

THE SPANGENBERG REPORT

Spring 1994

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The Spangenberg Group

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Welcome to The Spangenberg Report. This is the first of four quarterly newsletters that you will be receiving to keep you up-to-date with current developments in the indigent defense field across the country.

The idea of such a newsletter has been percolating in our minds for several years. It is in response to those in the field who have repeatedly suggested that it would be valuable for us to share information we receive with others around the country concerned about the improvement in the delivery of indigent defense services.

We have come to recognize over the years that jurisdictions addressing problems surrounding indigent defense have a great desire to learn how other states or regions have responded to similar problems. What works? What has been tried? If it has not worked, why not? We hear this everywhere we go.

In thinking about our audience for the newsletter, we concluded that we wanted the readership to be broad. Not confined to public defenders and private court-appointed counsel. We want the newsletter to be a voice to state and local bar associations, funders, judges, court administrators and others in the criminal justice system who recognize the need for a strong and vibrant response to the Sixth Amendment - adequate funding and competent administration. We firmly believe that indigent defense is a cornerstone of the criminal justice system and must combine effective advocacy with accountability and efficiency. So this is one of our primary messages to all of our friends in the indigent defense field, the funders and all three branches of government.

The newsletter will be designed to give you the latest information on what is going on around the country: New ideas about funding alternatives. Proposed changes in indigent defense structure (delivery). State legislation directly affecting indigent defense delivery. News of statewide task forces created to address one or more problems in the indigent defense system. Litigation regarding attorney fees, case overload, systemic challenges, etc. New approaches to handling specialized cases such as death penalty, abuse and neglect, mental health, appeals, dependencies, etc.

We also want to share with you the activities that we are involved with in the indigent defense field around the country. The Spangenberg Report will be your introduction to our ongoing work and the trends that we discover in this work.

We also hope to provide you with a broad context within which indigent defense systems operate. Thus, this first newsletter will inform you about FY 1994 fiscal trends of state and local government, how the fiscal pie is divided among the five major components of the criminal justice system, state and federal policy that affects indigent defense and caseload trends across the country.

We invite your response. Tell us what you want to see in future editions of the newsletter. Send us material that you feel will be valuable to others around the country. Welcome aboard!

The Spangenberg Group

The Spangenberg Group is a nationally recognized firm working with state and local

jurisdictions to improve our nation's justice system. We are widely recognized as the nation's expert on the delivery of indigent defense services.

All of the activity is directed by Robert Spangenberg, the President of The Spangenberg Group. Bob has devoted more than 30 years of his professional life to improvement in the delivery of legal services to low-income people in the United States.

Bob began his career as a trial lawyer in state and federal court before becoming Assistant Dean at Boston University School of Law where he taught and developed a series of new clinical law programs as Director of the school's Legal Studies Institute. Later he began the Boston Legal Assistance Project, the neighborhood civil legal services program, which he headed for nine years. He then undertook a two-year foundation study of civil legal services to the poor in Boston and indigent defense on a statewide basis in Massachusetts. In 1976, he became the Deputy Area Manager of the Law and Justice Division of Abt Associates in Cambridge, Massachusetts, where for ten years he conducted national and local studies of indigent defense systems across the nation. In July 1985, Bob formed The Spangenberg Group to continue the efforts he had undertaken for over 20 years.

In the past 15 years, Bob has visited all 50 states and worked with civil legal services programs, indigent defense programs, bar associations, state and county officials, and legislative bodies concerned about improvement in our nation's justice system.

Marea L. Beeman is beginning her fifth year with The Spangenberg Group. She has played a lead role in a number of our important studies in the past two years. She was the Project Director for our Civil Legal Needs Study in Hawaii, Co-Director with Bob Spangenberg of the Mississippi Public Defender study and Research Director for our Crisis Points study last year.

Judy Menton has been with The Spangenberg Group for six years. She is our able Administrative Assistant and the glue that keeps our operation running smoothly.

The Spangenberg Group clients have included the American Bar Association, the Ford Foundation, the State Justice Institute, the Bureau of Justice Statistics, state and local bar associations, all three branches of government, civil legal service programs, indigent defense programs and broadly based state task forces, commissions and committees.

