and, 20 appeals).

²⁵ Indiana's 92 counties have the primary responsibility for funding the indigent defense programs within their jurisdictions. Each county may choose between a county public defender, contract defender program and an assigned counsel system. The Indiana Public Defender Commission (IPDC) allocates state funds to offset county indigent defense expenditures in those counties that comply with the commission's standards for indigent defense services in capital and non-capital cases. Counties that enforce these standards are reimbursed by the IPDC for 40% of the cost of representing indigent defendants in non-capital felony cases and 50% of the cost of attorneys' fees, as well as expert, investigative and support services, in capital cases. Currently, 54 of Indiana's 92 counties comply with IPDC standards and receive funds from the Commission.

²⁶ Indiana Public Defender Commission. "Standards for Indigent Defense Services in Non-Capital Cases: With Commentary," January 1995.

²⁷ Indiana's felony caseload standards vary by severity of case handled. The specific standards are: 150 non-capital murder and all felonies; 120 non-capital murder, Class A, B, C felonies only; 200 Class D felonies only; and 300 Class D felonies and misdemeanors.

Table 5
Indiana Public Defender Commission's
Adequate Support Staff Guidelines

Support Staff Position	Ratio of Support Staff to Attorneys
Paralegal - Felony	1:4
Paralegal - Misdemeanor	1:5
Paralegal - Juvenile	1:4
Paralegal - Mental Health	1:2
Investigator - Felony	1:4
Investigator - Misdemeanor	1:6
Investigator - Juvenile	1:6
Law Clerk - Appeal	1:2
Secretary - Felony	1:4
Secretary - Misdemeanor	1:6
Secretary - Juvenile	1:5

Appendix A

STATEWIDE INDIGENT DEFENSE SYSTEMS: 2001

STATE Type of Program	Commission	Commission Duties and Responsibilities	Public Defender Selection Process, Terms and Qualifications	Public Defender Duties and Responsibilities
ALABAMA	None	Not applicable	None	Not applicable
ALASKA State Public Defender Agency (Executive agency, Department of Administration)	None	Not applicable	Appointed by Governor from nominations of judicial council. Confirmed by majority of legislature in joint sitting. Four-year term; renewal requires legislative confirmation. Member of bar. Governor can remove for good cause.	Appoint, supervise and control assistant public defenders and other employees. Submit annual report to legislature & Supreme Court on number and types of cases, dispositions and expenditures. Full-time; private practice prohibited.
ALASKA Office of Public Advocacy (Executive agency, Department of Administration)	None	Not applicable	Public Advocates appointed by Governor. Serves at will of Governor.	Provides Guardians Ad Litem for abused and neglected children and status offenders. Provides representation in conflict cases from the Alaska Public Defender Agency. Acts as Public Guardian and conservator for citizens with disabilities.
ARIZONA	None	Not applicable	None	Not applicable
ARKANSAS Arkansas Public Defender Commission (Executive agency)	Seven members appointed by Governor: at least four licensed Arkansas attorneys experienced in criminal defense; at least one county judge. Governor designates one member as Chair. No more than two residents of same congressional district. No two members from same county. Serve five-year terms.	Establish policies and standards for Public Defender System. Approve budgets for trial public defender offices. Require annual reports from trial public defender offices. Appoint Executive Director. Evaluate performance of Executive Director, Capital, Conflicts & Appellate Office, trial public defenders and private assigned counsel. Maintain list of private attorneys willing and qualified to accept capital case appointments. Authorize contracts with trial public defenders.	Executive Director appointed by Commission. Must have experience in defense of capital cases. Serves at will of commission.	Supervise capital conflict and appellate office. Maintain records of operation of public defender system. Prepare budget for commission. Implement attorney performance procedures pursuant to commission's standards. Maintain court opinions, statutes, etc. for use by trial public defenders and court-appointed counsel. Maintain appellate brief bank. Convene training program related to public defender system. Prepare annual report.

<p>CALIFORNIA California Habeas Resource Center Judicial Branch)</p>	<p>Five-member Board of Directors confirmed by the Senate. Each of the state's five Appellate Projects shall appoint one board member; all must be attorneys. No lawyer working as judge, prosecutor or in a law enforcement capacity is eligible. Four year terms.</p>	<p>Appoint Executive Director.</p>	<p>Executive Director appointed by Board of Directors. Must be member of California state bar during the five years preceding appointment and possess substantial experience in the representation of accused or convicted persons in criminal or juvenile proceedings during that time. Serves at the will of the board.</p>	<p>Hire up to 30 attorneys to represent any indigent person convicted and sentenced to death in California in postconviction actions in state and federal courts. Work with the supreme court to recruit attorneys to accept death penalty habeas case appointments and to maintain a roster of attorneys so qualified. Employ investigators and experts to provide services to appointed attorneys in capital postconviction cases. Develop and maintain brief bank for use by appointed counsel. Review case billings and recommend compensation of members of the private bar to the court. Prepare annual report on the status of appointment of counsel for indigent prisoners in capital postconviction cases.</p>
<p>COLORADO Office of State Public Defender Commission (Judicial agency)</p>	<p>Five members appointed by Supreme Court. No more than three from same political party. Three attorneys, two non-attorneys. No judges, prosecutors, public defenders or law enforcement personnel.</p>	<p>Appoint State Public Defender and discharge for cause.</p>	<p>State Public Defender appointed by Commission. Five-year, renewable term. Member of bar five years prior to appointment. Full-time position.</p>	<p>Employ and set compensation for all employees (rates approved by Supreme Court); establish regional offices as necessary; provide commensurate legal services to indigents accused of crimes as are available to non-indigents, independently of any political consideration or private interests.</p>
<p>COLORADO Office of Alternate Defense Counsel (Judicial Agency)</p>	<p>Nine members appointed by Supreme Court. No more than five from same political party. Six member lawyers, each representing one of the six congressional districts, all of whom are Colorado licensed lawyers practicing criminal law. Three members citizens not licensed to practice law in Colorado. No member at any time a judge, prosecutor, public defender or employee of a law enforcement agency. Serve four-year terms.</p>	<p>Select an Alternate Defense Counsel; serve as an advisory board to the alternate defense counsel; advise alternate defense counsel on development and maintenance of competent and cost-effective representation. Shall meet at least annually.</p>	<p>Alternate defense counsel appointed by Commission to renewable five-year term. Must be licensed to practice law in Colorado for at least five years prior to appointment. May not hold private practice. Serves at will of the Commission.</p>	<p>Employ and set compensation for all employees. Provide legal representation to indigent persons and partially indigent persons in circumstances when the state public defender has a conflict of interest by contracting with licensed attorneys and investigators. Legal services provided to indigents shall be commensurate with those available to non-indigents and independent of any political considerations or private interests.</p>
<p>CONNECTICUT Public Defender Services Commission (Autonomous body within judicial department for fiscal and budgetary purposes only.)</p>	<p>Seven members: two judges appointed by Chief Justice; one member appointed by each: Speaker of House, President Pro Tem of Senate, minority leader of House, minority leader of Senate. Chairman appointed by Governor. Three-year term. No more than three, other than chairman, from same party. Two of four non-judicial members non-attorneys. No public defenders.</p>	<p>Adopt rules for Division of Public Defender. Establish a compensation plan comparable to state's attorneys. Establish employment standards. Appoint Chief Public Defender and Deputy Chief Public Defender. Remove Public Defender and Deputy Public Defender for cause following notice and hearing. Submit annual report to Chief Justice, Governor and Legislature by October 15. (See duties of public defender.)</p>	<p>Chief Public Defender appointed by Commission for a four-year term. Member of state bar for five years. Full-time position.</p>	<p>Direct and supervise work of all personnel. Submit annual report, including data and recommendations for changes in law, to Commission by September 15. (Note extensive list in Sec. 51-291.)</p>
<p>DELAWARE Office of the Public Defender (Executive agency)</p>	<p>None</p>	<p>Not applicable</p>	<p>Public Defender appointed by Governor. Six-year term. Qualified attorney licensed in Delaware.</p>	<p>Appoint assistant attorneys, clerks, investigators and other employees as necessary and set salaries. Determine indigency prior to arraignment. Prepare annual report.</p>

DISTRICT of COLUMBIA D.C. Public Defender Service (independent agency)	Eleven member Board of Trustees. Appointed by panel of two U.S. judges, two D.C. judges and Mayor of D.C. Three-year term; not more than two consecutive. No judges. Four of eleven members non-attorney residents of D.C.	Establish general policy but shall not direct conduct of particular cases. Submit fiscal year report to Congress, chief judges of U.S. Courts and D.C. Courts and D.C. Mayor. Arrange annual independent audit. Quarterly reports to court on matters relating to appointment system. Appoint Director and Deputy Director and set their salaries.	Director appointed by Trustees. Serve at pleasure of Trustees. Member of D.C. Bar. No private practice.	Employ and supervise personnel. Set compensation not to exceed salary paid to U. S. Attorneys and staff.
FLORIDA Florida Public Defender Association (FPDA); Florida Public Defender Coordination Office (FPDCO)	None per se, but the FPDA is governed by a Board of Directors comprised of the 20 elected public defenders in Florida, two representatives of the assistant public defender staff and one representative piece from public defender investigative and administrative staff. The FPDCO works with the FPDA.	The FPDA engages in activities that promote and develop the public defender system in Florida. The FPDCO coordinates FPDA meetings; collects caseload and budget information from public defenders; analyzes public defender workload; prepares annual funding formulas which are based on caseload and attorney unit cost and used by the three branches of government and the circuit public defenders in the budget request process; monitors pertinent legislative developments; conducts training for public defender staff; and circulates pertinent case law to the elected public defenders.	Not applicable	Not applicable
GEORGIA Georgia Indigent Defense Council (separate agency within Judicial branch)	Fifteen member council. Supreme Court selects members: ten lawyers; three lay persons; and two county commissioners. Selected for four year terms.	Recommend standards and guidelines for local programs. Administer state funds to local public defender programs that comply with standards. Support local defenders. Provide local attorneys with technical, clinical help and training. Prepare budget.	Director selected by Council.	Duties and responsibilities not contained in statute.
HAWAII Office of State Public Defender (Executive agency, Department of Budget and Finance)	Five member Defender Council. Appointed by Governor. Serve at Governor's pleasure. One member from each county. Chairman selected by members.	Council shall be governing body of Office of State Public Defender. Shall appoint Public Defender. Approve employment decision of Public Defender.	State Public Defender appointed by Council. Four-year term. Qualified to practice law in Hawaii. Full-time position.	Subject to approval of Council: employ assistant public defenders, investigators and other support personnel. Assistant public defenders may be part-time and engage in private practice other than criminal law.
IDAHO State Appellate Public Defender (The Department of Self-Governing Agencies)	None	Not applicable	State Appellate Defender appointed by the governor with advice and consent from the senate from a list of 2-4 persons recommended by a committee comprised of the president of the Idaho state bar association, chairman of the senate judiciary and rules committee, and a citizen at large appointed by the governor. The chief justice of the Idaho supreme court, or her designee, is ex officio member of the committee. Public defender must be attorney licensed to practice in Idaho with at least five year experience practicing law. Four-year term; removed only for good cause.	Provide appellate and postconviction representation to indigent defendants convicted of felony offenses in those counties which participate in the capital crimes defense fund; prepare annual report. Employ deputy state appellate defenders and other employees. Adopt necessary policies or rules.
ILLINOIS Office of State Appellate Defender (agency of the Judicial department)	Board of Commissioners. Nine members. Appointed by various courts and bars. Governor appoints Chair. Serves one six-year term.	Approve budget. Advise Appellate Public Defender on policy. Can recommend dismissal of the Appellate Public Defender.	State Appellate Defender appointed by Illinois Supreme Court. Four-year term. Qualified to practice law in Illinois.	Provide representation in criminal appeals. Establish offices around the state. Train and assist trial level defenders.

<p>INDIANA Public Defender Commission (Policy board for capital and non-capital representation) (Judicial agency)</p>	<p>Public Defender Commission: Eleven members: three appointed by Governor; three appointed by Chief Justice; one appointed by Board of Indiana Criminal Justice Institute; two House members appointed by the Speaker of the House; two Senate members, appointed by Speaker Pro Tempore of the Senate. Four-year term. No law enforcement officers or court employees. Members designate one member Chair.</p>	<p>Set standards for indigent defense services in capital and non-capital cases. Adopt guidelines and fee schedule under which counties may be reimbursed. Make recommendations concerning the delivery of indigent defense services in Indiana. Prepare annual report on operation of public defense fund.</p>	<p>Not applicable, but see below.</p>	<p>Not applicable, but see below.</p>
<p>INDIANA Public Defender of Indiana (State post-conviction public defender) (Judicial agency)</p>	<p>None, but see above.</p>	<p>Not applicable, but see above.</p>	<p>Public Defender appointed by Supreme Court. Four-year term. Resident. Practicing lawyer in Indiana for three years.</p>	<p>Represent all indigent defendants in post-conviction proceedings.</p>
<p>IOWA Office of the State Public Defender (independent agency within Executive branch)</p>	<p>5 members: no more than three licensed to practice law in Iowa. Three members appointed by Governor - one who is nominated by Iowa State Bar, and one who is nominated by state supreme court. Two members from the General Assembly, one from each chamber and no more than one from a political party. Each member serves a three-year term.</p>	<p>(Not applicable) Advise the Governor, General Assembly and the state public defender regarding hourly rates and per case fee limitations for court-appointed counsel.</p>	<p>State Public Defender appointed by Governor. Four-year term. Licensed to practice law in Iowa.</p>	<p>Oversee all 18 public defender offices. Coordinate non-public defender indigent defense program. Contract with attorneys when public defender unable to take case.</p>
<p>KANSAS State Board of Indigent Defense Services (Executive branch agency)</p>	<p>Nine members: five lawyers, four non-lawyers. Appointed by Governor and confirmed by Senate. Two members from First Congressional District, one of whom is a registered Kansas lawyer, and at least one member from each other Congressional District. At least one (and up to five) registered Kansas lawyer from each county with over 100,000 population. No members may be judicial or law enforcement personnel. Three-year terms.</p>	<p>Appoint Director and public defenders. Maintain statistics on indigent defense representation. Conduct training programs. Establish public defender offices. Enter into contracts with attorneys to provide indigent defense representation and with cities or counties for misdemeanor representation. Provide technical assistance to public defenders and private attorneys.</p>	<p>Board appoints Director who must be licensed in Kansas and demonstrate commitment and ability in criminal law.</p>	<p>Serve as Chief Executive Officer of Board. Supervise operation, policies, procedures of Board. Prepare annual report.</p>
<p>KENTUCKY Department of Public Advocacy (independent state agency within Executive branch)</p>	<p>Nine appointed members plus deans of Kentucky law schools. Two members appointed by Governor. One by speaker, one by president of the senate, two by Supreme Court; two criminal lawyers appointed by Governor from list of five submitted by Bar Association, one appointed by Governor from list submitted by Kentucky Protection and Advocacy Advisory Board. Four-year term. No prosecutors or law enforcement officials. Chair elected by Commission to one-year term. Also a 17-member citizen advisory board appointed by the Public Advocate.</p>	<p>Recommend to Governor three attorneys as nominees for Public Advocate. Assist Public Advocate in selecting staff. Provide general supervision of Public Advocate and review performance. Engage in public education and generate political support. Review and adopt annual budget. Not interfere with handling of cases.</p>	<p>Public Advocate appointed by Governor from nominees submitted by Commission. Member of Kentucky Bar with five years experience. Four-year term.</p>	<p>Appoint Deputy Public Defender. Appoint assistant public defenders and other personnel. Serve as ex officio, non-voting member of Commission. Appoint 17-member Advisory Board for Protection and Advocacy Division.</p>

