



Public Defender Reform Act of 2007: The Process of Reform

By G. Paul Marx

After the Louisiana Constitution of 1974 recognized the right to counsel, the Louisiana Legislature created a State Indigent Defender Board and local boards in each judicial district. The system was built around vouchers. Lawyers were appointed to represent those who could not afford to hire counsel and submitted time charges to the local board for payment. The system required each local board to manage the attorneys and funds at its disposal and largely collapsed under the weight of increasing caseloads, insufficient funding and mounting public criticism. This article explores the challenges confronted in reforming the old system and how the 2007 Public Defender Reform Act¹ came to enjoy widespread support among the often competing interests of the attorneys, associations, and other groups working in criminal justice.

The History of Indigent Defense in Louisiana

The Indigent Defender System adopted in 1974 was primarily intended to provide a mechanism for compensating lawyers who were appointed to represent the indigent in criminal cases. Each local board managed the funds received through warrants and designated court costs, but did not operate as a “public defender office” in the traditional sense. Instead, the boards largely managed money. This structure posed significant problems because the local boards were

rarely involved in managing the public defense systems they funded. Many boards withered away. Others were mismanaged or subject to the whims of special interests. As a result, by the early 1990s, the system had largely broken down with the result, in many cases, being that criminal defendants were receiving ineffective assistance of counsel.

The Louisiana Supreme Court acknowledged these failings in two landmark decisions in 1993. In the first case, *State v. Peart*,² the court, in part, determined that the defendants who were assigned counsel in a particular section of Orleans Parish Criminal District Court received constitutionally deficient counsel, and thus found the existence of a rebuttable presumption of counsel’s ineffectiveness in cases arising out of that section of court. The court noted:

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.³

The court followed *Peart* with another ruling in *State v. Wigley*,⁴ in which the old Louisiana tradition of *pro bono publico* began to meet realities of the

20th century:

We find that in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs. However, a fee for services need not be paid, as long as the time the attorney must devote to cases for which he does not receive a fee does not reach unreasonable levels. What is unreasonable in this context is to be determined by the trial judge in the exercise of his discretion. Such a system will strike a balance between the attorney’s ethical duty to provide services *pro bono publico* and his or her practical need to continue to perform his or her other obligations.⁵

Public recognition of a broken system took other forms as well. The year before *Peart* and *Wigley*, the Spangenberg Group, a nationally recognized research and consulting firm specializing in improving justice programs, released a critical report entitled “A Study of the Operation of the Indigent Defense System in the 19th Judicial District, East Baton Rouge, Louisiana.” Many criminal defense groups also had become vocal in voicing their concerns.

The Process of Reform

The process of reforming Louisiana's public defender system began almost immediately with the establishment of a special Senate Study Group chaired by the late Sen. John Hainkel. However, when legislation proposed during the 1993 legislative session failed, Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr. moved to address the problem. Working with public defenders, the private Bar and the Supreme Court, he prevailed upon the justices to create a State Public Defender Board which would supplement indigent defender offices operating at the district level.

Despite this initial success, further reforms were necessary and slow in coming. In 1998, the Legislature acknowledged the need for reform by renaming the State Indigent Defense Board as the Louisiana Indigent Defense Assistance Board and moving supervision of the board to the Executive Branch with direct reporting obligations to the Governor's Office. However, the new board remained primarily a funding agency, limited to providing special funding assistance to what was essentially a multitude of independent local public defense systems operating at the district level without any uniformity in standards or accountability.

By the early part of this decade, a reform movement for public defense systems developed nationwide with Louisiana showing up as a prime example of the need for reform. In 2002, the American Bar Association (ABA) adopted "The Ten Principles of a Public Defense Delivery System."⁶ The principles identified fundamental criteria to consider when designing a constitutionally sound indigent defense system, which must deliver "effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."⁷ At about the same time, the National Association of Criminal Defense Lawyers (NACDL), the National Legal Aid and Defender Association (NLADA) and the ABA's Standing Committee on Legal Aid & Indigent Defendants started to evaluate the problems of indigent defense services in Louisiana.

Joining these groups in the policy debate were the Louisiana Public Defenders Association and the Louisiana Association of Criminal Defense Lawyers.