For almost nine years, The Spangenberg Group has been the principal source of technical assistance to the ABA Bar Information Program (BIP), which provides information and technical assistance to state and local jurisdictions concerned about improvement in their indigent defense system. This work has formed the factual basis for positive change in a number of states.

Since October 1987, The Spangenberg Group has provided technical assistance and conducted studies for the ABA Postconviction Death Penalty Representation Project with the goal of improving the delivery of indigent defense services to individuals convicted of capital crimes whose cases are in state or federal post-conviction litigation.

For the past three years, The Spangenberg Group has been the principal provider of technical assistance and information to the ABA's Special Committee on Funding the Justice System. Among the work performed for the Committee were two comprehensive surveys of all 50 states to determine the financial well-being of each component of the justice system and methods undertaken to improve these systems.

The Spangenberg Group has also played an important role in the improvement of the delivery of civil legal services to low-income persons throughout the country. Foremost among this work have been comprehensive civil legal needs studies conducted separately in Hawaii, Illinois, Maine, Massachusetts, New York, Ohio and Wisconsin, as well as a 1989 nationwide survey of the unmet civil legal needs of low-income households around the country for the American Bar Association's "Access to Civil Justice in the 1990's" conference.

The purpose of this newsletter is to share

with you all that we have learned and continue to learn about trends and developments across this country in the nation's justice system. We welcome your comments and ideas and are eager to learn more about your needs and what you are doing. Write to us or give us a call at (617)969-3820. Why not fax a message at (617)965-3966?

Indigent Defense and Justice System Funding

To understand the current fiscal condition of the justice system, it is necessary to not only look at changes in macro-level funding, but to also look at changes in funding for each of the system's components. Not only do differences in levels of funding for each component impact the whole system, but differences in sources of funding for each part can also significantly affect the others.

Funding for the criminal justice system comes from four levels of government: federal, state, county and municipal. The distribution of total spending on the justice system by each level of government has been shifting over the last ten years so that states and counties are becoming responsible for a larger proportion of total expenditures.

The overall percentage of direct government spending for justice, at 3.3% of all government spending, still ranks below overall government spending on such programs as, national defense, education, interest on the debt, housing, public welfare, hospitals and transportation (BJS, Justice Expenditure and Employment, 1990).

In 1979, according to the Bureau of Justice Statistics (BJS) data printed in Justice Expenditure and Employment in the U.S., 1985, the percentage distribution of total justice spending broke down as follows: 13.0% from the federal government, 28.4% from the states, 23.2% from counties, and 35.4% from municipalities. In 1990, the distribution shifted so that the federal share of spending was 12.5%, states paid for 34.1%, counties 23.9% and municipalities covered 29.5% (BJS, 1990).

A driving force behind state governments' growing distributional share of total justice expenditures is the increase of state spending for corrections. Between 1985 and 1990, state spending for corrections grew by 90%. And of all state direct justice system funding in 1992, \$15.4 billion, or 60.5% went to corrections as opposed to \$8.1 billion, or 55.1%, just two years prior.

According to data presented in a May 1993 report of the U.S. Advisory Commission on Intergovernmental Relations entitled, "The Role of General Government Elected Officials in Criminal Justice," per capita spending on corrections increased faster than any other area of public spending between 1985 and 1990.

Also contributing to the redistribution of funding among levels of government is the fact that municipal government spending (in 1985 constant dollars) on police decreased by 8.3% between 1985 and 1990. Police spending by municipalities totalled \$15.6 billion in 1988, representing 82.1% of all municipal justice dollars, but in 1990, although the overall amount rose to \$17.6 billion, the percentage of municipal justice spending earmarked for police protection dropped to 79.8% of municipal justice funds.

This is a significant decline because in 1990 municipalities accounted for 63% of total state-local spending on police. And 1990 overall expenditures on police protection by both state and local governments accounted for \$27.8 billion (42.8%) of total justice system expenditures,

which totalled more than \$64.9 billion. The distribution of state and local total justice system expenditures for the other justice system components were as follows: \$7.7 billion (11.9%) judicial spending, \$4.0 billion (6.1%) prosecution, \$1.3 billion (2.1%) public defense, and \$23.5 billion (36.2%) corrections.

