

"The Spangenberg Report"

THE KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY: A PRELIMINARY REVIEW January 1998

Prepared for:
THE DEPARTMENT OF PUBLIC ADVOCACY, Commonwealth of Kentucky
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On behalf of the American Bar Association Bar Information Program

1.0 Introduction

As part of the Kentucky Department of Public Advocacy's (DPA's) efforts to recommend and implement a plan for improving indigent defense services in Kentucky, Public Advocate Erwin W. Lewis requested in the fall of 1997 that The Spangenberg Group, on behalf of the Bar Information Program of the American Bar Association, conduct a review of DPA, its funding needs for the coming biennium and its "Plan 1998-2000." The ABA Bar Information Program (BIP) was established in 1986 to provide information and technical assistance to state and local jurisdictions interested in improving their indigent defense system. In the past 12 years, BIP has responded to over 150 requests from nearly all 50 states and has provided on-site technical assistance in more than 35 states. The Spangenberg Group is currently the ABA's sole provider of technical assistance relating to indigent defense systems.

The Spangenberg Group, based in West Newton, Massachusetts, is the nation's leading expert in the delivery of indigent criminal defense services, having conducted more than two dozen studies of statewide indigent defense systems over the past decade. In 1997, The Spangenberg Group was selected by the U.S. Department of Justice, Bureau of Justice Statistics, to perform a nationwide survey which for the first time in over a decade will collect caseload, expenditure and other information about indigent defense systems in all 50 states.

With over thirty years of experience in the provision of legal services for the poor, Robert L. Spangenberg, the founder and President of The Spangenberg Group, has provided research and technical assistance to defender organizations in every state in the country. Michael R. Schneider recently became "of counsel" to The Spangenberg Group, after practicing for four years as associate to

Harvard Law Professor Alan Dershowitz, and after serving ten years as a trial, appellate, and training attorney for public defender offices in Massachusetts and New York. In addition to the research team's rich background in indigent defense systems throughout the nation, Mr. Spangenberg has also been closely involved with the operation of DPA for nearly 20 years, having made numerous site-visits to DPA field offices, having conducted several previous studies of DPA, having provided testimony before the state legislature, and having provided technical assistance to DPA.

Over the course of three days in early December 1997, Mr. Spangenberg and Mr. Schneider conducted a series of site visits at a selected sampling of courts and defender offices throughout the Commonwealth, including Louisville, Lexington, Owensboro, Hazard, Pineville, and London. After reviewing DPA's "Plan 1998-2000" and volumes of supporting data furnished by the Public Advocate, extensive discussions were held in Frankfort with Public Advocate Erwin Lewis, Deputy Public Advocate Edward Monahan, as well as the directors of the Trial Division, the Post Trial Division, the Law Operations Division, and the managers of various trial and post-conviction branches and regional and local offices.

During the site visits, interviews were also conducted with full-time defenders, investigators, and support staff in various DPA district offices, part-time defenders in various contract counties, as well as prosecutors and district and circuit court judges. Caseload, personnel, case tracking, and budgetary data provided by DPA were extremely helpful.¹ This report contains both short-term and long-term recommendations based on our analysis and evaluation of DPA's needs.

2.0 DPA's "Plan 1998-2000"

In September 1997, in an effort to address the profound problems confronting DPA, Kentucky Public Advocate Erwin Lewis issued DPA "Plan 1998-2000" which lays out a series of goals prem

ised on a modest funding increase of \$ 6 million, approximately 15%, over the next biennium. The Public Advocate should be commended for his far-sighted effort to lay out a well-thought out plan to meet DPA's needs over the next biennium. In our experience, this is something few public defender offices around the country have even attempted. The Plan's three primary goals are as follows:

2.1 Improvement in juvenile representation and the reduction of caseloads.

This goal would require: a) creating five new full-time DPA field offices in Owensboro, Campbellsville, Paintsville, Maysville, and Bowling Green, staffed by 14 additional full-time defenders trained to handle both juvenile and criminal matters, b) the hiring of seven additional trial attorneys specializing in juvenile representation who would be placed in already-functioning full-time field offices, and two additional full-time appellate lawyers specializing in juvenile appeals who would be placed in Frankfort, c) the hiring of a full-time juvenile justice trainer to be based in Frankfort. The total projected cost for these improvements would be \$ 2,338,300 over the next biennium.

