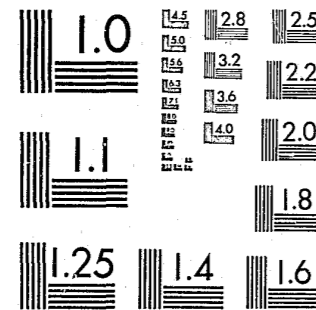


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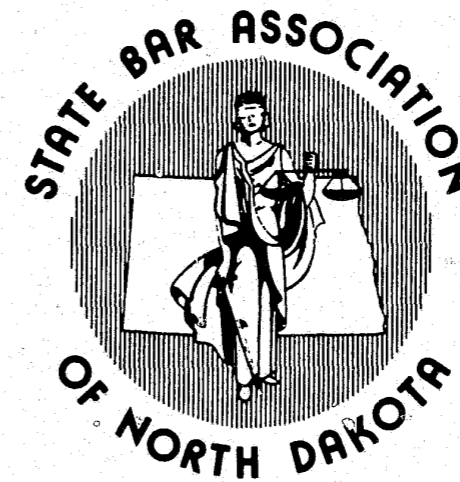
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9/14/83

Legal Representation for Indigents Entitled to Court Appointed Counsel in North Dakota



84770

*A Study with Recommendations
by the
Defense Delivery Project of the
State Bar Association of North Dakota*

**State Bar Association of North Dakota Study on Legal Representation
for Indigents Entitled to Court Appointed Counsel
in North Dakota**

Conducted by the Defense Delivery Project, an undertaking of the State
Bar Association of North Dakota, August, 1980 through May, 1981.

**DEFENSE DELIVERY PROJECT
ADVISORY COMMITTEE**

**William Bohn, Bismarck
Arne Boyum, Bismarck
Linda Catalano, Bismarck
Sharon Gallagher, Bismarck
Joel Gilbertson, Bismarck
Gerald Glaser, Bismarck
Juanita Helpfrey, Bismarck
William Kretschmar, Venturia
John Olson, Bismarck**

**Gladys Pederson, Minot
Cynthia Rothe, Fargo
Ron Soderberg, Bismarck
Wayne Stenehjem, Grand Forks
A. J. 'Bill' Stern, Bismarck
Betty Svihovec, Hettinger
Ralph Vinje, Bismarck
Dean Winkjer, Williston
Patricia Wold, Fargo**

**PROJECT DIRECTOR
Bruce Bohlman, Grand Forks**

**STAFF
John Walstad, Staff Director
Deb Livingston, Secretary**

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INTRODUCTION

The Defense Delivery Project is a project of the North Dakota State Bar Association. It was funded in part by the Federal Law Enforcement Administration in an effort to determine the current effectiveness of the indigent defense delivery system and how the North Dakota experience might serve as a model for other rural states. The project was an ambitious - and an important step in the overall improvement of the criminal justice system.

The project has its roots in the early 1970's when the North Dakota Law Enforcement Council funded a ten-county pilot public defender program, with its center in Bismarck. Both the 1973 and 1975 legislative sessions saw the introduction, and defeat, of legislation that would have established a public defender system. In 1977, there was a study made by the National Legal Aid and Defender Association of North Dakota's Defense Services Delivery System. As a result of this study, more legislation was introduced, but also failed. This legislation also centered on the public defender model.

From the efforts of the past, the future course of indigent defense services became clear - more research would have to be done and an acceptable solution found which would address the objections to a public defender system as well as assess the alternatives. It became quite clear that perhaps a public defender system was not the only service delivery model and that other systems may be just as effective. The recognition that a diversity of delivery systems, all operating in the state at the same time (in different counties) began to gain acceptance. North Dakota is, after all,

a rural state with strong rural traditions, one of which is to oppose centralized government and to maintain the integrity of the county structure of government to the maximum extent possible. The public defender system may be seen as an effort to centralize control, especially if it was a statewide program. Moreover, most states attorneys would probably oppose a full time public defender system on the grounds that it would unfairly tip the scales in favor of the defendant, who would have a full time specialist in criminal law at his disposal, while the states attorney would have many other non-criminal law duties to attend to, as well as a private practice for those states attorneys in the less populated counties.

And yet the concept of the public defender is sound and can work in a more urban environment, as the Bismarck experience has shown. Hence, the public defender concept could not be discarded, but neither can it be said that the entire state should be forced to accept such a system. It is critically important to recognize the need for adapting the delivery model to the needs of the county in which it is to function. What other models are available? The contract delivery system utilizes private attorneys on a full or part time basis to handle misdemeanors, felonies, or both types of cases. It is similar in many respects to a public defender system, but it is usually less than full time and is let on a competitive bid basis. It may encourage cost effectiveness, but does not necessarily guarantee the highest quality service. The assigned counsel system is the other alternative, and most counties use this system in North Dakota. Local attorneys are appointed on a rotation basis to handle the cases and this system usually results in

younger, less experienced attorneys accepting the court appointment and many of the older, more experienced attorneys do not want to become involved. This system can be effective but is subject to the obvious difficulties of applying uniform standards from county to county on the definition of indigency and the overall administration of such assigned counsel systems.

The North Dakota State Bar Association recognized the need for further study and action based on such a study. The application by the State Bar Association for funding assistance from the Law Enforcement Assistance Administration was a positive step forward in the improvement of court services in this state and the work of the project has now been largely completed. This report sets forth the results of the project.

The work was directed by an advisory committee consisting of twenty-one members coming from various parts of the state and representing county government, states attorneys, defense attorneys, the legislature and the judiciary. This broad based group took on the responsibility of coordinating the efforts of the staff director, Mr. John Walstad. Bruce Bohlman, the project director, was responsible for providing guidance, advice and consultation.

Mr. Walstad did an outstanding job in gathering data from the courts and other county officials throughout the state. He formed a data base that had never been accumulated before - a base that would serve as an important resource in foregoing an overall plan for North Dakota. Much work was put into the formulation of a survey form and its dissemination, tabulation of replies and evaluation thereof.

From the survey, the Advisory Committee concluded that

the most effective approach for North Dakota was to adopt a set of Supreme Court rules dealing with the subject. The rules would cover such areas as local option in the selection of a defense services delivery system, a uniform definition of indigency, and most importantly, would create a North Dakota Indigent Defense Commission within the judicial branch. The Commission would have the overall responsibility to collect data, review indigent defense plans of the various counties and to serve as a central clearing house for all matters dealing with defense of the indigent. The counties would still maintain control of their programs, but the Commission would be responsible for approving each county's system in order to assure fiscal responsibility and control.

The review and approval of county plans is largely necessitated by the passage of the so called "County Courts" Bill which made the state responsible for payment of indigent defense services in the district court on felony matters. This legislation places an administrative burden on the Supreme Court which can most effectively be dealt with by way of a commission, the members of which are appointed by the Chief Justice of the North Dakota Supreme Court.

If the proposed rules are adopted, a basic framework will be established which should be effective to provide uniformity and yet guarantee a local option. It is hoped that the rules as explained later in this report, will provide a model for use in other rural states. The rules represent the best thinking of some of the most knowledgeable minds on the subject in North Dakota and should provide the structure to assure an effective delivery system and should also increase the strength of the judiciary by placing the

system under its control rather than an agency or commission of the executive branch of government. Finally, the rules are much more adaptable to future change than a legislative approach since the rules can be modified much faster and with less uncertainty than the legislative process. The Advisory Committee feels confident that the proposed rules provide the best possible approach to the problem.

BRUCE BOHLMAN
PROJECT DIRECTOR
MAY, 1981

ADVISORY COMMITTEE
DEFENSE DELIVERY PROJECT

William Bohn
Arne Boyum
Linda Catalano
Sharon Gallagher
Joel Gilbertson
Hon. Gerald Glaser
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PROJECT DIRECTOR
Bruce Bohlman

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STAFF DIRECTOR
John Walstad

DEFENSE DELIVERY PROJECT CONCLUSIONS AND RECOMMENDATIONS

The following recommendations and conclusions are made by the Defense Delivery Project in hopes that they will be helpful to county commissioners, judges, legislators, attorneys and others concerned with provision of quality legal services to indigents. These considerations represent areas for review by counties or state government in investigating defense plans presently in use and exploring alternative systems as the need and cost of counsel increases with increases in population, crime and indigent caseload.

Indigent Defense Commission

1. Provision of legal services to indigents entitled to such services and the cost of providing those services are of such significance to the State of North Dakota that it is essential that a body be organized to deal solely with indigent legal defense matters.
2. The majority of the members of the Indigent Defense Commission should be persons licensed to practice law in the state due to the need for intimate knowledge of the legal system. The public, state government and county government should be represented in the Commission membership.
3. The Indigent Defense Commission should be an independent body within the judicial branch of state government.
4. The Indigent Defense Commission should have the following powers and duties:
 - a. To collect data regarding indigent defense cost

and caseload from all courts of the state and to prepare an annual report and recommended biennial budget for the Commission and for state funded indigent defense costs for submission to the Supreme Court.

- b. To provide planning and technical assistance to counties requesting assistance in facilitating indigent defense programs.
- c. To recommend to the Supreme Court rules regarding indigent defense.
- d. To review the indigent defense plans submitted by the various jurisdictions and to approve state funded plans.
- e. To review decisions on fees and support services as requested.
- f. To employ staff and private office support as possible within the limits of legislative appropriations.
- g. To adopt rules for its internal functioning.

Defense System Alternatives

5. The Defense Delivery Project finds that North Dakota counties present a wide range of circumstances, necessitating varying approaches to provision of defense services.
6. It is recommended that choice of a defense system be left to the local decision makers.
7. Acceptable defense systems are assigned counsel, contract or public defender systems or combinations of these alternatives.
8. The Indigent Defense Commission should adopt and

make public minimum guidelines for indigent defense systems. Included in Appendix D are minimum guidelines recommended to the Indigent Defense Commission for consideration.

Support Services

9. Non-attorney services necessary to an adequate defense should be provided at public expense to indigent or partially indigent persons requiring such services.
10. Support services likely to exceed a moderate cost should be subject to prior approval of the trial court.

Financial Eligibility Determinations

11. Financial eligibility for court appointed counsel should be determined by the court.
12. The standard for determining indigency should be as stated in Rule 6 of the Proposed Rules on Counsel for Indigents.
13. All courts of the state should utilize a standardized form to be completed and verified by persons applying for the assistance of counsel. The form should be approved and distributed by the Indigent Defense Commission and should contain a clear warning of the penalties for perjury.

Setting of Attorney's Fees

14. Attorney's fees in court appointed cases should be set by the Indigent Defense Commission with the advice of a special committee selected by concerned

groups.

15. Attorney's fees in court appointed cases should be reviewed annually and set with consideration for the time needed to include the fee level in budgeting deliberations.
16. The level of compensation for attorneys in court appointed cases should be sufficient to encourage counsel to accept court appointments.

Collection of Information on Indigent Defense

17. It should be the responsibility of clerks of court to report indigent defense cost and caseload data to the Indigent Defense Commission. It should be the duty of the Commission to prepare an annual report of this information.

Independence of Counsel

18. An attorney's representation of an indigent client should be as free from influence as it would be were the attorney representing a private client.

Partial Eligibility and Recoupment

19. Recoupment of attorney fees from indigent defendants as part of a criminal sentence is a dangerous practice without adequate safeguards.¹ This practice should be avoided.
20. Determinations of partial eligibility should be made where appropriate to provide reimbursement to the governmental unit. Periodic payments from wage

¹See, Fuller v Oregon, 417 U.S. 40, 40 L.Ed. 2d 042, 94 S. Ct. 2116 (1974).

earners are acceptable if not related to the outcome of the charge.

Waiver Of Counsel

21. Indigent defendants waiving their right to appointed counsel should be required to do so in writing and on the court record.

Legislative Review

22. Future legislative assemblies should be apprised of the advisability of state assumption of the cost of indigent defense in all courts and creation of a statewide public defender system. As costs and caseload rise, the economy of a statewide system increases.

CHAPTER ONE

It is essential to an understanding of the future of indigent legal defense in North Dakota to comprehend trends in indigent defense both within and without the state. To this end, it is necessary to review the history and implementation of the right to counsel.

CONSTITUTIONAL RIGHT TO COUNSEL

The rising cost and proliferation of literature characteristic of our present right to counsel for indigents are the results of U.S. Supreme Court interpretations of what the Constitutionally-guaranteed right to counsel is. Nearly 50 years ago the Supreme Court, in Powell v Alabama,¹ mandated that the Sixth Amendment² required not only the presence of legal counsel but also "...effective aid in the preparation and trial of the case."³ The Powell decision applied to capital cases and the same guarantee for indigents was extended to include all felony prosecutions in the 1963 decision in Gideon v Wainwright.⁴ In the aftermath of the Gideon decision the right to counsel was extended to

¹287 U.S. 45 (1932).

²U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

³supra note 1 at 71.

⁴372 U.S. 335 (1963).

to interrogations,⁵ lineups⁶ and preliminary hearings.⁷ Ultimately, the Court deemed this right to be of such consequence that one convicted of crime now cannot be imprisoned without having been afforded the opportunity for the assistance of counsel. This was the Court's holding in the landmark case Argersinger v Hamlin.⁸

It is not the purpose of this report to review Supreme Court decisions but it is important to note at the outset that the right to counsel for indigents has not evolved as a result of some misguided benevolence toward criminals. In a society that relies on law it is essential that each and every person have equal access to justice because equality will preserve the rights of all. Perhaps the words of one who has experienced life in another justice system can best bring home the meaning of the right to counsel.

"It seems a virtual fairy tale that somewhere, at the ends of the earth, an accused person can avail himself of a lawyer's help. This means having beside you in the most difficult moment of your life a clear-minded ally who knows the law."

-Alexander Solzhenitsyn, The Gulag Archipelago

Nationwide, the Argersinger decision provided impetus for growth in an already expanding field.⁹ In the wake of the

⁵Miranda v Arizona, 384 U.S. 436 (1966).

⁶United States v Wade, 388 U.S. 218 (1967).

⁷Coleman v Alabama, 399 U.S. 1 (1970).

⁸407 U.S. 25 (1972).

⁹See The Other Face of Justice, National Legal Aid and Defender Association, 1973.

decision more accuseds received the assistance of counsel in their defense. The greater number of cases involving counsel compensated at public expense led many states and local governments to implement public defender plans and other novel approaches to providing counsel.¹⁰ The impact of Argersinger has been greatest in those states that had previously been lax in providing counsel for indigents. The increased cost of providing counsel prompted states to reexamine their defense systems.

NORTH DAKOTA EXPERIENCE

The effect of the Argersinger decision in North Dakota is difficult to gauge. North Dakota has always been progressive in providing counsel, having codified the practice prior to statehood.¹¹ North Dakota's Supreme Court had, in fact, predated Argersinger with its decision in State v Heasley.¹² In the Heasley decision the Court ruled that:

"...the judge of the county court with increased jurisdiction, or the judge of the district court, as the case may be, must go forward to determine whether or not the defendant is indigent and a needy person, and the judge thereof, the

¹⁰Id. See also Guidelines for Legal Defense Systems in the United States, Report of the National Study Commission on Defense Services, National Legal Aid and Defender Association, 1976.

¹¹N.D. SESS. LAWS of 1879, Ch. 7, sec. 1. For a comprehensive discussion of the history of the appointment of counsel as well as appointed counsel fees see, Meeting the Challenge of Argersinger: The Public Defender System in North Dakota, 49 N.D.L.R. 699, 1972-73.

¹²180 N.W. 2d 242 (1970).

appropriate judge, upon making a determination that defendant is a needy person, must appoint counsel for the defendant at public expense in any proceeding arising out of a criminal case, whether the offense charged is a misdemeanor or a felony."¹³

In 1973 the North Dakota Supreme Court adopted Rules of Criminal Procedure. Rule 44 of those rules implemented the Argersinger and Heasley reasoning and stated:

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

¹³Id. at 249.

¹⁴Rule 44, N.D.R. Crim. P. The commentary states, "This Rule would allow appointment of counsel only when so required under the holding of Argersinger, whereas the present Federal Rule requires appointment of Counsel for all indigent defendants. It is not the intent of this Rule to impose upon counties the expenses of the defense of indigents in municipal courts.

counsel to represent a defendant at his expense if he is unable to secure the assistance of counsel and is not indigent."¹⁴

Whereas the language in Heasley has seemed to create a right to counsel in all criminal cases, Rule 44 delineated the boundaries of that right. When presented with an opportunity to rule on the meaning of Rule 44 North Dakota's Supreme Court held that, "The purpose of this Rule is that no defendant suffer a loss of liberty as a result of a trial at which defendant was not represented by counsel."¹⁵

Since 1879¹⁶ North Dakota, like most other states, has provided counsel for eligible persons by assigning attorneys on an ad hoc basis. Since North Dakota's crime rate has traditionally been low¹⁷ and its population sparsely settled the ad hoc assignment method has functioned quite well for

¹⁵State v Mees, 272 N.W. 2d 284, 290 (N.D. 1978). The Court goes on to state, "As the comments to Rule 44, N.D.R. Crim. P., point out, however, the intent of the rule is also to not impose upon the counties the expense of court-appointed counsel for non-felony defendants when a magistrate has determined no imprisonment will be imposed as a result of a possible conviction. Thus the important consideration under Rule 44, N.D.R. Crim. P., is the type of punishment (imprisonment) the defendant will suffer as the result of a possible conviction and not the degree or type of crime, provided the charge is a non-felony."

¹⁶Supra note 11.

¹⁷See U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports for the United States, 1978, 1979; Statistical Abstract of North Dakota 1979, The University of North Dakota Press, 1979; A Profile of Crime in North Dakota, North Dakota Combined Law Enforcement Council, 1979.

the state. Nationwide, the last twenty years have seen the decline of the ad hoc assignment approach and its replacement by other systems, most often a public defender.¹⁸ Defender systems have generally evolved in response to pressure from increased population, crime rate and cost. A 1973 NLADA study reported that, "The oldest defender systems are found in Metropolitan counties. 64% of all Metropolitan defender systems were in existence prior to 1965 while 78.8% of all Rural defender systems have come into existence since 1965."¹⁹ It appears that the primary factor triggering growth of defense systems is cost. This nationwide pattern appears to be occurring in North Dakota. Two of the state's largest counties, Cass and Burleigh, are utilizing contract defender systems in an effort to provide quality legal services and combat rising defense costs. Stark County has recently approved the institution of a public defender program and it can be expected that other counties will follow suit as their costs rise in response to population and crime rate increases.

DEFENDER SYSTEMS IN NORTH DAKOTA

The feasibility of defender systems in North Dakota's more sparsely populated areas has only been tested exten-

¹⁸The Other Face of Justice, NLADA 1973 at 13 states, "In 1961, two years prior to Gideon, defender systems existed in only 3% of the counties serving approximately a quarter of the country's population... Today (1973) 650 defender systems provide indigent defense services in 883 (28%) counties throughout the United States. These defenders serve almost two-thirds of the nation's population."