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Indigent Defense, continued

As the graph indicates, in FY 1990, approximately 79% of all justice spending by state and local government was for police and corrections. Thus, if public policy calls for substantial additional funding through federal, state and local funds, the pressure will be ever greater on prosecutors, courts, police, corrections and public defense to deal with the additional caseload. Depending upon whether the states or the counties pay for these three components, the pressure will be intense to keep up with the requirements of the law. Otherwise, the criminal justice system could face a severe slowdown in the next couple of years.

Much more about these themes in future editions of our newsletter.

State Fiscal Outlook

According to the National Conference of State Legislatures (NCSL), the fiscal forecast for the states midpoint FY 1994 is substantially improved over the past few years. Revenue collections are on par with or above projections in the overwhelming majority of states.

Twenty-four states, the District of Columbia and Puerto Rico report revenue collections on target for the early months of FY 1994. Twenty-one states report revenue collections above target, and five states report collections below target.

This is a vast improvement since FY 1992 when, according to the National Governor's Association and the National Association of State Budget Officers, 35 states were forced to reduce their enacted budgets by a total of more than \$5.7 billion.

NCSL found that state expenditure, like revenue collection, was also healthier than in previous years. Expenditures were on target with budgets in 26 states. However, 23 states reported that they are experiencing excess spending in at least one budget area. In most of these states, the overruns have not been so extreme as to require

drastic measures. Several states have been able to manage the unexpected expenditures with revenue surpluses from the previous year. Only five states to-date have reduced their FY 1994 budgets or imposed some sort of spending limit to offset cost overruns, revenue shortfalls, or both.

County Fiscal Outlook

While states are recovering from the shock of the last few years, counties have yet to experience fiscal recovery. Of 61 large urban counties recently surveyed by the National Association of Counties (NACO), more than one-third had to raise property taxes, postpone scheduled capital projects and/or freeze hiring to contend with revenue shortages in FY 1993. This trend continues in FY 1994. Only four of the 61 counties expect their fiscal condition to improve significantly over the next three years. The vast majority of counties anticipate only a slight improvement in their fiscal situations.

According to the NACO survey, unfunded state mandates, and to a lesser extent, unfunded federal mandates, are the primary cause of fiscal stress for counties. Another area of stress is the crime rate and related public safety needs.

The fact that counties are still experiencing budgetary stress points to an impending problem for those states whose public defense budgets are funded solely by county government.

Recent Legislation

Indigent Defense

State legislatures in Minnesota, Mississippi and Nebraska considered measures this year to restructure their indigent defense systems.

Two indigent defense bills are currently pending in Minnesota. The first resulted from a juvenile justice reform task force. The legislature appropriated \$4 million to be used for juvenile representation. The funds will allow the State of Minnesota Board of Public Defense to provide

representation in all juvenile delinquency cases in the state's 10 judicial districts. This bill is awaiting the governor's signature.

The second bill would appropriate \$8,800,000 to the State of Minnesota Board of Public Defense so that it could provide representation in all criminal cases in each of the state's 10 judicial districts. Currently the public defender provides representation in all felony and gross misdemeanor cases in the state. In addition, it provides misdemeanor and juvenile delinquency representation in five of 10 judicial districts. The other five judicial districts encompass 57 of the state's 87 counties, most of them rural. With passage of the "takeover" bill, the public defender
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Legislation, continued

would be responsible for all indigent criminal cases statewide.

Budget development for both of these bills was based on the public defender's weighted caseload formula, developed by The Spangenberg Group in a caseweighting study for the State of Minnesota Board of Public Defense in 1991. Bob Spangenberg travelled to Minnesota in March to consult with the staff and Board about the two bills, and to discuss it with legislators.

Mississippi

A subcommittee formed by former Supreme Court Justice James Robertson proposed legislation in both the House and Senate to establish a state funded, statewide public defender system (House Bill 1134 and Senate Bill 2666). The legislation would create District Public Defender offices on parity with the Offices of the District Attorneys.

Robert Spangenberg and members of the Mississippi Bar Association's Criminal Justice Task Force Subcommittee spoke to numerous legislators and testified before judiciary committees considering the bills.

The Spangenberg Group is currently

conducting a study of Mississippi's indigent defense system on behalf of the Mississippi Bar Association's Criminal Justice Task Force Subcommittee. While the legislation was not successful in this session, next year, with results from the study and more time to build consensus, it is hoped that efforts to create a statewide public defender system will meet with success.

