

**REPORT OF THE JUDICIAL COUNCIL CRIMINAL LAW
ADVISORY COMMITTEE ON THE STATE'S OBLIGATION
TO PROVIDE LEGAL SERVICES FOR PRISONERS**

BACKGROUND

The 2001 House Appropriations Committee made the following request of the Judicial Council:

“Request that the Judicial Council undertake a study and report back to the 2002 Legislature on the constitutional obligation the state has to provide legal services to inmates of Kansas correctional institutions. The issue arises in connection with funding for Legal Services for Prisoners, Inc., a corporation funded through the budget of the State Board of Indigents’ Defense Services. The Budget Committee is aware that inmates must have access to legal services, but believes both the Legislature and the Governor need to know the level of services that is constitutionally required in order to make informed funding decisions.”

The Judicial Council agreed to undertake the study and assigned it to the Judicial Council Criminal Law Advisory Committee. The members of that Committee are:

Hon. Marla J. Luckert, Chair, Topeka;

Professor Ellen Byers, Carbondale;

James W. Clark, Topeka;

Edward G. Collister, Lawrence;

Representative Jim D. Garner, Coffeyville;

Jessica R. Kunen, Lawrence;

Patrick M. Lewis, Olathe;
Hon. Michael Malone, Lawrence;
Steven L. Opat, Junction City;
Debra S. Peterson, Wichita;
Elwaine F. Pomeroy, Topeka; and
Loren L. Taylor, Kansas City.

The Committee heard testimony from the following conferees:

Steve Kessler, Director of Legal Services for Prisoners, Inc.;
Charles Simmons, Secretary of Corrections; and
Patricia Scalia, Executive Director of the Board of Indigents' Defense Services.

CONSTITUTIONAL REQUIREMENTS

The state has a constitutional obligation to provide inmates with access to courts so that they may challenge their convictions, sentences and conditions of confinement. The method of providing this access is left to the states to determine.

The constitutional right of meaningful access to the courts is set out in *Bounds v. Smith*, 430 U.S. 817 (1977), and *Lewis v. Casey*, 516 U.S. 804, 116 S.Ct. 2174 (1996). *Bounds* held that prisoners must be afforded access to an adequate law library or provided with adequate assistance from someone trained in the law. *Lewis* clarified that providing access to a law library alone, where the inmate may not be able to read or understand the materials, does not satisfy constitutional requirements.

The court did not specify a particular program to be used, but required that prisoners be assured of a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. 116 S.Ct. at 2182.

Lewis also identified two limitations on the scope of the right of access to the courts. First, the Court stated that the right is limited to whatever is necessary to enable the inmate to present a grievance to the court; however, prison officials need not help the inmate discover grievances or litigate effectively once in court. 116 S.Ct. at 2181. Second, the right does not extend to facilitating all types of grievances, only those related to the inmate's conviction, sentence or conditions of confinement. 116 S.Ct. at 2182.

LEGAL SERVICES FOR PRISONERS, INC.

The state currently meets its obligation to provide inmates with meaningful access to the courts by funding Legal Services for Prisoners, Inc., (LSP) a private, not-for-profit organization established in 1972 to provide legal assistance to inmates of Kansas correctional institutions.

Steve Kessler, Director of Legal Services for Prisoners, Inc., testified before the Committee that, LSP advises and assists inmates with sentencing guidelines and computation issues and with post-conviction issues. LSP prepares 60-1507 petitions and federal habeas corpus filings, and is occasionally appointed to represent inmates in court in those types of cases. LSP also negotiates

conditions of confinement issues with the correctional institutions. In domestic cases, LSP offers advice only. In spite of reduced services in some areas, LSP has continued to increase its efficiency by providing services to an ever increasing prison population despite static levels of funding.

ALTERNATIVE METHODS OF PROVIDING SERVICE

Other alternatives to direct legal assistance which might be used to meet constitutional requirements include extensive prison law libraries, paralegals, inmate law clerks, or mandatory attorney appointment lists. These alternatives can be costly and present unique problems of their own.

Although Kansas prisons already contain law libraries, they are not extensive and are only updated yearly. Establishing complete law libraries with support staff in each institution would be prohibitively expensive, and might not be sufficient to meet constitutional requirements. See *Lewis*, supra.