2.2 Funding Jefferson and Fayette County Public Defender Offices to Enhance Caseload and Salary Parity.

With respect to Jefferson County, the funding request would allow for the hiring of additional staff to lower caseloads from the current high level of 820 per attorney; the reduction in the disparity in salaries between DPA staff and Jefferson County Public Defenders staff; and for a much needed infusion of \$100,000 to cover conflict contracts for capital cases, all at a projected cost of \$732,000 over the next biennium. With respect to Fayette County, the funding request would allow for the hiring of two additional attorneys to cover the two new divisions of the circuit court; for a five percent annual salary increase to reduce the disparity between DPA staff and Fayette County Legal Aid staff; for an additional secretary and investigator; for the purchase of computers and printers; and for \$50,000 to cover conflict contracts for capital cases, all at a projected cost of \$471,000 over the next biennium.

2.3 Improving the Quality and Cost-Effectiveness of DPA's Delivery of Defender Services in Capital Cases.

DPA's funding request would allow for an increase in compensation of private attorneys hired by DPA under contract to litigate capital cases from

\$12,500 to \$20,000 per attorney per case, which is necessary to attract high quality lawyers and to fund the work necessary in such difficult and time-consuming cases; for use of change of venue surveys in high profile capital cases; for the replacement of federal Byrne grant moneys; for the hiring of two mitigation specialists, an assistant public advocate at the chief level, an additional investigator, and other essential experts, all at a projected cost of \$983,500 over the next biennium.

To make up for the defunding of the Capital Post-Conviction Branch, additional funds are requested to hire attorneys, experts and support staff to represent death row inmates at the post-conviction stage.

2.4 Other Goals

In addition to these three main goals, DPA's plan also seeks to meet a number of other goals, including: improved computer-based research capabilities, case tracking, and information technology; improved post-conviction representation for Class D felons in local jails and inmates in private prisons who are currently unrepresented by the hiring of three additional attorneys and three support staff to service these facilities; improved appellate efficiency to meet the demands imposed by videotaped records by hiring two additional attorneys and two additional support staff; and improved staff recruitment. In an effort to obtain some of the necessary funding from funding sources other than the general fund, the DPA plan also has asked the 1998 General Assembly to authorize an increase in the administrative fee paid by DPA clients from \$40 to \$50. See KRS 31.051(2).

3.0 Short-Term Recommendations Regarding DPA's "Plan 1998-2000"

Based on its on-site visits, its analysis of defender data, and its evaluation of the current needs of the state-wide defender program, The Spangenberg Group supports each of the three primary goals of DPA's "Plan 1998-2000", which has already received the unanimous support of the Public Advocacy Commission, and a strong endorsement of its modest funding request by the Board of Governors of the Kentucky Bar Association, the Children's Law Center, the 1997 Governor's Criminal Justice Response Team, the Department of Juvenile Justice's Advisory Board, and the Kentucky Association of Criminal Defense Lawyers. In our opinion, if adequate funding is provided to realize these goals, the quality of indigent defense services will be improved throughout the Commonwealth. However, we believe that the magnitude of prob

lems confronting DPA is profound, warranting longer-term, more significant changes which are discussed in Section 4.0 below.

Overshadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA's caseloads have increased dramatically, while funding has failed to keep pace. From FY 1996 to FY 1997 alone, DPA's caseload increased by approximately 5% from 93,839 cases to 98,797 cases. While Kentucky's extremely broad KRS Chapter 31 right to counsel accounts, in large part for this trend, a number of attorneys reported that they have been routinely appointed in cases even where there is no right to counsel under KRS Chapter 31, *e.g.*, cases where no incarceration or substantial fines could be imposed.

The caseload information provided to us indicates that in FY 1997, DPA full-time trial defenders handled an average of 604 felony, misdemeanor, juvenile and other cases per attorney, with public defenders in Louisville handling as many as 820 cases. It is clear that, with the exception of just a few rural offices, DPA's Trial Division caseloads are in violation of Standard 5-5.3 of the American Bar Association Standards for Criminal Justice: *Providing Defense Services* (3rd.ed.) (1992), which provides in part:

Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

The Commentary to Standard 5-5.3 states:

The standards of the National Advisory Commission [NAC], first developed in 1973, have proved resilient over time, and provide a rough measure of caseloads. They recommend that an attorney handle no more than the following number of cases in each category each year:

150 felonies per attorney per year; or
400 misdemeanors per attorney per year; or
200 juvenile cases per attorney per year; or
200 mental commitment cases per attorney per year; or
25 appeals per attorney per year.

