

Indigent Legal Services Task Force Meeting (HB 1064)
Fifth Meeting
August 29, 2023
10-11:43 a.m. 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
Arthur Hopkins, Oglala Lakota County Commission
Brent Kempema, Assistant Attorney General
Sen. Jim Mehlhaff
Rep. Will Mortenson
Traci Smith, Minnehaha County Public Defender's Office
Eric Witcher, 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:

Circuit Court Judge Christina Klinger
Wendy Kloepfner, Lake County State's Attorney
Lori Stanford, Attorney

OTHERS PRESENT:

David Carroll
Eric Erickson
Shana Flakus, Winner Resource Center
Aditi Goel
Katie Hruska
John Hult
Kris Jacobsen Bob Mercer
Jach Nelson, KCCR
South Dakota Public Broadcasting
Seth Tupper
Gary Vetter

CALL TO ORDER:

Dean Fulton thanked everyone for being there and stated there is a quorum to call the meeting to order.

TASK FORCE MEETING GOALS:

Dean Fulton said the task force has made much progress. How we improve indigent legal defense, become more efficient and effective, and improve the ease and cost distribution of indigent legal services remains a significant goal. One of Dean Fulton's goals is to remain patient in this process as it will take more than one year to meet these goals—this is the start of the conversation.

Judge Day said task force members have done a remarkable job, and he appreciates everyone's hard work in this matter.

REVIEW OF DRAFT FINAL REPORT AND RECOMMENDATIONS:

- Greg Sattizahn explained that the draft final report begins with an introduction of the Sixth Amendment to the U.S. Constitution stating that the accused shall have the right to the assistance of counsel for their defense, a summary of South Dakota law defining the types of proceedings counsel is needed and a mention of the consensus around the importance of this constitutional right.
- To set the stage, next is a background of South Dakota's indigent legal defense system, the state's long history of providing counsel, and how unique the state is in how it provides indigent legal defense. South Dakota is one of only six states that has no state entity overseeing trial-level indigent legal services. South Dakota is one of only two states that require counties to fund and provide indigent legal services at all levels (trial and appellate). South Dakota ranks 49th in the nation for the state's contribution to indigent legal defense costs. Sattizahn said it is important to understand the state's landscape and that it is vastly different from how other states provide indigent legal defense. This section also explains how state law provides for three options to provide for the representation of indigent persons.
- Next is an explanation of the challenges with the current system, which includes the ability to recruit, qualify, train and then pay for the costs of indigent legal defense in an efficient and effective manner.
- The next section documents the formation of the Indigent Legal Services Task Force, task force members and the task force's work plan.

Findings:

The task force reviewed the draft findings in the report.

Judge Day said he had the misconception that South Dakota was one of only a few states to make individuals reimburse the cost of their indigent legal defense.

Rep. Will Mortenson commented that more data is needed about the \$21 million that counties are paying for indigent legal services, such as a breakdown of the types of cases being funded. This could help determine cost drivers and the costliest types of cases. He suggested including an overview of funding currently in place to help pay for indigent legal services, so legislators understand it. He also suggested a spending cap on the counties' share of providing services.

Randy Brown agreed with Rep. Mortenson on considering a cap on a county's share of paying

for indigent legal services, such as a \$10,000 on each case or possibly a total annual limit that a county would have to pay to provide indigent legal services.

Art Hopkins said he is from one of the poorest counties in South Dakota, where a high percentage of land is not taxable. He suggested that the sovereign Native American nations in South Dakota could be approached about contributing money to the indigent legal system and lawyers to help provide indigent legal services.

Sen. Jim Mehlhaff suggested it might be helpful to have more information on indigent legal defense costs incurred from non-residents or people from different counties within South Dakota

Traci Smith said putting a cap on high-level cases, such as homicide cases, will be hard as there is already a problem with not enough qualified attorneys willing to take these cases. This would be a step backward, and the cost of expert testimony would be an issue. She suggested it might be better to go through the concerns, get a commission in place, and then look at standards on the number of hours needed for different types of legal cases. She suggested that the task force not make specific recommendations.

It was stressed that the proposal for capping costs would not be a proposal that limits a lawyer's time on a case or payment—just the counties exposure with the costs exceeding the cap paid by another entity.

Recommendations:

1. Create a statewide indigent defense services commission.

Will Mortenson suggested nine versus 13 members for the commission.

Eric Whitcher suggested the commission consist of a state senator, state representative, two Governor appointees, two county commissioners, Tribal appointee, Chief Justice appointee, State Bar appointee and a citizen representative.

