WASHOE COUNTY
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October 5, 2009

FILED

OCT 05 2009

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CLERK OF SUPREME COURT
BY
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Chief Justice James W. Hardesty
Justice Ron D. Parraguirre
Justice Michael A. Cherry
Justice Nancy M. Saitta
Justice Mark Gibbons
Justice Michael L. Douglas
Justice Kristina Pickering

The Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701

Re: ADKT No.411 Hearing: October 6, 2009

Dear Honorable Supreme Court Justices:

Subsequent to the issuance of The Spangenberg Group (TSG) study on July 1, 2009, the Indigent Defense Commission (IDC) held two meetings to consider the results and recommendations of the study and to develop a consensus recommendation to bring forward to the Court as it considers the report and current caseloads in Washoe and Clark County.

It became clear during these discussions, that developing such a recommendation was not likely; however, there was general consensus that the TSG study cannot be relied upon by the court to establish caseload limits in the two counties.

This sentiment was expressed by the American Civil Liberties Union Foundation (ACLU) in an August 24th letter to Justice Cherry and the Commission wherein it suggests setting aside the specific recommendations of the Spangenberg Study. Then in her letter to Justice Cherry dated September 4th, Ms. Forsman says summarily, "It appears that the consensus is that caseload standards cannot be adopted based on the Spangenberg Report because it does not account for representation in compliance with the Performance Standards."

In a separate peer review process of the study conducted by Washoe County (WC) relying upon the expertise of three nationally recognized experts in indigent defense, the reviewers expressed serious reservations in using the study to set caseload limits. These concerns are included in the attached report (Attachment A) which summarizes the observations, reservations and concerns expressed by the reviewers as they looked at the process starting with the methodology used; the process by which data was collected, cleaned and compiled; and the results and conclusions developed from the data collected.

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Moreover, the report's authors themselves say on page 55 of the report, "without additional study, TSG cannot provide a definitive figure" for the number of attorneys needed.

Finally, during the review of the final report where some 30 changes or corrections were identified by WC, co-author David Newhouse, in a separate written communication to me, described the ranges recommended for the number of attorneys needed as the authors' "best guess".

With all that being said, WC recommends that the Court not use the TSG study to set numerical caseload limits and beyond that, not to adopt any standards for the many reasons outlined below.

Since TSG study was issued, some have urged the Court to adopt interim caseload limits simply based on the National Advisory Council on Criminal Justice Standards and Goals (NAC) standards. As all members of the IDC will recall, this was discussed extensively prior to the Commission issuing its final report to the Court in December 2007, wherein the IDC recommended a modified NAC caseload limit schedule. In that report, Washoe and Clark Counties opposed the Court adopting those caseload limits and issued a Minority Report which outlined all the concerns and issues with doing so. Without repeating them here, in response to the arguments put forth by the counties in that report, the Court ordered a caseload study be conducted in both counties in its order dated October 16, 2008. Pursuant then to the order, Washoe and Clark County contracted with TSG for a separate study in both jurisdictions which cost taxpayers nearly $215,000 plus the thousands of staff hours it required to provide the data for the study.

Since that time and in addition to the arguments put forth by the counties, WC peer reviewers have also expressed reservations on simply using the NAC standards as a "one-size fits all." Specifically, one reviewer stated the numbers used for the standards "were arrived at without any organized research, were entirely based on the experience of a small number of defenders and do not account for the large array of differences arising from other factors such as geography, local practice, resources, etc." The reviewer goes on to say, "those caseload guidelines were definitive, although, perhaps, deceptively definitive."

WC suggests that all the reasons the Court considered when it did not adopt the NAC standards are still valid today. In addition, following such a recommendation would simply serve to scrap the significant investment of the counties and the taxpayers in favor of adopting 36 year-old caseload limits. This recommendation begs the question, why are so many caseload studies done and continue to be done, requiring substantial resources in jurisdictions across the country if the appropriate and cheapest option is to

simply adopt the NAC standards. I believe for all the good reasons the Court considered in ordering the caseload study, we cannot prudently and ethically reconsider this option given where we've come from and where we are.

Moving beyond the suggestion that the 36 year old NAC standards be used, as we have continuously done throughout this entire process, WC asks the Court to again consider the worsening financial conditions of the counties as it considers establishing caseload limits which will require additional county resources. Over the past two years, Consolidated Tax, which is primarily sales tax, has declined nearly 26% and is projected to decline another 10% this fiscal year, which will bring Consolidated Tax revenues back to the fiscal year 2001 level. To date, this funding source, which makes up 25 percent of the revenue in the General Fund from which public defense is supported, has declined 33 consecutive months with the last 10 months seeing double digit declines as high as 27 percent.

Eroding revenues have pushed the County to reduce the General Fund budget for the last four years by more than $100 million with the County losing 14 percent of its workforce which equates to more than 500 positions. Worse yet, an end to the declines is not in sight. Property tax revenues, which have buoyed the sinking taxable sales, are now just beginning to reflect the worse economic recession since the Depression. The specter of sustained declines in property tax revenue is unnerving because more than 50 percent of the budget depends on property tax. For fiscal year 2010, property tax revenue will fall by nearly 3 percent. However, the collapse of the residential housing market, the increasing vacancy rate for commercial property, and with nearly 60 percent of adjustable- rate mortgages still to adjust, all portend that the worse is yet to come in fiscal year 2011. More troubling than these results, is that the prospect for a turnaround in our local economy is not insight. Unemployment continues to rise with the latest report showing 12.4% unemployed which is a record for our County. Even when a turnaround occurs the County will have to manage a structural deficit, because property tax revenue growth is capped at 3 percent of existing residential value — a cap that will not likely bring in enough revenue to keep up with the cost of inflation. On top of all this, the County has lost 9 cents of property tax revenue to the State.

In spite of the County's financial challenges, WC has continued its investment in improving the quality of public defense. Over the past three years, the County has increased funding in excess of $3 million in abandoning its fixed contract for conflict counsel by funding the creation of Alternative Public Defender Office, contracting with Washoe Legal Services to provide legal services to children in NRS 432B proceedings, the implementation of the Model Court Plan with the creation of the contract Appointed Counsel Administrator and the hiring of over 30 contract attorneys and other defense support services to assist in conflict cases (see Attachment B). With almost 60 percent of

the General Fund budget going to support the criminal justice system, the current investment in public defense compares favorably with the cost of prosecution. The FY2010 Budget shows the County is investing over $11.5 million in public defense services while the District Attorney is budgeted for $12.3 million for prosecution of **all** criminal cases across the county.

This comparison speaks well of the County's commitment to improve the quality of representation. Arguably one of the most relevant metrics that may be considered in measuring the quality of legal representation is the number of successful challenges based on Ineffectiveness Assistance of Counsel (IAC). A review of the past twenty-five years experience in the Second District shows that out of the 100,000+ felony cases handled through the County's public defense system over that period, less than an estimated two-tenths of one percent of all such claims are successful and this number is expected to drop with the creation of the Alternate Public Defender Office.

This of course does not suggest that the current state of public defense in WC cannot and should not be improved. Accordingly, in the Minority Report, WC joined with Clark in not objecting to Performance Standards aimed at improving the quality of representation throughout the state which were ultimately adopted in April of this year.

WC has continued to further support the Court's efforts to improve the quality of indigent defense not only through its local investments but also statewide. Using as a basis, the white paper issued by David Carroll in March 2008, and his second paper in issued in September 2008, WC solicited the support of Nevada Association of Counties which lead to the introduction of AB45 in the 2009 Legislature. This bill recognized and mirrored Carroll's assertions that the counties "cannot implement ADKT No. 411 without causing serve financial strain at the local level;" that the counties cannot implement its mandates without substantial involvement by the state; that pursuant to the Gideon decision, while the state can and does delegate the obligation to the counties of Nevada to provide indigent defense, the guarantee of counsel was made obligatory upon the State; and, therefore the need for a statewide funding solution adopted by the legislature.

This bill died in committee in the face of the monumental funding challenges the session was facing. With that decision, we must conclude that the Legislature on behalf of the people of the state of Nevada, determined that improving indigent defense was not, at least at that time, as pressing a public policy question as the State's overall budget crisis.

Absent now the State's funding of indigent defense, should the Court choose to implement caseload limits, the effect will be to create a **court unfunded mandate.** Given that counties are creatures of the State, the counties have no inherent ability to

raise revenues to meet such a mandate. Therefore, with the Court's adoption of caseload limits, the counties will be placed in the untenable situation of being in the middle between the Court and the Legislature.

In his March 2008 paper, Carroll raises the possible argument that, while the adopting of standards is clearly within the purview of the Court, some may argue this presents a separation of powers issue i.e. the judicial branch in effect ordering the legislative branch (e.g. the County in this discussion) to spend money. This issue was recently discussed by the Court in its order under ADKT No.437 which described the differences between the branches; relationships among the branches; and most importantly recognized the Legislature's "power of the purse." This again, is particularly noteworthy in this discussion as it applies directly to the counties and the control by the Legislature over the counties' purses.

After two years of effort by the Court and many people from many jurisdictions and agencies, we are now at the point of deciding where to go from here. From Washoe County 's perspective, it is now time to reconsider the recommendation Carroll first made in his March 2008 white paper wherein he suggested the formation of a statewide commission. This commission, like the commissions in place in 31 other states and the District of Columbia, would work to craft an appropriate legislative funding solution in anticipation of the 2011 session. This solution could use TSG study in determining if caseload guidelines are appropriate and necessary. Additionally, the commission could develop a practical strategy to improve the system recognizing that the present state of indigent defense in Nevada has developed over decades and correcting its weaknesses cannot be done immediately. The creation of a single statewide system could most efficiently and uniformly assure that the goals of ADKT No. 411 can be met.

A closer look Carroll's data on the approach used by the various states to address weaknesses in indigent defense, shows that only 15 out of 50 states have adopted binding caseload standards. Of those 15 states, eleven have done so by forming a statewide commission by statute to establish the standards and provide a statewide funding solution for indigent defense. Thirty-two states fully fund the cost of indigent defense.

A final and compelling finding from this data is that, in none of the 50 states did the Supreme Court unilaterally adopt standards. In Nevada this is a critically important factor given the position of the County vise-a-vie the Court and the Legislature and the current fiscal plight of the counties.

Finally, WC has asserted and Carroll agreed in his March 2008 paper, that with the adoption the Performance Standards in April of this year, the Court took an historic step in indigent defense and in so doing arguably already adopted de facto caseload limits,

which mitigates the need for the adoption of any definitive numerical caseload standards today. Meanwhile the County systems are working to comply with the performance standards within existing resources and to the extent this has not been the consistent practice. To that end, in WC, internal procedures have been developed and are being implemented to avoid offices having to declare that they are unavailable to accept additional cases.

In the interim, both Washoe and Clark Counties will use the TSG study as guidance in future funding decisions as funding becomes available and efforts are already underway to use the report to identify all opportunities for improvement in the indigent defense system. Currently WC is undertaking various steps to improve the system including:

- Adoption of a memorandum of understanding between the three levels of public defensive to ensure that cases move efficiently through the criminal justice system by reducing continuances and costs, resulting in more timely dispositions.
- Video visitation – a new system is being implemented at the detention center which will be expanded to allow for desk-top visitation by attorneys with in-custody defendants.
- Early Case Resolution – a revised program compliant with ADKT No. 411 is under development and should be implemented before the end of the year.
- Specialty courts – to the existing portfolio of such courts, efforts are underway to create a veterans court and a DUI offender court at the justice court level.
- Efforts continue to streamline the system used to provide the tertiary level of conflict counsel that is managed by the Appointed Counsel Administrator, which is growing in the number of attorneys and defense service providers.