¹⁹Id. at 15. Refer to text for definitions of "Metropolitan" and "Rural".

sively in one instance. In 1969 the Burleigh County Bar Association conducted a study²⁰ of thirteen counties²¹ "for the purpose of inquiring into the need and desirability of utilizing a regional public defender system and other regional approaches to the administration of criminal and civil justice."²² This far-sighted effort resulted in the implementation of a ten county²³ "Regional Public Defender Office" funded by the counties and a grant from the Combined Law Enforcement Council.²⁴

In the year of its inception (1971) the Regional Public Defender Office (RPD) was staffed by a single attorney and operated on a budget of \$30,000. In the second year of operation the budget was increased to \$48,000 and another attorney was added to the staff. On this budget the RPD

²⁰Providing Counsel for the Indigent Accused: A Regional Survey, Prepared by the Burleigh County, North Dakota, Bar Association in cooperation with the city of Bismarck, North Dakota and the North Dakota Combined Law Enforcement Council, January 1, 1970. The study was funded by a grant from the North Dakota Combined Law Enforcement Council.

²¹Included in the survey were Burleigh, Eddy, Emmons, Foster, Grant, Kidder, McLean, Morton, Oliver, Sheridan, Sioux, Stutsman and Wells Counties. Id. at 1.

²²Id. at 1.

²³Meeting the Challenge of Argersinger: The Public Defender System in North Dakota, 49 N.D.L.R. 699, 715 1972-73. The counties ultimately selected for inclusion in the system were Burleigh, Morton, Emmons, Kidder, Sheridan, McLean, Sioux, Grant, Oliver and Mercer.

²⁴LEAA Grant Number A-0117. Burleigh and Morton Counties contributed 40% of the funds and federal funds provided the remaining 60%. Id. note 132. Subsequently, the 8 remaining counties contracted for services with the Defender Office.

handled all court appointed counsel cases, excepting the rare conflict of interest situation, for the ten county area.

The RPD was able to serve the ten counties involved even though the region covered an area of more than 14,000 square miles and had a population in excess of 100,000. The greatest highway distance from Bismarck to one of the other nine county seats is 77 miles and the average is approximately 50 miles.²⁵ The defender was able to reach any court served within approximately one hour and since the vast majority of cases in which the RPD was appointed were in Burleigh and Morton Counties²⁶ the office location kept lost time in travel at a minimum. Future defense systems in North Dakota can learn from the regional format used by the RPD.

The RPD provided quality representation for indigents in a large area with a limited budget. Community views of the RPD's function and performance were almost universally favorable.²⁷ Attorneys and judges expressed complete support for the RPD.²⁸ "The judges were unanimous in agreeing that the RPD represents its clients well in the adult court, and that the public defender system is superior to the

²⁵L. Kraft, Report on the Regional Public Defender Project, at 30, 1973. This evaluation was conducted on behalf of the Institute for the Study of Crime and Delinquency.

²⁶Id., at 35.

²⁷Id., at 25-30.

²⁸Id., at 27. See Burleigh County Bar Association resolution reproduced there.

assigned system, and should be retained."²⁹ Two reports evaluating the cost effectiveness of RPD against that of an assigned counsel system differed in conclusions.³⁰ Even in the report concluding that the RPD was less cost effective than assigned counsel it was observed that the cost difference was slight.

"It appears to cost more to provide defense services for indigents through the use of the public defender than it would under the assigned counsel system. Just how much more is difficult to assess, although the difference is not appreciable. In any event, uniform and effective defense services are probably worth the added cost."³¹ (emphasis added)

Statistical comparison of the RPD with systems in other states reflected very favorably upon the performance of the RPD from a client's point of view.³² In sum, the RPD drew praise from all quarters and there was almost nothing put forth in opposition to the program.

In view of all of the positive comment and consideration, how then did the RPD meet its death? The answer is a lack of funding from the participating counties. When the federal funds that were the backbone of the program ceased

²⁹Id.

³⁰Id., at 39,40. See also 49 N.D.L.R., supra note 23, at 720.

³¹L. Kraft, supra note 25, at 47.

³²49 N.D.L.R., supra note 23, at 718-720.

to be available, the counties refused to foot the bill for the RPD on their own. The RPD closed its doors in July of 1975. It is interesting to note that the ten counties that refused to pick up the \$48,000 budget for the RPD spent an aggregate of \$77,501.09 for counsel for indigents during the 1979-80 fiscal year.³³ While it is easy to say in retrospect that those counties ought to have funded the program, there was no way that the terrific increase in defense costs could have been foreseen. The counties involved gambled that they would be fortunate enough to keep costs of assigned counsel below the amount they would have paid for RPD representation. Had the county officials been aware of the implications of Argersinger and the growing court caseload, the RPD may have been retained.

After the demise of the RPD Burleigh County sought a replacement system to maintain a ceiling on indigent defense costs. Burleigh County instituted a system of contracting with private law firms for provision of legal services. This system will be discussed in more detail later but it should be noted here that Burleigh County was unwilling to return to ad hoc appointment of counsel for indigents.

Even though the RPD functioned for only about four years North Dakota was fortunate to have had the experience upon which to draw in the future. Now that North Dakota's state government has assumed its rightful share of the expense of counsel for indigents³⁴ it can be assumed that

³³See Table 1, infra, chapter 2.

³⁴H.B. 1060, passed by the legislature in 1981, provides for state assumption of district court costs, including the cost of legal counsel for indigents.

future legislatures will be interested in methods to provide cost control and accountability in indigent defense. Regional defender units may be one possibility that future decision makers will want to look at in depth. Considering the trend of other states going to statewide public defender systems,³⁵ North Dakota may wish to do so sometime in the future. With the state's rural characteristics regional defenders may be the best solution.

³⁵See infra. note 26, Chp. 3.

CHAPTER TWO

RELEVANT FACTS GATHERED IN NORTH DAKOTA

"Get your facts first, and then you can distort them as much as you want." -Mark Twain

"If enough data is collected, anything can be proven by statistical methods." -Williams and Holland's Law

"If the facts do not conform to the theory, they must be disposed of." -Maier's Law

At the outset, the Defense Delivery Project was faced with a lack of solid factual information on legal services to indigents in North Dakota. General impressions of possible areas for investigation were held by the persons involved in getting the project started. The grant application to the LEAA stated as two of the objectives of the project:

- (1) The project will gather information from all counties regarding the present cost, structure, uniformity and quality of legal services to indigent defendants;
- (2) The project will conduct an in-depth, on-site investigation of the above factors in a number of target counties; ...

These objectives were intended to fill a void that had always existed. It was also decided that it would be desirable to conduct surveys to determine the views of the judges and attorneys of the state regarding the status of indigent

defense in North Dakota. In this chapter we will first present data gathered relating to cost and caseload in the state and then provide a review of survey responses.¹

COSTS OF COUNSEL FOR INDIGENTS

It was the desire of those involved with this project to determine, with as much precision as possible, the total amount spent in North Dakota annually for indigent defense. This had never been done before except as projections. It was hoped that several years' totals could be obtained but it proved to be too difficult to collect all of the data. Each county has its own peculiarities in record keeping and it eventually took more than three months to gather just the county totals for the most recent fiscal year.

The following chart lists expenditures by county for the 1979-80 fiscal year and ranks the counties in order of expenditures.²

TABLE 1

<u>COUNTY</u>	<u>1979-80 INDIGENT DEFENSE EXPENDITURES</u>	<u>COUNTY</u>	<u>1979-80 INDIGENT DEFENSE EXPENDITURES</u>
ADAMS	\$ 2,425.25 (31)*	MCINTOSH	\$ 3,442.12 (27)
BARNES	5,446.95 (19)	MCKENZIE	6,302.11 (14)
BENSON	1,674.40 (35)	MCLEAN	6,057.30 (16)
BILLINGS	261.91 (47)	MERCER	2,551.18 (30)
BOTTINEAU	5,304.96 (21)	MORTON	22,855.97 (6)

¹The judges' and attorneys' surveys, plus the breakdown of responses, are reprinted in full in Appendix A&B.

²These figures were provided through the efforts and courtesy of the Auditor of every county in the state. The Defense Delivery Project expresses sincere gratitude to each of them for their assistance.

BOWMAN	\$ 1,447.47 (36)	MOUNTRAIL	\$ 967.55 (39)
BURKE	167.95 (49)	NELSON	5,869.62 (17)
BURLEIGH	34,839.49 (3)	OLIVER	-0- (53)
CASS	114,809.00 (1)	PEMBINA	3,169.81 (28)
CAVALIER	1,855.00 (33)	PIERCE	5,494.50 (18)
DICKEY	3,474.64 (26)	RAMSEY	10,247.46 (11)
DIVIDE	35.20 (52)	RANSOM	7,583.01 (12)
DUNN	951.37 (40)	RENVILLE	466.00 (46)
EDDY	70.00 (51)	RICHLAND	16,386.16 (7)
EMMONS	1,826.59 (34)	ROLETTE	4,307.13 (23)
FOSTER	3,613.23 (25)	SARGENT	792.00 (43)
GOLDEN VALLEY	4,320.10 (22)	SHERIDAN	566.70 (45)
GRAND FORKS	61,612.61 (2)	SIOUX	1,231.40 (38)
GRANT	888.75 (42)	SLOPE	6,207.75 (15)
GRIGGS	246.00 (48)	STARK	23,654.44 (5)
HETTINGER	782.80 (44)	STEELE	2,888.51 (29)
KIDDER	6,683.71 (13)	STUTSMAN	11,605.07 (10)
LAMOURE	909.25 (41)	TOWNER	100.00 (50)
LOGAN	3,958.19 (24)	TRAILL	2,236.55 (32)
MCHENRY	5,086.07 (20)	WALSH	11,807.35 (9)
		WARD	28,820.95 (4)
		WELLS	1,362.33 (37)
		WILLIAMS	14,720.18 (8)

NORTH DAKOTA TOTAL \$464,114.04

*The number in parentheses represents the county rank according to the amount of its expenditures.

The observer will readily see from Table 1 the vast range (0 to \$114,809) of expenditures made by North Dakota counties. Many factors interact to produce the "bottom line" figure spent in each county. Among the influences, direct or indirect, which affect a county's expenditures are: population; population density; crime rate; type of offense; law enforcement; prosecutorial prerogative in charging and plea bargaining; pressure from county commissions; hourly fees paid attorneys; appeals; defense

counsel's attitude and effort; accused's attitudes toward plea bargains or trials; travel required by counsel; support services utilized; judges' interpretations of "indigent", severity in sentencing and attitude toward approval of attorneys' fee vouchers; and the type of defender system utilized. Even this lengthy list of possibilities is not exhaustive of the variables that might alter county spending levels. The effect of some factors may be subtle while others are drastic. Their interaction in limitless combinations produces the wide spectrum of results found. The diversity of North Dakota's counties makes analysis difficult at best. While per capita costs of indigent defense vary greatly from county to county, the per capita cost for the entire state was \$.71 for fiscal year 1979-80.³

TABLE 2
Indigent Defense Costs - Other States

<u>STATE</u>	<u>BUDGET</u>	<u>PER CAPITA COST</u>
ALASKA	\$ 2,900,000	\$7.20
COLORADO	3,558,690	1.33
CONNECTICUT	4,852,045	1.57
DELAWARE	1,400,000	2.40
D.C.	6,105,988	8.72
FLORIDA	15,815,402	1.84
HAWAII	1,471,415	1.64
KENTUCKY	4,900,000	1.40
MARYLAND	7,336,894	1.77
MASSACHUSETTS	8,142,335	1.41
NEVADA	2,933,000	4.44
NEW JERSEY	17,255,371	2.35

³Population estimate from Statistical Abstract of North Dakota 1979, Bureau of Business and Economic Research, University of North Dakota, 1979.

NEW MEXICO	\$ 2,540,000	\$2.10
OHIO	12,972,364	1.21
RHODE ISLAND	1,128,000	1.21
VERMONT	1,153,404	2.41
VIRGINIA	4,668,535	.91
WISCONSIN	8,564,600	1.83
WYOMING	705,734	1.51

As can be observed from comparison of North Dakota's expenditures, North Dakota is very low in total and per capita cost compared to other states.

A telling statistic regarding the uncertainty faced by smaller population counties is their average cost per appointed counsel case. Table 3 presents that information for 46 counties.⁴

TABLE 3

COUNTY	APPOINTED COUNSEL CASES	AVERAGE COST PER CASE
ADAMS	1 (42)*	\$2,425.25
BARNES	16 (17)	340.43
BENSON	4 (28)	418.60
BILLINGS	2 (37)	130.96
BOTTINEAU	14 (19)	359.64
BOWMAN	10 (22)	144.75
BURKE	3 (33)	55.98
BURLEIGH	212 (2)	164.38
CASS	375 (1)	306.16
CAVALIER	10 (22)	185.50

⁴In most instances the number of cases involving appointed counsel was provided by the Clerk of Court. The Defense Delivery Project thanks those who aided in the compilation of these figures. The seven counties not listed in the Table were unable to provide the number of cases involving appointed counsel.

DICKEY	11 (21)	\$ 315.88
DIVIDE	1 (42)	35.20
DUNN	3 (33)	317.12
EDDY	1 (42)	70.00
EMMONS	7 (25)	260.94
GOLDEN VALLEY	4 (28)	1,080.03
GRAND FORKS	173 (3)	356.14
GRIGGS	2 (37)	123.00
HETTINGER	4 (28)	195.70
LOGAN	5 (26)	791.64
MCKENZIE	20 (13)	315.11
MCLEAN	19 (15)	318.81
MERCER	2 (37)	1,275.59
MORTON	64 (7)	357.12
MOUNTRAIL	4 (28)	241.89
NELSON	9 (24)	652.18
OLIVER	-0- (46)	-0-
PEMBINA	19 (15)	166.83
PIERCE	35 (12)	156.99
RAMSEY	130 (4)	78.83
RANSOM	16 (17)	473.94
RENVILLE	2 (37)	233.00
RICHLAND	48 (11)	341.38
ROLETTE	20 (13)	215.36
SARGENT	3 (33)	264.00
SHERIDAN	5 (26)	113.34
SIOUX	3 (33)	410.47
SLOPE	4 (28)	1,551.94
STARK	69 (6)	342.82
STEELE	2 (37)	1,444.26
STUTSMAN	53 (9)	218.96
TOWNER	1 (42)	100.00
TRAILL	12 (20)	186.38
WALSH	60 (8)	196.79
WARD	76 (5)	379.22
WILLIAMS	49 (10)	300.80
46 COUNTY TOTAL	<u>1583</u>	<u>\$ 293.19</u>

*The number in parentheses is the county rank by no. of indigent cases.

Adams, Golden Valley, Logan, Mercer, Nelson, Slope and Steele counties illustrate what can happen to county expenditures when more serious offenses occur in the county. Other small counties had a relatively "easy" year in defense expenses. Most counties have no control over these costs but in smaller counties there can be radical variation in costs from year to year. The average cost per case for the state is not overly high, it is probably below average. For example, it was reported that, "In Wisconsin, July through October 1980, 3,131 attorney vouchers were paid, totaling \$1,127,398.98. This is an average cost per case of \$360.08."⁵

An extreme example of what can happen to a county when a major felony occurs within its boundaries is the experience of Adams County. Adams County had these defense expenditures from 1970-80:⁶

1970	\$ 12.00	1976	\$ 625.00
1971	-0-	1977	84.50
1972	128.76	1978	557.95
1973	125.00	1979	3509.26
1974	1120.00	1980	2425.25
1975	-0-		

Adams County had struggled with these expenses in 1979 and 1980 but no one was prepared for the blow that fell later in 1980. A homicide in late 1979 forced Adams County to foot the bill for prosecution and defense of three individu-

⁵David C. Niblack, "The Statewide Public Defender Program: an Overview and Private Bar Certification Standards," Wisconsin Bar Bulletin, December, 1980.

⁶The years presented are the later year of the fiscal year involved. e.g. 1970 is the fiscal year 1969-70.

als charged in connection with the killing. Through March, 1981 Adams County has paid more than \$102,000, of which nearly \$45,000 has been paid for the legal representation of the defendants.⁷ The county has been forced to borrow \$80,000 and to institute a new three mill levy to cover the costs.⁸ As we shall see later, legislation aimed at correcting this problem has been enacted. It will not, however, remove the possibility of more \$100,000 criminal cases which will have to be paid for by the state. Counties will also still be faced with uncertain expense limits.

The significance of these figures lies in the fact that indigent defense costs cannot be anticipated with any certainty. While a county commission will know whether there will be a need for road improvement or salary increases, they cannot foresee expenses for appointed counsel. That county governments have feared the expense of indigent defense becomes clear from some of the responses received by this project from auditors providing cost data. A sampling of letters received:

"I believe that the 79-80 budget expense is the significant year showing that there is a drastic increase and am sure that this will become more drastic in years to come."

⁷Fargo Forum, Nov. 18, 1980, p. 11, "The county's biggest expense was \$39,668 in legal fees for the two defense lawyers ..." The county has since been ordered to pay \$3,600 in counsel fees and \$1,380 in expert witness fees in connection with a motion to declare a mistrial. The main appeal of the decision is still pending so the county will still face additional expense, according to Betty Svihovec, Adams County Auditor.

⁸Id.

"I feel we have been very fortunate, but anyway the bomb could drop on us, too."

"I am sure our County has been very fortunate in not having any more expenses for this purpose."

"I feel that this study is a very worthwhile project and trust that when your study is completed that relief might be provided for County Governments who are already overburdened with excessive operating costs. Altho I feel that this provision is a worthwhile service in a number of cases, I also feel that the privilege is often abused and that qualifications for entitlement to this service should be further scrutinized in an effort to bring about a more equitable administration of this privileged service."

"I would further like to note that we have a very expensive murder trial coming up in this fiscal year and is going to be a burden to this county."

"Our county has been fortunate in that we have had very few cases where court appointed attorneys have been necessary. We hope it can last, but it does not appear that it will." (All quotes exactly reprinted.)

It becomes clear from these comments that the counties realize that they are playing a game of chance in which they have no control. That the counties, with a limited tax base,⁹ should face this burden is inequitable and has now been recognized as such.

⁹See N.D. CENT. CODE § § 57-15-06 et seq. (Supp. 1979), 11-23-01 et seq. (Supp. 1979).

Since state funding will now be responsible for costs of appointed counsel in cases in district court¹⁰ the counties will be relieved of the fear of a major felony trial expense. That type of expense will still be possible but the cost will be spread over all state taxpayers. Only a change to a public defender or contract defender system would "insure" against the high cost of a major felony defense¹¹ from state or county funds.

Another facet of the difficulty in funding indigent defense is that the costs appear to be rising constantly.

¹⁰H.B. 1060 amended and reenacted N.D. CENT. CODE § 29-07-01.1 to require that the state pay expenses for legal defense of a "needy" person "if the action is prosecuted in district court."

