

2011 SENATE JUDICIARY

SB 2038

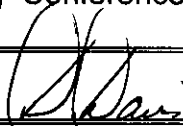
2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2038
1/10/11
Job #12709

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to legal counsel in cases involving the commitment of sexually dangerous individuals.

Minutes:

There is attached written testimony

Senator Nething - Chairman

Representative Shirley Meyer – District 36 – Introduces the bill. Explains the changes and reasons for this bill. See written testimony.

Senator Lyson asks if there was anything brought up during interim that the county should help pay for this.

Rep. Meyer – Responds no, but the counties have been paying for this since 2007. It was a cost they felt better handled by the state. Larger counties are impacted the most.

Vonette Richter – Legislative Counsel – Explains the bill – See attachment.

Kevin Glatt – Burleigh County Auditor – See written testimony.

Senator Lyson – Asks how much Burleigh County saves by the Indigent Defense Attorney's taking all the criminal indigent defense in Burleigh County.

Glatt – Said he imagines it's substantial but the fines and the fees are no longer retained by the county.

Senator Olafson – Asks what Burleigh County would do if they didn't pay the money for attorney fees. What would they spend it on?

Glatt – Said he would recommend to the Board of Commissioners to reduce taxes.

Senator Nething – Points out two different issues that are addressed here. One is the cost and the other is having someone available to represent the individuals. He discusses how to handle both problems.

Glatt – Says there are two issues, retaining counsel but also receiving a bill from something they have no control over. He said he would like to know what he's paying for. He said he doesn't know what the services are or to whom they are being provided.

Aaron Birst – ND Association of Counties – See written testimony.

Senator Nething – Asks him to explain the current system.

Birst – Explains how sexual crimes are monster time eaters. The numbers over all are small but time spent and bills sent from defense counsel are large per case. He continues to explain how the bills come in and how they are paid.

Senator Olafson – Would like everyone to understand that these are very serious proceedings and can result in life time commitments for certain individuals.

Birst – Responds with what kind of individuals they dealing with.

Fritz Fremgen – States Attorney with Stutsman County – He explains some of the costs involved in these court cases. He says in these instances the county is shoulder the burden of both prosecuting the case of this sexually dangerous individual and defending it. He would like to see a model where the state retains some of the monetary responsibilities for making the operation work. He continues offering information the type of cases and breaks down the costs per county.

Robin Huseby – Indigent Defense – See written testimony.

The committee discusses with Huseby on how to solve the problem with counties. She says that it is hard to find an attorney who has the immediate capacity to take on very complicated cases. She said she would need to recruit attorneys that can set aside hours per month knowing eventually they will have a case. It was felt that giving extra time to implement this might alleviate the problem so she can do her contracting. Discussion continued on a pay variance for these cases. The committee asked her if she saw any other options and she said no. They asked if there is anything they can do to make it easier to take this on.

Alex Schweitzer – ND State Hospital – The Chairman asks for an idea on numbers. He says there were 75 people committed to the program since 1997. Currently in program is 64, 16 discharges since the beginning of the program with 2 of those returning to prison. With very effective wrap-around services that are functioning adequately in the community. He mentions these individuals have a preliminary hearing, a treatment hearing and annual reviews. He said they are represented by independent attorneys. There are not a lot of attorneys doing this. When asked if any of the individuals are indigent he says they all are. He said they are supposed collect fees for their care but they don't because they are indigent. Most cases have no resources. These cases are evaluated frequently and are a lot of work.

Senator Nething closes the hearing on 2038

Senator Nething asks the Intern for amendments. An FTE amendment and an effective date of 1/1/12.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2038
1/26/11
Job #13503

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to legal counsel in cases involving the commitment of sexually dangerous individuals

Minutes:

Senator Nething – Chairman

Discussion

Committee looks over the amendment that provides for appropriation, an effective date, one full time equivalent position, and effective date on January 1, 2012.

Senator Lyson moves the amendment
Senator Nelson seconds
Verbal vote – all yes

Discussion

Senator Lyson does not agree with paying county bills. This does not fit in the Indigent Defense. Senator Nelson questions the fiscal note. Committee said it doesn't need a fiscal note when the amount is in the bill. The committee discusses the amendment. Senator Nething asks if we want Indigent Defense to administer this program. Senator Lyson remarks that we are setting up a different situation for Indigent Defense, now they would be doing civil work. Senator Nething said it would be broadening the responsibilities of the commission.

Senator Lyson moves a do not pass
Senator Sitte seconds
Roll call vote split – 3 yes, 3 no – motion fails

Senator Olafson moves do pass as amended
Senator Nelson seconds
Roll call vote split – 3 yes, 3 no – motion fails

Senator Olafson moves without committee recommendation
Senator Nelson seconds

Senate Judiciary Committee
SB2038
1/26/11
Page 2

Roll call vote
6 yes, 0 no

Senator Nething will carry

Without Committee Recommendation

January 27, 2011

FB
1-28-11

PROPOSED AMENDMENTS TO SENATE BILL NO. 2038

Page 1, line 3, remove "and"

Page 1, line 3, after "appropriation" insert "; and to provide an effective date"

Page 3, line 10, after the period insert "The commission on legal counsel for indigents is authorized one full-time equivalent position for the purposes of this section."

SECTION 3. EFFECTIVE DATE. This Act becomes effective on January 1, 2012."

Renumber accordingly

Date: 1/26/11
Roll Call Vote # 7

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2038

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Lyson Seconded By S. Nelson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman			Carolyn Nelson		
Curtis Olafson - V. Chairman					
Stanley Lyson					
Margaret Sitte					
Ronald Sorvaag					

Total (Yes) _____ No _____

Absent _____

Floor Assignment S.

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

Verbal yes

Date: 1/24/11
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2038

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☒ Do Not Pass ☒ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Lyson Seconded By S. Sitte

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman		X	Carolyn Nelson		X
Curtis Olafson - V. Chairman		X			
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 3 No 3

Absent _____

Floor Assignment S.

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

motion fails

Date: 1/20/11
Roll Call Vote # 3

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2038

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By S. Olafson Seconded By S. Nelson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson		X			
Margaret Sitte		X			
Ronald Sorvaag		X			

Total (Yes) 3 No 3

Absent _____

Floor Assignment _____

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

Fails

Date: 1-26-11
Roll Call Vote # 4

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2038

Senate Judiciary Committee

☐ Check here for Conference Committee Without Committee Recommendation

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 6 No 0

Absent _____

Floor Assignment Senator Nething

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

REPORT OF STANDING COMMITTEE

SB 2038: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2038 was placed on the Sixth order on the calendar.

