

THE WALWORTH COUNTY JAIL MEETS TLC - AND LOSES

Bill Trine, Faculty Emeritus

This is an inspiring story of how two TLC lawyers used the discovery obtained during the representation of an individual client to then file a class action to force the permanent closure of a county jail in South Dakota, a 111 year old dilapidated ‘fire hazard’ described as a ‘dungeon.’ The story also provides the educational tools and steps that can be used to ethically obtain the clients necessary to pursue such a class action seeking a preliminary and permanent injunction to close the jail; a description of the law and facts supporting the constitutional issues raised; and more importantly, how a heroic client and her lawyer can sometimes discover, and then pursue, the opportunity to make a difference in the lives of many other people.

The Beginning

It all started when a petite and meek mother named Lori Brandner, was expected to operate the family’s bar/restaurant business in a rural community in South Dakota. She had a medical history of failing eyesight and transient ischemic strokes related to a complicated blood coagulation disorder requiring specialty care and a daily regimen of prescription medications. One night after work, a fire started in the bar and Lori was charged with second degree arson, a charge requiring proof of an intent to defraud the insurer. This was Lori’s first and only significant experience with the criminal justice system. She was free on bond until convicted by a jury in February 2016. The evening following trial she was terrified as a kindly deputy transferred her, together with her large satchel of prescription drugs, to the Walworth County Jail.

She was placed in the jail’s decrepit “women’s cell” and was only sporadically provided with her blood thinner medications. A month into her incarceration, her plea to a correctional officer of her fear that she was having a stroke was ignored. She then suffered a stroke in her bunk, but the jail’s intercom system was dysfunctional and could not be used to seek help. The other women in her cell began hollering and pleading with the jailers for help for nearly an hour.

With no response, a phone card was obtained and Lori was able to call her husband to alert him that she needed an am-

balance. Her husband’s plea for help was also ignored as the jail staff was determined to rely on their guts to determine that Lori was a “faker.” So her husband called Lori’s criminal defense lawyer, Brad Schreiber, that evening, and Brad Schreiber called the jail demanding that an ambulance be called. Lori’s lawyer saved her life.

She was hospitalized for weeks after her stroke, and was then returned to the Walworth County Jail. Ultimately, she was transferred to the South Dakota Women’s Prison and was greatly relieved, feeling much safer there. Brad Schreiber specializes in criminal defense, so he referred Lori to Stephanie Pochop, a seasoned and highly respected civil trial lawyer in Gregory, South Dakota.

Stephanie agreed to bring a 1983 civil rights lawsuit on Lori’s behalf for damages resulting from the deliberately indifferent failure to provide medical care at the Walworth jail.

Stephanie discovered that Lori needed very little direction in re-enacting her fear of dying during her stroke with no one able to make the jail staff call an ambulance, and visualizing how her daughters and parents would feel if she died in jail. However, Lori explained that her primary goal was to get the Walworth County Jail closed so that no one else would experience the terror that she had suffered while incarcerated there. She was disappointed when told that she did not have standing to take action to have the jail closed because she was no longer a detainee. But she never gave up, and what her lawyer, Stephanie Pochop, then discovered during the litigation was so shocking that Stephanie was determined to do something.

The Undisputed Facts and What Stephanie Discovered

The Walworth County Jail is well over 100 years old. It was originally built as a sheriff’s residence in 1905 and had been remodeled over the decades to minimally accommodate criminal defendants. In preparing Lori’s case, Stephanie read and summarized all of the Walworth County Commissioner’s published minutes of meetings from 2013 onward, looking for anything related to jail policies and problems. She also hired a law student

to watch, summarize and time stamp over 140 hours of YouTube recordings of Walworth County Commissioner meetings. She contacted lawyers whose clients had ended up in the jail, seeking additional information. In doing so, a common statement made was, “it’s a shit hole.” One person stated, “if you ever wonder what ‘hell’ would be like, go there.”