Nebraska

Senator John Lindsay, on behalf of the Nebraska Indigent Defense Task Force, introduced a bill that would create a new state agency to implement a host of improvements to strengthen Nebraska's indigent defense system. Some of the key components were: development of a uniform, statewide policy for determining indigence; requirement of a (waivable) \$40 public defender application fee; salary parity between public defenders and county attorneys; creation of a state-funded litigation fund to help small counties defray expenses in costly cases.

Instead of acting on the bill, the legislature passed an interim study resolution which will give the bill's sponsors a year to educate legislators, hold public hearings and build support before reintroducing the bill next session.

The 36-member Indigent Defense Task Force oversaw a year-long study completed by The Spangenberg Group in December 1993. Senator Lindsay's bill drew heavily from the study's recommendations, which were endorsed by the Task Force.

Tennessee

In an effort to equalize the pay between District Public Defenders and District Attorneys General (district prosecutors), the Tennessee General Assembly passed the following amendment to the District Public Defenders Act:

"Effective July 1, 1994, the salary for District Public Defenders shall be an amount equal to 88% of the salary established by law for District Attorneys General. Effective July 1, 1995, the salary for District Public Defenders shall be an amount equal to the

salary established by law for District Attorneys General. The annual salary shall be adjusted to reflect all salary increases provided by the District Attorney General."

More and more, around the country, legislative bodies are recognizing salary parity between prosecutors and public defenders. If you would like more information on public defender salaries around the country, drop us a line.

NEW SOURCES OF FUNDS FOR INDIGENT DEFENSE

Our pre-circulation issue of The Spangenberg Report focused on different types of supplemental revenue sources available to indigent defense programs, other than general fund appropriations ("Alternative Revenue Sources for Indigent Defense Programs," February 1994). Since release of that document, legislatures in Kentucky and New Jersey have passed bills opening up new sources of funds for indigent defense in those states.

Kentucky

The General Assembly of the Commonwealth of Kentucky recently passed an act that creates three new sources of funds for the Department of Public Advocacy.

First, all persons who receive the services of a public defender will now be required to pay a \$40 administrative fee, which will go directly to
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New Sources, continued

the Department of Public Advocacy. The fee can be waived for individuals who are unable to afford it, or who are incarcerated.

Second, all persons convicted of drunk driving shall be required to pay a service fee of \$200. This represents a 25% or \$50 increase in the service fee, all of which will go to the Department of Public Advocacy.

Finally, Kentucky will now have a state-

administered fund to pay for expert witnesses, medical testing and other services required in the defense of indigents. Each county, except for Jefferson, will contribute 12.5 cents for each resident to the fund. Any costs beyond the estimated \$375,000 raised from the counties will be picked up by the state.

New Jersey

A state law that went into effect in February allows communities in New Jersey to collect fees for the use of public defenders in municipal court. State courts have had this option since 1991. It will be left to municipal judges to determine whether defendants face a harsh enough potential penalty to require a municipal public defender, to determine indigency, and to assess all or a portion of the \$50 fee.

Municipal Court Fees

What is happening in New Jersey is beginning to happen elsewhere in the country as municipalities find their indigent defense costs rising. Recently, in Laurel Springs, Pennsylvania the Borough Council passed an ordinance requiring a \$50 payment in all indigent defense cases.

* * *

We know that new sources of funds for indigent defense are high on the list for all such programs. Please inform us of new ideas and successes so that we can share them with others.

Task Forces, Commissions and Statewide Committees

In the past five years, The Spangenberg Group has worked with statewide task forces, commissions and committees designed to address problems with the delivery of indigent defense services in over half of the states. These groups are often established by a state bar association, the state supreme court, the legislative branch, the executive branch or a combination of these organizations. They may be organized around a single issue or the entire indigent defense system. In the last three years, similar groups have been formed to address the entire criminal justice system in a state.

The task force approach has formed the basis of much of our work with the ABA's Bar Information Program and in many cases, has been highly successful.

In each issue of The Spangenberg Report, we will advise you of the ongoing work of these organizations and their goals and successes.

Oregon

The Oregon State Bar (OSB) recently finished a year-long review of indigent defense delivery statewide and presented a series of recommendations.

Before formulating its recommendations, the OSB heard testimony from local, state and federal indigent defense providers and court administrators; reviewed national standards; and studied the federal indigent defense system and those of other states.

