

## **RESPONSIBILITY FOR LEGAL AND OTHER COSTS ASSOCIATED WITH MENTAL HEALTH AND SEXUALLY DANGEROUS INDIVIDUAL COMMITMENTS - BACKGROUND MEMORANDUM**

Section 1 of House Bill No. 1497 (attached as [Appendix A](#)) directs the Legislative Management to study the feasibility and desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals under North Dakota Century Code (NDCC) Chapter 25-03.3. Section 1 of Senate Bill No. 2370 (attached as [Appendix B](#)) directs the Legislative Management to study the feasibility and desirability of transferring from the county to the state the responsibility for the cost of expert examinations and the cost and responsibility for providing legal counsel in mental health commitment cases. Because of the similarity in the studies directed by the two bills, the two studies will be combined into one comprehensive study.

### **BACKGROUND Court Unification**

In 1981 the Legislative Assembly enacted legislation providing for one county court in each county instead of the multilevel system of county courts, county justice courts, and county courts of increased jurisdiction as existed at that time. The legislation also provided that county judges had to be law-trained and full-time and provided for the assumption by the state of many district court expenses, including criminal indigent defense costs.

In 1991 the Legislative Assembly unified the court system through elimination of county courts and the creation of additional district court judgeships from county court judgeships. In 1991 there were 53 district and county judges. Under unification, the total number of district court judgeships was reduced to 42 at the end of 2000. During the 2009 legislative session, the Legislative Assembly provided funding for two additional district court judgeships.

In 1999 the Legislative Assembly enacted legislation to provide for the state funding of clerk of district court services. The legislation, codified as NDCC Chapter 27-05.2, provided for the transfer of the funding for clerk of district court services to the state effective April 1, 2001.

### **North Dakota Indigent Defense**

The Sixth Amendment to the United States Constitution guarantees to all individuals accused of a crime the right to counsel in their defense. The United States Supreme Court has interpreted the Sixth Amendment to require each state to provide counsel to any individual accused of a crime before the individual can be sentenced to jail or prison if that individual cannot afford to hire an attorney. 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:

An indigent defendant facing a felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right. . . .

An indigent defendant facing a non-felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right or the magistrate determines that sentence upon conviction will not include imprisonment.

Prior to January 1, 2006, in North Dakota indigent defense services were provided primarily by attorneys working under contract with judges. Court-appointed attorneys handled those cases in which the contract attorneys had a conflict of interest. The state's indigent defense system was administered through the judiciary and was almost 100 percent state-funded. The one exception was that each of the 53 counties remained responsible for funding assigned counsel representation of indigent defendants facing mental health commitment proceedings or proceedings for the commitment of sexually dangerous individuals.

In 2005 the Legislative Assembly enacted legislation that removed the responsibility for the administration of indigent defense from the judiciary and established a statewide Commission on Legal Counsel for Indigents. The legislation, codified as NDCC Chapter 54-61, provides that the Commission on Legal Counsel for Indigents is charged with developing and monitoring the delivery process for state-funded defense services for indigents accused of crimes. The director of the Commission on Legal Counsel for Indigents is responsible for administering and coordinating indigent defense services in the state.

### **NORTH DAKOTA LAW REGARDING INDIGENT LEGAL EXPENSES AND OTHER COSTS Indigent Defense for Criminal Cases**

As discussed previously, NDCC Chapter 54-61 provides that the Commission on Legal Counsel for Indigents is responsible for providing state-funded defense services for indigents accused of crimes which are required under the Constitution of North

Dakota and the United States Constitution and any applicable statute or court rule. Under this chapter, the commission is authorized to establish and implement a process of contracting for legal counsel services for indigents and to establish public defender offices in the regions of the state as the commission considers necessary and appropriate. Section 54-61-02(2) provides that "[u]pon the request of a county or city, the commission may agree to provide indigent defense services in the county or city for those cases in which the county or city is otherwise required to provide such services. Moneys received by the commission in accordance with an agreement under this subsection must be deposited in the indigent defense administration fund."

For the 2009-11 biennium, the appropriation for the Commission on Legal Counsel for Indigents is \$11,420,365, which includes \$1,950,217 in special funds. The commission has 30 full-time equivalent positions.

