REFLECTIONS ON THE RURAL PRACTICE OF LAW IN SOUTH DAKOTA: 
PAST, PRESENT, AND FUTURE

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I. INTRODUCTION

If a law was passed evicting the attorneys from South Dakota’s forty-eight most rural counties, universal outrage would follow. If a law was passed forbidding new attorneys from locating in these forty-eight counties, there would be more justifiable outrage. The reaction would be, in large part, because there would be no access to legal services in those counties. Yet time and circumstances are well on their way to yielding the same result without the necessity of laws, guards, or barbed wire. Up until the passage of H.B. 1096, a pilot program to assist counties in recruiting attorneys, there was little if any public reaction to the crisis, let alone outrage.

South Dakota has approximately 1,800 active lawyers within its boundaries. Most people in the know say that is as many lawyers as we need. However, the lawyers are not spread evenly within the state’s population. Sixty-five percent of South Dakota attorneys reside in just four counties: Minnehaha, Pennington, Brown, and Hughes. Even at that, the remaining thirty-five percent of lawyers are heavily concentrated in Mitchell, Brookings, Watertown, Yankton, Huron, and the Northern Black Hills. Yet fifty-four percent of South Dakotans live and work in rural areas.

All South Dakotans are entitled to reasonable access to legal services. At one time, access to legal services in rural South Dakota existed. That is no longer always the case. The challenge now is how to restore a proper balance for access to legal services.

II. THE PROBLEM

As far as I am aware, no empirical or statistical study exists on the reasons for the decline of the number of attorneys in rural areas of South Dakota. Perhaps such a study is not possible. Based on four decades of personal observations and conversations with long-time members of the State Bar of South Dakota, I have identified reasons I believe significantly contributed to the decline. The list is not exclusive.

Moreover, many other states have a similar problem in their rural areas, so it is clearly not unique to this state.1 My participation in the Conference of Chief

† Chief Justice, South Dakota Supreme Court. The views stated herein are the personal views of the author and not the views of the South Dakota Supreme Court.
1. According to the New York Times article of April 8, 2013, on South Dakota’s enactment of H.B. 1096, seventy percent of Georgia’s attorneys live in the Atlanta area, ninety-four percent of
Justices brings me into regular contact with the Chief Justice of every state and territory in this country. In my visits with them, it is clear that every state with a significant rural area is facing the same problem. Rhode Island, Delaware, and the District of Columbia are probably the only jurisdictions that are immune from the issue.

How did we get to this point? Here are a few of my thoughts on how it occurred. In 1930, over 390,000 people populated South Dakota farms. This was 56.5 percent of the state’s population. The farm population was the bulwark of small-town South Dakota. By 2002, only 7.7 percent of South Dakota’s population, 58,200 people, lived on farms. During the same time frame, the overall population of the State remained relatively stable and increased by only 9.6 percent from 688,500 to 754,800.\(^2\)

At the end of World War II, millions of veterans re-entered the civilian population. Many took advantage of the G.I. Bill, which provided them with a free education. The enrollment at the University of South Dakota School of Law significantly increased. After graduation, veterans returned home to commence the practice of law. Many enjoyed successful careers that kept them in their hometown. By the 1970s and into the 1980s, however, they “aged-out” of the legal system and retired. They were either not replaced at all or not in the numbers in which they departed.

In 1972, the University of South Dakota School of Law began to aggressively recruit female students, where in the past the enrollment had been dominantly male. County commissioners told me that in the 1970s they had little problem attracting a steady supply of lawyers because, “the good hunting and fishing gets them here.” With the change in the make-up of the graduating law students, many had more cosmopolitan outlooks and interests and the lure of outdoor recreation as a recruiting tool diminished.