Page 1, line 3, remove "and"

Page 1, line 3, after "appropriation" insert "; and to provide an effective date"

Page 3, line 10, after the period insert "The commission on legal counsel for indigents is authorized one full-time equivalent position for the purposes of this section."

SECTION 3. EFFECTIVE DATE. This Act becomes effective on January 1, 2012."

Renumber accordingly

2011 SENATE APPROPRIATIONS

SB 2038

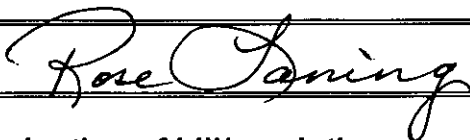
2011 SENATE STANDING COMMITTEE MINUTES

Senate Appropriations Committee Harvest Room, State Capitol

SB 2038
February 4, 2011
Job # 14033

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A bill relating to legal counsel to sexually dangerous individuals.

Minutes:

See attached testimony # 1 & 2.

Chairman Holmberg called the committee hearing to order on SB 2038.
Brady Larson - Legislative Council; Tad H. Torgerson - OMB.

Robin Huseby, Executive Director, Commission on Legal Counsel for Indigents
Testified in favor of SB 2038. Testimony attached - # 1

Speaking from testimony –

The Commission on Legal Counsel for Indigents is a young agency and is primarily a criminal justice agency. If they are required to take on this program, they would need the authority and money to hire one FTE who would be responsible for making sure the attorneys are properly insured, do correct and timely billings, comply with training requirements and that time lines are met. She could only estimate their possible budget because she hasn't received the information from the various counties for their expenses involved with the offenders.

Chairman Holmberg asked the Legislative Council to give the committee members a spread sheet of the amount of money or direct aid that went to counties this past biennium and what is in budgeted for the next biennium.

Senator Christmann thanked Robin for doing her best to estimate a number since the counties didn't get the information together and then asked why this bill was being introduced on the Senate side, when the Commission on Legal Counsel for Indigents budget is tied in with the Supreme Court – or is it separate?

Robin Huseby said it's separate from the Supreme Court, but their budget is in the House.

Senator Christmann continued to ask why this bill is in the Senate.

Chairman Holmberg said that it was a decision made by Legislative Council because it came from an interim committee and they schedule.

Senator Bowman wanted to know what happens if we don't pass the bill? Does everything stay the way it has been?

Robin Huseby: Yes, then the counties would continue to provide the attorney and nothing would substantively change.

Senator Bowman: This would free up money from the counties, do they pay part of that expense to this fund if they no longer have to defend these people? Or are they just that much ahead?

Robin Huseby: That was asked of them and there had been no alternatives added.

Senator Bowman: Does this include the reservations?

Robin Huseby: That is a touchy issue, but the answer is no. If a person from the reservation committed the offense off the reservation, then yes.

Senator O'Connell asked if this wasn't tied in with the judicial budget before and Chairman Holmberg told him it was set up as a separate agency.

Robin Huseby: Before 2005 it was with the Supreme Court. They called it indigent defense in the Supreme Court and then 2005 legislation created this individual agency.

Vonette Richter, Interim Judicial Process Committee, Legislative Council
Testimony attached - # 2

The committee recommended this bill and said she didn't really have any additional information from what Robin said. She has a copy of the final report from that committee that may help with some of the discussion that occurred and also contains some of the numbers they got from the counties at that time as well as some of their reasons for wanting this out of the counties.

Senator Christmann: Is this being discussed in your budget or are they not even aware of it?

Robin Huseby: When we were over on HB 1023, they listed it on the blue sheet as possible legislation so they talked about this more than the budget, but they are very well aware of it.

Senator Christmann said he's inclined to just put a quick Do Not Pass on this bill and get it out of here while the House still has the appropriation bill. They know this isn't coming from the other side and this is so confusing when this happens. If we pass it, then they won't. Then we'll get their budget and then we'll wonder if they're passing the bill or not. It seems that the quicker we get rid of this the quicker the decision will be made whether to put it in the budget.

Senate Appropriations Committee

SB 2038

February 4, 2011

Page 3

Chairman Holmberg asked if that was a motion.

Senator Christmann MOVED DO NOT PASS on SB 2038.

Senator Wardner seconded.

A Roll Call vote was taken. Yea: 10 Nay: 0 Absent: 3

Senator Holmberg will carry the bill.

Date: 2-4-11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2038

Senate Appropriations Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Christmann Seconded By Wardner

Senators	Yes	No	Senators	Yes	No
Chairman Holmberg	✓		Senator Warner	✓	
Senator Bowman	✓		Senator O'Connell	✓	
Senator Grindberg			Senator Robinson		
Senator Christmann	✓				
Senator Wardner	✓				
Senator Kilzer	A				
Senator Fischer	✓				
Senator Krebsbach	✓				
Senator Erbele	✓				
Senator Wanzek	✓				

Total (Yes) 10 No _____

Absent 3

Floor Assignment Holmberg

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

REPORT OF STANDING COMMITTEE

SB 2038, as engrossed: Appropriations Committee (Sen. Holmberg, Chairman)
recommends **DO NOT PASS** (10 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING).
Engrossed SB 2038 was placed on the Eleventh order on the calendar.

2011 TESTIMONY

SB 2038

SB 2038

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

The Judicial Process Committee focused on two issues—the counties caseload and costs with regard to civil commitment cases and the feasibility and desirability of transferring the civil commitment responsibility to the state.

We received extensive testimony from the Counties who would like the state to take responsibility for all civil cases, but they indicated that taking the sexually dangerous individual commitment cases is a step in the right direction. Besides being impossible to budget for, it was indicated that there are few attorney's willing to take these cases.

SB 2038 is a bill to transfer from the counties to the Commission on Legal Council for Indigents the responsibility for providing legal services for those individuals who are indigent and who are the subjects of sexually dangerous individual commitment proceedings.

The bill does include an appropriation of \$814,293 for the 2011-13 biennium.

SB 2038

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(2)

EXCERPT FROM JUDICIAL PROCESS COMMITTEE FINAL REPORT REGARDING SENATE BILL NO. 2038

PROVIDED BY: VONETTE RICHTER

JANUARY 10, 2011

MENTAL HEALTH AND SEXUALLY DANGEROUS INDIVIDUAL COMMITMENT COSTS STUDY North Dakota Indigent Defense

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

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

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

North Dakota Law Regarding Indigent Legal Expenses and Other Costs Indigent Defense for Criminal Cases

Chapter 54-61 provides that the Commission on Legal Counsel for Indigents is responsible for providing state-funded defense services for indigents accused of crimes which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. Under this chapter, the commission is authorized to establish and implement a process of contracting for legal counsel services for indigents and to establish public defender offices in the regions of the state as the commission considers

necessary and appropriate. Section 54-61-02(2) provides that "[u]pon the request of a county or city, the commission may agree to provide indigent defense services in the county or city for those cases in which the county or city is otherwise required to provide such services. Moneys received by the commission in accordance with an agreement under this subsection must be deposited in the indigent defense administration fund."

