

N.D.A.G. Letter to Schnell (Jan. 20, 1986)

January 20, 1986

Mr. Richard L. Schnell
Morton County State's Attorney
P. O. Box 190
Mandan, North Dakota 58554

Dear Mr. Schnell:

Thank you for your letter of January 3, 1986, concerning indigent defense contracts awarded by Morton County.

Although your letter does concern the subject of indigent defense contracts, the questions you have posed involve a delicate balancing of the responsibilities of two branches of government; namely, the executive and judicial branches. At issue are the responsibilities and interactions between the board of county commissioners and the county judge in attempting to carry out the constitutional requirement that those who may be imprisoned for any offense may not be so imprisoned unless they were represented by counsel at all critical stages of the proceedings.

Both parties involved in this issue have responsibilities to carry out. The county commissioners are interested in the fiscal affairs of the county and are concerned over the monies which may be involved in providing legal counsel for those who cannot afford it. The county judge is concerned with the constitutional requirements and ramifications as to the right to counsel by those who cannot afford it in certain criminal matters. The questions posed in your letter involve situations where the two interested parties are unable to arrive at a mutually satisfactory agreement as to the procedure to be followed in following through on the requirement of counsel for indigents in criminal matters.

As noted, the Constitution of the United States does require the provision of counsel to those who cannot afford it should those persons be imprisoned for any offense. Argersinger v. Hamlin, 407 U.S. 25 (1972). In North Dakota, this constitutional requirement is further implemented by Rule 44 of the North Dakota Rules of Criminal Procedure. This particular rule states that every indigent defendant is entitled to have counsel appointed at public expense to represent him at every stage of the proceedings in all felony cases and in all non-felony cases, unless a magistrate has determined that sentence upon conviction in the non-felony case will not include imprisonment.

In addition, the North Dakota Legislature has enacted legislation providing for the procedure for the payment of expenses for those attorneys appointed to represent indigents. N.D.C.C. § 29-07-01.1 states, in part, as follows:

Lawyers appointed to represent needy persons shall be compensated at a reasonable rate to be determined by the court. Expenses necessary for the adequate defense of a needy person, when approved by the judge, shall be paid by the county wherein the alleged offense took place if the action is prosecuted in county court, and by the state if the action is prosecuted in district court.

In light of the decision of the United States Supreme Court, the applicable North Dakota Rule of Criminal Procedure, and the applicable statutory provision on the payment of indigent counsel expenses, it is clear that a partnership is envisioned between the judge, who appoints the indigent counsel and approves their expenses, and the county, who pays for such indigent counsel expenses. However, N.D.C.C. § 29-07-01.1 is unequivocal in its commandment that the court is that body which determines the rate to compensate those lawyers appointed to represent needy persons. The statute further indicates that it is the court who approves the expenses necessary for the adequate defense of a needy person. Finally, the statute indicates that the county must pay for those expenses for indigent counsel incurred in the prosecution of criminal cases in county court when those expenses have been approved by the judge.

In light of this statutory language, the only conclusion to be drawn is that it is the court's duty to determine the rate at which compensation for lawyers appointed to represent needy persons shall be set and it is furthermore the court's duty to approve additional expenses incurred by such counsel in their representation of indigent persons.

I am aware of action taken by our North Dakota Supreme Court in establishing the North Dakota Legal Counsel for Indigents Commission. According to Administrative Rule 18 of the North Dakota Supreme Court, the North Dakota Legal Counsel for Indigents Commission has been established to provide assistance and guidelines to counties and judicial districts so as to facilitate programs for services to indigents. Indeed, the North Dakota Legal Counsel for Indigents Commission has issued Indigent Defense Procedures And Guidelines for use by counties and judicial districts in carrying out the responsibility in the provision of indigent defense services in North Dakota.

However, the Indigent Defense Procedures And Guidelines issued by the North Dakota Legal Counsel for Indigents Commission are exactly that -- guidelines. There is nothing in Administrative Rule 18 or elsewhere in the North Dakota Century Code or the North Dakota Rules of Court indicating that the guidelines issued by the North Dakota Legal Counsel for Indigents Commission are binding upon any legal entity. Instead, these guidelines are suggestions to be considered in arranging for the provision of indigent legal services. While the Supreme Court may review Administrative Rule 18 and the binding nature of resulting guidelines in the future, the present guidelines do not carry the force and effect of law or of rules of court and cannot be treated as directives superseding the statutory language of N.D.C.C. § 29-07-01.1.

Therefore, it is my opinion that the current status of statutory law in this state places the primary responsibility upon the courts in appointing and approving the expenses of legal

counsel called upon to provide legal services to indigents. The Indigent Defense Procedures And Guidelines issued by the North Dakota Legal Counsel for Indigents Commission are suggested guidelines and are not binding upon the courts in carrying out this responsibility. The further question of the manner in which the courts carry out this responsibility is solely an internal administrative matter left to the judicial branch of government for resolution.

It must be pointed out that Administrative Rule 18 does provide a mechanism to review the decisions of trial judges regarding counsel payments and county funded services. This procedure may be initiated by the state court administrator, the chairperson of any county commission, an indigent defendant, or any affected attorney or the trial judge. This procedure is further described at Section 3(a)(9) of Administrative Rule 18. You may wish to review this procedure with the county commission should they object to the decisions of the county judge on this particular matter.

Finally, I believe it would be appropriate for me to indicate my support for the Indigent Defense Procedures And Guidelines as issued by the North Dakota Legal Counsel for Indigents Commission. Realizing that these guidelines are mere suggestions, they appear to be an excellent approach to the improvement of defense services to indigent defendants in criminal cases in the state of North Dakota. The Commission has received much input as to the guidelines from judges, attorneys, and the public in general. This cooperative effort has provided counties and judicial districts with an excellent method whereby the provision of legal counsel to indigents may be accomplished in an effective and efficient manner.

Thus, it is my sincere suggestion to both the board of county commissioners and to the county judge that further attempts be made to resolve differences and to seriously consider the guidelines issued by the North Dakota Legal Counsel for Indigents Commission.

Sincerely,

Nicholas J. Spaeth

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