While the NAC standards do not make recommendations for public defenders who, like the

DPA's, handle mixed caseloads, it is clear that the DPA numbers far exceed those contemplated by the NAC. Our on-site interviews revealed that virtually all attorneys felt that their caseloads were too heavy, the quality of the representation they provided, adversely affected, and that they simply did not have enough time to interview all clients, investigate cases, prepare for trial, and draft motions, memoranda, and briefs adequately. This is corroborated by our interviews with judges.

The Need For Improved Juvenile Representation and Lower Caseloads.

In our view, Kentucky's juvenile defender system is badly in need of repair. Our site work tended to confirm many of the observations made by the Covington-based Children's Law Center in its 1996 report criticizing DPA for placing inexperienced full-time defenders in juvenile court, for contracting with part-time attorneys to handle juvenile cases without any training or experience in juvenile work, and for permitting many juveniles accused of serious offenses to go unrepresented in blatant violation of their constitutional right to counsel and their statutory rights under KRS Chapter 31. See Kim Brooks, Kim Crone, and James Earl, "Beyond *In Re Gault*: The Status of Juvenile Defense in Kentucky," 5 Ky. Children's Rts. J. 1 (1996).

During the course of our brief site visits, we heard many reports of judges pressing juveniles to "waive" counsel because defense attorneys were not readily available; of juvenile co-defendants being represented by the same attorney, notwithstanding the potential conflicts of interest; and of substandard representation at all stages of the process, including inadequate contact with their attorneys, inadequate investigation of their cases, little or no pretrial motion practice, as well as inadequate preparation for trial and dispositional proceedings. In many rural counties where the distances between the offices of defense attorneys and the nearest detention center or residential treatment center are often large, we were told that many juvenile clients are not interviewed until the very dates they are brought into court. We were repeatedly informed that in many of the contract counties, there is a scarcity of attorneys with an adequate knowledge of and experience in handling the highly specialized and complex area of juvenile defense. Virtually all parties interviewed reported that few if any juveniles receive any appellate representation whatsoever despite their statutory and constitutional right to appeal their adjudications.

While the increase in caseloads has been felt severely throughout the system, it has had par

ticularly harsh results in terms of DPA's representation of juveniles where the pressures of rising caseloads have been exacerbated by recent amendments to Kentucky's juvenile code, which provide for harsher penalties and the transfer of juvenile cases to circuit court in increasing numbers. If the problem is not addressed promptly, it risks systemically denying indigent defendants throughout the state their constitutional right to effective representation. DPA's approach of improving the quality of juvenile defense throughout the state by increasing the number of full-time defenders with expertise in juvenile matters makes good sense in view of reports from many full-time and part-time defenders and judges that the existence of full-time defenders with juvenile expertise tends to improve the general level of juvenile representation in full-time and part-time counties alike.

In light of already excessive caseloads and the looming demographic changes over the coming years, which may well result in increased juvenile crime, as well as the trend in Kentucky and elsewhere toward more punitive sanctions for juvenile offenses, the steps urged by DPA to improve the delivery of juvenile representation constitutes the bare minimum needed in the short run to satisfy the requirements of *In re Gault*, 387 U.S. 1 (1967), KRS Chapter 31, and KRS Chapters 600 *et seq.*

This renewed commitment to enhanced juvenile representation has received support from a wide variety of sources, including the Department of Juvenile Justice's Advisory Board and the Governor's Criminal Justice Response Team which issued its final report recommending increased funding for indigent juvenile defense, and from the 1996 Children's Law Center study, which has strongly endorsed DPA's "initiative to increase the level of staffing in trial offices to better accommodate juvenile matters."

3.2 The Need for Increased Funding for Jefferson and Fayette Counties.

In the urban counties of Jefferson and Fayette, DPA contracts with two independent non-profit public defender organizations, the Jefferson County Public Defender (JCDPD -- Louisville) and Fayette County Legal Aid (FCLA -- Lexington), to provide the full range of defender services to residents of the two counties. Caseloads in these two urban counties is extraordinarily high with caseloads in Fayette County topping 600 cases per attorney per year, and 820 cases per attorney in Jefferson County. These caseloads clearly jeopardize the provision of indigent defense services in these counties.

In Fayette County, in light of the Commonwealth attorney's placement of additional attorneys to staff the two new divisions of the circuit court, it is clear that FCLA's has a pressing and immediate need for two additional attorneys to staff these sessions. Indeed, judges we spoke with confirm that they frequently must wait around for defenders to appear in their sessions as the defenders are overworked and the organizations understaffed.

Salary parity is a significant issue in both Jefferson and Fayette county organizations. The problem is that in both counties starting salaries for defenders are considerably less than that of starting DPA defenders and where such attorneys have no prospect of regular step increases as in the DPA state personnel system. Morale in both of these non-profit offices appears to be adversely affected by the substantial salary disparities with DPA attorneys coupled with their enormous caseloads.