<p>LOUISIANA Louisiana Indigent Defender Program (separate agency within Executive branch created by Supreme Court Rule)</p>	<p>Seven to fifteen members. Appointed by Chief Justice of Supreme Court with concurrence of majority of justices. Renewable three-year terms. One member from each of the six Supreme Court districts. One additional member from First Supreme Court District. Not more than three non-lawyer members. At least three experienced criminal lawyers.</p>	<p>Members elect Chair. Establish uniform standards and guidelines for statewide program. Subdivide state into regions. Select most appropriate system for delivery in each region. Select regional full-time public defenders. Set policy for the Expert Witness/Testing Fund and the District Assistance Fund. Set eligibility standards and guidelines for district defender boards to receive Expert Witness/Testing and District Assistance Funds.</p>	<p>Chief Executive Officer selected by Board. Attorney with five years prior experience in criminal practice. Board sets term.</p>	<p>Supervise attorneys in Appellate Division and Capital Litigation programs. Manage monies in Expert Witness/Testing Fund and District Assistance Fund. Assist Board in enforcing its standards and guidelines.</p>
<p>MAINE</p>	<p>None</p>	<p>Not applicable</p>	<p>None</p>	<p>Not applicable</p>
<p>MARYLAND Office of the Public Defender (Executive agency)</p>	<p>Three-member Board of Trustees; two must be active attorneys. Appointed by Governor. Three-year term. Chair designated annually by Trustees.</p>	<p>Study and observe operation of Public Defender office. Coordinate activities of district Advisory Boards. Appoint Public Defender. Advise Public Defender on all relevant matters.</p>	<p>Public Defender appointed by Board of Trustees. Term is at the pleasure of Trustees. Attorney admitted in Maryland plus five years in practice.</p>	<p>Appoint Deputy Public Defender with Board approval. Appoint First District Defender in each judicial district. Appoint assistant public defenders with advice of District Defenders. Appoint other employees. Maintain at least one office in each district. General responsibility for operation of all offices. Maintain records. Supervise district defenders' maintenance of local attorney panels.</p>
<p>MASSACHUSETTS Committee for Public Counsel Services (Independent agency; Judicial branch for budget purposes only)</p>	<p>Fifteen members. Appointed by Justices of Supreme Judicial Court. Three-year term. Chair elected by the Committee.</p>	<p>Establish standards for public counsel and private counsel divisions. Establish uniform standards of indigency. Establish guidelines for training and for qualification and removal of counsel in public and private divisions. Prepare annual report. Appoint chief counsel and two deputies. Extensive list of other duties and responsibilities enumerated by Statute.</p>	<p>Chief Counsel appointed by Committee. Attorney. Serves at pleasure of Committee.</p>	<p>Overall supervision of various divisions of committee. Perform duties as defined by the Committee. Authorize all payments certified by judges for private counsel.</p>
<p>MICHIGAN State Appellate Defender Office, Appellate Defender Commission (agency of Judicial branch)</p>	<p>Seven members appointed by Governor. Two recommended by Supreme Court; one recommended by Court of Appeals; one recommended by Michigan Judges Association; two recommended by State Bar; one non-attorney. Four-year term. No member a sitting judge, prosecutor or law enforcement officer.</p>	<p>Choose State Appellate Defender. Develop appellate defense program. Develop standards for program. Maintain list of attorneys willing and qualified for appointment in indigent appellate cases. Provide CLE training for attorneys on list.</p>	<p>State Appellate Defender chosen by Commission. Can only be removed for cause.</p>	<p>Provide appellate representation. Maintain a manageable caseload. Prepare and maintain brief bank available to court-appointed attorneys who provide appellate services to indigents.</p>
<p>MINNESOTA State Board of Public Defense (separate agency within Judicial branch)</p>	<p>Seven members. One district court judge appointed by Supreme Court. Four attorneys familiar with criminal law but not employed as prosecutors, appointed by Supreme Court. Two public members appointed by Governor.</p>	<p>Elect chair and appoint State Public Defender. Chair may appoint Chief Administrator. Prepare annual report. Recommend budget for Board, Office of State Public Defender and public defense corps. Establish procedures for distribution of funds for public defense. Set standards for state and district public defenders and court-appointed system.</p>	<p>State Public Defender appointed to four-year term. Full-time position.</p>	<p>Provide appellate and post-conviction proceeding representation in all indigent cases. Assist in trial representation in conflict of interest cases when requested by a district public defender or appointed counsel. Conduct training programs.</p>

MISSISSIPPI Public Defender Commission of the State of Mississippi	None. (Mississippi Public Defender Act of 1998 repealed in 2000.)			
MISSOURI Office of State Public Defender (Independent department in Judicial Branch)	Public Defender Commission: Seven members: four lawyers; no more than four from same party. Appointed by Governor with advice and consent of Senate. Six-year term. State Public Defender is ex officio member without vote. Chair elected by members.	Select director and deputies. Establish employment procedures. Review office performance and monitor director. Public education to ensure independence of system. Advise on budgetary matters. Contract with private attorneys. Approve fee schedule for assigned counsel.	Director appointed by Commission. Four-year term. Attorney with substantial criminal law experience, also experienced in personnel administration.	Administer and coordinate operation. Direct and supervise work of employees. Submit annual report to budget to Commission. Supervise training. Contract out for legal services with approval of Commission.
MONTANA State Appellate Public Defender (Executive branch agency)	Five members. One trial level judge, nominated by Judges Association. Three attorneys, nominated by State Bar, who must have criminal defense experience. One lay person nominated by Governor. Staggered terms, one or two years.	Appoint Appellate Public Defender. Help gather attorney list for appointments of counsel at trial and state post-conviction. Draft criminal defense standards for counsel.	State Appellate Defender hired by Commission. No term limit.	Provides representation in state post-conviction or appeals if defendant claims ineffective assistance. Help in or assume responsibility in appeals. Assume case if trial or Supreme Court judge appoints.
NEBRASKA (Executive branch agency)	Commission for Public Advocacy. Nine members: six members for each judicial district; chair and two positions at large. Governor appoints from list prepared by State Bar. Non-salaried. Qualified attorneys with criminal defense experience or demonstrated commitment. Budget is from general funds and recovery of one-third of expenses from Nebraska's counties.	Provide legal services and resources to assist counties in providing effective assistance to indigent persons through its capital litigation, appellate and felony resource center divisions. Select a chief counsel.	Chief Counsel selected by Commission. Serves at will of Commission. Five years Nebraska practice. Criminal defense experience including capital case defense.	Overall supervision of appellate, capital and major case divisions and litigation support fund. Prepare budget and annual report. Establish and administer projects and programs for the operation of the commission. Oversee training programs.
NEVADA State Public Defender (Judicial branch agency)	None	Not applicable	Four-year term. Selected by Governor. Nevada Bar member.	Establish statewide system for all counties who choose to be part of state system. Oversee activities of these programs. Prepare annual budget. Annual report to legislature.
NEW HAMPSHIRE Judicial Council (Judicial branch agency)	State-level Judicial Council. Fourteen members. One selected from each court level: Supreme, Superior, Probate; President of the New Hampshire Municipal and District Court Justices Association (ex officio); Attorney General (ex officio); President of New Hampshire Bar Association (ex officio); representative from Superior Court Clerks; seven others appointed by Governor, four of whom must be attorneys.	The Judicial Council's responsibilities related to indigent defense include contracting with local defender corporations and individual attorneys for provision of defense services and general supervision of indigent programs in regard to: allocation of cases between public defender program and assigned counsel; performance of counsel; competence of counsel; fiscal and budgetary matters.	The Executive Director of the New Hampshire Public Defender, a private non-profit corporation under contract with the Judicial Council, is selected by the corporations board of directors.	Executive Director's responsibilities are contained in a contract with the Judicial Council.
NEW HAMPSHIRE New Hampshire Public Defender (Judicial branch)	None	Not applicable	The judicial council, with approval of the governor and council, contracts with an organization or group of lawyers approved by the board of governors of the New Hampshire bar Association to operate a public defender program.	Represent indigent defendants in criminal cases or juveniles charges as delinquents in the district, municipal, superior and supreme courts.

NEW JERSEY Office of the Public Defender (Executive Agency, Part of Division of the Public Advocate)	None	Not applicable	Appointed by Governor with advice and consent of Senate. Five-year term. Attorney, experienced in practice in New Jersey.	Appoint deputy and assistant public defenders as well as support personnel. Establish State Public Defender system for all counties. Engage and compensate assigned counsel.
NEW MEXICO State Public Defender (Executive department)	None	Not applicable	Chief Public Defender appointed by and serves at pleasure of Governor. Attorney active for five years prior to appointment and is experienced in defense or prosecution.	Manage all operations of department. Set fee schedule for assigned counsel. Establish local public defender districts. Appoint district public defenders who serve at his/her pleasure.
NEW YORK Capital Defender Office (Independent agency in Judicial branch)	None	Not applicable	Capital Defender selected by three-member Capital Defender Office Board of Directors.	In consultation with Board of Directors, hire attorneys as deputy capital defenders, investigators and other staff. The Capital Defender Office provides both direct representation and consultation services; it also has responsibility for determining, in consultation with the administrative board of the judicial conference, attorney qualification standards.
NORTH CAROLINA Office of Indigent Defense Services (Independent office in Judicial Department)	Commission on Indigent Defense. Thirteen members. Chief Justice appoints one active or former member of North Carolina judiciary; Governor appoints one non-attorney; General Assembly appoints one member recommended by President Pro Tempore of the Senate and one member recommended by the Speaker of the House of Representatives; the North Carolina Public Defenders Association, the North Carolina State Bar, the North Carolina Bar Association, the North Carolina Academy of Trial Lawyers, the North Carolina Association of Black Lawyers and the North Carolina Association of Women Lawyers each appoint one member (with no restrictions). Plus, the Commission will appoint three members, who must reside in different judicial districts from one another - one must be a non-attorney, one may be an active member of the North Carolina judiciary, one must be Native American.	Appoint the Director of the Office of Indigent Defense Services. Develop standards and guidelines governing provision of indigent defense services. Determine methods of delivering indigent defense services (appointed counsel, contract counsel, part-time public defender, full-time public defender, appellate defender or some combination of these) throughout the state. Establish compensation rates for court-appointed counsel and schedules of allowable expenses, appointment and compensation for expert witnesses. Approve budget for Office of Indigent Defense Services.	Not applicable	Not applicable
NORTH CAROLINA Appellate Defender Office (Judicial branch agency)	None	Not applicable	Appellate Defender appointed by Commission on Indigent Defense	Provide appellate representation to indigents. Maintain appellate brief bank. Provide CLE training. Consult with attorneys representing defendants in capital cases. Recruit qualified, willing attorneys for state and federal death penalty post-conviction proceedings.

<p>NORTH DAKOTA North Dakota Legal Counsel for Indigents Commission (Judicial agency)</p>	<p>Seven members. Chief Justice appoints: one county government representative recommended by North Dakota Association of Counties; one judge recommended by Chief Presiding Judge; three recommended by State Bar; and two recommended by Attorney General. Three-year terms. Chief Justice appoints Chair. State Court Administrator provides staff.</p>	<p>Review cost and caseload data. Prepare annual report and budget. Provide planning, guidelines and technical assistance to counties and judicial districts re: indigent defense services. Adopt guidelines for indigent defense services. Review disputed fee decisions of trial judges.</p>	<p>None</p>	<p>Not applicable</p>
<p>OHIO Ohio Public Defender Commission (independent commission within the Executive branch)</p>	<p>Nine members. Chair appointed by Governor. Four appointed by Governor; two of whom are from each political party. Four members appointed by Supreme Court. Chair and at least four members are bar members. Four-year terms.</p>	<p>Provide, supervise and coordinate legal representation. Establish rules for Public Defender such as compensation, indigency standards and caseloads. Approve budgets.</p>	<p>State Public Defender appointed by Commission. Attorney with minimum of four years experience. State bar member.</p>	<p>Appoint Assistant State Public Defender. Supervise maintenance of Commission standards. Keep records and financial information. Establish compensation procedures.</p>
<p>OKLAHOMA Oklahoma Indigent Defense System Board (Executive branch agency)</p>	<p>Five members for five-year terms. Appointed by Governor, subject to advice and consent of Senate. At least three lawyers. Governor designates Chair.</p>	<p>Make policies for indigent defense programs. Approve budget. Appoint advisory council of indigent defense attorneys. Establish policies on maximum caseloads. Appoint Executive Director.</p>	<p>Executive Director appointed by and serves at pleasure of Board. Licensed as Oklahoma attorney for four years. Experienced in criminal defense.</p>	<p>Develop state system, with exception of Oklahoma and Tulsa counties. Prepare system budget. Keep list of private attorneys for capital and non-capital case appointments. Advisor to indigent defenders. Act on system's behalf in legislative efforts. Conduct training.</p>
<p>OREGON Public Defense Services Commission (agency in judicial branch)</p>	<p>Seven members, appointed by order of the Chief Justice, who serves as non-voting, ex-officio member. Members must include at least: two non-lawyers; one criminal defense lawyer whose practice does not serve primarily indigent defendants; and one former Oregon state prosecutor. No current judge, prosecuting attorney, or law enforcement officer may serve. Four year terms. Chief Justice appoints chairperson and vice chairperson.</p>	<p><i>Effective October 1, 2001:</i> Plan for the establishment of a public defender system that ensures provision of public defense services in the most cost-efficient manner consistent with Oregon and federal constitutions and Oregon and national standards of justice. Establish and maintain public defense system for criminal and probation violation appeals. Establish Office of Public Defense Services (OPDS) and appoint an Executive Director. Submit budget of Commission and Office of Public Defense Services to Legislative Assembly. Review contracts negotiated by the director. Adopt a compensation plan for the OPDS. <i>Effective October 1, 2003:</i> Adopt rules regarding: indigency determination; appointment of counsel; fair compensation of appointed counsel; resolution of appointed counsel compensation disputes; costs associated with representation of persons by appointed counsel and; performance standards.</p>	<p>Selected by commission. Four-year term. Active member of Oregon state bar, private practice prohibited.</p>	<p>Employ deputies and other staff, including expert investigators, witnesses and interpreters.</p>
<p>PENNSYLVANIA</p>	<p>None</p>	<p>Not applicable</p>	<p>None</p>	<p>Not applicable</p>
<p>RHODE ISLAND Office of the Public Defender (agency of Executive branch)</p>	<p>None</p>	<p>Not applicable</p>	<p>Appointed by Governor with advice and consent of Senate. Three-year term. Attorney with five years experience.</p>	<p>Appoint, supervise and direct assistants as necessary. Develop and oversee statewide system by regions.</p>

