By Frank X. Neuner, Jr.

Representatives, from left, of Louisiana's public defender system:

John W. Lindner II, district defender of the 22nd Judicial District Public Defenders' Office (St. Tammany and Washington parishes), has worked diligently to improve the quality of public defense advocacy in his office.

Necole M. Williams, a juvenile defender in the Calcasieu Parish Public Defenders' Office, aims to ensure that children are not unduly criminalized and have opportunities for rehabilitation.

Samuel S. (Sam) Dalton has practiced law for 58 years, working to protect and improve the civil rights of the poor and nationally recognized for his experience in capital cases, including post-conviction relief for death-row inmates.

Katie Widhalm Dyson, a public defender in the Natchitoches Parish Public Defenders' office, represents juveniles in delinquency proceedings, parents in Child in Need of Care cases, and adults in misdemeanor and felony cases.

Frank X. Neuner, Jr., chair of the Louisiana Public Defender Board since 2007, assumed a critical leadership role in the restoration of the state's criminal justice system post-Hurricanes Katrina/Rita while serving as Louisiana State Bar Association president.
During my term as Louisiana State Bar Association president, Hurricanes Katrina and Rita struck Louisiana, washing away most of the criminal justice system in south Louisiana. For public defense, this was a needed cleansing that served as a catalyst for necessary and constitutionally mandated reform. In the aftermath of that tragedy, I assisted a Bureau of Justice Assistance (BJA) (within the U.S. Department of Justice) team in an evaluation of the New Orleans criminal justice system.

In March 2006, while the criminal courthouse at Tulane and Broad was still closed, the chief defender in New Orleans told the BJA team that the public defender office had no files, no private offices, no private phone line, no computers and no centralized resources — before Hurricane Katrina struck. In the frenzied rebuilding of the city, the Aquarium of the Americas managed to open a full six months before the criminal courthouse.

It has been nearly seven years since Hurricane Katrina; August also marks the fifth year of the Public Defender Act of 2007, which completely overhauled the state’s public defender system. During that time, there have been incredible accomplishments born from tremendous effort and incredible collaborations. Still, the public defense system remains on a precipice — financially insolvent, with practitioners daily risking their ethical responsibility, wholly beholden to the judiciary and the sheriff for funding, and outmatched in virtually every resource by their prosecutorial counterparts.

Public defense reform has come far, but still has far to go.

Addressing the Crisis: Immediate and Future Needs

July 1 marked the beginning of a fiscal year, and a financial forecast for the state’s public defender system that anticipates service restrictions in 10-14 district public defenders’ offices. Without a funding mechanism that addresses the real, data-driven demand for public defense services, local criminal justice systems will experience interruptions in service that risk public safety, delay the administration of justice and compromise their operational efficiency.

As every lawyer knows, there are ethical and practical limitations to attorney workload assignments, and while Louisiana has not yet created hard-and-fast workload caps, public defenders across the state routinely carry caseloads that run two to three times nationally accepted recommendations. District public defender offices cannot ethically bear a workload that is not adequately resourced; by breaching the ethical obligations imposed by the Rules of Professional Conduct, a district public defender office fails to satisfy the state’s constitutional mandate to provide effective assistance of counsel at every stage of the proceeding.

Louisiana’s public defense crisis is two-fold. There’s not enough money, and the majority of it is generated the wrong way. Compounding the situation are significant resource differences that create a lack of parity between the member-agencies of the criminal justice system. The Louisiana Public Defender Board (LPDB) acknowledges its debt to the Louisiana State Bar Association (LSBA) for its leadership that prompted public defense reform in 2007.

Since a number of district public defender offices and their local justice systems prepare for financial crisis in the coming fiscal year, LPDB again calls on the LSBA for its assistance to seek stable, sufficient funding for the public defense function, and a parity of resources between the prosecution and defense to ensure fairness in Louisiana’s courts.

Louisiana, unlike all other states, funds its public defense system primarily through local traffic tickets and other local fees and costs. Unfortunately, this is not new; public defense in Louisiana has long been funded this way. Hurricanes Katrina and Rita produced a vivid exposé of the weaknesses of the public defense system. Not only was the public defense function destroyed, like much of the other community infrastructure, but its almost complete dependence on month-by-month, traffic-ticket revenue meant that its recovery would be years in the making, and largely outside of its control.

The LSBA responded immediately to the crisis created by Hurricane Katrina by evaluating the broad-view systemic needs of the criminal justice system. This response took many forms, including direct service, public education and outreach, financial assistance, strategic planning, evaluations support, and collaborative, solutions-oriented project facilitation. Perhaps the most onerous of those tasks was the commitment to achieve real, sustainable public defense reform across the state. The LSBA wisely recognized that the public defense crisis was not confined to New Orleans, nor was it created by the tragedies of Hurricanes Katrina and Rita. LSBA leaders from across the state, and from all components of the criminal justice system, formally facilitated an expansive group of stakeholders through rigorous consideration of some 20-plus drafts of legislation to overhaul the state’s public defense system.