¹¹Even a contract defense system can require appointed counsel in a major case. Cass County, which is served by a contract defender, recently was forced to appoint counsel when the contract defender withdrew due to a conflict of interest. The cost to Cass County for appointed counsel at trial was \$17,650. Fargo Forum, February 10, 1981.

TABLE 4
EXPENDITURES

COUNTY	1977-78	1978-79	1979-80	PERCENT OF INCREASE FROM 77-78 to 79-80
ADAMS	\$ 557.95	\$ 3,509.26	\$ 2,425.25	334.7
BARNES	2,835.61	7,125.19	5,446.95	92.1
BILLINGS	1,033.89	-0-	226.91	-78.1
BURLEIGH	31,900.00	35,861.81	34,839.49	9.2
CASS	62,444.00	165,231.00	114,809.00	83.9
DICKEY	1,880.22	682.40	3,474.64	84.8
DUNN	148.75	357.80	951.37	539.6
GRAND FORKS	48,697.72	51,106.21	61,612.61	26.5
GRANT	1,684.12	2,223.35	888.75	-47.2
KIDDER	1,042.50	466.86	6,683.71	541.1
LAMOURE	1,040.80	119.30	909.25	-12.6
LOGAN	-0-	70.00	3,958.19	
MCHENRY	3,577.67	5,839.44	5,086.07	42.2
MCKENZIE	2,600.00	3,483.80	6,302.11	142.4
MCLEAN	1,548.90	2,148.57	6,057.30	291.1
MERCER	2,326.08	5,884.63	2,551.18	9.7
MORTON	8,070.77	9,113.01	22,855.97	183.2
PEMBINA	9,484.61	3,781.87	3,169.81	-66.6
PIERCE	3,475.99	3,120.58	5,494.50	58.1
RANSOM	2,958.11	1,769.53	7,583.01	156.3

RENVILLE	\$ 107.95	\$ 737.23	\$ 466.00	331.7
ROLLETTE	3,351.33	7,164.34	4,307.13	28.5
SARGENT	1,099.35	951.80	792.00	-28.0
SHERIDAN	613.80	1,042.25	566.70	-7.7
SLOPE	-0-	1,168.44	5,039.31	
STARK	8,586.44	22,701.49	23,654.44	175.5
STUTSMAN	12,389.53	26,435.54	11,605.07	-6.3
TOWNER	2,118.58	928.78	100.00	-95.3
TRAILL	2,104.90	1,570.75	2,236.55	6.3
WALSH	5,470.51	4,416.15	11,807.35	115.8
WARD	23,663.61	28,235.29	28,820.95	21.8
WELLS	1,764.55	2,596.28	1,362.33	-22.8
WILLIAMS	9,030.85	11,303.48	14,720.18	63.0
<u>COUNTY TOTALS</u>	<u>\$257,609.09</u>	<u>\$411,146.43</u>	<u>\$400,804.08</u>	<u>55.6%</u>
LESS CASS COUNTY	\$195,165.09	\$245,915.43	\$285,995.08	46.5%

It can be observed that the larger counties usually show a steady increase. Smaller counties display greater fluctuation but the overall impression from the totals is that expenses are climbing at a rather rapid rate. A rising crime rate, increased population and increased compensation for counsel¹² should combine to make sure these costs continue to rise.

Whether indigent defense is funded by the state or county government, costs will continue to increase. With the advent of state funding should come an interest, from state government, in examining alternative defense systems¹³ which might provide quality legal services and yet hold cost levels down.

The state's share of expenses will be those from district court cases. District court criminal cases in North Dakota are almost universally felony prosecutions. The gravity of these charges requires more time input on defense counsel's behalf and, as a direct result, greater expense for the funding body. Table 5 provides comparisons of county and district court expenses from several North Dakota counties.

¹²In most cases counsel for indigents received \$35 per hour at the times represented in Table 4 since that was the guideline fee. In November of 1980 the North Dakota Judicial Council raised its guideline fee to \$50 per hour from January 1, 1981 to June 30, 1981. It is anticipated that the fee will remain at or near that level.

¹³See, Chp. 3 *infra*.

TABLE 5
1979-80 EXPENDITURES BY COURT

COUNTY	COUNTY COURT	DISTRICT COURT
ADAMS	-0-	\$ 2,425.25 (1)*
BARNES	\$ 1,122.14 (5)*	4,324.81 (11)
BOTTINEAU	929.06 (5)	4,105.90 (9)
BURKE	35.00 (1)	132.95 (2)
DIVIDE	-0-	35.20 (1)
FOSTER	1,954.90	1,658.33
GOLDEN VALLEY	3,826.41 (2)	493.69 (2)
GRAND FORKS	29,039.38	32,573.23
GRIGGS	246.00 (2)	-0-
HETTINGER	200.00 (2)	582.80 (2)
KIDDER	416.10	6,267.61
LOGAN	2,079.86 (4)	1,878.33 (1)
MCKENZIE	1,762.71 (5)	4,539.40 (15)
MCLEAN	1,586.09 (9)	4,471.21 (10)
MORTON	4,836.11 (29)	18,019.86 (35)
NELSON	548.86 (4)	5,120.76 (4)
PEMBINA	1,111.73 (4)	2,058.08 (15)
RAMSEY	5,446.00 (108)	4,801.46 (22)
RANSOM	190.00	7,393.01
RICHLAND	4,117.23 (18)	12,268.93 (29)
ROLLETTE	1,321.03 (8)	2,968.10 (12)
SARGENT	194.00 (1)	598.00 (2)
SHERIDAN	214.70 (2)	352.00 (3)
SIOUX	584.40 (2)	647.00 (1)
SLOPE	1,168.44 (3)	5,039.31 (1)
STARK	17,344.97	6,309.47
STEELE	-0-	2,888.51 (2)
STUTSMAN	4,905.90 (17)	6,699.17 (36)
TOWNER	-0-	100.00 (1)
TRAILL	1,097.50 (8)	1,139.05 (4)

WALSH	\$ 670.99 (28)	\$ 7,136.36 (32)
WELLS	865.60	496.73
WILLIAMS	7,763.83 (41)	6,956.35 (10)
<u>33 COUNTY TOTALS</u>	<u>\$99,578.94</u>	<u>\$154,498.86</u>

% OF TOTAL EXPENDITURES 39.2% 60.8%

District Court expenses include Juvenile Court.

*The numbers in parentheses are the number of cases.

The vast majority of crimes charged in the state are misdemeanors. In calendar year 1979 there were 14,374 misdemeanors filed in county courts.¹⁴ During that same period 879 felonies were filed in the district courts of the state.¹⁵ It must be remembered that only the most serious misdemeanors¹⁶ carry potential for imprisonment which may require appointment of counsel under Rule 44, N.D.R. Crim. P. Nevertheless, it appears that more appointments of counsel are made in county court cases than in district court simply because of the greater caseload. From Table 5, in those counties furnishing caseload data, there were 308 county court cases involving appointed counsel compared with 263 cases in district court. The total cost of those county court appointments was \$49,767.99 and for district court appointments \$99,800.48. Thus it can be calculated that the average cost per case in these cases was \$161.58 in county court and \$379.47 in district court. The higher

¹⁴Source: North Dakota Judicial Council Annual Report 1979.

¹⁵Id.

¹⁶See, N.D. CENT. CODE § 12.1-32-01 for penalties.

cost of district court (felony) representation can be attributed to several factors. Since misdemeanors involve less serious criminal sanctions both defense and prosecution are more likely to agree to a plea agreement. Felony defendants are more likely to demand trial by jury and only felony defendants are entitled to a preliminary hearing.¹⁷ Defense attorneys are more likely to spend more time on a felony case due to these factors and the fact that the client faces a very grave penalty. For these reasons, district court counsel expenses account for slightly more than 60% of total expenditures in these counties.

SURVEY OF NORTH DAKOTA ATTORNEYS

The Defense Delivery Project devised and mailed a questionnaire on indigent defense to 970 attorneys in the state.¹⁸ The response was very good, with 53.7% of the surveys returned. 177 surveys were returned indicating that the respondent lacked significant enough involvement in criminal law practice to complete the survey. Another 344 surveys were returned completed and it can be assumed that these represent the majority of attorneys practicing criminal law in the state.

When asked, "On the whole, do you feel that the present appointment system adequately provides for the active defense of the indigent defendant?", fully one-third of responding attorneys answered "No." Obviously we cannot expect to be served by an ideal system and attorneys are

¹⁷See, N.D.R. Crim. P., Rule 5 (c).

¹⁸The survey instrument and all responses are reprinted in full in Appendix A.

generally regarded as a critical group; however, when that number of attorneys are dissatisfied with the system it cannot be said to be the opinion of a few congenital grippers. It is plain that a significant number of attorneys feel that our appointed counsel system hamstring defense counsel in some fashion. When asked for suggestions to improve the system of appointment of counsel many responses¹⁹ were offered covering many areas but the most common suggestions were "Higher fees" and "Public Defender System." While one is directed at the system structure itself the other attacks the profitability of serving within it.

Lest it be thought that those suggesting increased fees are merely avaricious or self serving, it must be pointed out that these respondents did not say that they wouldn't do a professional job. They were referring to improving the system, not the individual.

In fairness to the call for increased fees, there are valid reasons why it would improve the system. A prime reason is that our most experienced attorneys generally command at least double the hourly fee appointed counsel receive. They either refuse appointment or give younger firm members the responsibility. Even those attorneys willing to accept appointments do not turn much of a profit at it after deduction of overhead. It is a very real concern for an attorney in these times of high inflation that compensation be sufficient to cover expenses and leave enough to live on. The problem perceived by attorneys is that the appointed case at \$35 per hour competes for the attorney's attention with the retained case at \$70 per hour. This provides an impetus to

¹⁹See, responses to question 21 reprinted in Appendix A.

cut corners in indigent defense. At a November meeting the North Dakota Judicial Council recognized this problem and raised its hourly fee guideline to \$50. This was subsequent to the questionnaire return and should alleviate the concerns voiced.

Attorneys do not serve as appointed counsel merely for the compensation received. There is an element of public service involved in agreeing to represent an indigent. More than a quarter of attorneys responding indicated that they had served as assigned counsel without requesting payment for their services. Lawyers will accept fees lower than their customary rates due to this public service consideration but the fees must be reasonably attractive to interest the entire bar. After all, no other profession performing services for government is willing to accept a pay reduction.

Private bar participation in assigned counsel programs appears to be very good. Only 57 attorneys indicated that they had never served as assigned counsel and it can be assumed that lawyers in government service or prosecution make up the bulk of those responses.

When asked whether assigned counsel try more cases to completion than retained counsel very few (17.8%) respondents indicated that assigned counsel tried more cases. Almost half of the responses indicate no perceived difference between assigned and retained counsel in this respect. This indicates very little abuse of the public purse through "letting the meter run" in appointed cases.

Another area of inquiry regarding fees was fee approval.²⁰ 51.5% of responding attorneys stated that their

²⁰Id., questions 7 and 8.

fees had been reduced and 17.5% of those whose fees had been reduced stated they they had had fees cut in more than half of the cases wherein they represented indigents. This subject has been irritating to many attorneys. When attorneys submit their vouchers for payment, an affidavit is signed by the lawyer swearing that the time submitted was actually spent on the case. Judges review these vouchers and when the judge unilaterally cuts the time stated, attorneys feel that their integrity has been attacked. That this situation exists creates animosity between the bench and the bar. Some attorneys have also expressed the feeling that they must please the judge at trial or face fee reductions. That this situation exists poses a danger to the lawyer-client relationship. The American Bar Association has recognized this potentially dangerous situation in its standards on providing defense services. The ABA standard states, "Compensation for assigned counsel should be approved by administrators of assigned-counsel programs."²¹ The commentary to this standard states,

"This standard has been changed to provide that compensation paid to assigned counsel not be subject to judicial approval. The third sentence of the standard, which states that payments should be approved by administrators of assigned-counsel programs, is new. The first two sentences have been rewritten so as to remove references to the

²¹ABA, Standards Relating to the Administration of Criminal Justice, "Providing Defense Services." Standard 5-2.4, (1980).

use of the court's 'discretion' in approving payments for assigned lawyers. These changes were deemed necessary in order to assure independence of assigned counsel from possible judicial control or influence."²²

On the other side of the coin, it must be noted that the survey results indicate that the fee cuts occurring in over half of the cases are probably in a small number of jurisdictions. It is also unlikely that North Dakota's characteristics lend themselves to administrators for assigned counsel programs. The only persons in positions to assess the validity of the vouchers submitted by counsel are the trial judges. Perhaps the most feasible means of alleviating these pressures for North Dakota is the institution of an extra-judicial appeal procedure for review of fee decisions appealed by defense attorneys.

Only about one-fourth of attorneys surveyed stated that they would prefer someone other than the judge to approve vouchers. There is substantial confidence in the judges from the attorneys.

Another area of inquiry in the survey was availability of support services for attorneys representing indigents. The ABA standards state that, "The plan should provide for investigation, expert, and other services necessary to an adequate defense."²³ The survey results²⁴ make it doubtful that such services are uniformly available in the state. The provision of support services, when necessary to an

²²Id.

²³Id. Standard 5-1.4 (1980).

²⁴See, response to question 6 reprinted in Appendix A.

adequate defense, has been found to be constitutionally required.²⁵ North Dakota law appears to provide for support services²⁶ but there is no codification of the entire scheme and it appears that confusion has resulted.

Most attorneys polled felt that appointment of counsel is made early enough to allow adequate investigation and preparation. Some did note that appointment was often made too late to advise the client regarding communications with law enforcement officials. This can result in the defendant waiving important constitutional rights without consultation with an attorney. Overall, however, there appears to be substantial satisfaction with the time of appointment.

The attorneys of the state were asked, "Would you be in favor of a statewide program which instituted guidelines for indigent defense but allowed local option for selection of public defender, contract defender, or appointed counsel systems?" 77.5% of attorneys responding answered "Yes" to this question. Thus it appears that there is very strong support within the bar for this sort of program. Since there is already local option for selection of a defense system, it appears that the core consideration of respondents is the institution of statewide guidelines for indigent defense. Apparently the vast majority of responding attorneys recognize the need for uniformity in application of the various salient points of indigent defense.

²⁵United States v Chavis, 476 F. 2d 1137 (D.C. Cir. 1973).

²⁶N.D.C.C. § § 29-07-01.1, 29-20-05, 31-01-19; N.D.R. Crim. P. 28 (a), 17 (b); N.D.R.Ev. 706 (a); Baer v O'Keefe 235 NW 2d 885 (N.D. 1975).

SURVEY OF NORTH DAKOTA JUDGES

A survey instrument was designed for all county and district court judges in North Dakota.²⁷ This questionnaire is very similar to the one sent to attorneys and it was sent to all 76 county and district court judges. Sixty surveys were completed and returned, being a very high (78.9%) rate of return. It was very gratifying to see so many of the judges display enough interest to interrupt their busy schedules to complete the survey.

North Dakota enjoys a well experienced judiciary. In response to the question "How many years have you presided in that court?", the average answer was 7.85 years and the mean was 6 years. Nine judges indicated 15 years or more of service in their court. These judges were, of course, also experienced in other courts and in practice prior to taking the bench in their present capacities.

The judges were polled on whether or not they use standardized criteria in determining indigency. The purpose of this question is to discover whether defendants across the state have equal opportunity for appointment of counsel through uniform application of eligibility criteria. The majority of judges (56%) answered that they use no standardized criteria. Quite plainly, there is no uniformity. In 1976 the North Dakota Supreme Court adopted standards of indigency determination from Chapter 11 of the Guidelines of the Administrative Office of the United States Courts;²⁸ however, the survey response indicates that those standards

²⁷The survey and the responses are reproduced in full in Appendix B.

²⁸See, State v Jensen, 241 N.W. 2d 557,561, (N.D. 1976).

provide little guidance or are not followed. The NLADA National Study Commission,²⁹ the National Advisory Commission³⁰ and the American Bar Association³¹ have all taken positions urging adoption of uniform criteria for determining indigency. Without uniform application an accused may receive the assistance of counsel in one county and be denied the same opportunity in another county. This could mean that the amount of justice an individual is entitled to depends solely on where he happens to be charged with a crime. Obviously we cannot expect to dispense justice in perfect measure but it would certainly be an improvement to adopt a guide for all judges to use and to distribute to the courts a standardized eligibility questionnaire to allow all judges to consider the same information.

Contained in the fourth question are alternatives used by judges to select the attorneys who will represent the indigent defendants. Various commentators have pointed out problems in the selection of counsel such as "cronyism" or refusing to appoint counsel who "argue too much" on behalf of their clients.³² This question was designed to determine how counsel is chosen in North Dakota courts. A wide range

²⁹Guidelines for Legal Defense Systems in the United States, Report of the National Study Commission on Defense Services, National Legal Aid & Defender Association, 1976.

³⁰National Advisory Commission on Criminal Justice Standards & Goals, Task Force on Courts, Courts, 1973.

³¹Providing Defense Services, American Bar Association Standards Relating to the Administration of Criminal Justice, American Bar Association, (1980).

³²See, The Other Face of Justice, NLADA, 1973; Guidelines for Legal Defense Systems in the United States, supra. note 28 and Providing Defense Services, supra. note 30.

of responses were recorded. In addition to positive responses to each of the five answers listed, fourteen other answers were given. The most common answer was, "From a list of names of all practicing attorneys in your jurisdiction", with twelve positive responses. Eleven judges checked, "From a list of names of attorneys you personally select." Many of the other responses dealt with contract defense systems where the judge has little or no choice in selection of counsel. The impression from this is, again, lack of uniformity but it must be remembered that North Dakota counties operate under a broad spectrum of circumstances. While some counties have no attorneys interested in, or even eligible for, appointments, other counties have many who are eager for appointment. While analysis of the responses here is difficult, the range of methods reported seems to indicate that judges make their choices with local conditions in mind.

The fifth question seeks an answer to the question of whether judges screen attorneys for competence prior to appointment. Even of the judges responding "yes", only one went on to say "must have enough experience." While it is probable that some respondents would bear competency in mind anyway, the high proportion of negative answers seems to bear out the old saw that court appointments can be a practice ground for inexperienced attorneys. This can serve the indigent defendant to great disadvantage and some state observers have stated that young attorneys should be appointed as co-counsel until they are capable enough to serve independently.

To determine whether a strict rotation system of appointment exists is the goal of question six. The strong

majority of judges indicated that it does not, but once again, this may be a response to local conditions. It may also show that judges exercise judgment in appointing counsel according to the potential difficulty of the particular case. That most judges exercise personal discretion in selection of counsel is indicated but it cannot be said from this that the selection process is abused.

Question seven attempts to ascertain whether courts have developed any coordination in their assignment methods and whether more rural areas commonly share lists of counsel available locally. The vast majority of responses (80%) indicate no sharing of counsel lists. It appears that the courts are left to their own initiative to seek out counsel and develop their own attorney rosters. Compilation of available counsel rosters may prove particularly useful in those counties experiencing difficulty in finding attorneys willing and able to serve.

