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staff for the Judiciary A Committee
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INDIGENT DEFENSE AND PUBLIC DEFENDER SYSTEMS - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3017 (copy attached as an appendix) directs the Legislative Council to study the method of providing legal representation for indigent criminal defendants and the feasibility and desirability of establishing a public defender system. The testimony received during the hearings on House Concurrent Resolution No. 3017 indicated that it has been over 25 years since the Legislative Assembly considered the establishment of a different method of providing indigent defense services and that the dynamics and requirements of providing these services have changed considerably since that time.

BACKGROUND

The Sixth Amendment to the United States Constitution guarantees to all persons accused of a crime the right to counsel in their defense. The United States Supreme Court has interpreted the Sixth Amendment to require each state to provide counsel to any person accused of a crime before he or she can be sentenced to jail or prison if that person cannot afford to hire an attorney. These decisions include *Gideon v. Wainwright*, 372 U.S. 335 (1963) in which the Supreme Court interpreted the Sixth and Fourteenth Amendments as requiring states to provide counsel to all indigents accused of a crime in their jurisdictions; *Argersinger v. Hamlin*, 407 U.S. 25 (1972) in which the Supreme Court extended *Gideon* to include petty offenses that carried a possible sentence of incarceration; and *In re Gault*, 387 U.S. 1 (1967) in which the Supreme Court extended the right to counsel to include all juveniles involved in delinquency proceedings and facing possible incarceration. The states have responded to the Court's mandate in these landmark decisions by developing a variety of systems in which indigent defense services are provided.

Some states and localities have created public defender programs while others rely on the private bar to accept court appointments. In most states, the right to counsel has been expanded by legislation, case law, and state constitutional provisions. This expansion at the state level has contributed to the diversity of systems around the country.

The demand for indigent defense services grew steadily in the two decades following *Gideon*; however, the last 10 to 15 years have seen significant increases in the need for state-funded counsel. Prime factors contributing to the recent explosion in indigent defense caseloads are the "war on crime" and a major increase in drug offenses. It is not uncommon for indigent defense programs to represent up to 90 percent of all criminal defendants in a given felony jurisdiction. The cost of providing indigent defense services has escalated sharply, leaving states to search for ways to contain the costs of indigent defense.

Cost is usually the primary factor determining what type of indigent defense system a state or county adopts. Responding to increased costs, increased caseloads, and litigation challenging the programs in place, many states have refined their indigent defense programs in recent years.

Methods for Providing Counsel to Indigent Defendants

There are three primary models for providing representation to those accused of crimes and unable to afford counsel--assigned counsel, contract, and public defender programs. The assigned counsel model involves the assignment of indigent criminal cases to private attorneys on either a systematic or an ad hoc basis. The contract model involves a private contract with an attorney, a group of attorneys, a bar association, or a private nonprofit organization that will provide representation in some or all the indigent cases in the jurisdiction. The public defender model involves a public or private nonprofit organization with full-time or part-time staff attorneys and support personnel.

From these three models for the appointment of counsel, states have developed indigent defense delivery systems, many of which employ some combination of these types. For example, even in states with a statewide public defender system, private attorneys will be appointed to cases that present a conflict of interest and in some instances to alleviate burdensome caseloads. In other states where there is less uniformity, there may be contract counsel in one county, assigned counsel in a second county, and a public defender office in yet a third county.

Assigned Counsel Programs

Assigned counsel programs utilize private attorneys to represent indigent defendants. The oldest and most common type of assigned counsel program is the ad hoc program, under which the appointment of counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for attorneys. Cases are sometimes assigned to attorneys on the basis of who is in the courtroom at a defendant's first appearance or arraignment, the time when appointments are typically made. Attorneys are usually paid on an hourly basis; however, in some states, attorneys are provided a flat fee per

case. In most jurisdictions, private, court-appointed counsel must petition the court for funds for investigative services, expert witnesses, and other necessary costs of litigation. It is common for such an expenditure to require prior approval of the court and to be subject to a somewhat flexible but court-controlled maximum amount. The ad hoc assigned counsel method is frequently criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed attorneys.

Coordinated assigned counsel programs is a type of program that has some type of administrative or oversight body. These coordinated programs generally require attorneys to meet minimal qualification standards in order to join the program and provide a greater degree of supervision, training, and support for the attorneys who are accepted. In the coordinated model, attorneys are usually assigned on a rotational basis according to their respective areas of expertise and the complexity of the cases.

Contract Attorney Programs

In a contract program, the state, county, or other jurisdictional district contracts with private attorneys, law firms, bar associations, or nonprofit organizations to provide representation to indigent defendants. Often the contract is designated for a specific purpose within the indigent defense system, such as all cases where the public defender has a conflict of interest, or a certain category of cases, for example, felonies, misdemeanors, or juvenile dependencies.

The structure of these programs varies, but there are essentially two main types of contract programs--fixed-price contracts and fixed-fee per case contracts.