From the recordings of Commissioner meetings, she discovered the names of expert witnesses that the Commissioners had retained, and the evidence provided by those experts and others condemning the jail and its operation; the recommendations for its closure; and the facts supporting deliberate indifference to ongoing violations of detainees’ and prisoners’ constitutional rights. Armed with that information, she contacted the various correctional facility experts and architects that the County had hired over the years to obtain their expert opinions about the jail.

The crumbling facility was such a fire hazard that the local volunteer fire department came to a County Commissioners meeting and put the County on notice that the department would not be responsible should a fire occur. For years the Commissioners refused to replace a condemned fire escape on the second floor. A small investment of \$17,000 in safety would have made the *padlocked window* that served as the fire door on that floor “safer” but that was never seriously considered. One Commissioner suggested that inmates could jump from the second story into a nearby tree in the event of a fire.

Stephanie discovered that over the years the Commissioners had essentially turned the jail into a profit center by contracting with surrounding counties and the U.S. Marshals service to house prisoners, and routinely voted to increase the fees charged to those entities per inmate. With increased fees each year and savings from the unconstitutional way the jail was operated, the County had accumulated \$5 million plus in savings, no small feat for a very rural county with a small population base.

Expert after expert told the Commissioners that their facility was beyond repair, and described their jail as substandard and dangerous. The County’s own experts and their own States Attorney warned the Commissioners, repeatedly, that they were exposing themselves and the county to liability. Yet for years they ignored the warnings until they finally passed ‘Resolution 2018-09,’ officially recognizing “the need for a new county jail.” The Resolution was placed on the November 2018 ballot, proposing a \$10.5 million bond issue to build a new jail. The bond issue failed, leaving the Commissioners with the only remaining remedy—close the jail and transport all detainees and prisoners to the jails in surrounding counties! This they refused to do, despite all uncontroverted evidence they had received over the years that the jail was outdated, beyond repair, grossly inadequate, and dangerous. The primary reason they refused to do this was the loss of income that would result in closing the jail.

Stephanie was frustrated and outraged, but her successful trial practice had always consisted of representing individual clients. She didn’t know how to effectively seek class certification or how to ethically find plaintiffs with standing to file a class action.

She had been able to obtain a damage settlement for Lori, but she and Lori wanted to do more. So Stephanie reported her evidence to the Department of Justice, hoping it would take action because the U.S. Marshals office had a contract with the County to house their inmates in the jail. She didn’t hear back, though at some point the U.S. Marshal’s contract with Walworth County was cancelled.

Enter Jim Leach

Then one day her friend, Jim Leach, a graduate and former teacher at TLC, called and said he and his wife Ann were driving through her part of the country, and they agreed to meet and ‘catch up.’ Stephanie passionately related her Walworth County Jail story to Jim. To her relief, Jim soon contacted her and said he was interested in the case and was willing to review the more than 2,500 pages of materials she had accumulated. Stephanie reported that “the next thing I knew, Jim was burning up a beautiful summer weekend to drive across South Dakota to go to the Walworth County Jail to interview potential clients. Then he sent me a draft of the Complaint that we would jointly file with the United States District Court.”

In reviewing the documentary evidence supplied by Stephanie, Jim recognized that the County Commissioners’ recorded meetings and retained experts had already supplied all of the damning evidence necessary to support a Court ordered injunction to close the jail. All they needed were clients with standing to file a class action, and then the filing of a complaint in the Federal District Court for injunctive and declaratory relief—a complaint which would tell a detailed and uncontroverted story that supported the closure of the jail. Jim and Stephanie worked together to prepare a Complaint, then Jim searched for potential plaintiffs presently incarcerated in the jail. He did this by obtaining the names of inmates through a business called Tiger Commissary, which allows family and friends of inmates to buy them junk food and which has a contract with Walworth County. Tiger Commissary posts the names of prisoners on the internet. He was then able to determine the nature of the charges brought against each pre-trial detainee and prisoner by researching South Dakota’s online case docketing system.