At a meeting of the Glacial Lakes Bar Association a few years ago every attorney in attendance but one had returned to his or her home county to practice law. Thus, there was an obvious source for a replacement pool. However, as the overall population base of rural areas declined, there were fewer law school graduates to “go home.” By the 1960s and the 1970s, this was due in large part

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2 Drought—But Not Dust Bowl, S.D. STATE UNIV. COOP. EXTENSION SERV. (Coll. of Agric. & Biological Sci./USDA), Sept. 2007, http://pubstorage.sdstate.edu/AgBio_Publications/articles/ExEx5901.pdf. The number of attorneys in rural counties was apparently not kept. The only record available is the total number of attorneys including those in South Dakota’s larger cities. However, an interesting parallel is gleaned from the fate of South Dakota banks, a staple of small town’s business capabilities. In 1920, South Dakota had 695 banks. By 1935, only 212 banks remained. By 2007, that number shrunk to ninety-three banks, some with multiple branches. Id.
to the decline in the birth rate\(^3\) and the out-migration of South Dakota youth in search of educational opportunities and jobs.\(^4\)

Another significant shift in the make-up of the Law School student body was the emergence of non-traditional law students. These were individuals who engaged in another occupation before returning to law school. Many of them had a spouse and family. The financial obligations of family limited the graduate’s ability to test the waters of setting up a rural practice.

Many non-traditional students had the benefit of spousal support during their legal education. However, when it came time for the law school graduate to choose a locale and job, the job needs of the spouse often limited the choices for the graduate. Career opportunities for a spouse in a rural area were often minimal or non-existent.

The cost of a legal education dramatically increased. When I attended law school in the 1970s, the cost of tuition, books, and fees was under $2,000 per year. With the help of summer jobs, the G.I. Bill, or spousal or parental assistance, a student graduated from law school with minimal or no debt. This allowed graduates the option of hanging out their “shingle” in a rural county and seeing what happened. Now a graduate of a law school who has the benefit of in-state tuition commonly graduates with a debt load of around $75,000.\(^5\) This often requires the graduate to choose a career path that will produce an instant and certain cash flow to meet the debt and living expenses.

The economics of a rural law practice changed. A couple of examples are helpful. When I graduated from law school in 1975, most rural attorneys still did income tax preparation and examined abstracts of title. As one veteran attorney explained to me, “It is like the grocer putting bread on sale at cost. It gets the customer in the door.” By the 1980s, most attorneys no longer engaged in tax preparation and ceded that task to the accounting profession because of the advent of computer tax preparation programs and a change in the makeup of the Bar. In the late 1970s, the statute of limitations for legal malpractice affecting

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3. Statistics provided to me by the South Dakota Department of Health show a decline in the birth rate in every county in South Dakota except two, Lincoln and Hamlin. Since the 1960s, many counties have experienced a thirty-three percent decline and some exceed fifty percent. In 2002, then-Governor William J. Janklow gave a speech where he pointed out every school district in South Dakota had more seniors than first graders. He cited his hometown of Flandreau, which had 100 seniors and 21 first graders.

4. Anyone who lived in a rural area knew of the out-migration problem. Students graduated from high school and left never to return. These anecdotal observations were statistically verified by the work of Dr. Edward F. Hogan of the Department of Geography at South Dakota State University in the 1970s. A copy of his Ph.D. dissertation and his other writings on this subject are on file in the South Dakota State University Library. See Edward F. Hogan Papers, S. D. State Univ. Briggs Library, http://library.sdsstate.edu/UA53-1/?EdHoganPapers (last visited May 24, 2014).

5. Reports of student debt to the Bar Examiners of the State of South Dakota indicate that if a student attends a private college or a non-resident law school, the debt load can be substantially higher to the point where an applicant for entrance into the South Dakota Bar may not be able to cashflow the debt in any type of entry legal position.
real estate was reduced. On the surface, this reduction was positive for the rural attorney by limiting potential liability. It had, however, unintended long-term detrimental consequences. Bankers and other lenders no longer relied on an attorney’s opinion concerning the state of the real estate title as a long-term guarantee of protection. Instead, lenders required the borrower purchase title insurance from a title insurance company. Attorney title opinions went the way of the drive-in theater.