<p>SOUTH CAROLINA Office of Indigent Defense (independent agency within Executive branch)</p>	<p>Commission on Indigent Defense. Seven members appointed by Governor on recommendation of South Carolina Public Defender Association. One from each congressional district. One from state at-large who serves as Chair. Four-year terms.</p>	<p>Appoint Executive Director of Office of Indigent Defense. Supervise operation of Office of Indigent Defense.</p>	<p>Executive Director appointed by Commission.</p>	<p>Administer Office of Indigent Defense. Distribute state funds to counties. Compile statistics on indigent defense statewide. Report to General Assembly on indigent defense. Maintain list of attorneys qualified to accept appointments in death penalty cases. Administer collection and distribution of public defender application fees and surcharge fines imposed on specified criminal offenses. Supervise staff and carry out requirements of Commission.</p>
<p>SOUTH CAROLINA Office of Appellate Defense (independent state agency within Executive branch)</p>	<p>Commission on Appellate Defense: Dean of the University of South Carolina Law School; President of the South Carolina Public Defenders Association; President of the South Carolina Bar Association; President of the South Carolina Trial Lawyers Association; Chairman of the South Carolina Judicial Council; Chairman of the Senate Judiciary Committee or his designee; and Chairman of the Judiciary Committee of the House of Representatives or his designee. Commission elects Chairman for one-year term.</p>	<p>Appoint Chief Attorney. May, subject to rules of Supreme Court, recommend or establish policies for the operation of the Office of the Appellate Defense. Approve annual budget. Establish indigency criteria.</p>	<p>Chief Attorney appointed by Commission to four-year term. Licensed to practice law in South Carolina.</p>	<p>Submit budget to Commission. Establish training for employees. Represent indigent defendants in appeal of a conviction in trial court or decision of any proceeding in civil commitment or other involuntary placement.</p>
<p>SOUTH DAKOTA</p>	<p>None</p>	<p>Not applicable</p>	<p>None</p>	<p>Not applicable</p>
<p>TENNESSEE District Public Defenders Conference (agency of the Judicial branch)</p>	<p>Not applicable, but see below.</p>	<p>Not applicable, but see below.</p>	<p>Office of Executive Secretary to District Public Defender Conference. Elected by Conference for eight-year term.</p>	<p>Assist district public defenders to coordinate their responsibilities. Serve as liaison among various branches of state government. Prepare budgets for each district for submission to state. Provide public defenders with minimum law libraries.</p>
<p>TENNESSEE Office of the Post-Conviction Defender and Post-Conviction Defender Commission</p>	<p>Nine members: two appointed by the Governor; two appointed by the lieutenant governor; two appointed by the speaker of the House of Representatives; three appointed by the Supreme Court of Tennessee. Serve four-year terms.</p>	<p>Appoint Post-Conviction Defender; prepare annual budget for the Office of Post-Conviction Defender.</p>	<p>Post-Conviction Defender appointed by Post-Conviction Defender Commission. Four-year term. Must be lawyer in good standing with Supreme Court of Tennessee and possess demonstrated experience in capital case litigation.</p>	<p>Provide legal representation to indigent persons convicted and sentenced to death; hire assistant post-conviction defenders, investigators and support staff; maintain clearinghouse of materials and brief bank for public defenders and private counsel who represent indigents charged or convicted of capital crimes; provide CLE training and consulting services to lawyers representing defendants in capital cases; recruit qualified members of the bar to provide representation in state death penalty proceedings.</p>

<p>TEXAS Task Force on Indigent Defense (Standing Committee of Texas Judicial Council)</p>	<p><i>Eight ex officio members:</i> chief justice of the supreme court; presiding judge of the court of criminal appeals; member of the senate appointed by the lieutenant governor; member of the house of representatives appointed by the speaker of the house; a courts of appeal justice serving on the judicial council designated by the governor to sit on Task Force; a county court, statutory county court or probate court judge serving on the judicial council designated by governor to sit on Task Force; chair of the Senate Criminal Justice Committee; and chair of the House Criminal Jurisprudence Committee. <i>Five appointive members:</i> Governor appoints, with advice and consent of senate: active district judge serving as presiding judge of an administrative judicial region; either a judge of a constitutional county court or a county commissioner, practicing criminal defense attorney; public defender, either a judge of a constitutional county court or county commissioner in county with >250,000 population.</p>	<p>Develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal and in post-conviction proceedings. Develop a plan that establishes statewide requirements for counties relating to reporting indigent defense information. Use the information collected to monitor the effectiveness of the counties' indigent defense policies, standards and procedures. Submit annual report to governor, lieutenant governor, speaker of the house, and council regarding the quality of legal representation provided to indigent defendants; current indigent defense practices in Texas as compared to state and national standards; efforts made by the task force to improve indigent defense; and recommendations by the task force for improving indigent defense in the state.</p>	<p>None</p>	<p>Not applicable</p>
<p>UTAH</p>	<p>None</p>	<p>Not applicable</p>	<p>None</p>	<p>Not applicable</p>
<p>VERMONT Office of the Defender General (agency of Executive branch)</p>	<p>None</p>	<p>Not applicable</p>	<p>Defender General appointed by Governor with advice and consent of Senate. Four-year term.</p>	<p>Operates program thru public defenders and deputy public defenders or by contracting out to private attorneys. May establish local offices headed by a public defender. Contract with member of bar to serve as assigned counsel coordinator.</p>
<p>VIRGINIA Public Defender Commission (agency of Judicial branch)</p>	<p>Nine members. Appointed by Speaker of the House in consultation with Senate and House Courts of Justice Committees. Three judges, three practicing attorneys, three lay people. Three-year terms.</p>	<p>Oversee administration of Public Defender Commission. Select Executive Director and individual head public defenders.</p>	<p>Commission selects Executive Director who serves at pleasure of Commission. Member of Virginia State Bar and experienced.</p>	<p>Statute sets up office. Hire staff. Establish and oversee local public defender offices mandated by state legislature.</p>
<p>WASHINGTON Office of Public Defense (independent agency of the Judicial branch)</p>	<p><i>Advisory Committee</i> has nine members: three persons appointed by the chief justice; two non-attorneys appointed by the governor; two senators and two members of the house of representatives; one person appointed by the court of appeals executive committee; and one member appointed by the Washington State Bar Association.</p>	<p>Submit three names to the Supreme Court for Director of the Office of Public Defense.</p>	<p>Director serves at the pleasure of the supreme court, which selects from list of three names submitted by <i>Advisory Committee</i>. Director must have: practiced law in Washington for at least five years, represented criminal defendants, and proven managerial or supervisory experience.</p>	<p>Administers all criminal defense services; submits to state legislature a biennial budget for costs related to appellate indigent defense; recommends indigency standards; collects information and reports to the legislature on indigency cases; coordinates with the supreme court and judges of each division of the court of appeals to determine how attorney services should be provided. The Office of Public Defense does not provide direct representation.</p>
<p>WEST VIRGINIA</p>	<p>None</p>	<p>Not applicable</p>	<p>None</p>	<p>Not applicable</p>

VISCONSIN Wisconsin State Public Defender (Independent agency within Executive branch)	Nine members. Appointed by Governor, approved by Senate. At least five must be attorneys. Three-year terms. Chair is elected by Board.	Appoint state Public Defender and establish salary. Approve budget and submit to Governor. Promulgate standards of indigency. Promulgate rules for assignment of private counsel in regard to standards, payments and pro bono programs. Perform all other duties necessary and incidental. Contract with federal agencies and local public defender organizations for provision of services.	State Public Defender appointed by Board. Member of Wisconsin Bar. Five-year term.	Supervise operation of all state and regional public defender offices. Maintain data and submit biennial budget to Board. Delegate cases to any member of Wisconsin Bar. Negotiate contracts out for representation as directed by Board. Appoint staff.
WYOMING State Public Defender (Executive agency)	None	Not applicable	State Public Defender appointed by Governor. No term specified. Member of Wyoming Bar with experience in defense or prosecution.	Administer public defender program in districts and oversee operation of public defender system statewide. Assistant public defenders appointed by Governor and serve at pleasure of Public Defender. Public Defender may require them to be full-time. Public defender in each district appointed by Governor upon recommendations from district judge and county commissioners.

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SB 2027 Indigent Defense Commission
Sandi Tabor
February 2, 2005

Background on the ND Indigent Defense Task Force:

- State Bar Association of North Dakota formed a task force to analyze the present indigent defense system.
- To assist the task force, the Spangenberg Group was hired to conduct interviews and present a report regarding the existing system.
- The Spangenberg Group made the following findings:
 - **Lack of Independence:** The chief problem with the present system is a pervasive absence of independence for the defense function from the judiciary
 - **Funding:** North Dakota's expenditures for indigent defense services based on 2002 numbers are 43% percent less than the next lowest state (Wyoming).
 - Wyoming - \$7 million
 - South Dakota - \$12.6 million
 - Montana - \$18 million
 - North Dakota - \$ 4 million ... for this biennium the expenditure is \$ 5 million
 - **High Caseload:** All contracts in ND are flat-fee amounts for an unspecified number of cases. This means an attorney must take as many assignments as assigned, absent a conflict of interest. In recent years, the caseloads have steadily exceeded predictions made by the Court.
 - National standards applicable to full-time public defenders state that the caseload should not exceed 150 felony cases per year.
 - It is not uncommon for the caseload of North Dakota contract attorneys to well exceed this limit.
 - **Low Pay:** The goal is to pay attorneys \$65.00 per hour. In reality the average payment is \$55.00 per hour ... not enough to cover overhead.
 - In homicide cases, insufficient pay is a particularly significant problem. These cases are far more time intensive and the per hour rate drops dramatically.
 - Another issue affecting pay is contract attorneys are obligated to carry all cases that are open at the end of the contract period. This means that the attorneys are obligated

to represent the client until the case is closed, without pay, often well after the contract has expired.

- **Administrative and Quality Problems:** From the previous comments it should come as no surprise that concerns were raised about the quality of attorney/client communications ... and concerns were raised about the lack of oversight in general.
- The Spangenberg Group made the following recommendations:
 - **The Current System Needs More Funding:** Compensation must be tied to actual work performed or number of cases accepted.
 - **The Current System Needs Infrastructure and Better Administration:** Characteristics of an effective contract system include:
 - Minimum attorney qualifications
 - Support such as paralegals, investigators and social workers
 - Independent oversight and monitoring
 - Workload caps
 - Limitations of the practice of law outside the contract
 - Caseload caps
 - Case management and tracking system
 - Guidelines on client contact and notification of appointment
 - Oversight and evaluation of contract attorneys.

Provisions of SB 2027

- Sections 1 – 6 were inserted as the result of amendments added to the bill by the Senate Judiciary Committee. Representatives from the Association of Counties are here to discuss those amendments.
- Section 7 – Establishes the Commission on legal counsel for indigents – 7 members appointed by the Governor, Legislature, Supreme Court and State Bar Association.
- Section 8 – Outlines the duties of the Commission – it includes developing standards governing the delivery of indigent defense services. The bill allows the present contract attorney structure to remain, but also allows the Commission to provide public defenders in regions where the Commission considers it necessary.
- Section 9 – Provides that the Commission will appoint a director and outlines the duties of the director.
- Section 10 – Deals with the confidentiality of the files.

- Section 11 – Was inserted as the result of amendments added to the bill by the Senate Judiciary Committee. Representatives from the Association of Counties are here to discuss those amendments.
- Section 12 – Excludes the Commission from the definition of administrative agency.
- Section 13 – Clarifies that the Commission will determine the compensation rate for contract counsel.
- Section 14 – Establishes the indigent defense administration fund and establishes a continuing appropriation
- Section 15 – Provides an appropriation of \$1.1 million for the administrative costs of the program. As side note, the remaining appropriation to pay the contract counsel fees is included in SB 2002.
- Section 16 – Provides transition language regarding contracts awarded by the Supreme Court after June 30, 2005.
- Section 17 – Provides an effective date for Section 11 and 13 of January 1, 2006.

To: Senate Appropriations Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2027 (Indigent Defense Services)
Date: February 2, 2005

*Same
Sent to
the House*

The North Dakota Catholic Conference supports Senate Bill 2027 to improve our state's indigent defense services. Although the primary concern of this committee is the appropriation, no expenditure of state funds occurs in moral or justice vacuum. We provide this testimony to illustrate why this particular request is needed to ensure and preserve the interests of justice.

The right to provided counsel for indigent defendants has its roots in the Old Testament and has been recognized by religious leaders to this day. Most evident from the early Scriptures in this regard are the admonishments and rebukes by the prophets to those who did not justly and fairly treat the poor in the courts.¹ Indeed, the demand for justice for the poor is one of the most prevalent themes in the Old Testament. The early Christian Church continued this call, as when the bishops petitioned the Roman emperor to appoint a defender of the poor for legislative and judicial matters. More recently, the Catholic bishops of Wisconsin, after a year-long study of that state's system, stated:

Criminal justice policies and pastoral responses to crime must take special care to address and serve those with little or no money. Policies must ensure that justice is as accessible to victims and offenders who are poor as it is to those who are more affluent.

Continuing this tradition, the North Dakota Catholic Conference supports Senate Bill 2027, not just because it is in line with constitutional rights to justice, but also because it is in line with a core principle of Catholic social teaching. That principle holds that the measure of all institutions is the degree to which they either enhance or threaten the life and dignity of every human being, and the degree to which they protect and empower the poorest and most vulnerable members of our society.

We urge a **Do Pass** recommendation on Senate Bill 2027.