The problem of a lack of qualified counsel within the jurisdiction is addressed in question eight. While it does not appear to be a widespread problem, seven judges indicated a lack of counsel in their area. This undoubtedly creates a substantial hardship for those courts and judges. Solutions could take several forms but it will suffice here to note that those courts are on their own to deal with this difficulty.

Question nine tries to determine the success of the courts in finding counsel. None of the judges polled had been unsuccessful in finding counsel as demanded by defendants. This does not speak of the time and expense that some have experienced in trying to find counsel for indigents. Such a problem could serve as impetus for forced plea bar-

gaining or subtle coercion of guilty pleas. That is not shown by the survey but is a situation to be guarded against.

The tenth question is intended to gauge the judges' perception of the percentage of all defendants appearing without counsel, both in felony and misdemeanor cases. Once again a wide range of responses was received, going from 0 to 95% in felonies. Judges estimated that defendants waived counsel, on the average, in 14.43% of felony cases and 69.67% of misdemeanor cases. The mean responses in those categories were 5% and 80%, respectively. That felony defendants would waive counsel less frequently is understandable, as one's desire to have the advice of counsel would increase in proportion to the gravity of the impending sentence. Assuming the averages to be correct, it is interesting to speculate about what would happen to defense costs if all eligible defendants chose to exercise their right to appointed counsel. It also bears mention that those who complain that such costs are too high and that "free" attorneys are furnished to "criminals" too often should actually feel fortunate that those costs are as low as they are at present.

Question eleven intends to gain the opinion of the judges as to when counsel should be appointed rather than asking when the law mandates appointment. Nearly 80% of those responding felt that counsel should be appointed at the first appearance of the defendant in court. Probably not coincidentally, this response conforms to the requirement of Rule 44 of the North Dakota Rules of Criminal Procedure.

Question twelve tries to determine whether there is uniformity in the hourly fee paid appointed counsel. Almost

unanimously, the responses followed the guidelines promulgated by the Judicial Council in 1978; \$35 per hour. Given the adherence to the Judicial Council guidelines, the \$50 per hour rate approved by the Judicial Council beginning January 1, 1980 should show a marked increase in defense costs.

Questions thirteen and fourteen both address an area of complaint from defense attorneys, availability of funds for investigation or expert witnesses. The responses indicate that most jurisdictions do not budget for such expenses and that most judges have never approved these fees. We don't know how often requests for these funds are made.

Question fifteen asks whether there is a ceiling on attorney fees without prior court approval. In this situation the Judicial Council guidelines of 1978 aren't followed by many. Most judges said there is no ceiling and even of those saying yes, only five cited the \$500 figure used by the Judicial Council.

Question sixteen was intended to find the judges' ratings of attorneys overall, either retained or appointed. Attorneys received favorable grades in both categories and the average differed only slightly, being 7.62 for retained counsel and 7.54 for assigned counsel. This indicates that judges perceive virtually no difference in the quality of representation furnished by appointed counsel.

The point of question seventeen is to determine whether judges feel, as some vocal observers do, that assigned counsel go through trial more or less often than retained counsel. The responses cover the range of options but the most common response indicates no discernable difference. Averaging the responses would indicate that very little

difference is perceived overall. It seems that judges do not view counsel's "employer" as a prime motivating factor in deciding whether a case merits going to trial.

Question eighteen attempts to assess the amount of court time consumed in administering assigned counsel programs. Of the answers capable of numerical analysis, the responses tell us that judges average 1.2 hours per week and clerks average 1.3 hours per week on assigned counsel administration. While this does not sound like a great burden, it does add to judges' otherwise busy schedules and several courts expend a great deal more time than the average. One judge reports that he spends 6 hours weekly in this area. This is a waste of a limited resource - judicial time. Solution of the problem will probably require outside assistance.

The nineteenth question tackles an area that has been the source of much frustration and complaint from attorneys. Fee cuts by trial judges have irritated many defense attorneys so much that they no longer accept appointments. Many considerations are involved on both sides of this conflict. Bearing this in mind, this question hopes to determine how widespread this practice is. Of the judges responding, 43% stated that they had never rejected or reduced a voucher submitted by assigned counsel. It could be assumed that some of these responses came from judges in jurisdictions utilizing contract defenders, as those judges no longer approve vouchers of counsel. Nevertheless, a number of judges do not cut fees submitted. The second portion of the question attempts to determine how common the cuts are among the judges who have made cuts. Of the judges expressing a number of cases, the average is 6.2 cases with fees cut. This

ranges over a period of 5 years, so by their own estimation judges average slightly over one incidence per year of reduction of vouchers. It bears mention that one judge answered by saying that he cut fees in 75% of his cases. While this was an extreme example, the active mind will readily observe that this attitude ultimately injures the indigent defendant and therefore weakens the justice system. This attitude does not appear to be widespread but it does present a problem of concern. Perhaps an effective, accessible review panel would serve to alleviate the difficulty and ease friction existing between the bench and bar.

Question twenty investigates attitudes toward a coordinated assigned counsel system. The American Bar Association guidelines dictate that only this type of system or a public defender system is acceptable. The survey results don't show great support for such an option. Reasons given for disfavoring such a system vary but many indicated that the expense would outweigh the benefit derived.

Response to question twenty-one was much more favorable. Seventy-six percent of the judges expressing an opinion would favor a statewide program to institute guidelines for indigent defense and yet allow local option for selection of the system of providing defense services. One responding judge answered yes and went on to point out, "North Dakota's needs vary from county to county. System must retain flexibility." This succinct statement outlines a primary consideration for those national observers advocating statewide defender systems. The varying needs and attitudes within the state, as well as geographical considerations, dictate moderation in attempting to restructure defense delivery. Local option with centralized guidance seems to be acceptable to the state's judiciary.

Question twenty-two indicates that most judges are satisfied with our present system of appointment of counsel. However, a substantial number of respondents indicated dissatisfaction with the system. This is surprising, in view of the general judicial support for procedures which they work with and are familiar with.

The result found in question twenty-three may be startling to some. Rule 44 of North Dakota's Rules of Criminal Procedure dictates that counsel must be appointed for an indigent defendant "unless the magistrate has determined that sentence upon conviction will not include imprisonment." This is a codification of the constitutional requirement recognized by the U.S. Supreme Court in Argersinger v Hamlin, 407 U.S. 25 (1972). Rule 44 places the trial judge between competing considerations. On one hand, the judge must consider enforcement of our criminal laws and penalties. On the other hand, judges are acutely aware of the limited funds in the county budgets to pay the cost of indigent defense counsel. A number of judges indicated that they have, on at least one occasion, decided not to impose a sentence of imprisonment. Judges cannot be said to be at fault in this situation as it is not of their creation. Establishing a public defender or contract system would remove the consideration of expense and allow the judges freedom to enforce criminal penalties without that conflict. Those who feel that defender systems solely benefit defendants may find this point to be of interest.

Question twenty-four once again attempts to determine the common practice of North Dakota's courts. The ABA standards on providing defense services state that, "No waiver of counsel should be accepted unless it is in writing

and of record."³³ The ABA committee commentary to this section explains the requirement thus,

"The Supreme Court has held that every reasonable presumption will be indulged against the waiver of constitutional rights. *Johnson v Zerbst*, 304 U.S. 458, 464 (1938). In the absence of a record of offer and waiver, the presumption is that the offer was not made and that there was no waiver. *Carnley v Cochran*, 369 U.S. 506, 513-17 (1962). In recognition of these requirements, the recently adopted plans require a written waiver to be included in the record for a waiver to be effective. The requirement that waiver be made in writing and entered in the record is an important step in minimizing postconviction dispute over the matter of waiver."³⁴

While this commentary does not satisfactorily explain why entering the waiver on the record in open court is insufficient, it does make clear that the ABA feels that written waiver is mandatory. North Dakota's Supreme Court has not seen fit to require a written waiver. In *State v Heasley*, 180 NW 2d 242 (1970), the Court followed South Dakota's Supreme Court in stating, "To be effective, the waiver must be made voluntarily and intelligently by a competent mind." It appears that North Dakota courts follow this guide but do not generally require written waiver, as few judges respond-

³³Supra., note 30 at Standard 5-7.3.

³⁴Id.

ed positively to this query. Requiring written waiver would seem to be the better practice and would as the ABA notes, serve as a bar to appeals of the question.

Question twenty-five is, again, based on the ABA standards. The ABA dictates that, "Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond."³⁵ The commentary to this section indicates that there are two basic reasons for this suggestion. First, where posting bond is viewed as precluding eligibility with disregard to the source of the bail money, the cash may have come from someone not obligated to provide counsel for the defendant. Second, but more significantly, considering the ability to post bond as precluding eligibility may place the defendant in a dilemma. The defendant may be forced to choose between being at liberty pending trial and having the assistance of counsel. As stated in the commentary, "Since the defendant's liberty prior to trial often may be essential to the preparation of his defense, placing him in this dilemma may be a denial of his right to an effective defense."³⁶ From the results of our survey, it appears that most of our judges have adopted the ABA view. It may be necessary to make this approach uniform by rule to make certain that defendants are afforded the same opportunity in all jurisdictions. While it is important to carefully screen applicants for appointed counsel, such screening should not force defendants to choose between legal rights, as in this situation.

³⁵Id., standard 5-6.1.

³⁶Id.

Questions twenty-six and twenty-seven were intended to find out whether our state's judges would prefer to wash their hands of the problems associated with appointed counsel systems by disassociating themselves from determining indigency and approving appointed counsel fees. Several advisory committee members, in preparing the questionnaire, felt that the judges would respond heavily in favor of putting these responsibilities off to someone else. The results show a very different attitude. Four out of five judges answered that they would not prefer to have someone else assume these responsibilities. It can be assumed that this is a recognition on the judge's part that no one else is in a position to perform these tasks. The ABA standard in this area states that, "The selection of lawyers for specific cases should not normally be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender and assigned counsel programs."³⁷ Several reasons for this requirement exist, related mostly to the appearance and the reality of judicial control of defense counsel. However, at present, North Dakota's justice system has no machinery to lift these duties from the shoulders of the judiciary. Drastic and costly structural changes would have to be made to accomplish the ABA goal. Such changes are not favored by the judges, according to the survey results.

The final survey question asks for judges' opinions as to the percentage of attorneys in their area who accept court appointed case work. The responses ranged from 0 to 100%, showing vast differences from county to county. The

³⁷Id., standard 5-1.3.

average of the responses given was 53.7%. Using this as a guide, it seems that the involvement of the bar is rather limited in defense of indigents. In assessing the percentage of attorneys involved, reference should also be made to the results of the survey of attorneys.

The results are reported as objectively as possible. Expressions of supposed reasons for responses represent "best guesses" only, as it would be impossible to state all reasons for the considerations involved in assessing responses. The judicial system involves such a range of intellectual and environmental factors that this survey attempts merely to report findings and draw some conclusions for guidance.

CONCLUSIONS DRAWN FROM INFORMATION GATHERED IN NORTH DAKOTA

1. The cost of indigent legal defense in North Dakota has been increasing rapidly in recent years. There is good reason to expect the trend to continue.
2. North Dakota's indigent legal defense expenditures are very low when compared to other states, both in terms of total cost and per capita cost.
3. North Dakota counties have been burdened, in some cases severely, by being required to fund the defense of indigents.
4. State assumption of the cost of indigent legal representation in the district courts will ease a troublesome problem of the counties but it is not known whether the amount spent will be affected by the change.
5. There is presently a significant lack of information about indigent legal defense cost and caseload. This situation must be corrected to permit accurate projection of

cost for budgeting and other legislative consideration as well as to enable equitable allocation of funds.

6. Counties with larger populations can accomplish savings through institution of contract defense systems. Such systems can also insure against the great expense of defending an accused in a trial of a major felony. Such systems should be encouraged and utilized by the state government when feasible.

7. Cases prosecuted in district court are not as numerous as those in county court but they are more costly in aggregate and are potentially the most expensive in any single case.

8. Strict rotation of assignments among available attorneys is not generally followed.

9. A few counties do not have a sufficient number of attorneys to serve as appointed counsel.

10. There are no general requirements to serve as counsel for indigents other than a license to practice law in the state.

11. There is very little difference perceived in the performance of retained and appointed counsel.

12. Support services such as investigators and expert witnesses are rarely used and there appears to be confusion about the availability of such services.

13. North Dakota courts spend a significant amount of time in administration of assigned counsel programs.

14. Most North Dakota judges and attorneys favor local option in selecting a defense program. There is wide support for institution of statewide guidelines for indigent defense.

15. More than one quarter of judges and one third of

attorneys expressed dissatisfaction with the appointed counsel system presently used.

16. Most judges and attorneys would prefer that the trial court judge continue to make appointments and approve vouchers.

17. More than half of the attorneys polled had had appointed counsel fees reduced in prior appearances. Fees were a common complaint of attorneys.

CHAPTER THREE

Since the Supreme Court decision in Argersinger a wealth of literature has issued forth from various groups and commentators. The approaches to indigent defense are many and varied. It is necessary to review various standards and plans to determine whether North Dakota could benefit from introduction of a similar scheme.

The American Bar Association's monumental effort, Standards Relating to the Administration of Criminal Justice,¹ includes a chapter on "Providing Defense Services." These standards are the product of some of the finest legal minds in the country and are the result of years of effort, including numerous drafts and revisions. These standards are not a panacea but they do represent goals which the ABA believes should be met by all states.

The ABA standards provide, among other things, a standard of eligibility,² standards for waiver of the right to counsel,³ standards on professional independence,⁴ a standard on funding sources,⁵ a standard for prompt provision of counsel,⁶ and a standard for providing supporting services

¹American Bar Association, 1980. Published by Little Brown & Company, Boston, Massachusetts.

²Id., Standard 5-6.1.

³Id., Standards 5-7.2, 5-7.3.

⁴Id., Standard 5-1.3.

⁵Id., Standard 5-1.5.

⁶Id., Standard 5-5.1.

and training for attorneys.⁷ The relevant ABA standard is more progressive than the Argersinger decision and provides that, "(c)ounsel should be provided in all criminal proceedings for offenses punishable by imprisonment..."⁸ (emphasis added). This also goes beyond North Dakota law⁹ and would require appointment of counsel for indigents not waiving counsel in all prosecutions of criminal charges designated as a Class B misdemeanor or above.¹⁰ The advantage of such a rule is that the trial judge would not have to decide the punishment prior to trial, possibly prejudicing himself in the process. The disadvantage would be an increase in the number of appointments, thus higher cost which may influence funding sources to pressure judges who, in turn, may pressure defendants into waiver of counsel or guilty pleas in consideration of a reduced penalty.

A very significant ABA standard provides that, "The legal representation plan for each jurisdiction should provide for the services of a full time defender organization and coordinated assigned-counsel system involving substantial

⁷Id., Standard 5-1.4.

⁸Id., Standard 5-4.1.

⁹Rule 44, N.D.R. Crim. P. provides that counsel must be provided, "...unless the magistrate has determined that sentence upon conviction will not include imprisonment."

¹⁰N.D.C.C. § 12.1-32-01 provides for possible imprisonment in all felonies and misdemeanors. Even an infraction can be punishable by imprisonment if within one year of conviction of a similar offense.

participation of the private bar."¹¹ Public defender systems, either statewide or local are favored by all contemporary authorities. The National Legal Aid and Defender Association recommends that, "(a) full time defender organization should be available for all communities... ." ¹² The National Advisory Commission has issued standards stating that, "(s)ervices of a full time public defender organization and a coordinated assigned counsel system involving substantial participation of the private bar should be available in each jurisdiction."¹³ The Model Public Defender Act would mandate that each state provide for public defender representation statewide.¹⁴

In addition to nationwide mandates, North Dakota has been the target of individual studies recommending institution of a public defender system. The North Dakota Commission on Criminal Justice Standards and Goals echoed the NAC recommendation in stating, "(s)ervices of a full time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction to supply attorney services to indigents accused of crime."¹⁵ A comprehensive study published by the National Center for

¹¹Supra. note 1, Standard 5-1.2.

¹²NLADA, Standards for Defender Services 2 (a).

¹³National Advisory Commission on Criminal Justice Standards & Goals, Task Force on Courts, Courts 13.5, 1973, Washington, D.C.

¹⁴National Conference of Commissioners on Uniform State Laws, Model Public Defender Act § 10 (a).

¹⁵North Dakota Criminal Justice Commission, Standard 12.4 (1975).

Defense Management in 1977¹⁶ recommended adoption of a defender system as described by the North Dakota Criminal Justice Commission Standard.

The National Center for Defense Management study recommended that, "... a state defender administer the statewide defender program and be responsible for the representation of indigents entitled to the appointment of counsel throughout the state."¹⁷ This study then went on to describe in detail how the system was to be set up. The plan envisioned a state defender office in the Capitol and a defender office in each of the state's four largest cities. There was also provision in the plan for representation of indigents by the private bar and for contracting with part time defenders in areas that the defender offices couldn't cover. A detailed cost breakdown included in the report estimated the cost to the state for the system at \$943,143 for the first year.¹⁸ Due to several factors, not the least of which is inflation, that projection would have to be raised considerably to institute the program at this time.

The biggest obstacle facing successful legislative passage of a statewide defender program at this time is the cost of the system. The 1973, 1975, 1977 and 1979 legislatures all rejected proposed defender system legislation. The 1981 legislature was more cost conscious than recent legislative assemblies and the primary effort of the bar and judiciary was passage of the "County Courts Bill." That

¹⁶Systems Development Study for the State of North Dakota, National Center for Defense Management, Washington, D.C. (1977).

¹⁷Id. at 25.

¹⁸Id. at 47.

bill provided for state funding of indigent defense at the district court level with a cost of \$937,000 for the biennium.¹⁹ Since a fully state funded statewide defender would probably double the expenditures of state government²⁰ and since the legislature has just agreed to fund the portion of defense costs it has assumed in this time of budget costs, a defender system bill was thought to be doomed.

The cost of a statewide defender system for North Dakota in 1981 would depend on a large number of variables but comparison may prove helpful. The state of Wyoming is a larger state than North Dakota but has a smaller population.²¹ Wyoming's State Public Defender budget for the 1979-80 biennium was \$1,411,469.²² For the 1981-82 biennium the Wyoming defender has been appropriated \$2,280,839.²³ On this budget the Wyoming State Public Defender operates 15 field offices and an administrative office. The system has 23 staff attorneys and handled 2,885 new cases during 1980 from felonies to municipal court. The two states are fairly comparable.

¹⁹H.B. 1060, H.B. 1038, Forty-seventh Legislative Assembly of North Dakota.

²⁰Of course, it could also eliminate the cost to counties.