Respectfully,

John Berkich

John Berkich
Assistant County Manager

Encls.

Attachment A

October 5, 2009

Subject: Peer review comments on the Weighted Case Load Study in Washoe County issued by The Spangenberg Group on July 1, 2009

By: John Berkich, Assistant County Manager and facilitator/editor of the review process

BACKGROUND

With the Commission's May 20, 2008, approval of the contract with The Spangenberg Group to conduct the caseload study, the Chairman requested that a peer review process be conducted of the study.

Having no experience in such processes, staff sought the guidance of Ms. Caroline Cooper who is a Research Professor and the Associate Director of the Justice Programs Office, School of Public Affairs, American University, in Washington, D.C. Ms. Cooper offered assistance on how to design the process and most importantly, provided contact information for several qualified experts to participate in the process.

Based on our recruitment and selection process, the following review team of highly-regarded national experts was assembled:

- *Sheldon Singer* – former Illinois Circuit Court Judge; Professor of Law at Illinois Institute of Technology, Kent College of Law; and, editor of Illinois Law Enforcement Officers Law Bulletin
- *Marshall Hartman* – former Associate Professor of Criminal Justice at University of Illinois; held various high level positions in public defense
- *Norman Lefstein* - Professor of Law and Dean Emeritus of Indiana University School of Law; Professor of Law at University of North Carolina School of Law; Assistant United States Attorney; Director of Public Defender Service for District of Columbia

The process used for the review was as follows:

- I would serve as the facilitator/editor of the review process which would include the following general steps:
    - Review of the methodology proposed for use by the consultant to conduct the study
    - Review of the process by which data is collected, cleaned and compiled
    - Review of the results and conclusions based on the data collected

A complete final report was then to be a compilation of the comments of the reviewers which was to be published together with the final report from The Spangenberg Group.

RESULTS

REVIEW OF THE METHODOLOGY

The reviewers had consensus on the following aspects:

- the Spangenberg Group is highly qualified and experienced in conducting this kind of work
- the methodology is appropriate for what it sought to accomplish with the following reservations:
    - there are problems in reducing human behavior to a numerical analysis
        - defense lawyers have the least control of their working environment
            - therefore the valid estimate of a proper caseload is likely to change in the future
    - the extraordinary case may skew the amount of time spent on cases
    - the experience of the individual lawyer is another variable
    - the concept of "billable hours" in is not a normal experience for criminal defense attorneys
    - the time period studied was not long enough
    - attorneys may not record time accurately, either overstating or understating the time that they devoted to various tasks

REVIEW OF THE PROCESS USED TO PROVIDE DATA

To conduct this portion of the review process, the reviewers studied the Attorney Instruction Manual, Interim Progress Report, Attorney Activity Sheet, Staff Activity Sheet, Staff Daily Activity Log, and the Attorney Daily Activity Log.

The reviewers had consensus on the following aspects:

- Overall the forms and materials appeared to be very comprehensive and should provide the information necessary for a useful study with the following reservations:
    - The recording on Daily Activity Logs may have been overwhelming and confusing
    - Attorneys may have found the Manual to be complicated and difficult to implement.
    - The process does not differentiate between bench and jury trials which could make a significant difference in time spent
    - The process does not measure the type or result of motions
    - The records are complete, complex and time consuming to generate which may generate ambivalence in the attorney
    - Attorneys may behave differently because they are being so closely scrutinized
    - The recording of time will require close supervision to assure accuracy and was grossly understated

- The process does not appear to distinguish the more experienced lawyer from the inexperienced lawyer.
- The process does not contemplate how to handle extraordinary crimes
- Attorneys may have found the level of detail virtually impossible to manage which may have yielded "rough" data.

REVIEW OF THE RESULTS AND CONCLUSIONS

The reviewers had consensus on the following aspects:

- the report correctly concluded that additional staff attorneys are needed in the public defense offices with the following observations and reservations:
  - the description of defense representation does not seem sufficient to determine whether or not the lawyers from the PDO were providing adequate representation at the time of the site work.
  - The authors discount the usefulness of the NAC standards in favor of the case weighting methodology used in the study.
  - The methodology used may "institutionalize" poor practice.
  - The study's methodology works in a behavioral environment; its procedure is not hard science and should not be presented as an exact science as the environment is constantly changing with changes in personnel, internal practices, etc.
  - It seems that only a cursory study of the PDO was conducted as part of the Initial Assessment.
  - The time study period was too short and should have been done over a twelve month period.
  - The caseload data used in the analysis differs from that used in the concluding table which used the number of dispositions in other jurisdictions and compared that to Washoe.
    - Felony dispositions vary substantially between the four comparison jurisdictions; Maricopa County is comparable to Washoe.
    - There is insufficient information to conclude the four jurisdictions had appropriate caseloads and were furnishing adequate representation.
    - The basis for concluding that the programs in these jurisdictions were operating satisfactorily within these standards.
    - The report suggests that comparisons between different jurisdictions may not be useful
    - The report states that direct comparisons between jurisdictions cannot take into account all of the different factors that influence the complexity of any case type; in some cases the case type equivalents between jurisdictions are not exact; there are many system differences, sentencing differences and differences in charging practices which are unique to the jurisdiction.

The reviewers had differing opinions as to the reliability of the study's conclusions:

- the report does not provide a reliable estimate of additional attorneys needed to provide adequate defense representation and the estimates should not be relied upon as the report itself says the estimates should not be relied upon as "definitive".
- The report contains a caveat that without additional study a definitive figure cannot be provided and that the data provides an illustration of the depth of the problem.
- The validity of the study for future use is doubtful given the performance standards becoming effective subsequent to the time study.
- This is an excellent and valuable report which is both practical and penetrating in its insights and one that will be a model for other states by giving a clear picture of actual case-weighting dynamics.
    - The study reflects the hard staf work to present a verifiable study procedure and protocol.
    - The analysis is interesting and important and the comparisons of the number of cases disposed in other counties is useful.

REVIEW OF THE METHODOLOGY

COMMENTS ON WASHOE COUNTY WEIGHTED CASELOAD STUDY

To; JOHN BERKICH, WASHOE COUNTY, NEVADA

From: MARSHALL J. HARTMAN, CONSULTANT

DATE: NOVEMBER 25, 2008

The Spangenberg Group responded to a Request for Proposals to review the indigent defense caseload situation in several Nevada counties, namely Washoe and Clark. Several reviewers were asked to comment on the Spangenberg proposal. Below, please find my response and comments.

1. Qualifications- There can be no doubt that the Spangenberg Group (TSG) is highly qualified and experienced in this kind of work, both generally in the field of indigent defense services and specifically in case weighting measurements. They have also done some prior work in Nevada which should stand them in good stead.
   Their staff also appears to be highly qualified, with Robert Spangenberg as President. He is certainly one of the leaders in the field and has accomplished much in other states.

2. Caseweighting Formulas- Spangenberg says that their agency "feel[s] that any reliable caseload study must be empirically based". " I agree with that approach. In addition, TSG uses the "case weighting method which records the keeping of contemporaneous time records" and will be the methodology for the study in Nevada. I also agree wth that approach.

   The Delphi Method of gathering data for caseweight analysis is helpful when budget and staffing projections must be made immediately without sufficient time to track accurate data. However, the Delphi method is not as accurate as actual time recordkeeping and should be used only in emergency.

   I don't agree however with keeping time records for only 12 weeks. (See p. 18) I think such a slice of the court year could give a jaundiced picture of the caseload. Some cases are seasonal. For some defenders certain cases are brought to trial during certain periods of the court calendar, and concurrently pleas may be more successful at certain points in the Judge's calendar, than others. I would recommend a full year of keeping dispositional data or as close to that period as possible.

3. On p.15, TSG discusses the items which will be covered on the time sheets and mentions that the type of case in which the activity was performed will be listed.

TSG says, "e.g., misdemeanor, juvenile delinquency cases, or class A felony". I will assume that this was not a complete list, but merely illustrative. However, just to be sure, I would hope that in addition to Class A felonies, TSG would track the differential time spent on Burglaries, Robberies, Narcotics cases, Rape, and Murder. Then, projections based on the number of case types for the coming year would be far more accurate.

4. The fact that TSG will track time spent on motions is excellent and important. Of course this brings us to the basic defect in this time tracking system for case weighting, and that is, if the lawyers are not spending enough time on their cases, not filing enough motions or challenges, etc. such failures would not be accounted for on the time sheets. In order to improve the service rendered to clients, perhaps more time is needed per case, not just the time taken at the present time per case by the lawyers. TSG is to be commended for attempting to get a handle on this problem by conducting interviews with other actors in the system, but concomitantly there is a danger of introducing a measure of subjectivity into the study. I don't have a solution to this problem, except to maintain strict controls on this interview data.

5.. Site Visits- I consider site visits at the start of the study a plus and commend TSG for attempting to do a more complete job by conducting site visits to gain a better understanding of the Nevada system.

5. Training, Data Analysis etc. Some jurisdictions (e.g. Criminal Defense Consortium of Cook County, Illinois) utilized a "closing form" to be filled out by counsel at the end of a case. One of the features of this form was a space for the lawyer to fill in, "Theory of the Case". Some lawyers filled that in with "plea bargain" as opposed to "self defense, insanity, perjury by prosecution witnesses as to identity, etc." This tool became very useful in the supervision and training of defender staff to develop defenses, plea bargain more effectively, and research.

6. Conclusion- I think that TSG has produced a fine plan, which will lead to more accurate data being assembled, and improvement of indigent defense services in Nevada.

To: John Berkich, Assistant County Manager

Re: Weighted Caseload Study, Washoe County Public Defender Office

I have reviewed the Spangenberg Group (hereinafter TSG) Proposal, the court order in ADKT No. 411 and the "Nevada Indigent Defense Standards of Performance" attached to the order. The following are my comments.

OBSERVATIONS

There are problems of reducing human behavior to a numerical analysis. Of all the actors in the system, the criminal defense lawyer has, in some respects, although not entirely, the least control of the environment in which he/she works. That environment may change, sometimes dramatically and abruptly. For example, a prosecutor's office may change the plea bargaining process or charging practices. Judges may change their procedures, e.g. requiring omnibus pretrial motions where separate motions were the previous rule, as well as changing other local rules. The police departments may increase in size and, therefore, increase the number of arrests. The legislature may also impact defender caseloads by enacting new crimes, elevating misdemeanors to felonies, elevating less serious felonies into more serious felonies, and expanding criminal responsibility. Higher courts may eliminate, modify, or reduce the impact of the rules relating to criminal trials, e.g. the search and seizure exclusionary rules may become more limited or abolished, among other rule changes. Or, appellate courts may create new rules imposing added work on lawyers. These are matters beyond the control of criminal defense lawyers that impact upon the time necessary to complete a criminal case at the trial level. As a result, what may be a valid estimate of the proper attorney caseload today is likely to change in the future. Re-examination and revision of the system as changes dictate will be essential to assure its continuous viability.

Other events, such as the extraordinary case, may also arise impacting upon what is an appropriate caseload. For example, the serial killer defendant, or any other crime where there is enormous notoriety and extreme public interest may seriously disrupt existing budgets and undermine existing caseload standards. Also, the mere fact of the study may substantially alter normal attorney practice so that the time standards that are put in place do not reflect reality.

STG will engage in training of lawyers to reduce these characteristics. But can these factors be entirely eliminated? These are some of the variables that make predictability for satisfactory attorney caseload and proposed budgets imprecise. Enactment of TSG's caseload standards does potentially provide an invaluable tool for improving the effectiveness and efficiency of a public defender office. It provides supervisors with a relatively objective tool to keep the inventory of open cases at a manageable level for the trial lawyer and thus assure, as best one can assure, that cases and clients are disposed of

in a timely manner, and representation is consistent with standards and the service competently represents its clients. The system may speed the trial process and reduce the population in pretrial detention. It may also assist the defender agency in the budgeting process, enabling the office to present the funding agency with a more accurate budget supported by factual underpinnings. However, specific numbers of cases per attorney must be flexible and adjusted from time and the office should be prepared for the extraordinary. The experience of the individual lawyer is another variable.

