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SUPPLEMENTAL REPORT

of the

North Carolina Courts Commission

to the

1983 General Assembly

April 6, 1983

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H. PARKS HELMS, CHAIRMAN
CHARLOTTE

April 21, 1983

MEMORANDUM

TO: Members of the 1983 General Assembly

FROM: Parks Helms

The North Carolina Courts Commission is pleased to submit this supplemental report containing its recommendations with respect to the administration and funding of the Indigent Legal Defense Program. This report has been drafted to provide the various legislative committees, including the Appropriations Committee, with background information necessary to establish a realistic policy for the efficient and effective handling of indigent defense matters.

One of the principal recommendations of this report is that the funds appropriated for this purpose should be adequate to meet the projected costs at the beginning of the budget year. Inadequate funding of the program in past years appears to be one of the factors contributing to a lack of support for the program, and the General Assembly is urged to address this issue in its deliberations.

I express my appreciation to the members of the Commission for their hard work in developing these recommendations.

HPH:cj

Attachment

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INDIGENT COUNSEL REPORT

Introduction

The Courts Commission is directed by statute to make "continuing studies of the structure, organization, jurisdiction, procedures and personnel of the Judicial Department and of the General Court of Justice." The Commission presented its recommendations to the 1983 session of the General Assembly in early March. When that report was prepared, the Commission had not finalized its recommendations for dealing with the problems experienced in the state's programs for providing legal representation for indigent persons. This supplement to that report contains a discussion of the background of the problem, the options considered by the Commission, and its recommendations to improve the program's administration, along with recommended legislation to implement one of the recommendations.

Background of the Problem

G.S. 7A-450(b) provides, in part, that whenever a person "is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and other necessary expenses of representation." The statutes regulating appointment of counsel for indigents were enacted in 1969, and now provide for representation in 15 different kinds of proceedings. Seven are proceedings related to criminal actions, two are juvenile actions, and the others deal with matters such as involuntary commitments, incompetency proceedings, termination of parental rights, and sterilization proceedings. In most of these instances, the State is required by the United States Constitution to provide the representation if the person needing legal representation is indigent and does not waive his right to that representation. In other instances, the General Assembly has established state policy to provide the representation, even though it is not constitutionally required.

The representation is not "free." The person may be ordered to repay the State as a condition of probation if he is convicted of a crime and, in any case, the amount of the cost of legal representation can be entered as a civil judgment against him. This system for collection of the amounts expended by the State has recouped slightly less than 10 per cent of the costs of the program in recent years.

The legal services provided by the State are provided in two ways. In some judicial districts, the State has hired public defenders to represent most of the indigent criminal defendants and juveniles charged with criminal acts. The public defenders are state employees and are paid an annual salary set by the General Assembly. Private attorneys are assigned to represent the remainder of the indigent criminal defendants and juveniles in those districts, as well as all the other persons entitled to counsel. Those attorneys are not state employees, and they are compensated on a case by case or daily basis. In districts without public defenders, all services for indigents are provided by private attorneys.

Since its inception, the number of persons served by the indigent defense program and its total costs have risen dramatically. The level of appropriation during that period, however, has generally been high enough to pay the cost of the program for the previous year, but not enough to pay for any increase in costs. In most years, the number of people served by the program increased (and, correspondingly, so did the costs), and the Administrative Office of the Courts paid for the increased costs from other funds appropriated to the Judicial Department (usually lapsed salary funds). This pattern continued into this biennium, but with the current recession the turnover rate in the Judicial Department has dropped significantly, thereby reducing the amount of lapsed salary funds in the Department. In addition, after several years of absorbing inflationary increases in postage, travel, printing, and other items, those portions of the budget also need supplementation, and lapsed salaries are the principal source of that relief. The result is that in the current fiscal year the indigent defense program exhausted its appropriation (over $6 million) in early March. The funds from lapsed salaries will barely meet the shortfall in the other parts of the Department's budget and, as a result, are not available to pay the costs for private attorneys for the rest of the fiscal year (although public defenders, as state employees, will be paid). The indigent defense program's shortfall will probably be around $3.1 million. Simply put, after ten years of borrowing from other sources within the budget, the Judicial Department for the last four months of this fiscal year is unable to tap those sources of funds to pay its bills to private lawyers.