Some of the Task Force's recommendations were to:

- o Conduct a legislative-sponsored study of Oregon's criminal justice, juvenile and civil commitment delivery systems in the context of determining the feasibility of creating an integrated delivery system.

- o Promulgate and adopt OSB-sponsored standards for providing indigent defense services, similar to those promulgated by the American Bar Association.

o Create a permanent OSB Indigent Defense Committee or Task Force

o Encourage Bar support for law enforcement and prosecution guidelines.

o Encourage Bar support for mandatory fiscal impact statements and integrated budget

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Task Forces, continued

networking among all components of the criminal, civil commitment and juvenile justice systems.

o Create a trial-level death penalty resource center.

Texas

The State Bar of Texas has a newly-formed Indigent Defense Committee. Texas Lawyers Care, the pro bono component of the Bar, is staffing the committee, which will be looking at different ways to structure indigent defense in Texas. Currently only two of Texas' 254 counties are served by a public defender. Indigent defense is provided by assigned counsel in the other 254 counties and there are no state funds for indigent defense.

Utah

In Utah, the Supreme Court has appointed a Task Force on Appellate Representation of Indigent Defendants. The Task Force is looking at various systems to improve appellate representation and appropriate funding sources.

North Carolina

Last year, the Administrative Office of the Courts in North Carolina appointed a statewide committee to review the implications of the North Carolina Supreme Court decision in McBride v. McBride, which held that, absent appointment (or waiver) of legal counsel, an indigent defendant may not be incarcerated in a civil contempt proceeding for failure to comply with the terms of a child support order. The specific charge of the McBride Committee was as follows:

1. Suggest procedures for determining the

defendant's entitlement to appointed counsel;

2. Provide guidance in establishing criteria that may be followed by the trial courts in identifying cases in which the defendant is likely to be incarcerated;

3. Consider any available alternatives for providing counsel, such as public defenders, appointed counsel, attorneys working on contracts or on a per diem basis; and

4. Determine when and how counsel fees paid by the State may be recovered from the defendant.

Recently, the Director of the Administrative Office of the Courts circulated a draft of the committee report which begins to address a growing problem in the indigent defense world and that is how to provide counsel and funds for representation in non-traditional criminal cases. This is an expanding area of the law and the committee report addresses issues such as qualification for counsel (indigency, likelihood of incarceration, etc.), proper court procedure, alternatives for providing counsel and recovery of counsel fees. The Committee chose not to address the larger systemic issues but made a series of recommendations to meet the immediate consequences of McBride. One of the more controversial parts of the report recommends against assigning civil contempt proceedings to public defender offices, but rather to private contract attorneys.

The 1993 General Assembly authorized the Director of the Administrative Office of the Courts, "with the approval of the chief district court judge...to engage the services of a particular attorney or attorneys to provide specialized representation on a full-time or part-time basis...in order to facilitate the processing of juvenile cases and civil cases in which a party is entitled to counsel..." G.S. 7A-344(4), as amend. by S.L. 1993, Ch. 561, ½79.

The full report can be obtained from the Administrative Office of the Courts in North Carolina or from The Spangenberg Group.

"Three Strikes, You're Out" and Other Habitual Offender Provisions

The National Center for State Legislatures (NCSL) reports that as of April 1, 1994, 28 state legislatures were reviewing their habitual offender provisions and proposing new laws, such as the much-hyped "three strikes you're out" provisions.

Legislatures in six states: California, Georgia, New Mexico, North Carolina, Virginia and Wisconsin, have passed new sentencing laws this year applying to repeat, serious or violent offenders. Laws enacted in Georgia, Virginia and Wisconsin await action by governors. Kansas has House and Senate versions of new repeat offender legislation awaiting reconciliation.

Other states with habitual offender bills pending are: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana,

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Three Strikes, continued

Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Tennessee.

California's "three strikes" measure requires a life sentence for a third felony if there have been two prior "serious" or "violent" felonies, with a minimum of 25 years in prison. The measure also doubles the prison sentence for a second-time felony conviction if there has been one prior serious or violent felony conviction. New Mexico's "three strikes" law provides for life imprisonment with parole eligibility after 30 years for offenders convicted of three violent felonies. In North Carolina, life without parole is mandatory under a 1994 Extra Session enactment for a third conviction of certain violent felonies.

