

Minutes

Indigent Defense Subcommittee Meeting March 14, 2016

Present: Brooks, Coleman, Maher, Melton, Rubin, Wagoner, Kemp, Webb (Chair), Smith (Reporter)

Chair Webb opened the meeting; minutes from the prior subcommittee meeting were approved.

Maher and Smith led a facilitated discussion regarding the characteristics of an effective indigent defense delivery system, during which the following characteristics were identified and discussed:

- I. System Goal: Effective Representation
 - The Constitution sets the floor and provides the reason why the State must fund an indigent defense system.
 - The State has an interest in going above the floor, e.g., for efficient case management.
 - The consensus was to focus on effective assistance to ensure a fair proceeding. Fair proceeding rather than fair trial was noted because most cases do not go to trial
- II. System Must Afford Appropriate Independence
 - A. Independence of Counsel
 - From: judge, prosecutor, politics, conflicts
 - B. Independence of System
 - It was discussed that the organization serves as an important counterweight to pressure by individuals, such as an individual district attorney, a person who may have a complaint against a lawyer, or judge who improperly reduces a lawyer's fees.
 - By providing a system, you provide the ability to supervise its lawyers, including the ability to remove poorly performing lawyers.
- III. System Must Provide Meaningful Access to Counsel
 - A. Types of Cases for which Services Are Provided
 - Beyond those covered by existing law, the following potential additional categories were discussed: all misdemeanors (because of collateral consequences; especially for 16 and 17-year-olds).
 - Rule 17 GAL cases.
 - Also discussed was better access to counsel for support in filing MARs (PLS can offer only limited services), and in proceedings for removal from the sex offender list. The contrary position was argued that because of limited resources we should focus only on trials and direct appeals. Another view was articulated that with respect to extra-constitutional proceedings, the focus should be limited to those with severe consequences. Another alternative mentioned for non-constitutional proceedings was access to support from individuals who are not lawyers, such as paralegals or those with a limited license.
 - B. Determination of Indigency
 - Standards for indigency were discussed, including that it may be politically necessary to have such standards.

- Verification of indigency was discussed, along with questions about the value of such a function.
 - Partial indigency was discussed, with some noting that the existing statute does not make sense.
- C. Timely Appointment of Counsel
- The problem of lack of 1st appearance for misdemeanors was discussed
 - Pros and cons of magistrate involvement also was discussed.
- D. Access to Appointed Counsel
- Although access for both in-custody and released defendants was discussed, this is a special issue for in-custody defendants. In that respect it was noted that some jail rules create problems for access to clients.
 - The issue of geography contributing to access problems was discussed.
 - Access by video was discussed, and it was noted that the NCAOC had done a study about the cost effectiveness of such programs.
- IV. System Must Provide Qualified Counsel
- A. Counsel Must Have the Necessary Skills and Experience
- Need for standards
 - Need for method for ensuring that counsel meets the standards.
 - Need to create opportunities for individuals to get the necessary skills and experiences, such as a 2nd chair initiative.
 - Specialty law school programs were discussed.
- B. Counsel Conforms to Standards
- Standards must be promulgated by the supervising authority and performance must be evaluated against those standards.
- C. There Must Be Uniformity with Respect to Quality
- We currently have non-uniformity, particularly in rural areas.
 - Need to create incentives to attract qualified counsel to rural areas. Some options include: providing relocation assistance or creating public defender positions, including part-time positions.
- V. Counsel Must Have Appropriate Resources
- As a general matter, it was discussed that geography affects counsel's ability to access resources, such as experts.
 - It was also noted that non-CR cases create special issues with respect to all the topics listed below.
- A. Time
- Any workload formula must balance quality and efficiency.
- B. Investigators, Experts, Paralegals, Etc.
- Private assigned counsel may have access issues.
- C. Compensation
- There is general consensus that compensation is too low across the board.
 - Consider creative options to attract lawyers, such as debt forgiveness.
 - Concerns were articulated about compensation methods that create negative incentives to spend the necessary time on a case.
- D. Training

