

APPENDIX G: Attorney Workforce Findings

Background

The evaluator conducted focus groups in eight communities with 27 private attorneys. Many of the attorneys had served or were currently serving on the State Bar Foundation or as a State Bar Commissioner. The focus group questions included legal needs that private attorneys cannot address in their communities, factors that help and hinder pro bono and modest means participation, and attorney workforce recruitment and retention observations and suggestions. In addition, UJS judges, tribal judges, States Attorneys, tribal attorneys, and other attorneys provided observations on the attorney workforce in South Dakota. Their feedback is reported in this appendix.

Attorney Recruitment and Retention

The attorneys acknowledged the Sioux Falls and Rapid City markets recruit most of the attorneys graduating from law school, moving into the state, or moving within the state. They also observed it is difficult to get attorneys to go to mid-sized communities and those that do are required to be general practitioners. Attorneys who want to specialize need to be in a larger community such as Sioux Falls or Rapid City. Pierre attracts attorneys who want to work for the state government and / or do policy work.

Suggestions for recruitment ranged from middle school outreach to student loan forgiveness.

- Continue to emphasize the Rural Attorney Recruitment Program as described below.
- Coordinate outreach to middle and high school students to develop a pipeline. Find someone who is a motivating spokesperson. “It is a long payback, but it needs to be done.”
- “Home” grow attorneys within rural communities. For example, market the opportunity to run the ranch and practice law too.
- Offer student loan forgiveness for DPLS and ERLS attorneys.
- Law firms from small to mid-size communities need to be present in Vermillion at USD Law School. Provide information to the faculty and Dean to sell their practice.
- Near retirement attorneys need to have the mindset of recruiting their own successor.
- Offer competitive wages. The ERLS and DPLS staff noted this was the top reason attorneys leave. (DPLS / ERLS)
- The lack of housing in all areas has been problematic in recruiting and retaining attorneys. Some DPLS employees are currently commuting 2 – 4 hours per day. (DPLS)

It is important to explain the Rural Attorney Recruitment Program. The program is one of the most significant interventions made in South Dakota to recruit attorneys.

Rural Attorney Recruitment Program

In 2013, the South Dakota Legislature approved the Recruitment Assistance Pilot Program (SDCL 16-23) to address the current and projected shortage of lawyers practicing in small communities and rural areas of South Dakota.

This program provides qualifying attorneys an incentive payment in return for five (5) continuous years of practice in an eligible rural county or municipality.

Attorneys must enter into a contract with the Unified Judicial System (UJS), the State Bar and the eligible county or municipality in order to participate. Qualifying attorneys within the program will receive an incentive payment, payable in five equal annual installments, each payment equal to 90% of one year’s

resident tuition and fees at the University of South Dakota Knudson School of Law, as determined on July 1, 2013. This amounts to \$12,513.60 per year, with a total benefit of \$62,568 for each attorney.

- To be eligible to participate in the recruitment assistance pilot program, a county and municipality within the State of South Dakota must:
- Have a county population of 10,000 or less, or a municipal population of 3,500 or less;
- Agree to pay 35% of the total amount of the incentive payment, payable in five equal annual payments.
- Apply to the UJS by submitting a letter of intent from the County Commissioners and be accepted into the program by the UJS; and
- Is determined to be eligible by the UJS.

To be eligible for participation, an attorney must:

- Be a U.S. citizen, U.S. National or permanent resident of the U.S.;
- Have a Juris Doctorate degree from an ABA accredited institution and provide a transcript;
- Be licensed as an attorney in the State of South Dakota;
- Never have been disbarred, suspended or publicly censured from the practice of law in any jurisdiction;
- Be willing to reside in the county or municipality he/she serves unless the county or municipality otherwise agrees;
- Keep the UJS informed of changes to his/her physical and mailing addresses as well as any change to his/her telephone number;
- Carry malpractice insurance during his/her involvement in the program and provide proof thereof;
- Provide a Certificate of Good Standing from the SD Supreme Court;
- Agree to practice full time as an attorney within an eligible county for a minimum of five consecutive years. Full time is defined as a minimum of 35 hours per week, for a minimum of 49 weeks per year. Excess hours cannot be applied to any other work week. Participants are allowed to spend no more than 21 full time workdays per year, excluding federal and state holidays, away from their practice for vacation, continuing legal education, illness, or any other reason, unless permission is obtained from the Chief Justice of the South Dakota Supreme Court. Qualifying FMLA leave will be approved;
- Have never previously participated in this program, or any other state or federal scholarship, loan repayment, or tuition reimbursement program that obligates the person to provide attorney services within an underserved area; and
- Submit a complete application and be approved for participation in the program by the UJS. The UJS will consider not only the above requirements, but also the following:
 - Evaluation of the attorney seeking assistance under this program; and
 - Existing or previous ties of the applicant to the county or municipality.

All together there have been 31 participants under contract in the program. There are currently 14 active attorneys practicing in rural communities. 10 of the 31 participants have graduated out of the program and 7 of the 10 graduates have stayed in their communities to continue practicing. The following counties have participated in the program: Aurora, Bon Homme, Lyman, Jerauld, McPherson, Grant, McCook, Elk Point, Union, Bennett, Lake, Mellette, Spink, Miner, Gregory, Haakon, Marshall, Tripp, Perkins, Hand, Harding, Sanborn, Buffalo, Dewey, Roberts, and Douglas. Of the 31 participants, 26 are graduates of the University of South Dakota Knudson School of Law. There are also 6 students from USD Knudson School

of Law who are interested in the Rural Attorney Recruitment Program once they graduate and pass the bar exam.

Funding for this program has come from different sources since its inception. In 2013, the Legislature passed HB 1096 which established the program and appropriated \$475,000 from general funds to fund incentive payments for no more than 16 attorneys. In 2015, the Legislature passed SB 178, which expanded the program to 32 attorneys and appropriated \$500,000 in other fund expenditure authority to be paid from the court automation fund to cover incentive payments for 16 additional attorneys. In both cases, all unused funds reverted to the state per state law. In 2019, the program concluded its pilot status and the Legislature appropriated \$150,000 in other fund expenditure authority in SB 191 (General Appropriations Act). Court automation funds continue to support the program and the funding level has not changed.

All expenditures from the Rural Attorney Recruitment Program have been for direct incentive payments to eligible attorneys within the program. No money has been spent for personnel or any other administrative expenses. Direct incentive payments by fiscal year are shown below:

FY15 - \$6,256.80
FY16 - \$31,284.00
FY17 - \$50,054.40
FY18 - \$66,947.76
FY19 - \$108,242.64
FY20 - \$112,622.40
FY21 - \$87,595.20

SOURCE: South Dakota State Bar Association. March 2021

Lack of Attorney Specialty Skillset

As one focus group noted, if an individual has money, they can find an attorney to represent them. Nevertheless, the attorneys observed there was a critical shortage of attorneys in the practice areas of **immigration, bankruptcy, family law, and Native American law**. The quotes below are from

“We send all of the immigration cases to Sioux Falls. There is a severe shortage of immigration attorneys in South Dakota.”

“We do not have attorneys that practice bankruptcy cases in our region. We send all bankruptcy cases to Claire Garry in Sioux Falls.”

“Most attorneys are not taking on additional family law cases as these cases take a lot of time.”

“Not many attorneys in our region or the state take domestic violence cases. Most victims cannot afford the attorney, so they stay married. The victim feels trapped. We guess ~75% of domestic violence victims were turned away as attorneys do not have enough time to take their cases.”

“There is a lack of attorneys who have trauma-informed training and can work with DV and child abuse.”

“There is a significant gap of attorneys that understand and practice Native American law.”