In Fayette County, we found that there are currently no working computers in place on the desks of any of the organization's 16 attorneys. The needs of the Jefferson County organization in the computer and information technology area were only slightly less pressing.

For all of these reasons, we believe that the comparatively modest funding increase requested by DPA for Jefferson and Fayette Counties is desperately needed for the coming biennium.

3.3 The Need for Improvements in DPA's Delivery of Defender Services in Capital Cases.

The recent loss of federal monies and inadequate levels of compensation for private attorneys handling capital trial, post-conviction and appellate proceedings under contract from DPA is, in large part, responsible for the difficulties faced by the DPA in its provision of services in the area of capital litigation. For DPA to meet constitutionally adequate levels of representation in this area, it is essential that compensation rates be increased for private attorneys willing to contract for these exceedingly difficult and time-consuming cases. It is also clear that additional funds are, indeed, needed to permit the hiring of qualified experts, investigators, mitigation specialists, and support staff in order to properly support the defenders doing this difficult work.

In the past, federal funds have been obtained to assist in providing state post-conviction capital representation. The federal funds have now been

substantially reduced and must be replaced by adequate state funding in the next biennium.

4.0 Long-Term Recommendations

When the Kentucky legislature enacted KRS Chapter 31 in 1972, it was heralded across the country as a model approach to structuring a statewide public defender system. In fact, shortly thereafter, several states used the legislation to create their own statewide public defender system.

In our professional judgement, the once-heralded public defender system in Kentucky can no longer be called either a model or a coherent statewide system. Over the years, the program's caseload has sky rocketed while its budget appropriations have failed to keep pace. We have serious doubts about whether the statewide program is capable today of assuring that defendants who qualify for court-appointed counsel will receive adequate representation throughout the state.

We have reached the opinion not only as a result of our most recent visit to Kentucky, but also because of our previous experience with DPA, dating back to 1979, and our extensive experience reviewing indigent defense systems around the country over the past 20 years.

The problems with the implementation of the statute are well-documented in the numerous studies of DPA conducted by various organizations dating back to 1973. They were most recently set out in great detail in the December 1995 report of the Governor's Task Force on the Delivery and Funding of Quality Public Defender Services. This report includes testimony and substantial documentation of other state systems provided by Robert Spangenberg at the request of the Task Force. Sadly, despite the enormous efforts of the Task Force and DPA leadership, most of the problems remain, while few of the recommendations have been addressed.

The Kentucky Department of Public Advocacy has been "studied to death." The facts are clear and documented. Despite strong efforts of the Public Advocacy Commission and several recent Public Advocates, the program has lurched from biennium to biennium in a "patch-work, finger in the dike" approach, with no clear support for implementing the major findings.

The Department of Public Advocacy "Plan 1998-2000" period is well thought out, well documented, but falls far short of what is needed to bring the system up to minimum professional standards. The Spangenberg Group endorses the priorities

established by DPA for the next biennium. However, we strongly believe that the time has come to prepare a comprehensive plan, designed to assure that the Kentucky Department of Public Advocacy can reclaim its heralded stature of 1972 - as a model statewide public defender system - as it enters the 21st century.

To achieve that goal, DPA must have the cooperation of all three branches of government, as well as the organized bar and the citizens of the Commonwealth. The long-term approach needs a documented budget goal, a comprehensive statewide approach and a group of prestigious leaders of all segments of government, the organized bar and the business community to assure success. The details of such a plan must be developed by leaders in Kentucky. Based upon our work in other states facing similar challenges, we are confident that such an approach would succeed in Kentucky.

5.0 Conclusion

Kentucky's DPA has been fortunate to have had the far-sighted leadership of its current leadership team which has begun to grapple with the deep-seated problems facing the delivery of indigent defense services. While its "Plan 1998-2000" appropriately begins to address DPA's most immediate short-term needs in a balanced and effective way, DPA must set its sights far higher in the long-term. To assist in this regard, we would be happy to provide additional thoughts and information on how other states have successfully achieved these goals.

FOOTNOTES

¹The Spangenberg Group would like to thank the more than three dozen full-time and part-time defenders, DPA managers, investigators, and support staff, as well as the judges and prosecutors who took time out of their busy schedules to candidly discuss the problems confronting indigent defense in Kentucky. The commitment shown by DPA attorneys, managers and staff in defending their clients in the face of burdensome caseloads and severe underfunding is encouraging. ▼

