

Fifty-ninth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2027

Introduced by

Legislative Council

(Criminal Justice Committee)

1 A BILL for an Act to establish the commission on legal counsel for indigents for the purpose of
2 providing indigent defense services; to amend and reenact sections 14-07.1-05.1, 14-09-06.3,
3 14-09-06.4, 14-17-15, 25-03.1-13, 25-03.3-09, and 27-20-49, subsection 2 of section 28-32-01,
4 and subsections 1 and 4 of section 29-07-01.1 of the North Dakota Century Code, relating to
5 indigent defense services for mental illness commitment proceedings, civil commitment of
6 sexual predators, guardian ad litem services, and the commission; to provide an appropriation;
7 to provide for transition; and to provide an effective date.

8 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

11 **14-07.1-05.1. Appointment of guardian ad litem for minor.** The court, upon the
12 request of either party or upon its own motion, may appoint a guardian ad litem in an action for
13 a protection order to represent a minor concerning custody, support, or visitation if either party
14 or the court has reason for special concern as to the immediate future of the minor. The
15 guardian ad litem may be appointed at the time of a temporary protection order or at any time
16 before the full hearing. The role of the guardian ad litem consists of investigation and making a
17 recommendation and report to the court. At no time may the involvement of the guardian
18 ad litem alter the requirements set forth in section 14-07.1-03. The appointment of the
19 guardian ad litem expires immediately after the full hearing unless the court retains the right,
20 upon specific finding of need, to continue the appointment of a guardian ad litem to participate
21 in visitation. The guardian ad litem shall have access to records before the court except as
22 otherwise provided by law. The court may direct either or both parties to pay the guardian
23 ad litem fees established by the court. If neither party is able to pay the fees, the court, ~~after~~
24 ~~notice to the state's attorney of the county of venue,~~ may direct the fees to be paid, in whole or

1 in part, by the ~~county of venue~~ supreme court. The court may direct either or both parties to
2 reimburse the ~~county~~ state, in whole or in part, for the payment.

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

5 **14-09-06.3. Custody investigations and reports - Costs.**

- 6 1. In contested custody proceedings the court may, upon the request of either party,
7 or, upon its own motion, order an investigation and report concerning custodial
8 arrangements for the child. The court shall designate a person or agency
9 responsible for making the investigation and report, which designees may include
10 the county social service board, public health officer, school officials, and any other
11 public agency or private practitioner it deems qualified to make the investigation.
- 12 2. The investigator may consult any person who may have information about the child
13 and any potential custody arrangements, and upon order of the court may refer the
14 child to any professional personnel for diagnosis.
- 15 3. The court shall mail the investigator's report to counsel and to any party not
16 represented by counsel at least thirty days before the hearing. The investigator
17 shall make available to any such counsel or party the complete file of data and
18 reports underlying the investigator's report and the names and addresses of all
19 persons whom the investigator has consulted. A party may call the investigator
20 and any person whom the investigator has consulted for cross-examination at the
21 hearing. A party may not waive the party's right of cross-examination before the
22 hearing.
- 23 4. The court shall enter an order for the costs of any such investigation against either
24 or both parties, except that if the parties are indigent the expenses must be borne
25 by the ~~county~~ supreme court.

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

28 **14-09-06.4. Appointment of guardian ad litem or child custody investigator for**
29 **children in custody, support, and visitation proceedings - Immunity.** In any action for an
30 annulment, divorce, legal separation, or other action affecting marriage, when either party has
31 reason for special concern as to the future of the minor children, and in any action when the

1 custody or visitation of children is contested, either party to the action may petition the court for
2 the appointment of a guardian ad litem to represent the children concerning custody, support,
3 and visitation. The court, in its discretion, may appoint a guardian ad litem or child custody
4 investigator on its own motion. If appointed, a guardian ad litem shall serve as an advocate of
5 the children's best interests. If appointed, the child custody investigator shall provide those
6 services as prescribed by the supreme court. The court may direct either or both parties to pay
7 the guardian ad litem or child custody investigator fee established by the court. If neither party
8 is able to pay the fee, the court may direct the fee to be paid, in whole or in part, by the ~~county~~
9 ~~of venue~~ supreme court. The court may direct either or both parties to reimburse the ~~county~~
10 state, in whole or in part, for such payment. Any guardian ad litem or child custody investigator
11 appointed under this section who acts in good faith in making a report to the court is immune
12 from any civil liability resulting from the report. For the purpose of determining good faith, the
13 good faith of the guardian ad litem or child custody investigator is a disputable presumption.