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

Mental Health Commitment Costs

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

Sexually Dangerous Individuals Legal Counsel Costs

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

Testimony and Committee Considerations

The committee received extensive testimony from the North Dakota Association of Counties, the State Hospital, several state's attorneys, the Commission on Legal Counsel for Indigents, a county auditor, and a county administrator regarding the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous

individuals under Chapter 25-03.3 and in cases involving mental health commitments under Chapter 25-03.1. The committee's deliberations focused on two issues--the counties' caseload and costs with regard to civil commitment cases and the feasibility and desirability of transferring the civil commitment responsibility to the state.

County Caseload and Costs

The committee received testimony regarding the number of mental health and sexually dangerous individual civil commitment cases handled by the counties each year as well as estimates on the costs to the counties incurred as a result of providing the legal counsel services.

With regard to mental health commitment cases, in 2007 and 2008 there were 1,200 to 1,300 mental health commitment petitions filed each year in the state. According to the testimony, 1,067 individuals were committed to the State Hospital for mental health reasons in 2007 and 1,076 individuals were committed in 2008. It was noted that the vast majority of these cases involved both the state's attorney and an indigent defense lawyer, both of whom are paid by the counties. Regarding the cost of legal counsel for the mental health commitment cases, information provided by the Supreme Court indicated that the counties spent \$262,243 on legal fees for indigent mental health clients in 2007 and \$333,663 in 2008.

With regard to sexually dangerous individual commitment cases, there were 17 sexually dangerous individual commitment filings in 2008 and 15 in 2009. Of 15 sexually dangerous individual commitment filings in 2009, 2 were committed to the State Hospital. The testimony indicated there are usually about 15 to 20 filings per year, and from those about 8 individuals to 10 individuals are committed.

There are 61 individuals currently committed to the State Hospital as sexually dangerous individuals. It was noted that each of those committed individuals is entitled to an annual review of their case. An attorney is required for all new cases and for annual reviews. With regard to the counties' costs of providing legal counsel in sexually dangerous individual commitment cases, the testimony indicated that because counties typically include funding for legal costs for mental health commitments, guardians ad litem, and sexually dangerous individual commitments in one budget, it is difficult for counties to identify the actual cost of sexually dangerous individual commitment cases.

The committee received testimony from several counties regarding costs of providing legal counsel in sexually dangerous individual commitment cases. Grand Forks County indicated that in 2007, 2008, and 2009, the county spent \$28,807, \$21,538, and \$7,105, respectively on sexually dangerous individual commitment cases and \$30,000 for each of those years on mental health commitment cases. Testimony from Williams County indicated the county spent \$29,727 on mental health, chemical dependency, and sexually dangerous individual commitment cases in 2007 and \$30,800 in 2008. Other testimony indicated that

Burleigh County spent \$16,000 in 2008 and \$31,000 in 2009 on costs associated with sexually dangerous individual cases. In 2009 Cass County paid \$31,380 for indigent defense in both mental health and sexually dangerous individual commitment cases. Divide County spent \$608 on civil commitment costs in 2008 and \$8,635 in 2009.

With regard to the state's cost for sexually dangerous individual commitments, the testimony from the State Hospital indicated that sexually dangerous individual commitments cost the state about \$10 million per biennium. Included in this amount is the cost of expert examinations for sexually dangerous individual commitment cases at a cost of about \$352,000 per biennium. Since 1997, 12 individuals have been released from the sexually dangerous individual treatment program at the State Hospital. The State Hospital's sexually dangerous individual treatment program has a maximum capacity of 85.

Responsibility for Legal Counsel in Civil Commitment Cases

The committee received extensive testimony from the North Dakota Association of Counties regarding the reasons that the costs and responsibilities incurred by the county in providing legal counsel in sexually dangerous individual commitment cases and mental health commitment cases should be shifted to the state. The testimony noted that because the county state's attorney represents the county in commitment cases and the respondent's attorney is paid by the county, conflict of interest issues exist. The testimony also noted that the issue of conflict of interest arises because the court appoints the legal counsel that represents the respondent. The testimony cited the following reasons for shifting the responsibility of providing legal defense counsel for those individuals for whom the state's attorney is pursuing for civil commitment:

- There is no direct oversight on the county level for evaluating the delivered services.
- Even if oversight could be established, the county officials lack the expertise and qualifications to make those determinations.
- While not staggering, costs can be difficult to budget for especially in the smaller counties in which the demand for services is more sporadic. Additionally, counties lack the true leverage to negotiate fees when appointments have already been made by the court system.
- There already exists a statewide system designed to deliver and monitor indigent defense counsel.

The testimony indicated that an attorney needs a very different level of expertise for handling a sexually dangerous individual commitment case than for a criminal case. It was noted that because the individual potentially could be committed for life, it is important to have an attorney with expertise in that area defending that individual. It was noted that some counties may have only one commitment case in five years. The testimony indicated that having 53 different ways of handling commitment cases is a very inefficient way of providing legal counsel and suggested it would be much

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more efficient to have one entity responsible for providing legal counsel for all commitment cases in the state. The committee also received testimony regarding the shortage of attorneys who are willing to take civil commitment cases, especially in the western part of the state.

Other testimony indicated that while counties may be able to control the expenditure of funds on mental health commitment hearings, the lack of uniformity and control in sexually dangerous individual commitment cases is problematic. It was noted that while larger counties are able to plan for the wide variation in the sexually dangerous individual commitment case expenditures, most counties in the state are not equipped for the lack of predictability and lack of uniformity in expenditures. According to the testimony, a natural consequence of this unpredictability in expenditures is that a county may base the decision to pursue a civil commitment solely on the availability of funding for defense counsel. Conversely, it was noted, the state budgeting process leaves more room for the unpredictability of expenditures. According to the testimony, an unexpected \$20,000 is more easily planned for and absorbed in a state-level budget than in a county-level budget. Besides the cost issue, it was noted the issue of the treatment of mentally ill individuals is one of statewide importance. The testimony suggested that the state is far better equipped to administer the defense attorney component of the civil commitment process than are the 53 separate counties of the state. The testimony indicated that if provided with the necessary additional money and staff, the Commission on Legal Counsel for Indigents is the agency best-suited for providing the legal services for mental health and sexually dangerous individual commitment cases.