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¹ Translated in many English translations as "at the gate."

AH #3
(meter 2550)

STATE BAR ASSOCIATION OF NORTH DAKOTA

TESTIMONY ON SB 2027
Sherry Mills Moore, President
January 18, 2005

As President of the State Bar Association of North Dakota I am here to ask for your support of Senate Bill 2027. Let me tell you why our association has put so much time, energy and resources into this issue. First, and foremost, because it is a hinge-pin to our system of justice.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him...". Gideon v. Wainwright, 372 U.S. 335 [1963]."

Assuring constitutionally required protections to our citizens of this state falls upon the entire state – all branches of the government and all our citizens. As the “go-betweens” between the litigants and the judicial system, lawyers are particularly well suited to see the problems. The indigent defense system has been throbbing in the distance for many years. With a resolution of our membership in 2003, as an association SBAND made a conscious decision to study the problems and seek solutions.

We are so committed to the concept of an independent adequately funded system that we helped to organize, sponsor and staff the Indigent Defense Task Force and pay for the Spangenberg Group to come in and specifically examine our state. The Spangenberg Group is a criminal justice research and consulting firm that specializes in studying indigent defense. The Task Force was composed of judges, legislators, private and contract defense counsel, states attorneys and representatives of the federal defense and prosecutorial bar.

I echo, but hopefully do not restate, the comments of the previous speakers, and no doubt those who are to follow. But, let me give you another perspective, another piece of the puzzle, and that is the perspective of the lawyer.

This is not a lawyer's employment bill. Only a very small fraction of our association members actually provide indigent defense services. Let me then say this again, this is not a lawyer's employment bill.

North Dakota is noted for its work ethic and nowhere is that more evident than in the work done by counsel for the indigent defense. With my testimony is an article that I hope you all have the time to read. Frankly, I practice in “the

trenches", real law with real people, and I work hard, as do so most in my profession. But, when I read this article, I was thunderstruck by how this attorney's life must be. His story is repeated all across North Dakota and despite his education, intelligence, and experience, and even though he provides a vital need, his income is limited and the praise left unsung, except for this article. This August 1, 2004 Bismarck Tribune article describes his as, *"the least glamorous job in the justice system"*.

Let me just tell you a little about Wayne Goter, the featured attorney. He has not seen an increase in his wages since 1991, but he says, for him, *time is not money it is someone else's freedom. For us there is always the pressure to do well," its not the money. People could go to jail and they could go to jail for a long time.*

This article describes a day in his life, here is how they summarized it, *"This is the world of Wayne Goter, where there are no reserved parking spots. There is no health insurance for him or his family, no money to hire a secretary for his office. There's no support staff, no cell phone, no money for out-of state expert witnesses, no money for private investigators not approved and paid by the court system. And there's hardly any time."*

It describes the impact on his personal life. *He wanted to make it home at lunchtime to see his kids today but the day isn't shaping up that way. Actually he says he usually doesn't eat lunch. It takes too long and it makes him tired. When things get pushed back like they are today, it pushes Goter's list of tasks to complete back too. It'll be late by the time he is done calling back all of his clients, maybe after dinner. And before he goes to bed, Goter doesn't have spy novels to read. Instead he has a few stacks of legal papers, each half a foot tall, that are important to the cases he's working."*

He sums up the position of the bar on this issue, *"You are dealing with people on a real personal, emotional level. You deal with their triumphs and their defeats. To some that might not seem that intellectually stimulating but to me it is important."* And, *"I think everybody, really, should want a strong public defender system. The letter of the law and the spirit of the law have to be met."*

Part of the strong public defender system comes with SB2027, setting up an independent system. The next part will come in the form of appropriations. The State Bar Association of North Dakota asks for your support on both. To sum up, let me quote from Judge Gary Lee, then President of the SBAND (and he in turn, in part, is quoting the North Dakota Supreme Court".

We must keep in mind the right to counsel is empty rhetoric if the attorney provided is not reasonably competent, or lacks the resources to do an adequate job. 'The right to counsel includes the right to effective counsel and ineffective, incompetent, or inadequate representation is the same as having no counsel at all.' State v. Keller, 57 ND 645, 223 NW 698, at 699 (1929). The lawyers I know who are providing indigent criminal defense are diligent, hardworking, and dedicated. Sadly, I believe they're also poorly paid, understaffed, under-appreciated and on their own."

Thank you very much.

**Testimony To The
SENATE APPROPRIATIONS COMMITTEE
Prepared February 2, 2005 by the
North Dakota Association of Counties
Wade Williams — Government Relations**

CONCERNING SENATE BILL 2027

Chairman Holmberg and members of the Senate Appropriations Committee, I am here on behalf of counties and county officials from across the State in support of Senate Bill 2027, specifically the portions moving mental health and sexual predator indigent defense to the state.

Indigent defense is a cost that has no home in county government. Counties have worked for a number of years to transfer the indigent defense of mental health and sexual predators to the state. The proposed restructuring of the indigent defense system into the Commission for Legal Council for Indigents, seems like a good match to move these services from the county level.

We understand the costs of these services cannot be absorbed into the Supreme Court's budget as proposed. We want to stress that an additional \$590,000 of funding needs to be included to fund this transfer of services fully. The removal of these services from the county level will help to further reduce the strain on property taxes felt by counties as they work to balance their budgets.

Mr. Chairman, and committee members, on behalf of North Dakota's counties I urge you to support this vital transfer of services during this proposed restructuring. Thank you for the opportunity to address this issue and we urge a Do Pass recommendation on Senate Bill 2027.

V

**TESTIMONY OF D'JOYCE KITSON SMUTZLER
TO THE SENATE APPROPRIATIONS COMMITTEE
REGARDING SB 2027
FEBRUARY 2, 2005**

**CHAIRMAN HOLMBERG AND MEMBERS OF THE
SENATE APPROPRIATIONS COMMITTEE, MY NAME IS
D'JOYCE KITSON SMUTZLER AND I APPEAR TODAY
IN SUPPORT OF SENATE BILL 2027. IT IS IMPORTANT
FOR NORTH DAKOTA TO ESTABLISH AN
INDEPENDENT COMMISSION ON LEGAL COUNSEL
FOR INDIGENT PEOPLE.**

**I WISH TO OFFER THE FOLLOWING
RECOMMENDATIONS TO THE COMMITTEE
REGARDING THE MEMBERS OF THE PROPOSED
COMMISSION:**

- 1. I BELIEVE THAT IT IS CRITICAL TO INCLUDE A
PERSON OF COLOR ON THIS COMMISSION, TO BE
APPOINTED BY THE NORTH DAKOTA INDIAN
AFFAIRS COMMISSION.**
- 2. I ALSO BELIEVE THAT IT IS IMPORTANT TO
INCLUDE A PERSON WITH A DISABILITY ON THIS
COMMISSION, APPOINTED BY THE PROTECTION
AND ADVOCACY PROJECT.**

**BY INCLUDING PEOPLE THAT OFTEN NEED THE
SERVICES OF DEFENSE COUNSEL, THEIR VOICES AND
PARTICIPATION ON THE COMMISSION WILL ASSURE
THEIR REPRESENTATION.**

**THANK YOU AND I WOULD BE HAPPY TO ANSWER
ANY QUESTIONS YOU MAY HAVE.**

TESTIMONY ON SB 2027

My name is Bonnie Johnson and I serve as the Cass County Coordinator. In that capacity, I am here today to speak on behalf of the Cass County Board of Commissioners regarding indigent defense...public defender costs and guardian ad litem costs.

I applaud the State legislature for considering a bill that has been discussed by several interim committees over the past several years. We have all known the system needed a complete overhaul. This bill, unlike those in the past, provides a comprehensive framework for providing indigent defense.

Not only are the large criminal caseloads addressed, but the growth of civil cases, such as mental health and sexual predator commitments, are also included. Another bill, SB 2373, requiring civil commitment of "meth" addicts was introduced this session without a fiscal note. Under the bill before you, these costs would be covered by the newly created indigent defense commission.

The amended SB 2027 now establishes a statewide framework for operating and financing a statewide indigent defense system. The current system is broken and it definitely needs fixing.

Thank you for the opportunity to talk with you about this issue.

Headline: No glamour for these lawyers
Publication Date: Sunday, August 1, 2004
Publication Page Number: 1
Publication Section: A
Publication Name: Bismarck Tribune
Byline: Natalie Storey

Story Body:

At 10 a.m., a young man in a black-and-white striped jumpsuit sits in a Burleigh County district courtroom handcuffed, shaking his head as the charges against him are explained. He's accused of being a drug dealer, and he wouldn't have a chance if it weren't for his indigent defense attorney.

Across the room sits an investigator talking about a sting operation and a prosecutor who's been questioning him for the past 15 minutes. This is a pretrial hearing, where the prosecution must prove there is enough evidence in the case to charge the defendant. The prosecutor questions the investigator about the sting operation, the sale of drugs that allegedly took place and the location where they were found. This case looks like a slam dunk.

Twenty minutes pass before Wayne Goter, indigent defense attorney, speaks up. He begins to ask the detective questions about what he saw when he was watching the drug deal.

The detective admits that he couldn't see inside the car when the deal supposedly took place.

The detective has used a police informant to obtain most of the evidence against Goter's client. Goter calls into question the informant's credibility by suggesting that perhaps the informant was selling drugs at the time of the sting.

When Goter is through, the judge says there is probable cause to charge Goter's client. The client pleads not guilty to all the charges. But Goter and his client don't look defeated. They know Goter has poked a few holes in the prosecution's case. Despite how it looked at first, there is now a little light shining through.

Goter earns his pay this way, poking holes in the other side's cases and shining light down corridors that might have gone unexplored by investigators and prosecutors. He works for people who can't afford their own attorneys. He has one of the least glamorous jobs in the justice system. His job is not the stuff of "Law and Order," especially not in North Dakota.

Large caseloads

Goter is among the attorneys in the state who are contracted on a flat-fee basis to provide services for indigent defendants. There are about 10 other attorneys like him

in the Bismarck area and many others throughout the state. Their numbers and caseloads vary depending on the region they work in, but many of them are like Goter.

His caseload continues to balloon each year, and he hasn't seen his wages increase since 1991, when he first received the contract. He is a part of a system that, according to 2003 study, is badly in need of a makeover, if not a complete overhaul.

Goter, like many indigent defense attorneys in North Dakota, says he's overloaded with work. He doesn't handle juvenile cases, but every other type of case from Burleigh and Morton counties lands on his desk. And for him, time isn't money -- it is something akin to other people's freedom.

"For us there is always the pressure to do well," he said. "It's not the money. People could go to jail, and they could go to jail for a long time."

It's good that Goter isn't working for the money, because according to experts who have studied North Dakota's system, he isn't getting paid enough for the work he does. The North Dakota task force, organized by the State Bar Association, charged with studying the system, set a target pay rate of \$75 an hour. Despite this number, the Philadelphia-based firm hired by the task force to study the system, the Spangenberg Group, found that the average pay for contract attorneys is \$55 in North Dakota, while some attorneys are paid only \$40 an hour. According to the firm, which has studied criminal defense systems across the United States, indigent defense attorneys should be paid a minimum of \$65 an hour because they have to cover the expenses of criminal defense work.

Goter says he was paid about \$50 a case for contract work he did out of municipal court in February, a rate of pay that fell far short of covering his expenses.

Since pay is so low in North Dakota, indigent defense attorneys often find ways to cut expenses. Some are unable to pay for secretaries for their offices, and some don't have funds to hire and fly in expert witnesses from outside of North Dakota. Private investigators are often too expensive for indigent defense attorneys to hire, and any research that costs money is often out of the question.

And, although their pay isn't sufficient to cover costs, Spangenberg found indigent defense attorneys' workloads in North Dakota keep ballooning.

There were 18,039 indigent defense assignments in the state in 2001-03, a 7.7 percent increase from the previous biennium.

Many members of the state task force also agree that the workload of indigent defense attorneys is too much and not proportional to the amount they get paid.

"There is no doubt in my mind that there are some lawyers on contract that are just drowning," said James Ganje, a lawyer for the North Dakota Supreme Court who was a member of the task force.

Kent Morrow, an indigent defense attorney, knows the feeling. He says he's willing to do indigent defense work because he likes it, but he thinks finding new people to do contract work will continue to be a problem for the state.

"There basically are no younger attorneys who want to do this type of work," he said. "They look at the caseload and then the compensation they get for that caseload and for whatever reason decide it's not worth it."

Besides his private practice, Morrow has about 75 open contract cases right now. Goter has about 150 open cases. In comparison, private defense attorney Ralph Vinje estimates he has about 100 open cases, although some of those are civil cases.

Spangenberg found that one problem with the system is that there is no cap on caseloads, so even though a Cass County attorney the firm interviewed in December had 550 cases, he was bound to get more if more indigent defendants popped up in the region he covered.

Brenda Neubauer said she stopped doing contract work because her caseload got so high that she believed she was unable to spend the time on her cases that each deserved.

"I felt I wasn't able to give (my clients) the level of representation that they deserved," she said. "In the end, something had to suffer. It's either your family or your private practice or your indigent clients. I just didn't see any light at the end of the tunnel."

High caseloads lead to less time spent on cases, which Spangenberg found was a problem in North Dakota. The overall average amount of time spent on each case by indigent defense attorneys was 3.8 hours, according to the firm's study. For felony cases, contract attorneys spent five hours in North Dakota, while the national standard is 10 hours per felony case.

"The defendants that we have right now, we are almost running them through the system like cattle," Neubauer said.

Vinje says it's nearly impossible for him to estimate how much time he spends per case. It can range from two hours to 100 hours, depending on how complicated a case is. But he thinks five hours sounds low for felony cases, and he says he believes some indigent defense attorneys cut corners to save time. For example, many will waive preliminary hearings for their defendants to save time, something he says he almost never does.

Those who were on the task force say that although Spangenberg's findings are alarming, people should keep in mind that Spangenberg used national standards to rate North Dakota's system, which do not necessarily take into account differences in the state's criminal justice system. For example, Ganje said, in North Dakota there is often more cooperation and communication between judges, prosecutors and defense attorneys, which can cut down on time spent on cases. He said he thinks a better average for the number of hours that should be spent per felony case in North Dakota is about eight hours.

"We know the experts from out of town think we are doing a terrible job, but are we really doing that badly?" he said.

Members of the task force still agree, however, that the system needs to be changed. During the last legislative session, a raise for contract attorneys was approved. That's a start, but many more changes need to be made, said Christine Hogan, director of North Dakota's Bar Association, who also was a member of the task force.

