

From My Vantage Point

Measured Progress: Steps Toward Reform Must Include Independence

by Jonathan E. Gradess*

We Are Making Progress

Governor Eliot Spitzer's budget declares a direct role for the State in monitoring and improving public defense services. Issued in a very tight fiscal year, the budget includes \$3 million for an office to examine and make recommendations for solving the problems in New York's county-based public defense delivery system. Indigent Legal Services Fund (ILSF) money distributed by the Comptroller would be capped at \$72 million so that this new office could distribute the rest according to a plan it would develop.

Before evaluating limitations with the Governor's proposal, let us stop and celebrate the progress this bill represents.

In 2001, we published a paper addressing the ongoing public defense crisis—manifested most clearly then in the fallout from stagnant assigned counsel fees. Soon thereafter, I wrote in this column that there had been “widespread acceptance of our first four recommendations” regarding the need to raise fees. We didn't get everything we wanted, of course, but under 2003 legislation fees did go up, in-and out-of-court differentials were dropped, and State money has been flowing to localities based on overall public defense spending, not solely assigned counsel fees.

In pressing for our fifth recommendation—creation of a statewide Independent Public Defense Commission to create standards and distribute state money to localities—I wrote that the moment for reform occasioned by the fee crisis would not easily return. In that belief, I was fortunately wrong.

Chief Judge Judith S. Kaye made good on a promise not to let public defense reform die once fees were raised. In 2006 the Kaye Commission issued recommendations *exceeding* our own. It called not only for a statewide Independent Public Defense Commission controlling state funding for public defense, but for such a commission to head a statewide, fully state-funded public defense system.

In 2007 a bill to implement the Kaye Commission recommendations was introduced and is pending in both houses of the Legislature. Thus, two of the three branches of government had as of last year engaged not only on the need for the State to accept its responsibility to ensure quality public defense representation but on the core issue of independence.

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We welcome the current Executive's recognition that the State must step up with regard to “widespread problems” in public defense. We understand that members of the administration, new to this issue, want to study the problems—and the cost and possible designs of any solutions—from an executive branch viewpoint. We believe that any thorough study will lead them to conclude, as did the Kaye Commission, that “[t]he delivery system most likely to guarantee quality representation to those entitled to it is a statewide defender system that is truly independent, [and] is entirely and adequately state-funded”

Independence Remains Key

As I wrote in 2001, “creating an independent Commission will protect constitutionally and statutorily required legal services from control by those with conflicting interests and provide a single, accountable entity to whom any and all concerned groups can turn when quality representation is not being met.”

Independence of the defense function is recognized as a key principle by more than just NYSDA and other defense agencies and advocates. The American Bar Association, with a broad general membership including prosecutors, judges, and civil practitioners, has made independence a leading standard for provision of public defense services. The New York State Bar Association, which received the ABA's Harrison Tweed Award for creating and adopting “Standards for Providing Mandated Representation,” places independence at the top of its list of requirements.

This is not news to those of us working in public defense, or those who follow public defense issues. But it bears repeating as we look at the Governor's proposal. For while we are delighted that all three branches of our State government are now engaged on the issue of needed public defense reform, we are troubled that the Executive—the branch that prosecutes criminal cases and administers programs that act to deprive clients in Family Court of parental rights—has yet to recognize independence as a core principle for providing public defense. The Article 7 bill to create an Office of Indigent Defense Services (OIDS) gives the Governor unfettered power to appoint an Executive Director for whom no qualifications are established.

Around the state, we continue to see manifestations of a lack of independence of the public defense function at the local level. One Public Defender was not reappointed by the county legislature late last year after refusing to move the office into the courthouse. National standards that say courthouse locations raise issues of client trust and confidentiality were ignored. That Public Defender was replaced by a young lawyer from the District Attorney's office. (A prosecutorial background does not mean a lawyer will not function well as a defender, of

course. The NAACP in Schenectady County, which had opposed the appointment of Mark Caruso some years ago based in part on his prosecutorial background, later gave him an award.) But selection processes that reflect issues of political control rather than client concerns and quality representation do much to damage the vital attorney-client relationship.

An example of this exploded in Monroe County this year. Community outrage over the County Legislature's refusal to honor the merit selection process used to select former Public Defender Ed Nowak thirty years ago made headlines. Bitterness about the manner of the new Public Defender's appointment (press accounts detailed suspicions that the selection was a foregone conclusion) will no doubt make the transition more difficult for him, for his office, and for clients.

These two illustrations stand in for many other examples of the current lack of independence of the defense function across New York.

Embracing the Paradox

I talked about independence and the Governor's bill when I testified recently at the Legislative Budget hearing. I noted that "protecting against executive, legislative and judicial interference paradoxically requires executive, legislative and judicial approval of the concept of independence and insulation for the defense function."

At one level, the paradox is easily addressed. Each branch of government routinely accepts limitations on its power necessitated by the checks and balances built into our constitutional system. But to accept that none of the branches can overly influence public defense requires recognition of its unique nature as a governmental function.

Public defense lawyers represent individuals against the very government that pays for public defense services. Our job is to protect the interests of people who cannot afford protection. We must be held accountable to do that job right. Conflicts of interest are created if the judiciary has any more control over public defense lawyers than over retained counsel, if the executive has control of the resources available to its adversaries, and if the legislature is in a position to punish public defense providers—individually or collectively—for challenging the propriety of laws operating to the detriment of their clients.

When each branch recognizes that limitations on its power with regard to public defense should be embraced as an embodiment of our constitutional system, justice happens. We want to work with the Executive, and continue working with the Legislature and Judiciary, toward that goal.

Dealing with Other OIDS Details

As this issue of the Backup Center *REPORT* goes to press we are putting the finishing touches on our comments regarding the Governor's Article 7 bill. The bill sets out and constrains in sometimes confusing ways a series of duties and powers for fulfilling the office's responsibilities to monitor and improve public defense services. Our concerns include: the limitation to issues regarding representation in *criminal* cases (ignoring the huge impact that Family Court representation has on public defense budgets and functions); a lack of authority to mandate uniform data (such as the definition of a case) and apply standards; ambiguity as to certain powers and duties; and of course the overarching lack of independence. We will be sharing our analysis with the Governor, the Legislature and others, keeping the defense community apprised as well.

Continuing the Call for Independence

In both its Backup Center capacity and as a member of the Campaign for an Independent Public Defense Commission, NYSDA will, with others, continue to advocate for public defense reform that includes the core principle of independence. Comments decrying the lack of public defense independence in the new bill have already been made by the New York State Bar Association and its Committee on Mandated Representation, NYSACDL, and the Committee for Modern Courts. We hope and assume that the Governor and his staff are listening with open minds. ☺

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