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

16 **14-17-15. Costs.** The court may order reasonable fees of experts and the child's
17 guardian ad litem and other costs of the action and pretrial proceedings, including genetic tests,
18 to be paid by the parties in proportions and at times determined by the court. The court may
19 order the proportion of any indigent party to be paid by the ~~county social service board of the~~
20 ~~county in which the child resides or is found~~ state. In addition, the court may award reasonable
21 attorney's fees if an award is permitted under chapter 28-26.

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

24 **25-03.1-13. Right to counsel - Indigency - Waiver - Recoupment - Limitations.**

- 25 1. Every respondent under this chapter is entitled to legal counsel. The counsel has
26 access to the respondent's medical records upon proof of representation.
- 27 2. Unless an appearance has been entered on behalf of the respondent, the court
28 shall, within twenty-four hours, exclusive of weekends or holidays, from the time
29 the petition was filed, appoint counsel to represent the respondent. If a respondent
30 retains counsel, the retained counsel shall immediately notify the court of that fact.

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

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

20 **25-03.3-09. Right to counsel - Waiver.**

- 21 1. Every respondent is entitled to legal counsel. Unless an appearance has been
22 entered on behalf of the respondent, the court, within twenty-four hours from the
23 time the petition was filed, exclusive of weekends or holidays, shall appoint
24 counsel to represent the respondent. If a respondent retains counsel, the retained
25 counsel immediately shall notify the court of that fact.
- 26 2. After consultation with counsel, the respondent may waive the right to counsel or
27 the right to any hearing provided pursuant to this chapter by notifying the court in
28 writing. The notification must clearly state the respondent's reasons for the waiver
29 and the respondent's counsel shall separately certify that counsel has explained to
30 the respondent the proceedings, the legal and factual issues, potential defenses,
31 the burden of proof, and possible outcomes of the proceedings. No guardian,

- 1 guardian ad litem, attorney, or other individual may waive the right to counsel on
2 behalf of an individual with mental retardation.
- 3 3. If the court determines that the respondent is indigent, the court shall ~~appoint~~
4 ~~counsel and~~ order that appointed counsel be ~~compensated by the county that is~~
5 ~~the respondent's place of residence in a reasonable amount based upon time and~~
6 ~~expenses~~ provided by the commission on legal counsel for indigents.
- 7 4. The state's attorney of a the county that ~~has expended sums pursuant to~~
8 ~~subsection 3~~ is the respondent's county of residence may seek civil recovery of
9 those sums from property of the respondent. Commencement of the action must
10 occur within six years after the date the sums were paid. After notice and hearing,
11 the court may order an individual to reimburse the ~~county~~ state for expenditures
12 made on that individual's behalf pursuant to this chapter.

13 **SECTION 7. Commission on legal counsel for indigents - Membership.**

- 14 1. The commission on legal counsel for indigents is established for the purpose of
15 developing and monitoring a process for the delivery of state-funded legal counsel
16 services for indigents which are required under the Constitution of North Dakota
17 and the United States Constitution and any applicable statute or court rule. The
18 commission shall provide indigent defense services for those individuals
19 determined by the court to be eligible for and in need of those services.
- 20 2. The commission consists of the following members:
- 21 a. Two members appointed by the governor, one of whom must be appointed
22 from a county with a population of not more than ten thousand.
- 23 b. Two members of the legislative assembly, one from each house, appointed
24 by the chairman of the legislative council.
- 25 c. Two members appointed by the chief justice of the supreme court, one of
26 whom must be appointed from a county with a population of not more than
27 ten thousand.
- 28 d. One member appointed by the board of governors of the state bar association
29 of North Dakota.
- 30 3. Appointing authorities shall make their initial appointments to the commission
31 before August 1, 2005.