The committee also received testimony from the Commission on Legal Counsel for Indigents regarding the prospect of having the commission assume the responsibility for providing legal counsel in cases involving mental health commitments and the commitment of sexually dangerous individuals. The Commission on Legal Counsel for Indigents, which has 30 full-time employees--3 of whom are in administration--administers and oversees 16 staff attorneys and about 42 private attorney contractors. Through the attorneys, the commission provides legal services for indigents for about 9,500 criminal cases per year. It was estimated that sexually dangerous individual commitment cases take an average of 50 or more hours of an attorney's time compared to an average of 15 hours for a criminal case. When comparing the two types of civil commitment cases, the testimony indicated that sexually dangerous individual commitment cases require more expertise and present more challenges than mental health commitment cases. It was noted, however, that mental health cases operate extremely tight deadlines.

The testimony indicated that the commission's attorneys are not trained to handle civil commitment cases; therefore, if the commission assumed this responsibility, funding would be necessary for extra staff, training, office space, and equipment. It was also noted

that because part of the commission's budget is funded by fees paid by criminal defendants, the costs of legal counsel for civil commitment cases could not be commingled with criminal defense costs. According to the testimony, if the commission was required to assume civil commitment cases, a separate budget would be necessary for criminal and civil cases, new attorneys would need to be hired, and another administrator would be needed to handle a separate, civil division of the commission. The testimony indicated that the commission would prefer that the responsibility for civil commitments not be given to the Commission on Legal Counsel for Indigents.

The committee considered a bill draft that would transfer from the counties to the Commission on Legal Counsel for Indigents the responsibility for providing legal services for those individuals who are indigent and who are the subjects of sexually dangerous individual commitment proceedings. The bill draft includes an appropriation of \$814,293 for the 2011-13 biennium. Because there are about 1,400 mental health cases in the state per year versus 20 sexually dangerous individual commitment cases, the committee made the decision to focus the bill draft on the sexually dangerous offender commitment cases.

Testimony from the Commission on Legal Counsel for Indigents regarding the bill draft indicated the commission adopted a resolution that indicated that the commission does not wish to expand the legal services currently being provided. According to the testimony, the resolution provided that if the commission is given the responsibility for the sexually dangerous individual cases, the commission would request a separate division and budget for those cases. The testimony indicated that the appropriation amount includes funding for one FTE position housed in the Valley City office and four attorneys located across the state.

Testimony from a county administrator in support of the bill draft indicated that there is a need for a more efficient system of providing legal counsel in civil commitment cases in the state. The testimony noted that although the counties select attorneys for these cases, the counties do not provide training and have not developed any standards for selecting attorneys. According to the testimony, the commission is the perfect program to make sure sexually dangerous individual cases are handled properly. It was noted that although the counties would prefer that both mental health and sexually dangerous individual cases be handled by the state, the transfer of these responsibilities may have to be done in steps. The testimony also noted that it is likely that 100 percent of the counties would support moving costs and responsibility for mental health and sexually dangerous individual cases to the state.

Testimony from the State Hospital regarding the bill draft indicated that the patient is the one who would benefit by having legal counsel with more expertise in handling the commitment cases; however, it was noted that in most cases the individuals have been receiving adequate legal counsel.

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The North Dakota Association of Counties also expressed support for the bill draft. The testimony indicated that the counties would like the state to take responsibility for all civil cases, but the sexually dangerous individual commitment cases is a step in the right direction. It was noted that the sexually dangerous individual commitment process is a relatively new process and new cost for counties, the cost of which is much more erratic for counties than mental health commitment cases. It was also noted that certain counties, such as Burleigh and Stutsman, bear the majority of the costs because of the location of the State Penitentiary and the State Hospital. The testimony indicated that the Commission on Legal Counsel for Indigents is the best agency to handle the sexually dangerous individual commitment cases.

The committee also received testimony in support of the bill draft from a county auditor. According to the testimony, there are few attorneys willing to take sexually dangerous individual commitment cases. The testimony noted that the district court administrator is reluctant to get involved in the attorney selection process because it is a county function. The testimony also indicated that the state's attorney is reluctant to get involved in the legal defense selection because the state's attorney is prosecuting the case. As a result, it was noted the responsibility then falls to the county auditor. The testimony indicated that county auditors do not have the expertise needed to select a qualified attorney for the commitment cases.

Other testimony in support of the bill draft indicated that it is very difficult in the western counties to find attorneys who are willing to take these cases. It was noted that attorneys who can make three times as much in oil-related cases do not want to take sexually dangerous individual commitment cases. According to

the testimony, counties are reaching the point where no one will take these cases and are in need of a state entity to take over these responsibilities. The testimony also emphasized that it would be more streamlined and efficient for the state to handle civil commitment cases.

Several committee members expressed concerns that counties have little control over their costs in civil commitment cases and indicated that a centralized location for providing legal services in sexually dangerous individual commitment cases would create a higher level of efficiency and expertise. The committee members expressed support for the idea of having four attorneys with expertise in the area of civil commitment of sexually dangerous individuals. These committee members concluded that the Commission on Legal Counsel for Indigents is the best solution.

One committee member in opposition to the bill draft indicated that the current system is working and that the only question that needs to be addressed is who is responsible for paying for the services. The committee member indicated that the Commission on Legal Counsel for Indigents does not want this responsibility, and the counties should be responsible for finding the appropriate location for the responsibility.

Recommendation

The committee recommends Senate Bill No. 2038 to transfer from the counties to the Commission on Legal Counsel for Indigents the responsibility for providing legal services for those individuals who are indigent and who are the subjects of sexually dangerous individual commitment proceedings. The bill includes an appropriation of \$814,293 for the 2011-13 biennium.

(3)

**TESTIMONY TO THE
SENATE JUDICIARY COMMITTEE**
Prepared by Kevin J. Glatt, Burleigh County Auditor

SENATE BILL 2038

INDIGENT DEFENSE for Sexually Dangerous Individuals

Mr. Chairman and members of the committee, I am here today in support of SB2038.

Presently it is very difficult to find lawyers to represent people believed to be sexually dangerous in civil commitment cases. Although I am very fortunate in Burleigh County to work with such an accommodating Court Administer, my experience has been that the State's Attorney and District Judges are reluctant to seek out attorneys to provide defense services because of possible conflicts of interest.

I am further concerned that other county officials including myself lack the required expertise to retain proper defense counsel.

Furthermore when a billing is sent to me, I have no access to case files, and I have no idea if the services have been provided. Again, I am fortunate to have a very good working relationship with the Court Administered in my judicial district, and I implicitly rely on her guidance.

Burleigh County expenditures for SDI legal services:	\$31,131.62 (2009)
	\$49,926.71 (2010)

Thank You.

