

Indiana Task Force on Public Defense
Friday, December 8, 2017
10:00 – 12:00
309 W. Washington Street, Fifth Floor

Agenda

- 1) Welcome and Opening by Judge John Tinder
- 2) Approval of Minutes of the Friday, November 10th Task Force Meeting
- 3) Presentation: Children in Need of Protection and Termination of Parental Rights Issues – Introduction and Subcommittee update by Jeff Papa
 - a) Brief Overview of Indiana Issues – Kim Tandy
 - b) High Quality Representation for Parents and Children in Child Welfare Proceedings
Mimi Laver – Director of Training, ABA Center on Children and the Law
- 4) Subcommittee Reports:
 - a) Appellate/Post-Conviction – Joel Schumm
 - b) Juvenile Defense – Judge Vickie Carmichael
- 5) Old Business:
 - a) Update on Listening Tour
 - b) Data update – Commission vs. Non-Commission Counties
 - c) Stakeholder Surveys
Sheriffs, County officials, Judges, public defenders
- 6) New Business:
Chief Defender Meeting – January 26th, 12:00 – 2:00
- 7) Discussion Topic: Closed Session
Narrowing Key Principles/Questions still to be Answered
(See Confidential Discussion Document)

Adjourn

Indiana Task Force on Public Defense
Friday, November 10
309 W. Washington Street, 5th Floor
10:00 – 12:00

Agenda

Members present: Judge John Tinder, Dr. Jeff Papa, Rep. Greg Porter, Larry Landis, Prof. Joel Schumm, David Bottorff, Justice Christopher Goff, Senator Rodric Bray, Joe Heerens, Sen. Rodric Bohannan. **By phone:** Dean Andrea Lyon, Judge Mary Beth Diekhoff.

Guests: David Carroll, Sixth Amendment Center

Staff and others: Dean Emeritus Norm Lefstein (Advisor), Kim Tandy, Kathleen Casey, Derrick Mason, Andrew Cullen, Bernice Corley, Kristin Casper, Mike Frische

1) Welcome and opening by Judge John Tinder

Judge Tinder gave opening remarks to the Task Force, thanking the members for their participation in the Task Force evaluation effort. He also thanked the staff supporting the Task Force for their work.

2) Approval of Minutes from October 27th Task Force Meeting

Rep. Porter moved to approve the minutes from the previous meeting, Larry Landis seconded the motion. Motion passed unanimously after a vote.

3) Presentation: Quality of Representation: Sixth Amendment Center Report

Kim Tandy opened the presentation with a discussion of the issues raised by the 6th Amendment report written by David Carroll and his team. She thanked David Carroll for his work studying the state and explained how she came to be involved in the project.

Kim Tandy stated that the report issued by the 6th Amendment Center is in reality two separate reports. First, the report covers the state-level responsibilities provided by the Public Defender Commission, and second goes in-depth on county-level public defense providers and their practices.

While the State may place responsibility to deliver public defense services at the county level, Kim Tandy stated, the obligation does not leave the state.

Kim Tandy then reviewed the Constitutional basis of effective assistance of counsel, starting with Gideon v. Wainwright in 1962. She also cited the case of United States v. Cronic (1984), which is now cited for claims of constructive denial of counsel. It is possible to have a system so deficient systematically that persons are denied the right to counsel even if attorneys are present.

Kim Tandy then noted the factors for consideration of constructive denial of counsel: (1) failure to appoint counsel at critical states; (2) Substantial structural limitations, such as a several lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; (3) Traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecutor’s case—are absent or significantly compromised on a system-wide basis.

Kim Tandy noted the following potential issues in Indiana: no counsel at initial hearings in some counties; high waiver rates due to inadequate resources; inconsistent eligibility determinations, and the fact that Criminal Rule 26 pre-trial release depends on lawyers actually present to make it effective.

She also noted the American Bar Association and National Juvenile Defender Council standards for representation. She also cited the Department of Justice Statements of Interest filed under President Obama are an effective summary of the law.

Kim Tandy noted that the Public Defender Commission has limited independence and that there is the potential for conflicts. She said it was difficult to have safeguards because of current impediments structurally. Over one-third of counties do not participate in the reimbursement program. Further, there are potential opportunities for political pressure in awarding public defense contracts, as well as an overall pressure on the system to save money for the county. Finally, she noted that the Commission places no restriction on non-public defender work, leading for the possibility for excessive caseloads.

Kim Tandy then reviewed the different methods through which public defenders may be paid: contracts paid to attorneys which sets a flat amount for a limited number of cases; employment on a salary basis as a county employee; and hourly contracts where attorneys bill the court on an hourly basis. She said that the Commission must balance the voluntary nature of the program where counties can choose to participate, with the challenge to mandate compliance.

In summary, Kim Tandy noted three issues leading to one major conclusion: Indiana lacks oversight and accountability because of (1) the limitations of the Public Defender Commission in regulatory power; (2) the limitations of public defender boards; (3) the fact that counties may choose to opt-out of the Commission program.

At this point Judge Tinder thanked David Carroll for his attendance at the meeting and for the writing of the report. David Carroll then proceeded to introduce his work and explained the history of how counties were chosen for the report. David Carroll noted that a group assembled by the Public Defender Commission chose the counties; Mr. Carroll stated that this previous group was formed in order to ensure that there was no bias in terms of the county selections.

Echoing the comments made by Kim Tandy earlier, David Carroll identified a pressure on the Commission to keep counties in compliance, because if the county does not wish to participate they can simply leave the program.