For decades, the farm real estate client had been the “bread and butter” of a rural legal practice. However, South Dakota has experienced boom and bust cycles in its agricultural economy since Statehood. During the 1970s, land prices had risen bringing in additional business to attorneys in the areas of estate and business planning for farm clients eager to expand their operation or pass it on to the next generation. However, over the long-term, land prices had risen so that the purchase price could no longer be cash-flowed by the land’s production capability. Double-digit interest rates also added to the problem for those dependent on credit. Many clients in times of easy credit had taken out loans, which in the “fine print” carried variable interest rate clauses. They were now invoked. In the late 1970s, land prices crashed often by two-thirds in six months. Acquisition and expansion for many clients became a distant memory.

Some farm clients did not survive this crisis. Such an economic disaster had an obvious negative ripple effect in the small towns that lived or died on the surrounding farm economy. Failed businesses followed failed farms. This negatively impacted this important aspect of many a rural legal practice. While the economic situation has currently corrected itself and then some, much damage was sustained during the 1970s and 1980s.

Costs in a rural practice also presented additional problems. In the 1980s, the cost of legal malpractice insurance skyrocketed. What once cost only a few hundred dollars per year now cost thousands of dollars. Moreover, many private carriers would only write for existing firms and refused to take on new attorneys who were faced with the prospect of practicing in a rural area with no malpractice insurance due to cost or availability. Fortunately, this crisis later abated, but damage had certainly been done.

The arrival of computers turned out to be a mixed blessing. While their use increased the efficiency of a rural attorney, the cost of hardware and software added additional financial pressure on a person considering a rural practice. One now needed more than a storefront office, a telephone, and a copy of the South Dakota Codified Laws to start a law practice.

6. S.D.C.L. § 15-2-14.2, enacted in 1977, set a three-year statute of limitations for attorney malpractice from the date of the act of malpractice whether the claim be in tort or contract. Prior to that, S.D.C.L. § 15-2-13 provided that all breach of contract cases carried a six-year statute of limitations.
Many new rural attorneys were traditionally able to earn income through court-appointments in criminal cases. In the 1980s, however, cash strapped counties, in a move to save money, contracted with a single law firm at a fixed annual fee for all the criminal defense work in that county. Other counties set up public defender programs. Both had the effect of closing this door of revenue to some rural attorneys or those considering this option.

This crisis has not only brought financial distress challenges to the opening of a rural law practice, it has also brought similar financial challenges to the rural counties themselves. They are now faced with the specter of “importing” their prosecutors and defense attorneys from significant distances outside of the county. This can substantially raise the cost of these services due to the distance and travel time involved.

A variety of factors contributed to the current dearth of attorneys in rural South Dakota. How much each factor contributed is not known, but I believe the sum total caused us to arrive at the doorstep of today’s problem.

III. MY INTRODUCTION TO THE PROBLEM

I grew up in a rural community. After I graduated from law school, I engaged in a rural private practice in my hometown for ten years. After that, I became a circuit judge for ten more years. I spent the bulk of my time in rural counties. Thus, my background prepared me to identify this problem.

I became Chief Justice of the South Dakota Supreme Court in September of 2001. One of my goals was increased outreach to the State Bar and public. I resolved to visit each courthouse in South Dakota to see for myself how things were going in each county.

After several years of driving to rural towns in South Dakota, it occurred to me that in one small county seat town after another, an attorney I had known had died or retired, and no one filled the vacancy. One former office of a long time attorney had been converted into a beauty parlor. Visits with local public officials and the remaining members of the bar confirmed this. I was told that the lack of availability of legal services in some areas was reaching a crisis level. Moreover, all agreed the problem was going to get worse as more rural attorneys

