

Approved 1-17-89  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Wint Winter, Jr. at  
Chairperson

10:00 a.m. on January 12, 1989 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Winter, Moran, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock

Committee staff present:

Gordon Self, Office of Revisor of Statutes  
Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Jane Tharp, Committee Secretary

Conferees appearing before the committee: None

The chairman recognized Senator Gaines to bring to the attention of the committee the recommendations of the Attorney General's Task Force on drugs (See Attachment I). Senator Gaines moved that the recommendations from the Task Force on Drugs be drafted and introduced as committee bills and resolutions. Senator Feleciano seconded the motion. Following Senator Gaines explanation of the recommendations, the motion carried.

The chairman introduced Randy Hearrell with the Judicial Council and Ron Miles, the Executive Director of Indigents' Defense Board in Kansas. Mr. Hearrell and Mr. Miles were present to respond to questions from the committee. Mr. Hearrell explained the work of the Judicial Council and discussed briefly the results of the study of the Judicial Council Public Defender Advisory Committee concerning statewide public defender system.

Staff reviewed interim committee bills relating to Proposal No. 21 and Proposal No. 23.

A copy of the Report of the Judicial Council Public Defender Advisory Committee is attached (See Attachment II).

A copy of the guest list is attached (See Attachment III).

The meeting adjourned.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 1-12-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Randy Hearrell	Topeka	Ks. Judicial Council
Jim Clark	Topeka	Ks County DA Assoc
KEITH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Don Limosey	OSAWATOMIE	UTU
Ron Miles	Topeka	Rd of Ind. Def
Bob Fry	"	Trial Lawyers
Fron Smith	"	Ks Bar Assoc
Jim Kauf	Topeka	League of Municipalities
M. Hoover	"	Capital Journal

THE ATTORNEY GENERAL'S TASK FORCE ON DRUGS  
LEGISLATIVE RECOMMENDATIONS

Education/Treatment

1. Pass a legislative resolution that all state colleges and universities providing teacher education be encouraged to add a prevention course for graduating education majors. This course could include the issues of: teenage pregnancy, suicide, and child abuse in addition to the alcohol/drug issues.

Also, to send a letter to all school superintendents encouraging them to include such courses in their inservice programs.

2. Request the State Board of Education to mandate in all elementary and secondary schools in Kansas a course on alcohol and drug abuse.

Criminal Justice/Law Enforcement

3. Amend K.S.A. 1987 Supp. 21-3610a which relates to furnishing cereal malt beverage to a minor or intoxicants to a minor to enhance a second conviction to an A misdemeanor. Under current law the penalty is and remains a B misdemeanor regardless of the number of convictions. (This was proposed in 1988 as part of House Bill 2707.)

4. Amend K.S.A. 1987 Supp. 41-727 which relates to purchase or consumption of liquor by minors to make the crime a class C misdemeanor upon first conviction and a class B misdemeanor upon a second or subsequent conviction. Currently it is an unclassified misdemeanor punishable by a fine of not less than \$100 or more than \$250 and up to 40 hours public service for persons over the age of 18 but less than 21 years of age. (This was proposed in 1988 as part House Bill 2707.)

5. Create a new alternative for the courts to utilize in dealing with alcohol and drug abusers. This would allow the judge to send a defendant to a drug or alcohol rehabilitation treatment program in a secure facility prior to sentencing. The procedure would further require all defendants to have an alcohol and drug pre-sentence evaluation prior to disposition of the case.

6. A new state crime patterned after the federal crime of arranging drug sales or purchases over the telephone should be established as a class D felony. (This was proposed in 1988 in House Bill 2708.)

*Attachment I  
Senate Judiciary  
1-12-89*

Intervention/Treatment

7. Pass a legislative resolution requiring that all inmates in the custody of the Secretary of Corrections be screened for alcohol and drug abuse problems by a qualified evaluator and be provided appropriate treatment for identified problems prior to release. Although the parole board has basically been requiring inmates who become parole eligible to complete a drug treatment program if necessary, there is no requirement otherwise that this be done. (This was introduced in the 1988 Legislative Session as House Resolution 5048.)

8. Pass a legislative resolution requiring all juvenile offenders who have been adjudicated for a felony type offense to be assessed by certified alcohol drug safety action project and referred for treatment or education programs if appropriate. Such assessment should be discretionary in cases in which the juvenile offender is adjudicated for a misdemeanor type offense or the juvenile is placed on diversion. (This was introduced in the 1988 Legislative Session as House Resolution 5047.)

Other Items

9. Support the statewide district attorney system or modifications which provides increased prosecution of drug offenses.



JUSTICE RICHARD W. HOLMES, CHAIRMAN,  
TOPEKA  
JUDGE MARY BECK BRISCOE, TOPEKA  
JUDGE WILLIAM D. CLEMENT, JUNCTION CITY  
JUDGE HERBERT W. WALTON, OLATHE  
SENATOR ROBERT G. FREY, LIBERAL  
REPRESENTATIVE ROBERT S. WUNSCH,  
KINGMAN  
ROBERT H. COBEAN, WELLINGTON  
JACK E. DALTON, DODGE CITY  
MARVIN E. THOMPSON, RUSSELL  
JAMES D. WAUGH, SECRETARY, TOPEKA

KANSAS JUDICIAL COUNCIL  
KANSAS JUDICIAL CENTER  
301 West Tenth Street  
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RESEARCH ASSOCIATE  
NELL ANN GAUNT  
FISCAL OFFICER &  
EXECUTIVE ASSISTANT

October 7, 1988

(913) 296-2498

Speaker James D. Braden, Chairman  
Legislative Coordinating Council  
State Capitol Building  
Topeka, KS 66612

Dear Speaker Braden:

Enclosed is the "Report of the Judicial Council Public Defender Advisory Committee on Determining the Feasibility of Establishment of a Statewide Public Defender System and the Appropriate Funding for Such System" as it was approved by the Judicial Council. The study was requested by the Legislative Coordinating Council in May of 1987.