In 2004, the NACDL and NLADA issued a report entitled "In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After *Gideon*."⁸ The report identified deficiencies in Avoyelles Parish but also focused on systemic problems statewide. The Louisiana Public Defenders Association responded to this report and the continuing need for reform with a proposal for a new system framed by objective performance standards and modeled after work undertaken by the Georgia Public Defender Standards Council in 2003. At about that time, the Louisiana Supreme Court rendered its decision in *State v. Citizen*⁹ making clear that the need for reform had become dire:

We order that unless adequate funds are identified and made available in a manner authorized by law as expressed in this opinion, upon motion of the defendants, the trial judge may halt the prosecution of these cases until adequate funds become available to provide for these indigent defendants' constitutionally protected right to counsel or take other measures consistent with this opinion which protect the constitutional or statutory rights of the defendants.¹⁰

Momentum picked up in 2005 when the Louisiana Legislature passed SB 623 by Sen. Lydia Jackson. This bill enacted an across-the-board, \$35-per-case court cost, defined a criminal case, and established mandates for districts to report caseload data. The bill also changed the membership makeup of the state board as a prelude to anticipated empowerment with regulatory authority. One of the most important developments was the involvement of the Louisiana State Bar Association (LSBA) in the issue. Then-LSBA President Frank X. Neuner, Jr. of Lafayette set the improvement of the indigent defense system as a

primary focus of the association. Neuner rejuvenated the LSBA's Right to Counsel Committee and recruited public defenders, defense attorneys, prosecutors and state and federal judges in the dialogue about the problems of indigent defense in Louisiana and the need for comprehensive reform. The LSBA, in conjunction with Yale Law School, sponsored a Conference on Public Defense in Louisiana at Springfield in 2006. More than 30 participants, including Supreme Court Chief Justice Calogero, Justice Bernette J. Johnson, Neuner, criminal defense attorneys and academics from across the country, met for two days to discuss, not the current problems in Louisiana, but what was working in other states and might be of benefit to Louisiana. In what is reported as the "strongest" speech ever given by a state judge, at a joint session of the House and Senate, Chief Justice Calogero in his annual State of the Judiciary Address urged lawmakers six times to restructure indigent defense, saying, "I admonish you, simply, to do the right thing."

Late in 2006, the effort to take specific steps began. At the direction of Rep. Daniel Martiny, Greg Riley, senior staff attorney for the House Administration of Criminal Justice Committee, began the process of drafting comprehensive legislation. Weekly meetings and conference calls concerning the nature and scope of the problems of indigent defense and possible solutions became daily meetings and conference calls as Riley drafted sections of the proposed bill, circulated them to dozens of stakeholders for comment and then redrafted and assimilated all of their different perspectives into a bill that complied with the ABA's "Ten Principles." More than 17 formal drafts were circulated during the process.

Act 307 became formally known as "The Public Defender Act of 2007." The effort had been inclusive, and the result is a consensus bill supported by most of the formal groups associated with criminal justice in Louisiana, including the Louisiana Public Defenders Association, the LSBA's

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Right to Counsel Committee and the Louisiana Association of Criminal Defense Lawyers. Input was also received from the Louisiana District Judges Association, the Louisiana District Attorneys Association and national groups like the NLADA.

The 2007 Public Defender Reform Act

The cornerstones of the 2007 Public Defender Reform Act (the 2007 Act) are standards and accountability. Delivery of public defender services to clients takes place at the Judicial District level, and enforcement of standards is conditioned upon providing resources necessary to meet them. The 2007 Act anticipates that the transition of the Louisiana Indigent Defense Assistance Board (LIDAB) to a regulatory board will be a complement to local control by providing that current delivery systems remain unless they fail to meet the performance standards to be promulgated by the new board, which will be called the Louisiana Public Defender Board (LPDB). These standards are based on the job description in the 2006 trial-level performance standards adopted by LIDAB. Respect for the locals is assured by provisions that make intervention by the state conditional, based upon objective criteria, not political schemes. The state will not arbitrarily change local operations. At the same time, the local operations have to comply with well-established best practices and meet current standards to uphold the right to counsel. Public defenders will not be employees of anyone but their clients.