- 1 4. Initially, as determined by lot, one member will serve for one year, three members
2 will serve for two years, and three members will serve for three years. At the
3 expiration of the initial terms, the appointing authorities designated in subsection 2
4 shall make appointments for three-year terms. A member may not serve more
5 than two consecutive three-year terms plus any initial term of less than three
6 years.
- 7 5. Individuals appointed to the commission should have experience in the defense of
8 criminal cases or other cases in which appointed counsel services are required or
9 should have demonstrated a commitment to quality representation in indigent
10 defense matters. Membership of the commission may not include any individual,
11 or the employee of that individual, who is actively serving as a judge, state's
12 attorney, assistant state's attorney, contract counsel or public defender, or law
13 enforcement officer.
- 14 6. A member of the commission is entitled to reimbursement for travel and expenses
15 as provided by law for other state officers. If not otherwise employed by the state
16 of North Dakota, a member is entitled to receive per diem compensation of
17 sixty-two dollars and fifty cents for each day devoted to attending meetings or
18 performing other duties relating to the official business of the commission.
- 19 7. One of the two appointees of the chief justice, as determined by the chief justice,
20 shall convene the commission's first meeting no later than August 15, 2005. The
21 members of the commission shall select the chairman of the commission within
22 thirty days after the commission's first meeting and annually thereafter.

23 **SECTION 8. Commission responsibilities.**

- 24 1. The commission shall:
- 25 a. Develop standards governing the delivery of indigent defense services,
26 including:
- 27 (1) Standards governing eligibility for indigent defense services;
28 (2) Standards for maintaining and operating regional public defender
29 offices if established;
30 (3) Standards prescribing minimum experience, training, and other
31 qualifications for contract counsel and public defenders;

- 1 (4) Standards for contract counsel and public defender caseloads;
2 (5) Standards for the evaluation of contract counsel and public defenders;
3 (6) Standards for independent, competent, and efficient representation of
4 clients whose cases present conflicts of interest;
5 (7) Standards for the reimbursement of expenses incurred by contract
6 counsel; and
7 (8) Other standards considered necessary and appropriate to ensure the
8 delivery of adequate indigent defense services.
9 b. Establish and implement a process of contracting for legal counsel services
10 for indigents.
11 c. Establish public defender offices in the regions of the state as the commission
12 considers necessary and appropriate.
13 d. Establish a method for accurately tracking and monitoring caseloads of
14 contract counsel and public defenders.
15 e. Approve and submit a biennial budget request to the office of the budget.
16 2. Upon the request of a county or city, the commission may agree to provide
17 indigent defense services in the county or city for those cases in which the county
18 or city is otherwise required to provide such services. Moneys received by the
19 commission in accordance with an agreement under this subsection must be
20 deposited in the indigent defense administration fund.
21 3. The commission shall adopt rules for the exercise of its authority under this
22 chapter in a manner generally consistent with the notice and comment provisions
23 of section 28-32-11.

24 **SECTION 9. Commission director - Responsibilities.**

- 25 1. The commission shall appoint a director who must be chosen on the basis of
26 training, experience, and other qualifications considered appropriate. The director
27 must be an attorney licensed and eligible to practice law in this state at the time of
28 appointment and at all times during service as director. The director may be
29 removed for cause by a majority vote of commission members.
30 2. The director shall:

- 1 a. Assist the commission in developing standards for the delivery of adequate
- 2 indigent defense services;
- 3 b. Administer and coordinate delivery of indigent defense services and
- 4 supervise compliance with commission standards;
- 5 c. Recommend the establishment of public defender offices when considered
- 6 necessary and appropriate to the delivery of adequate indigent defense
- 7 services;
- 8 d. Conduct regular training programs for contract counsel and public defenders;
- 9 e. Subject to policies and procedures established by the commission, hire the
- 10 professional, technical, and support personnel, including attorneys to serve as
- 11 public defenders, considered reasonably necessary for the efficient delivery of
- 12 indigent defense services;
- 13 f. Prepare and submit to the commission a proposed biennial budget for the
- 14 provision of indigent defense services; an annual report containing pertinent
- 15 data on the operation, needs, and costs of the indigent defense contract
- 16 system and any established public defender offices; and any other
- 17 information as the commission may require;
- 18 g. Submit the annual report required under subdivision f to the legislative
- 19 council; and
- 20 h. Perform other duties as the commission may assign.