That process was effective; the bill passed through the Legislature without last-minute amendments and picked up 92 co-authors along the way. Through both chambers, the bill only raised nine votes of opposition. The Public Defender Act of 2007 dissolved the then-41 local indigent defender boards, created a new state agency with much broader regulatory authority and set forth a vision of public defense that addressed training, quality control, financial accountability, specialized resources dedicated to juvenile defense, technological improvements and the dynamic participation of the public defense function in the creation of criminal justice policy and practice. The challenges that had to be overcome before the Public Defender Act of 2007 became law cannot be overstated, nor can the value of the contribution and leadership of the LSBA.

Significantly, even on that celebratory day when the Public Defender Act of 2007 was overwhelmingly approved by the Legislature, the source of the next great public defense challenge was on the horizon. Progress is incremental, and Louisiana
took a decisive step in the right direction by creating a statewide public defense system under the considerable supervisory authority of the new centralized agency. However, the Public Defender Act of 2007 did not address the amount or the source of public defense funding. This issue — chronic underfunding from unreliable revenue streams — has finally become so acute that service restrictions are an inevitable reality for 10-14 district public defender offices in the coming months. Service restrictions will have dire consequences for the operation of local criminal justice systems and will once again involve the statewide membership of the LSBA, many of whom will likely be tapped to contribute their service to the direct representation of indigent defendants in service-restricted districts.

Last calendar year, statewide, more than 66 percent of district public defender funding — some $31.8 million — was generated locally. State funds accounted for 33 percent (approximately $18.5 million) of district public defender office expenditures. Local funds come from a variety of sources. Public defenders receive a small portion of bail bond revenue, criminal bond fees, revenue from forfeitures, probation fees and a $40 application fee from defendants appointed to their office. A couple of districts (Orleans and Plaquemines) receive appropriation from local government, but the rest do not. Depending on local negotiations, the public defender may get a percentage of fees collected from photo-enforced traffic tickets or fees from seatbelt violations. Judges may, or may not, assess partial indigency fees. However, the vast majority of revenues come from a $45 special court cost that is assessed to every criminal defendant who is convicted after trial, pleads guilty or no contest, or who forfeits his or her bond for violation of a state statute or a parish or municipal ordinance other than a parking ticket. The result is that fines and fees tacked on to traffic tickets account for the vast majority of public defense revenues. No other state in the nation funds the majority of its constitutional obligation to provide the right to counsel based on fees collected from traffic citations.

A combination of factors — including increased regulation of caseload limits that threaten the effectiveness of counsel and a shift to photo-enforced traffic tickets (which deprives most district offices of revenue they would have received through traditional traffic ticketing), among other factors — led the LPDB to recognize that many districts would be forced to restrict public defense services without significant revenue increases. Because public defenders represent the vast majority of criminal defendants, any service interruption will have catastrophic effects on the entire criminal justice system.

Before the start of the legislative session this March, feedback from the Governor’s Office discouraged any hope that the LPDB would receive its submitted budget; when the final appropriation was set, it was not even 80 percent of the request. Therefore, advocates pursued the only other revenue source that was available. Rep. Jeff Arnold (D-New Orleans) introduced HB 325 to raise the $35 fee to $55 per convicted defendant. This increase was expected to generate enough additional local revenues to help most of the districts avoid service restrictions. However, after opposition from the Louisiana District Attorneys’ Association, the Sheriffs’ Association and Mayors’ Courts, HB 325 was amended to a $10 increase, with additional exceptions. While projections show that this fee increase (from $35 to $45) will generate $5.7 to $6.9 million in increased local funds, 10-14 district public defender offices still anticipate revenue shortfalls in Fiscal Year 2013 that will force them to implement service restrictions. While the special court cost fee increase was a necessary strategy to address an imminent financial crisis in a number of districts, it is not a long-term solution, nor is it one that the LPDB felt good about advocating. There are a number of reasons why Louisiana needs to reconsider the way it funds public defense.

New Strategies Needed to Fund Public Defense

Collections-based revenues have no discernible relationship to local demand for public defense services and fluctuate due to factors beyond the public defenders’ control, despite having major ramifications for office revenues. The service restriction that the Orleans Public Defenders (OPD) was forced to implement in January 2012 demonstrates the instability of this funding scheme. Based on previous years’ revenues, the OPD created a budget on the expectation that it would receive $9.3 million in revenues. However, revenues from Traffic Court and Municipal Court did not meet forecasts. However, in reality, actual revenues follow unstable trends and have nothing to do with the number of clients or the complexity of cases that the office is appointed to represent. The 10th Judicial District Public Defenders’ Office (Natchitoches Parish) had a similar experience — a sudden drop-off in traffic ticket revenue midway through 2011 created immediate financial crisis for the office. Emergency funding from the LPDB and intense local outreach and collaborations are the only reasons that Natchitoches was able to avoid service restrictions.