Pro Bono and Modest Means Efforts

Most attorneys that participated in the focus group had completed pro bono and/or modest means cases either on their own accord or through A2J, DPLS, or ERLS. Most agreed 50 hours per year of pro bono services is reasonable. Attorneys explained it is the attorney's oath and South Dakota codified law to volunteer hours.

CODIFIED LAW 16-18-A

Rule 6.1. Voluntary Pro Bono Publico Service

A lawyer should render public interest legal service.

A lawyer may discharge this responsibility by:

- (a) providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; or
- (b) by service without compensation in public interest activities that improve the law, the legal system or the legal profession; or
- (c) by financial support for organizations that provide legal services to persons of limited means.

The factors listed below encouraged volunteerism.

- Attorneys were willing to take on cases where there is a clear beginning and end.
- When A2J, ERLS, or DPLS determine eligibility and ease the burden of the intake process, the attorneys knew the client qualified for legal aid.
- Attorneys prefer to take on one pro bono or modest means case at a time.
- The culture of the firm leads attorneys to volunteer or not volunteer. If the partners encourage pro bono work, others will follow. Some firms outside of South Dakota require their attorneys to complete a minimum number of hours to pro bono work. If not, they are required to donate the equivalent pay to legal aid.
- In general, attorneys that are active in their local community are more likely to accept pro bono cases.
- In the past, ERLS had ~20 private attorneys on a rotating list to pull the paperwork together for protection orders. There was an understanding that protection orders were time sensitive, and the attorneys would move quickly to respond.

The factors that discouraged volunteerism are listed below.

- There is a perception by the attorneys that clients who receive free service, bring issues to the table that should not be addressed in litigation. This results in extensive service.
- The attorneys were reluctant to take on family cases that would take months or years to litigate and manage. "There is more counseling than legal work."
- Working in the domestic violence field is traumatic (vicarious trauma).
- Attorneys are less likely to volunteer to accept a case involving children, especially divorce and child custody, due to the amount of follow-up required in child custody cases.
- In general, attorneys observed that pro bono clients are the least appreciative clients. They do not know when to stop asking for services. They do not understand the expectations of the services. If they pay for services at a reduced fee, the clients seem to better understand expectations. For example, if they pay \$100 per hour versus \$300 per hour.
- Attorneys that have had bad experiences with pro bono clients may not only refuse to take on another pro bono client but may also sour the attorneys in their firm in accepting pro bono or

modest means clients. “The private attorneys hear stories from each other and do not want to put up with pro bono clients that they have had to follow for years.”

- The Sioux Falls attorneys believed the number of attorneys that perform pro bono work is below average. In larger firms, especially those with corporate offices outside of South Dakota, there is a requirement to complete pro bono work. For example, Ballard Spahr counts 50 hours of pro bono time as 100 billable hours. They also reward attorneys with a bonus for admirable pro bono work. The philosophy is to complete pro bono work is in their culture and policy.
- If the attorney is in solo practice, it is very difficult to take on pro bono cases as some cases are so time consuming.
- The attorneys reported they all had a full load and work up to 80 hours per week. We have more work than what we can handle.
- Attorneys in rural communities explained that almost all cases that rural private attorneys accept are at a discount. “Farmers and ranchers do not have the cash flow to pay attorneys at a market rate. Everyone is broke. We are already doing pro bono and modest means work. I net about \$0.30 per every \$1 I bring in. The driving expenses are a lot.”

Other suggestions were:

Mentoring. Several attorneys confessed they do not feel qualified to complete pro bono family law work as they do not have the training or background to do so. Solo practice attorneys are especially at a disadvantage as they do not a) have peer attorneys down the hall to mentor them; and b) cannot afford to take away from their own practice. A suggestion was to request A2J sponsor a project where attorneys’ mentor other attorneys in pro bono work. They may not want to work directly with clients; however, they may find it fulfilling to mentor peer attorneys. It would expand the knowledge base and take some pressure off the family law attorneys.