On September 5, 2020, Jim went to the jail with a legal assistant to use as a witness, if needed. He asked for admission to the jail to visit with detainees and prisoners. The jailers let him in because he had a South Dakota Bar Association card. Two and a half hours later he had signed up seven clients, all pre-trial detainees. He knew that if he and Stephanie filed a lawsuit only on behalf of the individual pretrial detainees, their release from custody would deprive the court of jurisdiction because, in the eyes of the law, there would no longer be any “case or controversy.” But a class action for the plaintiffs and for all future detainees would solve that problem. Six of the seven clients were Native Americans; Walworth County is adjacent to the Standing Rock Sioux and Cheyenne River Sioux Reservations.

How Jim Ethically Obtained the Clients

Jim carefully explained to each potential client that he was

not bringing a lawsuit for money damages and would not charge them an attorney fee or court costs. The clients would instead be class representatives in a class action to close the jail. If that occurred and they were still detainees, they would probably be transferred to another jail in the area. The ABA Model Rule of Professional Conduct 7.3(b), which South Dakota and most states have adopted, which prohibits direct solicitation of clients, only applies, “when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain.”

The Complaint

The Complaint seeking a Class Action for Injunctive and Declaratory Relief was filed the next day, September 6, 2020, in the Northern Division of the United States District Court in the District of South Dakota. The Complaint carefully details the evidence supporting a permanent injunction prohibiting the County defendants from violating the constitutional rights of people held in the Walworth County Jail, stating that the defendants had been told by their own experts, in great detail, why the jail, built in 1909, “is outdated, grossly inadequate, and dangerous.” The Complaint then tells the story provided by all of the documents and videotapes of Commissioner Meetings previously discovered by Stephanie, including these facts:

- In a 2018 brochure attempting to convince the public of the need for a new jail, the Walworth County Jail Committee, consisting of two of the five county Commissioners and the County Sheriff, posed and answered the question, “Why do we need a new jail?” Their answer was: “It is no longer a safe option for the community, staff or inmates. Unless replaced, there is an overwhelming amount of liability that may cost the county taxpayers millions of dollars due to potential lawsuits.”
- Defendants, on the advice of their States Attorney, chose not to notify their insurer of the condition of the jail, so that the insurer would not cancel their insurance coverage.
- On August 6, 2013, the Commissioners met with Jim Rowenhorst, a correctional expert who has participated in more than 150 projects in 42 states, who described the jail’s inadequacies and advised the Commissioners that: “...federal case law concerning jail facilities and operations makes it very clear that the lack of funds is not a defense to poor facilities and inadequate staff. Those small counties that choose to operate a jail and ignore minimum requirements do so at their own risk.”
- On April 22, 2014, a former Walworth County Sheriff, Duane Mohr, told the Commissioners: “It doesn’t take a

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rocket scientist to go to the jail and see that it needs to be replaced.”

- On March 10, 2015, former Sherriff Mohr told the Commissioners that there were serious problems with a remodel. He pointed out that in one cell there was a ten inch drop in the floor from one side of the room to the other. He believed the County “could figure on a 2.5 million dollar remodel and still have an old building.”
- On August 18, 2015, the Commissioners received a report from Solien & Larson Engineering, P.C. on their findings after their structural inspection of the jail, concluding that it is not feasible “to renovate the structure.”
- On October 6, 2015, Rowenhorst and Dean Marske, AIA, the President and Principal Architect of HKG Architects, Inc, a reputable local architectural firm, met with the Commissioners and asked them what they wanted to do with the jail, stating that “doing nothing is not an option.” There was discussion of building a jail

in a nearby town, “closing the jail,” building a regional jail, “or doing something for only Walworth County inmates.”

- On January 17, 2017, Commissioner James Houck stated that the jail “is falling apart and we need to do something about it right now.”
- On February 7, 2017, Marske and Matt Beaner with Kyburz-Carlson Construction met with the Commissioners

to present preliminary plans for a new Walworth County jail facility and discussed the steps to move the project forward.