Testimony to the

SENATE JUDICIARY COMMITTEE

Prepared January 10, 2011 by the North Dakota Association of Counties

Aaron Birst, Legal Counsel

CONCERNING SB 2038

Chairman Nething and members of the Committee, the North Dakota Association of Counties is here today to offer its strong support for SB 2038. As you are aware SB 2038 is the result of a large collective effort taken during the interim. This bill is an attempt to shift the responsibility for providing indigent defense counsel in the cases of civil commitment of sex offenders from the county to the State.

The North Dakota Association of Counties supports the concept of shifting the responsibility of providing legal defense counsel for those individuals who the State's Attorney is pursuing for civil sexual commitment. We support this for the following reasons:

- One, currently there is no direct oversight on the county level of evaluating the delivered services.
- Two, even if oversight could be established the county officials lack the expertise and qualifications to make those determinations. Thereby, the counties would be wholly reliant on Judicial and/or the State's Attorney's determinations of competency which in an adversarial system is always suspect.
- Three, the costs. While not staggering, costs can be difficult to budget for especially in the smaller counties where the demand for services is more sporadic. Additionally, counties lack the true leverage to negotiate fees when appointments have already been made by the court system.
- Fourth, there already exists a State-wide system designed to deliver and monitor indigent defense counsel. In 2005, when the State created the State indigent defense counsel, civil commitment of indigent defendants was not included.

First off, NDACo completely supports the position that those whose liberty may be threatened deserve competent and effective defense counsel. Contract defense lawyers, hired by the counties, have provided this service for years. NDACo also stresses any proposed shifting of duties off the county must also be matched with the appropriate State fiscal resources in order to continue to provide a needed service for the State's indigent population.

Just by way of historical record, prior to 2005, the judicial branch was funding indigent defense costs for criminal cases. In other words, judges would appoint defense attorneys in criminal cases and the defense attorneys would be reimbursed from the judicial branch. Counties were still

responsible for paying defense costs for civil commitments. Generally, how it worked was counsel providing the criminal defense would also indicate to the counties they could also handle the civil commitment hearings. Many counties then created contracts with the defense attorneys and the courts would then appoint those attorneys for the civil commitment cases. (This is the general process ongoing now at least in the bigger jurisdictions. Many smaller jurisdictions have such a limited number of cases they do not have a contract but simply pay bills occasionally submitted by defense counsel who are appointed by the court)

In 2005 the legislature, in NDCC Chapter 54-61, provided that the Commission on Legal Counsel for Indigents would be charged "with developing and monitoring a process for the delivery of **state-funded** legal counsel services for indigents." (emphasis added) Because civil commitment indigent services were not state-funded, the county continued to pay for the services.

What is the process for appointment of indigent counsel in civil commitment cases now? As mentioned above, this process varies amongst the counties. This is also one of the reasons finding hard numbers on what counties spend statewide is difficult. The counties with sporadic civil commitments do not make specific note of the costs. They simply receive a bill from a defense lawyer who the court appointed and they pay the costs out of the general fund. There generally is no oversight or price negotiation from the county or court. Some of the larger counties maintain a contract with local defense firms but there again there is no price negotiation or oversight. This can best be reflected by referring to a quote from Bonnie Johnson, Cass County Administrator when she stated, **"We basically found our crew by word of mouth. We use the firm in Jamestown to do our work in that county and we use two guys from Fargo to do the work for the county. We don't have an application process, we don't interview anybody, we don't do any follow-up work on the lawyers; we don't check to see if they have ethics complaints filed on them. There is not 5 minutes spent on this per year from the county. We simply add the COLA county employees receive onto the existing contracts and send them out for renewal."**

NUMBERS

There are now approximately 61 civilly committed sexual offenders in the State Hospital. Although, 61 may seem like a small number, sexual commitments cases are time intensive for prosecutors, defense attorneys and the State hospital itself. If the State's Attorney is successful in the commitment hearing most if not all offenders appeal their conviction to the North Dakota Supreme Court. Additionally, once committed, all sex offenders have the opportunity to request a yearly review hearing. At each and every step in these proceedings the county bears the cost of not only the prosecution but also the defense attorney costs which can become significant.

To illustrate these costs we can use Burleigh County for an example. Since Burleigh County is one of the largest "purchasers" of these defense services they do have some specific numbers. In 2010, Burleigh County paid \$49,926.71 for indigent defense in sexual civil commitment cases.

Contrast those costs with Divide County which in 2008 went from \$608.76 spent on civil commitment costs to \$8635.64 in 2009 and you can see the dilemma counties face come budget time. In an attempt to figure out these costs to counties I surveyed the county auditors in the summer of 2010. The cost calculations honestly were hard to nail down because of wide swings in costs and the fact the counties have no direct knowledge of the services being performed. However, the bottom line is these costs were found in both large and small counties.

For the following reasons we ask that you support SB 2038 which would alleviate some of these burdens off the property tax payer while at the same time strength the type of services necessary to defend those who cannot afford to defend themselves.

Thanks you and let me know if you have any other questions or concerns.

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Aaron Birst

From: Nathan Madden [nathanm@co.williams.nd.us]
Sent: Sunday, January 09, 2011 4:07 PM
To: Aaron Birst
Cc: Nathan Madden
Subject: Thoughts on the meeting

I wish I could make it down there, but sometimes things happen you can't control. I put together some comments below:

In the last two years, Williams County has committed two individuals to the North Dakota State Hospital as Sexually Dangerous Individuals. One was committed in 2009, the other in 2010. There is another Williams County initial civil commitment, which was started in 2010 and continues to the present date.

The last information I received regarding the number of Sexually Dangerous Individuals at the State Hospital is that they total approximately 61 persons. Of which, Williams County has 6, or 7, if one counts the pending commitment. Either way, our individuals make up approximately 10% of the SDI population at the State Hospital. This is a number that far exceeds the population percentage when comparing Williams County to the rest of the State.

We have been fortunate that for some years, a few of these individuals have not made an annual petition for release. That however, is changing. Each annual petition requires the committed individual have an opportunity for an independent evaluation. The last few evaluations were done by Dr. Riedel out of Florida in 2009 for about \$5,000 per evaluation, with some haggling over travel expenses, etc. Depending on charges for evaluations in 2011, I would place the expected costs for independent evaluations to range between \$35,000 and \$50,000 for the current year, assuming that the trend of demanding annual reviews continues. This figure does not include transportation costs for driving down to Jamestown from the Northwestern part of the State, nor does it include attorney representation costs.

Williams County has also been fortunate that there have not been many appeals from SDI cases. I am aware that Cass County, for example, has experienced innumerable appeals in this arena. Appeals costs for attorney fees would certainly add to county budgets.