A copy of the Appendix to the report is on file in the Legislative Administrative Services Office and a copy is on file in the Judicial Council Office.

You may contact the Judicial Council if you would like a member of the Council staff or a member of the drafting committee to testify on legislation that relates to the subject of this report.

Sincerely,

Richard W. Holmes, Chairman  
Judicial Council of Kansas

RWH:ng  
Enclosure

c: Governor J. Michael Hayden  
President Robert V. Talkington  
Senator Paul "Bud" Burke  
Senator Michael L. Johnston  
Representative Marvin W. Barkis  
Representative David J. Heinemann  
Representative Joseph Knopp  
Ronald E. Miles ✓  
Legislative Administrative Services

SJC  
1-12-88  
Attach. II

REPORT OF THE JUDICIAL COUNCIL  
PUBLIC DEFENDER ADVISORY COMMITTEE  
ON DETERMINING THE FEASIBILITY OF ESTABLISHMENT  
OF A STATEWIDE PUBLIC DEFENDER SYSTEM AND THE  
APPROPRIATE FUNDING FOR SUCH SYSTEM

\* \* \* \* \*

Approved by the Judicial Council of Kansas  
October 4, 1988

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REPORT OF THE JUDICIAL COUNCIL  
PUBLIC DEFENDER ADVISORY COMMITTEE

I. BACKGROUND

a. Request for Study

On January 21, 1987, Senator Robert G. Frey requested, by letter, that the Legislative Coordinating Council request the Kansas Judicial Council to conduct a study to determine the feasibility of establishing a statewide public defender system and funding the system in some manner to make it self-supporting. Senator Frey also requested that, to the extent possible, a determination be made as to whether or not a public defender system might be utilized in the various municipal courts of the state. (See Appendix at page 1.)

On May 15, 1987, Arden K. Ensley, Secretary of the Legislative Coordinating Council, wrote to Robert H. Miller, Chairman of the Kansas Judicial Council, requesting ". . . the Kansas Judicial Council to conduct a study to determine the feasibility of establishing a statewide public defender system and the appropriate funding of such system." Secretary Ensley stated that the study was requested upon the basis of Senator Frey's letter of January 21, 1987, and enclosed a copy of the letter to indicate the scope of the requested study. (See Appendix at page 3.)

b. Acceptance by Judicial Council

Upon receipt of the Legislative Coordinating Council's request to undertake the study, the Judicial Council accepted the request and decided that the advisory committee should include a cross-section of people from various parts of the state and should include judges, lawyers (from both public defender districts and appointed counsel districts), nonlawyers, legislators, a public defender, a district or county attorney, and a person with municipal court experience. The Council also decided to appoint persons who could provide liaison with, or represent, the previous Judicial Council Advisory Committee that studied the subject, the Judicial Council Criminal Law Advisory Committee, the State Board of Indigents' Defense Services and the Governor.

Thereupon, the Judicial Council appointed the following persons to serve on the advisory committee: Judge William D. Clement, Chairman, Junction City; Senator Richard Bond, Overland Park; Jack Focht, Wichita; Representative Wanda Fuller, Wichita; Glenn I. Kerbs, Dodge City; Judge C. Fred Lorentz, Fredonia; Larry McClain, Olathe; Michael F. Powers, Council Grove; Joseph N. Robb, Newton; Representative Jack Shriver, Arkansas City, and Ronald Wurtz, Topeka.

c. Plan for Study

It was the committee's plan to become knowledgeable about indigent defense services generally and specifically the Kansas system for delivery of those services. The Committee agreed to gather writings and research on the subject and to interview persons with information of interest to the committee.

d. Changes During the Study

Changes occurred during the course of the committee's work which affected the study. When the study began it was anticipated that it would involve gathering financial and caseload information and calculating its application to the existing system of delivering defense services to indigents.

The court decision in State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987) holding the Kansas system for delivery of defense services to indigent persons unconstitutional and various reactions to the decision impacted on the committee's study by causing changes in the system of delivery of defense services to indigent persons and by bringing about suggestions for additional changes. (See Appendix at page 4.)

A brief discussion of the changes that have occurred during the course of the committee's study follow.

1. State ex rel. Stephan v. Smith

The action which culminated in the State ex rel. Stephan v. Smith case began shortly after Senator Frey requested the study. It continued during the early part of the work of the committee and on December 15, 1987 the Kansas Supreme Court handed down the decision which found the current system for delivering defense services to indigents unconstitutional.

The Supreme Court found the current system unconstitutional in three areas. First, the court found it violates the Fifth Amendment rights of attorneys by requiring attorneys to undertake representation of indigent defendants at a rate which is below the attorney's overhead costs and expenses. The court held that failure to provide compensation over and above the attorney's overhead was confiscatory and violated the Fifth Amendment of the U.S. Constitution which prohibits the taking of private property for public use for just compensation.

Secondly, the court found that the present system violates the Equal Protection Clause of the U.S. Constitution because it treats attorneys differently than other professions because they are required to provide their services to indigent defendants and in return receive compensation less than their average expenses.

23 Const.  
Art. 2 Sec 17  
State Law  
app. -  
university

Thirdly, the court found that the variety of different treatments attorneys receive regarding the requirements they serve on panels to provide services to indigent defendants violates Article 2, Section 17 of the Kansas Constitution, which requires that state laws be applied uniformly throughout the state.

The court also noted that the experience required for public defenders is higher than for private counsel. The court stated that the number of hours spent by an attorney on cases is more indicative of the burden imposed on the attorney than the number of cases handled by the attorney. The court implied that the state should not set caps on amounts paid assigned counsel. The court held that the present system could remain in effect until July 1, 1988 to allow time for legislative and administrative changes.

## 2. Regional Delivery of Indigents' Defense Services Plan

The "Regional Delivery of Indigents' Defense Services" plan was proposed by BIDS as a reaction to the State ex rel. Stephan v. Smith case pursuant to the board's statutory obligation under K.S.A. 22-4522. Originally this same plan was called the "Regional Public Defender Concept" but the name was changed because it caused confusion. (See Appendix at page 53.)