- On April 4, 2017, Rowenhorst told the Board that the County’s options are to close the jail and transport the inmates elsewhere, or to build a new facility.
- On June 7, 2017, Brad Hompe, a correctional expert associated with the National Institute of Corrections, met with the Commissioners and told them that he was “shocked with the condition of the facility and working condition of employees.” He stated that the “facility was very outdated and could no longer support your needs.” He recommended that they “pursue the option to purchase a new jail.” The video of the meeting reflects Hompe’s actual remarks to the Commissioners: “I have to be very brutally honest with you. I am shocked to say the least about the condition of the facility ... ; there is absolutely no question in my mind that you have to do something ... ; your liability is through the roof. I cannot believe that you haven’t had significant litigation already”; “I’ve never seen anything like it to be honest with you. It’s beyond anything you can do structurally-wise or remodeling”; “Anybody that’s in the middle of a fire,

they're not going to be able to last long in there; "You've been made aware of the situation as a Board and I think you've got some county and personal liability at this point if you don't do something, that could be considered deliberately indifferent"; and, "If you choose to ignore it, and someone decides to take you to federal court, it is my belief that you're going to be in big trouble."

The Complaint then summarizes Hompe's written report dated June 21, 2017, which is 25 pages long and describes all of the jail's many deficiencies that make it unsafe and in need of either replacement or shutting down, including fire exit problems; booking area problems; requiring inmates to strip in front of a camera that is recorded and visible to staff; no exercise or program space; no space for healthcare or provisions for onsite medical services; inadequate food service; failure to meet inmates' basic needs; inadequate training of staff and supervision of inmates; unsanitary facilities and mold; presence of pests or vermin; inmates on suicide watch have no intercom; and "inadequate or contaminated ventilation."

The findings, observations and opinions of Brad Hompe become more powerful and believable when the Complaint explains that his employer, the National Institute of Corrections, is an agency within the Federal Bureau of Prisons that is headed by a Director appointed by the U.S. Attorney General, and the Federal Bureau of Prisons is a federal law enforcement agency under the United States Department of Justice. This lends great credibility to the Complaint allegations.

On November 7, 2017, the Commissioners again heard from Brad Hompe who told them they had only two options, "to build a new facility or to close the current jail and no longer provide inmate detention in Walworth County."

In drafting the Complaint, Jim and Stephanie then state that despite all of the expert opinions and information provided to the Commissioners in years 2013 through 2017, in December 2017 and January 2018 the Commissioners approved *seventeen* two-year contracts with South Dakota counties to house their prisoners for \$95 per day, and "continue to house prisoners from other counties pursuant to similar contracts."

A Judge reading this Complaint would have to be impressed with the evidence that would be available to the plaintiffs at trial based on the story being told by the defendants' own experts and witnesses. The Complaint then describes even more shocking evidence to support the Plaintiffs' claims. On June 19, 2018, Hompe again spoke, this time at a meeting in the Walworth County courtroom.

The Commissioners were present, as was the public. Hompe stated, in part:

- "Your old jail ... simply does not meet federal law, national correctional standards that are acceptable in the community anymore."
- "I think the bigger issue is that you have overwhelming life safety issues there, not only for the inmates but for your staff and the community."
- "The bottom line is that the facility no longer meets the needs and is, in my mind, as a person in this business for 25 years, it *should no longer be used*."
- "The bottom line is that it does not meet standards, and the *overwhelming liability* is the biggest problem because it's not a matter of if, it's when you are going to have a lawsuit because of what you have and not doing something about it and it won't be a couple hundred thousand or even a couple million, it will be millions."
- If the Commissioners don't make a decision to do something,

"they're *deliberately indifferent* meaning they ignored the issue. In Federal court you'll be *found guilty of that and you will pay dearly*."

Faced with years of overwhelming evidence of the need to eliminate the present jail and to either stop operating it or to build a new jail, the Commissioners passed a resolution to place a proposed bond issue on the November 2018 ballot to build a new jail. The Commissioners then met with the Walworth County

States Attorney James Hare to decide what to do if the bond issue failed. Hare informed them that if they kept the jail open and the insurance carrier canceled insurance because of the risks and they continue to operate the jail, "there's going to be a lot of exposure on this county" ... "and you can all be held personally liable."

Before the election on the bond issue, the Walworth County Jail Committee drafted and circulated a brochure urging the passage of the bond, which states that the jail "design is outdated and unsafe, ... and cannot meet Federal laws."

The expert, Hompe, then prepared a slide presentation to support the bond issue explaining why the jail does not meet Federal law and must be replaced.