In a fixed-price contract program, the contracting lawyer, law firm, or bar association agrees to accept an undetermined number of cases within an agreed-upon contract period, frequently one year, for a single flat fee. The contracting attorneys are usually responsible for the cost of support services, investigation, and expert witnesses for all the cases. Even if the caseload in the jurisdiction is higher than was projected, the contractor is responsible for providing representation in each of the cases for no additional compensation. This type of contract has been severely criticized by the courts and national organizations. The American Bar Association's House of Delegates approved a resolution in 1985 condemning the awarding of contracts for indigent defense services based on cost alone. In *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), the Arizona Supreme Court found this type of system, which was in use in several Arizona counties, unconstitutional because the system does not take into account the time the attorney is expected to spend in representing indigent defendants; does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks; fails to take into account the competency of the attorney; and does not take into account the complexity of each case.

In a fixed-fee per case contract program, the private lawyer, law firm, or organization contracts to provide indigent defense representation. The contract specifies a predetermined number of cases for a fixed fee per case. Frequently, funds for support services, investigation, secretarial services, and expert witnesses will be included in the contract. The contracting attorney typically submits a monthly bill indicating the number of cases handled during the period. Once the predetermined number of cases has been reached, the option exists to renegotiate or extend the contract. The fixed-fee per case system is far less common than the fixed-price contract system.

In the past decade, the number of jurisdictions utilizing contract programs has substantially increased. In most instances, contract programs have been introduced as an alternative to court-appointed attorneys handling conflict cases in jurisdictions that have a public defender office.

The primary appeal of contract systems to funding bodies is the ability to project costs for the upcoming year accurately by limiting the total amount of money that is contracted out. With an assigned counsel system, it is impossible to predict the total cost for the upcoming year. Variables affecting the cost of an assigned counsel system include the total number of cases assigned, whether any death penalty or complicated cases are filed, and whether there are drug sweeps resulting in multiple defendants. Counties and states utilizing fixed-price contracts are not subject to these variables, so they can project with certainty what their indigent defense expenditures will be at the beginning of the year.

Public Defender Programs

A public defender program is a public or private nonprofit organization staffed by full-time or part-time attorneys and is designated by a given jurisdiction to provide representation to indigent defendants in criminal cases. While there are many variations among public defender programs, the defining characteristic is the employment of staff attorneys to provide representation.

The first public defender program was established in Los Angeles in 1913. This early model was intended to provide a core group of experienced criminal lawyers who would improve upon the pro bono representation offered by members of the private bar. Besides the occasional local program, such as in Los Angeles or New York, the public defender model did not proliferate around the country until after the landmark Supreme Court decisions and the publication of several important national studies in the 1970s.

Due to the inevitable cases in which the public defender has a conflict of interest resulting from a

multidefendant case or some other source, no jurisdiction can operate with a public defender alone.

Systems Used by Each State to Provide Indigent Defense Services

The states have developed a wide range of systems to respond to the United States Supreme Court's mandate on the right to counsel. Some states organize their systems on a statewide basis, others by county, and still others by region or judicial district. Some states have passed on to the counties their responsibility to select a system from the various options.

Statewide Systems

More than half of the states have organized some form of a statewide indigent defense program. These statewide systems have varying degrees of responsibility and oversight, but they share the common element of providing some degree of uniformity to the delivery of indigent defense services statewide. A statewide agency may operate under the executive or judicial branch of government or as an independent public or private agency. Often, a governing body or commission is created to enact policy and select the state public defender or chief counsel of the agency. In some states, a state public defender is appointed by the Governor.

Some statewide systems incorporate a variety of local indigent defense delivery systems throughout the state, including public defender offices, assigned counsel, or contract programs. Typically, public defenders serve metropolitan areas, and private bar programs or contract programs serve the less populous regions. Private bar programs are also necessary in all public defender regions to provide representation in conflict and caseload overload situations.

Sixteen states operate indigent defense programs utilizing a state public defender with full authority for the provision of defense services statewide--Alaska, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin, and Wyoming.

Most of these statewide programs provide public defender representation in every county in the state. However, in some states, such as New Hampshire and Vermont, it is not practical to operate staffed public defender offices in rural areas, so assigned counsel or contract programs have been developed for these regions.

Nine of the sixteen states with a statewide public defender have a commission that oversees the program, although the commissions have varying degrees of involvement and responsibility. Massachusetts, for example, has a state public defender and a commission. The commission provides counsel in every indigent defendant case, but the statute mandates representation in particular types of cases between public defenders and the private bar.

State commissions are found both in states with statewide public defender systems and in states that organize their indigent defense systems in a way that combines aspects of state oversight with substantial local control. In these systems, a state commission or board often provides overall direction and may develop standards and guidelines for the operation of local programs. The principal feature of these systems is the provision of central, uniform policy across the state to ensure accountability and quality.

Twelve states have indigent defense commissions setting guidelines for the provision of indigent defense services statewide--Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee. Frequently in the state commission model, local jurisdictions within the state are authorized by statute to determine the type of program (public defender, assigned counsel, contract) that best suits their needs within the adopted guidelines. The local jurisdictions then operate the program independently at the local level. Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, North Dakota, Ohio, and South Carolina all have such commissions or boards, although their duties and responsibilities vary substantially.