BIDS was confronted with problems of abolishing mandatory panels to avoid constitutional problems, finding adequate number of attorneys for voluntary panels, possible high costs for voluntary panels and dealing with equal protection and uniform application problems raised by State ex rel. Stephan v. Smith. In reaction to the problems seen by BIDS the "Regional Delivery of Indigents' Defense Services" plan was prepared. The plan proposes to utilize parts of public defender, assigned counsel and contract counsel systems. It is the opinion of BIDS that the problems outlined by State ex rel. Stephan v. Smith can be resolved by the plan.

The "Regional Delivery of Indigents' Defense Services" plan provides for establishment of six regions in the state with each region having at least one administrative public defender office. BIDS determined the regions based on judicial districts, caseload, caseload density, maximum use of current resources, as well as demographic and geographic characteristics.

The plan proposes a regional administrative office which will be a "full service" office for the region. The attorneys of the "full service" office would generally be appointed to all indigent felony cases in the county and all A & B indigent felony cases in the region. In addition, the regional office would serve as a resource for judges and defense attorneys throughout the area. Public defenders would also be available for appointment in cases in which local counsel is not available. Depending on the caseload, other public defender offices would be

established in the region in medium case-volume counties. Attorneys assigned to work as public defenders in the region would be under the supervision of the chief public defender of the region.

In many counties, voluntary attorneys paid at rates set by BIDS, would be utilized. If this is not possible, contracts may be negotiated by BIDS. An assigned counsel coordinator would develop a pool of attorneys in each county, district and region.

The regional defender concept would utilize public defenders in urban areas and in complex cases occurring in rural areas. The regional chief public defender would serve as administrator for all public defender operations in the region regardless of the number of offices in the region.

Defense services, office commodities, research materials and personnel would be concentrated in one office to reduce administrative costs. The regional concept is intended to prevent administrative duplication that would occur if public defender offices were set up in each county. It is the position of BIDS that the regions are small enough that the uniqueness of each area can be addressed through the regional defender concept.

### 3. Legislative Action

During the 1988 legislative session, the State Board of Indigents' Defense Services proposed an amendment to their budget to allow implementation of the "Regional Delivery of Indigents' Defense Services" plan. The proposed amendment was approved by the House Committee and by the entire House.

The Senate Ways and Means Committee considered the amendment to the budget and their action was to postpone the implementation of the "Regional Delivery of Indigents' Defense Services" plan and to study the matter for a year.

In conference committee it was agreed to provide BIDS with resources to implement a public defender system in the 12th judicial district (Clay, Cloud, Jewell, Mitchell, Republic and Washington counties). The 12th judicial district is a part of Region Three of BIDS "Regional Delivery of Indigents' Defense Services" plan.

### 4. Legislative Interim Study

The Legislative Coordinating Council, at the request of the conference committee to which the budget of BIDS was assigned, approved an interim study which has been designated "Interim Study No. 23". The study was assigned to the Special Committee on Judiciary. The charge to the committee is to "Explore the need for statewide public defender and district attorney systems." The committee is chaired by Senator Frey and its vice-chairman is Representative Wunsch. Senate members of the committee are Senators Bond, Feliciano, Hoferer, Langworthy and Mulich.

Members of the House of Representatives serving on the committee are Representatives Adam, Allan, Bideau, Foster, Freeman, Peterson, Sebelius, Solbach, Snowburger and Scott.

#### 5. Action by BIDS

Recently the State Board of Indigents' Defense Services has taken action in several areas.

BIDS has established a public defender system in the 12th judicial district replacing the present assigned counsel system. Additional positions allotted by the legislature have been filled. Defense services for the 12th judicial district will be provided out of the Public Defenders Office in Saline County.

In August BIDS held a public hearing in Kansas City for the purpose of hearing comment on the proposal to establish public defender offices in Johnson and Wyandotte counties. After the hearing BIDS voted to take the necessary steps to establish the offices.

Also, in August BIDS adopted administrative rules and regulations removing Geary County from the Shawnee County conflicts office, relating to qualifications and service of panel attorneys and relating to compensation of panel attorneys. (See Appendix at page 115.)

#### 6. Sharp et al. v. State of Kansas

Early in 1988 a class action lawsuit was filed in the federal district court in Wichita by lawyers in Liberal, Kansas for ". . . the fair market value of the services rendered to the State of Kansas from the date of the filing of this complaint until plaintiffs are no longer appointed against their will to represent indigent criminal defendants; . . .". The case, Sharp et al. v. State of Kansas (88-1001-K) was dismissed for lack of subject matter jurisdiction. The dismissal has been appealed to the 10th Circuit Court of Appeals (case #88-1553).

The case also has been refiled in the State District Court in Seward County (88-C-33) where it is now pending.

#### 7. Discovery of Lack of Statistics

During the course of the study the committee discovered that less than half of the municipal courts in the state report any caseload statistics and less than one-fourth of the municipal courts report complete caseload statistics. The committee also discovered that those courts that do report do not use a uniform method of compiling statistics.

The committee also discovered that the statistics relating to county's expenditures for defending indigents charged with misdemeanors are not available unless gathered individually from each county and the accuracy of the available statistics was questioned.

#### 8. Board of Osage County Commissioners v. Burns

In January of 1988, the Supreme Court held in the case of Board of Osage County Commissioners v. Burns, 242 Kan. 544, 747 P.2d 1338 (1988) that it is the obligation of the county to provide counsel for indigent defendants who are charged with misdemeanor offenses when imprisonment is a real possibility. The case also held that it is the obligation of the county to pay the fee of such counsel and that the hourly rate fixed by the state for felony representation under the guidelines of State ex rel. Stephan v. Smith could well be the hourly rate for misdemeanor representation. (See Appendix at page 127.)

## II. METHOD OF STUDY

The committee met once every two months until late spring of 1988 and monthly thereafter. The committee met ten times beginning in May of 1987 and ending in September of 1988, discussed the research and writings in the field of delivery of defense services to indigent persons and interviewed persons with expertise in the field.

