

2009 HOUSE JUDICIARY

HB 1107

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1107

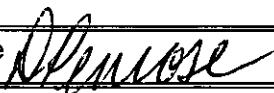
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/14/09

Recorder Job Number: 7010, 7011, 7015

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1107.

Jean Delaney, Deputy Director, ND Commission on Legal Counsel for Indigents:

Sponsor (attachment of Robin Huseby, Director).

Chairman DeKrey: What has been the response from attorneys and judges?

Jean Delaney: This information was sent to the attorneys, judges, Supreme Court, etc. but no comments were received.

Rep. Delmore: How affordable are the fees charged to the defendant. The fiscal note says \$500, is that all we're going to recoup from this.

Jean Delaney: That would be for the home rule county ordinance portion of it. That is the portion where it runs about is \$500 for home rule county violations, usually less. As to the recoupment of indigent defense costs, we really can't anticipate what we would get. We're hoping that it would be more. Our goal is to get the judges to do this.

Rep. Delmore: Who determines if a defendant's parents can pay or not. The parent part surprises me a bit. How does this fit in?

Jean Delaney: If there is no possibility of charging this to the defendant, the defendant has a constitutional right to an attorney. Particularly if it is a criminal defendant, they are headed for

the state pen, there is no way that they would be able to pay for their attorney fees and the judge would not assess any fees against them. For a parent, under the Juvenile Court Act is responsible for providing for an attorney for their child and if they are able to pay for it, or a portion of it, they should reimburse the state for what they reasonably can.

Rep. Delmore: It also includes children over the age of 18, which I assume, they are of legal age, how and why would we go after the parent.

Jean Delaney: Where are you looking?

Rep. Delmore: On the page 3 in the bill, regarding the parent.

Jean Delaney: Under the Juvenile Court Act, when a child is under the age of 18, or 19 and 20, and was charged when they were under 18, and sentenced after they turned 18, the parent still has some responsibility. The reason for the notice going up when the child is over the age of 18, is under HB 1108. We are proposing, determination of whether the child is indigent is based on the child's own income and assets, then the parents would not be responsible for that child. For a child who is under 18, they would be responsible.

Rep. Delmore: Parents are still liable when the child committed an offense when they were under the age of 18.

Jean Delaney: We give notice of the amount that they are responsible to pay. Under 11.08 it talks about who is responsible for providing an attorney, that would be under 27.20.26 and so it wouldn't be the parents who are responsible for paying an attorney for the child over the age of 18 or older.

Chairman DeKrey: How do you get an attorney in the first place, please explain the process.

Jean Delaney: The judge informs the party of their right to an attorney, and then if the person indicates that they want an attorney, they would fill out an application. There are several different applications. There is an application for a person in a criminal proceeding, there is

also an application for a child seeking an attorney in a juvenile matter, seeking an attorney for an adult in a juvenile matter. The parents would be applying for an attorney for themselves, or the parents applying for an attorney to represent the child who is 18, who is applying for themselves. The next step, is the judge looks at the application or a clerk of court, they apply the criteria, and if the person is eligible, an attorney would be assigned to them. The type of case also determines if you are eligible for an attorney.

Chairman DeKrey: You go back and try to recoup the money for the state. If there is an error made, the state is paying. That's why we have come up with legislation trying to get the people to pay for their own representation. So the state is saying, if you could have afforded an attorney in the first place, we think you should reimburse us for what we paid. This is what we are trying to accomplish here.

Jean Delaney: Yes, there are often cases where a person is arrested, they are put in jail, and they might lose their job. They fill out the application, they're not working so they put down \$0 income; the judge then determines that they are eligible. The judge assigns an attorney to them, once they are given an attorney, they bond out, and then they go back to work. Now they are making money. The court sometimes requests a review to determine if they are still eligible. But most often, the judge says that you have an attorney, you are keeping the same attorney on the case, and then the person doesn't go to jail, they are working and this is the person who should be able to pay back at least a portion of the cost of their defense. That way the funds are available for the truly indigent person with no resources.

Rep. Delmore: Can you give an example of what the fees might be for the parents.