21 **SECTION 10. Records, files, and information - Accessibility - Confidentiality.** Any

22 file, record, or information regarding representation of a defendant under sections 1 through 4

23 of this Act which are attorney work-product or otherwise subject to any attorney-client privilege

24 are confidential and may not be disclosed except in accordance with a court order or in

25 response to applicable discovery rules. All other case-related records are exempt from

26 disclosure except as otherwise provided in rules adopted by the commission.

27 **SECTION 11. AMENDMENT.** Section 27-20-49 of the North Dakota Century Code is

28 amended and reenacted as follows:

29 **27-20-49. Costs and expenses for care of child.**

- 30 1. The following expenses are a charge upon the funds of the county upon
- 31 certification thereof by the court:

- 1 a. The cost of medical and other examinations and treatment of a child ordered
2 by the court.
- 3 b. The cost of care and support of a child committed by the court to the legal
4 custody of a public agency other than an institution for delinquent children, or
5 to a private agency or individual other than a parent.
- 6 c. The cost of any necessary transportation for medical and other examinations
7 and treatment of a child ordered by the court unless the child is in the legal
8 custody of a state agency.
- 9 2. The ~~supreme court~~ commission on legal counsel for indigents shall pay reasonable
10 compensation for services and related expenses of counsel appointed by the court
11 for a party and the supreme court shall pay reasonable compensation for a
12 guardian ad litem. The attorney general shall pay the witness fees, mileage, and
13 travel expense of witnesses incurred in the proceedings under this chapter in the
14 amount and at the rate provided for in section 31-01-16. Expenses of the state
15 include the cost of any necessary transportation for medical and other
16 examinations and treatment of a child ordered by the court if the child is in the
17 legal custody of a state agency in which case the cost must be reimbursed to the
18 county by that state agency at the state mileage rate, excluding meals and lodging,
19 plus twenty-nine cents per mile.
- 20 3. If, after due notice to the parents or other persons legally obligated to care for and
21 support the child, and after affording them an opportunity to be heard, the court
22 finds that they are financially able to pay all or part of the costs and expenses
23 stated in subsection 1, and expenses payable by the supreme court under
24 subsection 2, the court may order them to pay the same and prescribe the manner
25 of payment. Unless otherwise ordered, payment shall be made to the clerk of the
26 juvenile court for remittance to the person to whom compensation is due, or if the
27 costs and expenses have been paid by the county or the state to the county
28 treasurer of the county or to the state treasurer.

29 **SECTION 12. AMENDMENT.** Subsection 2 of section 28-32-01 of the North Dakota
30 Century Code is amended and reenacted as follows:

- 1 2. "Administrative agency" or "agency" means each board, bureau, commission,
2 department, or other administrative unit of the executive branch of state
3 government, including one or more officers, employees, or other persons directly
4 or indirectly purporting to act on behalf or under authority of the agency. An
5 administrative unit located within or subordinate to an administrative agency must
6 be treated as part of that agency to the extent it purports to exercise authority
7 subject to this chapter. The term administrative agency does not include:
- 8 a. The office of management and budget except with respect to rules made
9 under section 32-12.2-14, rules relating to conduct on the capitol grounds and
10 in buildings located on the capitol grounds under section 54-21-18, rules
11 relating to the classified service as authorized under section 54-44.3-07, and
12 rules relating to state purchasing practices as required under section
13 54-44.4-04.
 - 14 b. The adjutant general with respect to the division of emergency management.
 - 15 c. The council on the arts.
 - 16 d. The state auditor.
 - 17 e. The department of commerce with respect to the division of economic
18 development and finance.
 - 19 f. The dairy promotion commission.
 - 20 g. The education factfinding commission.
 - 21 h. The educational technology council.
 - 22 i. The board of equalization.
 - 23 j. The board of higher education.
 - 24 k. The Indian affairs commission.
 - 25 l. The industrial commission with respect to the activities of the Bank of North
26 Dakota, North Dakota housing finance agency, North Dakota municipal bond
27 bank, North Dakota mill and elevator association, and North Dakota farm
28 finance agency.
 - 29 m. The department of corrections and rehabilitation except with respect to the
30 activities of the division of adult services under chapter 54-23.4.
 - 31 n. The pardon advisory board.