Voters in Washington state approved an initiative last fall calling for "three strikes you're out" life without possibility of parole for offenders convicted of a third serious felony. Compared to

those of California and New Mexico, Washington's provision is notably tough, mandating natural life.

Reform of State Indigent Defense Systems Through Rulemaking

While landmark decisions of the United States Supreme Court in Gideon v. Wainwright, Argersinger v. Hamlin and In Re Gault have mandated the constitutional right of indigent defendants to appointed counsel in state court, the form and the system to implement the mandate has been left to each of the states. The states' response has varied from the creation of a comprehensive statewide indigent defense system to an optional county or local model providing the choice of a public defender program, a contract system or a private bar appointed system. The U.S. Supreme Court has also left the funding mechanism (state, local or state and local) to each state. Twenty states have opted to fund the entire system through state funds. Seven states (Idaho, Louisiana, Mississippi, Nebraska, South Dakota, Texas and Utah) provide no state funds for indigent defense representation in any courts in the state. Twenty-three states combine some form of state and local funding for their indigent defense system.

Over the years, state supreme courts have, through their rulemaking authority or through specific legislation, promulgated requirements for certain aspects of their state's indigent defense system. These have included standards of indigency, qualification standards for court-appointed counsel, fee schedules for court-appointed counsel and special provisions for capital cases.

However, in the last 18 months, state supreme courts in Indiana, Tennessee and Louisiana have under consideration petitions for sweeping changes and improvements in the overall operation of the indigent defense system in their own state.

Indiana

A Petition for Rulemaking or Other

Intervention by the Indiana Supreme Court was filed with the Court on October 14, 1992. In this case, petitioners allege that the Marion County Indigent Defense System, "...existing in non-capital cases in Marion Superior Court is such that indigents' constitutional rights to the adequate and effective assistance of counsel are being violated."

The petitioners cite a number of prior studies of the system and contend that the current resources are inadequate to provide proper representation and ask the Court to, "...accept jurisdiction of this matter, appoint a Special Master, enter relief designed to address the problem, ...and render all appropriate relief."

In its preliminary order, the Court states in part:

"The Court notes that for the past several years the Marion County Public Defender system has been criticized as inadequate. Marion County's problems in providing quality representation to poor people are not unique, however, and the question occurs whether rulemaking limited to one county would be adequate. Accordingly, the Court gives notice that any individual or organization wishing to support or oppose the Petition for Rulemaking or Other Intervention by the Indiana Supreme Court, or to comment on broader issues relating to indigent defense statewide, is invited to file a response with the Clerk of this Court on or before March 31, 1993."

It is our understanding that there were a number of responses across the state, but no further action has yet to be taken by the Court.

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Reform, continued

However, last winter, Marion County Commissioners created for the first time a countywide public defender system with a board of directors which is hard at work addressing the problems of indigent defense delivery in Marion County.

Tennessee

In 1986, the Tennessee legislature, recognizing the limitations of the court-appointed counsel system, created the District Public Defenders Conference. The Conference first operated as a pilot program in seven of the state's 31 judicial districts and received administrative support from the executive secretary to the supreme court. In September 1989, the Public Defender Act established 22 additional public defender offices and an administrative office for the Conference. All 31 judicial districts in Tennessee are now certified publicly elected district public defenders who, together, make up the governing body of the Tennessee Public Defender Conference.

It was not long before it became obvious that the funding for the Public Defender Conference was wholly inadequate, as were the funds available for court-appointed counsel in cases that could not be handled by the public defender system. In September 1990, the Tennessee District Public Defenders Conference asked the American Bar Association Bar Information Program to provide technical assistance to conduct an overview of the new statewide public defender system because of the concern of inadequate funds.

The Spangenberg Group conducted "a Study of the Tennessee District Public Defenders Conference" and published this report in June 1991 highlighting a number of serious funding and resource problems. Subsequently the system reached further crisis in funding and as a result of the urgency of the problem an ad hoc group was formed and identified as the Criminal Justice Funding Crisis Group (CJFCG), which included representatives of the Tennessee Bar Association, the Tennessee Association of Criminal Defense Lawyers, the Tennessee Trial Lawyers Association, the Tennessee Public Defenders Conference and the Capital Case Resource Center, with input from other bar associations and interested parties. The CJFCG contracted with The Spangenberg Group to do a comprehensive study of the entire indigent defense delivery system in

the state and The Spangenberg Group published, "A Study of the Indigent Defense System in the State of Tennessee" in December 1992, which indicated that the problem had grown worse since 1991 and the whole system was in a state of crisis.

