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REPORT

of

COMMISSION ON THE DEFENSE OF INDIGENT PERSONS ACCUSED OF CRIME

(CODIPAC)

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INTRODUCTION

(CODIPAC)

This Commission was created by Senate Joint Resolution No. 25, introduced May 16, 1966, and passed in the Senate May 31, 1966; and by the Assembly June 15, 1966; and approved by the Governor June 18, 1966.

The Joint Resolution contains no provision for a staff of any kind (other than a direction to governmental departments and agencies to cooperate and furnish assistance), and called for the making of the Report of the Commission "not later than September 1, 1966."

The appointment of members to compose the Commission was completed September 19, 1966. On that date arrangements were made for the Commission's organizational meeting and to move forward as rapidly as possible as the membership had not been constituted until after the due date of the Report.

Following meetings of the full Committee reviewing the voluminous materials already available, a public hearing was held on November 25, 1966. The testimony at the hearing, together with additional material submitted by mail and an exhaustive tabulation of inquiries made of many defender systems throughout the country, was the subject of detailed discussion and debate.

From a full consideration of all these materials, and mindful of the importance of an early submission of its conclusion, the Commission herewith submits its findings and recommendations.

The Commission deeply regrets the sudden loss of one of its members, Assemblyman Nicholas St. John La Corte, who faithfully attended the work sessions and whose efforts are reflected in this report.

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Paragraph 3 of SJR 25 (1966) makes it the duty of this Commission to develop and prepare a comprehensive program for the defense of indigent persons who are accused of crime, under some system or program to be operated at governmental expense. The resolution goes on to enumerate a number of factors which the Legislature wished to have explored. By paragraph 5 of SJR 25 (1966), the Report of the Commission is required to include "a specific proposal for the establishment of a program for the defense of the indigent at governmental expense."

With these two directions in mind as the boundaries of the area to be dealt with, the Commission has arrived at the following conclusions and recommendations:

I. TYPE OF SYSTEM

1. The type of system best suited to the discharge of the public obligation is one which is established as a statewide Defender Office rather than a series of separate county-oriented offices. Such a statewide office would function with centralized policy making, supervision, administration, and research. Field operations, particularly in respect to the appearances in court, would be handled through regional offices. Determination of the number of those regional offices, their location, and the degree of their staffing, the Commission feels, should be left to the statewide Defender Office to decide in the light of the distribution of work load and other pertinent factors.

2. The legislation should include authority in the Defender Office to retain counsel for indigents to serve on a case basis (aside from its own permanent staff) in cases where the matter calls for some special experience or skill, or where there is a need to meet a peak load demand beyond normal level or where potential conflict with the positions of multiple defendants requires that there be separate and independent representation.

3. There should also be authority given to the Defender Office from time to time to enter into contracts with private organizations which are equipped to provide some part or all of the service as occasion may require. These authorizations would be especially valuable in the very early stages, since it will make it possible for the Defender Office to begin rendering service almost at once in a number of areas, even though it may be some time before it has completed its own organizational operations and successfully recruited and engaged in its own permanent staff.

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4. In all instances these authorizations will add considerable flexibility and will make it possible for the Defender Office to plan the size of its staff at a conservative level, thereby avoiding the danger of over-staffing. This risk would be high in the beginning because so many details remain to be developed.

II. STATE TO PROVIDE FUNDS

The Commission has concluded that the cost of providing the service of the Defender Office should be borne entirely by the State without any provision for apportionment either of the entire cost or of any part thereof among the Counties.

The reasons for this go both to quality and cost of the operation. An arrangement in which the expenses are shared would inevitably involve a division of responsibility as well as increased overhead.

If it were possible to keep a complete separation between the structure and operation of the system on the one hand and the financing on the other, there would be room to give consideration to a system of cost sharing, assuming that some useful purpose were to be served by such sharing. Extended discussion of possible formulas for sharing and of the quid pro quo which the counties would expect in return made it perfectly clear that it would be unrealistic to expect the mode of operation and its cost to be independent of the source of financing.