- 1 o. The parks and recreation department.
- 2 p. The parole board.
- 3 q. The state fair association.
- 4 r. The attorney general with respect to the state toxicologist.
- 5 s. The board of university and school lands except with respect to activities
- 6 under chapter 47-30.1.
- 7 t. The administrative committee on veterans' affairs except with respect to rules
- 8 relating to the supervision and government of the veterans' home and the
- 9 implementation of programs or services provided by the veterans' home.
- 10 u. The industrial commission with respect to the lignite research fund except as
- 11 required under section 57-61-01.5.
- 12 v. The attorney general with respect to guidelines adopted under section
- 13 12.1-32-15 for the risk assessment of sexual offenders, the risk level review
- 14 process, and public disclosure of information under section 12.1-32-15.
- 15 w. The commission on legal counsel for indigents.

16 **SECTION 13. AMENDMENT.** Subsection 1 of section 29-07-01.1 of the North Dakota
17 Century Code is amended and reenacted as follows:

- 18 1. Lawyers appointed to represent indigent persons must be compensated at a
- 19 reasonable rate to be determined by the ~~court~~ commission on legal counsel for
- 20 indigents. Expenses necessary for the adequate defense of an indigent person,
- 21 when approved by the judge, must be paid by the state if the action is prosecuted
- 22 in district court and by the city in which the alleged offense took place if the action
- 23 is prosecuted in municipal court. The city shall also pay the expenses in any
- 24 appeal taken to district court from a judgment of conviction in municipal court
- 25 pursuant to section 40-18-19. A defendant requesting representation by appointed
- 26 counsel, or for whom appointed counsel without a request is considered
- 27 appropriate by the court, shall submit an application for appointed defense
- 28 services. For an application for appointed defense services in the district court, a
- 29 nonrefundable application fee of twenty-five dollars must be paid at the time the
- 30 application is submitted. The district court may extend the time for payment of the
- 31 fee or may waive or reduce the fee if the court determines the defendant is

1 financially unable to pay all or part of the fee. If the application fee is not paid
2 before disposition of the case, the fee amount must be added to the amount to be
3 reimbursed under this section. Application fees collected under this subsection
4 must be forwarded for deposit in the indigent defense administration fund
5 established under subsection 4.

6 **SECTION 14. AMENDMENT.** Subsection 4 of section 29-07-01.1 of the North Dakota
7 Century Code is amended and reenacted as follows:

8 4. The indigent defense administration fund is a special fund in the state treasury.
9 The state treasurer shall deposit in the fund all application fees collected under
10 subsection 1. All moneys in the indigent defense administration fund are
11 appropriated on a continuing basis to the ~~judicial branch~~ commission on legal
12 counsel for indigents to be used in the administration of the indigent defense
13 system ~~and the collection of indigent defense costs and expenses required to be~~
14 ~~reimbursed under this section.~~

15 **SECTION 15. APPROPRIATION.** There is appropriated out of any moneys in the
16 general fund in the state treasury, not otherwise appropriated, the sum of \$1,135,285, or so
17 much of the sum as may be necessary, to the commission on legal counsel for indigents for the
18 purpose of establishing the commission, for the biennium beginning July 1, 2005, and ending
19 June 30, 2007. Any moneys not expended by the supreme court for contract services by
20 December 31, 2005, in accordance with section 16 of this Act, are appropriated to the
21 commission on legal counsel for indigents and must be transferred to the commission on
22 January 1, 2006.

23 **SECTION 16. TRANSITION.** All contracts for indigent defense services awarded by
24 the supreme court after June 30, 2005, must expire no later than December 31, 2005.

25 **SECTION 17. EFFECTIVE DATE.** Sections 11 and 13 of this Act become effective on
26 January 1, 2006.