7. See, e.g., Gideon v. Wainright, 372 U.S. 335 (1963) (establishing the right to counsel for an indigent criminal defendant as a federal constitutional right). In 1901, however, South Dakota far preceded this decision by statutorily providing the indigent criminal defendant with counsel “paid by the county.” 1901 S.D. Sess. Laws 134.
8. Bennett County Commission Chair Rolf Kraft stated, “Between sending out prisoners to Winner and bringing in lawyers and judges, we are breaking the county budget.” Martin Mayor Gayle Kocer agreed, “Our state’s attorney drives down from Rapid City. It’s crazy.” See Brunner, supra note 1.
9. It is clear that the attraction of a legal education is not what it once was. When I was admitted to law school in 1972, there were ten applicants for each student admitted. Recently I attended a meeting of the Conference of Chief Justices where we were told for the last several years there were two applicants for each student admitted. This year that dropped to one applicant for each opening.
continued to leave the practice of law. Yet no one was advocating a program to reverse this trend.

To verify these observations, I obtained a 1985 State Bar Membership Directory and compared it to the 2010 directory. In town after town it was clear that the number of attorneys in small towns during this twenty-five-year period had declined. Moreover, one attorney told me in 2010 about his county with a population of 5,000: “The Bar Directory shows six attorneys in this county. Actually I am the only one who practices full time.”

IV. PUBLIC AWARENESS OF THE PROBLEM

The declining number of attorneys in rural South Dakota had never been discussed in a public forum. It appeared to me that before there was going to be a public response to the problem, the public and government officials had to become aware a problem existed. My annual State of the Judiciary Message provided an opportunity to bring to the public’s attention the existence of the problem and the nature of the issues.10

In my 2005 Message, I addressed the issue for the first time. I noted that “a hospital will not last long with no doctors and a courthouse and judicial system with no lawyers faces the same grim future. Local county lawyers should not suffer the same fate as the tin lizzie or the buggy whip.”11 While the message was politely received, no major discussion or action followed. I returned to the subject in my 2007 State of the Judiciary Message. I pointed out that in the 1970s a similar crisis existed in health care in rural areas of this state and a pending legal crisis was not far behind. In 2009, I again discussed the matter and stressed that two-thirds of all attorneys in South Dakota resided in only four counties, seven counties had only two attorneys, fourteen counties had only one attorney, and two counties had no attorneys. I observed, “The likelihood of replacing these attorneys is remote.”12 I concluded: “The real and sad truth is we are heading toward a state that will not provide justice for all no matter the location. We are heading for a state which contains islands of justice in a sea of empty rural courthouses.”13

10. As Chief Justice, I present the State of the Judiciary Message orally to a joint session of the Legislature. The Governor, Lt. Governor, and other constitutional officials attend. It is covered and reported by the press. The written text of the message is published in booklet form and provided to South Dakota public officials, every active member of the South Dakota Bar, and to court leaders in the other jurisdictions of this country. The messages are archived on the web page of the Unified Judicial System. See Judiciary Messages, SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM, http://ius.sd.gov/Supreme_Court/messages.aspx (last visited May 24, 2014).
13. Id.
In the 2011 Message, I noted that while the on-going national recession made it difficult for many law school graduates to find jobs, the rural supply of attorneys continued to decline. Thus, “greener pastures” from other states did not lure away our law school graduates. Nationally, only fifty-six percent of law school graduates in the past two years have found positions that require the use of their law degree.

In 2012, I told the Legislature that the State Bar had organized a Rural Practice Task Force. The problem was identified, the public was informed, discussions were taking place, and affirmative attempts were being made to address the problem. In the 2013 Message, I was pleased to report “Project Rural Practice” had a website with the goal of bringing law school graduates together with rural areas seeking attorneys.

V. THE HISTORY OF HOUSE BILL 1096

While Project Rural Practice was a huge step in the right direction, it did little to rectify the core problem of finances because it had no money. I met with sixteen third-year law students at the University of South Dakota School of Law. In a closed-door session I asked if any of them would consider practicing law in a rural county. I expected most of them to tell me that they had no such interest under any circumstances. To my pleasant surprise only one of the sixteen had no interest in rural practice. The other fifteen indicated they would consider that option under the right circumstances. While the students identified other concerns, it was clear finances were the dominant issue.