Implicit in the system is the need for adequate supervision. Case weighting may be an effective tool in controlling present caseload of individual lawyers and case assignments by supervisors to lawyers. But caseloads must be constantly monitored and case assignments controlled. Supervisors must be present and have the time and motivation to assure that standards are followed and to assist the trial lawyer.

Also, a post-study evaluation of the system should be undertaken a year or two after its implementation. Perhaps adjustments will be required. In any event the primary question to be answered is what improvement, if any, results. This examination should be undertaken by an agency other than TSG and without any affiliation with TSG.

SPECIFIC COMMENTS

The proposed time study assumes that the defender office presently performs consistent with standards. See court order of October 16, 2008, HDKT No. 411 and its Ex. A. TSG's proposal does recognize that there is a danger that the case weighting system and time recording procedures may "institutionalize...bad practices" (p. 19 of proposal). They include in their proposal a plan to assess the quality of the present services of the defender office. However, the evaluation is to be done by interviews of "prosecutors, judges, and defense attorneys...." In addition, the TSG "will circulate a detailed survey requesting that attorneys identify..." how much time they spend on particular activities (p. 19). The problem in this evaluation is that it is entirely subjective and anecdotal. Admittedly, defender office evaluations are difficult. However, there are relatively objective procedures available. For example, court clerk docket sheets are an invaluable source of accurate and precise information, such as, length of time to dispose of cases, pretrial motions and their results; kinds of dispositions, i.e. guilty plea, bench trial, jury trial and results, custodial or non custodial status of defendant in the pretrial stage among other things. Detention facilities usually log in and out lawyer visits to clients in detention. Those records may reveal whether or not defenders are spending enough time with clients. Such information will provide a more objective and accurate picture of the effectiveness of the service.

Impressionistic information obtained from interviews of the suggested respondents may not reflect reality. These respondents have interests to protect that are often at odds with an effectively functioning defense service. Indeed, their concept of effective defense may be at odds with the adopted standards. Much of a criminal justice system is a competitive activity among the various agencies, e.g. prosecutor, judge, police, and defense lawyer.

After all, it is described as an adversarial system. I do not suggest that the interviews should not be apart of an evaluation, only that the evaluation should include more than interviewing. Also, people to be interviewed fail to include community persons and former clients, a serious omission. This preliminary evaluation is important and must precede the calculations of time spent on cases.

Section 2C of TSG proposal opines that the concept of "'billable time" (which is a close relation to this study) is well understood in private law practice." However, in my experience that is overly optimistic. Billable hours as a measure of charging fees by lawyers who specialize in criminal defense are not the normal experience of public defender offices. Criminal defense lawyers usually do not keep track of time. Most private practice criminal defense lawyers charge a flat fee by the case based upon a subjective concept of how much time the case will take. The more serious the case, usually the higher the cost to the client, whatever the time spent it takes to end the case. Indeed, the nature of a private lawyer's practice where criminal cases are included is to accept a flat fee in cases that are civil, and not by billing periodically based on time. Of course, there are exceptions.

Defender staff lawyers are even more removed from the billable hours' experience. While the study proposes that the staff lawyers will undergo training in keeping time sheets, I suggest that there will be resistance and omissions once the training ends. Therefore, there will be the need for close supervision. The TSG staff is experienced in these kinds of studies. Nevertheless, I do not agree with their assumption that "billable hours" concept is well understood among criminal law practitioners and that understanding will ease the way to implementation of the program.

Scope of the Study

The TSG proposal appears to aim exclusively at defender staff lawyers. Private practice defense lawyers must be appointed occasionally because of the conflicting interests of defendants. The most frequently encountered examples of conflict occur when two or more defendants are charged for the same crime. Conflicting interests require that a private practice lawyer be appointed for one defendant, the public defender for the other. There are other examples where a defender office should not represent an indigent. Also, where caseloads of defender staff reach the maximum, appointment of private practice lawyers is essential for additional cases. Sometimes a jurisdiction has an alternative defender office for conflict cases. But there is no indication in my materials of such an office. My experience several years ago in Clark County, Nevada revealed no such alternative defender office. But even with an alternative defender office, occasionally private lawyer appointments are necessary. The proposal appears to ignore entirely private practice lawyers from the study.

TSG may assume that their time study of a defender lawyer applies to a lawyer appointed from private practice, and there may be a good deal of similarity. But there also is likely to be noteworthy differences. For example, a private lawyer will likely travel to the court for appearances in one or more private cases at the same time as he/she appears on an appointed case. Travel time may be different for a private lawyer. Is there any oversight of appointed non defender staff lawyers? Will the privately appointed lawyer use some of the resources of the defender budget, such as a fund for expert witnesses or investigators? In short, should not lawyers who accept appointments be included in the study? Understandably, including private practice lawyers in the study presents a number of problems. But identical standards apply to both a private practice lawyer and a defender lawyer.

Some defender agencies are responsible for the payment of fees of private lawyers appointed to represent indigent defendants. The defender office must include these fees in its budget. The Montana state defender system is in that category. The Illinois capital crimes defense system is another example. I do not know if Washoe County's defender office is in the same category. If the county defender's budget includes money for private defense lawyer appointment and the defender is responsible for compensating these appointed lawyers, the time study results may be a valuable tool in deciding the proper compensation. However, differences, if any, between the appointed non defender staff lawyer and the defender staff lawyer should be identified to assure fairness.

Apportioning Time for Defender Lawyers

Lawyers spend some time not directed at a specific case, such as reading reports of recent appellate decision, formal continuing legal education programs, various administrative activities, etc. I would assume that retrieval of data from time records will include such activities. Those activities are <u>not</u> usually included in "billable hours." Yet, those activities are essential. In private practice, in calculating the billable hours, per hour rate, all overhead expenses are included. Are those hours in the case weighting calculation? I presume they are. But how? The TSG proposal does not indicate what happens to time not attributable to a specific case. In Component 10 of TSG's proposal, there is a sentence addressed to the issue raised here. But there is no indication of what, or even if, there will be a conclusion as to time that is not spent on a specific case. Nor is there any indication of a base total time for a defender lawyer over a specific period such as a year. That is, what are the total work hours in a year, counting for holidays, vacations, sick leave, etc? Also, will time be calculated for supervisors in the defender office who will handle fewer, if any clients?

The proposal also does not indicate if or how the years of practice experience of a lawyer will make a difference in the case weighting process. Presumably, a highly experienced competent lawyer will usually need to spend less time on a case than an inexperienced lawyer.

CONCLUSION

The proposal in general is reasonable and gives promise of substantial value in controlling caseload, assisting in budgeting and in justifying budget requests. Based upon descriptions of the TSG staff in the proposal, they certainly have the ability to carry out the study. The proposal indicates the extensive planning experience of their staff. My suggestions are only intended to raise matters I believe should be considered.

Published standards give caseload limits for a year based upon some historic perception. Hard data and specific research hardly ever support these conclusions. The case weighting system, while by no means providing absolute timelines, gives the promise of a more intelligent caseload control, and most important focuses on the lawyers' present caseload. Implementing effective caseload control is essential in providing effective and efficient defender services. However, supervision in the defender agency must also occur along with adequate funding, to successfully implement TSG's plan.

This review addresses only TSG's proposal. I assume that TSG will present a specific and detailed work design for Washoe County which would include the evaluation and teaching instruments and record-keeping documents. I assume those materials will be made available for my examination and further comment.

Of course, I would happily answer any questions and further discuss the matter. I would also reserve the right to supplement this report as other issues come to mind.

Respectfully submitted

Signed: _____
Shelvin Singer, Judge
Circuit Court, Illinois (Retired)

Dated: November 17, 2008

Lofstein

INDIANA UNIVERSITY

SCHOOL OF LAW
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Norman Lofstein
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November 25, 2008

John Berkich
Assistant County Manager
Washoe County
1001 E. 9th Street
PO Box 11130
Reno, Nevada 89520-0027

Dear Mr. Berkich:

This letter is in response to your request, pursuant to our agreement, that I provide you with an analysis of the methodology proposed for use by The Spangenberg Group (TSG) in conducting a weighted caseload study of the Washoe County Public Defender Offices. I have reviewed TSG's submission to Washoe County and am pleased to offer these comments.

I regard the TSG proposal as well organized and effectively written. It is also clear from the proposal (and from my personal knowledge) that TSG has considerable experience in conducting weighted caseload studies. In fact, I do not believe there is any other organization in the country that has conducted as many such studies as TSG. Nor is there any organization in the country that is more knowledgeable about indigent defense generally than the personnel of TSG, especially Robert Spangenberg and David Newhouse.

I regard TSG's methodology for conducting its proposed weighted caseload study in Washoe County to be sound, to the extent that any such studies can produce data on which reliance can reasonably be placed. This sentence purposely reflects concerns that I have about weighted caseload studies, as explained below.

Weighted caseload studies are conducted by asking defenders to record all of the time they spend on their cases, counting from the beginning of cases through dispositions. Once a sufficient number of cases are closed, an analysis is performed respecting the amount of time spent on different kinds of cases and further extrapolating from these data. But what if the defenders are pressed for time and lack adequate resources? Or, conversely, suppose the defenders are spending too much time on their cases and this could somehow be objectively documented? If you accept the time submitted by defenders to be accurate and appropriate, you will simply institutionalize bad practices.

To its credit, TSG's methodology recognizes this potential difficulty. At page 19 (first full paragraph), the proposal discusses precisely the concerns noted above. In order to deal with these risks to the soundness of its study, TSG indicates that it will conduct interviews of prosecutors, judges, and defense attorneys, following which it will circulate to defense attorneys "a detailed survey requesting that attorneys identify with specificity how

much more or less time might be spent on those activities for each case-type they handle."

In other words, TSG must necessarily depend on the defenders to recognize that they are either spending too much or too little time on various tasks in connection with their cases; and, further, if the defenders believe this is happening, TSG must necessarily depend on the defenders to acknowledge their shortcomings, i.e., that they are spending too much or too little time on their cases; and, further, TSG must necessarily depend on the defenders to be able to estimate accurately how much additional time they should have spent on various tasks or how much extra time they should not have devoted to their cases. Obviously, this is asking a lot of defenders, and carries with it all kinds of risks that the data collected may not be entirely reliable.

Permit me to be more specific about some of the kinds of risks that I believe are involved in the data collection process:

- Defenders may not record their time accurately, either overstating or under stating the time that they devoted to various tasks.

- Defenders may not be willing to admit, fully or at all, that they should have spent more time on their cases. (In general, persons are extremely reluctant to admit their own deficiencies.)

- Defenders may not understand that they should have spent more time on their cases, simply because they are not well trained, are uninformed, etc.

- Defenders may recognize that they should have spent more time on certain tasks in connection with their cases but fail to calculate accurately how much additional time the various tasks would have taken.

Consider this last potential area for erroneous calculation of time. Suppose a defender realizes that additional time should have been devoted to investigating a number of his or her cases. In this event, the defender would be called upon to guess about how much of his or her additional time the investigations would have required, whether conducted by the defender personally or by an investigator. Even if an investigator is used, the defender must meet with the investigator or write up an instruction of what needs to be done, review the investigator's report, decide whether additional investigation is necessary, etc. To further illustrate, suppose an investigation would have uncovered witnesses about whom the defender was unaware, and these witnesses in turn would have led to other information or defense theories of the case, which would have required more

of the attorney's time. How can the defender possibly estimate accurately how much additional time would have been required? Unfortunately, I do not believe a defender can be entirely sure how much more of his or her time would have been required to complete investigations, as well as a variety of other tasks, that were not undertaken.