A bibliography of the material considered by the committee and staff appears in the Appendix to this report. (See Appendix at page 133.)

During the course of the study the committee interviewed a number of persons with expertise in one or more areas of interest to the committee. The following persons were interviewed by the committee during the study: Jim Clark, Executive Director of the Kansas County and District Attorneys Association; Ron Miles, (interviewed three times) Executive Director of the Kansas Board of Indigent Defense Services; Evelyn Gates, Office of Judicial Administrator; Lisa Nathanson, Executive Director of Legal Services for Prisoners; Ben Wood, Chief Appellate Public Defender; Steve Opat, Geary County Attorney; Michael P. McKome, practicing attorney in Junction City; Brian Moline, Executive Director of Topeka Legal Aid Project; Roger McCollister, Executive Director of the Kansas Legal Aid Project; R. Kent Pringle (interviewed two times), practicing lawyer in Chanute; Clyde Toland (interviewed two times), practicing lawyer in Iola; John Toland (interviewed two times), practicing lawyer in Iola; Judge James J. Smith, District Court Judge in the Fourth Judicial District; Orville J. Cole, practicing lawyer in Garnett; Patricia Henshall, Office of Judicial Administrator; Senator Franklin Gaines, Eldorado; Richard Ney, Sedgwick County Public Defender;

John Arango, New Mexico, American Bar Association Information Project; Ed Collister, practicing attorney in Lawrence; and Senator Robert G. Frey, Liberal. (See Appendix at page 139.)

It should also be noted that Representative Jack Shriver, a member of the committee, also was interviewed by the committee on two occasions and was helpful to the committee in answering questions on many other occasions because of his position as a member of the Board of Indigents' Defense Services.

### III. BACKGROUND OF INDIGENT DEFENSE

#### a. Definitions

Ad Hoc System - A system of delivery of defense services to indigents by providing for the random appointment of counsel by the court among those practitioners in the locale served by the court. Appointments may be made from a list kept by the court, compiled by the bar association, kept by the clerk of the court or, in some jurisdictions, appointments may be made from attorneys present in the courtroom when the occasion arises. (The National Legal Aid and Defenders Association describes the "ad hoc system" as the least desirable method of providing defense services to indigents.)

Assigned Counsel System - A system of delivery of defense services to indigents in which there is a systematic method of selecting panel members and designating case assignments. (The structure and control in assigned counsel systems distinguishes them from the ad hoc systems.)

BIDS - The State Board of Indigents' Defense Services created in 1982 by K.S.A. 22-4519.

Conflict or Conflict of Interests - A situation occurring in which the handling of a defendant's case is incompatible with another case handled by the lawyer or by the lawyers office. (In Kansas it has been determined that approximately 15 percent of cases assigned to a public defenders office will be "conflict" cases.)

Contract Counsel System - A system of delivery of defense services to indigents whereby the unit of government required to provide the defense service enters into a contract with attorneys to provide defense services to indigent persons.

Mixed System - A system of delivery of defense services to indigent persons which is a structured, organized and coordinated blend of public defenders and assigned counsel or contract counsel or both.

Public Defender System - A system of delivery of defense services to indigents whereby public officials are appointed to render defense services and do so through an employed staff.

Statewide Public Defender System - A system of public defenders organized on a statewide basis and providing defense services to indigent persons in all cases in the state except cases which pose a conflict of interests to the defender office.

b. History in Kansas

Kansas has a long history of providing counsel for indigent defendants charged with felonies. The 1855 Kansas Territorial Laws (Chapter 129, Art. 5, Sec. 4) provided for counsel, without pay, for felony defendants unable to employ a lawyer.

The law remained much the same until 1941 when K.S.A. 62-1304 was amended to provide for payment of up to \$10 per day for indigent persons charged with any offense. The fee was paid from the county general fund, after approval of the judge.

In 1949 K.S.A. 62-1304 was amended to limit fees on appeal to \$300, and then only in first degree murder cases involving capital punishment. In 1963 the legislature replaced the \$10 per day limit with "reasonable fee". The \$300 limit on appeals was not changed until 1968 when the cap was removed.

In 1969 the Aid to Indigents Defendants Act (AIDS) passed (K.S.A. 22-4501 et seq.). The act replaced previous legislation and provided for creation of panels of attorneys to represent indigent persons accused of felonies in each county. The act also provided for the creation of a Board of Supervisors of Panels to Aid Indigent Defendants to administer the system and that compensation would be paid by the state. (See Appendix at page 223.)

In 1982 the State Board of Indigents Defense Services (BIDS) was established by K.S.A. 22-4517 et seq. to administer delivery of defense services to indigent persons accused of felonies. BIDS was given broad statutory powers and duties and replaced the Board of Supervisors of Panels to Aid Indigent Defendants. (See Appendix at page 96.)

K.S.A. 22-4522(a) provides that BIDS "Provide, supervise and coordinate in the most efficient and economical manner possible, constitutionally and statutorily required counsel and related services. . .". In addition, the statute provides that BIDS ". . . establish, in each county or combination of counties designated by the board, a system of appointed counsel, contractual arrangements for providing contract counsel or public defender offices, or any combination thereof, on a full or part-time basis, for the delivery of defense services for indigent persons accused of felonies;"



c. Present System in Kansas

Kansas has a mixed system of public defender and assigned counsel. The system operates under the executive branch of government, is administered by the State Board of Indigents' Defense Services, and has a staff of three full time and one part-time persons. Public defenders handle approximately 40 percent of indigent felony cases with assigned counsel handling the remainder. (See Appendix at Page 231.) All indigent felony post-conviction appeals are handled by the State Appellate Defenders Office.

Presently, there are four public defender offices in the state. They are located in the third, eighth, eighteenth, and twenty-eighth judicial districts. There is a Conflicts Office in the third judicial district and a State Appellate Public Defenders Office in Topeka.