Jean Delaney: If you have a child who is 18, did something when he was 17, the petition filed, the parents, unless they want an attorney for themselves and apply as such, they don't have any financial obligation in providing for an attorney for the child. It would be just the child. The

average number of hours that usually go into a juvenile matter are about four x \$65/hr, would be \$260. The court could look at the child and say, I don't really see that you are going to have the ability to pay all \$260, we're going to make you pay \$50, a portion of it.

Rep. Wolf: You talk about having a set fee, is there a fee for a misdemeanor vs. a felony.

Jean Delaney: The average number of hours, for a misdemeanor, is about 4 hours, a felony is 6 and juvenile matters are usually about 4. If the person wouldn't be able to pay this, the court would not assess it. If there is no opportunity that this person is going to be able to pay, they are going to Pen for 20 years, the court would not assess it. If all the defendant did was to go into court and plead guilty and knows that it only took 30 minutes, I would expect and encourage the defense attorney to say how many hours he worked and this is what should be assessed for attorney fees.

Rep. Zaiser: If the parents are clearly affluent enough to hire an attorney, are there any circumstances where you ask the parents to provide the assistance or reimburse the state.

Jean Delaney: The indigency of the juvenile is determined by the income of the parents. As it currently stands it is the parents' income if the child is under the age of 18.

Rep. Zaiser: What are the fees you charge again.

Jean Delaney: The attorneys are on contract, and the contract price per hour is \$65.00. It's hard to calculate how many hours they work a month. The court is currently assessing recoupment on defendants on different fees. The court determines if the defendant will pay for the hourly rate or a set charge.

Rep. Koppelman: Is there a look-back period for a defendant, or is the income just looked at when they are assigned an attorney.

Jean Delaney: We would love if someone had money and the court reviewed their case and determined that they are no longer indigent. If something is said in open court, where a

defendant would say that they need to get back to their job, the court might review their circumstances. If the information would come out during talks with their attorney, that is privileged communication and the court wouldn't be able to find out that the defendant could now pay their attorney fees. The attorney could encourage the defendant to update the court on their status. Occasionally a defendant will do that and sometimes the court will require the defendant to pay.

Rep. Koppelman: So that deals with the trial itself. But let's say that after the trial is completed and the defendant is working, can the court go back and get the fees.

Jean Delaney: That person who was working throughout the process, the court would say, there is a certain amount of attorney fees that you are responsible for. The state could say that this is a jury trial, I know the average number of hours the guy is working, and could request that the court review and set a different amount owed.

Rep. Koppelman: My question is not so much the amount, if somebody is truly indigent then your office looks at the application and you defend them. The disposition of their case is positive enough so that they are out working before trial. Two or three months later, they have a good job, but they were legitimately indigent when they applied and you defended them. Do you go after that person.

Jean Delaney: Unless something new was to happen, I don't think you could do that.

Chairman DeKrey: My understanding from a board meeting, what we're trying to get at here is the ones that are blatantly obvious when they fill out the paperwork for indigency, or it comes out during trial that they have a job or money to pay for their own attorney fees.

Rep. Koppelman: On the bottom of page 3, the court can order three groups of people to pay: 1) the parents; 2) other persons legally obligated to care for and support the child; and 3)

the child if over the age of 18. This says that you can go after the child, if she/he is over the age of 18, not the parents of that child who is over 18, correct?

Jean Delaney: Yes, if the child is in juvenile court because they committed a crime when they were a juvenile, and now are of legal age, we go after the child, not the parents; they would no longer have an obligation to support them.

Rep. Koppelman: Even though the parents would have been obligated at the time of the offense.

Jean Delaney: Yes. The child is responsible for providing for their own attorney in court. Although you could also go after the parents in that situation, if the parent, for some reason, requested an attorney and an attorney was assigned to them in the case separate from the child.

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

Rep. Koppelman: I would like to talk about the fiscal note. How much revenue would it generate for the counties.

Jean Delaney: Since it is very easy to utilize the process would increase the amount, but there is no way to calculate what that would be.