After I review the actual data, as called for in the second part of my agreement with Washoe County, I may feel somewhat better about potential risks of error in predicting the kinds of caseloads deemed reasonable for defenders in your county. In the meantime, I will sum up this letter by stating that I regard TSG's proposed methodology as appropriate for what it seeks to accomplish. However, in my opinion, there are certain inherent miscalculation risks in conducting weighted caseload studies, which TSG intends to control for as best it can.

Sincerely,

Norman Lefstein

REVIEW OF THE PROCESS USED TO PROVIDE DATA

TO: JOHN BERKICH
FROM: Marshall Hartman
Re: Caseweighting Study, WASHOE COUNTY, NEVADA
Date:3/11/09

Overall, materials, logs, instructions, etc. seem to be very comprehensive and should provide the information necessary for a useful study. Certainly the Spangenberg staff should be commended for designing a product which can be used easily by the defender staff. They show 41 attorneys in Washoe County participated in the initial study, and 31 other staff. I do have a few comments for thought however.

1. The goal here should be to determine future staffing needs as well as present workload to insure that the agency has sufficient personnel to handle the future caseload, and so that the lawyers are not so overloaded that their efficiency is cut. It seems to me that what would be most desireable to reach those calculations is to collect sufficient data to determine first how many dedicated work hours the average public defender trial lawyer has available for casework, and secondly, how many hours it takes to complete each kind of case. Then, it is necessary to extrapolate the number pf cases of each kind, that the office will be assigned to in the coming year, and calculate the number of lawyers needed.
2. For example:
   a) Assume that it is determined that the average felony trial defender has 1800 hours to spend on cases in a calendar year.
   b.) Assume from the logs that the average felony case takes 9 hours to complete (non-trial).
   c.) Then each assistant can represent 200 felony defendants per year (non-trial).
   d.) Based on the number of felony cases closed last year (or a five year extrapolation of an average of non-trial felonies), assume that it is anticipated that the office will be assigned to an additional 200 felony cases in the coming year, thus, requiring the hiring or assigning of an additional lawyer for the felony division for that year.
3. A more sophisticated (and more accurate) result can be obtained if the the data is kept by type of case, e.g. murders-20 hours, robbery 10 hours, burglary 8 hours, theft- etc. Then if the data from last year (or an extrapolation from several years) can be broken down by the number of murders, robberies, burglaries, etc. a more sensitive figure can be obtained for how many lawyers will be needed for next year. The same analysis can be used for trial cases and factored into the total number of hours and lawyers needed. (The Spangenberg Group has grouped the cases by severity of sentence- felonies Capital, A, B, C,D,E, except for Felony A, which is broken down by murder, sex, and other. Such groupings are fine.)
4. In the materials which the Spangenberg group has submitted they have suggested that they will break down the data by the time required for each type of case, but that has not yet been done yet in the materials submitted. Perhaps it is too early in their study for that type of analysis. So far, all that they have given us in the preliminary

report is a breakdown tracking the percentage of time utilized by staff for each type of court activity. That alone will not give us the data we need for a full caseload study.

5. With respect to the DAILY ACTIVITY LOGS, they seem clear enough. However, except for court or case activities, I would not record all of the other activities that Spangenberg wants to record. It simply becomes overwhelming and confusing to the staff. Recording time spent in legal research or preparing expert witnesses is valuable, but for example, Code 94 is especially non productive, as is recording code 80 information, material which is too much of a catch-all.
Travel and waiting time information (both productive and non-productive) are useful. However, again the Spangenberg group is to be commended for attempting to capture all of the staff and attorney activities, which then gives a clearer picture of the work involved with each case.

6.CASETYPE codes seem clear, and the idea of coding each case with the most serious charge is useful.

7. DISPOSITION DATA- It would be useful to track the method of disposition of cases, i.e. bench, jury, plea of guilty, or acquittal. The method of disposition of the motions is critical in determining the amount of time each type of case takes and will affect the number and types of staff needed. TSG requests some of the dispositions, but does not differentiate between bench and jury trials, which might make a huge difference in time spent.

8 .MOTIONS- It might be helpful to track the outcome of certain motions filed by type of case, e.g. motions to suppress confessions or evidence. Motions take time to prepare and often hearings are required to dispose of such motions. Spangenberg requests the number of motions filed, but not their type or results. It might be helpful to track the most common motions.

9. CASE COMMENTS- The idea of having the attorneys and other staff of the agency comment on how much more or less time could be spent on the activities for each case type they handled is an excellent one. Otherwise the amount of time currently spent on each case type may be insufficient and be carried on in the future, endangering the quality of their work. The Spangerberg staff should be commended for that addition to the usual study.

10. ENHANCERS- The use of enhancers is interesting. I would like to see comments by the lawyers and the results of the final product, before I can comment further on whether the use of enhancers helps define the work more definitively or is simply too confusing to use.

11. MANUAL- The Spangenberg Group should be commended for the preparation of a detailed Attorney Instruction Manual which lays out step by step what the attorneys and other staff must follow and record in order to have a valid study. All in all, these materials comprise an excellent product.

Singer

Washoe County Memo: Re Case Weighting Study
Review of information retrieval procedure:
Date: March 3, 2009

I have reviewed the following items provided to me: David Newhouse memorandum dated September 9, 2008, 4:41 P.M.: "Attorney Activity Sheet," "Staff Activity Sheet," "Staff Daily Activity Log," "Attorney Daily Activity Log," "Attorney Instruction Manual" John Berkich reply to my memo of February 11, '09

The following comments arise from the review of those documents.

I. General Comments

A. Over the course of the study it is likely that maintaining the logs will take a good deal of time, particularly in the early stages of the recording activity. Although your instruction manual (p. 41) directs that time used to maintain the log is to be reported in "Code 91: Administrative Activities," this activity, I would suggest, be separately identified and recorded. I assume that if lawyers will be required to keep a log once this study is completed, that log will be substantially simplified and the time expended on the log will considerably less and, as a separate activity become less important. But in the present, maintaining the log may be a significant burden. In the Spangenberg materials I reviewed earlier, the time records required by the Spangenberg Study were compared, at least by inference with time records maintained by lawyers in private practice who bill clients by time. However, the records for the Spangenberg Study are infinitely more complete, complex and time consuming than any other time records I have seen used by private lawyers for billing purposes. Hence, a separate category should exist for maintaining the present log.

B. The complexity of the log, although necessary for achieving the objective of the study, will likely generate ambivalence or even hostility in some. Hopefully, the program has or will deal with the situation which I believe is taken too lightly in the materials I have read. The case closing memo presently used by trial assistant public defenders should continue to be required as a necessary tool for supervision, statistics, and evaluations. I do not see any legitimate reason to discourage that. However, because time calculation is the subject of the study, perhaps there will be a danger that lawyers will ignore the present closing case memo. Trainers should specifically direct that the present case closing memo is still required.

C. Evaluation Function: An intensive examination as one undertaken here over a period of time obviously has the danger, indeed, the likelihood, that the people in the study group will behave differently because they are being so closely scrutinized. I understand that training will attempt to minimize this concern, but is not likely to be entirely successful. Accordingly, I would urge that the study group be evaluated as to both the effectiveness and efficiency of its representation and compared with representation before and after the Spangenberg Time Study. Indeed, the concentration upon time may alter attorney behavior. The factors to be noted in an evaluation and comparison include: 1) length of time of like charges from start to disposition; 2) substantive motion practice and results; 3) kinds of dispositions, pleas, trial, bench trial, trial by jury, dismissal, sentences; 4) pretrial status of defendant, i.e. in custody or pretrial release; 5) number of cases disposed of; 6) perceptions of clients and/or relatives of clients. The evaluation must be undertaken by an organization other than the Spangenberg Group.

II. Comment on Time and Disposing of Criminal Cases

The Spangenberg Group concentrates on time. How much time passes from the start to the end of criminal cases within the court system? The study assumes that cases may be systematically grouped, and thus weighted by potential sentence for the purposes of determining the proper caseload for individual attorneys. The study also assumes that cases of identical charges will consistently take approximately the same length of time to conclude. Those assumptions (or hypotheses) may prove to be substantially correct. In that context those responsible for supervising and funding the system should be aware that occasionally use of time is a tactic. Speedy disposal or delay in disposing of a case may be a tactic. In general, efficiency is a necessity. The quicker a case is disposed of, the more cases the system can process and, it would appear, the less public money is required to support the system. Indeed, defense lawyers and prosecutors have the ethical obligation to not needlessly delay a case. But lawyers also have the obligation to effectively represent their clients and to become thoroughly prepared as to the law and the evidence, even in cases where a guilty plea is expected. Occasionally, efficiency conflicts with effectiveness. Neither the defense nor the prosecution will admit to purposely delaying disposition of a case. Nevertheless, under certain situations delay may become a tactic of the prosecutor or the defense. And while both the prosecutor and the defense may have the ethical requirement of efficiency, both sides also have the obligation to, as they see it, effectively represent their side of the case. The prosecutor has a distinct advantage over the defense in early preparation of a case. That advantage arises from the fact that police conduct investigations for the prosecution before the public defender enters the case. An important fact also is

that the prosecutor has discretion over whether or not to introduce a case into the court system. Thus, the prosecutor has some control over caseload. When would a prosecutor believe it to be a good tactic to delay a case? Perhaps this would occur when an accused is in pretrial custody, particularly where probation is offered for a guilty plea or where the time in custody, usually credited toward an incarceration sentence after conviction, would substantially reduce, or even eliminate, the incarceration sentence as a practical matter after conviction. Thus, a defendant in custody would elect to plead guilty when the case otherwise should go to trial because the plea would result in immediate release. Few, if any, prosecutors would admit to this, but I assure you that does occur. When may the defense unnecessarily delay a case? When the defense receives a plea offer that is perceived to impose an unfairly harsh sentence, delay in some instances may benefit a defense. Within the system, usually the judge, as well as others, exerts pressure to move cases along. The public wants speedy justice. When a case becomes too old, in order to dispose of the case, the prosecutor may reduce a sentence recommendation or even reduce the charge to induce a guilty plea to finally end an old case. The point is that the time it takes to end a case in the court system and all this attention to time inherently may increase pressure to more quickly dispose of cases. Like the prosecutor, few, if any, defense lawyers would publicly admit to employing a delaying tactic. Nevertheless, occasionally the delay tactic is used. One issue that should be addressed by the study is to what extent is the delay tactic used and affected by the study.

III. Comment on Specific Items in the Spangenberg Study

A. Recording staff time utilizing the appropriate codes and following the directions described in the "Attorney Instruction Manual" will not be easy. It will be time consuming, more so initially, and will be unpopular. It will take training and supervision to assure accuracy. This problem is addressed somewhat on p. 2 of the manual, but, in my opinion, grossly understated. The problem should be conceded not glossed over. The manual comment appears to grossly understate what I see as a serious problem.