BIDS created the conflicts office in Topeka in 1983, public defender offices in Wichita in 1984 and the State Appellate Public Defender Office in 1985. Since their creation the jurisdiction of the Junction City and Salina offices has been increased.

The three original public defender offices located in Topeka, Junction City and Salina were created between 1970 and 1972 either by local administrative order or by the Board of Supervisors of Panels to Aid Indigent Defendants. The public defender system operated within the judicial branch of government until July 1, 1982 when the Indigent Defense Services Act (K.S.A. 22-4519 et seq.) created the State Board of Indigents' Defense Services.

Counsel for indigent persons accused of misdemeanors is paid for by the county. The ad hoc, assigned counsel or contract counsel, system is used. In municipal courts when counsel is required it is paid for by the municipality and the ad hoc, assigned counsel or contract counsel system is used.

d. Proposals for Kansas

The only two formal proposals to change the system known to the committee to be under consideration are the Regional Delivery of Indigents' Defense Services plan and the separate proposal to create public defender offices in Johnson and Wyandotte Counties.

The committee has heard that there is support for a public defender in the Garden City area. The committee is also aware that some members of the Senate Ways and Means Committee would propose continuing with the assigned counsel system, at least in certain areas. The Special Committee on the Judiciary is studying the subject, but has not yet made a proposal.

#### IV. COMMITTEE RECOMMENDATIONS

a. A TOTAL STATEWIDE PUBLIC DEFENDER SYSTEM SHOULD NOT BE ADOPTED BUT KANSAS SHOULD CONTINUE TO PROVIDE DEFENSE SERVICES TO INDIGENTS THROUGH A MIXED SYSTEM.

In Kansas the components considered to be parts of a sound system for delivery of defense services are in place. State ex rel. Stephan v. Smith has increased funding for the system and adequate funding seems assured in the future. The Kansas system is an administered system with an active board and an experienced administrator to carry out board policies. The board has a system in place to gather and compile accurate statistics.

In addition, the taxpayers are protected by K.S.A. 59-4522 which provides that economy and efficiency are to be the primary goals of BIDS. The indigent persons defended by public defenders are protected by K.A.R. 105-21-3 which allows the public defender to refuse to accept new clients when the current actual caseload would preclude the providing of adequate representation to new clients.

Mr. John Arango of the American Bar Association Bar Information Project (a project of the ABA to provide experts to the states to assist in the area of improving defense services to indigent defendants) testified that, even prior to the State ex rel. Stephan v. Smith case and The Board of Osage County Commissioners v. Burns case, the Kansas system was among the best in the country.

Mr. Arango provided the committee with statistics which indicate that the present Kansas system is sound. Mr. Arango stated that in 1986 the per capita expenditure per resident ranged from \$28.90 in the District of Columbia to \$.69 in the state of Arkansas. Kansas ranked 41st in per capita expenditure with \$1.73. Kansas ranks 35th in caseload per thousand population with a caseload of 10.47 per thousand. Oregon is first with a caseload of 52.10 per thousand population. Statistics indicate that the average cost per case (include misdemeanors) in 1986 was \$165.34 in Kansas compared to a national average of \$223.72.

An indication that the Kansas system is well administered, and works well, is the standing of the state as the most effective state in recoupment of expenditures for appointed counsel. A law review article authored by Michael Kaye and Fred L. Yaffe, which makes such a finding, will be published in 1988.

The recommendation that Kansas continue to provide defense services to indigent persons through a mixed system is consistent with all past studies known to the committee and the decisions of both the AIDS board and BIDS.

The 1978 report of the National Center for Defense Management, (see Appendix at page 233) the 1978 report of the Kansas Legislative Division of Post Audit (see Appendix at page 347) and the 1979 report of the Kansas Judicial Council (see Appendix at page 359) all recommended mixed systems.

The Board of Supervisors of Panels to Aid Indigent Defendants operated a mixed system and the State Board of Indigents' Defense Services, which has statutory responsibility to provide the most economical and efficient system for delivery of defense services, has favored a mixed system since its creation in 1982.

The conclusions of the studies and of BIDS are similar. They have found that, where sufficient caseload exists, it is cost effective to implement a public defender system. But, because of the demographics of Kansas there are counties and judicial districts in which it is less expensive to continue with the assigned counsel system.

2 b. THE PLAN FOR REGIONAL DELIVERY OF INDIGENTS DEFENSE SERVICES PROPOSED BY BIDS IS A SOUND CONCEPT WHICH PROVIDES A MIXED SYSTEM THAT CAN BE SUPPLEMENTED TO PROVIDE FLEXIBILITY.

On August 25, 1988, in a hearing before the Special Committee on the Judiciary, Ron Miles, Executive Director of BIDS, presented the following explanation of the BIDS plan:

The Regional Delivery of Indigents' Defense Services

The State Board of Indigents' Defense Services approved a regional plan for providing felony defense service throughout the State of Kansas. The plan has been labeled as a statewide public defender plan. This label causes confusion and misunderstanding and should be replaced with one which is more descriptive, such as:

State Plan for the Regional Administration and Delivery of Indigents' Defense Services

The following are characteristics of this regional plan:

1. The state is divided into six or more service regions which will consist of one or more judicial districts, but never only part of a judicial district.

2. Each region shall have at least one public defender office which shall serve as the primary resource for defense services in the region.

3. The regional office shall be responsible for coordinating, under the direct supervision of the director and in accordance with Board policy, all felony

defense services in the region (excluding conflict cases). Board policy shall dictate, in general terms, the defense delivery systems to be used in each region, and may include any combination of public defense, contract and assigned counsel system.

4. Board policy regarding the system or systems to be utilized in a particular region shall be based on at least three factors:

- (a) The quality of representation to be afforded indigent felony defendants under each system;
- (b) The cost-effectiveness which can be demonstrated both long-term and short-term under each system; and
- (c) The likelihood of continuity of representation (i.e. the system with the least chance for disruption or delay in services).

The Board's plan provided that the staff attorneys represent all felony defendants (excluding conflicts) within the county in which the office is located. Caseloads and staffing limits, however, could result in a slightly different system.

