

LEGAL SERVICES FOR THE INDIGENT

The League believes that indigent criminal defendants and indigent civil litigants are entitled to legal services at no cost to them in order to provide them with access to the third arm of government – the judiciary. The League has worked to improve the quality of and funding for such services. Since 1998, the League has been working with the New York State Defenders to improve legal representation for the income eligible defendants in the courts of New York State. The League Judicial Specialist, Lenore Banks, was League Liaison to the NYS Defenders Association and a member of the Client Advisory Board. We have worked with New York State Defenders Association (NYSDA) and others to co-sponsor public hearings on the adequacy of public defense programs across the state and as members of the Gideon Coalition. We participate annually in "Gideon Day," to lobby state legislators on the necessity of reform.

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Statement of position

Adopted by the League in 1975:

The rights of the defendant should be protected at every stage of a criminal proceeding. At present, indigent defendants must be provided counsel at full public expense. The quality of defense provided for the indigent should be improved by better training and screening of attorneys. Funding for indigent defense should come from all levels of government.

Recent League Activity

In 2010, the state enacted the Legislature passed a public defense reform bill as part of the Public Protection budget. The bill did not create the Independent Public Defense Commission sought by the League; however, it did create an Office of Indigent Legal Services and an Indigent Legal Services Board in the Executive Branch to monitor, study, and make efforts to improve the quality of services provided under County Law article 18-B, relating to public defenders, legal aid offices, assigned counsel, conflict offices, and representation in Family Court.

The League will continue to:

- Monitor implementation and push for expansion of the Public Defense Reform Act, in concert with the NYS Public Defenders Association;
- Seek permanent adequate funding for civil legal services;
- Seek independence of the Judiciary through expanded recusal requirements and disclosure of corporate campaign contributions to judicial elections, in concert with the Fund for Modern Courts.

Past League Activity

League participated in the 2001 Gideon Legislative Day. League and coalition members urged legislators to:

1. Restore to the budget those public defense programs that the governor cut.
2. Raise the rate of compensation set for assigned counsel and abolish caps on those fees and related expenses.

3. Establish a schedule of state appropriations to subsidize the rate increase so that it would not simultaneously undermine the provision of public defense services by organized providers (public defenders, legal aid societies and not for profit providers).

Also in spring 2001 The New York State Defenders Association released a report: 'Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services'. This report called for similar legislation actions as the Gideon coalition had in their March lobby day.

A lawsuit in New York City, demonstrated how the low assigned counsel fees created a crisis of constitutional proportions in the delivery of public defense services. This resulted in an injunction raising fees from \$25 in court/\$40 out of court to \$90 per hour across the board in the City. Before that lawsuit could be implemented, the Legislature raised fees statewide in 2003 (effective 2004) to \$60 per hour for misdemeanors, \$75 per hour for all other matters.

In the midst of the fiscal crisis of 2003, the Legislature passed a reform of public defense services in New York State providing for an increase in fees paid to some providers, the first increase since 1986. Fees in cases begun as misdemeanors were raised to \$60 an hour, in or out of court. In other matters for which publicly paid counsel is provided, including felonies (other than capital cases), appeals, and family court matters, the fees were raised to \$75. This represented a substantial jump from fees of \$25/hour out of court and \$40/hour in court, though it is well below the \$90/hour rate set in litigation in New York City as described in the previous paragraph. Caps or limits placed on amounts payable per case were unfortunately not dropped, but were increased, as was the cap on fees for investigators and other expert services needed to assist counsel.

An important aspect of the new law was that New York State agreed to support the public defense function by providing a projected 20 percent increase on top of what localities were already paying. The bill also created an Indigent Legal Services Fund in the custody of the Comptroller and the Commissioner of Taxation and Finance. Four revenue streams were to feed this fund, expected to generate an estimated \$65 million per year. Of this, \$25 million was designated for law guardian payments, the remainder to be distributed pursuant to a formula to counties and the City of New York. The state funds were not earmarked for the assigned counsel fee increase.

The law did contain a 'maintenance-of-effort' provision that requires localities to use state money to improve the quality of public defense, stipulating that as long as the funds are used to improve the quality of the local public defense system (public defender office, assigned counsel program or legal aid society), localities may use these funds as they see fit. In order to receive state funds localities must certify that they spent the same amount in the preceding fiscal year as the year before, unless they can demonstrate a measurable increase in quality. For the first time in New York State history, the examination of the use of experts and investigators, caseload limits, training, resource and similar issues is part of the funding calculus.

The fee increase, while welcome, did not constitute needed reform. Real oversight, with standards by which to measure public defense services, still does not exist.