B. I note that there is an attorney code sheet and a separate code sheet for non attorney staff. The manual I received is labeled "Attorney Instruction Manual." A staff manual is referred to as not yet complete. I have not received a staff instruction manual and, of course have not reviewed that manual. Hopefully, a separate support staff manual will be published and be substantially less complex than the attorney manual

C. The "Activity" and "Disposition" codes do not sufficiently identify results: "Motions..." are activities that are required to be logged, but the ruling is not required to be recorded. Nor is the type of motion identified. The disposition code does require specific result recording in the log (see "Attorney... Log") i.e., bench or jury trial. Specific results such as guilty on which counts, not guilty on other counts, guilty of lesser included offenses, etc. are not recorded. The same criticism applies to the "appellate ruling" category. I suppose the study group would argue that they are not doing an evaluation (see pp. 1-2 of manual); and it is only a time study. Hence, detailed results are unnecessary. However, I would urge that an evaluation is essential. This study is a significant intervention into the work of the defenders. It may result in a substantial change in how caseloads are controlled and the presentation of budget requests. Hence, there should be confidence that effectiveness and efficiency are not compromised by new administrative procedure. This is not a laboratory experiment. Lives and futures of people represented are at stake. It, therefore, is essential that concentration on time does not adversely affect quality of representation. Hopefully, the quality will be improved. But quality must not be ignored. Requiring discrete recording of results would not significantly increase already complex recording burdens. But such recording is important for purposes of evaluation.

D. Case code No. 19 "case type...," i.e. "certification," in the juvenile case category refers to a procedure not a "case type." The issue is that of transfer from the juvenile court to the adult court. The materials I examined indicated that the Spangenberg team did consider the issue I raised here and decided to place the transfer (certification) hearing in the juvenile case category. I assume this decision was arrived at because a lawyer assigned to the juvenile court division represents the juvenile in the hearing. If a transfer is ordered, I also assume that another lawyer then undertakes representation. However, to assure continuity of defense representation, sometimes called vertical representation, it is suggested that a lawyer from felony court division provide the representation at the transfer hearing although it takes place in the juvenile court. Of course, a decision like that is for the defender office, not the study group. Nevertheless, vertical representation should be encouraged. Reclassification will encourage continuity of representation. Therefore, the activity should be in the "In Court" column of the Activity Code. In making this comment, I assume that there is agreement that vertical representation enhances quality and efficiency of representation.

E. In "Case Type Codes" felonies are divided into nine categories. The categories are based upon how serious the offense, according to the potential sentence. However, exception is made for a "complex economic

crime." Presumably this departure from the sentence category is justified. However, I would suggest another category departure from sentence potential may be justified; namely, the case that comes under intensive and continuous public scrutiny, i.e. the high profile case. One of several accepted methods employed in such cases to avoid potential juror contamination by pretrial publicity is to tolerate lengthy delay of the trial, thus substantially extending the time it takes to dispose of the case and increasing the time devoted to the case. In any even, rather than identifying case type entirely by severity of potential sentence, I suggest the following category of felony cases: capital murder; violent offenses; non-violent offenses which are not probationable; probationable offenses; special crimes where there is publicity and/or particular complexity. I believe that these categories reflect a more accurate casual connection relative to the time devoted to the case. In any event, except for capital offenses, the fact alone of creating case categories solely because of sentence potential creates an artificial and inappropriate constraint upon a defense lawyer's decision as to necessary preparation time. To put it another way, defense lawyers implicitly are advised to spend less time preparing a case that carries a lesser sentence possibility.

F. Case Definition: On p. 27, section 4.8 of the manual a case is defined as one defendant charged with a crime arising from one incident. To encourage precision and consistency among the various units of government involved in the legal system, it may be helpful if all agree on the identical definition of a criminal case. Therefore, should not the prosecutor, the court clerk, the judiciary all agree to this definition? Also, section 4.9, pp. 27-28, of the manual appears to create an inconsistency in definition of a criminal case, as defined in section 4.8. In section 4.9, it appears that "a case" is defined as all charges appearing "in a single complaint" (p. 27). That would not be a problem if Nevada law limits the joining of two or more charges in one complaint to a single or same incident. However, if Nevada joinder rules are more flexible and allow joining of charges in one complaint although not arising out of the same incident, this would in fact create an inconsistency in the definition of "a case." To avoid confusion with the definition of "a case" in 4.8 and 4.9 " should be defined with consistency.

G. There does not appear in the log any way to distinguish the more experienced lawyer from the inexperienced lawyer. Presumably, the inexperienced lawyer will expend more time than experienced lawyers on similar cases. Sometimes a high number of experienced lawyers leave an office within a short period of time, and thus the office has an influx of inexperienced attorneys. Is that variable accounted for? I do not know if

it can be accounted for, but if not, the study should alert the agency of this potential variable.

H. Results: In the late 1960's and early 1970's, caseload standards were developed entirely based upon number of cases disposed in a year by a presumably competent public defender lawyer without relying upon specific times applied to cases except for broad categories. Frequently, that was 150 felonies, 400 misdemeanors, 24 or 25 appeals, etc., per lawyer. Concededly, those numbers were arrived at without any organized research, were entirely based on the experience of a small number of defenders and do not account for the large array of differences arising from other factors such as geography, local practice, resources, etc. However, those numerical caseload guidelines have existed for decades, relatively unchanged. Presumably, therefore, they were somewhat useful. At the very least, those caseload guidelines were definitive, although, perhaps, deceptively definitive. I presume that the objective of the Spangenberg system is to more accurately make budget predictions for submission to the funding agency and for more effective internal supervision to assure that the quality and efficiency of representation is maintained. But how are those goals to be implemented? A good deal of information will be accumulated. How will that information be translated so as to be meaningful and applicable? Perhaps that is obvious, and I am simply at fault for not understanding. Nevertheless, I am not confident how the Spangenberg system provides a practical improvement over the admittedly flawed, but easily understood and communicated numerical system. That old numerical system must have some utility since it has lasted for decades and has been substantially adopted by a number of organizations. Once the study is completed, what change should result and how is it to be achieved? I suppose work hours per lawyer for a budgetary period will be calculated, and the various case weights, based on time, divided into available hours. However, the formula or application method is not described. Another way of putting it is how will the information retrieved be condensed and put into understandable and applicable form?

I. Extraordinary conditions: The Spangenberg Study covers a specific period of time. Perhaps, that period of time will be one of usual tranquility. Only the usual kinds and numbers of murders, rapes, robbery and other mayhem and misdemeanors occur. How are the extraordinary crimes to be handled and accounted for? For example, the riot situation, the mass killer/rapist or any high profile extraordinary situation to be accounted for? For example, are there a group of volunteer lawyers, perhaps organized and maintained by the local bar association, for immediate availability in extreme emergency situations. Some reference

examples include the Katrina hurricane, the Chicago riots after the Martin Luther King assassination, or the 1968 Presidential Democratic Convention protests, or a "Son of Sam" type of murder spree, etc. Surely, those worse case scenarios should be included in any defender plan. But I do not observe it accounted for in the Spangenberg procedures.

Conclusion: As time passes and if I receive more materials, perhaps additional comments may be appropriate. Also, if there are only questions or comments that should be answered or clarification required, I would be happy to make appropriate responses.

Shelvin Singer, Judge (retired)

glorsing@aol.com

Lefstein

May 12, 2009

John Berkich
Assistant County Manager
Washoe County
1001 E. 9th Street
PO Box 11130
Reno, Nevada 89520-0027

Dear Mr. Berkich:

This letter is in response to your request, contained in your email to me of January 30, 2009, that I review and comment on the effectiveness of the procedures and instruments used by The Spangenberg Group (TSG) in implementing their weighted caseload study in Washoe County related to public defense.

Before preparing this letter, I reviewed TSG's "Attorney Instruction Manual" and a TSG email dated, January 4, 2009, titled, "Interim Progress Report on Clark and Washoe County Case Weighting Studies." (I also recently exchanged emails with David Newhouse of TSG in order to understand the current status of the organization's work in Washoe County.)

The following observations are based upon my review of the foregoing documents:

- I believe that the Attorney Instruction Manual is thorough and reasonably well suited for the purposes for which it was designed, i.e., attempting to track the amount of time that public defenders devote to their various types of cases *and* to the different kinds of work performed in connection with these cases.

- I regard the Attorney Instruction Manual to be informative and well written. However, I have concerns about whether public defenders found it to be complicated and difficult to implement. Of course, I have no way of knowing whether this is true. The issue is of some importance, however, because to the extent public defenders deemed the instructions to be complicated and difficult to follow, compliance with them was likely reduced.

- At page 2, the Introduction requests that the "time records be kept contemporaneously to ensure the accuracy of the data." At page 5, the instruction states that "you should record your activities as you complete them, not at the end of the day."

- Again, while I have no way of knowing what may have occurred, I am somewhat doubtful whether the public defenders were actually able to enter their time "contemporaneously" with the myriad of activities in which they engaged and to record the actual minutes and time of day on which their attention was devoted to these activities. Accordingly, I wonder whether attorneys faithfully followed the instructions and recorded their time in the manner requested or whether they simply did the best they could and reconstructed their time records after events occurred but in ways sufficient to satisfy the watchful eyes of the researchers.

- My hunch is that at least some of the public defenders found that the level of detail they were asked to maintain virtually impossible to implement. As a result, they probably completed the requested time records as best they could, which in the end yielded a kind of "rough justice" respecting the amounts of time actually devoted to the myriad of tasks on which data was sought to be compiled. The defenders themselves could confirm whether my concern is, in fact, correct.

- My comments are based upon my several years of experience in the private practice of law, when I was required to track the time that I spent on behalf of clients for whom I was working. I found that tracking my time was very difficult to do, more so if throughout the day I worked on the cases of a number of different clients. Moreover, in all likelihood, my practice did not involve as many different clients and activities as those of public defenders. Yet, I invariably had to review each day and reconstruct my time records based on notes that I made throughout the day. In addition, I was never required to record the precise start time and end time for the activities in which I engaged and to account for every minute in the day. I believe it would have been quite difficult for me to that.

- Still, if I am correct, and the public defenders found that they had to reconstruct their time at the end of each day as best they could, it would not necessarily undermine the validity of the study. However, it would mean that the data that is finally reported, which will likely be said to be the actual number of minutes and hours devoted to various activities and cases, is probably not as precise as represented to be.

- In his email of January 4, 2009, Mr. Newhouse states the following: "The Spangenberg Group will then circulate [after all data has been collected] a detailed survey requesting with specificity how much more or less time might be spent on those activities for each case type they handled during the study in order to assure compliance with the performance standards of ADKT 411...." As

explained in my letter to you of November 25, 2008, I believe that these kinds of estimations are exceedingly difficult for public defenders to make.

- Further, I understand from Mr. Newhouse that the use of this survey has been delayed, and it is not known at this time when it will be administered. Apparently there is even some question whether the survey will ever be administered.

- In my judgment, the data respecting the amount of time that the public defenders in Washoe County have devoted to their cases and to different types of activities in connection with these cases is of relatively little value *unless* the detailed survey referenced above is administered. And, even if it is, I still likely will have questions about whether the necessary staff resources required for public defense have been accurately measured, as indicated in my prior letter to you. But I will await a final report before commenting on this issue further.

I hope that these observations are of some use to you and your colleagues. Please let me know if you have any questions.

Sincerely,

Norman Lefstein
Professor of Law and Dean Emeritus
Indiana University School of Law - Indianapolis

REVIEW OF THE RESULTS AND CONCLUSIONS

Lefebvre

August 17, 2009

John Berkich
Assistant County Manager
Washoe County
1001 E. 9th Street
PO Box 11130
Reno, Nevada 89520-0027

Dear Mr. Berkich:

This letter is in response to your email to me of July 7, 2009, sent pursuant to our Letter of Engagement, in which you ask that I review and comment on the "Assessment of the Washoe and Clark County, Nevada, Public Defender Offices, Final Report," dated July 1, 2009. The Final Report (hereinafter "Report") was prepared by The Spangenberg Group and the Center for Justice, Law and Society at George Mason University. This letter pertains to Washoe County, as I was asked only by Washoe County to review the Report.