Chairman DeKrey: That is the problem we are trying to get at. The districts and judges work so differently; there are judges that say yes, he gets on and no one looks at any application, etc. Then you have another judge that might actually look at the process and try to do the right thing. We are trying to get a uniform system out there that a majority of judges will use it. Maybe the state will eventually get some money back, but the object isn't to hurt the defendant, the object is to have that money available to a defendant that actually deserves a lawyer. The lawyer, of course, is obligated not to let the judges know anything more than they

need to in regard to the defendant's defense, etc. That's his job. That's why we are trying to make it more uniform.

Chairman DeKrey: We will take a look at HB 1107, what are the committee's wishes.

Rep. Delmore: I move a Do Pass.

Rep. Kingsbury: Second.

13 YES 0 NO 0 ABSENT

DO PASS

CARRIER: Rep. Griffin

FISCAL NOTE
Requested by Legislative Council
 12/22/2008

Bill/Resolution No.: HB 1107

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

| | 2007-2009 Biennium | | 2009-2011 Biennium | | 2011-2013 Biennium | |
|-----------------------|--------------------|-------------|--------------------|-------------|--------------------|-------------|
| | General Fund | Other Funds | General Fund | Other Funds | General Fund | Other Funds |
| Revenues | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 |
| Expenditures | (\$500) | \$0 | (\$500) | \$0 | (\$500) | \$0 |
| Appropriations | \$0 | \$0 | \$0 | \$0 | \$0 | \$0 |

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

| 2007-2009 Biennium | | | 2009-2011 Biennium | | | 2011-2013 Biennium | | |
|--------------------|--------|------------------|--------------------|--------|------------------|--------------------|--------|------------------|
| Counties | Cities | School Districts | Counties | Cities | School Districts | Counties | Cities | School Districts |
| \$500 | \$0 | \$0 | \$500 | \$0 | \$0 | \$500 | \$0 | \$0 |

2A. Bill and fiscal impact summary: Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).

This bill deals with indigent defense attorney fees, expenses. It addresses payment of fees for indigent persons prosecuted for home rule county ordinance violations. It modifies the methodology in the way attorney fees are determined for recoupment. We do not foresee significant fiscal impact.

B. Fiscal impact sections: Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.

Sections 1 and 4. Requires home rule counties to pay for indigent defense costs (in the same way that municipalities pay for indigent defense costs for the violation of their own ordinances). Contract attorneys have handled an average of 2 to 3 of these cases per year, at a maximum of approximately \$500 per year.
 Sections 2 through 4. Provides a new methodology for recoupment of the costs of attorney fees and expenses provided for indigent clients. One goal of the legislative change is to promote a consistent way to determine recoupment amounts across the state. However, it cannot be determined whether this legislation change would result in more or less money being recouped. Our guess is that there will be minimal fiscal impact, and if there is one, it would be that more money will be collected as the Courts may find the fees easier to assess.

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

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

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

The commission has paid no more than \$500 per year on these matters. Contract attorneys in districts with home rule counties have taken these cases as part of their contract to provide indigent defense services. No FTE positions are affected.

C. Appropriations: Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.

| | | | |
|---------------|--------------|----------------|--|
| Name: | Robin Huseby | Agency: | Commission on legal Counsel for Indigents |
| Phone Number: | 701 845-8632 | Date Prepared: | 12/23/2008 |

Date: 1/14/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1107

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Delmore Seconded By Rep. Kingsbury

Total (Yes) 13 No 0

Absent 0

Floor Carrier: Rep. Griffin

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

REPORT OF STANDING COMMITTEE (410)
January 14, 2009 3:56 p.m.

Module No: HR-07-0345
Carrier: Griffin
Insert LC: . **Title:** .

REPORT OF STANDING COMMITTEE

HB 1107: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS
(13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1107 was placed on the
Eleventh order on the calendar.

2009 SENATE JUDICIARY

HB 1107

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1107

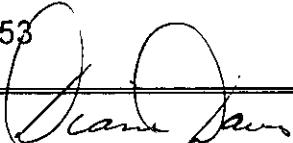
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/16/09

Recorder Job Number: 9553

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Relating to expenses for indigent defense services in home rule counties relating to the payment of and reimbursement for indigent defense attorney's fees and expenses.

