

From My Vantage Point

By Jonathan E. Gradess*

Speak With One Voice in 2006

More than a decade of neglect of legal services for the poor by the Executive Branch should soon end. We can take comfort in the fact that whatever disagreements we may have with gubernatorial front-runner Eliot Spitzer's substantive criminal justice policies, I believe as governor he can be called upon to support basic fairness, helping to level the playing field in the public defense system.

But we must do more than outlast the current administration.

Thirty-one months ago, assigned counsel fees were legislatively increased. The change was effective in 2004 with only 50 percent of the projected increase being borne by the State and promised for 2005. The effect of the increase, however, was to move county after county, fearful of higher costs, to join a race to the bottom. Established defender systems, the New York statutory scheme, and existing national standards were disregarded as local cost containment efforts propelled many counties to bypass quality in a search for cheaper delivery models. Three years after the assigned counsel fee bill, we face a fractured, chaotic system. In that chaos, or perhaps because of it, there is hope and opportunity. The defender community must seize this opportunity by coming together to speak with one voice so that changes sure to come in the months ahead constitute real reform.

Movement Toward Reform

During the last three years we have finally seen an increase in state financing of defense services through the establishment of the Indigent Legal Services Fund. The Fund's reporting, though not without problems, has begun to give the first statewide fiscal picture of defense services. During this same period three sets of standards have been promulgated—by the Chief Defenders and NYSDA, the New York State Bar Association, and NYSDA's Client Advisory Board. A bill establishing an Independent Public Defense Commission has been introduced in both houses of the Legislature.

More importantly, Chief Judge Kaye has commissioned a far-reaching inquiry into public defense services. Her Commission on the Future of Indigent Defense Services has held four public hearings, deliberated for a year, and commissioned its own statewide study by The Spangenberg Group. The Commission has reportedly given Judge Kaye a confidential preliminary report widely believed to contain recommendations for meaningful statewide reform of public defense services. If the testimony at each of the hearings—all of which were attended

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by NYSDA staff—and the written testimony provided to the Commission are any indication of the Commission's approach, it is reasonable to assume that defenders from across this state will welcome the Kaye Commission's final report slated for this spring.

If it remains true to evidence placed before the Commission, the ultimate report will reflect current activity by many groups calling for broad reform. Witnesses from across the state suggested the need for an oversight agency to monitor and govern public defense services. Many witnesses in each venue called specifically for the Independent Public Defense Commission. Uniform support was heard for standards, increased state funding, and political independence. Most importantly, a system providing client-centered representation was demanded by defender witnesses, many of whom fell on their sword to show that our current system is a sham.

Meanwhile, the State Bar Association's Special Committee to Ensure Quality of Mandated Representation and the New York State Association of Criminal Defense Lawyers are each exploring oversight mechanisms and state defender systems. It is likely that each would support an entity that coordinated and delivered defender services at the state level and no doubt would throw their respective clout behind a call for a commission empowered to promulgate standards, increase funding and deliver services.

The New York and American Civil Liberties Unions have called on New York State to begin the funding and administration of defense services. The Brennan Center and the National Association of Criminal Defense Lawyers have called for state involvement. The New York State Defenders Association, the Committee for an Independent Public Defense Commission, the Appellate Division Committee on Representation of the Poor, and the *New York Times*, have all called on the State to establish a commission or oversight body. From my vantage point, we—along with the Chief Defenders who voted last year to support the Independent Public Defense Commission—all seem to be in the same chapter, even if we are not on the exact same page.

Defense Unanimity Needed

If there is a threat to public defense reform, it is one that arises whenever an idea reaches critical mass. That threat is a resistance to changing what is known, familiar and established. Our review of the report of the Commission on the Future of Indigent Defense Services and evaluation of competing proposals for state defender systems and commissions may generate forthright internal disagreement. Careful consideration of the structure and design of system reform by defenders, motivated by a good faith desire to protect clients' rights, may produce

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In 1993 the Legislature passed a law requiring a 6-month suspension of the driver's license, or a 6-month delay in eligibility for a driver's license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, chap. 533). The sunset clause of this legislation has been extended from October 1, 2005 to October 1, 2007.