The 2007 Act also provides for the hiring of key personnel, including Louisiana's first chief public defender, who will be responsible for the day-to-day administration of the statewide system. Other key personnel to be hired include a deputy director of training to coordinate trial skills training and other criminal-defense-focused education to improve the courtroom skills of current and future public defenders; a deputy director of juvenile defender services to assure that children receive representation

from specially trained defenders who focus on juvenile defense specifically and have the resources available to meet their unique needs within the system; a budget officer; an information technology and management officer to oversee the development of a uniform system for reporting case-related data from each judicial district and to improve the technology available to public defenders delivering actual services to clients; and a trial-level compliance officer to focus on developing fair and comprehensive methods of performance evaluation for indigent defenders, district chiefs and, where established, regional chiefs.

The LPDB is empowered to establish up to 11 public defender service regions. The 2007 Act allows the LPDB, under certain circumstances, to consolidate districts for efficient, effective and practical service delivery, while still keeping all locally generated funds within the respective districts. Local boards as currently constituted were eliminated and all local judges removed from the system. All duties and functions of the current local boards were transferred to the district public defender who is now responsible for implementing the standards, guidelines and procedures established by the LPDB. All locally generated fees collected in each district will be maintained in that district for the purpose of service delivery. If a judicial district wants to create a local advisory board, the bill provides a method for providing input to both the district chief and the LPDB. However, advisory boards have no decision-making authority in the system.

Essentially, a local program cannot lose any funding under the 2007 Act. The statute paves the way for an increase in both funding and the professionalism of public defenders. For the first time, public defenders will have the opportunity to work toward retirement and health insurance benefits, which are now the exception for them instead of the rule. In districts without a local board or chief, or where the local program prefers to be part of a state system, the law will authorize the district to join a state-sponsored region.

The LPDB will have the authority to create regions where needed and to pool resources so that rural areas can work together on special matters such as capital cases or multiple-defendant cases without bogging down the prosecution.

Professionals in criminal defense can take pride in Act 307's adherence to the ABA's "Ten Principles." The previous system met only one-half of one of the "Ten Principles;" Act 307 meets all of them. This Act is the biggest, most sweeping legislation on criminal justice in Louisiana in 33 years. Nonetheless, it is likely that old problems that have been eliminated will be replaced by new ones that develop as the infrastructure of indigent defense in this state is rebuilt. Consequently, the LSBA and other groups must remain engaged in this critical, quality-of-life issue of the proper functioning of the criminal justice system, including proper vindication of the right to counsel provided by the federal and state Constitutions.

FOOTNOTES

1. La. R.S. § 15-141 *et seq.*
2. 621 So.2d 780 (La. 1993).
3. *Id.* at 791.
4. 624 So.2d 425 (La. 1993).
5. *Id.* at 429.
6. Available at: www.abanet.org/legal_services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.
7. See *id.* at Introduction.
8. Available at: www.nlada.org/Defender/Defender_Evaluation/la_eval.pdf.
9. 898 So.2d 325 (La. 2005).
10. See *id.* at 339.



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- ▶ Wyndham Canal Place (504)566-7006
- ▶ Royal Sonesta Hotel (504)553-2345
- ▶ "W" Hotel French Quarter (504)581-1200
333 Poydras St. (504)525-9444
- ▶ Whitney Wyndham (504)581-4222
- ▶ Loews New Orleans Hotel (504)595-5370

Baton Rouge

- ▶ Holiday Inn Select (225)925-2244
- ▶ Sheraton Hotel & Convention Center (225)242-2600
- ▶ Marriott (225)924-5000
- ▶ Richmond Suites Hotel (225)924-6500
- ▶ Hilton Capitol Center (800)955-6962

Lafayette

- ▶ Hotel Acadiana (800)826-8386 (337)233-8120
Use VIP No. 71 when making your reservations.
- ▶ Hilton Garden Inn Lafayette/Cajundome (337)291-1977

Lake Charles

- ▶ Best Western Richmond Suites (337)433-5213

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- ▶ Clarion Shreveport Hotel (318)797-9900

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The following vendors have agreed to discount rates for LSBA members.

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