

The Crisis in Public Defense Funding: The Approaching Storm & What Must Be Done

By John Burkhart

“If you cannot afford an attorney, one will be appointed to you.” For many members of the Louisiana Bar, these words have not been relevant since a law school course or their most recent viewing of a network crime drama. Unless the structure of Louisiana’s public defense funding is drastically reformed, these words will have a profound impact on every Louisiana attorney. It will not matter the firm an individual belongs to, his background, education or how many years of practice he has. If public defense funding stays on its present course — and there is no indication it would do otherwise — every attorney in Louisiana must be prepared to defend an undetermined number of criminal defendants pro bono.

How We Got Here

When the Louisiana Legislature passed Act 307 in 2007, the Louisiana Public Defender Act, it organized what until then had been a less-than-consolidated delivery system for indigent defense. Previously, each jurisdiction was overseen by a local Indigent Defense Board. In addition to varying methods of supervising indigent counsel, the prior arrangement all but ensured significant influence from judges, district attorneys and local officials, severely compromising a defendant's impartial counsel. With Act 307, the Louisiana Public Defender Board (LPDB) was established, granting supervisory authority into a statewide body responsible for accountability and transparency.

New standards brought an increase in state appropriations, at least initially. Throughout Louisiana, public defenders' offices were finally able to hire new attorneys and conduct more thorough investigations. These new luxuries would be considered staples in most other fields, highlighting just how behind the times Louisiana's funding for public defense was.

Unfortunately, the modernized public defense delivery system was not accompanied by a modernized funding system. The increased state appropriation brought greater capacity to LPDB and district offices but also highlighted the instability, unreliability and inadequacy of the present funding structure.

Unstable, Unreliable, Inadequate

Almost two-thirds of funding for Louisiana's public defenders comes from court fees, the majority of which derive from traffic violations. In addition to having no control over traffic enforcement, this funding mechanism is highly unstable. If sheriffs choose to reduce traffic enforcement (as is their right), public defenders' revenues drop. If a periodic storm hits one part of the state, be it a hurricane or temporary freeze, the impact on road traffic causes a direct hit on the public defenders' wallets.

Even without a calamity, the present funding structure is unreliable. Besides

there being no relationship between traffic infractions and public defense needs, 13 of Louisiana's judicial districts do not contain a stretch of major interstate — the surest resource for traffic violations. Not only is local law enforcement hesitant to ticket its constituents when reliant on their votes, but a significant number of violators do not have the means to pay. Compounding this dilemma is the lack of enforcement. District offices are reliant on counterparts in the criminal justice system to collect and remit the fines on which they are dependent. "The check is in the mail" would be more comforting were funding not also grossly inadequate.

At present, Louisiana's public defenders are understaffed and overworked according to the American Bar Association's *Ten Principles of a Public Defense Delivery System*. In the short term, a client with an overburdened public defender is more likely to unjustly lose his or her freedom or face a punishment disproportionate to the crime. In the long term, public defenders burn out from having to work late nights and frequent weekends.

On the surface, it is a familiar refrain and one not unique to Louisiana. Unfortunately, the clouds on the horizon look to beget an unprecedented crisis that will affect not only public defenders and clients, but also every practicing attorney in Louisiana.

The Approaching Storm

The increased appropriation funded an improvement in indigent defense delivery, even permitting several districts to operate with a modest fund balance. As both the state appropriation and local revenues have plateaued, district offices have had to dip into these fund balances to keep up with high caseloads. What in 2010 was a statewide fund balance of \$17.7 million is now slightly more than one-third and dipping fast. Making matters worse is that, in a few years, any remaining fund balance will be concentrated in no more than five districts.

A number of districts have needed last-minute "lifelines" to make it through the fiscal year in years past. Fortunately, the districts in need were smaller, requiring sizeable, albeit manageable, lifelines

measured in tens of thousands of dollars. Not so in the future. By the end of the approaching fiscal year on June 30, 2015, up to 12 public defender offices are projected to go insolvent, including populous East Baton Rouge, Caddo, Bossier and Lafayette parishes. And that's not the worst of it.

St. Tammany and Jefferson parishes are projected to go insolvent by the end of the 2016 fiscal year, in addition to nine more. Of course, these are only projections. If the past is any indication, even an accurate forecast will likely be conservative. Upcoming elections may bring a decrease in traffic tickets in several jurisdictions and just one high-profile case would be enough to plunge an otherwise solvent district into the red. Even a local sheriff's decision to divert one officer away from traffic enforcement could have repercussions for someone else's Sixth Amendment right to counsel.

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What is the result? What happens if LPDB does not receive a significant boost to its statewide allocation? What if a new, equitable funding stream is not implemented in the coming year?

If you are an attorney in Louisiana, you will be a part of the Band-Aid for an indefinite period.

As each public defender's office (PDO) goes insolvent, it will be forced to implement a Restriction of Services (ROS) protocol. Simply, PDOs will only be able to represent the number of clients for which they have funding. In adherence to Louisiana and United States requirements for effective assistance of counsel, district offices must refuse any cases beyond this threshold. The remainder will either be placed on a waiting list or fall to locally registered members of the Louisiana State Bar Association.