➤ **Chap. 577 (S.5280) (Sunset Extended—Closed-Circuit testimony of child witnesses). Sunset extended to September 1, 2007.**

Extends the sunset clause of CPL Article 65 relating to the closed-circuit testimony of certain child witnesses from September 1, 2005 to September 1, 2007.

➤ **Chapter 56 (A.6840) (Omnibus Sunset Extender). Extends the sunset clauses of the following programs and laws:**

Jenna's Law (1998) and Sentencing Reform Act (1995): (Sept. 1, 2009)
Correction Law Article 26-A—SHOCK Incarceration Program (Sept. 1, 2007)
Correction Law § 805—Earned Eligibility Program (Sept. 1, 2007)
Correction Law Article 26 (§ 851 et seq)—Temporary Release Programs (Sept. 1, 2007)
CPLR § 1101 (f) – Fees for inmate filings (Sept. 1, 2007)
Penal Law §§ 205.16, 205.17, 205.18, 205.19—Absconding offenses (Sept. 1, 2007)
Penal Law § 60.35 – No waiver of mandatory surcharge (Sept. 1, 2007)
Executive Law § 259-r—Medical Parole (Sept. 1, 2007)
Correction Law § 189—\$1 weekly incarceration fee (Sept. 1, 2007)
Correction Law § 2 (18)—ASAT (Sept. 1, 2007)
Executive Law § 259-a (9)—Parole supervision fee (Sept. 1, 2007)
VTL §1809—Mandatory Surcharges (Sept. 1, 2007)
VTL §1809—Ignition Interlock Program (Sept. 1, 2007) ☺

Immigration Practice Tips

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crime even in some situations where a state or local court has vacated or reversed the conviction.

The bill would amend the immigration laws to allow the federal government to ignore certain vacatur or reversals of a criminal conviction by a state or local court, including vacatur or reversals based on unlawful failure to advise the immigrant of the immigration consequences of a guilty plea. [§ 613]

Due to these and other potential changes in deportation laws relating to accusations of criminal conduct,

defense practitioners advising non-citizens currently accused of crimes and considering guilty pleas may wish to counsel that the noncitizen or noncitizen's lawyer consider making a statement on the record during any plea allocution indicating that the plea is based on the defendant's understanding of current immigration law. This may give the defendant a basis for later moving to withdraw or vacate the plea should HR 4437's crime-related provisions become law in 2006.

In the New York delegation, those voting in favor of H.R. 4437 were: King (R-03), Fossella (R-13), Kelly (R-19), Sweeney (R-20), McHugh (R-23), Boehlert (R-24), Walsh (R-25), Reynolds (R-26), Higgins (D-27), Kuhl (R-29). Those voting against the bill were Bishop (D-01), Israel (D-02), Ackerman (D-05), Meeks (D-06), Crowley (D-07), Nadler (D-08), Weiner (D-09), Towns (D-10), Owens (D-11), Velazquez (D-12), Maloney (D-14), Rangel (D-15), Serrano (D-16), Engel (D-17), Lowey (D-18), McNulty (D-21), Hinchey (D-22), Slaughter (D-28). Not voting was McCarthy (D-04). H.R. 4437 now goes to the Senate, which is expected to take up consideration of similar measures in early 2006. ☺

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alternate views within the defender community. While full airing of any divergent views is healthy and productive, nitpicking and entanglement in trifling details is not and will certainly stall any reform. As we deliberate on the particulars of reform measures, we must not, as a community, be distracted or diverted from our primary goal—statewide reform. This call, made before, has never been more urgent.

There is a need for unity in 2006.

Our clients—those we represent inadequately today because of resource deprivation and those we will represent tomorrow in a reformed system—have the right to demand our allegiance to change. The *status quo* is not acceptable. The current system is broken. The New York public defense system must be replaced.

In many struggles over the years, I have been warned that the "perfect" must not become enemy of the "good." That advice is worth remembering in 2006 as we go forward together. My wish for the New Year is that we live out our common commitment to our clients. We have reached critical mass in New York; there is consensus for reform. Let us not bicker away our chances, stumbling on details. Let us not allow our differences to be characterized by our opponents in such a way that we are separated from our cause. Let us not focus on trees while the enemies of our clients clear-cut the forest.

Let us find the way to speak with one voice as together we transform our public defense system. ☺