The growth in the Western part of the State due to the oil industry has brought many good things to the area. It has also stretched the resources in the area rather thin. Further, civil commitment costs, particularly the annual reviews, are continuing costs which will be present whether an oil boom is or is not present. Each year, for each SDI committed, Williams County can expect to spend somewhere between \$5,000 and \$10,000 in evaluation costs, transportation costs, attorney representation costs, etc. until the person is discharged or dies.

This growth has also lead to an increase in the costs of providing defense services on a contract basis. The current contracting firm has indicated a usual hourly rate of \$200-\$250 per hour in its more recent bid proposal.

While Williams County does not seem to have the possible quality of service concerns that were expressed at earlier hearings, the biggest problems are costs which are cyclical and perpetual. Some years may have the same costs as others due to issues such as continuances which can push evaluations into the next year. This happened in Williams County in 2010. However, barring any unexpected months long delays, these costs are fixed and annual.

SENATE BILL 2038

Testimony by Commission on Legal Counsel for Indigents

Senate Bill No. 2038 purports to give our agency the defense responsibility in civil commitments pursuant to §25-03.3-09; that is, civil commitment of sexually dangerous individuals.

When this proposal came up last session, and during the interim legislative period, I have gone on record several times indicating that our commission does not desire to expand the scope and breadth of our agency. We are very young agency (started in 2005), and only became fully staffed at the end of 2009. We have just settled into the rhythm of providing legal services in approximately 9500 case assignments a year throughout the state. It is a real concern that this bill will be just one of other bills shifting defense matters to our agency which were not contemplated by our commission when we first began in 2005.

It was very difficult to do an estimate of how much this program would cost an agency for a biennium. The Association of Counties has yet to provide hard and fast numbers showing how many cases were filed, how many reviews were requested, and how many hours were spent by attorneys, in any given time period. We did project a biennial cost of \$814,000.00 to our agency based upon a work sheet simply guessing how many cases would be filed and how many hours would be spent. We anticipated, for the biennium, 50 new filings plus 110 annual reviews. We figured a new filing would take an attorney 65 hours to complete, and that an annual review would average approximately 25 attorney hours. We used the rate of \$75.00 an hour. We projected the costs of a full time employee, with benefits, for the biennium.

The monies sought by our agency was listed in the bill at \$814,293.00 for the biennium. What is not specifically listed, and what **we would ask that this committee consider for amendment**, is that the figure is inclusive of one Full Time Employee, which would be an administrative officer II. Currently our administrative staff consists of three people in the Valley City office, and with the amount of travel we now do, we would need someone at the office to handle these matters which come in on an emergency basis at any given time. While the numbers of new SDI cases in the state certainly are not prolific like our criminal case load, an attorney has to be appointed within 24 hours of the filing of the petition, so the appointing authority has to be on top of these filed matters across the state. If this bill does pass, and our agency becomes

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responsible for the defense in SDI commitment cases, we need to make sure we get authority to hire one FTE, not just get the money requested. The FTE would be responsible for making sure the attorneys are properly insured, that their billing is correct and timely, that they are complying with training requirements, and that time lines are being met, just for examples of some of the new FTE's duties associated with taking on a state system. I think one perception which I would like to quash is that the people we have working for us as public defenders, or as contractors, would be handling these SDI commitment cases. None of our public defenders would be handling any of the commitments as they were not hired to do so, and their case load would not allow for such representation. As and for the contractors now working with us, I only know of two who have expressed any interest in these complicated and time consuming cases. If we take on this program, we would have to seriously recruit attorneys around the state and set up a consistent appointment system.

Robin Huseby
Executive Director
Commission on Legal Counsel for Indigents
P.O. Box 149
Valley City, ND 58072
701 845-8632

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SENATE BILL 2038

Testimony by Commission on Legal Counsel for Indigents

Senate Bill No. 2038 purports to give our agency the defense responsibility in civil commitments pursuant to §25-03.3-09; that is, civil commitment of sexually dangerous individuals.

When this proposal came up last session, and during the interim legislative period, I have gone on record several times indicating that our commission does not desire to expand the scope and breadth of our agency. We are very young agency (started in 2005), and only became fully staffed at the end of 2009. We have just settled into the rhythm of providing legal services in approximately 9500 case assignments a year throughout the state.

It was challenging to do an estimate of how much this program would cost an agency for a biennium. The Association of Counties has yet to provide hard and fast numbers showing how many cases were filed, how many reviews were requested, and how many hours were spent by attorneys, in any given time period. We ended up using information from Alex Schweitzer of the State hospital. We did project a biennial cost of \$814,000.00 to our agency. We anticipated, for the biennium, 50 new filings plus 110 annual reviews. (20 the first year, 30 the 2nd year). We projected that each new case would take 65 attorney hours, and each annual review would take 25 attorney hours. We figured a new filing would take an attorney 65 hours to complete, and that an annual review would average approximately 25 attorney hours. There are currently 64 persons committed. We used the rate of \$75.00 an hour. We projected the costs of a full time employee, with benefits, for the biennium.

One issue the appropriations committee should consider is that because each committed individual has the right to an annual review, and few individuals are released, this program grows each and every year. It is interesting to note in Minnesota the program has incrementally grown so much that they are looking at renovating a new facility for sexually dangerous individuals because the currently used one is full.

The monies sought by our agency was listed in the bill at \$814,293.00 for the biennium. You will note the bill includes the addition of one FTE. Currently our administrative staff consists of three people in the Valley City office, and with the amount of travel we now do, we would need someone at the office to handle these matters which come in on an emergency basis

at any given time. While the numbers of new SDI cases in the state certainly are not prolific like our criminal case load, an attorney has be appointed within 24 hours of the filing of the petition, so the appointing authority has to be on top of these filed matters across the state. If this bill does pass, and our agency becomes responsible for the defense in SDI commitment cases, we need to make sure we get authority to hire one FTE, not just get the money requested. The FTE would be responsible for making sure the attorneys are properly insured, that their billing is correct and timely, that they are complying with training requirements, and that time lines are being met, just for examples of some of the new FTE's duties associated with taking on a state system. I think one perception which I would like to quash is that the people we have working for us as public defenders, or as contractors, would be handling these SDI commitment cases. None of our public defenders would be handling any of the commitments as they were not hired to do so, and their case load would not allow for such representation. As and for the contractors now working with us, I only know of two who have expressed any interest in these complicated and time consuming cases. If we take on this program, we would have to seriously recruit attorneys around the state and set up a consistent appointment system.