²¹Wyoming's land area is 97,203 square miles versus North Dakota's area of 69,273 square miles. The population of Wyoming in 1979 was estimated at 450,000 while North Dakota's 1979 population was estimated to be 657,000. Source, 1981 Information Please Almanac, Simon & Schuster.

²²Source: Wyoming Public Defender Office.

²³Id.

Assuming a 20 percent increase in North Dakota expenditures for 1981, North Dakota will spend about \$600,000 compared to Wyoming's \$1.1 million. It is apparent that a public defender system is considerably more expensive than an assigned counsel approach for a state with a population similar to North Dakota's.

Although the time may not be ripe for institution of a statewide public defender, localities using a public defender may realize benefits. Stark County is in the process of starting such a system. The use of a full time defense attorney barred from private practice offers advantages pointed out by the ABA and other observers. Counties would also be insured against the devastating cost of a major felony trial. Some of North Dakota's larger counties should investigate the possibility of a public defender system.

Another factor in funding a statewide defender system is the inclusion of the cost of starting up. Many one-time expenses such as office furnishings, equipment and library costs would balloon the initial expense. Upkeep and replacement in later years would be much lower. Nevertheless, the initial cost is a major stumbling block to instituting a system.

One means of avoiding the cost of equipment, office space, libraries and other public defender expense is the employment of a contract defender system. Although the ABA, NLADA and NAC reject the approach it is being utilized in many jurisdictions. The reason contract defense is not favored is the fact that the contract attorney is paid a set amount monthly for indigent defense work and is free to accept private clients. It is believed that this causes the attorney to render as little service as possible to indigent

clients in order to increase profits by spending more time on private clientele. This has not been reported to be the case in North Dakota. It has also been observed that a private practitioner will obtain the contract for defense and then hire young legal talent for a lesser amount in order to turn himself a profit without being involved in the defense work himself.

Burleigh and Cass Counties in North Dakota have been using contract defense services for indigents for some time. The Burleigh County system uses the services of three separate law firms which virtually eliminates potential conflict of interest situations.²⁴ It also serves as an incentive for the contract attorneys to render quality legal services to clients because their performance can be evaluated against the other attorneys by the judges. Burleigh County's system is well conceived and the county has been very fortunate to be served by very capable counsel under contract.

During fiscal year 1979-80 there were 1,025 criminal complaints filed in Burleigh County Court. The contract defense attorneys were appointed to represent 212 of those defendants. 172 defendants were bound over to district court on felony charges and 102 of those defendants were represented by contract counsel. Only 38 felony defendants were represented by retained counsel. Thus Burleigh County shows 59.3% of all felony defendants were represented by appointed counsel and 72.9% of all felony defendants desiring the assistance of counsel were indigent. The 110 misdemeanor

²⁴Cass County recently had to expend additional sums for defense when the contract defender was disqualified due to a conflict. Supra. Chapter 2, note 11.

defendants represented by contract defenders were undoubtedly faced with the more serious misdemeanor charges, requiring more attorney time. The 212 defendants represented under contract cost Burleigh County an average of \$141.51 per case, much lower than the statewide average cost per case of \$293.19.²⁵ Even though the contract attorneys received an increase in compensation for 1981, Burleigh County will realize a substantial savings over the cost of an assigned counsel system. The county is also insulated against the cost of a major trial such as Adams County faced. The contract defense system in Burleigh County has functioned very well and enjoys the support of the local bar and judiciary.

Even though contract defense systems are not favored by the national authorities, there is no compelling reason to recommend abandonment of the concept in North Dakota. North Dakota's small bar association makes the performance of contract counsel visible. An attorney shirking responsibilities would quickly be recognized. Contrary to the view of authorities, assigned counsel systems would conceal dereliction of duty more effectively than a contract system in North Dakota. There is also a good basis for an adequate screening process in selection of contract defense counsel. The greatest pitfall to be avoided in North Dakota is the awarding of the defense contract solely on the basis of low bid. The attorneys to serve as contract counsel should be selected on the basis of the quality of legal services to be rendered. A screening committee with substantial input from the local bar could ably perform this function since the attorneys in any locality are familiar with one another and

²⁵Chapter 2, Table 3, supra.

can assess legal talent and integrity. These considerations combined with good planning of system structure should produce an indigent defense alternative free from the problems feared by those rejecting contract defense systems.

Assigned counsel programs have traditionally been used most extensively, both nationally and statewide. Although the current trend is to drop such systems in favor of public defender structures,²⁶ the ABA has recognized the value of assigned counsel systems in maintaining involvement of the private bar.²⁷ There is also a very practical reason for retention of assigned counsel programs in North Dakota. Only 12 North Dakota counties had more than 20 cases involving appointed counsel last year and only 21 counties had more than 10 cases.²⁸ With so many counties with very low caseloads even regional defender systems may be impractical in some areas. Since ad hoc assignment of counsel has historically functioned well in North Dakota the system should be retained where appropriate.

A defense system combining assigned counsel and a public or contract defender may also prove useful in some counties. This would allow a defender system to maintain the interest and involvement of the private bar in indigent defense. However, a combined defense program may prove to be slightly more costly than other options.

Whatever defense system is selected, it is believed

²⁶See, Guidelines for Legal Defense Systems in the United States, supra. Chapter 1, note 11 and The Other Face of Justice, supra. Chapter 1, note 18.

²⁷Supra. note 1. See commentary to Standard 5-1.2.

²⁸Chapter 2, Table 3, supra.

that the choice should be left to each locality. Local and regional factors so pervade the choice that no one in state government could adequately assess alternatives for each county. Some counties may choose to join together for defender programs but, at this time, they are best equipped to make that choice. However, since the state will now fund indigent defense in district court it will become the responsibility of state government to make certain that state tax revenues are wisely spent. Thus, it will be necessary to devise a means for the state to monitor and review or approve state funded defense plans.

The ABA standards suggest a governing body for indigent defense structures. Those standards state:

"Boards of trustees should have the power to establish general policy for the operation of the defender and assigned-counsel programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction."²⁹

The Advisory Committee of the Defense Delivery Project has adopted a similar posture. It is proposed that an Indigent Defense Commission for North Dakota be instituted. The functions proposed for this Commission are discussed in the following chapter.

²⁹ABA Standard 5-1.3, supra. note 1.

CHAPTER FOUR

RULES PROPOSED FOR NORTH DAKOTA

In this chapter are presented the rules approved by the Advisory Committee of the Defense Delivery Project for submission to the Supreme Court of North Dakota. Commentary accompanies the rules. It is hoped that these rules will be adopted by the Supreme Court.

RULE 1. PURPOSE

It is the policy of the State of North Dakota and its courts to provide the constitutional guarantees of the right to counsel and equal access to the courts to all persons in criminal cases and to provide adequate defense services for indigent persons accused of crime to assure equal justice to all accused persons.

The first rule is simply a statement of purpose for the rules proposal. It is intended to serve as a guiding principle in application of the following rules to make clear that the primary consideration should always be the right to counsel rather than cost or any other factor.

RULE 2. NORTH DAKOTA INDIGENT DEFENSE COMMISSION

(a) There is hereby established, within the Judicial branch, an Indigent Defense Commission consisting of seven members, one representative of county government, one non-lawyer and five persons licensed to practice law in North Dakota. The Chief Justice of the Supreme Court shall appoint the Commission members from nominations submitted by the Board of Governors of the State Bar Association of North Dakota. The state court administrator shall serve as non-voting executive secretary of the Commission.

- (b) The members of the Commission shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties as members of the Commission from funds available to the Commission.
- (c) Of the members initially appointed, two (2) shall be appointed for one year, two (2) for two years, and three (3) for three years. Thereafter, each appointment shall be for a three-year term.
- (d) No member shall serve more than two successive three-year terms. Each member shall serve until his successor is appointed.

The second rule establishes and defines the membership of the North Dakota Indigent Defense Commission. Counties and the public are to be represented on the Commission because their views are to be considered. As the ABA recommended, the majority of the Commissioners are to be persons licensed to practice law in North Dakota. Although the ABA recommended that no judges serve on the governing body, their membership is not precluded here. The Commission members are to be appointed by the Chief Justice since the Supreme Court heads the unified judicial system. Commissioners are to be nominated by the State Bar Association because practicing attorneys will be most aware of problems in indigent defense and because they are directly affected by Commission action. Criticism may be voiced that the Commission is overloaded with lawyers but the Commissioners will need to possess special expertise to set policy and review attorney fees. Only law trained persons can ably determine whether an attorney's expenditure of time or money is reasonable.

The remainder of the rule sets the Commission positions up in rotating terms, limits the terms a member may serve and provides that Commission members receive no compensation. It was hoped that per diem payment could be provided but no funds are available for that purpose.

Rule three will be discussed one section at a time due to its length.

RULE 3. POWERS AND DUTIES

The Commission shall have the following powers and duties:

(a) To collect data regarding indigent defense cost and caseload from all courts of the state and to prepare an annual report and recommended biennial budget for the Commission and for state funded indigent defense costs for submission to the Supreme Court.

The Commission is given the responsibility to gather data on indigent defense cost and caseload statewide because this information is necessary, both now and in the future. At present it will be of assistance to the Supreme Court, where responsibility has fallen to determine the legislative appropriation needed to fund indigent defense in district courts. In the future this information will be useful for legislative consideration.

(b) To provide planning and technical assistance to counties requesting assistance in facilitating indigent defense programs.

Since the Commission has no staff it will be able to provide little assistance in terms of staff time. The planning provided by the Commission would have to take the form of draft guidelines or suggested contract forms for those

counties needing this assistance.

(c) To recommend to the Supreme Court rules regarding indigent defense.

Since any person can submit proposed rules to the Supreme Court of North Dakota, this rule is included simply to make clear that the Indigent Defense Commission has the same power as a body.

(d) To review the indigent defense plans submitted by the various jurisdictions and to approve state funded plans.

This power of the Commission makes the Commission responsible for determination of the portion of contract or public defender system expense which the state will assume. The Commission will also review other plans according to such guidelines as the Commission shall establish.

(e) To review decisions on fees and support services as requested. The review procedure may be invoked by request of the state court administrator, county commissions or defense attorneys. The Commission may reduce, increase, or approve fees in the amount certified by the trial judge.

The review procedure established by this rule is intended to remedy a problem existing in a few jurisdictions; namely, attorneys' complaints about fee cuts. The review is intended to be an informal proceeding which binds the parties unless further appeal to the Supreme Court is taken. Setting up a complex, time consuming process would be self

defeating since attorneys value the time needed to go through appeal. The peer review concept in the state appears to be a failure so it is hoped that a simple review will alleviate the problem with fees faced by both judge and attorney and prevent the difficulty from affecting the quality of legal services.

- (f) To employ staff and provide office support as possible within the limits of legislative appropriations.

The provision for employment of staff within the limits of legislative appropriations allows for no staff at present since there is no appropriation. It is included so that, should a future legislature approve funds for staff, it will not be necessary to petition the Supreme Court for a rule change.

- (g) To adopt rules for its operation not inconsistent with these rules.

The Commission is empowered to create its own rules of operation. This is necessary so that it may take care of its internal operation, selection of a chairman and other business without resort to Supreme Court rules.

RULE 4. INDIGENT DEFENSE SYSTEM SUBJECT TO LOCAL OPTION

- (a) The courts of the state shall provide a system for the representation of indigent persons in which the individual is entitled to legal representation under the laws and Constitution of the State of North Dakota and the Constitution of the United States. Each jurisdiction, acting alone or in combination with one or more other jurisdictions, shall provide this representation by:

- (1) Establishing and maintaining an office of public defender;
- (2) Arranging to assign counsel on an equitable basis through a systematic plan;
- (3) Contracting with private attorneys for defense services to indigents; or
- (4) Adopting a combination of these alternatives.

- (b) Each jurisdiction shall submit its plan and any subsequent amendments to the Commission for review. Each state funded plan must be approved by the Commission prior to disbursement of funds.

The considerations discussed in Chapter 3 led to proposed Rule 4. Since all of the indigent defense plans have functioned well in North Dakota, any option or a combined system is acceptable. The choice of a plan is left to the courts of the state, which will presumably make decisions in conjunction with county commissions. The language in the rule also makes clear that courts and counties are free to join together to provide defense services. In fact, such combinations are encouraged and should be investigated by local authorities.

Once localities have selected plans for indigent defense, the Indigent Defense Commission will review them. For any plans in district court involving state funds, Commission approval must be given before state funds are released. It is anticipated that this review will be of consequence in situations involving contract or public defender systems wherein the state must pay a portion of the cost. The standard of review should be whether or not the plan is reasonable in terms of cost and service.

RULE 5. SUPPORT SERVICES

Investigatory, expert, and other services necessary to an adequate defense shall be provided at public expense upon a satisfactory showing of necessity. Counsel for an indigent defendant shall make prior application to the trial court for approval if such expenses are likely to exceed the amount established by the Commission under Rule 7.

This rule is included to make clear that non-attorney services are available to indigent defendants if it is shown that such services are necessary to an adequate defense. There has been confusion about this point and some attorneys have complained that money spent for support services came from their own pockets. The rule also provides that counsel should obtain approval from the trial court if such expenses are likely to exceed a threshold amount established by the Commission from time to time.

Rule 6 establishes a standard for determining indigency. This is essential to promote uniformity in the state and to provide a standard of review in appeals. The rule is discussed here one section at a time.

RULE 6. FINANCIAL ELIGIBILITY DETERMINATIONS,
PARTIAL ELIGIBILITY

- (a) An eligible person is one who is unable, without substantial financial hardship to that person or that person's dependants, to obtain effective representation. The determination of eligibility shall be made by computing the amount of the person's liquid assets and subtracting therefrom the amount needed for the payment of current obligations and for the support of the person and the person's dependents. The person shall be deemed eligible for representation at public expense if the remaining assets are insufficient to cover the anticipated costs of counsel at prevailing rates charged by competent criminal defense counsel in the jurisdiction, including the

cost of such investigatory, expert or other services necessary for effective representation. The person's own assessment of that person's financial ability to obtain effective representation shall be accorded significant consideration.

All of Rule 6 was modeled after the NLADA National Study Commission standard and the subsequent Model Defender Act. In 6 (a) "substantial financial hardship" is used in defining indigency in general terms. The section goes on to state that assets remaining after deducting valid obligations from liquid assets are to be compared to anticipated expense of legal representation. Obviously, more complex situations or serious charges will be more costly and this rule is flexible enough for consideration of circumstances. Since the person requesting counsel is best able to assess his finances, his opinion is to be considered. However, this does not preclude a finding of ineligibility. Obviously, one applying for court appointed counsel believes he cannot afford retained counsel. The fact finder will still have to calculate assets.

- (b) Liquid assets include cash in hand, stocks and bonds, bank accounts, and any other property including equity therein which can be readily converted to cash, however, the person's reasonable equity in a necessary motor vehicle, household furnishings, clothing, and necessary provisions shall not be considered in determining eligibility. Except as otherwise provided by law, representation shall not be denied to any person merely because the person's friends or relatives have resources adequate to retain counsel or because the person has posted or is capable of posting bond.

This section further defines the person's assets and provides a list of "exemptions." It is also made clear that only the applicant's financial resources are to be considered unless the law creates responsibility of another person for the applicant. The ability to post bond is not to be considered in determining eligibility. This is because it is inherently unfair to force an accused to choose between legal representation and freedom pending trial.

- (c) Financial eligibility determinations shall be made by the court.

Eligibility determinations must remain the responsibility of the court because no other "impartial" fact finder exists except in those jurisdictions having court administrators. In those few counties using court administrators the courts could delegate this duty subject to the court's review.

- (d) If the person is determined to be eligible for defense services and if, at the time that the determination is made, the person is able to provide a limited cash contribution toward the cost of that person's defense without imposing a substantial financial hardship upon the person or the person's dependents, such contribution shall be required as a condition of continued representation at public expense. The contribution shall be paid to the appropriating body.

Section (d) provides for a finding of partial eligibility and contribution from the accused. The contribution is to be paid to the county or state depending on where the payment comes from.

- (e) The person's eligibility may be re-evaluated at any time while that person is being represented at public expense. It shall be the duty of the person to inform the court of a change in financial circumstances.

This section allows for re-evaluation of eligibility during representation should the defendant receive a wind-fall or the like.

RULE 7. SETTING OF ATTORNEY'S FEES

- (a) The Judicial Council, the Board of Governors of the State Bar Association of North Dakota and the North Dakota Association of Counties shall each appoint two persons to serve on a special committee on attorney's fees. This six member committee shall formulate and recommend to the Commission an hourly rate of compensation for attorneys representing indigents in the state courts. The committee shall also recommend a maximum amount to be allowed for support services without prior approval of the trial court. This recommendation shall be made to the Commission by March 15 of each year beginning in 1982.
- (b) The Commission shall set the hourly rate of compensation to be paid to attorneys representing indigents in the state courts and the amount related to support services by May 1 of each year but the rate set shall not become effective until July 1 of that year.

This rule outlines a procedure for setting attorney fees. Since so many groups are affected by the rate of compensation a special committee is designated to review fee levels and recommend to the Indigent Defense Commission an hourly rate for court appointed counsel. The Commission will then set the fee level and amount to be allowed for support services without prior approval of the trial court.

The time deadlines used are intended to allow consideration of fee levels in budgeting processes.

RULE 8. REPORTING REQUIREMENTS

(a) The clerk of district court in each county shall submit to the Commission the total number of cases in which indigents were represented by counsel. This report shall be based upon the fiscal year and shall be submitted by July 31 of each year.

(b) The clerk of each county court shall submit to the Commission by July 31 of each year a report showing the total number of cases in which indigents were represented by counsel and the total cost of that representation for the prior fiscal year.

This rule imposes responsibility for data reporting regarding indigent defense upon clerks of county and district court. This is not expected to be much of a chore since it only requires annual totals to be sent to the Commission. If proper records are kept this will only entail preparation of one letter per year.

It is the hope of those involved with the Defense Delivery Project that implementation of these rules will operate to strengthen efforts on behalf of indigents in the state and also to make uniform the handling of indigent defense matters across the state.

**ATTORNEY SURVEY
DEFENSE DELIVERY PROJECT**

THROUGH 12-22-80

176/ If you do no criminal work and you believe you do not have enough background or experience to answer the questionnaire, please check here and return the questionnaire in the enclosed, stamped envelope.

PLEASE RETURN THIS QUESTIONNAIRE BEFORE NOVEMBER 8, 1980.