The point that cannot be overlooked here is that the type of service to be performed by the Defender Office will be unique. Our judicial system is adversary in nature, and it must be the prime object of a defender system to approximate as closely as possible the service that would be rendered to the accused by private counsel engaged, even though the defender system is paid for by the public, which also pays for the police and the prosecutor who press the charge of guilt. All other considerations must be subordinated to this object.

It is legitimate, of course, to look for ways to achieve economy in the operation of such a system, so long as the quality and uniformity of the service are not thereby compromised. This, it seems clear, can best be accomplished through the structure of a single system for the entire State, designed to concentrate on the service to be rendered at greatest feasible efficiency, and with as little as possible of collateral burdens such as would be involved in dealing with twenty-one separate boards of freeholders.

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A pertinent question in regard to sharing of cost is what such a feature would tend to accomplish in terms of the service to be rendered. It is evident that a sharing of cost has only to do with the question of how much revenue the State or its governmental subdivisions are called upon to raise, and has nothing to do with the system itself, which must be designed to serve the individuals represented, and not the State or the Counties or, for that matter, the municipalities.

In addition, the aggregate cost involved is not of such dimensions as to justify the unproductive burden which would be imposed upon the system staff in having to deal with the counties. In the end, with the whole cost met from State revenues, the whole public will bear the cost; and if there be any question of inefficiency or waste, it can be dealt with much more effectively through a single, direct responsibility.

Sharing of costs involves risks that the prime object will be adversely affected, or that the total cost will be unnecessarily increased, to justify inclusion of such a feature in this system. It could not add anything of real value to the system itself. Whatever the nature and scope of the problems of raising public revenue as between the counties and the State, they are fundamentally of dimensions considerably larger than would be involved in this program and will be resolved and balanced in other and more general ways.

It is noted, too, that so long as the office of the prosecutor is entirely financed at the county level, State financing of the Defender Office will further support the complete independence of duty and responsibility which must exist between them.

In the event that the imponderable factors of revenue estimates and general budget needs may preclude total absorption of the cost by the State, the only feasible solution would seem to be to include a provision for payment by the counties of amounts representing the trial cost of capital cases. These amounts can be ascertained on an administrative basis and certified by an appropriate fiscal agency.

III. ESTIMATE OF COST

The best estimate which can be made at this time is that a State-wide system can be expected to cost approximately $2 million per year, this sum to be regarded as a presently foreseeable annual rate. If legislation is enacted promptly so as to cover the period from about January 1, 1967 to the end of the State's fiscal year on June 30, 1967, a supplemental appropriation of $1 million should be adequate. This sum will make it possible to meet startup expenses for equipment, furniture, books, preparation of office space, and the like. Some of it may well go for contract services where private organizations exist and are in a position to provide that service promptly and some of the funds may well go to reimbursement of the counties for expenditures made by them under orders pursuant to State v. Rush, in cases other than murder cases assigned after January 1, 1967.

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This latter application probably should be handled from a standpoint of distributing to the counties by way of reimbursement whatever unexpended balance there happens to remain out of the $1 million appropriation and after covering commitments as of June 30, 1967.

It is the view of the Commission that this estimate of $2 million per year should hold fairly well so long as the scope of the service which the Defender Office is expected to provide remains as it is at the present, namely, to provide counsel to represent indigent defendants in connection with indictable offenses from the time the defendant is first in court.

If the scope of that service should be increased as by enlargement to include lesser offenses than crimes or to include representation before the matter is in a court, the cost would obviously increase. Since it is impossible to predict where or when these changes will take place or to what extent, no estimates of additional cost are possible in that connection.

However, once the State-wide Defender Office is established, the data it will be in a position to gather ought to be sufficient to permit estimates of that kind to be made with reasonable accuracy.

IV. SOURCE OF REVENUE

The Commission considers that the available source of revenue to meet the cost of the recommended program should be the general revenues of the State.