The obvious way to deal with this problem is to appropriate more money. Before appropriating more money, however, it is reasonable for the General Assembly to ask whether the available resources can be used more efficiently. One of the Commission's recommendations deals with that issue by recommending that the General Assembly consider public defender expansion. While the Commission believes that recommendation may help stretch the appropriation, it is important to note that the Commission found no evidence that the program has been mismanaged. In fact, the statistics suggest just the opposite. The costs of the program have risen dramatically, but that increase is generally due to an increase in cases, not to an increase in the per case cost. From 1971-72 to 1981-82, the cost per case in criminal matters rose from $162 to $186; in the same period the number of cases for which payment was made increased from 9,600 to 34,600. The part of the formula subject to control by the court officials and the Administrative Office, the cost per case, rose about 15 per cent in ten years, a percentage far less than the cumulative inflation rate for the same period. The portion of the formula not subject to their control, the number of cases, rose very dramatically because of changes in the scope of protection provided by the U.S. Constitution, additions of new categories of proceedings covered by the statutes, and a general caseload increase.

In fact, those statistics suggest that the payment per case has fallen short of the statutory standard for payment of fees. G.S. 7A-458 provides that fees paid to attorneys should be set at levels "usually charged in similar cases," taking into account the particular facts of the case. An average of $180 per case for representation in court of the most common misdemeanor for which counsel is appointed, drunk driving, is significantly

below the prevailing rate charged by attorneys privately retained for those cases, and the $180 fee average also includes payments for all noncapital felonies. The responsibility to represent indigents has always been an ethical obligation of the bar, and the level of payment has never been expected to reach the levels paid to a privately retained attorney. But in the past that program has balanced those interests much more equitably than it has in recent years. Now the program achieves its balanced budget at the expense of the private bar, in violation of the statutory standard for determining the amounts of the fees to be paid. The Commission believes that standard has been unrealistic since its inception, and is particularly unrealistic given the amount of money available for appropriation now. Accordingly, one of the recommendations contained in the Commission's main report would revise the formulation of the standard for payment to include as a factor the amount of money available for payment.

Options Considered but not Recommended

In discussing possible recommendations to improve the indigent defense program, the Commission considered many options. Some of those discussed and rejected are listed below, along with a brief explanation of the reasons for the Commission's decision:

1. Establishment of a maximum payment for each category of case (which could be accompanied by an escape clause allowing a judge to exceed the maximum if he justifies it). The Commission rejected this option because the variety of cases for which counsel is appointed makes such a categorization very difficult. In addition, that type of system usually results in a situation where the maximum becomes the standard, and it could easily cost more than a system without such firm limits. Finally, with the relatively wide variation in complexity among cases within a category, this kind of a system inadequately compensates the attorney representing the defendant in the complicated case and overcompensates the attorney in the relatively simple case.

2. Contracting with private lawyers to provide legal services on other than a per case basis. The Commission considered several drafts of a bill to allow the Administrative Office to enter into contracts with private attorneys to provide legal services to indigents. The attraction of such a system to the State is that it shifts to the contracting attorney the burden of dealing with unexpected increases in caseload. There are some potential problems, however. The Commission's research and testimony presented to the Commission suggest that a contract system must be very carefully constructed and strictly limited to insure that the indigent persons receive quality legal services. One problem encountered in other jurisdictions is an obvious one--if the caseload is heavier than anticipated, the natural tendency of any contractor is to reduce his cost per case to make up the difference. In addition, in some other states contract systems have in the long run cost as much as other delivery systems when competent counsel is retained as the contracting party. The Commission concluded that the potential conflict between the indigent person's interest and the contractor's economic interest was a potentially serious enough problem that it should retain the matter on its agenda for

further study. Other states are trying similar systems, and if that experience suggests that the system is cost effective and reveals ways to handle the problem of conflict of interest, the Commission may consider this option in the future.

3. Requiring by statute, a monthly allotment of the available funds to each county or district. The Commission does not recommend this as a statutory requirement, but many of its members believe it to be the fairest method of apportioning the limited funds available if it is practical to administer. Under such a system, when the funds for a month (or quarter) are spent, no one is paid until the next month (or quarter). Despite its appeal, the Commission declined to recommend the option for two reasons: First, it believes the Administrative Office already has the authority to try this system. Second, it has never been tried, and if there are practical problems not now anticipated (or if the practical problems of prediction of future caseloads and apportioning the money cannot be solved), it would be desirable not to straight-jacket the Administrative Office with an untried procedure. If the procedure is used successfully, the Commission may recommend that it be mandated by statute in the future.

4. Require payment when an indigent person furnished counsel is found not guilty or the charge is dismissed. Under current law, a person is responsible for repayment of the expenses of his representation if he pleads or is found guilty. In contrast, a non-indigent person has to pay for a lawyer he retains as a private citizen regardless of whether he is convicted. To treat the indigent in the same manner, the Commission considered a bill requiring the clerk to enter a civil judgment against the indigent person for the costs incurred by the state in representing him in instances in which the case is dismissed or the person is acquitted. The Commission declined to endorse the bill, however, because it offended most members' sense of fundamental fairness.