Robin Huseby
Executive Director
Commission on Legal Counsel for Indigents
P.O. Box 149
Valley City, ND 58072
701 845-8632

SB 2038

Commission on Legal Counsel for Indigents Fiscal Note - SDI Program (Sexually Dangerous Individual)

1) ATTORNEY COSTS

(Assuming 20 new filing year one, 30 new filings, year 2)

Year I

20 New Filings at 65 hours x \$75.00/hour \$97,500.00

50 Annual Reviews at 25 hours x \$75.00/hr. \$93,750.00

Year II

30 New Filings at 65 hours x \$75.00/hour \$146,250.00

55 Annual Reveiws at 25 hours x \$75.00/hr. \$103,125.00

Appeals to Supreme Court *
(40 hours x \$75.00/hour) \$150,000.00

50 Filings for Biennium

TOTAL ATTORNEY FEES FOR BIENNIUM \$590,625.00

ADMINISTRATIVE COSTS (FOR BIENNIUM)

Administrative Officer II \$127,568.00

Office Costs (postage, travel, supplies, set up costs, IT) \$14,600.00

TOTAL ADMINISTRATIVE COSTS \$142,168.00

3) TRAINING & TRAVEL FOR ATTORNEY

4 Trainings x \$5,000.00 each \$20,000.00

Attorney Travel for Biennium
(205 cases x \$300/ case) \$61,500.00

(205 cases = 50 Appeals, 105 Annual Reviews, 50 New)

TOTAL TRAINING/TRAVEL FOR ATTORNEY \$81,500.00

1) ATTORNEY FEES

\$590,625.00

2) ADMINISTRATIVE COSTS

\$142,168.00

3) TRAVEL/TRAINING FOR ATTORNEY

\$81,500.00

RAND TOTAL COST \$814,293

2007 there were 4 appeals, in 2008 10 appeals,
2009 12 appeals and to date (September 9, 2010), there have been 14 filed.

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EXCERPT FROM JUDICIAL PROCESS COMMITTEE FINAL REPORT REGARDING ENGROSSED SENATE BILL NO. 2038

PROVIDED BY: VONETTE RICHTER

FEBRUARY 4, 2011

MENTAL HEALTH AND SEXUALLY DANGEROUS INDIVIDUAL COMMITMENT COSTS STUDY North Dakota Indigent Defense

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

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

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

Testimony and Committee Considerations

The committee received extensive testimony from the North Dakota Association of Counties, the State Hospital, several state's attorneys, the Commission on Legal Counsel for Indigents, a county auditor, and a county administrator regarding the cost of and responsibility for providing legal counsel in cases involving the commitment of sexually dangerous individuals under Chapter 25-03.3 and in cases involving mental health commitments under Chapter 25-03.1. The committee's deliberations focused on two issues--the counties' caseload and costs with regard to civil commitment cases and the feasibility and desirability of

transferring the civil commitment responsibility to the state.

County Caseload and Costs

With regard to mental health commitment cases, in 2007 and 2008 there were 1,200 to 1,300 mental health commitment petitions filed each year in the state. According to the testimony, 1,067 individuals were committed to the State Hospital for mental health reasons in 2007 and 1,076 individuals were committed in 2008. It was noted that the vast majority of these cases involved both the state's attorney and an indigent defense lawyer, both of whom are paid by the counties. Regarding the cost of legal counsel for the mental health commitment cases, information provided by the Supreme Court indicated that the counties spent \$262,243 on legal fees for indigent mental health clients in 2007 and \$333,663 in 2008.

With regard to sexually dangerous individual commitment cases, there were 17 sexually dangerous individual commitment filings in 2008 and 15 in 2009. Of the 15 sexually dangerous individual commitment filings in 2009, 2 were committed to the State Hospital. The testimony indicated there are usually about 15 to 20 filings per year, and from those about 8 individuals to 10 individuals are committed.

There are 61 individuals currently committed to the State Hospital as sexually dangerous individuals. It was noted that each of those committed individuals is entitled to an annual review of their case. An attorney is required for all new cases and for annual reviews. With regard to the counties' costs of providing legal counsel in sexually dangerous individual commitment cases, the testimony indicated that because counties typically include funding for legal costs for mental health commitments, guardians ad litem, and sexually dangerous individual commitments in one budget, it is difficult for counties to identify the actual cost of sexually dangerous individual commitment cases.

The committee received testimony from several counties regarding costs of providing legal counsel in sexually dangerous individual commitment cases. Grand Forks County indicated that in 2007, 2008, and 2009, the county spent \$28,807, \$21,538, and \$7,105, respectively on sexually dangerous individual commitment cases and \$30,000 for each of those years on mental health commitment cases. Testimony from Williams County indicated the county spent \$29,727 on mental health, chemical dependency, and sexually dangerous individual commitment cases in 2007 and \$30,800 in 2008. Other testimony indicated that Burleigh County spent \$16,000 in 2008 and \$31,000 in 2009 on costs associated with sexually dangerous individual cases. In 2009 Cass County paid \$31,380 for

indigent defense in both mental health and sexually dangerous individual commitment cases. Divide County spent \$608 on civil commitment costs in 2008 and \$8,635 in 2009.

With regard to the state's cost for sexually dangerous individual commitments, the testimony from the State Hospital indicated that sexually dangerous individual commitments cost the state about \$10 million per biennium. Included in this amount is the cost of expert examinations for sexually dangerous individual commitment cases at a cost of about \$352,000 per biennium. Since 1997, 12 individuals have been released from the sexually dangerous individual treatment program at the State Hospital. The State Hospital's sexually dangerous individual treatment program has a maximum capacity of 85.

Responsibility for Legal Counsel in Civil Commitment Cases

The committee received extensive testimony from the North Dakota Association of Counties regarding the reasons that the costs and responsibilities incurred by the county in providing legal counsel in sexually dangerous individual commitment cases and mental health commitment cases should be shifted to the state. The testimony noted that because the county state's attorney represents the county in commitment cases and the respondent's attorney is paid by the county, conflict of interest issues exist. The testimony also noted that the issue of conflict of interest arises because the court appoints the legal counsel that represents the respondent. The testimony cited the following reasons for shifting the responsibility of providing legal defense counsel for those individuals for whom the state's attorney is pursuing for civil commitment:

- There is no direct oversight on the county level for evaluating the delivered services.
- Even if oversight could be established, the county officials lack the expertise and qualifications to make those determinations.
- While not staggering, costs can be difficult to budget for especially in the smaller counties in which the demand for services is more sporadic. Additionally, counties lack the true leverage to negotiate fees when appointments have already been made by the court system.
- There already exists a statewide system designed to deliver and monitor indigent defense counsel.

The testimony indicated that an attorney needs a very different level of expertise for handling a sexually dangerous individual commitment case than for a criminal case. It was noted that because the individual potentially could be committed for life, it is important to have an attorney with expertise in that area defending that individual. It was noted that some counties may have only one commitment case in five years. The testimony indicated that having 53 different ways of handling commitment cases is a very inefficient way of providing legal counsel and suggested it would be much more efficient to have one entity responsible for providing legal counsel for all commitment cases in the

state. The committee also received testimony regarding the shortage of attorneys who are willing to take civil commitment cases, especially in the western part of the state.