### **Mental Health Commitment Costs**

North Dakota law regarding involuntary mental health commitments provides that the respondent has certain rights. North Dakota Century Code Section 25-03.1-09 provides that the respondent has a right to a preliminary hearing, a treatment hearing, the right to be present at the hearings, the right to have counsel before the hearings and any court-ordered examination, the right to an independent evaluation, and, if the respondent is indigent, the right to counsel and to an independent expert examiner. This section provides that in the case of an indigent respondent, the legal counsel and independent expert examiner are to be provided at the expense of the county that is the respondent's place of residence. Section 25-03.1-13, which also provides that "[e]very respondent under this chapter is entitled to legal counsel," provides that if the court determines that the respondent is indigent, the court is required to order that appointed counsel be compensated from county funds of the county from which the respondent is a resident.

### **Sexually Dangerous Individuals Legal Counsel Costs**

For cases involving the commitment of sexually dangerous individuals, NDCC Section 25-03.3-09 provides that every respondent is entitled to legal counsel. This section provides that if the court determines that the respondent is indigent, the court is required to appoint counsel and order that the appointed counsel be compensated by the county that is the respondent's place of residence.

### **Guardian ad Litem and Child Custody Investigator Costs**

In addition to cases involving mental health commitments and the commitment of sexually dangerous individuals, the county also is responsible

for the cost of court-appointed guardians ad litem for minors and investigators in contested proceedings dealing with parental rights and responsibilities. North Dakota Century Code Section 14-07.5-05.1, which authorizes the court to appoint a guardian ad litem in an action for a protection order to represent a minor concerning custody, support, or visitation if there is concern as to the immediate future of the minor, provides that the court may direct either or both parties to pay the guardian ad litem fees established by the court. This section further provides that if neither party is able to pay the fees, the court may direct the fees to be paid, in whole or in part, by the county of venue. This section also authorizes the court to direct either or both parties to reimburse the court, in whole or in part, for the payment.

North Dakota Century Code Section 14-09-06.3 provides that in contested proceedings dealing with parental rights and responsibilities, the court may order an investigation and report concerning parenting rights and responsibilities regarding the child. This section requires the court to order either or both parties to pay for the costs of the investigation. The section further provides that if the parties are indigent, the expenses are the responsibility of the county in which the child resided at the time the action was commenced, or if a modification of parental rights and responsibilities, at the time the motion to modify is served.

## **PREVIOUS STUDIES AND LEGISLATION 2001-02 Interim**

During the 2001-02 interim, the Judiciary A Committee, in its study of the method of providing legal representation for indigent criminal defendants and the feasibility and desirability of establishing a public defender system, considered a bill draft that would have provided that the state rather than the counties is responsible for paying the cost of indigent defense for mental illness commitment proceedings, sexual predator commitment proceedings, and for guardian ad litem costs. Testimony in support of the bill draft indicated that not making these indigent defense costs a state responsibility may have been an oversight at the time court unification was implemented. Other testimony indicated that currently these three types of indigent defense services are being provided by the attorneys with whom the state has contracted, but the costs of services are paid by the county. The bill, introduced as 2003 House Bill No. 1045, failed to pass the House.

## **2003-04 Interim**

During the 2003-04 interim, the Criminal Justice Committee, in its study of the state's method of providing legal representation for indigent criminal defendants and the feasibility and desirability of establishing a public defender system, received testimony that costs of indigent defense for mental health commitments, the civil commitment of sexual

offenders, and guardians ad litem continued to be the responsibility of the county. It was estimated that the indigent defense costs were costing the counties about \$300,000 per biennium. The committee was urged to consider whether these costs should be the responsibility of the state. The committee made no recommendation regarding this issue.

### **2005-06 Interim**

During the 2005-06 interim, the Advisory Commission on Intergovernmental Relations received information regarding the counties' responsibility for certain legal costs. According to the final report of the commission, counties use the same procedure for applying for indigent counsel for civil matters and criminal matters. The report indicated that it was argued that this creates the appearance that the state should likewise be paying for the civil matters. According to the report, the Commission on Legal Counsel for Indigents does not fund several matters for which there is not a constitutional right to counsel but for which indigent individuals are provided legal services at no cost. The commission received information on indigent defense costs paid by counties for 2001-02 and 2003-04 for sexual predator commitment proceedings, mental illness proceedings, guardian ad litem proceedings, and custody investigations. The total estimate of costs for these services was \$390,300 per biennium. The commission received testimony on the problems with counties providing indigent defense. The commission was informed that the costs for counties are sporadic and some are especially costly, e.g., for the commitment of a sexual predator. In particular, this cost is borne by the county to which the predator is released after prison regardless of whether the county has a connection to the predator. The commission was informed that there had been an increase in costs for custody hearings as a result of a federal law that requires a quicker process and more use of guardianships when a child is removed from a home. The commission was informed that there was a conflict of interest when a county hires someone to represent an individual in a legal proceeding against the state's attorney who is a county official. According to the report, it was argued that although the transfer of these legal services to the state would save the counties money, the conflict of interest and difficulty in budgeting are satisfactory and independent reasons for the transfer. The Advisory Commission on Intergovernmental Relations made no recommendation regarding this issue.