On July 9, 1993, the CJFCG along with five other statewide bar associations and lawyers groups in Tennessee filed a "Petition for Amendment of Supreme Court Rule 13 in Order to Establish a Constitutional, Adequate and Effective Indigent Criminal Justice System," and a "Petition for Adoption of Proposed Supreme Court Rule 13.1" in the Supreme Court of Tennessee. The petitions asked the Court to take the action requested pursuant to its inherent constitutional authority, its statutory authority and its rulemaking authority in its supervisory capacity and in its capacity as the highest court of the judiciary of the state of Tennessee.

The petitioners filed numerous documents including the two Spangenberg Group studies as well as extensive briefs in the matter.

Subsequently the Supreme Court of Tennessee invited responses to said petition in an order entered October 5, 1993. That order invited responses from the Governor, Lieutenant Governor, Speaker of the Senate, the Attorney General, the Executive Secretary of the Tennessee District Attorney General's Conference, the President of the Tennessee District Public Defenders Conference and the Executive Director of the National Bar Association. A number of responses were received by most of the group and on March 1, 1994 the Supreme Court of Tennessee issued an order as follows:

"After consideration of the petition and the responses, it is the decision of the Court that this matter be set for hearings during the June 1994 session at Nashville. The Clerk of the Courts is instructed to set the case for hearing in June 1994 and to notify all interested parties of the hearing."

The proposed petitions in Tennessee ask the Court to create a statewide indigent defense commission responsible for all aspects of indigent

defense delivery and the promulgation of specific requirements in death penalty cases.

More about the petition in our July newsletter.

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Reform, continued

Louisiana

Louisiana is unique among all the states in terms of its method of funding its state indigent defense system. More than 95% of all the funds for indigent defense in the state are provided through an assessment of \$17.50 to \$25.00 on all criminal convictions across the state. These funds are assessed and collected and form virtually the entire budget for the indigent defense board in each of the parishes of the state. The greatest part of these assessments occur in motor vehicle offenses such as speeding. Thus, the amount of funds available to any IDB depends in part on the number of assessments that are made from month-to-month regardless of the needs of the indigent defense program or the docket of the local court.

Attempts have been made over the years to address what is perceived to be a serious problem in the funding of indigent defense in Louisiana through this method both by proposed legislation and litigation.

In December 1990, the Supreme Court of Louisiana appointed a Statewide IDB Committee of the Supreme Court's Judicial Council to study "all facets of Louisiana's indigent defense system."

Subsequently, The Spangenberg Group was asked to conduct a comprehensive study of the indigent defense system in Louisiana on behalf of the new statewide IDB committee.

On March 12, 1992, the report, "A Study of the Indigent Defense System in Louisiana," was submitted to the statewide task force who endorsed its findings and recommendations and sent the report with its recommendations to the Louisiana Supreme Court Judicial Council. The Judicial Council then approved the findings and recommendations and sent them to the State Supreme Court and the legislative and executive

branches of government. The recommendations were later put in the form of legislation and submitted to the 1992 legislative session in Louisiana. The bill failed to get out of committee and shortly thereafter in July and September 1993, the Louisiana Supreme Court decided the cases of State v. Leonard Peart and State v. Penny Wiggly and Robert Earl Higgenbotham.

In Peart, an assistant public defender in New Orleans sought relief for an overwhelming caseload. In Higgenbotham and Wiggly, court-appointed counsel raised questions regarding the right to compensation and to be reimbursed for expenses.

The Louisiana Supreme Court found merit in both cases and recommended legislative action. The Court in Peart stated,

"If legislative action is not forthcoming and indigent defense reform does not take place, this court, in the exercise of its constitutional and inherent power, and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel."

In December 1993, discussions were held among the three branches of government, IDB attorneys, and the private bar regarding how best to approach the problems with indigent defense services in Louisiana. In January 1994, the Governor appointed a task force and asked Chief Justice Calligaro to chair the body. During the course of the deliberations of the Task Force over the last three months, a recommendation was made that the Louisiana Supreme Court prepare a draft rule to address the overall problems set out in the IDB study and the two cases decided by the court. After several drafts, the full task force recommended that the final rule prepared by the court be adopted and that \$10 million be sought during the current legislative session to double the funds for indigent defense in Louisiana.