Locally generated funds remain in the district where they are generated, and the LPDB has no authority to redistribute local revenues from districts with excess funds to districts in financial crisis. Some districts have aggressive law enforcement who patrol highly-trafficked highways; other districts do not. This is but one factor. The result is that revenue disparities between districts — even contiguous districts — affect the quality of counsel and raise constitutional concerns about the state’s constitutional obligation, since the Constitution requires the Legislature to provide for a “uniform system of securing and compensating qualified counsel for indigents.”

The LPDB’s funding formula, by which it distributes its state appropriation to the districts, is, of course, mindful of this inequity and considers a district’s ability to raise local revenues as a major factor. However, with an insufficient state appropriation, there are sometimes not sufficient funds to close the gap. Even in districts where the judges are diligent in remitting revenue promptly and accurately, the disconnect between the abil-
ity to collect fines and fees and the demand for public services threatens a district’s financial solvency. The LPDB, in order to control this disparity and comply as best it can with the requirement for uniformity, caps the fund balance that any district may retain at 50 percent of one year’s operating budget, which is the minimum amount that financial advisors recommend holding for emergencies. Very few districts are able to maintain a fund balance that complies with this recommendation; more than half of all districts have no fund balance at all. These districts live month-to-month, without the ability to absorb unexpected costs, whether they come in the form of a natural disaster, a complex case, an unforeseen technology expense or a drop-off from last year’s received revenues.

Another significant problem in Louisiana is the public defense system’s dependence on special court costs, tasking the judiciary with the responsibility to “assess, collect and remit” these fees. The first principle of the American Bar Association Ten Principles of a Public Defense Delivery System advocates independence: “The public defense function, including the selection, funding and payment of defense counsel, is independent.” Louisiana’s public defense system is squarely in violation of this principle. Ongoing non-compliance from the New Orleans judiciary prompted litigation to compel them to remit fees that were statutorily dedicated to the public defender. However, despite the mandamus ruling, a scathing report from the Inspector General, follow-up forensic audits confirming court debts to the district public defender office, and the Orleans Public Defenders’ implemented service restriction, the Traffic Court judges in New Orleans continue to fail to accurately and promptly remit collected fees that the law specifically dedicates to the local indigent defender fund, and more litigation is on the horizon.

While the LPDB dedicated significant time and energy to trying to avoid service restrictions in New Orleans (working through the mechanics of a service restriction protocol), it cannot undertake this kind of effort in 42 districts. As a high-volume district with more contention than cooperation between criminal justice agency members, the LPDB made great efforts to resolve the funding crisis appropriately, again seeking LSBA leadership and cultivating community partners to obtain adequate resources for the public defender. However, the intensity of this effort cannot be initiated and sustained by the LPDB in 42 district offices. Although the LPDB is granted great regulatory authority, the current funding stream creates challenges for even the most vigilant of supervisors. There are 42 district public defender offices, each one reliant on at least six different, oscillating revenue streams. Each district submits a monthly revenue and expenditures report to the LPDB, which, when taken collectively, contains varying trends in income. By law, revenue is supposed to be remitted to the local indigent defender fund in itemized form; in many districts, the remittances are made in lump sum, making it impossible to verify the accuracy of the amount or source. The LPDB has one budget officer on staff and employs one accountant to provide this monthly financial oversight. This responsibility is but one of many, which also include managing all contracts, providing financial supervision of the LPDB’s nine contract programs, reviewing budgets of all offices, creating and managing the state agency budget and all of its expenditures, completing all disbursements, participating in intensive reviews and/or audits of districts and assisting in the development of service restriction plans.

Finally, the right to counsel is a constitutional right reserved for poor people. There is a qualification process and district public defender offices are vigilant about only accepting appointments for eligible clients. The service cannot be denied if a person cannot pay. There is a practical problem with depending on fines and fees from indigent clients to pay for their defense. The Times-Picayune printed a June 10, 2012, letter to the editor from counsel at the Brennan Center for Justice, which said:

The Road Ahead: Progress and Challenges

I have been actively involved in the public defense reform movement since my term as LSBA president, when I recognized how much needed to be changed. During a seminar hosted at Loyola University School of Law several months after the passage of the Louisiana Public Defender Act of 2007 — though before any LPDB staff member was hired or the board membership filled — David Carroll, a national public defense analyst who had been working in Louisiana for many years, said, “For those of you who have worked so long and hard to achieve public defense reform in Louisiana, I congratulate you. But I also want to prepare you, and encourage you . . . If the road behind us was hard, the road ahead is infinitely harder.”