- All providers must have access to appropriate training that is both topical and skills-based.
- E. Feedback on Performance, Remediation, Reinforcement and Support
 - Lacking with respect to private assigned counsel.
- F. Access to Specialized Resources
 - This includes things like forensic resource counsel, and help with immigration and mental health issues.
- G. Access to Research Tools
 - This includes things like the pattern jury instructions and online legal research tools.
- H. Office Support
- VI. Supervision and Oversight
 - It was noted that non-CR cases create special issues with respect to all the topics listed below.
 - A. Recruitment of Counsel
 - B. Selection of Counsel
 - Maintaining lists of qualified counsel.
 - Ensuring that counsel is qualified to handle the particular case.
 - C. Ongoing Evaluation
 - Including observations in court and soliciting input from judges, prosecutors, and peers.
 - D. Remediation and Training
 - E. Authority to Remove Poorly Performing Counsel
 - F. Ability to Provide Rewards
 - Including pay and other rewards.
 - G. Monitoring Workload
 - H. Evaluating Support
 - Such as investigators, etc.
 - I. Monitoring and Addressing Conflicts
- VII. System Involves Participation By Private Defense Counsel
 - For, e.g., conflicts.
- VIII. Indigent Defense is involved in Policy Discussions Regarding Indigent Defense Services
- IX. The System Is Actively Managed
 - A. Collect and Use Data in Decision-Making
 - B. Long-Term Planning
 - C. System is Managed for Efficiency
 - D. Reporting and Accountability

The focus of the discussion then turned to various delivery methods and included discussion of the following:

- I. Defenders
 - A. Full-Time Public Defenders
 - Systematic data suggest that full-time public defenders get better results than private assigned counsel, including trying fewer cases.
 - Several expressed the view that this may be the “optimal” delivery system but acknowledged lack of funding for full implementation.
 - It was noted that broader implementation does not look cost-effective now because of depressed and unsustainable private assigned

counsel rates; as those rates increase expansion looks more cost-effective.

- Even if preferable, a safety valve is needed for overload cases.
- Regional defender offices were discussed.

B. Part-Time Public Defenders

- Challenges were noted, including segregation of time.
- Positions are attractive to lawyers because they offer benefits, such as health insurance, although there may be minimum hour requirements.
- Benefits to the system include: administrative flexibility, the ability to cover greater geographic territory, and better control over service providers.
- Part-time defenders could be placed in regular public defender offices and/or regional offices.
- It was noted that in most counties you would probably have at least one full-time public defender, supported by one or more part-time defenders.
- As compared to private counsel, it is easier to get part-time defenders access to investigators, paralegals, and other support needed

C. Full-Time Conflict Defender Offices

- This was an attractive idea, but it only works where there is volume to sustain the office.
- Negative is that it cuts down on private bar involvement.

IV. Private Lawyers

A. Systems that Allow for Supervision

1. Formal Assigned Counsel System

- Advantage of providing structure for necessary supervision and oversight of private assigned counsel.
- It could be done by a regional defender or other indigent defense services employee.
- To some extent we have this with the capital and appellate defender, and in public defender districts that supervise private assigned counsel, though Maher suggested that there may be ethical considerations associated with having supervisors provide oversight of private assigned counsel working on conflict cases.

B. Compensation Methods

1. Contracts

- These may be thought of as a “bundled flat fee” arrangements.
- When you are outside an urban area and the contracts involve fewer cases, the lawyers experience inefficiency in managing cases.
- When a small number of lawyers handle a significant percentage of cases, scheduling conflicts develop.
- Contracts work best in a high-volume system.
- So that they don’t create a negative incentive to spend necessary time on a case, they need to be accompanied by a serious case compensation exception.
- Are administratively expensive to administer.
- Create a disincentive because of travel time.

- Are harder to administer with high-level felonies.
 - Are exclusive; limit involvement by the private bar.
2. Flat Fee
 - Can be per session or per case.
 - If purpose is to keep costs down, that can lead to problems.
 - There must be availability of compensation for exceptional cases.
 - Involve low administrative costs.
 - Are inclusive of the private bar.
 - Give greater flexibility for lawyers, who may not want to take a large number of indigent cases.
 - Create certainty for the client.
 - Create disincentives because of travel time.
 3. Hourly Fees.
 - A benefit is that payment is tied to case complexity.
 - Create an incentive to overbill.
 - Administratively burdensome in that someone has to review hours.
 4. Voucher System
 - Would need to be limited to allow only qualified counsel to serve.
 - Would need to be a prohibition on negotiating fees.
 - What happens if the lawyer is dismissed from the case?
 - May improve the lawyer client relationship, by affording client choice.
 - A voucher really is a flat fee with choice.
 - What happens if the defendant fails to secure counsel under the voucher?
- III. Large Non-Profit Defender Organizations
- These vehicles were discussed but deemed impractical for North Carolina, largely because the desire to create them needs to come from the field.