The task force prepared a proposal that recommends the Legislature establish a seven-member commission that would either restructure the current contract system or look at the possibility of creating a public defender's office in North Dakota. The estimated cost of this effort is \$11,737,301. The legislation has been approved by interim legislative committees and is ready for deliberation during the next session in January.

"This has been something that the Legislature has postponed for several sessions," Hogan said. "Now it's time to do more than just putting a Band-Aid on it."

Spangenberg said North Dakota's current system is vulnerable to legal challenge and was not meeting constitutional requirements, so people like Hogan say time is of the essence.

"If we don't make changes now we will go well beyond crisis into total failure mode," Hogan said. "I don't want to say that as any part of threat or ultimatum, but people have to understand that even though they might not want to pay for criminal defense, this is a state government responsibility. It's required by the constitution."

Montana is in the midst of a lawsuit involving indigent criminal defendants who say that state's public defender system deprived them of their constitutional right to legal counsel. People like Ganje and Hogan don't want North Dakota to end up in the same situation.

"It's enough of a risk that it is something the Legislature should be aware of," Ganje said.

Hectic schedule

Goter doesn't spend much of his time debating the problems of the system. He lives in its midst.

By the time he gets to the man accused of being a cocaine dealer on a Monday morning, he has already seen three other clients, each for only a couple of minutes. This morning he still has two appearances in municipal court and one sentencing hearing in district court. Later, he will drive to Mandan where two other clients await him. Then there's the mail, trial transcripts to collect, briefs and motions to file and a never-ending list of messages from clients.

Following his client's pretrial hearing in district court, Goter hurries across town to his office, where his wife is answering the phone. The money from the contract isn't exactly enough to hire a secretary, he says, so his wife, Diane, has filled the position. It is clear she is badly needed, since the phone rings at least 50 times a day here. He pulls up his calendar on the computer screen and skips to Aug. 18. He has three trials scheduled for that day.

"I might as well not show up for the third one," he says. "I'll be completely shot by the third one."

Superman couldn't try three criminal cases in a day, he says, and explains that he thinks at least one of the trials will be moved. Perhaps one of his other clients will take a deal, which means he won't have to go to trial. He doesn't pause on this thought for long because he is worried about being late for court appearances. He says good-bye to his wife briefly and fills his coffee cup. He slurps from it on the way out the door and opts to take the rest in the car.

When he pulls into the parking lot at the courthouse, he's obviously pleased to snag one of the two-hour parking spots. He's been gone from the courthouse, which is really more like a second home, for about 10 minutes. At 10:30 his clients' appearances are scheduled to take place in municipal court. Sometimes, when he's in a real rush and there are no other spots, he parks in 90-minute parking, where he often gets ticketed.

"You can do the most honorable public service in the world, and you'll still get a ticket," he says.

Today he's parked across from the spots labeled, "Reserved for State's Attorneys." He doesn't notice the irony and walks briskly into the courthouse.

This is the world of Wayne Goter, where there are no reserved parking spots. There is no health insurance for him or his family. There is no money to hire a secretary for his office. There's no support staff, no cell phone, no money for out-of-state expert witnesses, no money for private investigators not approved and paid for by the court system. And there's hardly any time.

"Another attorney might be able to spend more time on his cases," he says. He is waiting outside court chambers because the action in Judge William C. Severin's court is running about an hour behind. He can't really sit still for too long, though, and he laments that sitting out here is a "colossal waste of time." Instead he walks around looking for his clients. He comforts a young woman about to testify and gives a little boy some change for the candy machine. He starts shuffling through his briefcase, which contains a couple dozen files he's working on. There's an air freshener in one of them, berry flavored. He laughs and says, "That smells fruity," insisting that the freshener is evidence in a case, which he collected on his own.

Goter, who used to be a prosecutor, says he keeps doing this work because he likes it.

"Criminal law has always been fascinating to me," he said. "You are dealing with people on a real personal, emotional level. You deal with their triumphs and their defeats. To some that might not seem that intellectually stimulating, but to me it is important."

He wanted to make it home at lunchtime to see his kids today, but the day isn't shaping up that way. Actually, he says he usually doesn't eat lunch. It takes too long, and it makes him tired. When things get pushed back like they are today, it pushes Goter's list of tasks to complete back too. It'll be late by the time he gets done calling back all of his clients, maybe after dinner. And before he goes to bed, Goter doesn't have spy novels to read. Instead, he has a few stacks of legal papers, each half a foot tall, that are important to the cases he's working on. He'll have to read those sometime, too.

After all is said and done, he says he wouldn't be running around so frantically if he didn't think indigent defense was an important part of the criminal justice system.

If you don't have confidence in the system, namely if defendants have negative feelings about their attorneys, then the system is really going to suffer," he said. "I think everybody, really, should want a strong public defender system. The letter of the law and the spirit of law have to be met."

(Reporter Natalie Storey can be reached at 355-8842.)
Outline: Mike McCleary 1 photo

S.B.2027

TESTIMONY:

Sharon W. Martens, Walsh County State's Attorney

DATE:

January 18, 2005

Att #4
(meter 3060)

I am Sharon Martens, State's Attorney in Walsh County. Before being elected State's Attorney in 2002, I was a partner in a Grafton law firm in private practice and I was also a contract lawyer providing legal services to indigent persons. I did that work for about ten years, on and off. I was a member of the Indigent Defense Task Force (Task Force) and served as its Chair.

Currently indigent defense in North Dakota is provided by contracts in each of the judicial districts. The practical goal of the system is that a contract lawyer should actually receive \$65 per hour for his/or legal work in criminal, juvenile, and mental health commitment cases. The true goal per hour is \$75. A lawyer with little or no experience may apply and be awarded a contract. The contract specifies the kind of cases the lawyer will be assigned and is for a flat sum for the period no matter how many cases the lawyer may get.

In its work the Task Force had benefit of information developed by the Spangenberg Group, consultants in the area of indigent defense. Research indicated that North Dakota was spending the least per capita of a group of nine states, five of which had populations of less than 900,000 and four states that had a greater population but contained a large rural area within them. In this construction the nine state average cost per capita for providing indigent defense was \$8.54. North Dakota spent \$3.23 per capita. Further, of these states North Dakota spent 43% less than Wyoming, the state with the second lowest expenditure for indigent defense and 49% less than the second ranked state in the grouping, which was Idaho.

It should be no surprise to this body that felony cases are increasing in North Dakota and that most of that growth is related to methamphetamine. Spangenberg placed that growth rate at 15%. In the area of indigent defense the American Bar Association has endorsed caseload caps. For example, an indigent defense lawyer should not have more than 150 felony cases assigned to him/her per year. Likewise, the assigned limit for misdemeanor cases is 400, mental health 200, juvenile 200, and appeals 25. The caseload caps would assume a lawyer only does legal work in one of the categories.

It is clear that North Dakota under its contract defense system is unable to meet these caseload caps. To provide some examples, a Bismarck lawyer quit applying for contract work when her caseload in felonies reached 200. A Bismarck juvenile lawyer closed 225 to 250 cases per year. A Minot contract lawyer in 2000 had 216 felony cases. In 2002, that lawyer had 250 felony cases plus 30 to 40 juvenile cases plus mental health cases. The lawyer had to cut back. In Cass County a contract lawyer in a two and one-half year period had 750 juvenile cases which included re-opened cases.

Having too many cases to contend with means that a contract lawyer will be unable to completely deal with cases. That contract lawyer will have insufficient time to do complete legal research, motion practice will be weak, there will be little time to fully investigate, trial preparation will suffer and, ultimately, the contract lawyer will either quit the contract or burn out.

Further, the contract lawyer is responsible for the appeal of a case which he/she may have taken to trial. Using caseload cap figures on appeals, it was calculated that an average criminal appeal requires an additional sixty-nine hours of work—all at no additional pay. Most felony contract lawyers have an appeals case once a year at least.

A contract lawyer may choose not to re-apply for an indigent defense contract when the term is up. However, his/her caseload under the former contract remains his/her responsibility and it can mean that the lawyer will work those cases for several months—again for no additional pay.

Research would seem to indicate that a flat fee system such as the one North Dakota has in place encourages quick case resolution with minimum effort. The average contract lawyer has many cases and not enough time and resources to fully work them. Most contract lawyers employ a form of legal triage to highlight those cases which can be easily settled within the outline of legal ethics even when, in a perfect world, a possibility of avoiding the charge may exist. In some cases contract lawyers had no more than three or four jury cases in a year. In the Northeast Judicial District in 2002 the percentage of cases which actually went to trial was 0.3%. That included criminal and civil cases.

There is no uniformity of payment to the lawyer per hour. Although the goal per hour is theoretically \$75 per hour, the working goal pursuant to the latest budget is an actual \$65 per hour. In some judicial district the lawyer actually receives \$40 per hour, all dependent on the number of cases assigned. Assignment to a murder case, for example, requires an inordinate amount of work and does not allow the contract lawyer to take other paying cases to supplement the funds he/she receives from the contract. The result can be a financial hardship. Further, the contract lawyer must also pay his/her overhead expenses and legal education requirements of the contract. Overhead can include travel and a legal research system generally on-line and expensive.

The number of lawyers who seek to participate in the contract has declined. For example, in Burleigh County, each lawyer who applied got a contract. In Stark County,

there has been a decline in applications. In Williston three lawyers who had formerly held the contract did not apply. Cases are being handled by the same lawyers but for \$65 an hour. Minot has three experienced lawyers on the contract. One of those lawyers is seventy; no new lawyers have applied. In Walsh County no local lawyers applied for the last contract. The contract was awarded to two Grand Forks firms. Research has indicated pay is a definite factor for the lost interest.

In some of the judicial districts, a contract lawyer will handle both adult and juvenile cases. There is a considerable difference between these cases. Adult court in my mind concentrates on punishment while juvenile courts emphasizes rehabilitation. The manner in which the courts operate is quite different and the mindset is likewise different. Yet many contract lawyers will go from an adult preliminary hearing to a juvenile deprivation hearing within minutes. The current system does not, in most cases, allow the luxury of specialization.

Lastly, the budget that allowed for indigent defense in North Dakota is not expansive enough to allow contract lawyers to hire investigators and experts without application to the district judge whom also has the power to renew or not renew the contract. Judges are under pressure to hold expenses down and research indicated that many contract lawyers do not bother to apply because the feeling is the application will be rejected or cut down in allowed expense.

Related to that issue is the fact that contract lawyers have no voice in the system as it is currently constituted. The contract lawyer has no power to negotiate and has no way except on an individual basis to address areas of concern with policymakers. State's

Attorneys have a statewide organization and a lobbying effort. Contract attorneys have none.

I expect that some of you may be thinking, "Why does a State's Attorney care whether or not an indigent person has a lawyer?" That is a fair question and the quick answer is that it makes my job a lot easier. In the law as in other fields there are conventions and rules a practitioner must follow and has ease with. A person untrained in those procedures is at a distinct disadvantage when dealing with a person who is familiar with them. In most cases there is a proper point to negotiate. Practitioners recognize that and follow the process. Others would not and cases, which can be settled, aren't, which results in a stretched judicial system supporting unneeded hearings and trials.

A mental and ethical sign that hangs over every prosecutor is, "To do justice." In some cases a person accused of a crime is guilty and should be punished. In others an innocent person accused of a crime is released and allowed to pursue his/her life. In most cases that result is best met by a practitioner on each side who is fervently working for his/her client zealously with knowledge, resources, and skill. A remodeled indigent defense system in North Dakota would go a long way toward balancing the equation resulting in justice for the indigent in criminal, juvenile, and mental health commitment processes in this state.

Testimony of Lawrence (Larry) P. Kropp

Att # 5
(number 3947)

Good Morning, I am Larry Kropp, an attorney from Jamestown, North Dakota, where I have owned and operated a private law firm since February 1990. Throughout my entire legal career spanning over 20 years, I have provided legal services for the State of North Dakota under various contracts; namely, attorney services for the South Central Child Support Enforcement Unit from December 1984 through March 2000, and indigent defense services since July 1, 1999. In addition, I was the Jamestown City prosecutor for some 6 years from June 1990 through June 1996.

Suffice it to say, being allotted only some 10 minutes to address the indigent defense crisis is woefully insufficient. Accordingly, I will attempt to get right to the point; as aptly stated by Chief Justice VandeWalle in his recent 2005 State of the Judiciary Message, the indigent defense system in this State is deficient and "woefully underfunded." Simply stated, not only is it time for a change, we need a major overhaul.

From an indigent defense counsel prospective, we are overworked, under-appreciated, and grossly underpaid. I previously appeared before an interim legislative committee where I testified that the current system almost bankrupted my law firm due to my appointments in two cases; namely, a murder case, and charges involving an inmate at the James River Correctional Center. If you wonder why I am still doing such contract work, the answer is quite simple: It's difficult to bite the financial bullet as the State's interpretation of indigent defense contracts is that the firm must conclude all cases which are assigned to it during the contract period – regardless of the type of case and even if the case is assigned in the last hour of the last day of the contract – with no additional compensation should the firm opt to not renew the contract. To that regard, it should be noted that while I still have one of the 2 contracts for Stutsman County, I terminated my contracts for Barnes, Dickey and LaMoure counties last June; and despite that termination, I am still representing various clients appointed under those expired contracts, including 2 jury trials completed to-date, without any additional compensation nor reimbursement for expenses.

Caseload. As of Friday, January 14, 2005, I am appointed to represent 43 clients with 86 charges (an average of 2 charges per client); whereas, in

2002 I averaged 50 to 60 cases per month in Stutsman County. The major reason that I have seen for that significant increase is the skyrocketing felony methamphetamine related cases where virtually every one of the defendants are qualified as indigent.

Compensation. Under my current contract, I receive the total gross sum of **\$39,750.00** per year paid in equal monthly installments of **\$3,312.50** together with an additional **\$66.25**, an amount equal to 2% of that contract for services amount, to purportedly cover "administrative costs or expenses incurred by the Firm, including telephone charges, copying charges, postage and fax charges."

Despite the fact that the State's target goal was to compensate the indigent defense attorneys at the rate of \$60.00 to \$65.00 per hour, I have always averaged far less than that amount. I don't know of any attorney in the State of North Dakota who holds these contracts who is even getting close to averaging the target rate. In fact, in 2001 through 2002, when I was handling the above noted murder case and charges against a JRCC inmate, I averaged around \$45.00 per hour. Since my overhead has averaged between \$35 to \$45 per hour, including secretarial and other nonattorney support staff, the deficiency of our compensation becomes quite evident. Costs are never fully covered and the time staff takes to do the mandatory monthly reports is a freebie our office extends to the State of North Dakota. Applying the same financial criteria under our current indigent defense system to my net income earned under the contract, I would have qualified as indigent for much of the past 5 ½ years!! Hence, the true meaning of "indigent attorney"??

