

South Dakota Commission on Indigent Legal Services

Thursday, May 16, 2024

Welcome and Introductions

Introductions

Chief Justice Jensen opened the meeting at 10am. He provided a brief history of the project and the process the UJS pursued with stakeholders to reach the point of the commission. He thanked the members and the 6th Amendment Center for their dedication and expressed excitement about the potential outcomes of the group's efforts.

Members Present

- Betsy Doyle
- Eric Erickson
- Dean Neil Fulton
- Rep. David Kull
- Judge Larry Long
- Judge Bobbi Rank
- Senator Lee Schoenbeck
- Dick Travis
- Heather Lammers Bogard (virtual)

Katie Hruska from the Governor's Office observed, as well as Mark Kadi from the Minnehaha County Public Advocate's Office. In addition, there were additional representatives from BIT, BHRA, and UJS.

David Carroll (in-person) and Aditi Goel (virtual) from the 6th Amendment Center also participated.

Election of Commission Chair

Motion: A motion to appoint Dean Fulton as Chair was moved by Senator Schoenbeck and seconded by Judge Rank. The motion carried.

Commission and Office of Indigent Legal Services Organization and Support Structure

Unified Judicial System

Mr. Sattizahn provided an overview of the statutory responsibilities of the Commission on Indigent Legal Services, highlighting the mission to oversee indigent representation services in South Dakota and ensure effective assistance of counsel. He also highlighted the unique relationship that the Commission would have with the Unified Judicial System, as well as stressing the necessity for a certain level of divide between the Commission and the UJS.

Personnel Decisions

The Chief Defender will head the Office of Indigent Legal Services, appointed by a majority vote of the Commission.

- The hiring process for this position needs to be determined.
- The Chief Defender will serve a four-year term, subject to reappointment by the Commission.
- The Chief Defender may be removed by a two-thirds vote during a term.

Funding

- The Commission will explore mechanisms to ensure adequate funding for indigent representation services statewide, including sharing costs between state and local governments.
- Advocacy for necessary resources and policies will be essential.
- The Commission will distribute \$3 million in one-time funding to assist counties after July 1st.

Rules Promulgation

- Development of minimum training standards for indigent defense.
- Establishment of maximum caseloads for attorneys.
- Procedures for handling conflict cases.
- Setting hourly rates and travel reimbursement rates for appointed or contracted attorneys.
- Implementation of an audit and monitoring process for attorney billings.
- Provision for data collection from state and local systems.

Senator Schoenbeck asked if the Chief Defender would lay the groundwork for the rule promulgation. Mr. Sattizahn presumed that the Chief Defender would draft the rules, and the Commission would approve them, like how the State Court Administrator drafts rules that are then approved by the Supreme Court. He offered the help of the UJS in this area or suggested that the commission could also create a subcommittee.

Senator Schoenbeck asked if the Commission had a broad enough scope to introduce policies that would dictate caseloads. Mr. Sattizahn responded that the legislation did grant authority over that area but recognized that there must be collaboration between the Commission and the UJS. He noted that the court previously took the lead due to the absence of another authority in this area. As the Commission steps into this role, the court will need to relinquish some of that lead. Dean Fulton recommended that the Commission first adopt caseload guidelines that are aspirational, and then eventually start bending the aspirations into rules.

Future Direction

- Ensure the delivery of appellate services statewide first and foremost.
- Approval of the expansion of the Office of Indigent Legal Services to additional case types beyond initial cases.
- Strategic planning and oversight of statewide training for attorneys handling indigent defense.
- Budget approval and decisions on office locations.
- Joint powers agreements with state agencies for administrative support.

Future Meetings

- Meetings will be held at the call of the Chairperson or at the request of a majority of its members.

- It is recommended to schedule meetings for the next several months due to scheduling challenges.

Senator Schoenbeck stressed how important data would be to this process and how the legislature would be expecting to see results, which could be difficult in the short-term due to how long it may take to set up these initial processes. Ms. Doyle added that some of this data may be hard to quantify because so much goes unseen with defense work, and it may be impossible in some cases to capture everything. She was concerned that part of the data would be lost because it cannot be easily quantified

Bureau of Human Resources and Administration

BRHA Support Services

Jennifer Meyer opened her portion of the presentation by outlining the comprehensive support services her department would offer. She explained that they would handle workers' compensation, job descriptions, pay grades, shared services, payroll processing, and personnel files. Additionally, they would assist with talent management and training. She highlighted the Memorandum of Understanding, which detailed the services provided by both their department and BIT. Ms. Meyer emphasized that while these services were extensive, they were not all-inclusive, and the costs associated did not cover the employer's portion of benefits or other ancillary benefits.