In counties having no public defender office, the plan calls for the staff attorneys assigned to handle all class A and B felonies. All other cases would most likely be assigned to local attorneys by the regional administrator.

The regional administrators, much like our chief public defenders, will be hired by the Board and its Director and will be active in trial practice. The administrator will be responsible for ensuring the timely, effective representation of all nonconflict cases in the region. The administrator will monitor the work product of all assigned counsel and review payment vouchers at the conclusion of their service.

Where will the  
Director be  
Admin. office  
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Rules and regulations should be promulgated which will enable the regional public defenders to enforce panel qualifications, remove panel attorneys and to assign cases to panel attorneys.

#### Advantages of the Regional Delivery System

1. Uniform - A regional system administered by the Board will help ensure that standards of quality representation are applied equally and uniformly throughout the state.

2. Qualitative - The regional administrator shall be a skilled criminal defense attorney who will be expected to rigorously monitor the quality of representation within the region. Case assignments will be made based on the experience and competence of the individual attorney.

3. Flexible - The regional system allows for a variety of options within each region, depending on (a) demographics; (b) attorney availability; (c) seriousness of crime; (d) concentration of crime; etc.

The state is diverse in geography and population density. The regional plan makes best use of the three delivery systems to best accommodate the needs of the indigent client and the judiciary. In many parts of the state, more than 80% of the felony cases will continue to be handled by qualified members of the private bar.

4. Constitutional - The regional plan fulfills the mandate expressed in the Sixth Amendment to the United States Constitution. The plan addresses the three major problem areas identified by the Kansas Supreme Court in State ex rel. Stephan v. Smith.

- (a) Equal Protection - Because the regional plan relies on volunteer panels of attorneys it cannot be found to be unconstitutional on this basis.
- (b) Fifth Amendment - Voluntary panel attorneys agree to serve at a specified hourly rate of compensation, thus ruling out a Fifth Amendment challenge.
- (c) Kansas Constitution, Article 2, Section 17 - Uniformity of application. The Regional plan calls for a statewide system, albeit with local adaptations. This system must be administered by the Board throughout the state, as a voluntary system, to pass constitutional muster on this point.

(See Appendix at page 418.)

Representative Jack Shriver, a member of BIDS, presented a region by region analysis of the BIDS proposal to this committee on August 19, 1988 (see Appendix at page 210). The analysis follows:

## REGION BY REGION ANALYSIS OF BIDS PROPOSAL

Region I (Western Kansas) consists of 41 counties with three (Finney, Seward, Ford) that account for 60% of the cases. Four attorneys will handle most of the cases in those three counties, and the A & B in the rest of the 41 counties. BIDS also considered contract counsel for two judicial districts in northwest Kansas but it was not finalized. The rest of the cases will be handled by assigned counsel.

Region II (South-Central) consist of 13 counties including Sedgwick which already has public defender office. Four counties account for 65% of the non-Sedgwick County cases, (Reno, Cowley, Harvey and Butler). BIDS would add three attorneys to the Wichita office, with probably satellite offices in at least Reno, and possibly Cowley and Butler. Due to the number of courts in these areas the public defender would handle A & B felonies and assist assigned counsel in most of the rest of the cases.

Region III (North-Central) consists of 19 counties with 8 counties already being served by public defender offices in Salina and Junction City. BIDS will add two attorneys. One attorney has already been added at the request of the administrative judge in the 12th judicial district to provide service to that five county district. Presently BIDS is servicing all of Region III except the 20th district (Barton and four other counties). If BIDS takes them in BIDS probably would place one attorney in Great Bend to handle A & B felonies, with assigned counsel and/or contract counsel to handle the rest of the cases.

Region IV (Southeast and Johnson County) consists of 17 counties with Johnson accounting for nearly one-half, (425), of the cases and Montgomery and Crawford making up about 35% of the rest. BIDS will add nine attorneys with five being in Johnson and satellite offices in Montgomery, Crawford and perhaps Allen County. With the exception of Johnson County, most of the cases except A & B felonies probably will be handled by assigned counsel or contract counsel.

Region V (northeast except Atchison, Leavenworth, Wyandotte) consists of 12 counties including Shawnee (which is already served by public defender and handles about one-half of the cases in proposed region). Lyon and Douglas counties have about 75% of the rest of cases BIDS will need four additional attorneys and offices in Lawrence and Emporia. The public defender office would handle A & B felonies for the other nine counties with assigned or contract counsel to handle the rest (including conflicts in three other counties).

Region VI (Wyandotte, Leavenworth, Atchison) BIDS would establish an office in Kansas City and in Leavenworth with addition of six and possibly seven attorneys due to number of courts especially in Kansas City. Due to large number of cases and rather compact area public defender would handle more nonconflict cases in Leavenworth-Atchison than most other regions.

It is the opinion of the committee, in view of the holding in State ex rel. Stephan v. Smith and the statutory requirements made of BIDS, that the plan for regional delivery of indigents' defense services meets both the requirements of the case and the requirements of the statutes.

The committee believes the BIDS proposal is reasonable and is flexible enough to be adjusted to changing circumstances that will be encountered in its implementation.

The committee is aware that, while the BIDS plan is sound, other workable proposals could be made and that, during consideration, practical and political questions will likely be raised about the BIDS proposal.

**(3)c. THE FINANCING OF THE STATE BOARD OF INDIGENTS' DEFENSE SERVICES SHOULD CONTINUE TO BE FROM STATE GENERAL REVENUE FUNDS.**

In its request the Legislative Coordinating Council asked the Judicial Council to conduct a study to determine ". . . The feasibility of establishing a statewide public defender system and the appropriate funding for such a system." The Legislative Coordinating Council request also referred to Senator Frey's letter of January 1987 which requested the Judicial Council to consider the feasibility of establishing a funding system through assessments made on criminal and traffic cases.

Due to changes occurring in the area of delivery of indigents' defense services that subject received more attention from the committee than the area of funding. The committee was hampered in its consideration of funding by unavailability of statistics necessary to conduct such a study. (See pages 5 & 19 of this report.)