The compensation paid for indigent defense services in other states as summarized in the Spangenberg Report has been presented by Sharon Martens. It should also be noted that the Federal government has been compensating indigent defense attorneys the rate of \$90.00 per hour together with reimbursement for actual expenses incurred for the past 2 years.

There are inherent problems with the flat-fee contract method of compensating attorneys. Some feel the flat-rate contract system discourages attorneys from spending time visiting indigent clients, preparing motions, performing research and taking cases to trial. I believe the hourly rate compensation method utilized by the Federal government together with reimbursement for our actual expenses for appointed counsel who are not

employed in public defender offices would result in fairer compensation. That method would also help minimize the possibilities of assigning excessive caseloads to counsel.

While we do not expect to get rich, we simply wish to receive a fair and reasonable compensation for our services. Quoting a fellow indigent defense attorney, "quite frankly, I am tired of subsidizing the State of North Dakota when it is the State's legal responsibility to provide representation to their indigent citizens."

Att # 5
(side B. O. O)
meter

January 18, 2005

CHAIRMAN TRAYNOR AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE

My name is Kent Morrow. I am an attorney practicing in Bismarck. I am also an indigent defense contract counsel covering the 13 counties of the South Central Judicial District. I am here today to support the passage of Senate Bill 2027.

The current indigent defense system is working... thanks to the professionalism and dedication of many highly skilled attorneys, and their staffs, across North Dakota. There are, however, many problems inherent in the current system that this bill addresses. District Judges need to be relieved of the responsibility and inherent conflict of interest in approving attorneys for an award of a contract and then sitting in judgment of their performance under the contract. While we in the South Central District have never been discouraged or asked to consider not filing for as many trials or pretrial motions, I have heard from colleagues in other parts of the state that the filing of too many pretrial motions or insisting on trying too many cases can jeopardize your future chances of being considered for future contracts. This is unacceptable and only serves to make indigent defense counsel's jobs even more difficult in providing high quality, competent representation.

My concerns in implementing a new indigent defense system across North Dakota are severalfold:

1. Each counsel needs to be paid a reasonable salary or contract amount that allows him or her to make a living. The average citizen in North Dakota may see our contract payments as quite reasonable and fair. However, they may not realize that we have to cover our overhead, as well as retirement and health insurance, with those payments.

2. Each counsel needs to have a caseload maximum per year. Too many cases cause too much temptation to cut corners, not avidly pursue motions and trials when a plea bargain can reduce the number of outstanding cases. This stress has caused other contract counsel to either not seek a contract or seek to terminate a contract early.

3. Each counsel needs to have the benefit of a certain level of annual continuing legal education on issues pertinent to criminal defense. States attorneys are provided outstanding continuing education at taxpayer expense. We are forced to find our own courses and pay for them ourselves. We also have to find the time in the midst of an average of 3-5 jury trials scheduled each week.

My concern as a current indigent defense counsel is the lack of younger attorneys who are willing to apply for any open contracts. When a contract opened up recently in the Bismarck-Mandan area, there was no interest. Finally, upon readvertisement, a young attorney moved here from Fargo to fill the void. Those of us that have done this kind of work for many years will eventually be retiring or seeking other ways to slow down. The concern is whether younger attorneys now practicing or in law school will have enough incentive, financially and professionally, to seek such positions or contracts.

North Dakota needs to do something now. I urge your support of Senate Bill 2027. Thank you.



State Bar Association
of North Dakota

**State Bar Association of North Dakota
Indigent Defense Task Force**

**Report of the Indigent Defense Task Force to the
State Bar Association of North Dakota**

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him..."

- Justice Hugo Black, writing for a unanimous Court in *Gideon v. Wainwright*
372 U.S. 335 [1963]

"As we now reflect upon Gideon, and our own state history we must keep in mind the right to counsel is empty rhetoric if the attorney provided is not reasonably competent or lacks the resources to do an adequate job. 'The right to counsel includes the right to effective counsel; and ineffective, incompetent, or inadequate representation is the same as having no counsel at all.' State v. Keller, 59 ND 645, 223 NW 698, at 699 [1929]."

- Gary Lee, President of the State Bar Association 2003

Introduction and Background

After several years of increasingly clamorous concerns being raised about inherent conflicts of interest, spiraling caseloads, and inadequate funding of the indigent defense system, the 2003 legislative session finally shone a spotlight on a system said to be in "full-blown crisis." Legislators learned about defense lawyers bound by fixed-fee contracts being forced to handle three times the number of cases they bargained for when they signed their contracts, with no extra compensation. They heard about lawyers in the Northwest Judicial District so overburdened by overwork and low pay that they walked away from their contracts in despair. They listened to lawyers who told them the current fixed-fee contract system places not-so-subtle pressures on contractors to plead their cases. After all, the lawyer will be paid the same if he or she pleads out the case in three hours or spends forty hours preparing the case for trial. They learned that the average number of hours contract defense lawyers reportedly spend on each felony case in our state is only three hours. And they heard from lawyers and judges alike who admitted the potential for conflicts of interest exists when district judges decide which resources will be available to the defense contractors they appoint in the first place. The bottom line, they said: "our system is vulnerable to legal challenge."

So-called "solutions" were floated, including one to move the contract administration out of the judicial branch and into the Office of Administrative Hearings. None of the solutions provided a remedy for the fundamental problems—inadequate state funding, lack of caseload management and lack of independent oversight and accountability. In response, the State Bar Association asked the Legislature to pass House Concurrent Resolution 3004, which called for a Legislative Council study of the state's method of providing legal services to indigent criminal defendants and of the "feasibility and desirability of establishing a public defender system."

It was not the first time the issue had been studied. Legislative Council committees recommended proposals for state-wide public defender programs and introduced bills that would have created programs in 1973 and 1975. Both bills failed to pass. In the 1977-78 interim, a Legislative Council Committee proposed creation of a full-time prosecution and defense system, but the system was deemed too costly, and no bill draft was submitted.

The 2001-02 Legislative Council interim study committee received extensive testimony from judges and attorneys identifying critical problems: (1) Our current system of having trial judges appoint contract attorneys causes conflicts of interest; (2) crushing caseloads and inadequate compensation are making it difficult to find attorneys who are willing to contract with the state; and (3) flat-fee contracts without caseload caps create incentives to plead or shortchange indigent cases. That study resulted in the proposal to transfer the administration of the contract system from the judiciary to the Office of Administrative Hearings. It was the specter that this transfer might actually happen that set off the alarm that caught the attention of North Dakota's lawyers. It provided the impetus for the Association to lend its support to yet another interim study in the 2003-04 biennium, in the form of HCR 3004. This time, however, the State Bar Association promised to support the Legislative Council committee with its own Blue-Ribbon task force.

In June 2003, the Board of Governors passed a resolution authorizing the Association, under the leadership of Past President Gary Lee and President Maureen Holman, to establish and fund the SBAND Indigent Defense Task Force. The resolution charged the Task Force with studying the feasibility of establishing a public defender system in this state, and called for a report and recommendations to the Board of Governors and the membership at the June 2004 Annual Meeting.

The Indigent Defense Task Force

President Holman appointed members to the Task Force with demonstrated interest in and knowledge of the complicated issues surrounding indigent defense. The Task Force is composed of judges, legislators, private and contract defense counsel, states attorneys and representatives of the federal defense and prosecutorial bar. The Task Force held its organizational meeting in September, 2003.

Before the initial meeting in September, each member was provided with extensive study materials on indigent defense counsel issues, including background information on other states' systems and reports and recommendations of national entities with expertise on public defender systems, including the American Bar Association, The National Legal Aid and Defender Association and The Spangenberg Group. Thereafter, the Task Force convened in face-to-face meetings in November, December, February, March and April. Chief Justice Gerald W. VandeWalle attended most of the meetings and offered his wisdom, his insight and

his intimate familiarity with the criminal justice system, all of which guided the Task Force throughout the process.

The Task Force began its work with lengthy discussions about North Dakota's current system and the rules and statutes that govern delivery of indigent defense services in our state. The Task Force invited Marea Beeman, Vice-President of The Spangenberg Group (TSG), a nationally-renowned criminal justice research and consulting firm that specializes in studying indigent defense, to attend the November, 2003 meeting. Ms. Beeman explained her firm's services in the field of indigent defense and gave the Task Force an overview of key policies to guide them in crafting a defense delivery system for North Dakota. Ms. Beeman noted that North Dakota ranks dead last among the fifty states in its *per capita* expenditures for indigent defense.

The Task Force members voted to recommend hiring The Spangenberg Group to help the Task Force with its goal of developing an acceptable legislative package to present to the Legislative Council Interim Criminal Justice Committee and the Association's Board of Governors for consideration in the 2005 legislative session. The Task Force authorized the Task Force staff to negotiate a joint contract between the State Bar Association, the Supreme Court and the Legislative Council to retain the consulting services of TSG.

Ms. Beeman and Jennifer Riggs of TSG conducted site work in North Dakota in December, 2003. They reviewed extensive data and interviewed contract attorneys, judges, state's attorneys and court administrators in Dickinson, Bismarck, Jamestown and Fargo.

The Spangenberg Group's Findings and Recommendations

Ms. Beeman presented TSG's findings and recommendations to the Task Force at the February, 2004 meeting. TSG's bottom line was stark:

"We feel the North Dakota system is wrought with many serious problems. The current system is in danger of failing to fulfill its constitutional mandate of providing indigent defendants with effective assistance of counsel. We recommend that North Dakota shift to a statewide public defender program to better serve indigent defendants." (Emphasis in the original)

A summary TSG's findings:

1. *Lack of independence*

North Dakota is the only state in the Union where attorneys contract with judges on a flat-fee basis. This results in a decided lack of independence from the judiciary and in the lack of an effective mechanism for defense lawyers to get relief from excessive caseloads. All key decisions about which attorneys will receive the contracts, how much they will be paid, and what individual case resources will be allocated to them are made by the judges.

"One county's attorney selection process raised strong concerns about the level of independence of indigent defense contract attorneys from the judiciary. In Cass County, there are eight judges and the judges decide as a group who will be awarded contracts. Contracts are not awarded on the basis of a majority vote; it is all or nothing. If a single judge feels that an attorney should not be awarded the contract, no contract will go to that attorney."

"One contract attorney told us: 'an unwritten rule is: if you (exercise your right to) bump judges, you won't get your contract renewed. You're working for the judges.'"

"Some judges subtly let contractors know that they do not want them to file too many motions or seek too many trials. (One) attorney was explicitly told not to file unnecessary motions or go to trial unnecessarily. He said if he would not have this sort of pressure from the judges, he would have gone to trial more often."

2. Funding

North Dakota has some of the lowest rankings among all states in the nation for overall indigent defense expenditures and in cost-per-capita. The TSG report provides comparative information for nine states: five with populations below 900,000, including North Dakota, and four that have greater populations, but also have large rural areas similar to North Dakota. Among these nine states, North Dakota ranks last in both cost per capita and overall expenditure on indigent defense. The average cost per capita among the nine states was \$8.54, while in North Dakota it was \$3.23.

In terms of overall indigent defense expenditures, North Dakota spent 43% less than the state with the second-lowest expenditure (Wyoming). In terms of cost per capita, North Dakota spent 49% less than the state with the second-lowest rank (Idaho). Contractors are not paid uniformly throughout the state. None of the attorneys TSG interviewed reported earning the target contract rate of \$65 per hour. In some areas they are paid only \$40.00 an hour.

3. High Caseloads

High caseloads were cited by most of the contract attorneys TSG interviewed. All contracts in North Dakota are flat-fee amounts for an unspecified number of cases. While some contract attorneys contract to handle only a certain percentage of indigent cases in a given jurisdiction, there is still no specified caseload cap. This means that an attorney must take as many assignments as he or she is given, absent a conflict of interest. Although the judges and attorneys make an effort to determine the number of cases that will be assigned in a coming year, there is no way at the time the contract is entered to predict the number of cases with certainty. In recent years caseloads have steadily exceeded predictions.

According to national standards applicable to full-time public defenders, the caseload of a public defender attorney should not exceed more than 150 felonies a year. North Dakota's contract attorneys consistently reported much higher caseloads. In Cass County, where there are separate contracts for juvenile and criminal cases, one criminal case contract attorney estimated he had 170 to 180 open, active cases at the time of the interview. In early December 2003, he had received over 550 new cases for the year and expected for finish with about 570. With a caseload this high the attorney admitted "it's impossible to do everything for your client." Despite this, however, the number of criminal contract attorneys in Cass County has been reduced from five to four.

4. Low Pay

Pay for a contract attorney is problematic. As previously mentioned, there is no uniformity. Although the goal is to pay the attorneys \$65.00 per hour, this amount is less than the \$75 per hour the North Dakota Indigent Defense Commission recommended several years ago. In reality, the average payment to contract attorneys was \$55.00 per

hour, not enough to cover overhead. The 2% administrative fee currently included in the contracts does not begin to cover administrative costs. Overall, TSG said, pay is not adequate.

In homicide cases, insufficient pay is a particularly significant problem. Although there is some ability to return to the judge to seek additional resources in a homicide case, requests are not always made, and not always granted. Contract attorneys reported to TSG that one major homicide case can cripple a solo practitioner. Termination of a contract is often not an option. The attorneys noted they felt unable to withdraw from their contracts because they are required to carry all cases that are open at the end of a contract period. This means that the attorneys are obligated to represent the clients until the cases are closed, without pay, often well after the contract has expired. Some attorneys interviewed said they had given notice they wanted to terminate the contract, only to be appointed to a homicide in the months between the notice and the end of the contract.

5. *Administrative and Quality Problems*

Complaints of lack of communication among contract attorneys and judges were noted. There is no formal process for overseeing performance and no accountability or quality control. The most frequent client complaint is that there was not enough contact from the contract attorney or the attorney did not interview witnesses or file appropriate motions. The system has no formal process to address these client complaints. The North Dakota Counsel on Indigents Commission does not serve this function. The TSG report states: "if any monitoring is to be done it is by judges, primarily through refusal to renew a contract."

6. *Inherent Problems with the Flat-Fee Contract*

The flat-fee contract system discourages attorneys from spending time visiting indigent clients, preparing motions, performing research and taking cases to trial. Many of the defense contractors reported feeling subconscious pressures to plead the cases and, as a result, some have not re-enlisted after contracts have expired.