David Carroll noted the length of his report, and said that he did not intend the report to be read cover-to-cover, but was more of an encyclopedia that provided reference when necessary in a number of different areas: at the state level from a systems perspective, and also as an in-depth reference guide on counties.

David Carroll noted that Idaho and Michigan may have public defense models to consider as the Task Force moves forward.

Judge Tinder asked David Carroll what Michigan transitioned from, and whether they began their reform effort with an existing Commission or not. David Carroll stated that Michigan had a structure that handled twenty-five percent of appeals at the state level, while trial-level services were entirely county-based. Judge

Tinder clarified that before the reform effort, Michigan had no central communication and David Carroll confirmed that fact.

David Carroll stated that Indiana has “bones” to our current system on which the Task Force can build a structure. It was not necessary to build an entirely new system. David Carroll stated that in Michigan, the reform effort left the appellate unit in a separate commission to be a true check on the trial-level system. In Idaho, David Carroll stated that a Commission was formed. He stated that this state may be similar politically to Indiana. In Idaho, there was a desire to ensure compliance through enforcement, while in Michigan there is a more incentive-based system. The key for Indiana is to ensure that there is an effective enforcement mechanism.

In Idaho, David Carroll explained, the State may take over a local public defender system and withhold sales tax revenue.

Sen. Bray asked what percentage the state pays in Idaho. David Carroll said that the state added twenty percent to the amount the counties were already paying.

David Carroll noted that many states are being sued over public defense services. In Utah, he noted that this state uses the approach of “laboratories of democracies,” where non-profits are being used to great effect as public defense organizations.

David Carroll said that he encouraged regionalization, and that Koch Industries is interested in continuing to help. He offered his help to the Task Force in the manner that they found best. He noted that it is important to include the private bar in all contemplation of a new system. He noted that one of the major criticisms in the report was that attorneys’ caseload is not accurately tracked if a public defender works in a commission and a non-commission county. Only the cases in the commission county are counted, which leads to an inaccurate depiction of the caseloads.

David Carroll noted that local public defender boards are not working as currently formulated.

Judge Tinder asked about the issue of TPR/CHINS, and Kim Tandy noted that there would be an expert from the American Bar Association speaking on that topic at the next meeting.

Professor Emeritus Norman Lefstein echoed the importance of the private bar.

Larry Landis stated that at the time, there is no quality oversight of county systems. Justice Goff noted that while anecdotal, he said that he had heard of the challenge of finding people for the public defender boards.

Rodrick Bohannon stated that there was a struggle within the state with how to find attorneys for pro bono work. He stated that attorneys in rural counties are already spread thin.

Larry Landis asked David Carroll for his opinion on what should be the Task Force's top priorities assuming that they were not going to re-invent the wheel.

David Carroll noted that misdemeanors and the lack of reimbursement and oversight over misdemeanors was an immediate problem. Additionally, he noted that there should be more state-level provided experts and investigators. He also noted the need for more appellate defenders. One of the biggest issues was the amount of judicial interference.

One of the biggest issues amount of judicial interference. Public defenders internalize a need to stay in the judge's favor, when in reality the sole ethical duty is to the client. The judge may not be aware that this is even happening, according to David Carroll. Boards were attempting to be a buffer, he explained, but in both Commission and non-Commission counties, the role of judicial interference is too great.

Larry Landis added that he believed that public defender boards were not working. He said that it was a design flaw. While it did provide some insulation, it has not provided service or quality of oversight.

David Carroll said that state-funded systems do tend to function better. He said that state funding is not a panacea for all ailments, however in a reformulation of

the state system there could be increased opportunities for mental health screenings and diversions.

David Carroll pointed out the need for stability of funding that comes from outside the criminal justice system. For example, in Louisiana in a pre-reform system, public defense was funded in part on fines and fees. Better systems are state-funded out of the general appropriation, he explained.

Professor Schumm asked whether regionalization was necessary. David Carroll said that there are multiple ways to achieve an effective system. In Tennessee, there are multiple offices, while in Colorado the model is completely centralized. The Commission chooses a district public defender, and there is a completely separate office that oversees conflicts, staffed by members of the private bar.

Kim Tandy then asked a question about process, and whether the Task Force wished to continue working with David Carroll as an advisor. There was general consensus to continue working with David Carroll. Kim Tandy then previewed the next meeting, which would focus on the issue of TPR/CHINS, with a guest from the American Bar Association.

4) Subcommittee Reports

a) CHINS/TPR

The CHINS/TPR report, given by Jeff Papa, noted that there was an upcoming WebEx session with Mimi Laver of the ABA at Barnes and Thornburg.

b) Appellate

Joel Schumm gave a report that the Appellate subcommittee continued to report on the progress of researching different states and that a report would be forthcoming from the subcommittee.

c) Juvenile

Amy Karozos gave a report on behalf of the juvenile subcommittee and noted that there was substantial input from the stakeholders for the Juvenile Justice Project

funding through the Public Defender Council and that a report on that input would be given at a later date.

5) Old Business:

a) Public Hearings

Kim Tandy addressed the issue of soliciting input from the public, an issue raised at the previous meeting; the Task Force asked that staff pick three locations, located south, central and north, with a target to begin in March.

6) New Business

Larry Landis reconfirmed that the Task Force would like to continue working with David Carroll, which was affirmed by the Task Force. Professor Schumm asked what deliverables were needed to have at the end of the task force, and that it would be useful to consult with David Carroll on that issue.

At the next meeting Kim Tandy stated that staff would present the Task Force with proposed dates to seek public input on the Task Force proceedings.

7) Adjourn

Signed by:

Date: _____