State tries to curb indigent defense expenses
Flat fee program being tested in Macon courts

By Jessi Stone
News Editor

Court-appointed lawyers are the crux of the U.S. justice system because it is their duty to ensure every U.S. citizen is granted their constitutional right to a fair trial, but many lawyers in Western North Carolina are concerned a new pilot program implemented by the state could threaten that right.

Macon is one of six counties across the state that is being included in a pilot program in which court-appointed lawyers are compensated using a flat-fee schedule instead of an hourly rate. According to data from the Indigent Defense Office of North Carolina, indigent defense costs increased 168 percent between 1989 and 1999 while caseloads increased by 90 percent. Capital defense costs rose 338 percent during the same time period.

“Ultimately the goal is for the state to save money, which always sounds like a good thing — but you have to balance that against the constitutional rights of individuals,” said David Moore, the attorney for Macon County Social Services.

Many lawyers in Macon and the rest of the 30th Judicial District are concerned the flat-fee plan could impact the number of lawyers who choose to serve as court-appointed, lawyers which could in turn affect the quality of representation for indigent defendants.

“Lawyers that are concerned about the system express that a flat fee may not allow them to spend the time necessary to provide effective representation for their clients in more difficult cases,” said Thomas Maher, executive director of the state Office of Indigent Defense Services. “We have tried to address this concern by allowing judges to make additional payment when a case is extraordinary in terms of the time it would take to provide effective representation.”

Maher made a trip from Durham to Franklin in April to give a presentation about the pilot program and answer lawyers’ questions and concerns. The IDS and its 13-member governing board were created in 2000 with the passage of the Indigent Defense Services Act. IDS was instructed last year through legislation to look for ways to cut down on the state’s indigent defense costs, which is how the flat fee program came to be.

Maher presented a detailed fee schedule that clearly lays out how a court-appointed lawyer will be paid per service whether it’s a Class A felony, a DUI charge, a child custody dispute or a probation violation.

“I believe that the program was created to determine whether fee schedules would lead to more predictability in spending and save money,” Maher said. “There are other jurisdictions that use flat fees, and I do not know if they have any published studies regarding the potential cost savings or the impact on the quality of representation.”

Differences by district

Cabarrus and Rowan are the only two counties in the state currently using a flat-fee system. Unlike Macon, those counties also serve as their own districts — District 19A and District 19C, respectively. However, Macon is one of seven counties included in the 30th Judicial District.

The 30th Judicial is also different because it doesn’t contain a public defenders office. Instead, the judicial system relies on private lawyers to opt in to serving as court-appointed lawyers for indigent defense. Only about 15 counties in the state actually have a public defender’s office, meaning lawyers are full-time public defenders who are paid by the state.

Danya Ledford Vanhook is a private attorney handling cases throughout the seven-county district and is also on the court-appointed list to accept all types of cases in District and Superior Court (except murder charges) in Haywood, Jackson and Swain counties. She knows from experience that making time for court-appointed cases is difficult for a small, private law firm within such a large district.

“We, as private counsel, are self-employed and only work for private law firms, and one of the advantages of working for our own firm is the money we pay our lawyers, but we know from experience that making time for court-appointed cases is difficult,” she said. “Most of us are self-employed sole practitioners with our own individual law firms.”

Besides the difference in the districts, the 30th Judicial just doesn’t have the high numbers of lawyers like the cities to the east of the state. Considering the district includes seven spread-out rural counties, the ratio is much smaller.

“There’s not a lot of lawyers in this district and there’s even fewer attorneys that do parent representation — we already don’t have many,” Moore said. “As a result, when the flat fee was instituted, we had more lawyers come off the list. We’re down to six lawyers total now (for parent representation).”

By the numbers

Flat-fee pay schedule for court-appointed lawyers in Macon County, which was chosen to participate in a state pilot program overseen by the Indigent Defense Office.

<table>
<thead>
<tr>
<th>Category</th>
<th>State average</th>
<th>Flat fee</th>
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<tbody>
<tr>
<td>Class A-D felonies</td>
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<td>$400</td>
</tr>
<tr>
<td>All other felonies</td>
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<td>$230</td>
</tr>
<tr>
<td>Class A1 misdemeanors</td>
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<td>Class 1-3 misdemeanors</td>
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<td>Probation violations</td>
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<tr>
<td>DWI</td>
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<td>$300</td>
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<tr>
<td>Civil and criminal contempt</td>
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<tr>
<td>Juvenile felonies</td>
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<tr>
<td>Juvenile misdemeanors</td>
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<tr>
<td>Termination of parental rights</td>
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</table>

Defense shortage

The flat-fee schedule is putting more pressure on a judicial system that is already struggling to keep enough lawyers on the lists for criminal defense and child custody cases. Many lawyers took their name off the court-appointed list when hourly rates dropped to $55, and now more are coming off the flat-fee program.