Within a few days of my 2013 State of the Judiciary Message, Senator Mike Vehle asked if I would be interested in working with him to draft a bill to provide financial incentives to law school graduates who chose to relocate to rural areas. He wanted to pattern it after other programs in South Dakota that provide financial incentives to doctors, nurses, physician’s assistants, dentists, and veterinarians. I was pleasantly surprised by Senator Vehle’s offer. His professional background is banking rather than law, and his district is largely an urban one that stood to gain nothing by such a proposal. He simply said he was interested because “it was the right thing to do.”

With strong lobbying support from the State Bar, the bill was introduced in the State Senate despite the fact the Senate did not have a single lawyer in its membership. Through a lot of hard work, we thought we had an excellent chance of passing the bill and were devastated when it failed by a single vote.

With the end of the legislative session in sight, the Executive Director of the State Bar, Thomas Barnett, Jr., proposed taking H.B. 1096, which dealt with the non-controversial subject of affidavits in probate cases, and “houghousing” 16

15. See generally S.D.C.L. §§ 34-12G-1 to -17 (2004).
16. According to Rule 6E-2 of the South Dakota Legislature’s Joint Rules, a “houghouse” is a substitute bill. In Duxbury v. Harding, 490 N.W.2d 740, 743 n.5 (S.D. 1992), the Court stated: “When a
it into a resurrection of the rural attorney bill, which had already died. The bill was modified to address the concerns of individual legislators. With these changes, H.B. 1096 passed the Senate with the required two-thirds approval. With only hours left in the session, H.B. 1096 was introduced into the House and it passed with more than the required number of votes. The Governor signed it and it became law. The Phoenix had indeed risen from the ashes.

VI. H.B. 1096

It is not my purpose here to give a detailed legal analysis of H.B. 1096. Suffice it to say it is a pilot project that allows up to sixteen law school graduates to receive annual payments for five years. The cumulative payments are roughly equal to the total cost of an in-state legal education at the University of South Dakota School of Law. One-half of the cost of the payments is borne by the State, thirty-five percent by the applicable county, and fifteen percent by the State Bar. In exchange, the lawyer signs an agreement to maintain a full time legal office within the rural county for the five-year period. Applicants must be graduates of an American Bar Association accredited law school and members in good standing of the State Bar of South Dakota.

Only counties with populations of 10,000 or less are eligible. That still encompasses forty-eight of South Dakota’s counties. Recognizing other political subdivisions have an interest in access to local legal services, the law authorizes participation by municipalities, school districts, and other public entities to participate and contribute to a county’s financial obligation of thirty-five percent of the stipend.

VII. THE EFFECT OF H.B. 1096

At this point, the ultimate effect of H.B. 1096 is unknown. As I pointed out to the Legislature during a committee hearing, this situation has all the elements
of a junior high dance; the boys are on one side of the gym, the girls are on the other, and nobody is quite sure how to make the first move. To overcome this situation, the Unified Judicial System and State Bar have partnered with the University of South Dakota School of Law to encourage law student participation\textsuperscript{19} and with the South Dakota Association of County Commissioners to encourage county participation. The Unified Judicial System and the State Bar's websites also provide information about the rural attorney recruitment program.\textsuperscript{20}

A collateral effect of H.B. 1096 is the positive national attention it is receiving. For those of us who have worked on this problem for years, this was totally unexpected and clearly not something we sought. According to such diverse entities as the American Bar Association and the New York Times, this problem is hardly unique to South Dakota and exists in every state that has significant rural areas.\textsuperscript{21} South Dakota is the first state in the nation to affirmatively take on the problem by a financial incentive program through H.B. 1096. This drew the attention of a New York Times front-page article, CBS radio in its national news broadcast, the American Bar Association Journal, the National Bar Journal, and other news entities. It drew public awareness to the problem and South Dakota’s attempt to deal with it. It certainly adds a level of status to students considering applying to enter the program. It may also encourage other states to try the same path.