Senator Schoenbeck inquired about the timeline for signing the agreement, and Dean Fulton expressed an urgency, suggesting it should be signed that day. He noted the importance of regular meetings, preferably starting monthly via Zoom, to foster familiarity and collaboration. He stressed that nothing could proceed without the signed agreement.

The discussion shifted to the confidentiality of HR data and attorney hours. Dean Fulton asked if any information would include client-attorney confidential information. Ms. Doyle raised a concern about potential conflicts of interest. Ms. Meyer explained that while their system did manage multiple applications, they did not provide HR support for the UJS or the Attorney General's office. Thus, any conflict would likely be managed in-house and were unlikely to be an issue.

Mr. Erickson sought clarification on Dean Fulton's earlier question about attorney time vouchers. Ms. Meyer explained that their time and attendance system could track various hours, allowing for detailed time entries. Dean Fulton questioned if this system would include specific case issues and the security issues that could pose. Heather Perry from BIT noted that in IT, they could bill back to specific areas, so she did not foresee this being an issue. In response, Ms. Doyle described their system, which involved paper timesheets and manual entries sent to auditors, without involving payroll or HR. Judge Long indicated that the potential issues might not be as significant for this office, as they did not bill counties for lawyers' time, and the AG's office for instance did not hire their lawyers or the State's Attorney. He believed the potential conflict was minimal, noting that agency lawyers did not engage in criminal work and were salaried, thus not requiring time tracking.

Dean Fulton raised a concern about data access, particularly with BIT, emphasizing the need to be cautious about who could access case data. Ms. Doyle explained their case management system (CMS), which was created by the county IT department specifically for their Public Defender office. She noted that although another system existed, their CMS was exclusively for managing hours, with restricted access. Their office manager could clean the data and push it to the auditor as needed.

Ms. Perry reassured everyone that they would handle data with great sensitivity. She mentioned that although they might need someone with high-level admin access to address any issues, this would not

be accessing the data for other reasons. Mr. Erickson asked if they could revoke access if something went wrong, to which Ms. Perry confirmed that they could. Dean Fulton inquired if they could control the information BIT accessed, and Ms. Perry affirmed this as well. Judge Rank then asked if it would be possible to switch to another vendor if necessary, and Ms. Perry confirmed that it would be.

Ms. Doyle expected that the Chief Defender would determine the tasks and choose the system they wanted to use. Mr. Erickson then moved to approve the Memorandum of Understanding and to authorize its implementation. The motion was seconded by Dean Fulton. With no opposition, the motion carried.

Motion: A motion to approve the memorandum of understanding was moved by Mr. Erickson and seconded by Dean Fulton. The motion carried.

Chief Defender Information

Ms. Meyer described the job classification as Level 4, including the pay band for attorneys, and noted the need to determine the salary range for the position. Dean Fulton clarified that the annual salary could not exceed the maximum of \$182,000. Ms. Jensen confirmed that salaries could reach the band maximum and explained the process for annual increases, typically administered on June 9 and implemented on July 1, subject to legislative approval.

Discussion ensued about salary competitiveness, with Ms. Doyle emphasizing the need for attractive compensation to recruit the right person, comparable to salaries in Minnehaha and Pennington. Ms. Doyle and others noted that while the pay is lower than private practice, the position requires a special commitment.

Senator Schoenbeck raised questions about advertising and office location. Mr. Erickson suggested flexibility, as location can be a significant factor for candidates. Dean Fulton discussed potential locations, highlighting Sioux Falls, Pierre, and Rapid City, and suggested deferring the decision until a candidate is selected. Ms. Meyer offered posting the job statewide or to specific locations and involving the commission in the hiring process. Senator Schoenbeck emphasized considering system interfaces and practicalities, such as the need for a presence in Pierre for legislative and Supreme Court interactions.

The group agreed on the importance of the right salary to attract qualified candidates and proposed advertising the position statewide, with flexibility on the location. They decided to establish a liaison between the Bureau of Human Resources and Administration and the commission for the hiring process.

Dean Fulton suggested including minimum qualifications, such as five years of experience and appellate work. Mr. Erickson noted the need for candidates to handle both legal and administrative responsibilities, with the possibility of out-of-state applicants. They also discussed including requirements for practicing in South Dakota or obtaining admission.

Senator Schoenbeck proposed a motion to approve the job description with statewide language, a minimum of five years of practice, and a salary range between \$130,000 to \$170,000. He suggested appointing Ms. Doyle and Dean Fulton as the contacts for the hiring process. He recommended including the bill number that created the office and meeting again in 30 days to reevaluate if the applicants are unsuitable.