The committee found that only two states in the United States fund indigent defense other than through tax revenues. In Alabama indigent defense programs in each county are reimbursed for their services from a "Fair Trial Tax Fund". Revenues for the fund are derived primarily from a \$7 fee imposed in criminal cases, upon conviction, and a \$10 fee imposed in each civil case, in circuit court, in which a jury is requested. (See Appendix at page 462.)

In Louisiana there is an "Indigent Defender Fund" within each judicial district which is funded by a fee of between \$4.50 and \$10 per each misdemeanor or municipal ordinance violation other than a parking violation and a fee of \$10 for each felony case involving a guilty plea or conviction. (See Appendix at page 464.)

Mr. John Arango of the American Bar Association Bar Information Project testified before the committee that there have been severe problems in Alabama and Louisiana and that the fees raised are grossly inadequate. He testified that the general experience is that systems like those two states have, do not raise enough money to provide adequate funds for indigent defense. (See Appendix at page 200.)

The committee decided because Kansas has a sound system for delivery of defense services to indigents, Kansas is in the vast majority of states in how it funds its system, states which fund through fees have had problems and Kansas will be spending more money because of the State ex rel. Stephan v. Smith case to recommend that financing continue to be through general revenue funds.

d. THE ADMINISTRATION OF INDIGENT DEFENSE SERVICES IN KANSAS SHOULD CONTINUE TO BE UNDER THE EXECUTIVE BRANCH OF GOVERNMENT.

It was suggested that the administration of indigent defense services be moved from the executive branch of government to the judicial branch, which originally administered the AID program. Various reasons have been given for the suggestion such as: the judicial branch has the ultimate control of how the system works; the judicial branch is more concerned about the administration of justice and the quality of defense services; it is an appropriate change because the Supreme Court regulates lawyers; the Office of Judicial Administration has a knowledgeable staff that could administer the program; there are budgetary advantages in being a part of the judicial branch budget and there is little likelihood of partisanship in a program administered by the court.

It is the consensus of the committee that the BIDS system has worked well and is considered one of the best systems in the country. The committee notes that the Supreme Court has indicated that it does not want to administer the BIDS system; the previous governor indicated a desire to establish the system under the executive branch and the current governor has not indicated otherwise; questions were raised about the constitutionality of a system administered by the judicial branch; if the system were under the judicial branch public defenders and assigned counsel would be placed in the position of appearing before their employers and the budget is presented as a separate item to the legislature and is considered on its own merit.



6 e. THE STATE BOARD OF INDIGENTS' DEFENSE SERVICES SHOULD BE INCREASED BY FOUR PERSONS WITH ONE NEW MEMBER BEING APPOINTED BY EACH OF THE FOLLOWING PERSONS: THE PRESIDENT OF THE SENATE; THE SENATE MINORITY LEADER; THE SPEAKER OF THE HOUSE AND THE HOUSE MINORITY LEADER.

The committee believes that four additional members to the board will create more legislative awareness of the programs of the board and K.S.A. 1987 Supp. 22-4519 should be amended to read as follows:

22-4519. State board of indigents' defense services; appointment and terms. (a) There is hereby created within the executive branch of state government the state board of indigents' defense services, which shall consist of thirteen members. Nine members shall be appointed by the governor, subject to confirmation by the senate. Four members shall be appointed as follows: One by the President of the Senate; one by the Senate Minority Leader; one by the Speaker of the House and one by the House Minority Leader.

(b) ~~Of the initial appointments, the governor shall appoint three persons for terms of one year, three persons for terms of two years and three persons for terms of three years.~~ All appointments made by the governor, the President of the Senate and the Speaker of the House shall be for three years. The initial appointment made by the Senate Minority Leader shall be for a term of one year and the initial appointment made by the House Minority Leader shall be for two years. Thereafter, all appointments shall be for terms of three years.

(c) Of the nine members of the board, appointed by the governor, there shall be:

- (1) Two members from the first congressional district, of whom one shall be a lawyer registered with the Kansas supreme court, and at least one member from each other congressional district in the state;
- (2) at least one member from each county in the state having a population in excess of 100,000, who shall be a lawyer registered with the Kansas supreme court, but not more than five members from such counties; and
- (3) five members who are lawyers registered with the Kansas supreme court and four members who are not lawyers.

(d) The members appointed by the President of the Senate, Speaker of the House, Senate Minority Leader and House Minority Leader may reside in any county of the state.

~~(d)~~(e) No member of the board shall be, or shall be employed by, a judicial officer or a law enforcement officer and no member of the board shall be an employee of the board.

~~(e)~~(f) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which such member's predecessor was appointed shall hold office for the remainder of such term.

~~(f)~~(g) No member of the board shall serve more than two consecutive three-year terms.

10f. REGIONAL ADVISORY COMMITTEES SHOULD BE CREATED IN EACH OF THE PROPOSED REGIONS FOR ASSISTANCE IN THE IMPLEMENTATION OF THE BIDS REGIONAL PUBLIC DEFENDER CONCEPT.

The committee believes that creation of regional advisory committees to make recommendations regarding the implementation of the BIDS regional public defender concept would be helpful in gaining input from the local area, avoiding problems unique to that area and giving persons in the area more of an interest in the success of the system.

11g. THE STATE BOARD OF INDIGENTS' DEFENSE SERVICES SHOULD CONSULT WITH INTERESTED PERSONS AND HOLD PUBLIC HEARINGS PRIOR TO IMPLEMENTING CHANGES IN DEFENSE SYSTEMS OR PROPOSING MAJOR CHANGES TO THE LEGISLATURE.

The committee recognizes that in December 1987, when the holding in State ex rel. Stephan v. Smith was handed down by the Supreme Court, it left BIDS little time to hold extensive hearings. BIDS was obligated by K.S.A. 22-4522 to provide the most efficient and economical defense services for indigent persons. Due to the small staff of BIDS and the limited amount of time before the legislature met, BIDS did not have adequate time to hold the numerous public hearings and attend the local meetings that would have been necessary to answer many of the questions relating to the proposal.