Summary of Report and Overview of My Conclusions

The Report concludes that the Public Defender Office (PDO) in Washoe County needs additional staff attorneys to represent effectively the clients who comprise its current caseload. I believe this assessment is correct, and it is supported by the weighted caseload data presented in the Report.

However, the Report does not estimate in a reliable way the number of additional staff attorneys necessary to furnish adequate defense representation. Although estimates of the number of necessary new attorneys are contained in the Report, I do not think the numbers suggested are sufficiently valid to be relied upon. Moreover, the Report itself concedes that its estimates should not be relied upon as "definitive." *See* page 6 of this letter and Report at page 55.

This shortcoming of the Report is not one for which The Spangenberg Group (TSG) and George Mason University (GMU) is responsible. As stated in the Report at page 58, TSG/GMU planned to conduct "a secondary survey of attorneys to determine the additional time necessary to comply with the performance [standards] set forth in ADKT-411," which has been adopted by the Nevada Supreme Court. The grant application that TSG submitted to Clark and Washoe Counties proposed that a "detailed" follow-up study be completed by PDO attorneys. *See* page19 of the "Proposal to Conduct a Weighted Caseload Study of the Washoe and Clark County

Public Defender Offices" (hereinafter "Proposal"). In the end, however, follow up surveys were not implemented, for reasons beyond the control of TSG/GMU. See Report at page 58.[1]

"Initial Assessment" and Its Importance

The Proposal for the weighted caseload study submitted to Clark and Washoe Counties describes an "Initial Assessment" to be conducted at the outset of the study. *See* Proposal at pages 14-15. This description of the initial assessment does not specifically commit TSG to conducting a thorough qualitative evaluation of the defense services being provided in Clark and Washoe counties. At page 14, the Proposal states that researchers will "meet with representatives of each defender agency, key criminal justice representatives (presiding judge, district attorney, etc.), and appropriate county officials to familiarize ourselves with the procedures and policies affecting criminal law practice for public defenders throughout Clark and Washoe Counties." Also, at page 14, the Proposal states the following: "The Spangenberg Group considers these site visits a critical part of the study, because they will best inform us as to how defenders and other staff from the various agencies spend their time on case specific and non-case specific tasks."

The methodology of a case weighting study normally requires an "initial assessment" in which a qualitative study of defense services is undertaken.[2] Researchers need to know whether attorneys are providing adequate representation. They need to learn, for example, whether attorneys are meeting with their clients promptly on a regular basis; whether adequate legal research and investigations are being undertaken; whether necessary motions are being filed; whether lawyers are sufficiently knowledgeable about their cases when plea agreements are recommended to clients; and whether lawyers prepare adequately for trials and hearings, including sentencing hearings.

If adequate defense services are not being provided, caseload standards derived from a case weighting study will do little more than confirm the amount of time being spent in delivering substandard legal representation. This same point is made in the Proposal submitted to Clark and Washoe counties, at page 19:

> "One of the challenges in performing a case weighting study is to prevent the institutionalization of bad practices. That is, if attorneys are spending too much or too little time on their cases, or do not have adequate resources, the resulting workload standards run the risk of establishing a

[1] In my letter to you of November 25, 2008, I discussed possible difficulties with follow-up surveys to determine additional amounts of time required to handle various kinds of cases. These concerns are irrelevant for purposes of this letter since no surveys were conducted.

[2] The assessment of the defense services provided would not necessarily have to be conducted at the beginning of the study. However, it is usually recommended that the assessment be done prior to the gathering of data from time records.

baseline that reflects current practice rather than identifying the amount of time necessary to provide adequate and meaningful representation."

Was a qualitative study of the PDO undertaken as part of the "Initial Assessment" phase of Washoe County? Based on pages 15-19 of the Report ("Site Visits in Washoe County: Observations and Findings"), it seems that only a cursory study of the PDO was conducted. The visits were made during two days, i.e., July 31 and August 1, 2008, although the Report states that "additional phone interviews [were] held around the same time." The persons with whom the researchers spoke were "court administrators and coordinators, judges, and clerks, as well as the Washoe County District Attorney and a County Contract attorney." Page 15.

Researchers also had conversations with PDO staff members, although the Report does not indicate the number of such conversations and the positions of the PDO staff with whom the researchers spoke. As for the quality of the representation provided, there are references to investigations not always being conducted (page 16); PDs beginning to appear at arraignments (page 17); judges' "suspicions that the public defenders were not meeting with their clients prior to the court appearance" (page 17); concerns expressed by judges that PDs should meet with their clients prior to preliminary hearings (page 17); defense attorneys often file pretrial motions (page 17); mental health issues being raised at preliminary hearings (page 18); seventy-five percent of preliminary hearings being continued for 30-60 days, with many ending in "counter pleas" without appearing before a judge (page 18); and discussion of an "Early Case Resolution Program" that appears no longer to exist, but in which "clients frequently entered pleas before investigation and discovery" (pages 18-19).

On balance, the Report's description of defense representation in Washoe County does not seem sufficient to determine whether or not the lawyers from the PDO were providing adequate representation at the time of the site visit. During the two-day site visit, there apparently was not sufficient time for court observations of staff attorneys or inspections of case files. There also is no indication that the researchers discussed with staff attorneys and supervisors the adequacy of the representation being provided.

Nor does the Report state that the researchers inquired about pending caseloads of staff lawyers. Data on pending caseloads, accompanied by a breakdown of the kinds of cases being represented along with their current status, enable persons experienced in public defense to assess whether or not the lawyers are likely able to provide competent and diligent representation.

Conceivably, data about pending caseloads and additional information about the quality of representation was acquired, but simply not discussed in the Report. Alternatively, an in-depth qualitative assessment may not have been undertaken of the PDO because the researchers were aware from prior studies of Washoe County that the caseloads of lawyers were quite high. At page 5, the Report cites a December 2000

study conducted by TSG that refers to "high workloads of indigent defense providers, particularly in Clark and Washoe Counties."

Basis of Report's Conclusion that PDO Has Excessive Caseloads

Sections V and VI of the Report present a variety of data derived from time records compiled by PDO staff. Section VII, titled "Discussion," suggests that the caseloads in Washoe County are too high.[3] This conclusion is not based upon the "Initial Assessment," which seems appropriate since it appears that insufficient information was collected during the assessment on which to base such a judgment. Nor is the conclusion based *solely* on the weighted caseload data. Instead, the conclusion about excessive caseloads, to a considerable degree, is based on the number of dispositions[4] per year in Washoe County compared with other jurisdictions. At page 49, the Report explains:

> "TSG's case-weighting model shows that, in felony cases, public defenders in Clark and Washoe Counties average nearly 200 dispositions per year.[5] Although these numbers evidence progress from prior studies

[3] Although I did not check all of the Tables in the Report respecting Washoe County, I did observe some mistakes in ones that I reviewed. For example, Table 21 at page 48, projects the number of FTE attorneys required using Calendar Year 2008 assignments. However, several of the FTE projections are incorrect. *See, e.g.*, the projections in Column "C" for "Misd DUI, Misd DV, and Other Misd." Also, in Table 24 at page 56, the numbers in Column A for "CY 2008 Assignments" are incorrect, as the Report appears to have used numbers from Clark County whereas the Table pertains to Washoe County.

[4] A definition of "dispositions" is not provided in the Final Report, although presumably dispositions are cases that are closed following a dismissal or sentence. However, the Report states at page 24 that cases in which conflicts developed or private counsel was retained were excluded from time record totals and not counted as "dispositions," despite the fact that "[s]ubstantial work may have been performed on many of these cases." It is unclear to me why these cases are omitted. Insofar as the PDO is concerned, such cases are just as much a "disposition" as any case that is dismissed or the accused sentenced. If such cases consume "substantial" time of lawyers during the data collection period, is it not also reasonable to assume that such cases will assume similar amounts of time during the rest of the year? No explanation for excluding these cases is provided, except that at page 24 the Report states that "this has been a consistent practice in all of the case weighting studies performed by TSG to date."

[5] The data does not actually reflect "dispositions per year." Instead, based upon the time study completed during 2008, and projecting data derived from the time study over 12 months, the data show the average number of cases that a hypothetical attorney, handling only one type of case, *would potentially* dispose of during a calendar year. The *actual* number of felony, misdemeanor, and juvenile "dispositions" during calendar year 2008 are not reported. Table 21, Column A, at page 48, lists "CY 2008 Assignments." Since the time study was administered and all data collected during 2008 (*see* Report at page 23), and the Report was not completed until mid-2009, it would seem that *actual* dispositions (i.e., "closed cases") for 2008 could have been reported. Data about actual dispositions would have enabled a comparison to be made between the *projected* numbers of dispositions per lawyer on average during calendar year 2008, based upon the time study, with the *actual* number of dispositions per lawyer on average during the calendar year. Because it is simpler, albeit not technically correct, I refer in this letter, as the Report does,

of Nevada, they are still significantly higher than caseload standards found in other comparable jurisdictions in which TSG has conducted studies."

The comparison with other jurisdictions continues at page 54:

> "In Felony B cases, the category that consumes the most time of any category in either Clark or Washoe County, the workload is more than twice that of the standards established in any of the other jurisdictions. For combined Misdemeanors, attorneys in the other studies spent between 6 and 8.5 hours per disposition. In Clark County, the time spent on Misdemeanors is just under two hours, and just over four hours in Washoe County."

In Table 22 (page 53), Washoe County is compared to King County, Washington; the State of Colorado; and Maricopa and Pima Counties, Arizona. All of these jurisdictions had lower felony caseload numbers per annum per attorney than Washoe County. Whereas Washoe County PD staff attorneys close, on average, 189.2 felonies per annum, based upon data of the weighted caseload study, staff of King County's PD office in 2001 closed, on average, 99; Colorado's staff, on average, closed 135.9; Maricopa County staff closed, on average, 177.5; and Pima County staff closed, on average, 106.5 cases per lawyer.

Are the comparisons between Washoe County and the four other jurisdictions useful? My observations and concerns respecting these comparisons are set forth below:

- The felony dispositions per attorney of the four non-Nevada jurisdictions vary substantially, ranging from a high of 177.5 in Maricopa County to a low of 99 in King County. The 177.5 felony dispositions in Maricopa County are not much different from the 189.2 in Washoe County.

- I do not believe the Report contains sufficient information about the basis for concluding that the four jurisdictions used for comparison purposes had appropriate caseloads and were furnishing adequate representation. At page 49, the Report states that "caseload standards in those jurisdictions reflect justice systems in which attorneys were not overloaded with cases to the extent present in Clark and Washoe counties." This statement implies that the lawyers in these other jurisdictions had too many cases (i.e., were "overloaded"), but to a lesser degree than in Clark and Washoe Counties.

- At page 53, the Report contains the following statements about the four jurisdictions: "The caseload standards established in these other studies were conducted at a time when the public defender was thought to be operating satisfactorily. Colorado, for example, is a state that has been

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to cases closed during the year by the PDO in Washoe County and in the four other jurisdictions cited in the Report.

operating relatively well with these standards. In one jurisdiction, Pima County, the table presents standards that have been adjusted upward to ensure that the public defender is being utilized to their full potential." However, the basis for concluding that these programs were "operating satisfactorily" and for the belief that Colorado "has been operating relatively well with these standards" is not provided. Were detailed assessments made of the defense programs in these four jurisdictions at a time when they were adhering to their various caseload standards? Absent additional information, it would not seem to be appropriate to draw firm conclusions about the quality of representation provided in these other jurisdictions.

- Despite offering caseload comparisons with four other jurisdictions, the Report suggests that such comparisons may not be useful. At page 51, after discussing various ways that jurisdictions invariably differ from one another, the Report states the following: "For all of these reasons and many more, one could then expect that attorney workload varies from jurisdiction to jurisdiction." This seemingly was meant to express the belief that one would normally "expect that *appropriate* workloads" would vary among jurisdictions.