1. How many years have you been licensed to practice law in ND? _____
2. In which Judicial District do you practice? _____
3. Please characterize your practice of law: Private practice
Government service Prosecution Other (specify) _____
4. Please estimate the percentage of your practice which is:
Criminal _____% Civil _____%
5. Have you ever served as assigned counsel for an indigent defendant?
Yes 286 No 57 1
6. Are funds available for expenses, investigators and expert witnesses?
Yes 127 No 134 83
If yes, explain how funds are made available: _____
- Have you ever utilized funds for investigators or expert witnesses in appointed cases? Yes 79 No 223 42
7. Have fees you submitted for an assigned counsel case ever been reduced or denied? Yes 154 No 145 45
8. If yes, in what percentage of those cases were fees reduced or denied?
Less than 20% 94 20% to 50% 42 More than 50% 27 181
9. Have you ever served as assigned counsel and elected not to request payment for services rendered? Yes 85 No 213 46
If yes, why? _____
10. Do you feel that your ability to practice criminal law would be enhanced if specialized training courses were available to you through a public defender program, a coordinated assigned counsel program, or the State Bar?
Yes 233 No 64 47
Would you utilize such a course? Yes 201 No 84 59
11. In the county(s) in which you practice, how does one get on the assigned counsel list? _____
12. What problems do you generally encounter in obtaining payment for services rendered to indigent criminal defendants? _____

(Please see other side)

13. In your judgment, are more cases tried to completion by assigned counsel than by privately retained attorneys?
 Yes 54 No 105 No difference 144 41
14. Would you be in favor of the development of a statewide coordinated assigned counsel system which supplies the Court with a list of attorneys available to accept appointments in certain types of cases (homicide, felony, misdemeanor, juvenile, etc.)
 Yes 179 No 83 No opinion 68 If no, why? 14
15. Would you be in favor of a statewide program which instituted guidelines for indigent defense but allowed local option for selection of public defender, contract defender or appointed counsel systems?
 Yes 210 No 61 No opinion 57 If no, why? 16
16. At what stage in criminal proceedings is counsel appointed for an indigent defendant?
 Immediately after arrest 30
 At the first appearance in court 257
 At arraignment 17 29
 After arraignment 11
17. In our present system of appointment, are assignments of counsel made early enough in the proceedings to allow adequate investigation and preparation?
 Yes 236 No 67 41
18. Would you prefer that someone other than the judge make appointments of defense counsel?
 Yes 55 No 260 29
 If yes, who? _____
19. Would you prefer that someone other than the judge approve fee vouchers of appointed counsel?
 Yes 80 No 237 27
 If yes, who? _____
20. On the whole, do you feel that the present appointment system adequately provides for the active defense of the indigent defendant?
 Yes 208 No 111 25
21. What improvements would you suggest in the present system of appointed counsel?

THANK YOU FOR YOUR TIME AND YOUR THOUGHTS.

Attorney Survey

question 1

AVERAGE 17.95
 55% of respondents less than 10 yrs.

- | | |
|------------------------|-------------------|
| 1 - zero (law teacher) | 8 - 21 years |
| 4 - less than 1 year | 6 - 23 years |
| 34 - 1 year | 4 - 24 years |
| 21 - 2 years | 5 - 25 years |
| 26 - 3 years | 2 - 26 years |
| 26 - 4 years | 11 - 27 years |
| 14 - 5 years | 2 - 28 years |
| 18 - 6 years | 4 - 29 years |
| 18 - 7 years | 7 - 30 years |
| 14 - 8 years | 4 - 31 years |
| 10 - 9 years | 5 - 32 years |
| 5 - 10 years | 6 - 33 years |
| 7 - 11 years | 1 - 35 years |
| 14 - 12 years | 1 - 37 years |
| 7 - 13 years | 1 - 39 years |
| 4 - 14 years | 1 - 40 years |
| 5 - 15 years | 2 - 41 years |
| 7 - 16 years | 1 - 42 years |
| 5 - 17 years | 2 - 43 years |
| 6 - 18 years | 2 - 44 years |
| 6 - 20 years | 2 - 45 years |
| | 2 - 46 years |
| | 3 - 48 years |
| | 3 - 50 years |
| | 1 - 51 years |
| | 1 - 52 years |
| | 1 - over 50 years |
- No Answer - 3

question 2

Did not compile.

question 3

- | | |
|-------------------------------|----------------------------------|
| Private Practice - 260 | Private and Prosecution - 33 |
| Government Service - 10 | Private and Government - 3 |
| Prosecution - 14 | Prosecution and Government - 4 |
| Other (Specify) - 13 | Private and Other (Specify) - 4 |
| 1 - Law Teacher | 1 - County Justice |
| 1 - Legal Assistance | 1 - Municipal Judge |
| 1 - Primarily a retired Judge | 1 - Part time judicial & teacher |
| 1 - Retired | 1 - (Did not specify) |
| 1 - Not practicing | |
| 1 - Court | |
| 1 - Pub. Interest | |
| 2 - Municipal Judge | |
| 2 - Legal Services | No Answer - 2 |
| 1 - (Did not specify) | |
| 1 - Corporate | |

Question 4

Criminal
 39 - 0%
 13 - 1%
 9 - 2%
 5 - 3%
 32 - 5%
 61 - 10%
 1 - 12%
 16 - 15%
 33 - 20%
 27 - 25%
 9 - 30%
 3 - 33%
 4 - 35%
 19 - 40%
 24 - 50%
 8 - 60%
 2 - 65%
 2 - 70%
 5 - 75%
 6 - 80%
 2 - 85%
 1 - 90%
 1 - 95%
 1 - 97%
 7 - 100%

Civil
 7 - 0%
 1 - 3%
 1 - 5%
 1 - 10%
 2 - 15%
 6 - 20%
 5 - 25%
 2 - 30%
 2 - 35%
 8 - 40%
 24 - 50%
 19 - 60%
 4 - 65%
 3 - 67%
 9 - 70%
 27 - 75%
 33 - 80%
 16 - 85%
 1 - 88%
 62 - 90%
 31 - 95%
 5 - 97%
 9 - 98%
 13 - 99%
 39 - 100%

No Answer - 12

Question 6

Of the 127 who indicated "yes" were these responses:

- 1 - Program funds.
- 1 - For experts as part of a pre-sentence investigation or to have client evaluated as to competency.
- 1 - Public defender contract includes a \$10,000 contingency fund.
- 1 - I have made use of such funds at the Federal level. Whether they are properly available is questionable.
- 1 - Only most reluctantly and usually only in "major" cases. Routine matters are slighted.
- 1 - Attorney uses his funds.
- 1 - Not so much for investigators.
- 1 - Through request of the court or the county.
- 1 - Public Defender contract with the county.
- 2 - County upon approval of District Court.
- 4 - On a very limited basis.
- 36 - County.
- 61 - Through the Court.

(cont.)

question 6 (cont.)

Some indicated "no" and commented:

- 1 - county is hard pressed financially, unfortunately.
- 1 - small amount in budget, usually from general fund.
- 1 - not for investigations, I do that myself.
- 1 - our courts have been less than sympathetic toward providing funds.
- 1 - actually depends on nature of case.
- 1 - friends, etc.
- 1 - only on a very limited basis by getting court's approval first.
- 1 - judges only allow minimum fees.
- 1 - if there is, the judge usually reduces fees to compensate for such use.
- 1 - such funds as are available appear to be insufficient to assure a zealous and competent defense.
- 1 - however, appointed counsel do bill for expenses. City has a limited but to this point adequate budget for court appointed attorneys.

3 didn't check either box, but wrote a response:

- 1 - we have contract Public Defender.
- 1 - this depends on the type of expense and the judge. I have been burned.
- 1 - only in extraordinary circumstances.

question 9

Of the 82 who indicated "yes", were these comments:

- 1 - personal friendship
- 1 - don't have good sense.
- 1 - because the court wanted to control the defense.
- 1 - the judge indicated a refusal of plea bargaining if the state paid the legal fees.
- 1 - prior to 1960, most cases were private.
- 1 - why not?
- 1 - I didn't feel taxpayers should pay.
- 1 - defense of the indigent if a duty and responsibility of all lawyers. Too often, money is the prime concern.
- 1 - the matter was disposed of - no services rendered.
- 1 - to avoid disclosing that certain information, which would reflect poorly on client, was gathered.
- 1 - I reduced charges due to cost burden to county.
- 1 - took a note from the defendant.
- 1 - county judge requires restitution, unconstitutional in my view.
- 1 - appointment in county court not approved by Dist. Court - to avoid delay, withdrew request - normally only the plea and sentencing stage remains. Or, case dismissed without court appearance after appointment.
- 1 - the hours involved became so great, just didn't bill for all of them.
- 1 - defendant's family assumed responsibility.
- 1 - my client refused to cooperate in his defense so, after a suitable period of frustration, I withdrew.
- 1 - defendant already overburdened with other costs to be paid by him while on parole.
- 1 - poor bookkeeper.

(Continued.)

question 9 (cont.)

- 1 - client agreed to pay.
- 2 - I refuse to be demeaned by the courts.
- 2 - if I am going to be paid on a token basis, I would rather not submit a bill.
- 2 - conflict of interest.
- 3 - court required reimbursement of fees as part of sentence.
- 4 - donation.
- 6 - a desire to contribute some of my time.
- 10 - too much bother.
- 16 - services were minimal.

question 11

- 1 - all attorneys regularly engaged in criminal work in this area are on list.
- 1 - just lucky I guess.
- 1 - God and the judge know.
- 1 - county judge appoints by firms. Each firm gets as many appointments as they have numbers.
- 1 - supposedly every attorney, unless disqualified. Actually only those who do some criminal defense and have practiced less than 5 years.
- 1 - out here, you are either a state's attorney, a city justice, or a defense attorney.
- 1 - call county court with increased jurisdiction. Federal Court requests members of District Bar to serve.
- 1 - in our county court one must apparently be a favorite of the county judge.
- 1 - I am not certain. We usually get a phone call followed by a letter of appointment.
- 1 - retainer by county.
- 2 - contract with the county commissioner.
- 2 - through city commission appointment.
- 2 - no formal procedure, attorneys say when they are willing to act or not.
- 2 - the judge knows when someone new begins practice in county.
- 3 - through the District Court.
- 6 - no choice, the question is how to get off.
- 8 - no list exists.
- 11 - rotation basis.
- 13 - contract, use no list.
- 17 - judge just appoints (no list).
- 22 - notify the clerk of court.
- 23 - placed there by presiding judge.
- 28 - we have Public Defender, no list.
- 41 - automatically.
- 63 - request to be on it.

question 12

- 1 - court refuses to appoint.
- 1 - record keeping
- 1 - jury investigations, private psychiatrists.
- 1 - most public defense contracts are limited to specific service providers and are not open to other members of the bar.
- 1 - distance from selective centers, ie Williston or Minot.
- 1 - multi-county charges against defendant.
- 2 - judge.
- 1 - requiring prior approval if over \$200.

- 1 - obtaining payment for the many phone calls from client.
- 1 - Federal Court requires extensive justification of fees.
- 1 - objections from state's attorney.
- 2 - none if appointed.
- 2 - none if paid by county.
- 2 - usually none of court appointed but we must account for every minute spent.
- 3 - delay, cuts in fees, harassment, no money for witnesses, experts, investigators.
- 5 - some judges do not seem to appreciate the time and effort it takes to handle some cases.
- 10 - county commissioners.
- 33 - time delay.
- 62 - fees cut, payment inadequate.
- 105 - none.

question 14

Of the 83 who indicated "no", were these responses:

- 1 - it would simply put more power in the hands of fewer people.
- 1 - judges cut bills and pay is not adequate.
- 1 - rural environment, city attorney would be unfamiliar with environment problems, expenses.
- 1 - statewide system might not work.
- 1 - perhaps a directory by the Bar Association to assist local counsel in getting help if needed, and to assist courts in small counties.
- 1 - lists are not the problem.
- 1 - too much removal of authority and responsibility from local government and courts.
- 1 - it would compound the problems of the present system.
- 1 - some attorneys are not capable of giving an alleged criminal the proper defense.
- 1 - I think it would be prejudicial to local and young attorneys.
- 1 - appears unmanageable.
- 1 - should be left in judge's discretion, I don't like my name on a list.
- 2 - restricts contribution by all attorneys, forces counsel when not desired.
- 3 - statewide control is just another bureau.
- 5 - expense of travel.
- 9 - Public Defender System is answer.
- 29 - not necessary, matter would be better handled locally.

question 14 (cont.)

(6)

6 answered "yes" and gave comments:

- 1 - only in that it would be better than the present arbitrary system - should be a system with all licensed attorneys offered inclusion, and appointments should be strictly rotated with no provision for a judge "passing over" dis-favored attorneys.
- 1 - I believe it would be helpful to the judges.
- 1 - January to April I am overloaded, couldn't accept felony case.
- 1 - if state funded.
- 1 - except juvenile cases which I believe requires a special dedication to that type of work.
- 1 - if a person is allowed to decline being listed.

question 15

Of the 61 who indicated "no" were these answers:

- 1 - contract defender seems worse than appointed, too heavy caseload and too little money for experienced lawyers.
- 1 - if there is a local option it appears to be a waste of time and funds as local courts prefer their own choice anyway.
- 1 - I don't want to travel entire state.
- 1 - guidelines always become rules in practice.
- 1 - we cannot create an indigent factory defense system.
- 1 - not in favor of public defender for smaller counties.
- 1 - if the state is to take it over, there should be no local option.
- 1 - who's option is "local option"?
- 1 - we would need more than statewide guidelines to encourage the local county commissioners to change from the present system.
- 1 - there are already enough rules and red tape.
- 1 - Public Defender program in our county hasn't improved delivery of Judicial services.
- 1 - statewide system might not work.
- 1 - leave guidelines up to the judge.
- 1 - because the most repressive places in the state would immediately opt out so they would not have to bother with such trivialities as due process or presumptions of innocence.
- 2 - each case is individual matter.
- 3 - it would put more power in the hands of fewer people.
- 3 - I see this as local responsibility.
- 3 - definitely feel program should be uniform.
- 4 - should have statewide Public Defender system.
- 9 - I do not feel our present system needs attention.

5 gave a "yes" response and commented:

- 1 - if it cannot be full-time throughout the state.
- 1 - it would keep cost down.
- 1 - might be of assistance.
- 1 - we have a Public Defender contract and we should have the option of continuing that program even if a statewide program exists.
- 1 - but - not sure if small counties could afford public or contract defender.

question 18

(7)

Of the 55 who indicated "yes", were these responses:

- 1 - someone who has contact immediately after arrest.
- 1 - by someone having knowledge of the attorneys' ability with respect to the particular type of case.
- 1 - statewide coordinators (as described in #14 in survey).
- 1 - would you believe almost anyone - who didn't have some kind of stake in the outcome of the process: How about the County Auditor making the appointments from a list compiled by solicitation of all the attorneys in a given Judicial District.
- 1 - independent agency.
- 2 - clerk or court administrator.
- 2 - another judge or clerk
- 2 - allow client to select an attorney.
- 9 - court administrator.
- 9 - clerk.

4 answered "no" and also gave comments:

- 1 - should be strict rotation.
- 1 - would like review if judge arbitrarily excluded someone on personal grounds.
- 2 - I think it's important that they be routine.

question 19

Of the 80 who indicated "yes" came these replies:

- 1 - judge should have an input but there should be a uniform system.
 - 1 - attorney general's office.
 - 1 - they should not have to be approved: nor should the money be included in the Court budget per se. Other payment requests are submitted through the auditor for payment by the County Board; attorneys already certify that the claim is proper, and could be DISBARRED for fraudulent claims, so what is the problem?
 - 1 - group of attorneys that rotates every six months.
 - 1 - perhaps another judge, perhaps nobody unless fee is challenged by the county commissioners.
 - 1 - clerk or administrator.
 - 1 - independent agency.
 - 1 - judge not trying case.
 - 1 - judge with approval of states attorney.
 - 1 - there should not be any approval system.
 - 1 - coordinator.
 - 1 - someone who has time to analyze vouchers.
 - 1 - dis-interested party.
 - 1 - anyone who will not arbitrarily reduce the charges, thus impliedly impugning the honesty of the attorney.
 - 1 - judicial administration office.
 - 1 - if there is a statewide system, one person should do so, so there is consistency.
 - 2 - committee not subject to the political election process.
 - 2 - anyone.
 - 3 - clerk.
 - 4 - county auditor.
- (CONT.)

question 19 (cont.)

(8)

- 6 - county commissioners.
- 7 - court administrator.
- 10 - committee of attorneys.

4 stated "no" with these comments:

- 1 - judge is most familiar with case and work necessary.
- 1 - but judge should allow recognized hourly rate in full.
- 1 - I think it's an imposition of County Justice as often they are not necessarily experienced and familiar with amount of time and work.
- 1 - but I believe guidelines should be provided judges on a statewide basis.

(9)

question 21

- 1 - Coordinated system.
- 1 - Provide more support services.
- 1 - That the judges check with counsel before appointing them.
- 1 - Partial payment of fees for the borderline indigents.
- 1 - Keep records of which judges reduce fees and how much and why. Make the judge justify the reduction. I won't take Federal appointments anymore because of the low fee ceiling and the judges' autocratic way of dealing with a justified bill.
- 1 - Make sure that fees are paid.
- 1 - A general review of the time it takes to competently represent criminal defendants - especially when the appointed attorney is inexperienced. In my county, the established attorneys refuse appointment. So, the new attorneys get the job and then have their vouchers cut. This is so even when all the time put in is not recorded. The judge feels the vouchers are padded and, in effect is calling the attorneys liars.
- 1 - Standardize payment on a time basis requiring judicial adherence.
- 1 - The judges should not interfere in the defense counsel's decisions on the scope of the defense.
- 1 - Specific guidelines as to costs allowed in major felony cases - for example for independent psychiatric evaluation, for ballistics and other independent analysis.
- 1 - More cooperative states attorneys. Advise defendants prior to appointment that they will be expected to pay the county for the attorneys fees.
- 1 - The lowest bidder system, staffed by inexperienced, has not been the best in Cass County for the accused, although it has saved the county money. A full-time defender's office or the "old system" of privately appointed counsel better saves the accused.
- 1 - Public Defender or in alternative: fees proportionate to work so as to cover overhead on fees of \$35 and plus lose business that he normally has and can't work on because of costs. Ex. If I received a serious crime appointment like murder, rape, etc. I may as well kiss my practice good bye.
- 1 - Either a state-wide public defender system or have counties get together and set up regional system.
- 1 - Contract defense system, public defender in option.
- 1 - Relatively more freedom at times to pursue a vigorous defense free from any concern over fee payments.
- 1 - Have a list of local attorneys available so that they can be contracted upon arrest so that they could appear with defendant at his first appearance.
- 1 - Guidelines on investigators and expert witnesses.
- 1 - Representation by specialists in criminal defense work (if not specialists, at least persons interested in criminal defense work.)
- 1 - Aid to counties to pay for counsel.
- 1 - Upper limit on reimbursement as in Federal System.
- 1 - Change ethics opinion to allow city prosecutors to defend in matters arising out of city.
- 1 - Having the judge who approves vouchers "insulated" from outside pressures.
- 1 - Slow down "speedy justice" to allow adequate time to prepare without stopping all other work.
- 1 - Require some minimum standard to study and experience qualification for defense work.
- 1 - More time should be allowed for investigation of indigent defendants.
- 1 - More uniformity between counties.
- 1 - ABA Standards for providing Defense Services.
- 1 - Educate judges in the cost of legal services.