Rich Cassady, an attorney in Macon County, took his name off the list for criminal defense after attending the meeting with IDS back in April.

“I got off the misdemeanor list shortly after our meeting with Thomas Maher of Indigent Defense Services. I had removed myself from the felony list last September,” he said. “True to form for attorneys, some stayed on the list because their choice was to either work for peanuts or start driving for Uber, and at least one out-of-county attorney got on the Macon County list because he smelled opportunity. If he wants to drive 70 miles round trip several times for $485 (misdemeanor), $230 (felony) or $300 (DUI) he’s welcome to it.”

Cassady is obviously not a supporter of the flat-fee pilot program as it puts lawyers between a rock and a hard place when it comes to fulfilling their duties and their ability to make a living.

“I pointed out to Mr. Maher at our meeting that the Legislature was pitting an attorney’s duty to zealously defend a client against his duty to feed himself and his family,” Cassady said. “Who can put hours into a case for $185? This model turns criminal defense into a volume business like Walmart.”

The concern is that if lawyers know they’re only going to get $300 for a DUI case, they’ll be quicker to just make a plea deal instead of going above and beyond to make the best decision for their client.

Sometimes District Court cases are simple and can be resolved with only a couple of hours invested, but others are complicated and require hours of research, hours of travel time and hours of sitting in court waiting for their client’s name to come up on the docket.

“The only way an attorney will make money is to plead the cases as soon as he can,” Cassady said. “Who can afford to sit around in the Macon County Courthouse all day behind a desk, 50 breaks, lunch, and inmate cases just to finally get to plead their cases later in the afternoon?”

Cassady said this program would only work financially for lawyers if the court-appointed list stays lean and they can take on enough cases to make the money work for them. If too many are on the list, the cases will be spread too thin — being on the list won’t have any financial benefit for lawyers taking time away from their private practices for the public service.

A thin list is what the district has right now. As an elected official, it’s difficult for Ashley Welch, the 30th Judicial District Attorney, to have a personal opinion on the...
state pilot program, especially since she’s never been on the criminal defense side of the courtroom. She does know that just the implementation of the flat-fee schedule in Macon has already caused a shortage of court-appointed lawyers.

“The number of people on the court-appointed list has dramatically decreased just since April,” Welch said. “There’s only four on the list for District Court in Macon County — we had 12 to 15 when I was an assistant DA.”

Vanhook remains hopeful that lawyers will stay on the court-appointed list because of their ethical responsibility and belief that every person is entitled to competent, vigorous legal counsel.

“Even though they are taking a loss, it’s an emotional, visceral response that someone has got to stand up to DSS for the poorest and most disadvantaged members of our society,” she said. “But, at the same time, we have children of our own and have to feed our families. The flat fee would not be sustainable, so what it does is encourage lawyers just to do the bare minimum, because that’s all you’re getting paid for anyway.”

**Fair fees?**

Maher said during his presentation that a flat-fee schedule — if successful — would also help the state create a uniform, standardized system across the state instead of having different payment plans in each district.

Macon is included with Burke, Davidson, Iredell, Lincoln and Watauga counties to test out the pilot program.

“Macon and the other counties were picked because the legislature required two large counties, two medium and two small counties for the pilot, and we tried to find counties that meet these criteria and in which there appeared to be a healthy indigent defense system already operating,” Maher said.

Many of the established fees fall below the state average — $400 for a Class A-D felony, $200 for a Class A1 misdemeanor, $300 for a DUI and $185 for a probation violation.

In a case with multiple charges per defendant, IDS says the court-appointed lawyer will be compensated based on the highest original charge of all the charges being resolved at the same time. For example, if a court-appointed lawyer is dealing with a defendant who has a misdemeanor and a DUI charge, the lawyer will receive the higher $300 DUI fee.

IDS is still working on “extraordinary pay guidelines” in an effort to cover those cases which, either because they are complicated or lengthy, cannot be fairly compensated under a flat fee system. For example, a DWI that is litigated in both the District and Superior Court may be submitted to the presiding judge for payment under the hourly rather than the flat fee rate.