The long-standing crisis in public defense -- overwhelming caseloads, delay in representation, etc. -- did not end with the fee increase for assigned counsel passed by the Legislature in 2003 (effective in 2004). That legislation did provide for eventual payment of some state funds to counties, funds that

were not earmarked for assigned counsel fees but are to be used to improve public defense of any type. However, counties received no state money as a result of the legislation until 2005. That delay, along with uncertainty about the amount of state funds that would be ultimately forthcoming as a result of that legislation and about how those state funds would be distributed, caused chaos in counties. Focusing almost exclusively on cost rather than on quality of defense services, half the counties in the state considered changing their mechanisms for providing counsel, and many did. Now, questions are arising about whether state funds are being used, as the legislation requires, supplementing, and not supplanting county expenditures, to improve the quality of representation that public defense clients receive.

Public Defense Reform

The League has participated for several years in "Gideon Day," the annual observance of the right to counsel case *Gideon v Wainwright*, educating legislators and the public about the need for and problems in our public defense system. In 2003, the League joined the New York State Defenders Association (NYSDA), the New York State Community Action Agency Association, and the Committee for an Independent Public Defense Commission in co-sponsoring a Gideon Day Client-Defender Speak Out. Testimony at that Speak Out again illustrated the need for public defense reform.

In the 2004 and 2005 legislative session, the League was involved with NYSDA and other groups, in hearings held in specific client communities. The League and other groups concerned about quality have sought to keep up with the effects of the 2003 legislation and continue to advocate for improvement in the quality of public defense.

On March 11, 2005, League's Judicial Specialist appeared before Chief Judge Judith Kaye's Commission on the Future of Indigent Defense Services to present the League's views on reform of the present New York State public defense system. Later in March, the Gideon Coalition, of which the State League is a member, went to Albany to demand reform of the state's public defense system.

Independent Public Defense Commission

In 2002, the State League made "Establish an Independent Public Defense Commission" a priority on its Legislative Agenda. Such a commission would protect constitutionally and statutorily required legal services from control by those with conflicting interests and provide a single, accountable entity to which any and all concerned groups could turn when quality representation is not met. It would act as a conduit for transmitting state funds to localities that meet standards established by the commission.

On July 9, 2001, the Committee for an Independent Public Defense Commission composed of many former legislators who supported the original 1965 legislation setting up the current system of delivery, announced presentation to the governor and the legislature of proposed legislation which: increased the rate of compensation for lawyers providing legal representation to the poor (so called assigned counsel); provided for an increase in state funding for publicly provided legal representation (Public Defenders); and established a public defense commission to oversee the expenditure of state funds and the provision of publicly provided representation.

The public defense commission was to be housed in a public benefit corporation governed by an independent board. The commission was empowered to create and enforce standards regarding the selection, training, workload, and performance of lawyers, as well as eligibility standards of clients. It

would have functioned as the conduit for state financing, fiscally accountable to the state, yet independent of both the executive and judicial branches of government.

The proposal also provided for a nominating committee structure to be chaired by the LWVNYS to help assure independence from both the executive and judicial branches of government. In a letter to the League, July 6, 2001, the chair of the Independent Committee, Michael Whiteman wrote to the League: "We have named the New York State League of Women Voters as one of the members of the nominating committee because we believe your organization represents the kind of experience, integrity and independence that will allow the nominating committee process to succeed."

Under the proposal, the 13-member unpaid commission would have included representatives of the governor, legislative leaders, the New York State Association of Criminal Defense Lawyers, the Vera Institute of Justice, Community Action Association of New York, the New York State Defenders Association, and the New York State Bar Association. It would have been independent of the Department of Criminal Justice Services and the Judiciary and run by a full time director. While the commission would not have had the authority to alter rates - that power would remain with the legislature - it would have established standards for indigent counsel. The general proposal was endorsed by 29 counties through two organizations, the Inter-County Association of Western New York and the Inter-County Association of the Adirondacks. No legislative action was taken on this proposal. In the 2003 legislative session, bills similar to the one proposed by the Independent Committee were introduced. In the 2004 and 2005 legislative sessions, bills were again introduced in the Assembly, but no action was taken in the Senate.

In 2006-2007 a Commission appointed by Chief Judge Kaye to study public defense issued an interim report supporting creation of a statewide independent public defense commission and the final report in June 2006. Release of the final report, calling for a statewide system of defense services headed by an independent commission, engendered statewide public awareness of the need for this public commission. Findings of the commission included: that the system fails to protect defendants' rights, New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the accused indigent.

Recommendation include: establishment of a statewide defense system overseen by an independent commission; this statewide defender office should consist of an Indigent Defense Commission, a Chief Defender and Regional and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense. This recommendation will ensure the delivery of indigent defense services in New York State to insure accountability, enforceability of standards, and quality representation.

The League believes that the Judiciary cannot reform public defense alone. The advent of a new Administration provides what we hope will be a welcoming ear in the Executive on this issue.

Locally and on a state level the League will press for Executive support for state legislation creating an Independent Public Defense Commission in 2008.

The League has advocated for an *Independent Public Defense Commission* to protect constitutionally and statutorily required legal services from control by those with conflicting interests and to provide a single, accountable entity to which any and all concerned groups could turn when quality

representation is not met. The commission would act as a conduit for transmitting state funds to localities that meet its standards.