CONTINUED

1 OF 2

question 21 (cont.)

- 1 - Keep the state and federal funds out of it.
- 1 - Better appointment system. More involvement by state bar and specif. Law Office Economics Committee in setting fee schedule and updating that schedule.
- 1 - In many counties the defendant gets no choice of lawyers, but may eventually have to pay for this lawyer he did not choose. In such circumstances, he should have some type of choice.
- 1 - Let it be up to those who are more informed on the public defender system.
- 1 - A system that would assure them of reasonable payment for services.
- 1 - Contracts between county and public defender or between state and public defender should be more detailed.
- 1 - State-wide guidelines on procedure, and number of hours considered proper for various type cases; some form of safe-check to avoid needless expenditures of defense monies, but sufficient funds to provide adequate defense without bankrupting a county.
- 1 - I like the contract system, but would have the number of lawyers contracted larger.
- 1 - Some method of putting the attorney in a position of requesting hearings and bringing motions when they are necessary, not when they feel they must cover their tail. Indigent defendants get more, not less services. The defendant will say to appeal when he doesn't have any concern about the attorney's fee.
- 1 - A uniform method of appointed counsel with a pool of qualified investigators and experts. Under no circumstances should a bid system for public defense works be allowed to continue as the emphasis then is on a lowest cost basis. As opposed to reasonably competent representation. If a public defender system is utilized it should be on a full-time basis with no private practice allowed.
- 1 - Have regional public defenders paid for completely by state which regional public defenders have access to investigators and state laboratories for scientific tests.
- 1 - Courts should have greater authority (or at least they should exercise it) to cut down or reduce the many court appearances where minor offenses are involved.
- 1 - Guidelines and more education in handling misdemeanor cases:
- 1 - Make certain that every lawyer including senior members in firms must also represent indigent clients when appointed.
- 1 - Improvement in larger counties.
- 1 - Junk it.
- 1 - Money made available other than the county.
- 1 - A system that would place evaluation of available counsel before the presiding judges, the evaluation being from a committee of peers, perhaps a bar assoc. committee.
- 1 - I believe study is proper. Improvement of the assigned counsel system is of greater importance than is the development of an extensive public defender program.
- 1 - Attorneys giving free legal service should be given tax credits.
- 1 - Greater reliance should be placed on speedy trial alternatives. In ND the bail system is so ridiculous that defendants are forced into submission despite the existence of some decent defense probabilities. Prosecutors won't talk settlement until defendants have an opportunity to sit in jail awhile.
- 1 - Constraints arising from limited budgets and need for approval by co-commissioners, coupled with court's fixed idea of what a case should be worth - with benefit of 20-20 hindsight discourages investigation and preparation of defense in many cases.
- 1 - Formation of criminal section of bar association.
- 1 - Provide adequate conference rooms in jail so you can communicate with client.
- 1 - State pay costs in district court.
- 1 - In this area the lawyers are not willing and don't have enough time. It is on a rotation basis and when forced to take criminal cases the quality of the system goes down appreciably.
- 1 - Leave it at the local level.

question 21 (cont.)

- 1 - Provide C.L.E. classes in Eastern ND for defense attorneys. Probably Fargo is best location.
- 1 - Allow defense counsel the flexibility to adequately defend client without severe constraints as to amount of fees to be paid. It has to be up to defense counsel as to what is to be done to defend client.
- 1 - Appointment immediately...then allow the individual to pay a part or all or if he wants the case handled by himself or other counsel he can. In time it will be necessary to eliminate part-time states attorneys and part-time county justices. In McKenzie County court (justice) should be on a daily basis...too long a wait for the individual that is held in jail. Many times a defendant is ready to go to trial immediately or the next day and even wants to and the first appearance in justice court is usually to get a plea and then adjourn until the next court day...once a week...too long a wait. Justice is delayed and justice is denied. (These are minor cases or in justice court only.)
- 1 - The court should be free to appoint counsel if it sees fit, especially in the more serious type offenses.
- 1 - I have not been that close to the appointed system since Cass went to public defender - but defendant should have a simple clear cut way to seek a change of counsel if person appointed isn't performing satisfactorily - e.g. not enough effort or attention to case, personality clash, etc. While payment is important, I have seen attorneys talking as though the money was all important and the defendant just an inconvenience. When someone's freedom is at stake they deserve better, even if unquestionably guilty.
- 1 - It is sad - but true - commentary on the present system that the procedural rights accorded to a citizen who is without (sufficient) funds to pay for an attorney to defend him on criminal charges may depend ALMOST ENTIRELY on WHEN AND WHERE s/he is charged and tried: Under the supervision of such Judges as Benny Graff or Roy Ilvedson a defendant is accorded substantive and procedural safeguards by the appointment of competent and active counsel: in other places where appointment is made at the whim and caprice of a county judge such as (deleted) or (deleted) you may well have an appointment list that has been reduced to those who tend to share the philosophy of the judge, and whose concern is finishing up the first interview with the client to be able to go back into the court room and finish up the case itself (and get the defendant on the way to the state hospital, State farm, state prison, or, maybe, just out of town by sundown), and get the filled out voucher for \$50.00-\$75.00 approved and turned into the auditor before the ink is dry. In (deleted), the "Good Old Boy" who pleads 'em all guilty and keeps the judge from incurring all of those nasty old costs for trials and motions and things is (deleted) who sometimes fills in himself, for a spell as acting County Judge.
- 1 - Independence of attorney from judge.
- 1 - I believe there should be systematic guidelines and a rotational system where counsel is appointed each time at arrest, if needed. Sort of a "duty" list of the available attorneys with a choice to the suspect.
- 1 - Question #14 in survey.
- 2 - Questions #14 and #15 in survey.
- 2 - Better guidelines for payment.
- 3 - Rotation so judges could not favor special friends.
- 2 - More lawyers willing to take those types of cases.
- 3 - Appointments and approval of fees should not be handled by the court involved. That is, a potential conflict of interest which should be avoided.
- 4 - Need training courses.
- 5 - Appointment as soon after the arrest as possible.
- 6 - Defendants should have qualified counsel.

question 21 (cont.)

(12)

- 2 - The Public Defender should be eliminated.
- 7 - Make involvement in court appointment program voluntary.
- 7 - Stiffer standards as to who is eligible for public defense.
- 1 - Guidelines should be set as to what constitutes undue financial hardship under 27-20-26. NDCC.
- 8 - Steps should be taken to allow defense attorneys to hire investigators and experts when necessary.
- 1 - I do not do criminal defense work on an appointed basis anymore but two younger lawyers in our office do. We have had many problems wherein the judges have cut fees as much as 50% stating that too much time was put on the case. I don't see how a judge can make this decision and I don't see how a lawyer can fail to use his best judgment in determining what investigation, research or other matters are necessary. I recognize guidelines are essential but I do not believe that the present judges are cognizant of the time it takes to prepare a defense which would be considered adequate if the person were a paying client. Unfortunately judges are too far removed from the real world - even though they may have practiced for a number of years.
- 43 - Higher fees.
- 31 - Public Defender System.

JUDGE SURVEY

THROUGH 12-22-80

The State Bar Association of North Dakota is studying the problem of providing legal representation to indigent criminal defendants. This survey of North Dakota Judges is being conducted to provide information for the Bar Association to furnish to the Legislature and to assist the Bar Association in formulating proposals for legislation. Your responses are confidential and your assistance will be greatly appreciated.

PLEASE RETURN THIS QUESTIONNAIRE BEFORE NOVEMBER 8, 1980.

1. In which court do you preside? District County Municipal
2. How many years have you presided in that court? _____
3. Do you utilize standardized indigence criteria in determining whether a defendant is eligible for the appointment of counsel?
Yes 23 No 27 10
If yes, please describe below, or send a copy of any written criteria. _____
4. How are assigned counsel identified? (Check all appropriate responses)
 By their presence in court at the time they are needed.
 From a list of names of all practicing attorneys in your jurisdiction.
 From a list of lawyers who volunteer their names to the court.
 From a list of names of attorneys you personally select.
 From a list of names provided by some other source. (Please identify source.) _____
 If some other method is used, please describe. _____
5. Are there any criteria which you impose for an attorney seeking to get on the list?
Yes 8 No 37 15
If yes, please describe below, or send a copy of any written criteria. _____
6. If you use a list of attorneys in selecting assigned counsel, do you select names from the list in order?
Yes 9 No 29 22
If no, how do you select attorneys from the list? _____
7. Do the courts in your area share lists of lawyers available to be assigned to indigent defendants?
Yes 9 No 38 13
If yes, describe the process used and relationship between the courts. _____
8. Do you have a sufficient number of qualified attorneys in your area who are available to serve as assigned counsel?
Yes 40 No 8 12
(over please)

9. Have you ever had to dismiss charges against a defendant because of a lack of counsel?
 Yes 0 In approximately how many cases over the last 5 years? _____
 No 55 5
10. In approximately what percentage of cases do defendants waive right to counsel in your court?
 _____ % felony _____ % misdemeanor
11. At what stage in criminal proceedings do you believe counsel should be appointed for an indigent defendant?
 Immediately after arrest
 At the first appearance in court
 At arraignment
 After arraignment
12. What are the specific hourly fee arrangements in your court for?
 Felony cases: _____
 Misdemeanor cases: _____
 Juvenile cases: _____
 Others (please specify): _____
13. Are funds budgeted for expenses such as investigation or obtaining expert witnesses?
 Yes 20 No 34 6
14. Have you ever approved vouchers for non-attorney investigation services or for expert witnesses?
 Yes 19 No 35 6
15. Is there a ceiling upon the fees and expenses that an attorney may claim without prior court approval?
 Yes 24 No 28 8
 If yes, please indicate the maximum allowed in:
 Felony cases: _____
 Misdemeanor cases: _____
 Juvenile cases: _____
 Others (please specify) _____
16. On a scale from one to ten, how would you rate the overall quality of representation by retained counsel in criminal cases? (Check one)
 Poor 1 2 3 4 5 6 7 8 9 10 Excellent
- On the same scale how would you rate the overall quality of representation by assigned counsel? (Check one)
 Poor 1 2 3 4 5 6 7 8 9 10 Excellent
 -2-
 -84-

17. On the average for a similar case, do retained or assigned counsel go to trial more often? (Check one)
 Assigned counsel go to trial much more often.
 Assigned counsel go to trial slightly more often.
 There is no discernable difference.
 Assigned counsel go to trial slightly less often.
 Assigned counsel go to trial much less often.
18. Approximately how much time do you and your clerks spend each week on the average on assigned counsel matters (including maintaining assigned counsel lists or finding attorneys to serve as assigned counsel, processing assigned counsel vouchers, etc.)
 _____ hours/week/judge
 _____ hours/week/clerk
19. Have you ever rejected or reduced an assigned counsel voucher?
 Yes 29 In approximately how many cases over the last 5 years? _____ 9
 No 22
 If yes, for what reason(s)? _____
20. Would you be in favor of the development of a statewide coordinated assigned counsel system which supplies the Court with a list of attorneys available to accept appointments in certain types of cases (homicide, felony, misdemeanor, juvenile, etc.)?
 Yes 21 No 24 No opinion 10 If no, why? _____ 5
21. Would you be in favor of a statewide program which instituted guidelines for indigent defense but allowed local option for selection of public defender, contract defender or appointed counsel systems?
 Yes 32 No 12 No opinion 9 If no, why? _____ 7
22. Do you feel satisfied with our present system of appointment of counsel?
 Yes 39 No 14 7
23. Have you ever decided not to impose a jail sentence to avoid the requirement for appointing counsel?
 Yes 15 No 39 6
24. Do you require waiver of counsel to be in writing?
 Yes 9 No 44 7
25. Do you consider whether the defendant has posted bail in determining indigency?
 Yes 20 No 33 7
 -3-
 (over please)
 -85-

26. Would you prefer that someone other than yourself make the determination of indigency? Yes 8 No 44 8
 If yes, who would you recommend? _____
27. Would you prefer that someone other than yourself approve or disapprove appointed counsel vouchers? Yes 9 No 42 9
 If yes, who would you recommend? _____
28. Please estimate, for your jurisdiction, the percentage of the bar who accept criminal appointments:
 _____%

THANK YOU FOR YOUR TIME AND YOUR EXPERTISE.

DISTRICT-COUNTY JUDGE SURVEY

- question one. Dist. 18
 County 40
- question two. 6,1,8,4,7,14,6,1,1,1½,1mth.,5½,22,2,9,7½,2,11,8,8,14,11,21,5,7,16,
 2,12,18,10,16,1,3,4,1,15,6,25,4,10,3,5½,2½,21,6,1,8,6,16,2,1,4,9,
 1,1,13
 (no answer, one)
- question four. (no answer, three)
 4 - By their presence in court at the time they are needed.
 12 - From a list of names of all practicing attorneys in your jurisdiction.
 6 - From a list of lawyers who volunteer their names to the court.
 11 - From a list of names of attorneys you personally select.
 2 - From a list of names provided by some other source.
 (City Attorney's recommendations)
 20 - If some other method is used.
 1. 3 said Public Defender System
 2. 1 said Logically located to keep down mileage costs.
 3. 3 said Contract for services with specified law firms.
 4. 1 said by presiding Dist. Judge
 5. 3 said by request of the defendant

 7. 1 said whoever is willing to represent the defendant.
 8. 2 said attorney is selected on rotation basis.
 9. 1 said by Legal aid U.M.D.
 10. 2 said generally by county court appointment

 12. 1 said counsel are appointed in Justice Court and appear with their client in dist. court.
 13. 1 said contract with private attorney.
 14. 1 said contract with county commissioners.
- Additional Comment: "My caseload is limited to the point where two only have to appoint once or twice a year."
- question five. Those who answered yes and gave comments:
 1. 1 said availability
 2. 1 said must be a resident of county.
 3. 1 said Public Defender's office or conflict attorney - all are under contract with county.
 4. 4 said must have enough experience
 5. 1 said that he must hold himself available for court appointment in criminal cases.

question 3.

Of the 22 who indicated "yes" were these responses:

- 1 said monthly income and assets.
- 1 said I ask for mortgaged seal and personal property.
- 1 said clerk of court manual.
- 1 said deffendant is questioned by me.
- 1 said by affidavit of assets + income - liabilities + potential = ability.
- 3 said standard definition of indigency, ability to hire attorney without undue financial hardship.

3 indicated "no" on the survey but also responded:

- 1 said case by case basis.
- 1 said the attorneys should be in good standing with the North Dakota Bar Association.
- 1 said in a small rural jurisdiction such as this, I already know who has and who hasn't.

question five (cont.)

Two answered no but still gave comments:

- 1. We have no one "seeking to get on the list.
- 2. Competence in criminal cases, geographical proximity.

question six.

Those who answered no and gave comments:

- 1. 3 said the attorney best able to represent.
- 2. 1 said basically rotation depending on the case.
- 3. 7 said by availability
- 4. 2 said they use their discretion.
- 5. 1 said by contract
- 6. 1 said city attorneys
- 7. 1 said it depends on the facts.
- 8. 2 said logically located to keep down milage costs.
- 9. 1 said rotation plus willingness to act.
- 10. 1 said "we have one who was a public defender and he gets appointed if possible;

One answered yes and gave a comment:

- 1. By rotation.

question seven.

Six answered yes and gave comments:

- 1. Each court keeps a list of available attorneys. Selection is on a rotation basis. Courts include cases for mental health hearings, juvenile hearings and criminal hearings.
- 2. Dist. and Justice Courts are helpful here.
- 3. All honor Public Defender Contract.
- 4. County Court appoints counsel in each county.
- 5. Based on my personal opinion as to competence.
- 6. The Bar Directory issued SBAND.

question ten.

<u>Felony</u>	<u>Misdemeanor</u>
8 said 0%	1 said 0%
4 said 1% or less	1 said 1%
2 said 2-3%	1 said 2%
11 said 5%	1 said 15%
3 said 10%	2 said 25%
1 said 25%	3 said 50%
1 said 40%	1 said 50-60%
2 said 50%	1 said 70%
1 said 60%	3 said 75%
1 said 90%	1 said 80%
1 said 95%	2 said 85%
	8 said 90%
	4 said 95%
	1 said 99%

DIST.-COUNTY JUDGE SURVEY

(3)

question 11.

- 4 said immediately after arrest
- 41 said at the first appearance in court
- 4 said at arraignment
- 2 said after arraignment
- 4 - no answer
- 1 answered "When requested"

question 12.

Felony Cases

- 1 said "as billed"
- 2 said "none"
- 3 said \$30 per hour
- 1 said \$35-40 per hour
- 25 said \$35 per hour

Misdemeanor Cases

- 1 said "some"
- 2 said "none"
- 1 said "as billed"
- 3 said \$30 per hour
- 24 said \$35 per hour
- 1 said \$35 per hour but must have prior approval if over \$500.
- 1 said \$35 per hour but with a limit.
- 1 said \$35-40 per hour
- 1 said \$50

Juvenile Cases

- 2 said "none"
- 1 said "some"
- 3 said \$30 per hour
- 10 said \$35 per hour
- 1 said \$35 per hour but with a limit.
- 1 said Juvenile Supervisor has a monthly salary.
- 1 said "as billed"

Others

- 3 said "none"
- 2 said contract
- 1 said according to contract at \$35 per hour
- 1 said \$30 per hour
- 1 said \$35 per hour
- 1 said Mental Health Cases at \$25 per hour
- 1 said Mental Health Cases at \$35 per hour
- 1 said Public Defender contracts are for lump sums.

- *2 said "We have no set fee."
- 1 said "We used the amount prescribed in the book."
- 1 said "Public Defender is under contract through competitive bidding."
- 1 said "No specific arrangement."
- 1 had no answer marked but stated, "However, I believe the Public Defender system operates on an hourly basis of \$35 per hour."

(4)

question 15.

Not everyone filled in all blanks.

8 - no answers at all.

Felony cases

- 2 said \$200
- 1 said \$350
- 4 said \$500
- 1 said \$500, rule usually relaxed.
- 1 said "prior approval required in all cases"
- 1 said "reasonable"

Misdemeanor cases

- 2 said \$200
- 3 said \$500

Juvenile cases

- 1 said \$200
- 1 said \$350
- 2 said \$500
- 1 said "prior approval required in all cases"

Others

- 1 said \$500
- 1 said "no specific figures"

- *1 said "depends on facts; time spent"
- 1 said "discretionary"
- 1 said "I require that all facts be submitted to me for approval before being sent to County Commissioner for approval."
- 1 said "see attached information"
- In addition to stating \$500 for each Felony and Juvenile cases, 1 said "refer to Judicial Council action, recommendation."

question 16.