Bills have been introduced each year since 1963 to establish a State-wide defender program at the $2 million level, designed to be financed from a 5% override surtax on the inheritance tax. This would have yielded about the amount required. However, while such Bills have enjoyed a large and bi-partisan sponsorship, none has succeeded in gaining the support needed for enactment.

The conclusion reached is that it is not feasible to look to even so small an increase in any one of the existing tax sources, and that room for this cost can be best met by balancing all of the appropriations to be covered by general revenues.

The Commission also feels quite strongly that with the development of experience some revenue should be derived by payments to be made by the persons to be represented in cases where they are able to make a payment they can afford, even though it may be well below the cost or value of the services. Experience in the Essex County Experimental Plan indicates that there are considerable values to this feature quite aside from the revenue obtained. Not the least of these is the fact that where a payment is made, even though it is modest, it adds considerably to the dignity of the defendant and it also affects the attitude of the attorney assigned to represent him, particularly in respect to dedication, personal interest, and the like.

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The mechanism for reimbursement should be simple, effective, and inexpensive. Some form of recorded lien seems to be most effective, and it should be of State-wide effect, applicable to both personal property or real estate in which the defendant has or may acquire an interest. An existing county collection agency is recommended to be utilized to insure reimbursement in every case possible.

From an administrative cost standpoint, the most productive source will likely be from such payments as the defendant can afford to make while the case is active. This is especially true in cases where the defendant is able to secure release on his own recognizance, thus saving bail expense and maintaining his income from employment. The next most productive source will be from equities in real or personal property which, at the time, are too small to be a source of funds, but which will tend to grow in value as prior obligations are reduced. For these instances a reliable source of reimbursement will exist when the property comes to be sold and the lien will automatically come to be paid from the proceeds.

V. DEFINITION OF INDIGENTS

Perhaps the most difficult problem is the matter of defining who is "indigent." Several decades ago the term meant an actual pauper who was entirely without means. The term no longer has this narrow significance. In general, it now is most widely understood as referring to a person who is unable to afford the cost of engaging counsel to represent him. Since the cost of counsel will vary considerably according to the nature of the case, its simplicity or complexity, and even the seriousness of the charge, it is quite obvious that the concept of indigency is a variable. On the one hand there is a relatively fixed level representing the economic position of the defendant in terms of both net assets and disposable income over and above ordinary needs. On the other side there is a variable cost depending on the service which the occasion demands.

Some experiments were conducted in Essex County to test the feasibility of using the services of private credit rating agencies of the kind normally used to evaluate the ability of a prospective purchaser to keep up installments on a color TV set, automobile, and the like. This study was inconclusive primarily because the sampling was too small and the operation lacked the staff to undertake a more extensive study. However, what was done looked to be sufficiently promising to justify further exploration of this area as a possible solution.

In addition, the cost of inquiry and verification of a claim of indigency could be reduced by having the application form include a suitable authorization for access to information and data from government records, such as those of the Internal Revenue Service, Unemployment Compensation, Temporary Disability Benefits, Welfare, Social Security, Motor Vehicles, Secretary of State, and the like. To the extent that any of these source records are in the hands of the State, county, or municipal agencies, the enabling act should provide for furnishing them to the Defender Office without cost or fee.

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As a matter of basic policy, the Commission considers it of great importance to have enabling legislation include suitable provision for the following items:

...preservation of the essential lawyer-client privilege even though the "lawyer" may be a public official; the individual case files should be as fully protected as with privately engaged counsel. However, since statistical and case study data will doubtless be quite valuable from a sociological standpoint, explicit permission to use file material for that purpose should be granted with the limitation that in making such use there should be no disclosure of identity or of means for discovering identity.

