

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION

Steering Committee:

Cornish F. Hitchcock, Cochair
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Carol Elder Bruce
Richard B. Hoffman
Jeffrey F. Liss
Randell Hunt Norton
Arthur B. Spitzer



The District of Columbia Bar

Committees:

Court Rules
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COMMENT OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE D.C. BAR AND ITS COMMITTEE ON COURT RULES REGARDING PROPOSED FEDERAL PUBLIC DEFENDER

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* Prepared separate statements
which are attached to this comment

March 1989

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"The views expressed herein represent only those of the
Section on Courts, Lawyers and the Administration of Justice of
the District of Columbia Bar and not those of the D.C. Bar or its
Board of Governors."

SUMMARY OF COMMENT REGARDING
PROPOSED FEDERAL PUBLIC DEFENDER

The Section on Courts, Lawyers and the Administration of Justice of the D.C. Bar endorses establishment of a separate federal division within the Public Defender Service rather than establishing a Federal Public Defender's office that would be appointed by the federal courts. The comment cites the reputation and proven ability of PDS, as well as the efficiency of assigning this task to an existing entity, and adds that single public defender's offices have worked well elsewhere. The comment notes that this approach also addresses the concern -- voiced in ABA and NLADA standards, among others -- of having defense lawyers serving, in effect, as employees of the judges before whom they must practice.

A separate statement challenges the need for establishing an separate federal division within PDS, noting the successful operation of federal public defender offices in many other judicial districts. The concern is also expressed that the greatest need for criminal defense representation is in the District of Columbia courts, where PDS presently handles only 15% of all felonies plus appeals in its own cases, and that this is where additional PDS resources should be directed.

Another separate statement concludes that both approaches are reasonable and that the issue is essentially a turf fight and thus not a matter as to which the central concern of this Section, namely, improving the administration of justice in the District of Columbia.

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The Section on Courts, Lawyers and the Administration of Justice and its Committee on Court Rules endorse the proposal to shift primary responsibility for providing legal representation to indigent criminal defendants in the District of Columbia federal courts from the existing system of court appointments to a defender organization. Rather than establish a new federal defender organization, however, we recommend that the Judicial Council entrust responsibility for providing these services to the highly-regarded Public Defender Service for the District of Columbia ("PDS").

PDS is a respected agency which recruits highly qualified law school graduates and lawyers from the District of Columbia and across the country. Before the Court Reform and Reorganization Act of 1970, PDS' predecessor, the Legal Aid Society, represented indigent criminal defendants in the District Court, which then had jurisdiction over all felony cases. Since the enactment of court reform, PDS has continued to represent clients in the District Court and the Court of Appeals. By establishing a separate federal court division within PDS, the courts would benefit from PDS' reputation, recruitment, training and experience, as well as avoid the costs of establishing a separate, brand new office.

Moreover, as the experience of the Legal Aid Society in New York City illustrates, it is entirely practical for a single organization to provide state and federal defense services through independent divisions. The Legal Aid Society contracts with the City of New York to provide representation to indigent defendants in state criminal matters, while a separate division represents indigent defendants in the federal courts for the Southern and Eastern District of New York.

Placing responsibility for defending indigent persons accused of crimes in the hands of an organization which is independent of the courts would also be preferable to the proposal that a federal public defender be appointed by the court. As the Constitution recognizes in Article III, tenure in office may have a substantial bearing on the ability of an individual to withstand pressure. A defender whose continued employment hinges upon good relations with the court might compromise the zealous representation of a client because of the potential to antagonize the court. It is inadvisable, in our view, to build such a potential conflict of interest into the structure of a defender program.

The relevant ABA standards provide that:

The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice

American Bar Association, Standards for Criminal Justice, Chapter 5, Providing Defense Services, Standard 5-1.3 (emphasis added).

Standard 5-3.1 also states that "Selection of the chief defender and staff by judges should be prohibited."

Similarly, Standard III.1 of the NLADA Standards for Defender Services states that:

. . . The most appropriate method of assuring independence modified with a proper mixture of supervision is to create a board of directors representing various segments of the community.

Standard III.4 further provides:

The relationship of defenders to court structures should be characterized by the same mutual independence which usually characterizes (or ought to characterize) that relationship as it exists with respect to the private bar and court structure

In accord are the standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals, Standard 13.8 of which provides:

The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused person

The commentary to this Standard explains:

. . . Appointment of the defender by a judge may impair the impartiality of the defender because the defender becomes an employee of the judge. Moreover, such a system will create a potentially dangerous conflict because the defender will be placed in a position where occasionally he must urge the error of his employer on behalf of his client. Such dual allegiance to judge and client will cripple seriously any system providing defender services. . . .