Judge Long seconded the motion with an amendment to include a sentence specifying that the Chief Defender will write the rules governing the office's operation. Dean Fulton agreed, contingent on

approval, noting this might attract the right candidate. The group discussed the high-end salary, with Judge Long suggesting flexibility and Senator Schoenbeck noting market challenges.

Senator Schoenbeck moved to approve the job description and post it, with Ms. Doyle and Dean Fulton handling edits. The group agreed on the motion, seconded by Mr. Travis, with no opposition. Ms. Meyer confirmed the next steps, including the Memorandum of Understanding and posting details, and will contact Dean Fulton and Ms. Doyle. The goal is to have resumes for review by the next meeting.

Motion: A motion to post the Chief Defender position was moved by Senator Schoenbeck and seconded by Mr. Travis. The motion carried.

Bureau of Information Technology

Heather Perry from BIT discussed the various technological costs, including the cost of about \$20,000 for necessary licenses, such as Word, VPNs, and service desk connectivity. She mentioned that there would be additional charges for setting up systems if someone is not in a state building or courthouse. Based on the discussion, she confirmed she would order a new computer, prioritizing security, and offered various options for setup. Ms. Perry also mentioned the possibility of setting up a website and a case management portal to assist with public requests.

Dean Fulton asked if they should order a computer immediately. Ms. Perry responded that if ordered on the 15th, billing would not occur until July 9, ensuring no charges until funds are available. She suggested starting any necessary system setups right away. Ms. Doyle mentioned that the county had created its own system and suggested it might be a useful reference, especially regarding the defender side of the software.

Ms. Perry added that they could create a login system that wouldn't require new emails, which would be complex but feasible. Dean Fulton emphasized the need for security, especially for reviewing vouchers, and suggested many decisions, including ordering the computer, should wait until the Chief Defender is hired. Mr. Erickson noted the potential need for specific computer requirements for the Chief Defender, while Rep. Kull inquired about laptop options. Ms. Perry confirmed they had four computer options and that ordering could cause a two-week delay, but the computers could be traded in later if needed.

County Reimbursement Fund Overview

Aaron Olson, director of Budget and Finance at the UJS, provided background information on recent legislative actions aimed at providing immediate financial relief to counties struggling with indigent defense costs. He mentioned that both he and Mr. Sattizahn participated in meetings with legislators who recognized that while the newly created Office of Indigent Legal Services would reduce the appellate burden, it would not immediately impact county budgets. To address this, a plan for a one-time special appropriation was created, intending to disburse \$3,000,000 all at once, though he deferred to legislative members for additional comments.

Mr. Olson highlighted the fiscal impact of the \$3 million appropriation, noting that in FY23, counties spent \$21.4 million on court-appointed counsel and public defender offices, and nearly \$1.2 million on representation of abused and neglected children. This appropriation will offset approximately 13% of last year's costs for county indigent legal services. Combined with the \$1.4 million appropriated to create the Office of Indigent Legal Services, this is a significant first step in addressing funding needs.

He then explained HB 1057, specifically Sections 15 and 16. Section 15 appropriates \$3,000,000 from the state general fund to the Commission on Indigent Legal Services to reimburse counties for indigent legal services costs. Section 16 outlines the distribution process, mirroring current language in SDCL 23A-40-

20 and 26-8A-19. The process involves determining total expenditures by counties, establishing a percentage ratio of these expenditures, and applying that ratio to each county's gross expenditures to determine their respective payments.

Mr. Olson detailed the partnership with the Treasurer's Office, which agreed to help gather expenditure information from counties and apply the same percentage ratios for disbursement. The Treasurer's Office will send a memo to county auditors in early July, asking for certified total expenditures for court-appointed attorneys, public defender offices, and representation of abused and neglected children from the prior fiscal year. After collecting this information, the percentages will be determined, and funds distributed upon approval by the Chief Defender within the Office of Indigent Legal Services.

He further explained HB 1057 requires the Chief Defender to approve vouchers, and the state auditor to draw warrants for authorized expenditures. Unexpected or unobligated amounts will revert.

Senator Schoenbeck inquired if a significant case causing a county to surpass costs for a year would be accounted for in the funding calculations. Mr. Olson confirmed that if a county has a large case, they will receive a larger share over the five-year period, based on the previous fiscal year's calculations.