County and Regional Systems

In contrast to statewide systems, other states delegate the responsibility to organize and operate an indigent defense system to the individual county or group of counties comprising a judicial district. The decision of what type of system to use may be made by the county board, the local bar association, the local judges, or a combination of these groups. Under this system, there is little or no programmatic oversight at the state level; there is no state board, commission, or administrator. Fourteen states follow this pattern--Alabama, Arizona, California, Idaho, Maine, Michigan, Mississippi, Montana, New York, North Carolina, South Dakota, Texas, Utah, and Washington.

Other Systems

Eight states, plus the District of Columbia, have indigent defense systems that do not fit neatly into the above three categories. In the District of Columbia, a private, nonprofit public defender organization, which is overseen by a board of trustees, provides representation in a portion of the cases, while private, court-appointed attorneys provide counsel in all other cases.

In Florida, the legislature has created 20 independent publicly elected public defender offices. There is one office for each judicial district. While this structure is mandated by the state, there is no state oversight at the trial level.

In Illinois, by statute, every county with a population of 35,000 or more must have a local public defender program. In less populous counties, public defender programs are optional. There is, however, no state oversight at the trial level.

In Iowa, a state public defender is responsible for the tasks common to those of an executive director of a statewide indigent defense commission, although Iowa has no such commission. The state public defender oversees the local public defender, contract, and assigned counsel programs adopted and operated by the 99 counties.

In Nevada, there are two large county public defender programs in Reno and Las Vegas. The rest of the state is served by the Nevada state public defender at the option of each county. If the county opts out of the state public defender system, it must establish its own program and pay for it totally out of county funds.

In Oregon, all county programs are established through a contract negotiation process with the Office of the State Court Administrator.

In Pennsylvania, by statute, every county must have a local public defender program. The local programs are not subject to any state oversight at the trial level.

In Virginia, the legislature can create by statute a public defender program in any area of the state. Areas not designated for public defender programs are served by local assigned counsel programs.

In West Virginia, a state public defender services office administers all funds for indigent defense throughout the state to 13 nonprofit public defender corporations that serve 20 of 55 counties and processes assigned counsel vouchers for the remaining 35 counties. The state provides 100 percent of the funds for indigent defense.

How States Fund Their Indigent Defense Systems

State indigent defense systems may be funded by various sources including state funds, county funds, user fees, court costs, or by a combination of those. Twenty-three states fund their trial system exclusively through state funds, 10 states exclusively through county funds, and 17 states, including North Dakota, through a combination of state and county funds. In addition, a growing number of states rely on filing fees, cost recovery, and court costs assessments from civil litigants and criminal defendants to help fund indigent defense.

NORTH DAKOTA INDIGENT DEFENSE

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

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

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

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

PREVIOUS STUDIES AND RESULTING LEGISLATION

1971-72 Interim

During the 1971-72 interim, the Legislative Council's Model Laws and Intergovernmental Cooperation Committee studied the Model Public Defender Act. The Act would have created a statewide public defender program for the defense of indigents charged with crimes. The program would have been headed by a defender general, appointed by the Governor. Testimony received regarding the Act indicated that a

statewide regional public defender system would be desirable and would solve some of the problems that many small counties have in financing criminal defense of indigent persons. According to the testimony, a fully operational public defender system would handle about 300 cases per year at a cost of $160 per case and have an annual budget of $48,000 per year. A bill that would have implemented the Model Public Defender Act, House Bill No. 1038, was introduced in the 1973 legislative session. The bill failed to pass the House.

1975 Legislative Session

House Bill No. 1465, similar to the bill introduced in 1973, was introduced in the 1975 legislative session. The bill would have created an office of public defender and would have established districts, qualifications, powers and duties, and methods of selection of public defenders. The bill failed to pass the Senate.

1977-78 Interim

During the 1977-78 interim, the Legislative Council's Criminal Justice System Committee considered a bill that would have created a state public defender board with the primary responsibility for the selection of a state public defender director. The director would oversee the activities of the public defender system. Under the system, public defenders would have been responsible for defending indigent defendants. The bill also proposed the creation of an office of district attorney and prosecutorial districts in the state which would coincide with the judicial districts. The cost of a full-time prosecution and defense system was estimated at $2 million to $3 million. The committee did not recommend the proposal due to the cost and the inability of the state's attorneys to agree to the proposal.

SUGGESTED STUDY APPROACH

The committee, in its study of the method of providing legal representation for indigent criminal defendants and the establishment of a public defender system, may wish to approach this study as follows:

- Receive testimony from representatives of the Supreme Court, the State Court Administrator's office, the North Dakota Legal Counsel for Indigents Commission, and from district judges regarding the issues and concerns about the current system of providing indigent defense.
- Receive testimony from representatives of the Supreme Court regarding the costs of funding indigent defense in the state.
- Receive testimony from attorneys with whom the courts contract for indigent defense services regarding issues and concerns about the current system.
- Receive testimony from state's attorneys in the state regarding the costs of prosecuting criminal defendants, the costs attributable to prosecuting indigent defendants, and the relative effectiveness of the current system of providing criminal defense services.
- Receive information and testimony regarding the establishment of a public defender system in the state.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1