Given the advantages of an independent defender organization and the high quality of the legal assistance PDS has long offered to this community, we urge the court to allow PDS to serve as the defender organization for the federal courts through a separate federal division.

SEPARATE STATEMENT OF RICHARD B. HOFFMAN

In responding to the notice of intention to establish a federal defender program issued by the Judicial Council of the District of Columbia Circuit, the Section has been asked to endorse the position advanced by the Public Defender Service ("PDS") that PDS be selected by the federal courts in the District of Columbia to provide defender services in those courts. The alternative is creation of an independent Federal Public Defender by the Federal Courts.

It should be noted that in the 47 federal judicial districts which have established defender programs (the other 47 districts continue to use appointed counsel), of the total of 41 offices serving these 47 districts, 35 of these are independent Federal Public Defenders, while six are community public defenders, of which three are affiliated with a parent community organization such as PDS. Thus, the norm has clearly been to organize a separate public defender organization in most federal districts which have established a defender office. (The federal courts have also organized 13 separate death penalty resource centers, all of which are affiliated with community public defender organizations. Apparently, this has been occasioned by a statutory limitation restricting federal public defender offices to one per federal district.)

Although there have apparently been problems of adjustment in the federal courts on the part of judges unused to recognizing Federal Public Defenders as an independent organization within the judicial branch, not only have these been resolved over the

years, but the problems arising from a federal office affiliated with a community public defender organization are no less real: Disputes in New York, for example, where federal defender services are provided by the Legal Aid Society, a community public defender organization, have arisen between the defender organization and the state courts over adequacy of funding, and these have affected provision of services in the federal courts there, although there otherwise was no dispute with the federal courts.

PDS surely is a respected agency providing high-quality service to the District of Columbia Courts. Although it is fiercely and admirably independent, the agency has experienced significant conflicts with its Board of Directors over the direction of the agency.

More critically, until now, when PDS is strongly seeking to provide the federal courts with defender services, PDS has resisted virtually all efforts to encourage it to expand so as to provide more services within the District of Columbia Courts. PDS now appears in only 15 percent of the Superior Court felony cases and normally handles only its own cases on appeal to the Court of Appeals.

The question which should be appropriately addressed by PDS and the courts to which it provides services is: Can the District of Columbia afford to continue to be served by a defender organization which only appears in what it regards as the most important criminal cases while the overwhelming mass of criminal defendants are represented by far less proficient counsel, both at trial and on appeal? This disparity is accentuated in the

District of Columbia by the high quality of the prosecuting office, which appears in every felony case and appeal, as well as many misdemeanor cases. There is parity between PDS and the United States Attorney's Office, but that is of little help to the vast majority of defendants who are prosecuted by the latter, but defended by the many assigned counsel who lack the expertise and experience of PDS attorneys.

In view of the history of Federal Public Defenders, which tends to support the conclusion that issues of independence of Federal Public Defender offices have generally been resolved by increasing the sensitivity of federal judges to the need for their recognizing the special status of that office, it is difficult to conclude that this issue should necessitate the designation of PDS to provide defender services in the federal courts of the District. It is particularly important, moreover, to recognize, especially in view of the likely increase in demand for quality defender services in the District of Columbia Courts with a new anti-drug program in the works, the overwhelming need for a greater PDS presence in the local courts rather than expansion of PDS merely to serve the federal courts.

SEPARATE STATEMENT OF ARTHUR B. SPITZER

Everyone seems to agree that the creation of a federal public defender office is a good idea and would be an improvement over the current system of appointed counsel.

Given its past record, there is no reason to doubt that the D.C. Public Defender Service could do a good job in representing indigent defendants in the federal courts, and the Section's comment reasonably notes that a court-appointed public defender service may have some (at least theoretical) cause for concern about independence in its representation of clients.

On the other hand, given that there are 35 court-appointed federal public defenders in successful operation around the country, there is equally no reason to doubt that a court-appointed federal public defender office would do a fine job, and Richard Hoffman's separate statement reasonably notes that there is cause for concern that a community-based board of directors may have agendas other than providing the best possible representation for its clients.

Personally, the whole issue seems to me to be mainly a turf fight and thus not a matter as to which the concern of this Section -- the improvement of the administration in the District of Columbia -- particularly impels us to favor either side.