- Similarly, at pages 52-53, the Report offers this observation: "Please note that, as discussed throughout, direct comparisons between jurisdictions cannot take into account all of the different factors that influence the complexity of any particular case type. In some cases, the case type equivalents between jurisdictions are not exact. The existence of diversion and drug treatment courts, early disposition courts, and the severity of potential sentences and charging practices are unique to each jurisdiction and can substantially contribute to the differences between jurisdictions."

- Based upon the caseload standards from the four other jurisdictions, Table 24 (page 56) suggests that Washoe County arguably needs a total of 67 lawyers ("High Estimate") or perhaps 48 lawyers ("Low Estimate). However, just before presenting these data and comparisons with the four other jurisdictions, the Report contains a caveat that makes clear that its numbers are not to be relied upon for Washoe County. As stated at page 55, "[w]ithout additional study, TSG cannot provide a definitive figure, but the following tables provide an illustration of the depth of the problem in Nevada."

Are Caseloads of the Washoe County PDO Too High?

Although the Report does not recommend "definitive" caseload numbers, it is nonetheless unequivocal in stating that "none of the public defender agencies in these jurisdictions (referring to Clark and Washoe Counties) is able to provide competent and diligent legal services to all of its clients due to a substantial excess number of cases and an insufficient number of staff." Page 58.

The Report also contains a conclusion regarding the capacity of Nevada's two largest public defender agencies to comply with the Supreme Court's new performance

standards: "After completing the 2008 case weighting study in Clark and Washoe Counties, after reviewing previous studies conducted in Nevada, and after performing extensive site visits in Clark and Washoe counties (sic),[6] it is clear to TSG that public defenders in Clark and Washoe counties (sic) will be unable to comply with the requirements of ADKT-411." Page 57.

I agree with TSG that the caseloads in the Washoe County PDO are too high, that they almost certainly interfere with the ability of defense lawyers to provide "competent" and "diligent" defense services to all of their clients,[7] and that they will prevent compliance with the Supreme Court's performance standards. My opinion is based on my knowledge of what is required of lawyers who provide public defense representation.[8]

AT page 50, the Report discusses the caseload standards first published in 1973 by the National Advisory Commission of Criminal Justice Standards and Goals (NAC). This Commission recommended that annual maximum caseloads "of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200...."[9] Similarly, both the American Bar Association,[10] as well as the American Council of Chief Defenders, which is a unit of the National Legal Aid and Defender Association, has recommended that these numbers of cases not be exceeded.[11] In Washoe County, the numbers of felony and misdemeanor cases are above these recommended maximums.

For many years, I have regarded the NAC's recommended maximum caseload numbers as too high. The NAC published its recommended maximum caseload numbers more than 35 years ago, and since then the defense of criminal and juvenile cases has become substantially more time consuming and difficult. While I agree with TSG that caseloads of individual lawyers should be assessed and that it is important to

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[6] I am uncertain respecting the reference to "extensive site visits" of Washoe County. At discussed at the outset of this letter, it does not seem that the initial assessment in Washoe County was an extensive site visit. However, TSG conducted the site visit of Washoe County referenced at pages 3-4 of this letter.

[7] The Nevada Rules of Professional Conduct require that lawyers be "competent" and "diligent" in representing their clients. *See* Rules 1.1 and 1.3. Competence is defined as requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[8] In order that you and your colleagues in Washoe County might judge my qualifications to offer an opinion respecting appropriate caseloads in public defense, I have submitted with this letter my current Curriculum Vitae.

[9] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973).

[10] ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM at 2, Principle 5, comment (2002).

[11] *American Council of Chief Defenders Statement on Caseloads and Workloads*, August 24, 2007.

look at individual jurisdictions to understand local laws and practices, ultimately even the best lawyers, who are well trained and have adequate support services, should not exceed the caseload numbers recommended by the NAC. Despite differences in jurisdictions, staff attorneys in the best public defense programs in this country handle caseloads that are well under the NAC numbers.

I hope this letter will be useful to you and to your colleagues in Washoe County. If you have specific questions about the comments or opinions expressed here, please do not hesitate to let me know.

Sincerely,

Norman Lefstein
Professor of Law and Dean Emeritus
Indiana University School of Law – Indianapolis

Enclosure

Singer

WASHOE COUNTY 7-17-09

Introduction

At the outset, I am compelled to comment upon what appears to be the Spangenberg Group (TSG) bias toward what it calls the "Time Record-Based Case-Weighting Method" for establishing public defender caseloads for individual staff lawyers as compared to what TSG calls the "Delphi Method." The TSG's "Delphi Method" (p. 21 Report) refers to the standards first presented by the National Advisory Commission on Criminal Justice Standards and Goals (NAC). The time study procedure relied upon in TSG was developed by TSG and, of course, is preferred by them over the NAC. However, I believe that TSG unfairly minimizes the value of the NAC caseload standard on one hand. On the other hand, TSG fails to illuminate the limitations and weakness of its time study procedure.

TSG's prejudices appear in its labeling of the two methods. TSG's "Time Record-Based Case Weighting Method" gives the impression that it is a fact based system that is reliable in predicting the length of time from start to finish of identical classes of cases thereafter. The projections are alleged to be constant and transferable to the future. The calculations predict future behavior according to TSG. That is, because residential burglaries take an average of (let us say) 10 hours to conclude, all residential burglaries will average 10 hours to conclude in the future. On the other hand, calling NAC and its progeny "Delphi Method" conjures up a group of superstitious people traveling to the mount for the word from an ancient God speaking through a mysterious oracle. In other words, ignorant supervision is brought to mind. I confess that I was around when NAC developed its caseload standard. No one ever called the NAC standards "Delphi." Moreover, those who produced the NAC system recognized its limitations. In the commentary to the NAC caseload standard are several pages discussing its limitations and a number of caveats. TSG method also has a number of limitations. Yet I do not observe any of these limitations or caveats fully addressed in the TSG report, nor did I observe in the TSG report any appreciation for the potential consequences of TSG systems shortcomings in the context of the Washoe County Public Defender Office (PD).

I will avoid the value laden terminology used by TSG in addressing the TSG method vis-a-vie the NAC standard. It should be initially noted that the NAC does present a caseload standard not a methodology. TSG presents a methodology to arrive at a caseload standard, not a standard caseload. The two are simply different products. NAC depends upon informed opinion from a variety of sources. TSG attempts to reduce human behavior by a comparatively wide variety of persons in a complex, ever changing milieu of highly emotional activity to a mathematical certainty.

I do not intend to disparage the TSG procedure. It has value when used at appropriate times and when the limitations of the procedure are understood. Nor do I intend to claim that NAC caseload standards are set in stone and are not subject to criticism. NAC states what should be a caseload for individual lawyers, not how to arrive at that standard. My purpose, and I believe my role in this Washoe County project is to disclose what I believe are weaknesses as well as the strengths of the TSG procedure. I point out that within the last few days I along with several colleagues, have submitted a report on a state public defender system. In that report I, as team leader, criticized the system's adoption of a somewhat modified NAC caseload standard. In the list of recommendations, we urged that a case time study be undertaken to produce a caseload management tool. But the environmental circumstances of the state system we examined are very different from that which appears to exist in Washoe County. In that report we also explain under what conditions the time study should be undertaken. I do not believe that a time study for case weighting was appropriate at this time in Washoe County based upon what is now described as the Washoe County Public Defender Office. That will be explained below.

The NAC case inventory was published in 1973 and has remained as influential to the present. Rather than its age and longevity constituting weakness as TSG seems to indicate, I see its longevity as evidence of strength and enduring reliability. Indeed, as TSG admitted in the end of its report, the American Council of Chief Defenders (ACCD) on August 24, 2007, issued a "Statement on Caseloads and Workloads" in "Resolution" form endorsing the NAC caseload standard. The ACCD represents the national leadership in the defender community. Their recommendations should not be so lightly dismissed by TSG without convincing explanation. ACCD's commentary notes that "(a) number of state standards, as well as recent ethics opinions from...the American Bar Association accept the NAC standards...." (See also American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, May 13, 2006, n 10, 11.). The National Legal Aid and Defender Association has also adopted the NAC standards. In my view, those are impressive endorsements of NAC. It is short sighted, indeed patently wrong, for TSG to disparage the NAC.

My point is that TSG unjustifiably gives short shrift to the NAC (p. 21, Final Report). TSG's conclusion that its case weighting system is more reliable because it uses "contemporaneous time records...relies on quantitative data, is reproducible and statistically sound," and thus superior to NAC, in the context of the Washoe County environment is subject to serious question in my opinion. Specifically, in the context of Washoe County and what appear to be TSG's valid questions as to the quality of the County Public Defender Office, the entire TSG project, I respectfully suggest, may be an exercise in futility, if not downright harmful. The TSG system may do what TSG says it must not do, "institutionalize" poor practice. Furthermore, TSG does not alert Washoe County to the weaknesses of their system under the best of circumstance; namely, that the PD does not work in a vacuum. Environmental factors have a significant impact on the case disposition process; the NAC is considerably more candid. The TSG works in a behavioral environment. Its procedure is not hard science. Its procedure should not be presented as an exact science. I regret making such harsh judgment where the people

who produced TSG's work product have an apparently genuine desire to materially improve delivery of legal services to criminally charged persons unable to hire their own attorney. However, as I explain next, my comments are justified based on the evidence.

Final Report by TSG

1.

TSG's Study describes the present. TSG had the lawyers and staff of the Washoe County Public Defender Office (PD) record all time spent on specifically categorized cases over a "12-week time keeping period" (p. 22, Final Report), i.e. Sept. 29 to Dec. 19, 2008. I will not repeat the entire process detailed in TSG report since that is not necessary for the issue I raise here. What is significant is that time records produced related to one particular period of time. Inherent in the process, necessarily, is the conclusion that there will not be any significant changes in the relative environment between the time of the study and the extended time in which the caseload numerical standard developed from the study is to remain operative. That kind of assumption is inherently incorrect. The world is not static. My earlier reports illustrate in more detail this fact. It is constantly changing. Moreover, the TSG report reveals that dramatic change may occur to PD operations. A detailed group of standards the service is to satisfy became operative as of April, 2009, a time that is after the conclusion of the TSG time study.

A fundamental assumption for the validity of the study result must be that the public defenders are performing consistently effectively at the time of the study, whatever "effectively" means (e.g. American Bar Association standards or NAC standards or the new Nevada standards). Otherwise, the TSG study will "institutionalize" poor legal practice. Indeed, the TSG report appears to chronicle that the PD has not been performing as well as it should be. In its "Proposal" for this project, TSG stated that its December, 2000 report raised serious issues with the quality of P.D. legal services in Nevada, including Washoe County (pp. 5-7 of TSG Proposal). Other subsequent studies confirmed this conclusion. On April 2007, a concerned Nevada Supreme Court appointed a Commission to examine and make recommendations to improve the service. The Commission's last report was delivered in April, 2009, and included new "detailed performance standards...to be imposed in the future." (TSG Final Report pp. 5-6) Moreover, TSG did not conduct an evaluation of the Washoe County Defender Office as a necessary preliminary step to its time study. (I had recommended such an evaluation in my report to you of March 3, 2009, item 16, p. 2), although it was aware that serious questions had been raised about the quality of the PD service (TSG Final Report pp 6, 52-59).

The significance of all this is that the TSG study results quite likely describe a PD system operating with serious problems that will be substantially changed after the TSG Study

by the newly imposed standards. Hence, the validity of the study for future use is doubtful!