The proposed rule in its current form would create a statewide indigent defender board to be responsible for establishing standards and

guidelines for the operation of the indigent defense system throughout the state. Special emphasis would be given to death penalty cases and non-capital appeals. Local IDBs would be encouraged to submit requests to the state board for additional funds subject to the opinion of the board that the local IDB had met all of the new standards and guidelines promulgated by the board.

As we go to press, we are awaiting a final decision of the Louisiana Supreme Court in regard to the rule and the creation of a board and an effort to obtain funding from the state.

* * *

The petition and proposed rules currently being contemplated in Indiana, Tennessee and Louisiana, if promulgated, would be to our knowledge the first time that a state supreme court has exercised its constitutional, statutory

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Reform, continued

and inherent authority to address the problems of the local indigent defense system. It is the hope in Louisiana that the legislature will respond favorably to the rule and the request for funds and will over the next two years enact appropriate legislation that meets the requirements of the rule and provide adequate funds. We will give you an update of all three petitions and any other new efforts in this area in our July report.

State Court Caseload Growth

Recent data compiled by the National Center for State Courts and presented in the State Court Caseload Statistics: Annual Report 1992, shows that over 93 million cases were filed in state trial courts in 1992, of which 19.7 million were civil, 13.2 criminal, 1.7 juvenile and 59.1 were traffic and ordinance violations.

The level of filings represents an increase from previous years' levels, except for traffic, which dropped by 5% since 1985. The National Center attributes the primary reason in the drop in traffic filings to decriminalization of minor offenses.

Over this same seven-year period, however, civil filings grew by 30%, criminal by 25%, and juvenile by 35%.

The increase in criminal filings was driven by a rapid 65% growth rate of felony caseloads since 1985. For 33 states with available data, felony filings reached 1.11 million in 1992, up from 1.02 in 1990 and .67 million in 1985.

While some states, such as Connecticut, Maine, Massachusetts, New Jersey and New York all experienced declines in felony filings since 1990, these drops were offset by dramatic growth of filings in states such as California, Indiana and North Carolina whose levels doubled since 1985.

Unfunded Mandates Newsbrief

Over the course of the last decade, the federal government has enacted several far-reaching nationally mandated acts, such as the Clean Air Act, Clean Water Act, and the Solid Waste Removal Act which, while important and progressive, have placed an immense budgetary strain on state and local governments.

For many local governments, compliance with the federal mandates often entails such things as, reconstruction of sewer and disposal systems and upgrades of public transportation. Such large-scale projects are expensive and time-consuming, and, although are mandated by the federal government, must be financed solely by local funds.

According to the 1993 study, Impact of Unfunded Federal Mandates on U.S. Cities, issued by the U.S. Conference of Mayors, the cost of unfunded mandates to city governments for 1993 was \$6.5 billion, and is estimated to reach \$54.0 billion by 1998. The Clean Water Act alone costs an estimated 3.6 billion to Cities. For the City of Columbus, Ohio, for example, "compliance with environmental mandates is projected to require 23.1% of its total budget." And according to columnist George Will, Newark, New Jersey spends about 11% of its budget on public safety and about 11% on federal mandates.

The American Disabilities Act is one federal mandate familiar to justice system personnel. The requirement to provide "reasonable accommodations" in all court buildings and police stations has, according to the Conference of Mayors' report, cost cities almost five million staff hours and over \$355 million in FY 1993, with projected costs of more than \$2 million between FY 1994-98. One especially taxing clause of the ADA's provisions is the requirement to provide trained interpreters in the courts. This unfunded mandate has caused such a stress on many court systems that state's such as Maryland have named it as the biggest contributor to fiscal strain in the upcoming year.

The result of the unfunded mandates has been that local governments have had to put other projects on hold in order to put resources into the federally required projects. The level of concern over this problem caused county officials to name unfunded mandates as one of the leading causes of budgetary stress in the National Association of Counties' 1994 urban county survey, and has prompted the Conference of Mayors to call for a "National Unfunded Mandates Day."