

From My Vantage Point*

by Jonathan E. Gradess

Wanted: An Independent Commission to Oversee Public Defense Services

We have received positive feedback on the recommendations in our position paper to the Task Force to Study Compensation Rates for Law Guardians and Assigned Counsel (discussed in the last issue of the *REPORT*). There has been widespread acceptance of our first four recommendations—that the Legislature should: raise assigned counsel fees; index the fees to the cost of living; reject existing and proposed differentials for different types of work, along with per-case caps; and provide State funding for the fee increase without harming other public defense providers.

There has also been substantial agreement with our fifth recommendation, echoing the report of the First Department Committee on Representation of the Poor, for an independent statewide Public Defense Commission. 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. How and when to implement this recommendation is the subject of many ongoing discussions, and the venue for some disagreement.

As a matter of immediate need, some lawyers and judges are saying simply, “Show me the money.” They would have public defense reform via creation of a Commission wait for another day. But the signals from Albany indicate that a state-funded increase with no strings attached is unlikely.

Why Push for an Independent Public Defense Commission Now?

As one public defense lawyer observed, “Horrible things are already happening to public defense. Maybe this is the time to get something better.” For many clients, things cannot get worse. For many others, things are so bad that a risk to improve them is worth taking. The depths to which public defense has sunk is detailed in the transcripts of the hearings the League of Women Voters of New York State and others have held with us across the state (available on our web site). It is set out in the papers accompanying the recent motion filed in the NYCLA lawsuit (see p. 4). We see it every day in the files and on the desks of the Backup Center where our small staff struggles to staunch a flood of requests for help from

* The *REPORT* will periodically feature a column by the Association’s Executive Director on major issues concerning public defense in New York State.

dedicated public defense lawyers overwhelmed by too many cases, too little time, and too few resources.

Some say that by our call for an independent public defense commission, we may help create a governing entity we will all rue. But we are convinced that state funding will result in the creation of some type of oversight entity—which we must work to ensure is independent.

This Moment Occasioned By Crisis Will Not Soon Return

The Backup Center opened its doors in 1978, became State funded in 1981, and has been working to improve the quality of public defense services ever since. We have studied local systems and made recommendations. We have identified statewide problems and made recommendations. We have analyzed every budget, advocated for reforms, proposed new formulae for improvement. We have helped more than 20,000 lawyers prepare their cases. We have trained lawyers, implemented computerized case management systems and other technological aids for public defense providers, and tried to fix this ever-breaking, fiscally-bankrupt, politicized system. Things are worse now than when we began.

The moment for change is now, not because government has finally reached out to comprehensively fix these things but because a broken cog has temporarily slowed the wheel that ordinarily rolls over our clients. The assigned counsel fee crisis has reduced the number of lawyers needed to move cases through the system, and the Legislature is looking in our direction.

State officials are poised to act, because they must act on assigned counsel fees. And so we are letting them know that that they must do more than reluctantly spend money, they must act to ensure quality.

This moment for reform, occasioned by crisis, will not easily return. The timing could be better for us, but I believe the opportunity for systemic reform will be lost if we merely acquiesce in whatever is proposed by the Task Force. I also believe that if we do not pursue our vision of oversight we will invite oversight that will be adverse to the interests of clients and the defense community.

Oversight Is Promised, and It Threatens to be Harmful if We Don’t Demand and Achieve Independence

I believe that when state officials say they want to “monitor services,” “provide oversight,” and establish



“mechanisms to insure accountability and efficiency,” they are focused on cost containment, not assurance of quality. When they refer to a fiscal “watchdog,” I fear that they mean one that slashes costs, not barks at malpractice. Despite the millions of dollars drained from the State treasury for the prosecution function, fiscal “accountability” has never been required for prosecutorial expenditures. Such plans are reserved for the belated, proportionately small amount being discussed for defense services.

Obviously, nothing is inherently wrong with fiscal accountability; no one endorses waste. Our fear, however, is that political control of state public defense will undermine quality. Voucher cutting, county attorney standing to appeal extraordinary fee claims, limiting appointed lawyers’ use of experts to those experts employed by the government are all within the sphere of current legislative consideration. As desperate as is the need for more money, more money tied to that kind of oversight will bring no genuine relief.

When we call for oversight, we mean something quite different than undifferentiated cost containment. We support the cost containment of reducing genuine waste, inefficiency, and fraud. We oppose the “cost containment” of lowering eligibility standards so fewer clients need be served. We call for oversight that will require localities to provide high quality services, that will re-form impoverished structures that fail to provide such representation, and that will fiscally support those systems that do provide such representation. We call for oversight that will establish standards designed to support all counties in moving toward higher levels of individual, efficient representation.

Efficiencies will come from systematically requiring local programs to apply uniform standards to their work and funding jurisdictions that meet those standards. Such standards will support systems where there are healthy attorney client relationships, thoroughly investigated and legally researched cases, utilization and financing of experts needed to achieve adversarial testing of the prosecution’s case, lawyers ably equipped by training and experience matched to the complexity and severity of the matters to which they are assigned, and a political environment at the local and state levels that will protect the integrity and importance of the client attorney relationship.

Who Should Be On the Commission?

The Public Defense Commission that is to take on this quality oversight should be run by people who understand the nature of public defense work and can contribute to making the system better. Seasoned and distinguished trial and appellate criminal defense practitioners with demonstrated and deep-rooted sensitivity to

the complex issues affecting people in poverty should be included on such a commission. Public defense lawyers with a proven commitment to enhancing the constitutional and statutory rights of clients and the client community should be included. People with confirmed expertise in solving the problems of poor people in the justice system or who demonstrate a long-established commitment to positively addressing the need for adequate legal representation should be included, along with former consumers of defense services. Those who administer or have administered public defense systems and lawyers from private law firms with an established and demonstrated commitment to resolving problems associated with the representation of low-income people should all be considered.

Obviously, no judge, prosecutor or others whose positions create a conflict of interest or place them in an adversarial relationship to the defense, and no law enforcement official should sit on the Commission. And the Commissions’ membership should reflect the geographic, racial, ethnic, gender and cultural diversity of the state’s public defense clients.

How Can This be Accomplished?

We propose a Commission accountable fiscally to the State, housed in a public benefit corporation, and appointed by the Governor, Legislative leaders and the Courts from a pool of candidates selected by an independent nominating committee based on statutory criteria reflecting the qualifications and restrictions set forth above. The nominating process would be designed to assure experience, competence and integrity. On the nominating committee would sit representatives from statutorily-designated entities such as bar groups and civic and legal organizations, whose competence regarding defense representation, public defense services, poverty, and the criminal justice system would be evident. The nominating committee would consult as needed with others.

The road to an independent public defense commission is strewn with danger. Bringing the right kind of commission into existence will be hard. We know that the fears of our friends are genuine and legitimate. But in our judgment we have to try—now. We invite your help, your comments, even your loyal opposition to any aspect of our plan that threatens whatever positive there is in New York public defense today. Write me, call me, or e-mail me (jeg@nysda.org).

Ending with good news, I report that a survey conducted April 22-25, 2001, by the Albany-based research firm, Strategic Moves, LLC, publishers of the *New York Report*, reveals that nearly 70% of New York’s registered voters support an independent Public Defense Commission. With them and with your help, we are going to try to bring it into being. ♪