We are now almost five years down the road ahead. It has been very hard; it may get harder still. Despite political opposition from our agency-partners, local justice systems whose actors are more contentious than cooperative, and a funding crisis that
threatens nearly one-third of all public defender offices in the state, the LPDB board and staff have achieved much. Much of it has been done with support of the LSBA. The LPDB now has a top-rate training program that provides free training on a range of subjects all over the state. In 2011, more than 460 lawyers — 57 percent of all lawyers working as public defenders in the state — attended LPDB trainings, building bridges between districts for resource sharing and community-building. The LPDB has promulgated three sets of performance standards, including standards focusing on delinquency representation and advocacy for parents in abuse and neglect and termination of parental rights cases, both issues in which the LSBA has been heavily invested. Workload is better controlled.

Additionally, LPDB staff collaborated with the LSBA for three annual criminal justice summits, all of which focused, either entirely or in small part, on the ongoing public defender funding crisis. The LPDB procured a Case Management System that makes it possible to pull real-time information about caseloads and serves as a tool for defenders to promote motion practice, team-based advocacy, case file maintenance and appropriate supervision, and to allow LPDB to be a more effective contributor to the major policy decisions that the LSBA helps shape. The LPDB has changed the capital certification application and imposed training requirements that will serve the state well by ensuring that appropriately qualified counsel handles these most serious of cases. We have uniform contracts with the 38 District Defenders who manage the 42 district public defender offices, with firm responsibilities for the efficient administration of their offices. We have been asked to contribute training at national conferences; we have presented on Louisiana’s public defense system in several states in the process of their own reform movements, always touting the role of the State Bar as a model practice for attainable progress. Through our support of the Innocence Project New Orleans, who is also supported by the Louisiana Bar Foundation, we have celebrated the release of seven innocent men who served more than 140 years in prison for crimes they did not commit.

Despite all the accomplishments, 10-14 district public defender offices are on the verge of insolvency this fiscal year, and many more are just one step away from financial crisis. The public defense system needs more funding — with funds that the LPDB can regulate and which the LPDB can disburse based on the service needs within a district. The statute that resulted from the Public Defender Act of 2007, by and large, provides the LPDB with the vision and authority to continue to advance policies, standards, financial oversight and training programs to achieve a quality, uniform defense system that complies with the state’s constitutional obligation. However, despite its great power and authority, the LPDB lacks control over the way that public defense is funded. This is the most immediate change that needs to be addressed.

Thanks to dependable support from the LSBA, its members statewide, our District Defenders and assistant defenders, community partners, justice advocates, the law school professors and others, we are optimistic we can tackle this challenge — and that we must in order to continue the progress that has resulted from more than five years of dedicated time and energy since the passage of the Public Defender Act. The LPDB again calls on the LSBA and its members to learn more about the financial stability of their local public defender office and join us in ensuring that the right to counsel is sufficiently funded to dispense justice fairly, efficiently and accurately.

HB 325/Act 578 — the law that temporarily increases our revenues in order to avoid service restrictions in far more districts than the 10-14 we expect — is scheduled to sunset on Aug. 1, 2016. That gives justice advocates, leaders in the legal community, policy-makers and our criminal justice agency-partners four years to develop a sustainable, demand-driven funding strategy that ensures that the state meets its constitutional obligation to provide “effective assistance of counsel at every stage of the proceedings” in every district in the state. However, this requires the broad-based stakeholder buy-in that made it possible to pass the Public Defender Act in 2007. Without the urgent attention of all stakeholders, many more district public defender offices will be forced to restrict services. Service restrictions harm the effectiveness and efficiency of the greater justice system, threaten clients’ statutory and constitutional rights, force the private bar to take cases without compensation, and cause delays in justice outcomes for victims and the public.

Public defender workload is indisputably high; last calendar year, the LPDB’s Case Management System recorded 293,387 cases handled by public defenders, the majority of all criminal defense cases in the state. This year, with service restrictions projected in a number of districts across the state, the need for innovation and collaboration will hopefully inspire a better way to fund public defense — a way that provides sufficient and stable funding for public defender offices to serve their clients, promotes the public welfare of all Louisianaans, and improves citizen confidence in the ability of the state’s criminal justice systems.

FOOTNOTES

7. See www.ip-no.org.

Frank X. Neuner, Jr. has been managing partner of the Lafayette law firm of Laborde & Neuner since 1998. He has chaired the Louisiana Public Defender Board since 2008. He received a BS degree in 1972 and his JD degree in 1976 from Louisiana State University and its Paul M. Hebert Law Center. He was admitted to practice in Louisiana in 1976 and in Texas in 1994. He served as president of the Louisiana State Bar Association from June 2005- June 2006. He served in the American Bar Association House of Delegates from 1999-2009. (Ste. 200, 1001 West Pinhook Rd., Lafayette, LA 70503)