5. Repeal entitlements not constitutionally required. One way to control costs is to reduce the number of categories of cases for which counsel must be appointed. Several of the non-criminal actions lsited under G.S. 7A-451 fall into that category. In each case, however, the entitlement statute represents a judgment by a previous General Assembly that representation for that category of indigents is essential. For example, the most costly entitlement that is not constitutionally mandated is the one requiring a guardian ad litem for a child alleged to be abused or neglected. Repealing that requirement would save money, but it would also reflect a major change in the state's attitude toward children; and the Commission does not want to recommend that fundamental step simply because of a temporary shortfall in funds.

6. Add positions in some clerks' offices to verify affidavits of indigency. A bill to add a deputy clerk in 11 populous counties for this purpose did not receive favorable action in the 1981 session. The Commission discussed the proposal again this year and concluded that in a time of very scarce resources, it was not a high priority. Many of the members doubted its cost-effectiveness. In particular, several members felt that unless the deputy clerk had substantial resources and legal authority not now available

he would not be able to investigate a person's financial records in sufficient detail to give the court any better information than it already has. For these practical reasons, plus the added costs of hiring new people, the Commission declined to recommend this option for this session.

A widespread perception exists, however, that many people who could afford to retain private counsel are being classified as indigent. The Commission recognizes the problem, but it believes the problem is an administrative one that cannot be materially improved by statutory changes. Increasing the sensitivity of the courtroom officials to the problem and, in some cases, giving them the time to adequately consider each affidavit of indigency will help improve the court's performance in this area. It is an area, however, that requires a daily vigil in every criminal courtroom in this state.

Recommendations

The Commission has three recommendations for this session of the General Assembly. Two of them should make the administration of the system more efficient, and the third should make it easier for everyone, including the public, the measure the cost of and the commitment of the state to the program.

1. The first recommendation is that the General Assembly consider establishment of a public defender's office in those districts in which it would be cost effective to do so.

Since its re-creation in 1979, the Commission has been continuously evaluating the effectiveness of the public defender system. One of the problems that has plagued the Commission since then is the absence of reliable cost comparisons between the public defender and assigned counsel systems. In 1982, the Office of State Budget and Management agreed to study the issue and in November the Commission received that report. The report concluded, based on an evaluation of data from the 1980-81 fiscal year, that public defenders' costs per case are significantly lower than assigned counsels'; the average cost per case for assigned counsel was $186 and for public defenders the cost was no more than $130 (and perhaps less, due to an inconsistency in the way expenses are reported). Copies of the report, with an explanation of the methodology and assumptions used, are available from the Commission.

Despite those figures the Commission realizes that in many judicial districts in this state, a public defender's office would not be cost effective. The necessary cost involved in setting up the minimum-sized office would cost more than many rural, multi-county districts spend on assigned counsel. The Administrative Office, at the Commission's request, conducted a study of that issue and it concluded that unless a district spends at least $225,000 per year for assigned counsel, it would cost more to have a public defender than an assigned counsel system. Using that figure as the cut-off, 13 districts are candidates for further study of whether it is cost effective to have a public defender's office there. The Commission did not have suffficient information to enable it to determine which, if any, of those

districts would probably spend less with a public defender's office. That determination requires a careful analysis in each district of the caseload, travel and office requirements, and the level of fees currently paid to assigned counsel. As a result, the Commission recommends that the General Assembly carefully examine those districts which the Commission's data suggests are possible candidates and consider establishment of a public defender's office in those districts in which it is cost effective to do so. The Commission further recommends that the analysis begin with metropolitan areas located in one- or two-county districts. It is likely that most of the multi-county districts will not prove to be cost effective (even though some of them spend over $225,000 per year) because of the costs for travel and maintenance of several offices.

In addition to the questions of cost, there are other factors the Commission considered in making its recommendation. In counties in which there is a public defender's office, that office inevitably does most of the criminal defense work. The Commission believes it is desirable to have as many private lawyers as possible actively participating in the criminal courts, for many reasons, and to that end it recommends that any public defender's office be staffed and expected to handle no more than 70 per cent of the indigent defense work in the district. Cases in which the public defender's office cannot ethically represent a defendant will always require some assigned counsel to be used, but the Commission believes the State's policy should go beyond that minimum.