Jean Delaney – ND Commission on Legal Counsel for Indigents – See written testimony.

Senator Fiebiger – Asks, have you had conversation with the home rule counties.

Delaney – Replies, they did send out information to home rule counties but they did not respond back. She said what they are charging does not amount to a big amount of money.

Senator Fiebiger – Said it seems counterintuitive, what is the rationale.

Delaney – States some people can afford to pay for a portion of the amount. Some at the time they apply are considered indigent, but then they start a full time job.

Close the hearing.

Senator Lyson motions do pass

Senator Olafson seconds

Vote 6-0

Senator Lyson will carry

Date: 9/10
Roll Call Vote #: 1

**2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.**

1107

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass Do Not Pass Amended

Motion Made By Sysen Seconded By Dogfor

Total **(Yes)** _____ **(N)** _____

Absent _____

Floor Assignment Jen. Lyon

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

REPORT OF STANDING COMMITTEE

**HB 1107: Judiciary Committee (Sen. Nethling, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).** HB 1107 was placed on the
Fourteenth order on the calendar.

2009 TESTIMONY

HB 1107

HB 1107

North Dakota Commission on Legal Counsel for Indigents

House Bill 1107 deals with recoupment of indigent defense attorneys' fees and expenses. Recoupment of attorney fees is done in different ways in all the seven judicial districts and four administrative units. Some judges have the defense attorneys submit their actual billed hours; some judges have a set amount they assess; some judges don't seek recoupment at all. A defendant has many fees he/she can be assessed, such as the administration fee, the application fee, restitution, etc. General recoupment of attorney fees is often a lower priority than most of the other fees, so it is not uniformly collected across the state. According to information received from the State Court Administrator's office, about \$16,000.00 a month is now collected in attorney fees.

By introducing HB 1107, we are hoping to set forth a consistent manner in which the courts could assess recoupment of attorney fees throughout the state – that the Commission on Legal Counsel for Indigents would set a presumed amount for a given type of case. For example, so much for a misdemeanor, or a felony, or a juvenile deprivation case. The judge could then explain to the defendant what this presumed amount is, and that the defendant would have a right to ask for a hearing on the actual attorney fees if he/she objected.

How would the presumed amount be set? Our agency keeps track of the hours attorneys work on cases. Over 50 attorneys across the state, who work on approximately 9,500 cases in a year's time, submit their case hours to our agency. We take those hours over a year's period and determine an average of how many hours are worked on a particular type of case. Our commissioners would then periodically adopt "the presumed attorney hours for recoupment purposes" at one of their usual meetings, and this list would be distributed to the

state court administrator for the Judges use.

This bill asks for an enactment of one section, and amends other sections and I would specifically like to talk about a couple of them.

We are asking that a new section, 11-09.1-14, be enacted. This section would require home rule counties to pay for attorney fees and expenses for the defense of home rule ordinances violations. This would track with how municipal ordinance violations are handled. In those matters the municipality pays for defense counsel in indigent cases. While this issue is not a huge one financially speaking, the statutes are silent on this issue and we want to close that loop hole.

We are asking to amend section 29-07-01.1 to allow the attorney general to seek civil recovery of any amounts expended for indigent counsel. We felt that since any funds recovered go into the general fund, the attorney general would be the one with the dog in the fight, so to speak.

HB 1107
Senate Judiciary Committee
February 16, 2009
Testimony of H. Jean Delaney
North Dakota Commission on Legal Counsel for Indigents

House Bill 1107 deals with recoupment of indigent defense attorneys' fees and expenses. A defendant has many fees he/she can be assessed, such as the administration fee, the application fee, restitution, etc. Recoupment of attorney fees is often seen as a lower priority than other fees, so it is not uniformly collected across the state. Recoupment of attorney fees is done in different ways in all the different judicial districts, and differently from judge to judge. Some judges have the defense attorneys submit their actual billed hours; some judges have a set amount they assess; some judges don't seek recoupment at all. According to information received from the State Court Administrator's office, about \$16,000.00 a month is now collected in attorney fees.

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