During the course of this committee's work the committee has become familiar with the BIDS proposal for a regional system for delivery of indigents' defense services and has become aware of the questions and objections that have been raised to the system. The committee has found that a number of the questions can be answered and some of the objections come from a misunderstanding or confusion about the proposed plan. It is the committee's belief that better communication will remove a number of the objections to the proposed BIDS plan.

The committee notes that K.S.A. 22-4522(f) requires the board to hold a hearing for changing the system of providing defense services for indigent persons accused of felonies in any county or judicial district if such a hearing is requested by two or more members of the board. Wide use of such meetings is suggested.

h. **THE LEGISLATURE SHOULD REQUIRE STANDARDIZED RECORD-KEEPING AND REPORTING BY THE MUNICIPAL COURTS OF THIS STATE.**

In making this study of statewide public defender the committee was interested in both the total caseload of the municipal courts of the state and the amount of money spent to appoint counsel for indigent persons in the municipal courts of the state. Neither figure was available. The "Office of Judicial Administration Municipal Court Caseload Report for FY 1987" indicates that of the 390 municipal courts in the state that 82 submitted caseload summary for all four quarters of FY 1987, 66 submitted caseload summary for at least one quarter of FY 1987 but not all four quarters and that 220 courts did not respond to the collection of caseload information for 1987. (See Appendix at page 467.)

A member of the staff of the Judicial Administrator's Office appeared before the committee and testified that there are many problems with the collection of municipal court statistics. One problem is that the filing systems of the municipal courts vary. In some municipal courts each ticket or violation is filed and given a separate case number, and in others this is not done.

It was the consensus of the committee that the legislature should require standardized record keeping and reporting by the municipal courts of this state. It is the committee's opinion that it is appropriate to gather these statistics and they should be required in order to provide a body of information so persons studying the municipal courts can have adequate information to make informed recommendations.

The committee noted that K.S.A. 12-4108 reads in part as follows: "The clerk shall make reports to the Judicial Administrator and furnish the information requested by the Judicial Administrator or a departmental justice on such forms furnished by the Judicial Administrator, and approved by the Supreme Court." It is the recommendation of the committee that K.S.A. 12-4106 be amended to require standardized record keeping by the municipal courts and to require the municipal court judge to report the municipal court statistics. The proposed amendment is as follows:

12-4106. Same; powers and duties. The municipal judge shall have the power to administer the oaths and enforce due obedience to all orders, rules and judgments made by him or her, and may fine or imprison for

contempt committed in court or for failure to obey process issued by him or her, in the same manner and to the same extent as the district court.

The municipal judge shall have the power to hear and determine all cases properly brought before him or her, to grant continuances, to sentence those found guilty to a fine or confinement in jail, or both, to commit accused persons to jail in default of bond, to determine applications for parole, to release on probation, to grant time in which a fine may be paid, to correct a sentence, to suspend imposition of a sentence, to set aside a judgment, to permit time for post trial motions and to discharge accused persons.

The municipal judge shall maintain a docket in which he or she shall enter every cause commenced before him or her. Said docket shall contain the names of the accused persons and complainant, the nature or character of the offense, the date of trial, the names of all witnesses sworn and examined, the finding of the court, the judgment and sentence, the date of payment, the date of issuing commitment, if any, and every other fact necessary to show the full proceedings in each case.

The municipal judge shall promptly make such reports and furnish the information requested by any departmental justice or the judicial administrator, in the manner and form prescribed by the Supreme Court.

Because of the committee's special interest in the area it is of course the committee's recommendation that the statistics gathered include the amount spent for defense of indigent persons in municipal courts.

It is also noted that in Senator Frey's letter of January 21, 1988, which was the basis of the Legislative Coordinating Council's request to the Judicial Council, Senator Frey asked the committee to determine whether or not the public defender system might be utilized in the various municipal courts throughout the state.

While the BIDS statutes are broad enough to allow such an arrangement with the municipal courts, the lack of statistics prevented the committee from considering whether appointments in some municipal courts could be handled by public defenders and thereby making a public defender economically feasible in certain areas.

## V. COMMENT ON PROSECUTION SYSTEM

In the committee's study of the issue of appointed counsel for indigent defendants, it has become clear that what affects one part of the criminal justice system also affects the rest. Whether defendants are represented by appointed counsel or public defenders will have an impact on the state's prosecutors and ultimately the general public.

The committee recognizes a need for examination and review of the state's prosecution system to insure that it does not lag behind delivery of defense services.

## VI. CONCLUSION

The committee concludes Kansas should not adopt a statewide public defender system but should continue to provide defense services to indigent persons accused of felonies through a mixed system of public defenders and assigned counsel or contract counsel. This system should continue to be funded by state general revenue funds and the system should continue to be administered by the executive branch of government.

The committee reached these conclusions because the demographics of the state make a statewide public defender system unfeasible, financing delivery of indigent defense services by tax revenues is the best system and is used by all states except two, the executive branch has done a good job of administering delivery of legal services to indigents and the judicial branch does not want to administer the program.

The committee recommends the State Board of Indigents' Defense Services be increased by four persons appointed by various legislative leaders. It is the opinion of the committee that these additional members to the BIDS will give it a broader base and create more legislative interest in the Board's programs.

The committee reviewed the plan for delivery of indigents defense services proposed by BIDS. The committee found the BIDS proposal was a mixed plan which met the requirements of State ex rel. Stephan v. Smith. The committee approved of the flexibility of the concept and, while recognizing the plan will likely change during consideration and implementation, found the concept to be sound.

The committee recommended BIDS hold public hearings prior to implementing changes in defense systems in various areas of the state and also recommended that regional advisory committees be created to assist in the implementation of the BIDS plan.

The committee also recommended standardized record-keeping and reporting by the state's municipal courts. This recommendation was made because of a lack of information available relating to appointed counsel in municipal courts.