## **2009 LEGISLATION**

### **Responsibility for Indigent Legal and Other Costs**

In 2009 the Legislative Assembly considered two bills that related to the legal counsel and other costs for indigents which are the responsibility of the county. The two bills--House Bill No. 1497 and Senate Bill

No. 2370--were each amended to provide for a study of those issues.

### **House Bill No. 1497**

House Bill No. 1497, as introduced, would have transferred from the county to the state the cost of providing legal counsel for respondents in cases involving the commitment of a sexually dangerous individual. The introduced bill provided that the appointed counsel was to be compensated by the state but did not specify the state agency responsible for bearing the expense. The bill included an amendment to NDCC Section 54-61-03 which provided that the director of the Commission on Legal Counsel for Indigents was not responsible for the administration, supervision, or delivery of indigent defense services under Chapter 25-03.3, which relates to the civil commitment of sexually dangerous individuals. The bill included a fiscal note, prepared by the Department of Human Services, which estimated the fiscal impact of \$581,834 for the 2009-11 biennium and \$610,910 for the 2011-13 biennium. House Bill No. 1497, as amended by the House, directed the Legislative Council to study the transfer of the legal counsel costs in cases involving the commitment of sexually dangerous individuals from the county to the state.

### **Senate Bill No. 2370**

Senate Bill No. 2370, as introduced, would have transferred from the county to the state the cost of legal counsel and expert examinations in involuntary mental health commitment cases under NDCC Chapter 25-03.1. The introduced bill provided that if the respondent is indigent, the court-ordered legal counsel was to be provided by the Commission on Legal Counsel for Indigents. The bill included a fiscal note, prepared by the Commission on Legal Counsel for Indigents, which estimated the fiscal impact of \$1,843,224 for the 2009-11 biennium and \$2,027,546 for the 2011-13 biennium. Senate Bill No. 2370, as amended by the Senate, directed the Legislative Council to study the transfer from the county to the state the responsibility for the cost of expert examinations and the cost and responsibility for providing legal counsel in mental health commitment cases.

### **Other Related Legislation**

**House Bill No. 1107** required a home rule county to pay for an attorney and expenses necessary for the adequate defense of an indigent person prosecuted for a violation of a home rule county ordinance.

**House Bill No. 1108** provided that for the purpose of the right to counsel under the Uniform Juvenile Court Act, a child refers to an individual who is under 18 years of age at the time of the proceeding.

**House Bill No. 1146** provided that the Commission on Legal Counsel for Indigents must provide indigent defense services to eligible indigent

individuals pursuant to the standards and policies of the commission governing eligibility for services.

**Senate Bill No. 2023** required the Commission on Legal Counsel for Indigents to contract for public defender services at a minimum level of 50 percent of its biennial caseload.

### **SUGGESTED STUDY APPROACH**

The committee, in its study of the desirability of transferring from the county to the state the responsibility for the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals under NDCC Chapter 25-03.3 and the feasibility and desirability of transferring from the county to the state the responsibility for the cost of expert examinations and the cost and responsibility for providing legal counsel in mental health commitment cases, may wish to approach this study as follows:

- Receive testimony from representatives of the judiciary, the North Dakota Association of Counties, the Commission on Legal Counsel for Indigents, the State Hospital, and other interested parties regarding the issues and concerns about the current responsibility for costs of providing legal counsel and expert examinations in the state;
- Seek information regarding the costs to counties for providing legal services and expert examinations;
- Receive information regarding the legal expertise required for mental health and sexually dangerous individual civil commitment cases;
- Receive information regarding the cost and other implications of transferring from the county to the state the responsibility for providing the costs and services for the mental health and sexually dangerous individual civil commitment cases; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:2