...establishment of a Board of Trustees of the public defender system. The Board should consist of a small, independent body of citizens with visitation powers to assure the public that the service is what it is intended to be. Since the subject area is technical and professional, about half the membership should be actively practicing lawyers; the rest should be knowledgeable citizens. It is suggested that the Board consist of eleven members: four appointed by the Governor; three appointed by the Supreme Court; three appointed by the Bar Association of the State; and one appointed by the Association of the Board of Chosen Freeholders.

...an explicit provision making it clear that although the cost of the service will be borne by government, this is in no way to affect the duty of the Defender and his staff in relation to those represented, in every professional sense. That relationship must be the same as for privately engaged counsel. And, since sole authority over the profession is vested in the Supreme Court by the Constitution, every lawyer involved in the service is to remain fully subject to its jurisdiction in that sense.

...a provision for periodic reporting to the Governor, the Legislature, and the Supreme Court, by both the Defender Office and the independent citizen body, is essential. This should include the function of recommending statutory changes, including changes in the criminal law, and changes in court rules, as appropriate to improvement of the whole system of criminal justice, control of crime, rehabilitation of offenders, and so on.

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...a suitable guideline to divide the trial workload between the staff of the Defender general and the outside trial pools in a fashion that will continue to develop experienced members of the Bar in the specialty of criminal law and thereby avoid the risk of having this field served by too small a number of qualified counsel.

...an arrangement through which the level and quality of performance can be measured for adequacy according to professional standards established by the Supreme Court, and with authority in specific cases for the entry of appropriate orders in respect to the selection of outside counsel as the nature of the case may require.

...a provision to place the Defender Office "in" a suitable executive department, as required by the Constitution. The Department of Law and Public Safety would obviously be inappropriate because of its deep involvement in prosecution and law enforcement. The Commission recommends the Department of Institutions and Agencies, since this service is fundamentally a welfare service. It is the strong recommendation of the Commission that the official quarters of the Public Defender and his staff should not be housed in any municipal or county buildings or offices.

This last point has been the source of some confusion and possible misunderstanding, and deserves further exposition. The problem is one of governmental structure, arising from the provision added to the 1947 Constitution as Art. V, sec. IV, par. 1:

> "All executive and administrative offices, departments and instrumentalities of the State government, . . . and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable."

And, by Art. III, none of the powers of the legislative, executive, and judicial branches is to be exercised by the others.

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The establishment of a particular system to provide counsel to the indigent is a legislative function. The two Houses form the branch which is to make the decisions controlling the nature and structure of the system and to provide the funds for its operation.

The actual day-to-day operation of a Statewide defender system is obviously an executive function. The operation is the way in which the statute enacted by the Legislature is carried out, administered, and executed.

The function of the judiciary is twofold: (a) as the impartial vehicle through which an adversary system is carried out, it will decide the outcome of particular cases; (b) as the sole repository of the professional conscience, the Supreme Court will be concerned with the professional and ethical performance of lawyers who serve as defenders, in individual cases and in the aggregate, but without intruding upon areas of executive or administrative concern which do not involve professional or ethical matters.

Quite plainly, then, the defender system must be placed "in" one of the principal executive departments. From a functional standpoint, the most logical would be Law and Public Safety; but the Attorney General is necessarily involved so deeply in law enforcement, and is so much on the other side of the adversary relation, that to place the unit there would only invite a lack of confidence as to the dedication of the defender to his client.

Of the other departments, the only one that can be said to have a major purpose compatible with the defender is Institutions and Agencies. Despite the fact that this department is responsible for the incarceration of a convicted defendant, its functions in that regard are sufficiently neutral as to present no significant problem. Its major service is fundamentally a welfare function. It is, or ought to be, as much or more concerned with rehabilitation of the convicted criminal as it is with his incarceration. It has nothing to do with whether he is innocent or guilty.

The technical solution to this collateral problem is to have the enabling Act place the new unit "in" but make it clear that it is not "of," the Department of Institutions and Agencies. The "in but not of" distinction was relied on in N. J. Turnpike Authority v. Parsons, 3 N. J. 235, at 243-245 (1949) to support the independence of the Authority in respect to liability on its bonds while recognizing compliance with Art. V, sec. IV, par. 1.