The bond issue was defeated, but the jail was not closed. It continued to be a profit center for the County.

The Complaint concludes, alleging that operating the jail violates the Fourteenth Amendment right to due process of law of the people held in the jail or people who will be held in the jail before the lawsuit is concluded; a demand made for permanent declaratory and injunctive relief to remedy the unconstitutional

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conditions under which the class is confined; and for attorney fees and costs.

Motions

Despite the raging pandemic in South Dakota, on September 30, 2020, immediately after the defendants filed their Answer, Jim and Stephanie filed a Motion for Expedited Hearing on Class Certification, Expedited Discovery Schedule, and Expedited Hearing on Motion for Preliminary Injunction; a Motion to Certify the Class; and a Motion for Order Shortening Defendants' Time to five days to respond to plaintiffs' motions. A lengthy persuasive brief in support of these motions was also filed, again describing the shocking years of the County Commissioner's unconstitutional misconduct and the expert testimony that the jail must be closed or a new jail constructed.

The End

The defendants immediately refused to totally shut down the jail, wanting to use it only for short-term detainees. In response, Jim and Stephanie noticed the Commissioners for depositions. This caused the defendants to finally give up and enter into a Settlement Agreement which provides in part:

"a. Walworth County and the individually named Defendants agree, swear and promise that they will never incarcerate, house, hold, or detain any person in the current Walworth County Jail, or any part of it, for any amount of time whatsoever, no matter how brief. This agreement, oath and promise applies fully and completely even if Walworth County re-names the current Walworth County jail, or any part of it, a 'detention center,' a 'holding center,' a 'temporary holding area,' or anything else."

"b. Walworth County agrees to pay \$91,000 to James D. Leach and Stephanie Pochop by November 12, 2020" for attorney fees and costs. This was paid by the County and not the insurance company.

All inmates, both detainees and convicted prisoners, have now been transferred to facilities in other counties in South Dakota, and the jail is permanently closed, thanks to the heroic and courageous efforts of Jim Leach and Stephanie Pochop, and the initial persuasive concern of Stephanie's client, Lori Brandner. This is a classic example of "Ways in Which Trial Lawyers Make a Difference." See article by that title in the Fall 2016 Issue of the *Warrior Magazine*.

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Epilogue

Stephanie reports that after serving her sentence in prison, Lori Brandner "put her life back together; she pushed herself mightily to rehabilitate her physical health," she learned Braille to help compensate for her failing eyesight; she obtained an academic degree; and "she started a non-profit that offers services to help other women as they learn to become independent." She happily celebrated the closing of the jail when informed of the legal victory by Stephanie.

Stephanie Pochop attended the TLC in July 2019 and worked on Lori's case while at the college. She states that this was "immensely helpful." In forcing the defendants to close the jail, she felt euphoric for weeks thinking, "This is why I went to law school." She fulfilled her promise to Lori "that I would not give up trying to get the jail closed—and Lori stayed in contact with me to remind me of my promise."

Jim Leach attended TLC in 1994 as a trial lawyer with a background in psychodrama. He then served on the teaching staff for years, leading groups in psychodrama and teaching trial skills. He has been a successful trial lawyer in South Dakota and encouraged Stephanie to attend TLC in 2019. Jim is a wonderful, caring person, a great trial lawyer and my friend of 25 years. He has now been invited to return to TLC's faculty, has accepted, and plans happily to continue to be a part of TLC in the future.®

Bill Trine lives in Boulder, Colorado with his wife, Jeni. He has retired from the practice of law, where he was a proud and active trial lawyer for 55 years. He is a past president of the Colorado Trial Lawyers Association, a founder and past president of the Washington D.C. based Trial Lawye for Public Justice (now 'Public Justice'), and on the Board of Directors of the Florida based Human Rights Defense Center which publishes Prison Legal News. He served on the teaching staff of the Trial Lawyers College from its inception in 1994 until his retirement in 2015, but continues to be active in the College as an Emeritus member of the Board. He is the co-author of a bestselling book for lawyers, and the author of more than 75 published articles regarding the practice of law.