Lawyer for the day. In Meade County, the contracted public defender stays in the courthouse to help people all day. According to judges and attorneys who have practiced outside of South Dakota, this is a common in other states where attorneys rotate helping individuals with pro se forms or providing direction.

WORKS Program. The USD Law School WORKS program was highly praised by UJS judges, court administrators, and clerks. If possible, they recommend expanding the WORKS program. The only suggested change was to schedule the visits out at least 12 weeks prior to arriving so the clerks can fill the appointment slots.

Mediation

Mediation was offered as a viable alternative. The attorneys observed that although mediation alone will not finish the process, it would bring the case to a point where an attorney could file the paperwork with the court. In the Aberdeen area, there were three professionals qualified to mediate. In Watertown, there were two professionals.

The 5th Circuit Court Administrator and Clerks noted the court calendar was so busy, they encourage parties to mediate before they come to court in order to ease the burden of the judges.

Mediation comes at a cost as well and only works if the parties are willing to meet and negotiate.

Overall, the attorneys present at the focus groups were favorable regarding mediation. Mediation is cost effective versus litigation. Family law mediation may be an attractive business opportunity for professionals. It would also ease the burden of the courts.

Court Appointed Attorneys

Court appointed attorneys were noted as one of the highest priorities for Unified Judicial System (UJS) courts and tribal courts. The court administrators and judges explained it is a struggle to find anyone who will do this work. The inmates have iPads so they can email and text their attorneys at all hours of the day / night. The inmate's family members go to the attorneys' offices and persistently ask questions until their family member is out of jail. The inmate and families flood their phone lines.

The evaluator spoke to a few (<5) court appointed attorneys who did not work for DPLS or ERLS. They explained they spend a significant amount of time going to the jail to attain clients' information and then negotiate with the States Attorney office. They were overwhelmed with the number of cases they were assigned. The court appointed attorneys noted that the States Attorney Office (SAO) philosophy greatly influenced their caseload. Some noted their SAO was reasonable and other said they see every case.

In tribal courts, the need was more pressing as there were no court appointed attorneys at all in some jurisdictions. The consequence is that the defendant represents themselves. The tribal judges and prosecutors noted this as one of their most pressing needs. They were not necessarily advocating for DPLS to pick up this service as they preferred them to represent children, domestic violence victims, and other under representative populations. However, they were looking for solutions to fill this gap.

"The court appointed attorney contract does not pay enough to make it worth it." COURT APPOINTED ATTORNEY

"I am so burned out." COURT APPOINTED ATTORNEY

Suggested Policy Changes

The following are policy or procedure questions that were posed by attorneys who participated in the focus groups.

Divorce. Minnesota has a fast-track divorce process. Should South Dakota investigate this process?

Protection Orders. Protection orders are time sensitive. There needs to be someone prepared to act immediately. Private attorneys cannot drop everything to respond. Are there other professionals that can be trained to draft protection orders? (Please note some domestic violence shelters do help clients fill out the protection order form. Although some are proficient, the remaining need additional training.)

Immigration. If South Dakota cannot attract additional immigration attorneys, can a firm from Minneapolis, Omaha, or Denver contract through a South Dakota firm to handle the overflow immigration cases?

Licensing Best Practice

Currently, the South Dakota State Bar Association and other agencies do not have a method to monitor the attorney workforce in the state. An example of a workforce model who tracks reliable data is the South Dakota Board of Nursing. Nurses are required to renew their license every two years with the Board of Nursing. When they update their license, they are required to complete a short survey asking them

demographic information, education status, and employment status. Based on the results, the Board works with the higher education institutions and employers to make interventions and apply for grant funding to better recruit and retain the nursing workforce.

If the State Bar Association chose to monitor the workforce, they can collect a significant amount of data with the following question:

- Name
- Gender
- Ethnicity
- Year of Birth
- City
- County
- Areas of Practice
- Employment Status
- Reasons for Unemployment (Seeking for work as an attorney)
- Primary Employment Setting