One contract attorney said the flat-fee system "doesn't induce an attorney to do the best job possible." Another said "you are cautious of how much time you should spend ... there is a tendency to not do what you would normally do on private cases, and that bothers me. If I were paid more I would put in more time because I wouldn't have to supplement with private practice so much." Yet another attorney candidly spoke of the financial conflict in contract cases: "If you settle cases you get paid more per hour. I tried to forget it was a contract case, but it's hard to do."

7. *Constitutional Shortcomings*

Perhaps the most critical finding set forth in TSG's report is that North Dakota contract attorneys are not always meeting or able to meet the requirements of the U.S. Constitution and State Constitution as well as our state's rules of professional responsibility.

As past SBAND president Gary Lee stated in his message to the Bar marking the 40th anniversary of the United States Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963):

"We must keep in mind the right to counsel is empty rhetoric if the attorney provided is not reasonably competent, or lacks the resources to do an adequate job. 'The right to counsel includes the right to effective counsel and ineffective, incompetent, or inadequate representation is the same as having no counsel at all.' State v. Keller, 57 ND 645, 223 NW 698, at 699 (1929). The lawyers I know who are providing indigent criminal defense are diligent, hardworking, and dedicated. Sadly, I believe they're also poorly paid, under-staffed, under-appreciated and on their own."

The Spangenberg Group as well noted that due to inadequate funding and resources, North Dakota contract attorneys are not always able to meet the national defense counsel standards that give meaning to the Sixth Amendment Right to Counsel. This inability, according to the report: *"places indigent defendants in the position where neither the courts nor the government can assure their rights are being protected as required under federal and state law."*

8. Other Problems

Other problems noted by the judges and attorneys who TSG interviewed:

- Lack of competition for the contract positions
- Contracts in the rural areas require some attorneys to do all kinds of cases, where separate contracts would better serve the court
- Lack of prestige due to low pay
- Difficulty in getting expenses approved for experts and investigators
- State's attorneys have more resources, more staffing, better pay
- No voice in the system
- No effective advocacy for additional resources or policies
- No negotiating power
- Inability to lobby the legislature dilutes the ability to advocate for change
- All agreed the system is inadequately funded

A summary TSG's recommendations:

While The Spangenberg Group concluded that a system of statewide full-time public defenders would be the most preferable mechanism to serving indigent defendants, the authors also noted that some of the attorneys they interviewed expressed a preference for keeping the current system, but increasing the funding. In their report, the authors set forth a series of specific recommendations for implementing a public defender system, but also set forth a series of recommendations for a more effective contract system.

First and foremost, the authors said the current system needs more funding. Compensation must be tied to actual work performed or number of cases accepted. Second, they said, the current system lacks strong infrastructure and administration to provide independence, uniformity and oversight.

Additional characteristics of effective contract systems include:

- Minimum attorney qualifications

- Provisions for support costs such as paralegals, investigators, and social workers
- Independent oversight and monitoring
- Workload caps
- Limitations of the practice of law outside the contract
- Provisions for completing cases if the contract is completed, but breached or not renewed
- Caseload caps
- Case management and tracking requirement
- Guidelines on client contact and notification of appointment
- A mechanism for oversight and attorney evaluation

Task Force Recommendations

After receiving the findings and recommendations of The Spangenberg Group in February, the Task Force engaged in extensive debate about the best method for improving the current system.

The Task Force was unanimous in its view that the indigent defense system should be taken out of the judiciary, should be adequately funded, and should contain mechanisms for oversight and accountability. At the end of the February meeting, the members voted to work on draft legislation that would establish an oversight commission for the current contract system, with authority to propose establishment of public defender offices where appropriate.

The Task Force prepared a bill draft setting forth a proposed oversight commission structure that would embody the TSG recommendations for an effective contract counsel system. The Task Force reviewed, discussed and worked on draft legislation for an indigent defense oversight commission that incorporated elements from several other states. The bill draft incorporated the Task Force's consensus points as well as the features recommended by The Spangenberg Group for an effective contract counsel system.

At the April meeting, the Task Force continued to rework and refine the bill draft creating a new oversight body entitled the "Commission on Legal Counsel for Indigents." The members also reviewed and discussed supporting amendments to conform existing statutes to the Commission bill. Concurrently, the members worked extensively on developing an accurate cost estimate to support the indigent defense system embodied in the bill draft.

The legislative proposal is based on two central principles. First, delivery and management of indigent defense services should be removed from the judicial branch. There are several reasons for this, all of which have been identified in the report prepared by The Spangenberg Group. The second principle, directly related to the first, is that delivery of indigent defense services should be accomplished through an independent entity with general responsibility for funding, management, and oversight. The key importance for establishment of such an entity is, again, described in The Spangenberg Group report. The proposal differs from the report's final recommendation in that the proposal does not contemplate the establishment of institutional public defender system as the primary vehicle for providing indigent defense services.

The Task Force's Draft Legislative Proposal

Section 1 contains the core features of the proposal. First, it would establish a 7 member commission on legal counsel for indigents. Two members each would be appointed by the Governor and the Chief Justice. Two of these four members must be appointed from counties with a population of ten thousand or less. Two members, one from each house of the Legislative Assembly, would be appointed by the chairman of the Legislative Council. One member would be appointed by the Board of Governors of the State Bar Association. Members would have staggered terms and should be those with experience in criminal defense or other appointed counsel cases or have demonstrated a commitment to quality indigent defense representation. Members would be reimbursed for expenses and would receive per diem.

The commission would have a variety of responsibilities regarding delivery, management, and oversight of indigent defense services. The two central responsibilities are to establish and implement a process for contracting for legal counsel services for indigents, and, if deemed necessary and appropriate, to establish public defender offices within the state. Derivative responsibilities include tracking and monitoring appointed counsel caseloads, developing standards regarding delivery of indigent defense services, and approving a biennial budget for submission to the Legislative Assembly. The commission could enter into an agreement with a city or county to provide indigent defense services that the city or county would otherwise be required to provide. The commission would be required to adopt rules for the exercise of its authority in a manner consistent with the notice and comment provisions under the Administrative Agencies Practices Act; however, as clarified in a subsequent amendment, the commission would not be considered an executive branch administrative agency for the general purposes of that Act.

The commission would appoint a director, who must be a licensed attorney and eligible to practice law at the time of appointment. The director may be removed for cause on a majority vote of commission members. The director would have several responsibilities concerning the administration of the indigent defense system. Those responsibilities include preparation of a proposed budget for consideration by the commission, preparation of an annual report on operation of the system, hiring staff (including attorneys as public defenders), and otherwise administering and implementing standards, rules, and policies adopted by the commission.

Section 2 would amend Section 27-20-49 of the Century Code to transfer responsibility for appointed counsel services in juvenile court cases from the Supreme Court to the new commission.

Section 3 would amend subsection 2 of section 28-32-01 to exclude the commission from the definition of an administrative agency.

Section 4 would amend subsection 1 of Section 29-07-01.1 to identify the commission, rather than the court, as being responsible for determining the rate of compensation for appointed counsel.

Section 5 would amend subsection 4 of Section 29-07-01.1 to appropriate moneys in the indigent defense administration fund to the commission, rather than to the judicial branch.

Section 6 provides and appropriation of \$1,135,285 for the establishment of the commission effective July 1, 2005. It is important to note that the remainder of the estimated

budget related to the proposal would be included in the Supreme Court's biennial appropriation request.

Section 7 is a transitional provision and would require the Supreme Court to maintain contracts for indigent defense services through December 31, 2005, after which the commission would implement the new system.

Section 8 would provide an effective date of July 1, 2005, for establishment of the commission so the commission could begin the work of developing the new system. The section also provides an effective date of July 1, 2005, for Section 5 to ensure the commission would have access to the indigent defense administration fund to assist in defraying expenses.

Section 9 would provide an effective date of January 1, 2006, for Sections 2 and 4, which would establish the commission's statutory responsibility for appointed counsel services.

Budget Estimate

The cost estimate appended to this report reflects the Task Force's recommendations for improving North Dakota's indigent defense delivery system and its best prediction of the cost of implementing the system. The estimate suggests a biennial price tag of \$11,737,301 to fully and adequately implement the legislative proposal. This amount would include approximately \$750,000 in special funds, leaving a general fund impact of \$10,987,301. The current indigent defense budget for the 2003-2005 biennium is \$4,312,397 from the general fund plus approximately \$750,000 in special funds for a total biennial budget of \$5,062,397. If the current indigent defense budget were to normally increase approximately 5% for the 2005-2007 biennium, it would result in a budget of about \$5,278,017. The budget for the proposed legislation, then, would represent an increase in new dollars of approximately \$6,449,284.

North Dakota will have spent about \$2.5 million dollars per year on indigent defense during the 2003-2005 biennium. By way of comparison, South Dakota spends about \$6.3 million per year, Montana spends about \$8 million per year, and Wyoming spends about \$6.5 million per year.

The budget estimate contains two components: costs associated with contracting for indigent defense services and costs associated with establishment and operation of the commission on legal counsel for indigents. The estimate is based on three essential principles identified by the Task Force: 1) that contract counsel should be compensated at a "real" rate of \$75 per hour, 2) that there should be sufficient funding to ensure case assignments for each contract counsel would not exceed reasonable levels, and 3) that there should be adequate support services provided in the form of, for example, access to investigative services and defraying of office expenses.

Conclusion

The Task Force started and ended its study with its commitment to address the most pressing issues identified by the judges, lawyers, contract counsel and legislators who participated in the study. All Task Force members unanimously agreed on the following core principles embodied in the draft legislation:

1. The system must be administered separately from the judiciary;
2. The system must be adequately funded to provide adequate compensation and supporting resources to defense attorneys; and
3. The system must be administered by an oversight commission charged with the responsibility of establishing standards that ensure accountability, competency, caseload management and statewide information and communication.

The Task Force believes its recommendations are embodied in the attached legislative draft, and, when coupled with adequate funding as set forth in the attached cost estimate, will address most of the concerns identified by The Spangenberg Group and by all the participants in the Task Force study.

Respectfully submitted by:

The members of the State Bar Association Indigent Defense Task Force:

Sharon Martens, Chair

Robert Thomas
Hon. John Greenwood
Hon. Debbie Kleven
David L. Peterson
Bruce Quick
Dennis Fisher
Steven Mottinger
Sandi Tabor
Kent Morrow
Lawrence Kropp
Senator Thomas Trenbeath
Senator Constance L. Triplett
Marvin Hager

Rebecca Heigaard McGurran
Rep. Lawrence Klemin
Senator Jack Traynor
Rep. William Kretschmar
Rep. Duane DeKrey
Rep. Ron Carlisle
Hon. Laurie Fontaine
Hon. Allan Schmalenberger
James Ganje
Chad Nodland
Birch Burdick
Christine Hogan, Staff

AA #9

Introduction:

Mr. Chairman, and members of the committee, my name is Robin Olson. I am an attorney from Grand Forks. I have had part of the indigent defense contract in Grand Forks since 1995. I speak in favor of the Senate bill number 2027.

Reasons:

There are several reasons that I speak for this bill.

1. Generally speaking, this bill eliminates conflicts or potential conflicts that contract attorneys have with local judges. It allows for the Director to hire attorneys for indigent defense work rather than the Judges. While becoming a contract attorney should not be a popularity contest, it sometimes is.

Sometimes a Judge receives complaints from indigent clients regarding the amount of time a contract attorney spends with his/her case. The Judge then must address this with the attorney. I do not believe that Judges like to do this. Should a complaint arise under this bill, the Judge would not be involved.

2. This bill provides for a more acceptable method of securing investigators to aid in the defense of the accused. As it stands, a contract attorney must now motion the Court for approval of funds to hire an investigator. This places both defense counsel and the Judge in a difficult situation. The defense counsel needs to satisfy the Court that the reason for the request is valid and thus may have to divulge information to the court counsel would not otherwise do. The Court would not have to worry about

fiscal issues. Additionally, inadequate funds for an investigator would not be a possible appeal issue.

3. Providing an office, staff, and salary for a Public Defender would mean that the attorney could devote all of his/her time working for his indigent clients.

Currently, there are separate contract amounts in the various counties. Grand Forks contract attorneys, for example, receive roughly \$4300.00 a month to represent felony and misdemeanor cases but are also available to do overflow juvenile and mental health cases. This amount pays for office expenses and taxes. As a result most contract attorneys need to have other clients to supplement their income.

4. The bill would legitimize indigent defense attorneys. Indicating to an indigent client that the attorney is from the Public Defender's office, bring with it a notion that the client has the support of an office rather than a single person. It enables the attorney to inform the client that he/she has the same staff, legal research materials and an investigator to help represent them in their defense as does the prosecution.
5. Establishment of a Public Defender's office would also help keep experienced attorneys working for indigent clients. This, in turn, would enhance the client's and public's perception of competence.

Mr. Chairman, thank you for allowing me to speak in favor of this bill.



TED C. GLADDEN
STATE COURT ADMINISTRATOR

1/24 AH #2

State of North Dakota
OFFICE OF STATE COURT ADMINISTRATOR

SUPREME COURT
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January 24, 2005

TO: Ted Gladden
FROM: Susan Sisk *[Signature]*
SUBJECT: Indigent Defense Costs Paid by Counties

Attached are two worksheets containing costs of indigent defense paid by the counties for the years 2001-2004. These costs were provided to our office by the county auditors.

To summarize the information, average costs paid for 2001 and 2002 were \$390,300. These costs have increased to \$590,000 for 2003 and 2004. These costs are difficult to anticipate as they vary greatly from year to year.

Of the \$590,000, \$292,000 is for guardians ad litem and custody investigators. If these costs were transferred to the state, they would be part of the judicial budget. The remaining costs of \$298,000 for sexual predator and mental illness commitment proceedings would be part of the indigent defense system.