“See, there is a caveat to the flat fee schedule — you can apply to the judge in cases where you’ve had to work well over the 8-10 hours, which is the only amount of time that would be fairly compensated by the flat fee of $500,” Vanhook said. “So if you’ve had to work 20-60 hours, and that’s going to be pretty much in every case, the judge can elect to forgo the flat fee because it would be a gross underpayment, and pay at the $55 per hour rate.”

The state sets the hourly rates for court-appointed lawyers. Before the recession, Moore said hourly rates for noncapital cases was $75 but the legislature cut it down to $55 an hour as part of budget cuts.

“It still sounds like a lot of money, but it’s not a lot of money, especially if you have to pay overhead,” Moore said of the hourly rate. “A lawyer’s average rate in this region is $150 to $250 an hour.”

So $400 for a felony charge is sufficient if the lawyer only spent two or three hours on the case, but many cases will require more time than that. Some DUI charges will be pleaded out quickly, making the $300 fee reasonable, but other times it will only cover a fraction of the lawyer’s time. The hope is court-appointed lawyers won’t see much of a difference in pay, as it will be a wash over time.

“According to the data provided by the Indigent Defense Services or IDS, the Macon County averages for criminal cases and the new flat fee system is fairly in line,” Vanhook said. “Sometimes it was a little more and sometimes a little less, but overall looks like the flat fee system for criminal District Court will fairly compensate private court-appointed attorneys who accept indigent work in Criminal District Court only.”

While there’s no average cost data available for Superior Court and currently no proposal to extend the flat fee system to Superior Court, Vanhook said the data provided by IDS for private attorneys taking on DSS court cases was “wholly inadequate.”

**Child Custody**

It’s not about the money at all for Moore, who has practiced law for 18 years and has worked in child custody cases for more than 10 years. Moore is paid by the county to represent DSS in child custody cases. He’s not representing the parents in the custody case, but he understands the parents have every right to fight for their children. And if parents can’t afford their own counsel, then they have every right to a court-appointed lawyer to represent their interests.

Moore said his main worry is that less court-appointed lawyers will mean longer waits for children to be placed into a secure home.

“My concern is for the children in the system — there’s a constitutional right for parents to have that representation and ultimately if parents aren’t represented, that causes delays in permanent placement for the children,” he said. “We are allowing the financial constraints the General Assembly is imposing to potentially affect the wellbeing and permanency for children.”

Vanhook agreed that DSS cases involving the termination of parental rights are arguably the most important constitutional right that can be taken away from a person in District Court — and it’s a right the state legislature has put a $500 value on.

“If we spent 8 to 10 hours, which is typically the absolute minimum an attorney would ever spend on something so important, which would be $440-$550 under the current rate of $55/hour, then $500 a pop is fair. So looking on the surface, it looks fair,” she said.

But in reality, Vanhook said lawyers spend closer to 40 to 60 hours on each case involving abuse, neglect, dependency or termination of parental rights case, which would be $2,200-$3,300 at $55 per hour. Under these circumstances, she says the flat-fee schedule is unfair and grossly undercompensates court-appointed lawyers.

“The reason we spend so much time on these types of cases is that we have to in order to effectively represent our clients to defend their constitutional right to parent against a government agency with all its resources behind it (DSS),” Vanhook said. “Our clients only have us. We who practice indigent defense for parents must spend many hours reviewing medical, psychiatric, psychological evidence, attending multiple court dates and meetings, and advocating tirelessly for our clients, not to mention driving all over this judicial district.”

She said she is considering getting on the court-appointed DSS list in Macon if she sees more lawyers coming off. Being on the list will help her collect more data for IDS to show them the DSS fees aren’t adequate. Vanhook is from Macon County, is a former District Court Judge for the district and a former DSS attorney for Graham and Buncombe counties.

**What’s to come?**

The flat-fee program in Macon was supposed to be implemented by the end of April but it didn’t actually get underway until June 1. Lawyers are saying it’s too soon to see any real impact on the district.

Moore said he hasn’t had any new cases filed since June 1, but that could change in July.

“We could have 10 new cases in July — you just never know — but I do expect it will have a negative impact in the long term,” Moore said. “The question is where is that impact felt and by whom is it felt.”

While Vanhook is staying optimistic, she does fear more experienced lawyers will come off the lists, leaving indigent clients in the hands of new, inexperienced lawyers who need the work.

“In order to prevent this, our District Court judges, who are so wonderful, have encouraged all of the qualified attorneys to stay on the court-appointed list in DSS Court, and have assured us that they will fairly compensate us,” she said. “So, as of now, we are trusting the judges to do right by us, and we are still accepting these cases.”