VIII. THE FUTURE

Justice Brandeis famously wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\textsuperscript{22} That is what South Dakota has done with the passage of H.B. 1096.

Attorneys who engage in a rural practice say there is more than sufficient legal work needed to be done. Besides the normal demand for civil and criminal legal services, Professor Michael McCurry, the State Demographer for South Dakota, told me that with the rapid increase in farmland prices, and the aging of a significant portion of its population, South Dakota is on the verge of the largest transfer of wealth in its history. Planning for and the execution of this transfer will require legal services from rural attorneys.

\textsuperscript{19} One cannot start too early with this discussion. I contribute to the law school education process at the University of South Dakota School of Law by visiting with new law students on the first day of law school. I now emphasize the importance of considering the potential of a rural practice upon graduation.


\textsuperscript{21} See infra, note 1 and accompanying text.

\textsuperscript{22} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
The remaining question is whether the program will work. Since it has only been in effect since July 1, 2013, that is still a question to be answered. Similar programs have been successful in South Dakota since the 1970s in recruiting doctors, nurses, physician’s assistants, dentists, and veterinarians to rural areas. This is cause for optimism. What I know for sure is that if nothing is done, huge areas of South Dakota will be without reasonable access to legal services. I do not desire to be the Chief Justice who, on my watch, was charged with turning out the lights permanently in forty-eight courthouses because they were abandoned for lack of attorneys. Hopefully H.B. 1096 will reverse the specter of such a tragedy. By passing H.B. 1096, South Dakota has affirmatively pursued a plan to reverse the negative trend, which has existed for decades.

Where will these new rural attorneys come from? Thomas Barnett estimates that ninety percent of the licensed attorneys in South Dakota are graduates of the University of South Dakota School of Law. Thus, substantial relief will not likely come from what have been described as the “First Tier” Law Schools, but rather from bolstering and partnering with our state’s law school to see that students are aware of this opportunity for a successful rural practice.23

A promising start occurred on November 5, 2013, when Douglas County became the first county in South Dakota to enter into an agreement with an attorney pursuant to H.B. 1096.24 In May of 2014, Lyman County became the second. In June of 2014, Perkins County, Hand County, and Haakon County also joined the program raising the total to five counties. Other counties have shown interest, and it is hoped they will soon follow suit.

We all have a stake in the outcome. As a distinguished senior South Dakota attorney once told me about the larger city in which he resided, “For years we have been syphoning off as much business as we could grab from the smaller towns around us. We convinced their people to come to our city and spend their time and money here. The result? Now, there is nobody left in the rural areas because we sucked them dry. With nobody left out there, now it is our turn to pay the price.”

The front of the United States Supreme Court building proclaims: “Equal Justice Under Law.” This declaration is made without qualification. In recent decades, much attention has been rightfully paid to fulfilling this promise in the

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23. This observation is not iron clad. Jake Fisher is the attorney who is the first to enter the program through an agreement with Douglas County. He is a graduate of the University of Minnesota School of Law, but was raised in a county adjoining Douglas County, and has strong family ties to the Corsica area where he now practices. Thus in the end, family ties and geography are a strong enticement no matter where a legal education was acquired.

24. A portion of the contribution of Douglas County was provided by the Corsica Development Corporation as its town was without an attorney. See Elizabeth “Sam” Grosz, Douglas County First In State to Participate in Rural Attorney Recruitment Program, YANKTON DAILY PRESS & DAKOTAN, Nov. 14, 2013, http://www.yankton.net/community/article_bc9321f1-4ce4-11e3-8b7c-090a4bcf857a.html. As previously noted, such partnerships for the county portion of the financial contribution are specifically authorized by H.B. 1096.
areas of economic status and other personal classifications. Unfortunately, scant attention has been paid to the issue of geography. In all too many states, the urban areas have become islands of justice, while the surrounding rural areas are fast becoming a sea of justice denied. In South Dakota, H.B. 1096 and Project Rural Practice provide no guarantee of success. However, to do nothing is a guarantee of increased failure of the legal system in rural areas until it ceases to function.