**ND Supreme Court
Indigent Defense Costs Paid by Counties - 2003 and 2004**

County	Sexual Predator Commitment Proceedings		Mental Illness Commitment Proceedings		Guardians ad Litem		Custody Investigations	
	2004	2003	2004	2003	2004	2003	2004	2003
Burleigh	1,113.00	1,810.00	16,256.00	12,940.00	-	-	1,681.00	24,330.00
Cass	-	-	26,720.93	26,098.88	-	-	45,104.81	29,965.95
Grand Forks	-	-	30,000.00	30,000.00	5,328.00	15,034.55	-	-
Morton	1,600.00	2,274.25	5,117.00	5,124.00	-	-	5,287.50	945.37
Ramsey	-	-	2,079.91	1,353.74	2,873.05	8,328.79	-	-
Richland	-	-	2,884.14	60.00	1,740.00	2,761.06	440.55	1,919.28
Stark	-	-	9,870.60	12,637.75	2,900.00	4,852.50	-	-
Stutsman	-	-	13,081.84	-	5,821.45	-	8,111.89	-
Walsh	847.00	-	4,072.69	3,573.96	-	-	-	-
Ward	-	-	9,531.85	8,378.64	20,275.00	25,528.17	-	2,083.17
Williams	254.80	-	9,493.66	10,332.87	-	-	-	-
SUBTOTAL	3,714.80	4,084.25	128,908.62	108,498.14	38,937.50	56,505.07	57,825.75	59,163.67
Adams	-	-	256.75	1,366.20	-	-	-	-
Barnes	-	-	2,675.04	2,675.04	3,378.74	523.73	2,315.20	1,096.45
Benson	-	-	535.00	628.00	-	-	-	-
Billings	-	-	136.00	-	-	-	-	-
Bottineau	-	-	478.25	1,724.85	1,542.60	1,418.75	-	-
Bowman	-	-	-	-	-	-	-	-
Burke	-	-	-	271.90	-	-	-	-
Cavalier	-	-	212.00	45.00	-	-	-	-
Dickey	-	-	155.00	-	-	-	-	-
Divide	-	-	820.39	-	-	-	-	-
Dunn	-	-	-	-	-	-	-	-
Eddy	-	-	495.00	624.00	-	657.81	-	-
Emmons	-	-	-	-	-	-	-	-
Foster	-	-	576.00	545.40	948.50	-	-	-
Golden Valley	-	-	135.00	-	422.78	-	-	-
Grant	-	-	50.40	-	-	-	-	-
Griggs	-	-	2,500.00	3,250.99	-	-	-	-
Hettinger	-	-	-	-	-	-	-	-
Kidder	-	-	232.50	271.00	-	-	-	-
LaMoure	-	-	434.70	318.75	52.50	86.25	-	-
Logan	-	-	349.73	822.50	-	-	-	-
McHenry	-	-	425.15	517.90	-	-	-	-
McIntosh	-	-	30.00	288.50	-	-	-	-
McKenzie	-	-	271.05	110.50	-	-	-	-
McLean	-	-	1,010.00	925.00	-	-	-	-
Mercer	-	-	2,184.28	1,366.39	-	-	-	-
Mountain	-	-	600.00	2,000.00	-	-	-	2,026.00
Nelson	-	-	444.00	-	-	-	-	-
Oliver	-	-	-	-	-	-	-	-
Pembina	-	-	1,800.00	523.00	-	-	6,270.07	-
Pierce	-	-	140.00	838.60	-	-	2,184.94	2,796.78
Ransom	-	-	710.50	52.50	2,745.72	-	-	-
Renville	-	-	65.00	1,073.00	-	-	-	-
Rolette	-	-	2,261.85	3,569.84	-	-	-	-
Sargent	-	-	641.00	-	206.00	930.00	387.00	241.00
Sheridan	-	-	200.00	135.00	-	-	-	-
Sioux	-	-	-	-	-	-	-	-
Slope	-	-	-	-	-	-	-	-
Steele	-	-	340.00	115.00	-	-	-	-
Towner	-	-	290.00	301.00	-	-	-	-
Trail	-	-	740.00	233.00	23,799.47	18,480.78	3,000.00	3,819.00
Wells	-	-	968.64	2,144.36	-	-	-	-
SUBTOTAL	3,714.80	4,084.25	23,215.23	26,767.62	33,096.49	22,047.32	14,127.21	6,778.23
TOTAL	\$ 3,714.80	\$ 4,084.25	\$ 152,123.85	\$ 136,265.76	\$ 72,032.99	\$ 78,552.39	\$ 71,752.96	\$ 68,941.90

	State Counties	Contract Counties	Estimated Total
Averages/year			
Sexual Predator:	\$ 3,899.53	\$ -	\$ 3,899.53
Mental Illness	\$ 118,703.38	25,292.53	143,995.91
Guardians ad Litem	\$ 47,721.29	27,571.41	75,292.69
Custody Investigators	\$ 58,394.71	11,952.72	70,347.43
Total State	\$ 228,718.90	\$ 64,816.65	293,535.55
Total Estimate/Year	293,535.55		
Total Estimate/BI	587,071.10		
Total Estimate	590,000		

Averages/year contract counties:	
Sexual Predator:	-
Mental Illness	602.20
Guardians ad Litem	656.46
Custody Investigators	284.59
Total	1,543.25

Contract Counties	42
Total per year	64,816.65

**ND Supreme Court
Indigent Defense Costs Paid by Counties - 2001 and 2002**

County	Sexual Predator Commitment Proceedings		Mental Illness Commitment Proceedings		Guardians ad Litem		Custody Investigations	
	2002	2001	2002	2001	2002	2001	2002	2001
Burleigh	3,983.00	917.00	15,000.00	15,000.00	4,406.00	13,516.00		
Cass	-	-	23,518.95	28,498.75	7,384.80	2,391.61		
Grand Forks	-	-	11,506.19	11,811.00	17,409.03	12,273.32		
Morton	1,726.50	7,487.23	5,795.00	6,137.00	5,524.06	4,841.71		
Ramsey	-	-	327.00	2,546.00	5,455.08	2,146.50		
Richland	-	-	636.00	672.00	3,107.22	150.00		
Stark	-	-	9,063.00	8,940.34	951.00	2,590.68		
Stutsman	-	-	13,277.50	12,829.59	6,123.11	4,790.23		
Walsh	-	-	9,100.00	7,000.00	3,000.00	-		
Ward	-	-	5,025.50	5,492.87	3,348.80	76.20	4,504.20	380.00
Williams	-	-	9,424.26	10,855.89	-	-		
SUBTOTAL	5,709.50	8,404.21	102,674.30	109,783.44	56,708.90	42,776.25	4,504.20	380.00
Adams	-	-	-	414.80	-	-		
Barnes	-	-	3,152.50	2,420.99	2,838.86	-		
Benson	-	-	-	-	-	-		
Billings	-	-	378.22	-	-	-		
Bottineau	-	-	-	-	-	-		
Bowman	-	-	-	-	-	-		
Burke	-	-	-	-	-	-		
Cavaller	-	-	-	-	-	-		
Dickey	-	-	-	420.00	-	1,912.58		
Divide	-	-	143.00	1,339.75	-	-		
Dunn	-	-	731.00	80.00	-	-		
Eddy	-	-	1,248.23	97.50	-	24.00		
Emmons	-	-	200.00	193.00	236.00	445.00		
Foster	-	-	685.40	193.50	-	-		
Golden Valley	-	-	-	-	-	-		
Grant	-	-	-	-	-	-		
Griggs	-	-	1,092.84	1,039.18	-	-		
Hettinger	-	-	-	-	-	-		
Kidder	-	-	-	-	-	-		
LaMoure	-	-	6,781.67	1,105.36	1,228.90	402.69		
Laguna	-	-	1,912.00	583.00	-	-		
McHenry	-	-	600.00	77.50	-	281.00		
McIntosh	-	-	580.00	215.00	-	-		
McKenzie	-	-	2,242.77	1,378.15	-	-		
McLean	-	-	2,087.43	959.55	-	-		
Mercer	-	-	402.22	1,073.90	3,299.52	-		
Mountrail	-	-	369.15	1,424.75	-	-		
Nelson	-	-	440.00	187.50	-	-		
Otter	-	-	-	-	-	-		
Pembina	-	-	1,530.00	748.50	-	-		
Pierce	-	-	600.00	-	256.70	255.00		
Ransom	-	-	90.00	82.50	-	-		
Renville	-	-	821.28	295.48	-	-		
Rolette	-	-	521.00	322.00	-	-		
Sargent	-	-	1,515.00	300.00	2,348.00	1,632.00		
Sheridan	-	-	502.50	-	-	-		
Sioux	-	-	-	-	-	-		
Slope	-	-	-	-	-	-		
Steele	-	-	-	-	-	-		
Towner	-	-	150.00	150.00	-	-		
Traill	-	-	1,718.50	1,132.25	-	-		
Wells	-	-	649.75	1,304.80	52.38	-		
SUBTOTAL	-	-	30,234.47	17,432.96	10,260.36	4,852.27	-	-
TOTAL	\$ 5,709.50	\$ 8,404.21	\$ 132,908.77	\$ 127,216.40	\$ 66,969.26	\$ 47,628.52	\$ 4,504.20	\$ 380.00

Averages/year	State Counties	Contract Counties	Estimated Total
Sexual Predator:	\$ 7,056.86	\$ -	\$ 7,056.86
Mental Illness	\$ 106,228.87	25,667.08	131,895.95
Guardians ad Litem	\$ 49,742.58	8,137.57	57,880.15
Custody Investigators	\$ 2,442.10	0	2,442.10
Total State	\$ 165,470.40	\$ 33,804.65	199,275.05
Total Estimate/Year	199,275.05		
Total Estimate/BI	398,550.10		
Total Estimate for Fiscal Note	390,300		

Averages/year contract counties:	
Sexual Predator:	-
Mental Illness	611.12
Guardians ad Litem	193.75
Custody Investigators	-
Total	804.87
Contract Counties	42
Total per year	33,804.65

2d



State of North Dakota
SUPREME COURT
BISMARCK

CHAMBERS OF
Gerald W. Vandewalle
CHIEF JUSTICE

January 18, 2005

Bonnie Johnson
County Coordinator
P.O. Box 2806
Fargo, ND 58108

Re: Indigent Defense System

Dear Bonnie:

Thank you for your letter of January 6, 2005. I am pleased you will support the indigent defense proposal.

I understand your concerns with representation for indigents in mental health commitments and in guardian ad litem costs. I would support the shift of the costs to the State if the Legislature appropriates the funds to cover those costs. Ted Gladden and Susan Sisk have the exact costs from each county and they tell me the total is approximately \$590,000 for the years 2003, 2004. Although it might be argued that both the mental health and guardian ad litem programs are more the responsibility of social services rather than the Courts, I agree with you that the simple solution would be to include the services with the criminal indigent defense system. Having said that, however, I must note there are significant legal and philosophical differences between the constitutional requirement for adequate legal defense for indigents in a criminal prosecution and the issue of whether the State or the counties will pay for the civil legal defense expenses of indigents in mental health proceedings or those calling for a guardian ad litem. For some fairly obvious reasons as found by the Report of the Indigent Defense Task Force, I placed emphasis on the indigent criminal defense issues.

In addition to the appropriation of funds to cover the shift in costs from the counties to the State, a bill similar to HB 1045 of the last legislative session would be necessary to amend the substantive statutory provisions placing the responsibility for the costs with the counties. I note that bill carried an appropriation for nearly \$400,000. The current figure is larger and the staff tells me there is considerable fluctuation in some counties from year to year.

Bonnie Johnson
January 18, 2005
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In sum, I am not opposed to the shift in costs if the Legislature appropriates the money. On the other hand the underlying rationale for the shift is considerably different than the reasons underlying SB 2027 and I would want the legislators to understand those differences.

Sincerely,



Gerald W. VandeWalle

GWV/cja

SB 2027 Indigent Defense Commission

Sandi Tabor

March 16, 2005

Background on the ND Indigent Defense Task Force:

- State Bar Association of North Dakota formed a task force to analyze the present indigent defense system.
- To assist the task force, the Legislative Council, Supreme Court and the Bar Association hired the Spangenberg Group to conduct interviews and present a report to the task force and the Criminal Justice Interim Committee regarding the existing system.
- The Spangenberg Group made the following findings:
 - **Lack of Independence:** The chief problem with the present system is a pervasive absence of independence for the defense function from the judiciary
 - **Funding:** North Dakota's expenditures for indigent defense services based on 2002 numbers were 43% percent less than the next lowest state (Wyoming). Current biennial budgets for surrounding states:
 - Wyoming - \$12 million
 - South Dakota - \$13 million
 - Montana - \$27 million (\$23 million from the state)
 - North Dakota - \$ 9.8 million (Senate proposal)
 - **High Caseload:** All contracts in ND are flat-fee amounts for an unspecified number of cases. This means an attorney must take as many assignments as assigned, absent a conflict of interest. In recent years, the caseloads have steadily exceeded predictions made by the Court.
 - National standards applicable to full-time public defenders state that the caseload should not exceed 150 felony cases per year.
 - It is not uncommon for the caseload of North Dakota contract attorneys to well exceed this limit.
 - **Low Pay:** The presumptive hourly pay established in statute is \$75.00 per hour. In the past the Court's goal has been to pay attorneys \$65.00 per hour. In reality the average payment is \$55.00 per hour ... not enough to cover overhead.

- In homicide cases, insufficient pay is a particularly significant problem. These cases are far more time intensive and consequently the per hour rate drops dramatically.
- Another issue affecting pay is contract attorneys are obligated to carry all cases that are open at the end of the contract period. This means that the attorneys are obligated to represent the client until the case is closed, often well after the contract has expired, and often with no pay.
- **Administrative and Quality Problems:** From the previous comments it should come as no surprise that concerns were raised about the quality of attorney/client communications ... and concerns were raised about the lack of oversight in general.
- The Spangenberg Group made the following recommendations:
 - **The Current System Needs More Funding:** Compensation must be tied to actual work performed or number of cases accepted.
 - **The Current System Needs Infrastructure and Better Administration:** Characteristics of an effective contract system include:
 - Minimum attorney qualifications
 - Support services, such as paralegals and investigators
 - Independent oversight and monitoring
 - Workload caps
 - Limitations on the practice of law outside the contract
 - Caseload caps
 - Case management and tracking system
 - Guidelines on client contact and notification of appointment
 - Oversight and evaluation of contract attorneys.

Provisions of SB 2027

- Section 1 – Establishes the Commission on legal counsel for indigents – 7 members appointed by the Governor, Legislature, Supreme Court and State Bar Association.
- Section 2 – Outlines the duties of the Commission – it includes developing standards governing the delivery of indigent defense services. The bill allows the present contract attorney structure to remain, but also allows the Commission to provide public defenders in regions where the Commission considers it necessary.

- Section 3 – Provides that the Commission will appoint a director and outlines the duties of the director.
- Section 4 – Deals with the confidentiality of the files.
- Section 5 – Moves the funding source for guardian ad litem services to the Commission. This money is for guardian ad litem services in juvenile cases.
- Section 6 – Excludes the Commission from the definition of administrative agency.
- Section 7 – Clarifies that the Commission will determine the compensation rate for contract counsel.
- Section 8 – Directs the continuing appropriation of funds generated by the indigent defense administration fund to the commission on legal council for indigents.
- Sections 9& 10 – Provide transition language about transferring money to the Commission on January 1, 2006, and the expiration of contracts for indigent defense work with the Supreme Court.
- Section 11 – Provides an effective date for Sections 5 and 7 of January 1, 2006.