Judge Long asked if the catastrophic fund for exceptionally large cases factors into this calculation. Mr. Erickson responded that for counties like Bon Homme with a significant case, they would receive reimbursement from the catastrophic fund, which has a \$25,000 deductible. Mr. Sattizahn noted that the impact of this would be self-reported and that there is no directive to exclude catastrophic coverage from the calculations. Mr. Olson stated that he would consult the office managing the formula, as it has been in place for 20 years.

Mr. Erickson asked about the auditor's role in this process, and Mr. Olson confirmed that the auditor signs off and the document must be notarized. Mr. Sattizahn mentioned that this process encourages auditors to complete their tasks promptly since the necessary numbers must be pulled.

Mr. Erickson volunteered to discuss the matter with the executive director of the County Commissioners and suggested emphasizing the financial impact and benefits of the funding. Mr. Olson described the voucher process and indicated that it would be prudent to wait until the Chief Defender is hired, as they would be responsible for signing off on the vouchers. He clarified that the process is based on the fiscal year, not the calendar year.

National Landscape on Indigent Defense/Roles of Commissions/Lessons Learned

Mr. David Carroll and Ms. Aditi Goel from the Sixth Amendment Center began their presentation by delivering a comprehensive overview of their organization and its mission.

Ms. Goel emphasized the state's obligation under the Sixth Amendment, reinforced by the Fourteenth Amendment, to ensure a fair trial process, referencing the United States v. Cronin case on ineffective counsel. She highlighted the constitutional requirements for effective representation, including early appointment of counsel, sufficient time and resources, and the need for good data collection to make informed decisions. She cited ABA Principle 4, which advocates for the state to collect reliable data, review it regularly, and make necessary adjustments.

Mr. Carroll discussed the national landscape of indigent defense, explaining why many states have moved away from local funding. Counties with higher poverty rates often cannot afford to pay for defense services, even though they need them the most. He described other state models, such as Nevada's, where both top-down and bottom-up public defender systems are implemented to ensure efficiency. He detailed their evaluation of South Dakota's systems, which involved legal analysis, data

collection, observations, and interviews with stakeholders in seven counties representing various factors. Their observations included looking at the defendant's experience, the appointed attorney's experience, and the relevant laws and procedures.

Ms. Goel noted that they are still in the middle of their analysis, so they could not share specific results yet. However, she mentioned that a task force report highlighted the lack of oversight and raised questions about whether the system meets the needs of indigent defendants. She assured that their findings are not intended to place blame but rather to identify areas for improvement.

Mr. Carroll praised South Dakota for its cooperation, noting that it is not always the case in other states. He responded to questions about Nebraska's system, explaining that most of it operates at the county level with a commission and state office support, particularly for serious cases. He expressed concerns about the practice of electing public defenders, as seen in Nebraska and Florida, which can lead to conflicts of interest.

Regarding the timeline, Mr. Carroll stated that they aim to have a report ready by Labor Day. He acknowledged the data provided by the UJS and additional data from counties like Minnehaha, which helped in understanding the prevalence of counsel assignments and the workloads of attorneys. He emphasized the need for better data analysis to ensure accountability and effective representation.

Senator Schoenbeck raised concerns about the availability of qualified lawyers in rural areas. Mr. Carroll acknowledged this as a problem and discussed potential solutions, such as providing solid salaries and benefits for state-employed attorneys, establishing satellite offices, and incentivizing lawyers to work in rural areas.

Mr. Erickson highlighted the struggle with mid-level felony cases, where it is challenging to find adequate attorneys. Ms. Goel acknowledged this issue and noted that their analysis is looking into it. Dean Fulton pointed out regional disparities and the financial difficulties for sole practitioners taking on high-profile cases. Mr. Carroll mentioned the trend of attorneys dropping off panels and the need to understand and address this issue to bring them back.

Ms. Doyle expressed her admiration for the depth of the interviews conducted by the Sixth Amendment Center. Mr. Carroll reiterated their commitment to providing nonpartisan support and technical assistance. In response to a question about their operations, Mr. Carroll explained that many states adopted state-funded systems following a Supreme Court case in 1972 and during the "tough on crime" era, which increased the number of cases and the complexity of indigent defense systems.

Next Steps

Dean Fulton asked about topics for future meetings. He requested that Ms. Meyer provide a turnaround on the job description aspect by tomorrow, and he would review it, aiming to finalize things by the next meeting. He also suggested discussing the formation of a subcommittee to review resumes at the next meeting before delving into detailed tasks. Dean Fulton agreed to work with UJS to schedule specific dates through the end of the year and proposed a Zoom meeting later in June.

Motion: A motion to adjourn was made by Mr. Erickson and seconded by Rep. Kull. The motion carried.