

**Indigent Legal Services Task Force Meeting (HB 1064)**  
**Fourth Meeting**  
**July 31, 2023**  
**10 a.m. to Noon CDT**  
**Virtually via Zoom**

**PRESENT:**

Co-Chair Dean Neil Fulton, USD Knudson School of Law  
Co-Chair Circuit Court Judge Michael Day  
Randy Brown, Hughes County Commission  
Thomas Cogley, Attorney  
Brent Kempema, Assistant Attorney General  
Wendy Kloepfner, Lake County State's Attorney  
Sen. Jim Mehlhaff  
Rep. Will Mortenson  
Traci Smith, Minnehaha County Public Defender's Office  
Lori Stanford, Attorney  
Eric Whitcher, Pennington County Public Defender's Office

**TASK FORCE STAFF:**

Greg Sattizahn, State Court Administrator  
Aaron Olson, UJS Director of Budget and Finance  
Jeff Tronvold, UJS Legal Counsel

**NOT PRESENT:**

Arthur Hopkins, Oglala Lakota County Commission  
Circuit Court Judge Christina Klinger

**CALL TO ORDER:**

Dean Fulton stated there is a quorum to call the meeting to order.

**PROPOSED RECOMMENDATIONS:**

It was discussed that there is a lot the task force doesn't know about the state's current indigent legal defense system. Another phase of information gathering may be necessary.

Many states started this process with criminal appellate cases and then moved to habeas corpus and abuse and neglect cases. Trial work versus appellate habeas corpus was discussed and habeas corpus with an attorney versus filed pro se. There are currently 15 to 30 cases with an attorney per year.

The National Advisory Commission Standards recommends that an appellate defender focusing 100% of their time on appeal work is recommended to have no more than 25 appeals a year.

This is a dated standard and each jurisdiction's appellate work is unique in South Dakota. Ideally, a state entity could create its own localized workload measures.

Creating a state public defender office was discussed. In other states, this office is typically housed for budget purposes under the executive or judicial branch but is an independent entity. It is typically overseen by a board with nine to 13 members appointed by various authorities. The commission and its executive director should be nonpartisan, nonpolitical positions.

The task force discussed what the state public defender office could look like.

- South Dakota School and Public Lands could be used as an example of size and budget for the new office.
- The new office could be a counterpart to the Attorney General's Office. Attorneys could try cases one day and provide advice to other lawyers the next day.
- Staffing could consist of an executive director, three lawyers, a lawyer for abuse and neglect cases and two support staff.
- Staff training, travel, conferences and meetings were discussed. While a physical office will be necessary, some of the work could be handled remotely.
- Expenses will include rent, a case management system, tech, supplies, human resources, accounting, contract dollars for conflict cases and legal research subscriptions.
- There could be concerns with the new office being associated with the judicial branch as housing it under the judicial system could cause problems with "cross contamination."

The projected budget for a state public defender office is \$1,412,831 for total personal services and operating expenses.

The new entity would oversee what the task force is now discussing, but it will also be an evolution. Creating the office and board would provide the ability to have specific goals for indigent legal services.

Statutory responsibilities of the new office could include:

- Creates reporting provisions to the Legislature.
- Best practices in indigent legal defense.
- Establishes training/mentorship requirements for public defenders statewide and coordinates such training.
- Sets rates for court-appointed counsel.
- Develops a plan for providing indigent legal defense for child representation in abuse and neglect cases and felony cases on a statewide basis. It excludes misdemeanor cases as highest charged offense and establishes processes for conflicting cases.
- Seek grants to support defender services.
- Audits billing and services provided to ensure efficient and fair representation.
- Creates and monitors caseload standards for defenders statewide.

Proposed indirect costs savings discussed were:

- Increase current fees assessed to reimburse counties for criminal and abuse and neglect defense.
- Structure and funding sources need to be re-evaluated after further development of statewide office but would provide some relief right away.
- Currently \$7.50 for court appointed and public defender fund, and \$25.50 was the recommended new cost.
- Currently \$1 for abuse and neglect cases, and \$3.50 was the recommended new cost.

Estimated cost savings for counties discussed were:

- \$1.5 million to 2 million for appellate, abuse and neglect, and habeas defense.
- \$2.4 million estimated to be collected through reimbursement funds for liquidated costs with proposed increase.
- \$1.7 million increase over FY2022 reimbursement.

#### **DISCUSSION:**

Dean Fulton: Legislation for the upcoming session would create the state public defender office and establish the budget. It would set up a system for criminal and abuse and neglect cases and have a support function for independent attorneys. The request to the Legislature would be \$1.4 million and have 6AC conduct a seven-county study.

Randy Brown: Good job getting everything put together based on previous discussions.

Traci Smith: Understands the issue of clients paying fees will be addressed at another time. She asked about changing the calculation or upping what clients would have to pay. The answer was yes, increasing fees and the money coming in.