6 - no answer

1st answer

- 0 said 1
- 0 said 2
- 0 said 3
- 0 said 4
- 3 said 5
- 4 said 6
- 17 said 7
- 17 said 8
- 3 said 9
- 6 said 10

2nd answer

- 0 said 1
- 0 said 2
- 0 said 3
- 1 said 4
- 6 said 5
- 1 said 6
- 16 said 7
- 16 said 8
- 3 said 9
- 7 said 10

- * 1 marked #4 for 2nd answer but stated, "Attorneys assigned under contract as done in this county would rate much higher."

question 17.

(5)

6 - no answer

- 6 said "assigned counsel go to trial more often,"
- 11 said "assigned counsel go to trial slightly more often,"
- 25 said "There is no discernable difference."
- 4 said "Assigned counsel go to trial slightly less often."
- 3 said "Assigned counsel go to trial much less often,"

question 18.

hours/week/judge

- 6 said none
- 1 said very few
- 1 said 5 minutes
- 1 said 1/2 hour
- 17 said 1 hour
- 6 said 2 hours
- 1 said 5 hours
- 1 said 6 hours

hours/week/clerk

- 4 said none
- 1 said not known
- 1 said very few
- 1 said 5 minutes
- 2 said 1/2 hour or less
- 10 said 1 hour
- 5 said 2 hours
- 1 said 3 hours
- 1 said 6 hours

- *1 said "I have no accurate estimates."
- 1 said "1 1/2 hours per month."
- 1 said "Usually assigned in County Court and appointment is continued."

10 - no answer

question 19.

- 20 answered "No"
- 6 - no answer

Remaining answered Yes with these answers:

In approximately how many cases over the last 5 years?

- 3 said 1 case
- 3 said 2 cases
- 5 said 3 cases
- 2 said 4 cases
- 1 said 5 cases
- 1 said 7 cases
- 2 said 5-10 cases
- 2 said 20 cases
- 1 said 25 cases
- 1 said 5% of cases
- 1 said 10% of cases
- 1 said 75% of cases

Reasons:

- 18 said Bill too high
- 1 said Relative expertise required in the particular case - charges for travel.
- 1 said Expenditure of time seems inappropriate and political pressure from counties.
- 1 said Excessive time listed for research, interviews, and court appearances.
- 1 said Padded Account and duplication of charges on voucher at District Court subsequent to bind over.
- 1 said Too much research by new attorney.
- 1 said Was not appointed by the court.

question 20.

(6)

Of the 22 that indicated "no" came these responses:

- 1 said there seems to be plenty of attorneys to fill our requirements.
- 1 said it does not seem practical in rural areas.
- 1 said this gets to be a fence building situation where a selected few attorneys are favored but with no greater abilities.
- 1 said I would prefer full-time defense counsel.
- 1 said too expensive, usually particular attorney looking for glory. Who is to pay for it? Indigent defendant requires adequate counsel, not the best.
- 1 said local autonomy might be jeopardized. I would favor making a list available as a guide but not a "coordinated system."
- 1 said problems arising is being required to follow numerically the list in making appointments.
- 2 said local Public Defender system is adequate.
- 8 said they see no advantage, not necessary.
- 2 said this proposal would foster delay, make unnecessary expense for a very small benefit.

2 checked "no opinion" but gave these responses:

- 1 said could be handled locally.
- 1 said small county with no significant need.

1 checked "yes" and gave a comment:

Better to develop local list.

question 21.

Of the 11 who checked "no" came these responses:

- 1 said "guidelines" already exist.
- 1 said state should pay for appointed counsel.
- 1 said I prefer local autonomy and present system is quite adequate
- 3 said present system is adequate, it's unnecessary.

3 indicated "yes" and stated:

- 1 said those guidelines to stipulate definite "2 years" for repayment.
- 1 said if you are referring to letting each defendant pick between the three, no. Too unwieldy.
- 1 said North Dakota's needs vary from county to county. System must retain flexibility.

question 26.

(7)

Of the 8 who indicated "yes" on the survey were these responses:

- 1 said county judge level.
- 1 said city auditor, subject to objective criteria.
- 2 said don't know.

2 checked "no" and gave these answers:

- 1 said but would like to have guidelines for determination.
- 1 said this is a judicial type decision and should not be delegated.

1 said "N.A." but stated:

Generally that determination has already been made in Justice Court. The State is asked if it concurs and usually answers yes.

1 said "yes and no" with this statement:

The defendant can after questioning financial background.

question 27.

Of the 9 who checked "yes" were these responses:

- 1 said state court administrator's office when and if such fees are paid by the state.
- 1 said county commission or a selection of 4 local bar members and 2 interested civilians.
- 1 said do not know.
- 1 said county auditor or committee appointed by county bar association.
- 1 said city attorney.
- 1 said unfortunately there is no one to whom this duty can be shifted.
- 1 said some attorneys who are actively practicing law.
- 1 said the city auditor and county auditor.
- 1 said county auditor in conjunction with court.

4 indicated "no" and also responded:

- 1 said but should go through states attorney for comment.
- 1 said the court must have control of it's own budget.
- 1 said no problem but city auditor could do with objective criteria.
- 1 said this is part of the judicial job. To delegate this function would be a bad thing.

question 28.

(8)

- 1 said 0%
- 1 said 2%
- 3 said 10%
- 3 said 20%
- 1 said 25%
- 1 said 30%
- 1 said 35%
- 1 said 36.84%
- 1 said 37.5%
- 4 said 40%
- 6 said 50%
- 1 said 55%
- 5 said 60%
- 3 said 70%
- 3 said 80%
- 1 said 90%
- 1 said 98%
- 6 said 100%

No answer - 10

*If we did not have the public defender system, I would anticipate about 10-15% of the local bar would accept criminal appointments.

25-40% before we had the public defender system.

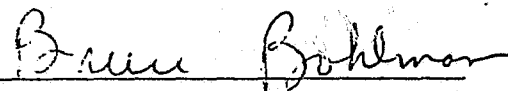
2 said "do not know"

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

PETITION TO THE SUPREME COURT FOR THE ADOPTION AND PROMULGATION OF RULES
ON COUNSEL FOR INDIGENTS AND FOR THE CREATION OF THE NORTH DAKOTA INDIGENT
DEFENSE COMMISSION

The Advisory Committee to the Defense Delivery Project, an undertaking of the State Bar Association of North Dakota, having studied and addressed the provision of legal counsel to indigents and having approved proposed Rules on Counsel for Indigents;

NOW RESPECTFULLY SUBMITS AND RECOMMENDS the attached proposed Rules to the Supreme Court of North Dakota for adoption, and petitions the Court to commence proceedings for the adoption and promulgation of these Rules, pursuant to the Rule on Procedural Rules, Administrative Rules and Administrative Orders of the North Dakota Supreme Court.



Bruce Bohlman, Chairman
P.O. Box 2136
Bismarck, ND 58502



John Walstad, Staff Counsel
P.O. Box 2136
Bismarck, ND 58502

ADVISORY COMMITTEE MEMBERS:

WILLIAM BOHN, Bismarck
ARNE BOYUM, Bismarck
LINDA CATALANO, Bismarck

SHARON GALLAGHER, Bismarck
JOEL GILBERTSON, Bismarck
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PATRICIA WOLD, Fargo

PROPOSED RULES ON COUNSEL FOR INDIGENTS

RULE 1. PURPOSE

It is the policy of the State of North Dakota and its courts to provide the constitutional guarantees of the right to counsel and equal access to the courts to all persons in criminal cases and to provide adequate defense services for indigent persons accused of crime to assure equal justice to all accused persons.

RULE 2. NORTH DAKOTA INDIGENT DEFENSE COMMISSION

- (a) There is hereby established, within the Judicial branch, an Indigent Defense Commission consisting of seven members, one representative of county government, one non-lawyer and five persons licensed to practice law in North Dakota. The Chief Justice of the Supreme Court shall appoint the Commission members from nominations submitted by the Board of Governors of the State Bar Association of North Dakota. The state court administrator shall serve as non-voting executive secretary of the Commission.
- (b) The members of the Commission shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties as members of the Commission from funds available to the Commission.
- (c) Of the members initially appointed, two (2) shall be appointed for one year, two (2) for two years, and three (3) for three years. Thereafter, each appointment shall be for a three-year term.

- (d) No member shall serve more than two successive three-year terms. Each member shall serve until his successor is appointed.

RULE 3. POWERS AND DUTIES

The Commission shall have the following powers and duties:

- (a) To collect data regarding indigent defense cost and case-load from all courts of the state and to prepare an annual report and recommended biennial budget for the Commission and for state funded indigent defense costs for submission to the Supreme Court.
- (b) To provide planning and technical assistance to counties requesting assistance in facilitating indigent defense programs.
- (c) To recommend to the Supreme Court rules regarding indigent defense.
- (d) To review the indigent defense plans submitted by the various jurisdictions and to approve state funded plans.
- (e) To review decisions on fees and support services as requested. The review procedure may be invoked by request of the state court administrator, county commissions or defense attorneys. The Commission may reduce, increase, or approve fees in the amount certified by the trial judge.
- (f) To employ staff and provide office support as possible within the limits of legislative appropriations.
- (g) To adopt rules for its operation not inconsistent with these rules.

RULE 4. INDIGENT DEFENSE SYSTEM SUBJECT TO LOCAL OPTION

- (a) The courts of the state shall provide a system for the representation of indigent persons in which the individual is entitled to legal representation under the laws and Constitution of the State of North Dakota and the Constitution of the United States. Each jurisdiction, acting alone or in combination with one or more other jurisdictions, shall provide this representation by:

(1) Establishing and maintaining an office of public defender;

(2) Arranging to assign counsel on an equitable basis through a systematic plan;

(3) Contracting with private attorneys for defense services to indigents; or

(4) Adopting a combination of these alternatives.

- (b) Each jurisdiction shall submit its plan and any subsequent amendments to the Commission for review. Each state funded plan must be approved by the Commission prior to disbursement of funds.

RULE 5. SUPPORT SERVICES

Investigatory, expert, and other services necessary to an adequate defense shall be provided at public expense upon a satisfactory showing of necessity. Counsel for an indigent defendant shall make prior application to the trial court for approval if such expenses are likely to exceed the amount established by the Commission under Rule 7.

RULE 6. FINANCIAL ELIGIBILITY DETERMINATIONS, PARTIAL ELIGIBILITY

- (a) An eligible person is one who is unable, without substantial financial hardship to that person or that person's de-

pendents, to obtain effective representation. The determination of eligibility shall be made by computing the amount of the person's liquid assets and subtracting therefrom the amount needed for the payment of current obligations and for the support of the person and the person's dependents. The person shall be deemed eligible for representation at public expense if the remaining assets are insufficient to cover the anticipated costs of counsel at prevailing rates charged by competent criminal defense counsel in the jurisdiction, including the cost of such investigatory, expert or other services necessary for effective representation. The person's own assessment of that person's financial ability to obtain effective representation shall be accorded significant consideration.

- (b) Liquid assets include cash in hand, stocks and bonds, bank accounts, and any other property including equity therein which can be readily converted to cash; however, the person's reasonable equity in a necessary motor vehicle, household furnishings, clothing, and necessary provisions shall not be considered in determining eligibility. Except as otherwise provided by law, representation shall not be denied to any person merely because the person's friends or relatives have resources adequate to retain counsel or because the person has posted or is capable of posting bond.
- (c) Financial eligibility determinations shall be made by the court.
- (d) If the person is determined to be eligible for defense

services and if, at the time that the determination is made, the person is able to provide a limited cash contribution toward the cost of that person's defense without imposing a substantial financial hardship upon the person or the person's dependents, such contribution shall be required as a condition of continued representation at public expense. The contribution shall be paid to the appropriating body.

- (e) The person's eligibility may be re-evaluated at any time while that person is being represented at public expense. It shall be the duty of the person to inform the court of a change in financial circumstances.

RULE 7. SETTING OF ATTORNEY'S FEES

- (a) The Judicial Council, the Board of Governors of the State Bar Association of North Dakota and the North Dakota Association of Counties shall each appoint two persons to serve on a special committee on attorney's fees. This six member committee shall formulate and recommend to the Commission an hourly rate of compensation for attorneys representing indigents in the state courts. The committee shall also recommend a maximum amount to be allowed for support services without prior approval of the trial court. This recommendation shall be made to the Commission by March 15 of each year beginning in 1982.
- (b) The Commission shall set the hourly rate of compensation to be paid to attorneys representing indigents in the state courts and the amount related to support services by May 1 of each year but the rate set shall not become effective until July 1 of that year.

RULE 8. REPORTING REQUIREMENTS

- (a) The clerk of district court in each county shall submit to the Commission the total number of cases in which indigents were represented by counsel. This report shall be based upon the fiscal year and shall be submitted by July 31 of each year.
- (b) The clerk of each county court shall submit to the Commission by July 31 of each year a report showing the total number of cases in which indigents were represented by counsel and the total cost of that representation for the prior fiscal year.

MINIMUM GUIDELINES FOR INDIGENT COUNSEL SYSTEMS

- I. ALL SYSTEMS - Since the goal of all defense systems is to assure the provision of quality legal representation to all persons entitled to representation under the laws and constitutions of the United States and the State of North Dakota, it is incumbent upon government and the courts to uniformly meet minimum criteria in providing for this representation. To this end, the following criteria should be met by all defense systems within the State of North Dakota.
- A. PROFESSIONAL INDEPENDENCE - Plans for provision of counsel for indigents should insure that the lawyer and client relationship is guarded. Lawyers representing indigents should be as free from political and judicial influence as they would be if privately retained.
- B. APPLICATION FORMS - All courts should utilize a standard form to be completed and signed under oath by applicants for legal counsel at public expense. The form should contain a warning regarding the penalty for perjury and indicate that verification of the information contained on the application may subject one to the penalty if untrue.
- C. REPORTING - All courts should provide for a system to keep and report records regarding indigent defense costs and caseload to the office of the state court administrator.
- D. WAIVER - No waiver of counsel should be accepted unless it is in writing and of record. Offer of counsel should be made at each stage of proceedings at which the accused appears without counsel but written waiver need only be required once. No waiver should be accepted unless it appears that the accused is able to make an informed, intelligent decision.
- E. PROFESSIONAL LIABILITY INSURANCE - Attorneys furnishing legal services to indigents should be required to furnish evidence of primary professional liability insurance coverage.
- II. ASSIGNED COUNSEL SYSTEMS - The following criteria should be met by all assigned counsel systems in the State of North Dakota.
- A. ROSTER OF ATTORNEYS - Plans should provide that a roster be maintained of all attorneys willing and able to provide quality legal representation to indigent clients in the jurisdiction. The roster shall be maintained by the judge

of the county court.

- B. ROTATION OF ASSIGNMENTS - Assignments of counsel should be made in the order that the names appear on the roster of attorneys. When the nature of the charges or the circumstances require, selection may be made of a lawyer possessing special qualifications to serve in the case, without regard to the established sequence.
 - C. EXPERIENCE OF COUNSEL - If the county court judge believes that the attorney requesting inclusion on the roster has not had sufficient trial experience the judge may require that attorney to serve as co-counsel with other attorneys until the judge places his name on the roster of eligible attorneys. Attorneys serving as co-counsel shall be compensated for actual legal services performed at the direction of head counsel.
 - D. FEE REVIEW - Plans should provide that assigned counsel should be compensated for effort, skill and time actually, properly and necessarily expended in assigned cases. Review of submitted fees should be from a prospective point of view in consideration of the position faced by the attorney prior to performing the legal service in question. Attorneys should be permitted an informal opportunity to justify fees questioned by the fee reviewer. Hourly fees paid should be those set by the Indigent Defense Commission.
- III. PUBLIC DEFENDER SYSTEMS - Public defender systems within the state of North Dakota shall meet the following minimum criteria:
- A. CASELOAD - Plans should provide for an adequate staff to assure that attorneys employed are able to provide quality legal services without being overburdened. There should be a contingency plan to provide for relief of the public defender office if the caseload becomes too great.
 - B. NO PRIVATE PRACTICE - Plans should provide that attorneys employed by the public defender office be full time employees and not be allowed to engage in the private practice of law.
 - C. PROFESSIONAL LIABILITY INSURANCE - The appropriating body should provide primary professional liability insurance coverage for all attorneys employed by the public defender office.
 - D. COMPENSATION - Plans should provide for compensation of attorneys which is adequate to attract and retain skilled counsel for the staff of the public defender office.
 - E. SELECTION OF STAFF ATTORNEYS - Plans should provide for the

appointment of a special committee by the appropriating body. The duty of the committee should be to interview and screen applicants for positions as staff attorneys in the public defender office. The members of the committee should be selected on the basis of their expertise or knowledge in the legal field but the committee should not include any judges before whom the attorneys will appear in court.

- F. CONFLICTS OF INTEREST - Provision should be made for alternative representation in situations in which the public defender office has a conflict of interest in representing a client.
 - G. EARLY REPRESENTATION - Plans should provide for legal representation of an accused within 24 hours of arrest, if the accused requests legal representation by the public defender office. Plans should specify that this representation is provisional and subject to determination of eligibility by the court. Plans may allow for reimbursement from the accused if the accused is later determined to be ineligible.
 - H. SUPPORT SERVICES - Plans should provide a contingency fund to cover anticipated costs of expert witnesses, investigators and other support services as needed to provide for the adequate defense of the accused. Support personnel may be retained on a full or part time basis by the public defender office.
 - I. LIBRARIES - The public defender office should either possess or have access to a legal library sufficient to permit quality legal research.
 - J. APPEALS - Plans should provide for representation of defendants on appeal and provide for the withdrawal or replacement of the public defender in appropriate situations.
- IV. CONTRACT DEFENSE SYSTEMS - Contracts with private law firms for indigent representation shall meet the following minimum criteria:
- A. BIDS - Under no circumstances should defense contracts be let solely on the basis of low bid. Provision should be made for appointment of a special selection committee by the appropriating body. Bids received should be considered by the committee but the primary consideration should be the provision of quality legal services. Judges before whom the defender will appear should not serve on the committee but may be consulted by the appropriating body with regard to questions about what persons would be capable to serve on the committee.
 - B. CASELOAD - Bidders should realistically anticipate caseload

demands and have an adequate staff to meet this need.

- C. CONFLICTS OF INTEREST - Provision should be made for alternative representation in situations in which the contract defender firm(s) have a conflict of interest in representing a client. Wherever feasible multiple law firms should be contracted with to reduce conflict situations.
- D. EARLY REPRESENTATION - Plans should provide for legal representation of an accused within 24 hours of arrest, if the accused requests legal representation by the contract defender firm. Plans should specify that this representation is provisional and subject to determination of eligibility by the court. Plans may allow for reimbursement from the accused if the accused is later determined to be ineligible.
- E. SUPPORT SERVICES - Plans should provide a contingency fund to cover anticipated costs of expert witnesses, investigators and other support services as needed to provide for the adequate defense of the accused.
- F. LIBRARIES - The contract defender firm should either possess or have access to a legal library sufficient to permit quality legal research.
- G. APPEALS - Plans should provide for representation of defendants on appeal and provide for the withdrawal or replacement of the contract defender in appropriate situations.

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