These members will surely include criminal defense attorneys in firms and small private practices alike. Soon after, there will be no option but for cases to be allocated to attorneys working outside of criminal defense. No practice area will be immune, meaning tax, civil, maritime, oil and gas and other attorneys will find themselves at their local criminal district

court with clients to represent. There is no guarantee judges will be amenable to repeated continuances for non-criminal attorneys to catch up to speed. On a similar note, exceptional accommodations for an attorney's malpractice insurance will likely not be available.

What type of cases might these be? In all probability, the local PDO will represent the cases with the greatest severity and complexity, with the lower classifications falling to private members. Many private attorneys may not mind taking their turn at a *pro bono* case here or there, but the number of these cases will only grow with time.

Public defenders represent close to 90 percent of all defendants in Louisiana's criminal courts, depending on the district. The more prolonged the budget crisis lasts, the greater will be the volume of cases imposed on the private bar. With so many non-criminal attorneys forced to practice in the criminal courts, proceedings will be far from efficient. The time and costs to private attorneys will compound even before factoring in appeals. As news of ROS spreads, claims of inadequate representation or lack of a speedy trial will proliferate, even in cases with dubious merits. As for the fiscal angle, the aggregate cost to the system will far dwarf the sum needed to entirely avoid this catastrophe in the first place.

What Can Be Done

Considering the scale of the impending insolvencies and the billowing long-term costs of inaction, it is surprising so little has been done. Then again, public defense has always been underfunded; it has just been a matter of degree. At least, so it was in the era of "Tough on Crime." The only possibilities of hope are tied to a sea change in how Louisianians and Americans regard their criminal justice system.

Fortunately, we are approaching, if not already in, such an era. Reform of our criminal justice system is an issue with champions on both sides of the aisle, rare in our otherwise polarized political climate. Liberals and conservatives are galvanized by the issue, whether by fear of government overreach, preservation of human rights, fiscal prudence or some combination thereof.

The issue of indigent defense, in particular, is no different. George Soros and the Koch brothers, individuals on opposite ends of most ideological debates, have given money to improve public defense delivery. Recent indigent defense reforms in Michigan and Texas were bipartisan endeavors, as is interest in the nascent movement here in Louisiana. If ever there was a propitious moment for reform, it is now.

What Must Be Done

Louisiana's public defenders need a stable, reliable and adequate funding source. Unlike most agencies, public defense has been spared the scalpel during the budget process and there is no small amount of gratitude for that. Unfortunately, the status quo is not enough. Though a one-time injection of funds would keep the public defender system on its legs, depending on the sum, this too would be insufficient.

Rather than a stopgap measure or, worse, inaction, the lone option is to restructure public defense funding entirely. At a minimum, Louisiana's funding structure provides a blueprint for what *not* to do.

For one, funding has to be tied to the mandate so no false disparities are created. Each local public defender's office needs a stable, reliable and adequate funding source to provide constitutional representation to its clients. Jurisdictions with equivalent populations and caseloads should have equivalent funding. There is no reason for one district to be flush while another wants — the only difference being that one boasts a stretch of interstate.

Additionally, funding our courts through user fees has been an unmitigated disaster. Close to 90 percent of all criminal defendants in Louisiana are deemed indigent. These are our tired, poor and huddled masses; even if one believes it is appropriate for them to pay for our criminal justice system, decades have shown they are unable. Increases to court costs and introductions of application fees have not made an appreciable difference to public defenders' offices over the years. The biggest impact these costs have is on the people on which they are imposed. An individual otherwise successfully rehabilitated already faces countless challenges in finding employment, housing

and a way forward. Thousands of dollars in fines and fees are an additional burden for these individuals to successfully integrate into society. Unsuccessful reentry threatens our public safety.

Such a move would not be without short-term cost, but also attendant savings in the not-too-distant future. Louisiana spends more than \$3.5 billion as the jurisdiction with the world's highest incarceration rate. More representation at the front end of the system, through better funding of public defenders, would allow Louisiana to relinquish this distinction. Considering the workforce needs of the large industries developing in Louisiana, we have the rare opportunity to transform so many "tax burdens" into self-sustaining taxpayers. Never has transformational reform held such promise across so many otherwise distinct interests.

Unfortunately, there does not appear to be such a silver bullet in the 2015 legislative session. The upcoming gubernatorial and legislative races, along with the anticipated state budget shortfall, suggest our lawmakers' thoughts may be elsewhere in the near term. But hope is far from lost.

What you can do as a law professional is help our effort, the Louisiana Campaign for Equal Justice, educate constituents across Louisiana about the importance of public defense and the consequences of inaction. Prosecutors and judges need to know about the impending bottlenecks and inefficiencies threatening their dockets. Attorneys outside of criminal defense need to know they will be called upon to represent clients if nothing is done. Business leaders need to know about the impact of a shrinking labor force on their balance sheet, church leaders about the dangers facing their congregants, citizens about the compromising of their personal safety, and taxpayers about the stewardship of their hard-earned money. The clock is ticking and there are no winners if time expires.

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