Wendy Kloeppner: Defendants don't have the money to pay the fees suggested; at best we can depend on collecting 30%. Those using the system should have to pay, but a lot of defendants don't or can't pay. The appeals office only takes the weight off the backs of the larger counties, as the small counties don't have the funds.

Tom Cogley: Asked about the training mechanism and if it would be something that those interested in doing indigent defense work would have to do. Yes, if the board is created, training will probably be a mission to point out/flush out. There is probably a way to pull everything together as the board begins to look at rates and training. The training component is going to be a core of the office and overall system improvement.

Wendy Kloeppner: If the statute passes, would the task force hand this over to the board? Yes, there is an advantage of having a group with appointees who are interested and informed. This group has a finite point, and there is a lot of work to be done that cannot be done within that time frame. Having this board would be the place to develop things from here.

Traci Smith: Did the task force evaluate that South Dakota is one of the highest in the country that bills clients per hour? Thinks the new board would be the one who would look at the fees as the proposed recommendations makes this for counties and clients. Maybe the biggest piece that needs updated is the travel. The proposal is probably a better way rather than the State Court Administrator posting that rate each year. It is good to look at doing it differently than how it has been traditionally done.

Dean Fulton: Would the 6AC study look at the fees and rates? Yes, that information is important, and other states start with this vast amount of information. The thought was that the time is to do something is now, so there is a balance of needing this information but there are things that can be done now. In terms of moving forward, Dean Fulton said he has heard implementation questions from task force members, but he is not hearing that anyone opposes recommending legislation.

He suggested there are two paths to proceed: a report of recommendations and information and/or start looking at comparing states with a similar entity and gather details. Does the group want to draft the legislation or come up with a recommendation/report to use as ideas during the next legislative session? Dean Fulton thinks the group should draft a report with recommendations.

Judge Day: Agreed with Dean Fulton.

Wendy Kloeppner: Concerned that the spirit of the task force will get lost in the fight of what the legislation should say if the group hands it over to someone else to write the legislation.

Dean Fulton: UJS would be willing to share and ask for comments during the proposal process.

Rep. Will Mortenson: Proposals should be tied to the intent of the work group.

Dean Fulton: The report deadline is Nov. 15, 2023. It was discussed having a draft report by mid-August to share with task force members for comment as conversations need to happen sooner rather than later. The report should contain a general understanding of what the task force is recommending—primarily the creation of a state public defender office. A report could present alternatives, such as you cannot fund an indigent defense system on the backs of indigent defendants. The report doesn't have to contain a full agreement on everything; it's more about informing policymakers.

Eric Whitcher: Agrees with the state-wide office. If legislation is passed and the new office is created on July 1, the ball won't get rolling for six months so year one's budget could be less. While funding is something that may need to be set aside for a while, the group does need to consider it. Funding the new office on the backs of indigent defendants isn't going to work. Whitcher thinks the task force should come up with ideas to consider as there is a lack of funding in every state that has a state-run system. Decisionmakers should have skin in the game. Cities should have a stake in this, as well as the state which needs to look at cost shares.

Randy Brown: Legislation will have to get creative on how to secure funding for the counties. Counties don't have two to three years for things to be fixed; they need financial assistance now.

Wendy Kloeppner: Suggested the task force is leaving out an essential piece for future policymakers; the group needs to lay out its vision for funding.

Dean Fulton: Recommended that the report include moving to a statewide system with a shift in funding, and the 6AC study will look at funding.

Sen. Jim Mehlhaff: Concerned about rearranging and pulling money from other jurisdictions. Putting in policies that discourage agencies from making arrests is not somewhere for this board to go. It would be nice to see some sort of relief to counties in the initial proposal.

Dean Fulton: Funding is going to be the most political topic. The report should acknowledge the significance of funding and offer up ideas that were discussed.

Traci Smith: Asked if there was funding from COVID because cases weren't going to trial and being backlogged. Is there a way to tie in state COVID funding?

Wendy Kloeppner: Most counties have already appropriated their funds, which is probably the same on the state level.

Rep. Will Mortenson: The appellate would largely help large counties. Asked if this is an extraordinary cost for small counties.

Randy Brown: County association has a pool fund, but under the deductible it doesn't help.

Eric Whitcher: Counties need help so we should probably look at a way to help them out possibly on a one-time basis with "no strings attached."

## **NEXT STEPS**

The next step is scheduling a meeting to discuss a draft report and continue providing ideas.

## **PUBLIC COMMENT**

Kristie Jacobsen, South Dakota Counties: Thanked the task force for its work.

Julie Bosch, Spearfish: Suggested considering that this affects defendants as repayment is incredibly hard. Is there a way to combine court costs? She thinks the Colorado system works well as there is a surcharge if you are convicted of a felony, and this could be a possible way to fund a system in South Dakota.

## **ADJOURNMENT:**

Dean Fulton adjourned the meeting.