In short, TSG Study results are outdated and unreliable because it describes an environment that is substantially altered, and that should impact upon the work practices and patterns of the PD staff. Incidentally, that further illustrates the differences between TSG case weighting from the NAC caseload standards. TSG attempts to describe what the present fact is, and assumes that the present as consistent with the future. The NAC caseload standard describes what should be not what is. It establishes a goal to be reached; it does not freeze the status quo.

2.

The TSG time study covers an approximately 12-week period, primarily in the fall of the year. Because of the limited period in which the time study was performed, the issue arises as to ability of projecting caseloads over a much extended period of time. For example, is there any substantial increase or decrease in tourist traffic over the year which may increase or decrease the type of crime and the rate of crime? What about the area's university; does the university's summer recess affect the quantity and type of cases for the period? Should those factors be taken into consideration? Perhaps more important is the likelihood that most felony cases and appellate cases will take much longer than 12 weeks from start to finish. That means that parts of several cases from the same case category must be combined to constitute the entire case. This adds another variable. I suppose TSG would call it an assumption, that the sum of the parts from a variety of fact situations, with a variety of lawyers involved in the cases create an accurate, consistent and transferable time parameter. That is an assumption that is, in my opinion, high problematic. I do not know of any independent evaluations that proves the reliability of that assumption. My own view is that the time study should last at least a year.

3.

In previous commentary, I have suggested that a number of environmental factors affect the time needed for a public defender to spend on a client. Furthermore, the change in defender personnel, internal office management practices, and the like are further variables impacting on caseload standards. Hence, the product TSG arrives at is far from objective and precise and subject to accurate replication. TSG does a disservice by ignoring those factors. That is, the prosecutor's office, the judiciary, even the police, the legislature, probation and parole personnel, etc. all have the ability to impact upon the representation provided by the PD.

The subject of the TSG study addresses human behavior functioning in an ever changing environment. Thus, any projections are not finite. Merely reducing the projection

process to a mathematical formula may create an unfair, if not downright inaccurate illusion of reality. In short, what worked at the time of the study may not work today or tomorrow. That caveat must always be with the PD managers who must work with TSG's formulas. Also, what about the extraordinary case or situation—the riot or other eruption? The high profile case? The highly complex case, etc.? Also, while TSG arrives at a specific number of work hours for a year (2080 hours), surely it is not suggested that a lawyer be restricted to that figure. PD lawyers are professionals! Hence, the usual 40-hour work week is not a limitation or even an expectation. The time spent on a case and the number of cases in a lawyer's inventory ebbs and flows. Lawyers should not be placed in the straight jacket of a specific time expectation. Lawyers must do what is needed, when it is necessary. Placing specific timeline expectations upon various types of cases may create unreasonable time-specific expectations. For example, the study noted that the Washoe County PD appeared to have a low trial rate and an usually high rate of guilty pleas. That situation may change under the new standards. That situation may also change because of staff turnover or an eventual change in PD leadership. Such changes, among others, may substantially impact the time it takes to conclude a case.

Conclusion

My present commentary primarily addresses the underlying conceptions, assumptions, and theories of the TSG project, not the TSG actual study process. My past commentary has attempted to raise issues with process.

Although my commentary here is largely negative, I do believe that a time study can provide valuable results that potentially improve a PD service and provides an important tool for management. The present problem is that TSG does not recognize or alert the county of the limitations of its process under the best of conditions, and the TSG study appears to have not taken place when the Agency was functioning under the best of conditions. Furthermore, the present TSG study took place before relatively dramatic changes occurred in the delivery of PD services, e.g., the new standards for the PD, thus affecting the time parameters suggested by TSG.

I would urge that in the coming year Washoe County Commission have an evaluation of the PD office and the time study results. That evaluation should be by an independent agency, not TSG and without any connection to TSG!

Hartman

WASHOE COUNTY- REPORT OF TSG CASEWEIGHTING STUDY

The report of the Spangenberg group with respect to caseweights in Washoe county is an excellent report. It is both practical in terms of explaining its methodology so that other jurisdictions can utilize it, and penetrating in its insights so that defender services to the indigent in Washoe county might improve.

The report opens by laying the foundation of the Defender Service in Nevada, pointing out that the two largest counties, Clark and Washoe counties are required to fund their own defender services, while the smaller counties can get state funds for that purpose. The Report then went into a brief history of legal defense services in Nevada culminating in the creation of the Indigent Defense Commission by the Nevada Supreme Court in 2007.

The Commission's enactments included 1) preparing a statewide standard for indigency; 2) ordering each judicial district to formulate a plan for the appointment of independent counsel, 3) ordering performance standards for court appointed counsel; 4) ordering several caseweight studies including Clark and Washoe counties, and (5) forming a statewide oversight committee for legal defense services.

The Spangenberg Group (TSG) was awarded the contract for the caseweight study and began to prepare the Washoe County Public Defender staff to collect the data necessary to conduct the study. The basic approach of TSG was to convert caseload to caseweights, If one could project the number of each case type which will occur in the coming year, and one could predict the average number of hours that a lawyer would have to spend on each case, one could project fairly accurately the number of lawyers needed to handle and dispose of the incoming caseload for a jurisdiction,

COURTS IN NEVADA

The Report documents the court system in Nevada, noting that there are two types of courts at the local level, Municipal Courts for misdemeanors, and Justice Courts which handle misdemeanors and in addition conduct preliminary hearings and felony arraignments. In addition, there are District Courts which have jurisdiction over felony and juvenile cases. Finally, the Nevada Supreme Court hears appeals from criminal trials. There is no intermediate appellate court in Nevada.

SITE VISITS IN WASHOE COUNTY

TSG conducted site visits to buttress the validity of the TSG study since it gives the study team the background needed to determine what tasks the public defenders must accomplish in dealing with their caseloads. TSG staff visited with and interviewed court administrators, judges, clerks, the district attorney, and a contract attorney in Washoe county.

PUBLIC DEFENDER STAFFS AND CONTRACT ATTORNEYS

There are 33 staff lawyers in the Washoe County Public Defender Office. In addition, there are 8 investigators, a mitigation specialist, and 17 secretaries. They handle criminal, juvenile, parole violations, child support, abuse and neglect cases, involuntary commitment cases, and their own direct appeals.

In addition, there is an alternate defender program with 9 lawyers to serve as counsel in the event of a conflict of interest between the defendants. The lawyers in that office also staff the adult drug and Mental Health Courts.

There are also 25 Contract Attorneys available to represent Class A felons in the event of a conflict, and another group of contract attorneys who handle cases other than Capital or Class A felonies in the event of conflict. These contract attorneys are paid on a per case basis,

The Public Defender is appointed at Arraignment. Then.they usually see their clients at Preliminary Hearing. Prior to the Preliminary Hearing, the lawyers receive case files which typically contain the indigency determination, a certificate of probable cause, and a schedule of pending Court dates. The lawyers do not receive discovery from the State, thus requiring them to request police reports, a rap sheet, and witness statements, including both audio and video tapes. The lawyers also must prepare subpoenas, and draft any pre-trial motions that they wish to file. (There are no form motions in a motion bank at the defender office.)

Awareness of these duties and procedures assisted the Spangenberg Group in their preparation of the time sheets and questions required in the caseweight study.

METHODOLOGY

Spangenberg discusses the various methods of determining the maximum caseload for defender attorneys which would allow them to effectively represent their clients. After an extensive literature search, Spangenberg asserts that whatever system is used, the data used must be backed up by empirical methods. In their study TSG utilized various forms and methods to acquire the data which would back up the Report.

These forms included a daily activity log for attorneys and support staff. The purpose of these logs was to attempt to track the amount of time needed by the lawyers and support staff to fulfill the requirements of their caseload. Other precautions to insure validity of the data were as follows- a. a training program (2 sessions for lawyers and 2 sessions for non-lawyer staff) on how to fill out the activity logs.

b. instruction manuals on timekeeping.

c. a pretest for three days involving 25 attorneys and 18 non-legal staff.

d. anonymity for timesheets (a secret number was used for each participant so that no one knew who was the author of the timesheets.)

e. easy access to TSG staff. (This included toll free phone, mobile phone, e-mail, and a web site.

ANALYSIS- TSG staff worked very hard to present a verifiable study procedure and protocol. There is a problem however that should be noted. That is, that the time frame TSG is using for the study is twelve weeks (September 29 to December 19, 2008). That is not long enough for certain crimes to come to a conclusion. Spangenberg takes cognizance of this fact by noting that ,"since appellate, capital and murder cases are distinctly more complex and less common than other criminal cases and take significantly longer from appointment to final disposition, the timekeeping period was insufficient to draw any conclusions about workload for those case types".

A possible solution to the problem relating to this important part of the overall study would be to run the project study longer, for example, for a year instead of 12 weeks. Another possibility might have been to continue on with logbook notations for those cases only,i.e. to continue to track information on appeals, murder and capital cases. Without data on murders and capital cases, I feel that a significant part of the study is missing.

TABULAR DATA

TSG certainly is comprehensive on presenting the data which it collects, utilizing the defender staff. I might note that for me most significant were Tables 20 and 21 where TSG tries to calculate Public Defender Workloads (based on 1831 available billable hours) and projected FTE needs based on 2008 figures.

TSG's analysis, based on the data, is interesting and important. Certainly, his comparisons of the number of cases disposed of in other counties is useful. He points out that the number of cases handled in Washoe County is significantly higher than the other counties he compares the data with. It is also significantly higher than national standards.(E.g. the National Advisory Commission on Criminal Justice Standards and Goals suggested 150 felonies per year or 400 misdemeanors or 200 Juvenile cases or 25 appeals (1973)). However, the Supreme Court of Nevada and Washoe County are to be commended for attempting to compile the empirical evidence to buttress their conclusions by conducting these studies..

ATTORNEY INSTRUCTION MANUAL

The instruction manual is very comprehensive and clear. The lawyers are to record their daily activities. There are codes (inter alia) for case type, courts, activities, and disposition, with adequate examples of each. There were two training sessions for the lawyers to familiarize themselves with the methodology and mechanics of the study, and a pretest before the actual study began. This shows exceptional effort and care by TSG, and they should be commended for it.

STAFF INSTRUCTION MANUAL

This instruction manual is designed for the non-lawyer staffer who will be participating in the study. Like the Attorney Manual, it well organized, clear, and comprehensive. If staff has questions, members of the study team are available. Again, as with the lawyers, there was a pretest and two training programs on the use of the Instruction Manual.

CONCLUSION

This will be a very successful and valuable study. Certainly, it will be a model for other studies in other states and should give us a clear picture of actual caseweighting dynamics in a jurisdiction. Since 1973 we have been guessing at effective caseload maxima. Some guesses were better than others, and early attempts by Paul Ligda who estimated 1500 available workhours per lawyer per year to the caseload standards of the National Advisory Commission on Criminal Justice Standards and Goals, we have not been able to be as definitive as we wanted to be. This study should not only be helpful to Washoe County but will be a groundbreaker for the nation. The Supreme Court of Nevada and Washoe County should be commended for their efforts to improve the delivery of indigent legal defense services in Nevada.

Submitted, Marshall J. Hartman
Consultant. September 3, 2009

Attachment B

WASHOE COUNTY
CONFLICT COUNSEL
FY2010 Budget

The total budget for this program is comprised of the following:

- 900 cases(1) at an average cost of $580 = $522,000
- 43 Class A Felony cases estimated at $10,000 = $430,000
- Legacy Class A cases = $50,717
- Appointed Counsel Administrator = $150,000
- Washoe Legal Services – child advocacy = $482,746
- Defense services = $50,000
- Early Case Resolution = $150,000

Total $ 1,835,463

(1) Felony, Misdemeanor, Juvenile, Family