Other testimony indicated that while counties may be able to control the expenditure of funds on mental health commitment hearings, the lack of uniformity and control in sexually dangerous individual commitment cases is problematic. It was noted that while larger counties are able to plan for the wide variation in the sexually dangerous individual commitment case expenditures, most counties in the state are not equipped for the lack of predictability and lack of uniformity in expenditures. According to the testimony, a natural consequence of this unpredictability in expenditures is that a county may base the decision to pursue a civil commitment solely on the availability of funding for defense counsel. Conversely, it was noted, the state budgeting process leaves more room for the unpredictability of expenditures. According to the testimony, an unexpected \$20,000 is more easily planned for and absorbed in a state-level budget than in a county-level budget. Besides the cost issue, it was noted the issue of the treatment of mentally ill individuals is one of statewide importance. The testimony suggested that the state is far better equipped to administer the defense attorney component of the civil commitment process than are the 53 separate counties of the state. The testimony indicated that if provided with the necessary additional money and staff, the Commission on Legal Counsel for Indigents is the agency best-suited for providing the legal services for mental health and sexually dangerous individual commitment cases.

The committee also received testimony from the Commission on Legal Counsel for Indigents regarding the prospect of having the commission assume the responsibility for providing legal counsel in cases involving mental health commitments and the commitment of sexually dangerous individuals. The Commission on Legal Counsel for Indigents, which has 30 full-time employees--3 of whom are in administration--administers and oversees 16 staff attorneys and about 42 private attorney contractors. Through the attorneys, the commission provides legal services for indigents for about 9,500 criminal cases per year. It was estimated that sexually dangerous individual commitment cases take an average of 50 or more hours of an attorney's time compared to an average of 15 hours for a criminal case. When comparing the two types of civil commitment cases, the testimony indicated that sexually dangerous individual commitment cases require more expertise and present more challenges than mental health commitment cases. It was noted, however, that mental health cases operate on extremely tight deadlines.

The testimony indicated that the commission's attorneys are not trained to handle civil commitment cases; therefore, if the commission assumed this responsibility, funding would be necessary for extra staff, training, office space, and equipment. It was also noted that because part of the commission's budget is funded

by fees paid by criminal defendants, the costs of legal counsel for civil commitment cases could not be commingled with criminal defense costs. According to the testimony, if the commission was required to assume civil commitment cases, a separate budget would be necessary for criminal and civil cases, new attorneys would need to be hired, and another administrator would be needed to handle a separate, civil division of the commission. The testimony indicated that the commission would prefer that the responsibility for civil commitments not be given to the Commission on Legal Counsel for Indigents.

The committee considered a bill draft that would transfer from the counties to the Commission on Legal Counsel for Indigents the responsibility for providing legal services for those individuals who are indigent and who are the subjects of sexually dangerous individual commitment proceedings. The bill draft includes an appropriation of \$814,293 for the 2011-13 biennium. Because there are about 1,400 mental health cases in the state per year versus 20 sexually dangerous individual commitment cases, the committee made the decision to focus the bill draft on the sexually dangerous offender commitment cases.

Testimony from the Commission on Legal Counsel for Indigents regarding the bill draft indicated the commission adopted a resolution that indicated that the commission does not wish to expand the legal services currently being provided. According to the testimony, the resolution provided that if the commission is given the responsibility for the sexually dangerous individual cases, the commission would request a separate division and budget for those cases. The testimony indicated that the appropriation amount includes funding for one FTE position housed in the Valley City office and four attorneys located across the state.

Testimony from a county administrator in support of the bill draft indicated that there is a need for a more efficient system of providing legal counsel in civil commitment cases in the state. The testimony noted that although the counties select attorneys for these cases, the counties do not provide training and have not developed any standards for selecting attorneys. According to the testimony, the commission is the perfect program to make sure sexually dangerous individual cases are handled properly. It was noted that although the counties would prefer that both mental health and sexually dangerous individual cases be handled by the state, the transfer of these responsibilities may have to be done in steps. The testimony also noted that it is likely that 100 percent of the counties would support moving costs and responsibility for mental health and sexually dangerous individual cases to the state.

The North Dakota Association of Counties also expressed support for the bill draft. The testimony indicated that the counties would like the state to take responsibility for all civil cases, but the sexually dangerous individual commitment cases is a step in the right direction. It was noted that the sexually dangerous individual commitment process is a relatively new

process and new cost for counties, the cost of which is much more erratic for counties than mental health commitment cases. It was also noted that certain counties, such as Burleigh and Stutsman, bear the majority of the costs because of the location of the State Penitentiary and the State Hospital. The testimony indicated that the Commission on Legal Counsel for Indigents is the best agency to handle the sexually dangerous individual commitment cases.

The committee also received testimony in support of the bill draft from a county auditor. According to the testimony, there are few attorneys willing to take sexually dangerous individual commitment cases. The testimony noted that the district court administrator is reluctant to get involved in the attorney selection process because it is a county function. The testimony also indicated that the state's attorney is reluctant to get involved in the legal defense selection because the state's attorney is prosecuting the case. As a result, it was noted the responsibility then falls to the county auditor. The testimony indicated that county auditors do not have the expertise needed to select a qualified attorney for the commitment cases.

Other testimony in support of the bill draft indicated that it is very difficult in the western counties to find attorneys who are willing to take these cases. According to the testimony, counties are reaching the point where no one will take these cases and are in need of a state entity to take over these responsibilities. The testimony also emphasized that it would be more streamlined and efficient for the state to handle civil commitment cases.

Several committee members expressed concerns that counties have little control over their costs in civil commitment cases and indicated that a centralized location for providing legal services in sexually dangerous individual commitment cases would create a higher level of efficiency and expertise. The committee members expressed support for the idea of having four attorneys with expertise in the area of civil commitment of sexually dangerous individuals. These committee members concluded that the Commission on Legal Counsel for Indigents is the best solution.

One committee member in opposition to the bill draft indicated that the current system is working and that the only question that needs to be addressed is who is responsible for paying for the services. The committee member indicated that the Commission on Legal Counsel for Indigents does not want this responsibility, and the counties should be responsible for finding the appropriate location for the responsibility.

Recommendation

The committee recommends Senate Bill No. 2038 to transfer from the counties to the Commission on Legal Counsel for Indigents the responsibility for providing legal services for those individuals who are indigent and who are the subjects of sexually dangerous individual commitment proceedings. The bill includes an appropriation of \$814,293 for the 2011-13 biennium.