The Committee heard testimony from Secretary of Corrections Charles Simmons that if LSP's funding were cut, the DOC would have to provide legal services through DOC's budget, possibly by hiring paralegals. One problem with using paralegals is that they are not qualified to perform all of the functions of an attorney such as giving legal advice and representing an inmate in court. A paralegal who gives legal advice is engaging in the illegal and unauthorized practice of law. If paralegals were

hired by the DOC, those paralegals would have to be supervised by attorneys. Furthermore, there would be at least the appearance of a conflict of interest in having paralegals and supervising attorneys who were hired and paid by the DOC helping inmates. Because of that perceived conflict of interest, it is better to have an outside organization provide legal services to the inmates.

Use of prison law clerks would create security concerns. Secretary Simmons explained that the DOC tries to limit inmates acting as legal advisors because, even though inmate paralegals are not allowed to charge for their services, a barter system often develops and the inmate paralegal obtains a power position. Also, neither paralegals nor inmate legal advisors can legally advise an inmate on whether any particular claim does or does not have merit. In contrast, LSP cuts down on the number of frivolous filings by weeding out cases with no merit and advising inmates why those cases should not be filed. Secretary Simmons stated that LSP serves as a management tool in helping to resolve inmate problems before litigation results.

Mandatory attorney appointment lists would be not only unpopular with the bar, but likely unconstitutional. See *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987). Only attorneys near the institutions would be affected by mandatory appointment lists, and there are often few attorneys available in those areas. Because appointed attorneys would not have the specialized knowledge and expertise of LSP attorneys or their established working relationship with the DOC, they

would have to spend additional time getting up to speed.

JUDICIAL COUNCIL RECOMMENDATION

The Judicial Council believes that LSP is the most cost effective alternative for providing inmates with the constitutional right of meaningful access to the courts for many reasons, both tangible and intangible. LSP attorneys have specialized knowledge and skills relating to criminal law and prison issues. LSP also serves in a problem solving capacity which may forestall inmate litigation. For example, LSP is often successful in negotiating conditions of confinement issues with the institutions involved. Simply giving an inmate the opportunity to express concerns to an attorney and receive legal advice helps to deter frivolous lawsuits. This in turn eases the burden on the judiciary to deal with these types of cases.

In previous budget requests, LSP has attached letters of support from judges in districts with correctional institutions. The Judicial Council found those letters, which attest to the benefits of the service provided by LSP, to be particularly persuasive; they are attached at the end of this report.

Secretary Simmons testified before the Committee that LSP is a major component of the Department of Corrections' ability to provide inmates with the constitutional right of meaningful access to the courts. Secretary Simmons believes that LSP is currently enabling the DOC to meet

constitutional requirements; however, if LSP's funding were cut, the DOC would have to hire paralegals and requisite supervising attorneys instead and any perceived savings would probably evaporate.

The Judicial Council is similarly concerned about the likely consequences of eliminating LSP or reducing its budget. If LSP did not exist, the state would have to fund more extensive prison law libraries and paralegals, or increase BIDS' budget so that local attorneys could be appointed. As discussed above, these are not desirable options.

Other entities have used a similar system of providing legal counsel and found this to be the most cost efficient. For example, the Corrections Corporation of America, a for-profit private prison operator, has found the use of attorneys to be more cost efficient than law libraries or paralegals. See "Limiting the Burden of Pro Se Inmate Litigation: A Technical Assistance Manual for Courts, Correctional Officials, and Attorneys General," by Lynn S. Branham, ABA, Criminal Justice Section (May 1997).

The Judicial Council recommends, not only that LSP funding continue at at least current levels, but that funding be increased so that its attorneys can provide better, more comprehensive service. Over the last ten years, LSP's staff numbers have not kept pace with the increase in prison population.

While the number of prisoners increased from 5,594 to 8,540 between June of 1991 and June of 2001, LSP's number of full time positions actually decreased from 12.75 FTE's to 10.5 FTE's.

As a result, LSP has narrowed the scope of services it provides to inmates. For example, while LSP used to represent inmates in disciplinary hearings, it now accepts only those cases where the inmate is unable to represent himself or the possibility of criminal charges exists. Also, LSP attorneys often correspond with inmates at remote facilities by mail rather than in person. Corresponding by mail is a less effective means of communicating legal advice, especially where illiteracy and language barriers are a problem.