Traci Smith suggested members of the commission not be acting judges, acting public defenders or currently in law enforcement.

Dean Fulton said Greg Sattizahn will revise this recommendation so it is more of suggestion to the Legislature as to who should be appointed to the commission.

2. The commission should oversee a statewide public defender office to be statutorily created and funded by the Legislature.

3. A chief public defender should be appointed by the commission that would oversee the newly created state public defender office.

Dean Fulton questioned if the Criminal Justice Act's goal of parity should go here, and Smith and Whitcher agreed. Greg Sattizahn will work on this addition.

Rep. Will Mortenson said he doesn't want people to think that a statewide public defender office will have the same budget as the state's Attorney General's office.

Art Hopkins asked about the number of paralegals versus lawyers and suggested that maybe paralegals could handle certain workload.

Sen. Jim Mehlhaff suggested that the office include investigators and social workers, which could lead to saving money on trial costs.

4. The enabling legislation creating the commission and state office should provide for mandated reporting provisions to the Legislature, Governor and Chief Justice related to indigent legal defense and require future planning goals

5. Consider alternate funding structure to assist counties with the costs of indigent legal defense.

Eric Whitcher questioned who will shoulder some of the costs and suggested a greater shift to the state's share. He asked if the Legislature considers the cost to the county for public defense when creating new laws regarding crimes. He thinks this should be something the Legislature consider before passing a new act.

Randy Brown said his earlier suggestion of a cap was on what the county would pay, and the state would pay the rest—a stop loss amount.

Sen. Jim Mehlhaff thinks this recommendation could be affected by the Committee on County Funding and Services' summer study.

Dean Fulton said he has heard from lawyers over the years that South Dakota is one of only a handful of states that taxes legal services and maybe this tax could be earmarked as a funding source for indigent legal services. He also suggested possibly pursuing reimbursement from defendants and moving from the current system of reimbursement to some type of fixed-fee cap.

Eric Whitcher indicated that billing at the Pennington County Public Defender's Office takes a tremendous amount of time and resources and that a more predictable fee might be better than spending so much time chasing collecting in some cases nothing. In talking with private attorneys, he said attorney fees for indigent legal services could be based on experience or type of case.

Traci Smith thinks the Legislature should eliminate expert or interpreter fees from being included in indigent legal services fees, as well as juvenile attorney fees. Also, she said some

cases make it to trial that should never have made it there.

6. The commission and statewide public defender's office should be vested with the authority and responsibility to address policy and take on the role as the entity with responsibility on the topic of indigent legal defense in South Dakota.

Dean Fulton said this recommendation could be included with recommendation one or two.

Rep. Will Mortenson said it is important to lay out all tasks of the new commission.

7. The UJS should contract with the Sixth Amendment Center to perform a thorough review of representative counties to gather further information to inform the work of the commission.

David Carroll with the Sixth Amendment Center said they would like to get out and talk to people to really understand at a grassroots level how things are being done South Dakota so that they can make recommendations. He doesn't think this would interfere with what the task force is currently considering.

Eric Whitcher suggested an analysis to see what is driving the need for indigent defense services, such as the types of defenses that are criminalized in the state.

Dean Fulton suggested adding a review of what types of cases are driving the cost of indigent legal services.

Art Hopkins asked about the types of interpreter services that are being provided and said there is sometimes a need for English interpreter services so defendants understand the words being used during the legal process.

Judge Day suggested moving forward with the Sixth Amendment Center as this information is needed. He suggested picking a county from each circuit so there is information from across the state to better fill in the gaps.

NEXT STEPS:

Greg Sattizahn will take recommendations, modify the final report and recommendations, and bring it back to the task force for final consideration.

PUBLIC COMMENT:

Eric Erickson, Sioux Falls, said he appreciates the work of the task force on the topic of indigent legal services. He suggested setting an upper limit on indigent legal services and looking at additional information on increased costs so counties can better budget in a more efficient manner. He suggested flexibility with collections so counties can settle on lesser amounts or work toward full reimbursement.

CLOSING COMMENTS:

Dean Fulton said the issue of indigent legal services is a big task to get our arms around. As the task force moves toward some conclusions, he thinks the recommendations are possible, plausible, and work of which the group can be proud. He said everyone deserves a round of applause as the task force is dealing with complicated, emotional issues, and everyone has acted professional during this process.

ADJOURNMENT:

Dean Fulton adjourned the meeting at 11:43 a.m. CDT.