Another important factor the Commission considered is the quality of service each kind of system delivers. Individual attorneys and judges have widely differing viewpoints on this issue. Some argue in favor of public defenders because of their generally greater exposure to criminal trials. Others argue that public defender systems are undesirable because that same greater exposure to trial, with its almost daily contact with the prosecutors, creates the possibility of conflicts of interest and does not expose the court and the prosecutor to enough differing viewpoints. Statistics gathered by the Institute of Government in its study of the Fair Sentencing Act indicate that privately retained counsel achieved more favorable results than either public defenders or assigned counsel, but public defenders achieved more favorable results than assigned counsel in the percentage of cases in which they achieved a dismissal of the charges. That statistic alone does not resolve the issue of quality, but the Commission found no reason to believe that a public defender system delivers a lower quality of legal service than assigned counsel.

Finally, the Commission realizes that this recommendation will not be politically popular with lawyers or judges. In December of 1982 the Commission solicited opinions from local bar presidents and trial judges about public defender expansion. The overwhelming majority oppose any expansion, and they generally endorse the present system, even though it is now out of money. The Commission believes the opinions of the bar and court officials are important, and its recommendation for targeting the percentage of public defender cases at 70 per cent is a recognition of the concern the lawyers have about maintaining an active private criminal defense bar. In the final analysis, however, the court system belongs to the public, and it is their

best interest that should be served. If that best interest requires a public defender system to provide some of the legal representation for indigents, the preference of the bar and bench must be secondary.

2. The Commission's second recommendation is that the Administrative Office of the Courts be given the authority and responsibility for adopting regulations setting out the procedure for determining indigency and assigning counsel. That statutory authority is now vested by G.S. 7A-459 in the State Bar Council in the districts in which there is no public defender. That statute also requires that plans for assignment of counsel be initially developed by the local district bars for approval by the State Bar Council. When the Commission reviewed this statute, none of the Commission members who are attorneys could cite instances in which their local bar has been active in regulating the indigent defense program, and they agreed that district bars are not organized to satisfy that responsibility. By default the method of assignment has most often been determined by the senior regular resident superior court judge.

Given the importance of maintaining a high level of efficiency in this program, the Commission recommends that G.S. 7A-459 be amended to shift the regulatory authority to the Administrative Office. This amendment would allow the Administrative Office to respond quickly to changes in the financial status of the program, and more importantly, it is likely to be active in seeking the most efficient way to administer the program locally. The Commission recognized that local situations may require that different plans be established in different areas of the state. To insure that local needs are considered, the Commission recommends that the Administrative Office be required to consult with local judges and bar presidents before adopting regulations.

The recommendation will not solve the immediate financial crisis, but it will place the authority in the appropriate administrative agency.

3. The Commission's final recommendation is that the General Assembly consider segregating the appropriation for the indigent defense program from that for the rest of the Judicial Department. Under current budget practice, the indigent defense program is simply a separate item within the Judicial Department's budget. It constitutes about 10% of the departmental budget, and is easily the fastest growing and most uncontrollable program in that budget.

The Commission is not recommending that the responsibility for administering the program be shifted from the Administrative Office to another state agency; it believes that the Administrative Office has handled its responsibility well and is as logical an agency as any other in state government to have that responsibility. The Commission simply recommends that, at budget time, the program's needs be considered independently of other needs of the court system, and once the appropriation decision is made, that the appropriations for the program be administered separately, without allowing other portions of the Judicial Department budget to be used to supplement the program's needs.

The Commission is recommending this action for two reasons. First, it believes that the budget for the indigent program would probably be more realistic and would certainly be more exposed to public scrutiny if the program had to operate solely from the appropriation it receives. The practice of using lapsed salary funds has been convenient for both the budget-makers and the administrators of the system, but a reliance on that practice should be discouraged and should be replaced by a budget that recognizes the needs of and demands placed on the program.

Second, considering the program separately would be fairer to the rest of the court system. With an uncontrollable, mandated program like the indigent defense program in the budget, the first priority for expansion funds in nearly every budget cycle is the amount of money necessary for the program to catch-up. The nature of the budget process is that other requests for program expansion or catch-up funds are less likely to be favorably received if the first priority item is as large (and unpopular) as the indigent defense program expansion inevitably is. The primitive level of technology used by the court system, with its resulting inefficiency, results, in part, from this budgetary process.

The Commission does not believe that this recommendation will necessarily result in more money for the indigent defense program or the rest of the court system, although that is one possible result. In any case, it is better to be honest about the degree of financial support provided for the program. If the Administrative Office and the bar know the General Assembly is unable or unwilling to fund the program fully, they can make adjustments in the level of fees or make other adjustments to balance the budget.

It is clear that adoption of this recommendation would result in an unusual budgetary treatment for this program. Because of its largely uncontrollable nature, its current state of crisis, and its long-term effects on the budget for the rest of the court system, the Commission believes it is time to take unusual action. The attention it will focus on the program and the clarity of decision it will require about the program's funding will be desirable and in the long run should benefit the program, the court system, and therefore the public the court system was established to serve.