If need be, the defender unit can be set up as an independent entity, as a public corporation, "in" but not "of" the Department of Institutions and Agencies. Such an approach would help to underscore the essential independence of the unit in terms of having a primary obligation to individual clients, and yet satisfy the Constitutional requirement for manageable housekeeping.

It is probably not necessary to go that far; the independence of the unit in respect to duty and policy can adequately be spelled out in the law, but if there be any doubts in that regard they can be resolved by establishing a separate public entity.

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It will also be important for the Supreme Court to undertake changes in its rules to accomodate to this new activity, including whatever may be needed to schedule calendar matters on a Statewide basis since this will have a considerable bearing on efficiency and costs. Other rules will probably be needed to define more clearly the professional standards having special application to this area. Rules changes should also provide for suitable participation through ex-officio delegates to Judicial Conferences and other like gatherings.

VII. STAFFING

The matter of structure was given considerable thought and debate. In sum, the conclusion is that there should be a full-time Defender General to head up the new unit, appointed by the Governor with Senate approval.

There should be a professional staff in the unclassified service, some of this assigned to supervision and administration, some to centralized research, and some to local offices for the actual rendering of services.

This staff should be supplemented by counsel in each county, whose competence for various levels of responsibility has been approved by the Assignment Judges, to supplement the staff for trial work and such other duties as may be necessary for the adequate protection of an accused held in custody or otherwise deprived of his liberty. In some areas office facilities and staffing will not be necessary and should not be provided.

The professional staff would be compensated on a salary basis; the supplemental pool would be compensated on a case basis at rates established by the Defender General within the limits of his appropriations.

Clerical and other non-professional staff would be in the classified service.

Selection and appointment of the professional staff members should be in the hands of the Defender General, to serve at his pleasure, and for whose performance he would be responsible. Testimony at the hearing confirmed the view that the local supplemental pools would provide the most valuable single source for evaluating recruits for the staff.

In view of the individual nature of the service to be rendered, the enabling Act should explicitly state that the Defender General should be sensitive to any aspect which might cast doubt on the complete independence and loyalty of the professional staff, and to that end should take care to show no undue preference in his appointments to persons who are members of a given political party.

It is also obvious that the enabling Act should provide considerable flexibility, as the entire operation will be required to pass through a number of evolutionary phases before experience can be said to support one mode of operational routine over another.

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The cost estimate of $2 million per year was confirmed as well as such matters can be by a study of the subcommittee on costs. One approach was to project the estimated Essex County cost, for which good experience is available, on a Statewide basis. Another approach was to make a count of the number of lawyers needed to cover the judges sitting in criminal cases in the last court year, based on a 6 month sample. A third approach was to compare an estimated staff with that of all the county prosecutors, recognizing that the latter have a workload for grand jury matters and for non-indigent cases that would not fall to the Defender General.

In all of these approaches, estimates were made on the basis of the principle suggested by Mr. Justice William J. Brennan, Jr., that:

> "Salaries of personnel should be at a par with salaries paid young lawyers by governments; high enough to attract good men for at least two or three years, and to hold some for full careers. *** the payments should be enough for a lawyer to live on respectably if he wanted to dedicate his life to such work."

The Commission feels that the enabling Act should not attempt to set out the various professional salaries; rather it should merely provide for them by line item, in the form of "such salary as may be provided by law," leaving the amounts and ranges to the budget, for the time being.

As the successful operation of this program will turn largely on the ability of the Governor to recruit the right individual to head the operation in the formative years, it is suggested that the Defender General's salary parallel that afforded cabinet rank officials.

CONCLUSION

The Commission recommends that legislation be promptly drafted and introduced embodying the elements set forth in this report for the establishment of a Statewide program for the defense of the indigent at government expense.

Respectfully submitted,

Ned J. Parsekian, Chairman

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